IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present:

The Hon'ble Justice Shekhar B. Saraf

G.A. No. 725 of 2019
With
C.S. No. 50 of 2019

Tata Chemicals Ltd.

Versus

M/S Kshitish Bardhan Chunilal Nath and Others

WITH

G.A. No. 733 of 2019
With
C.S. 51 of 2019

Tata Chemicals Ltd.

Versus

Ashok Kumar Saha & Anr.

For the Petitioner	: Mr. S. N. Mookherjee, Senior Advocate Mr. Ratnanko Banerjee, Senior Advocate Mr. Lokenath Chatterjee, Adv. Mr. Jaydeb Ghorai, Adv. Mr. Saugata Banerjee, Adv.
For the Respondent Nos. 1 to 4 in G.A. No. 725 of 2019	: Mr. Aniruddha Roy, Adv. Mr. Subhamoy Bhattacharya, Adv. Mr. Shankar Mukherjee, Adv. Mr. Sarangam Chakraborty, Adv.

For the Respondent No. 1 in G.A. No. 733 of 2019 : Mr. Jishnu Chowdhury, Adv.
Mr. Syed Nurul Arefin, Adv.
Ms. Saswati Chatterjee, Adv.

For the Respondent No. 5 in G.A. No. 725 of 2019 : Mr. Anirban Ray, Adv.
Ms. Urmila Chakraborty, Adv.
Mr. Ovik Sengupta, Adv.
Mr. Arindam Paul, Adv.

Heard on : 14.06.2019, 18.06.2019, 19.06.2019, 20.06.2019, 21.06.2019, 24.06.2019, 25.06.2019, 26.06.2019, 28.06.2019 & 01.07.2019

Judgment on: 17.07.2019

Shekhar B. Saraf, J.:

1. G.A No. 725 of 2019 in C.S No. 50 of 2019 and G.A 733 of 2019 in C.S No. 51 of 2019 are both taken up for hearing simultaneously as the two applications are relating to similar cause of action in relation to the same plaintiff/company (hereinafter referred to as "the petitioner") and a common defendant. In C.S 50 of 2019 the common defendant is the defendant no. 5 while in C.S 51 of 2019 the common defendant is defendant no. 2. This defendant is the employee of the plaintiff company (hereinafter referred to as "the employee"). Defendant no. 1 in C.S 50 of 2019 is a partnership firm while defendants 2 to 4 are the partners of the above partnership firm. These defendants were acting as distributors for various goods of the plaintiff company under the flagship brand of "Tata Paras". Similarly in C.S 51 of 2019 the defendant no. 1 is the distributor company. The defendant no. 1 to 4 in C.S No. 50 of 2019 and the defendant no. 1 in C.S 51 of 2019 are hereinafter referred to, for the sake of convenience, singularly as "the distributor no. 1" and "the distributor no. 2" respectively and jointly as "the distributors".

2. At the very outset, it is to be stated that this matter is being heard at the ad interim stage. I had given an option to the defendants in both the suits to file short affidavits providing an undertaking that they shall not alienate their immovable property pending disposal of the interlocutory applications. However, the defendants refused to do so and desired to argue the matter out without filing any affidavits as they were unwilling to give any undertaking at this stage.

3. The brief facts of the case are narrated below to come to a proper understanding of the present matter:-

   A. The petitioner is engaged in the business of manufacturing and marketing of industrial chemicals, nutraceuticals and agricultural solutions including fertilizers. The petitioner has appointed dealers throughout the country to facilitate the sale of these products. The distributors are engaged in purchase of these products from the petitioner for sale in various parts of West Bengal. The employee of the petitioner had served in various positions including as a Senior Accounts Officer and finally served as Deputy Manager (Accounts).

   B. In order to promote sale of its products, timely payment of dues and to compensate dealers for arranging their own transport, including expenditure incurred by them towards freight, local handling charges, lifting charges and the like, the petitioner in its usual course of business provided for rebates and discounts. Such rebates and discounts were accounted and labelled as ‘credit’ or ‘credit note/s” in the SAP system of the petitioner. Providing of such rebates and/ or discounts is a usual practice followed in the agriculture solutions industry. The credit notes which were issued to dealers were adjusted against the dues of such dealers to the

petitioner on account of the price to be paid for supply of the petitioner's products.

C. The petitioner had periodically issued price circulars for different fertilizers wherein the amounts of discounts/rebates were predetermined. The rebates and discounts, which were referred to as 'credit" or "credit note/s" in the SAP system of the petitioner, were solely determined from the price circulars issued by the petitioner for various fertilizers and different products. Price circulars, as and when issued by the petitioner, were intimated and furnished to the Sales Managers of the petitioner, who, thereupon informed the sales executives of the respective territories of such price circulars. The respective sales executives informed all dealers within their territory about the price circulars issued by the petitioner. No other discounts or rebate of any manner whatsoever was provided by the petitioner, other than the ones indicated in the price circulars.

D. The accounts managers of the petitioner issued credit notes on the basis of the price circulars in the SAP system of the petitioner. Once credit note was issued/passed, the balance dues payable by the dealers to the petitioner stood reduced to that extent.

E. The distributors had been involved with the petitioner for more than two decades. The aforesaid policy of discount and/ or rebate had been extended to the distributors based on the price circulars in respect of bulk fertilizers issued by the petitioner.

F. The employee of the petitioner as part of his job responsibility, used to calculate and extend the benefit of such rebates and discounts, inter alia, to the distributors, which were determined as per price circulars issued monthly, in respect of each of the products, depending upon the business requirements and management decisions of the petitioner. The extent of discounts and rebates in the form of credit notes in favour of the dealers (including the distributors) used to be uploaded in the SAP system of the petitioner by the employee using the unique login ID assigned to him by the petitioner.

G. In or about October, 2016, the regional accounts team of the petitioner discovered that the employee had issued credit notes to the distributors in excess of its entitlement and the same were reversed subsequently in December, 2016 by the employee and the petitioner accepted such excess rebates to be a bona fide error on the part of the employee. However, in July 2017, while verifying the accounts, certain anomalies were again detected in the accounts of the petitioner, with respect to the credit notes issued. Upon further scrutiny, it was discovered that the employee had passed and issued substantial credit notes to the distributors in excess of their entitlement. Therefore, the distributors had benefitted, by way of reduction in their outstanding dues owed to the petitioner, in excess of that what they were entitled to by way of rebates and discounts.

H. On being confronted, the employee had admitted to the errors committed in recording entries during the period October, 2016 to June, 2017 and stated that these recording entries had been incorrectly made by him due to his carelessness and negligence.

This admission is recorded by an email dated July 25, 2017 sent by him to the Controller – agri business of the petitioner.

I. The petitioner, thereafter, conducted an internal review to verify the excess credits passed by the employee during the last three years wherein further details of misdemeanour and fraud by the employee came to light. The employee was accordingly suspended on September 5, 2017. The petitioner, however, continued to do business with the distributors on an advance against delivery basis from July 2017 onwards.

J. The plaintiff company appointed a well known audit firm by the name of KPMG on October 19, 2017 to conduct an investigation into the entire transactions relating to issue of excess credit given by the employee to all the dealers of the petitioner.

K. With respect to C.S No. 50 of 2019, a meeting was held between the representatives of the petitioner and the distributor no. 1 on November, 14, 2017. Minutes of the said meeting recorded the admission of the distributor that in the event there were any excess credits passed on to the distributor, refund of the same shall be done by them. It is to be noted that the minutes of this meeting along with the month wise reconciliation of accounts statements for the period 2015-16 and 2016-17 were emailed to the distributor. Subsequently, an ad hoc payment of Rs. 1 crore was made by the distributor to the petitioner. Thereafter, one of the partners (respondent no. 3) of the distributor no. 1 came for a meeting on February 9, 2018 with the petitioner and admitted to having received excess credit notes for the sum of Rs. 26 crores for the

financial years 2015-2016 and 2016-2017. In his admission letter, he further stated that the employee had colluded with him and in exchange for the excess credit the employee received cash payments of approximately Rs. 3 crores. To show bona fide, a further payment of Rs. 50 lakhs was made by the distributor to the plaintiff company on that date itself.

L. The partner of the distributor no. 1 thereafter on February 14, 2018 sent an email retracting the statement made on February 9, 2018 and alleged that the said statement had been made by him under duress and coercion.

M. With respect to C. S. No. 51 of 2019, a meeting was arranged between the petitioner and the representative of the distributor no. 2 on February 19, 2018 at the office of the petitioner. The representative of the distributor no. 2 had been told that aberrations and irregularities were found in the dealership ledger statement of the distributor no. 2. The petitioner had also stated that credit notes in excess of the entitlement of the distributor no. 2 had been illegally issued and passed on to the distributor no. 2. Upon this, the representative of the distributor no. 2, of his own free will and without any protest, acknowledged receipt of excess credit notes and offered to refund the same in instalments. The representative of the distributor no. 2 had also admitted that in August 2017, excess credit notes of Rs. 69,27,600/- (Annexure 'H' of G.A. No. 733 of 2019) had been credited to the distributor no. 2 by the employee. The representative of the distributor no. 2 had stated in his admission letter dated February 19, 2018 that out of the said sum of Rs. 69,27,600/-, a sum of Rs. 9,05,161/- had already been paid by the distributor no. 2 to the petitioner. The

representative of the distributor no. 2 also undertook and agreed to pay the balance sum of Rs. 60,22,439/- in monthly instalments of Rs. 5,00,000/-. However, the distributor no. 2 failed and neglected to make repayments of the excess credit notes received illegally through the employee.

N. By a letter dated March, 27, 2018 (Annexure 'I' of G.A. No. 733 of 2019), issued to the distributor no. 2, the petitioner, on the basis of further enquiry, informed the distributor no. 2 that excess credit received by the distributor no. 2 during the financial years 2014-15 to 2017-18 (till June 2017) was to the tune of Rs. 2,49,87,636/-. The petitioner, along with the letter of March 27, 2018, had also forwarded a reconciled ledger statement, after making adjustments to subsequent payments made by the distributor no. 2.

O. The dealings between the petitioner and the distributor from July, 2017 till the time the petitioner stopped business with the distributor no. 2, resulted in total adjustments and payments of a sum of Rs. 3,66,06,076/- being made by the distributor no. 2 to the petitioner and the petitioner supplying goods worth a total sum of Rs. 3,22,28,115/- to the distributor no. 2. Upon making adjustments, including of the repayments made by the distributor no. 2, a total sum of Rs. 43,77,961/- remained to the credit of the distributor no. 2 with respect to such dealings. The petitioner did not refund such sum to the distributor no. 2 and instead adjusted the same towards its outstanding from the distributor no. 2 referred to in para N above.

P. KPMG, the audit firm entrusted with carrying on the investigation issued its report on March 20, 2018. With respect to the employee the KPMG report revealed the following :-

a) The employee had made aggregate Cash Deposits in excess of Rs. 1.27 crores in different bank accounts. The employee 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) The employee had incurred expenditure of approximately Rs. 50 lakhs from his VISA Regalia credit card.

c) The employee 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) The employee had made aggregate payments in excess of Rs. 45 lakhs towards premia for insurance policies.

f) The employee 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) The employee 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.

Q. The KPMG report further revealed various emails exchanged between the employee and the distributors that clearly revealed that excess credit notes had been issued by the employee and the difference between the actual credit notes and the excess credit notes were clearly indicated in the statements exchanged. The above emails indicated the exact amount of excess credit being passed on and the same being recorded.

R. The plaintiff company filed a criminal complaint on April 26, 2018 against the distributors and the employee under Section 120B, 406, 408, 420, 467, 468, 471 and 477A of the Indian Penal Code, 1860.

S. In the meantime, the plaintiff company appointed BDO India LLP (hereinafter referred to as "BDO") to identify the gross discrepancies in accounts and the fraud and also conduct forensic audit in relation to the excess credit note scam that had been discovered earlier. The BDO prepared its final report and submitted the same to the plaintiff company on February 4, 2019. The BDO report identified the amount of excess credit notes during the financial years 2014-2015 to 2017-2018 (till June, 2017). The findings of the BDO report with regard to the excess credit notes are provided below in relation to both the suits:-

C.S. No. 50 of 2019

Financial Year	Territory – 24 Parganas (South)	Territory-Hooghly (Dealership	Territory-24 Parganas (North)	Total Amount of excess credit

	(Dealership Code no. FK064S001) (Amount of excess credit notes issued)	Code no. FK099S001) (Amount of excess credit notes issued)	(Dealership Code no. FK209S001) (Amount of excess credit notes issued)	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.: FA059S001) (Amount of excess credit notes issued) [in Re.]
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/-

T. After giving credit for the sums paid by the distributors, the sum of Rs. 28,25,48,558/- became payable from the distributor no.1 and Rs. 2,58,68,781/- payable by the distributor no. 2. The decree sought in both the plaints further includes the interest payable on the above dues till March 5, 2019.

4. Mr. S. N. Mookherjee, Senior Advocate, appearing on behalf of the plaintiffs in both the suits has placed the documents that specifically highlighted the alleged fraud committed by the distributors and the employee. He put specific reliance on the emails exchanged between the employee and the distributors from 2014 to 2017 and indicated that each contained a chart which specifically stated the amount of rebate that the distributors were entitled to, the amount actually given to the distributors and the difference between the two. He submitted that these emails had been obtained from the computer of the employee by forensic examination carried out by experts. He, thereafter, highlighted the contents of the reports given by KPMG and BDO, the first highlighting the modus operandi and the second quantifying the exact excess rebate/credit received by the distributors based on the collusion and fraud of the distributors and the employee. He, thereafter, submitted that the price circulars were regularly issued by the plaintiff to all its distributors and was well known to all of them, as the entire basis for granting rebates/credit and thereafter making payments, was based on the said price circulars. He submitted that any plea stating contrary to the factual aspect that the distributors were not aware of the price circulars is absurd, unbelievable and ludicrous. Mr. Mookherjee, thereafter placed the documents with regard to the admissions made by the defendants as also their willingness to refund certain amounts. Mr. Mookherjee indicated that payments were made by the distributors on an ad hoc basis and the same amounted to a further admission on their part that excess credit

had been obtained by them. He also placed the subsequent retraction by the distributor no. 1 and submitted that the retraction was an afterthought and contained preposterous statements such as the distributor no. 2 was not aware of the price circulars. He further submitted that the distributor no. 2 was evasive and had no explanation with regard to the minutes and excess credit statement emailed to him on November 17, 2017. He further relied upon the balance confirmations that were issued by the petitioner that were never disputed by the distributors. Mr. Mookherjee thereafter placed the list of immovable properties owned by the distributor no. 1 (Annexure 'DD' in G.A. No. 725 of 2019) and the distributor no. 2 (Annexure 'R' in G.A. No. 733 of 2019).

5. With regard to the employee, Mr. Mookherjee placed all the documents annexed to the petition that revealed the assets of the employee as also the cash deposits and credit card expenses of the employee. He submitted that the annual compensation of the employee when his service was terminated was only Rs. 11 lakhs and such substantial assets and cash deposits clearly indicate that these are the ill gotten gains received by way of kick-backs from the distributors. He further relied on the admissions of the employee wherein he had admitted to the fact of having received 25 per cent of the excess credits as kick-backs from the distributors as also the letter wherein the employee had offered to the plaintiff as security a flat owned by the employee and his wife.

6. Mr. Mookherjee submitted that in the present fact scenario, where a clear cut prima facie case of fraud has been established in the interlocutory application, an ad interim injunction is required to be issued for protection of the petitioner. He submitted that the fraudulent conduct of the respondents in the dealings with the

petitioner makes it imperative for this Court to protect and secure the petitioner. He submitted that the petitioner had great apprehension that the respondents would alienate/transfer their properties in a manner that shall make the fruits of the decree nonexistent.

7. On the legal issues, Mr. Mookherjee firstly submitted that in the present fact scenario, where a prima facie fraud case has been established, the Court has the power to pass an injunction as per Section 94 read with Order 39 Rule 1(b). He further submitted that a chartered High Court has plenary jurisdiction and inherent powers to pass any orders to subserve justice, equity and good conscience. He relied on Section 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") to submit that the Code preserves the inherent powers of the High Court and therefore, the High Court in its jurisdiction can go beyond the contours of the Code for the ends of justice. He relied on ***Manohar Lal Chopra –v- Rai Bahadur Rao Raja Seth Hiralal*** *[Coram: K. N. Wanchoo, K. C. Das Gupta, J. C. Shah and Raghubar Dayal, JJ.]* reported in ***AIR 1962 SC 527***; ***Bhagat Singh Bugga –v- Dewan Jagbir Sawhney*** *[Coram: Lort. Williams, J.]* reported in **ILR 1941 1 Cal 490**; ***Chinese Tannery Owners' Association and others –v- Makhan Lal and others*** *[Coram: Das Gupta and Lahiri, JJ.]* reported in ***AIR 1952 Cal 560***; ***M. V. Elisabeth and others –v- Harwan Investment & Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa*** *[Coram: T. K. Thommen and R. M. Sahai, JJ.]* reported in ***AIR 1993 SC 1014; Sourav Ganguly –v- Mahuaa Media Pvt. Ltd.*** *[Coram: Sanjib Banerjee, J.]* reported in ***2015(4) CHN (CAL) 509***; ***Abheya Realtors Private Limited –v- SSIPL Retail Limited & Anr.*** *[Coram: Sanjib Banerjee, J.]* reported in ***2010(2) CHN (CAL) 203*** to buttress his argument. He, thereafter, relied upon ***Nanda Roy & Ors. –v- Gynanidhi Trust & Ors.*** *[Coram: Arijit Banerjee, J.]* reported in ***(2015) 4 ICC 817: (2015) 4 Cal LT 199:***

2016 AIR CC 718: (2016) 1 CCC 216 to indicate *in extensio* the powers available to a chartered High Court. He thereafter placed ***Deckert et al. –v- Independence Shares Corporation et al.*** *[Coram: Charles Evans Hughes, C.J. and Hugo L. Black, Felix Frankfurter, James C. McReynolds, William O. Douglas, Frank W. Murphy, Stanley F. Reed, Owen J. Roberts and Harlan F. Stone, JJ..]* reported in ***311 US 282 (1940)*** to indicate that even in cases of a money decree being sought by the plaintiff, an injunction can be passed by the court. He further relied upon an unreported judgment of the Calcutta High Court in ***Ajay Kumar Agarwal –v- Green Concretex Global Ltd. (GA No. 2685 of 2013, APOT No. 432 of 2013, CS No. 286 of 2013)*** *[Coram: Ashim Kumar Banerjee and Dr. Mrinal Kanti Chaudhuri, JJ.]* to show that the Calcutta High Court has taken a pragmatic approach in commercial matters putting the niceties of law in the back-sheet and directed the defendants to secure the claim of the plaintiff in a money suit.

8. Mr. Aniruddha Roy, counsel appearing on behalf of the distributor no. 1 submitted that the petitioner had discovered the alleged discrepancies and fraud in 2016, and thereafter in July of 2017, but had chosen to file the suit belatedly on 5th March, 2019. He submitted that an order of injunction is an equitable relief and the same stands defeated due to immense delay caused by the plaintiff. He further submitted that the claim of the plaintiff against the respondent is a simpliciter unsecured money claim that has till date not been crystallized. He submitted that the case made out in the plaint requires a full fledged trial and no interim order seeking any kind of protection/security at this stage can be passed.

9. Mr. Roy submitted that the various entries and materials that have been annexed to the interlocutory application have been obtained

allegedly from the laptop of the employee and the same are not within the knowledge or notice of the distributor no. 1. As such all these materials are required to be proved in a trial and cannot be accepted as sacrosanct without according an opportunity to the distributor no. 1 to examine its truth and correctness. With regard to the reports of the KPMG and BDO he submitted that the distributor no. 1 has a right to challenge the experts' opinion and the same can only be done at the time of trial. With regard to the minutes of the meeting dated November 14, 2017 he submitted that none of the respondents had signed the said minutes, and therefore, the document is a fabricated and manufactured document produced by the plaintiff. He submitted that the original minutes that had been signed by the respondent no. 3 has deliberately not been disclosed before the court. With regard to the two purported handwritten documents both dated February 9, 2018, Mr. Roy submitted that these documents had been obtained by the plaintiff by resorting to undue influence, duress and coercion. He further submitted that by letter dated February 14, 2018 the above two letters had been retracted and therefore, no reliance can be placed upon the letters dated February 9, 2018. He submitted that on a plain reading of the two letters it is clear that the same were obtained under duress. Mr. Roy concluded his submission on the factual aspects by submitting that as the facts are disputed, no prima facie case is made out by the petitioner.

10. On the legal aspects, Mr. Roy submitted that in a money claim the settled position of law is that no injunction can be granted unless it satisfies the test of Order 39, Rule 1(b) read with Section 94 of the Code. He submitted that the court can restrain the defendants from disposing of the property which is not the subject matter of the suit only if it appears that the defendant intends or threatens to dispose of the property with a view to defraud his creditors. He submitted that in

the present case no such averments or material is present in the plaint and/or in the application for injunction. With regard to attachment before judgment as prescribed under Order 38, Rule 5 of the Code, he submitted that the tests laid down by the Supreme Court in the matter of ***Raman Tech and Process Engg. Co. and Another –v- Solanki Traders*** *[Coram: R.V. Raveendran and P. Sathasivam, JJ.]* reported in ***(2008) 2 SCC 302*** have to be satisfied. He put reliance on ***Premraj Mundra –v- Md. Manek Gazi & ors.*** *[Coram: Sinha, J.]* reported in ***AIR 1951 Cal 156*** that had been approved in ***Raman Tech (supra)***. He submitted that no averments were present in the interlocutory petition that would satisfy the test of Order 38, Rule 5 of the Code.

11. With respect to the inherent powers provided in Section 151 of the Code, Mr. Roy submitted that these powers do not operate over substantive rights of a litigant. He submitted that the defendants have substantive rights over their immovable and movable properties guaranteed under the Constitution of India and no court has the inherent powers to forcibly seize such property, as such an action would invade into the substantive rights of a citizen, and the same is not permissible under Section 151 of the Code. To buttress his arguments as made above, he relied on ***Sunil Kakrania & Ors. –v- M/s. Saltee Infrastructure Ltd. and another*** *[Coram: Bhaskar Bhattacharya and Prasenjit Mandal, JJ.]* reported in ***AIR 2009 Cal 260*** and ***Kohinoor Steel Private Ltd. –v- Pravesh Chandra Kapoor*** *[Coram: J. N. Patel, C.J. and Bhaskar Bhattacharya, J.]* reported in ***AIR 2011 Cal 29***. Mr. Roy further relied on ***Padam Sen & Anr. –v- State of Uttar Pradesh*** *[Coram: Jafer Imam, A. K. Sarkar and Raghubar Dayal, JJ.]* reported in ***AIR 1961 SC 218*** and ***M/s Ram Chand & Sons Sugar Mills Private Ltd., Barabanki (U.P.) –v- Kanhayalal Bhargava and Others*** *[Coram: K. Subba Rao and V. Ramaswami, JJ.]*

reported in ***AIR 1966 SC 1899*** to advance the proposition that the inherent powers of the court are only in relation to procedural aspects, as courts derive this power from their own practice and procedure. He submitted that this inherent power cannot be utilized in contravention of the provisions of the Code, and specifically, for the purpose of seizing the property of a party which is a substantive right of a party. He submitted that the inherent powers under Section 151 of the Code are mainly to prevent the abuse of the process of a court. He relied on ***Vareed Jacob –v- Sosamma Geevarghese & Ors.*** *[Coram: V. N. Khare, C. J. and S. B. Sinha and S. H. Kapadia, JJ.]* reported in ***(2004) 6 SCC 378*** to submit that the powers expressly conferred under Section 151 of the Code is in addition to and the supplementary to the powers conferred under the CPC but the power cannot be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of the Code.

12. The next point pleaded by Mr. Roy was that the court cannot travel beyond the pleadings filed by a party and the relief granted by the court has to be based on the pleadings and nothing beyond. He relied on ***Union of India –v- Ibrahim Uddin*** *[Coram: Dr. B. S. Chauhan and Dipak Misra, JJ.]* reported in ***(2012) 8 SCC 148*** to support the above proposition. He further submitted that the plaintiff has resorted to suppression of material facts, and therefore, the ratio in ***S.P Chengalvaraya Naidu (Dead) by LRS –v- Jagannath (Dead) by LRS & Ors.*** *[Coram: Kuldip Singh and P. B. Sawant, JJ.]* reported in ***(1994) 1 SCC 1*** should be applied. He submitted that the Supreme Court in this judgment had clearly held that one who seeks equity must approach the court with clean hands. He further submitted that the particular case involved disputed questions of facts and the same cannot be adjudicated without a proper trial. He submitted that it is settled law that the court shall refrain from passing any discretionary

and equitable relief when disputed questions of facts are present. He placed reliance on ***Air India Ltd. & Ors. –v- Vishal Capoor & Ors. [****Coram: Ruma Pal, Dr. Ar. Lakshmanan and C. K. Thakker, JJ.]* reported in ***(2005) 13 SCC 42*** in support of the above proposition.

13. With regard to the powers of a Chartered High Court, he submitted that Clause 19 of the Letters Patent provides and empowers this Court to apply law and equity in a particular case to pass necessary orders. However, he submitted that as in the present case, the law in relation to money claims is well settled by two Division Bench judgments of this Court, the same operate as a binding precedent on this Court. He submitted that when law is settled and has a binding effect it is only the law which shall prevail and equity shall have no place to play. He further submitted that when there is a conflict between law and equity it is the law who has to prevail in accordance with the Latin maxim "dura lex sed lex", which means "the law is hard, but it is law". He submitted that equity can only supplement the law but it cannot supplant or override it. He relied on ***Council for Indian School Certificate Examination –v- Isha Mittal & Anr. [****Coram: S.P. Bharucha, Ruma Pal and Shivaraj V. Patil, JJ.]* reported in ***(2000) 7 SCC 521*** and ***Raghunath Rai Bareja & Anr. –v- Punjab National Bank & Ors.*** *[Coram: S.B. Sinha and Markandey Katju, JJ.]* reported in ***(2007) 2 SCC 230*** in support of the above proposition.

14. He concluded his arguments by distinguishing ***Manohar Lal Chopra (supra)*** that had been relied upon by the plaintiffs submitting that in the said judgment the subject matter involved was an anti-suit injunction. He submitted that the principles laid down there were framed to prevent the abuse of the process of court, and therefore, cannot be applied in the present fact situation. He submitted that

injunction on a substantive right is not permitted. He concluded by submitting that the two Division Bench judgment of the Calcutta High Court are directly applicable in the facts and circumstances of the present case and ***Manohar Lal Chopra (supra)*** has no application in the facts and circumstances of this case.

15. Mr. Jishnu Chowdhury appearing on behalf of the distributor no. 2 submitted that delay in approaching the court is a good ground for refusal of interim relief and relied on ***Zenit Mataplast Private Limited –v- State of Maharashtra and Others [****Coram: Altamas Kabir and Dr. B. S. Chauhan, JJ.]* reported in ***(2009) 10 SCC 388*** to buttress his argument. He, thereafter, placed paragraphs 17 and 18 of the Supreme Court judgment in ***State of H.P. –v- Jai Lal and Others*** *[Coram: K. T. Thomas and D. P. Mohapatra, JJ.]* reported in ***(1999) 7 SCC 280*** to submit that an expert is not a witness of fact and his evidence is that in the nature of an advisory character. He submitted that the reports filed by the plaintiff cannot be taken into account unless the same is subject to cross-examination in trial. He further relied on ***Keshav Dutt –v- State of Haryana*** *[Coram: Altamas Kabir and Dr. M. K. Sharma, JJ.]* reported in ***(2010) 9 SCC 286*** to show that even a handwriting expert has to be examined as an expert witness and without doing so no reliance can be placed upon his opinion. He, thereafter, placed paragraphs 17, 25, 29 and 30 of a Calcutta High Court judgment in ***Boeing Company –v- R.M. Investment and Trading Co. Pvt. Ltd.*** *[Coram: K. C. Agarwal, C.J. and M. G. Mukerjee, J.]* reported in ***(1994) 2 Cal Lt 300 (HC)*** to submit that the inherent powers preserved by Section 151 of the Code are only to be used with respect to procedure and cannot be used to take away the substantive rights of a litigant. He further relied on a Calcutta High Court decision in ***Badal Chandra Kundu and Ors. –v- Netai Mahato and Ors. (C.O. 3813 of 2017)*** *[Coram: Biswajit Basu, J.]* and placed paragraph 19 to

explain the functioning of Sections 94 and 151 read with Order 39, Rule 1 and 2. Mr. Chowdhury also referred to ***Premraj Mundra (supra)***, ***Vareed Jacob (supra)*** and ***Manohar Lal Chopra (supra)*** to buttress his argument that the powers under Section 151 of the Code cannot be used to affect the substantive rights of a litigant. Mr. Chowdhury thereafter produced a document issued by the plaintiff to the respondent no. 1 with reference to region Murshidabad to indicate that on 14th of February, 2018 the outstanding closing balance was only Rs. 25 lakhs odd. He submitted that the earlier admissions of the distributor to Rs. 69 lakhs odd was explained by this document. He argued that post admission documents may destroy the admission, thereby, rendering a situation where the admission cannot be relied upon. He referred to paragraphs 6, 7 and 8 of a Calcutta High Court judgment in ***Scope Vincom Industries Private Limited –v- Sitaram Sultania*** *[Coram: Sanjib Banerjee and Sabyasachi Bhattacharyya, JJ.] in* ***(GA No. 3872 of 2017)*** in support of his above submission.

16. Mr. Anirban Ray, counsel appearing on behalf of the employee placed relevant paragraphs of the plaint before me to indicate that the plaintiff had continued to do business with the distributors in spite of discovery of the alleged fraud having been committed in the year 2017. He further submitted that the documents relating to the assets of the employee do not reveal any link between the alleged kickback money and the said assets. He further submitted that the petitioner in the plaint only seeks loss and damages against the employee, and therefore, the claim is in the nature of a money decree for unascertained and unliquidated damages. He further submitted that it was very well known to the plaintiff that the employee had other businesses and therefore, at the ad interim stage, there was no manner in which the assets of the employee could be traced to the alleged fraud. With regard to the admission made by the employee and the

offer by the employee of securing the plaintiff's claim by way of offering a flat owned by the employee and his wife, he submitted that the letters relied upon by plaintiffs had been obtained by coercion and under duress. He further relied on a letter dated June 25, 2018 issued by the employee that had stated that under duress and coercion his signatures and scribes had been obtained on several documents by the representatives of the petitioner.

17. Mr. Ray further submitted that the plaint itself runs an alternative and inconsistent plea of mistake having been committed by the plaintiff. He submitted that such an inconsistent plea by itself destroys the very foundation of the primary plea of fraud that has been made by the petitioner in the plaint. Mr. Anirban Roy, thereafter, painstakingly placed in great detail the judgments of the Supreme Court in ***Manoharlal Chopra (supra)***, ***Ramantech (supra)*** and ***Vinod Seth –v- Devinder Bajaj and Another*** *[Coram: R.V. Raveendran and R.M. Lodha, JJ.]* reported in ***2010 (8) SCC 1*** and the two Calcutta High Court judgments of the Division Bench in ***Sunil Kakrania (supra)*** and ***Kohinoor Steel Private Ltd. (supra)*** to repeat and reiterate the submissions made by Mr. Aniruddha Roy and Mr. Jishnu Chowdhury. The sum and substance of his submissions were that in the present factual matrix, this Court does not have any power to pass any injunction and/or attachment even if the Court comes to the finding that a prima facie case of fraud has been committed by the defendants. He reiterated the principles in relation to attachment and injunction and submitted that where specific provisions are provided in the Code, the Court cannot travel beyond the Code under any circumstances. He further relied on the Supreme Court judgment in ***Jaisri Sahu –v- Rajdewan Dubey and Others*** *[Coram: P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta and T.L. Venkatarama Aiyar, JJ.]* reported in ***AIR 1962 SC 83*** to emphasize on the Doctrine of Precedents to submit

that this Court is bound by the two Division Bench Judgments of the Calcutta High Court relating to issue of an injunction in the case of a money claim.

18. I have heard counsel appearing on behalf of the plaintiff and the respondents in both the suits and perused the documents filed by the plaintiff in the interlocutory applications filed before me. I have also gone through a bunch of documents filed by Mr. Aniruddha Roy appearing on behalf of the distributor no. 1. Mr. Jishnu Chowdhury, counsel appearing on behalf of the distributor no. 2 has also filed a few ledger statements before me. I have to note that the documents filed by the respondents were by means of simply handing over the documents and the same are not supported by any affidavit whatsoever. As pointed out earlier, the respondents chose not to file affidavits in the matter in spite of the Court's inclination to call for affidavits with a undertaking from the defendants not to alienate their property.

19. The key documents, in my view, are the emails that have been exchanged between the employee and the distributors that lucidly reveal the modus operandi adopted by the respondents. These documents starting from page 671 to 690 in G.A No. 725 of 2019 and pages 658 to 661 of G. A. 733 of 2019 reveal the discounts payable to the distributors, the actual discounts given to the distributors and the difference/excess credit given to the distributors. Unfortunately, counsel appearing on behalf of the respondents have completely skipped any reference to these documents in their submissions, except stating that these documents would be admissible only at the trial and cannot be the basis for any ad interim order. I categorically reject this submission of the respondents as the same is without any basis in law. These emails and attachments have been obtained from the computer

of the employee and I find no reason to disbelieve the same at the ad interim stage.

20. The second set of documents that are relevant are the admissions made by the respondent no. 3 in G. A. No. 725 of 2019 (Annexure 'I' and Annexure 'L') dated February 9, 2018, admission of distributor no. 2 (Annexure 'H' in G. A. No. 735 of 2019) dated 19th February, 2018, the admissions of the employee on July 25, 2017 and in the two letters dated February 8, 2018 (Annexure 'E', 'J', 'K' in G. A. No. 725 of 2019) and the offer of employee to secure the plaintiff by a letter handed over on February 12, 2018 (Annexure 'M' in G. A. No. 725 of 2019). It is to be noted that the admissions made by the respondent no. 3 in C. S. 50 of 2019 were retracted on February 14, 2018 by an email sent by the respondent no. 3. In this letter, the respondent no. 3 stated that the distributor no. 1 was not aware of the price circulars by which the method of calculation or allocation of cash discounts, freights and other heads were given by the petitioner. The letter further recorded that in a meeting dated 14th November, 2017 he had sought for details of the excess credits so that he could reconcile the same at his end. The letter further explained the ad hoc payments of Rs. 1,50,00,000/- made on various dates and also stated that both the letters of February 9, 2018 had been issued by the respondent no. 3 under duress and threat.

21. With regard to the admission made by the distributor no. 2 on 19th February, 2018, there is no retraction whatsoever. However, Mr. Jishnu Chowdhury, counsel appearing on behalf of the said respondent produced certain documents to show that the admitted amount of Rs. 64 lakhs odd had been refunded by the respondents, and in fact, it was the plaintiff that owed money to the defendant. With regard to the employee, a letter was issued by him on June 25, 2018

(Annexure 'A' of supplementary affidavit in G. A. No. 725 of 2019), four months after the admissions made by him on February 9, 2018. In this letter, he states that upon grave threat and duress the company officials of the plaintiff had obtained his signatures and scribe over various documents. It is to be noted that this letter has been issued by him subsequent to his termination on April 30, 2018 and a criminal case having been filed against him along with the other respondents on May 1, 2018.

22. The third set of documents relied heavily by the plaintiff are the two reports submitted by KPMG and BDO. I have gone through the same meticulously and I find that the two reports clearly unveil and lay thread bare the modus operandi adopted by the respondents in the alleged fraud and also quantify the exact amount of excess credit passed on by the employee to the distributors. Both these reports are based on documents extracted from the computer that was operated by the employee and are categorical in the ultimate finding reached therein that by a mechanism of fraud and collusion between the distributors and the employee, the plaintiff has been defrauded of a substantial amount of money by way of excess credit having been passed on to the distributors by the employee.

23. At the ad interim stage, I am required to come to a prima facie finding based on the documents that are brought before me by the plaintiff. The plaintiff in both the interlocutory petitions reveals the collusion and fraud committed by the employee along with the distributors and the same is highlighted by the exchange of emails between them that clearly indicates (a) the actual credit that was to be given (b), the fraudulent credit passed and (c) the difference between the two. These documents are unimpeachable. Based upon these emails and the price circulars exchanged during the relevant time, the audit report of BDO

clearly chalks out the amount of excess credit that was passed by the employee to the distributors. It is to be noted that the distributor no. 2 never retracted his admission given on February 19, 2018 and the employee retracted his admission after four months, that is, after he was terminated from the service. This retraction on June 25, 2018 by the employee is obviously an afterthought and holds no water. With regard to the admissions of the distributor no. 1 the same were retracted after five days. However, this retraction does not explain the meeting held on 14th November, 2017. Furthermore, this retraction speaks about the distributor no. 1 not being aware of price circulars during the relevant period. This statement in the retraction is absolutely unbelievable, and accordingly, reduces the weightage of the entire retraction. Is it conceivable that a dealer who has been working with the petitioner and receiving discounts and rebates for almost two decades is not aware of the basis of the said discounts? In my opinion, such a situation cannot be conceivable in the commercial world. Furthermore, the exchange of emails from pages 651 to 690 in G.A. No. 725 of 2019 completely denounces the stand of the distributor no. 1. Hence, at this ad interim stage no reliance can be placed on this retraction. On a careful examination of the documents as indicated above, I am of the clear view, as one needs to be at an ad interim stage, that fraud has been committed by the respondents on the petitioner.

24. In fact, 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 'I' 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 the 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.

25. The question that arises now is whether the plaintiff is entitled to be secured for such a fraud that has been played on it. The contention of the respondents is that in a money decree for an unliquidated sum of damages no protection can be granted to a plaintiff. Before deciding on the legal issues that arise in this matter, I would like to pen down the relevant sections of the Code for a better understanding of the same. Accordingly, Section 4; Section 94; Section 151; Order 38, Rule 5, and Order 39, Rule 1 are delineated below:

Section 4. Savings. *– (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.*
(2) In particular and without prejudice to the generality of the proposition contained in sub-section 91), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Section 94. Supplemental proceedings. *– In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-*
(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Section 151. Saving of inherent powers of Court.*- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

Order 38, Rule 5. Where defendant may be called upon to furnish security for production of property. *– (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-*

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

[(4)] If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.]

Order 39, Rule 1. Cases in which temporary injunction may be granted. *– Where in any suit it is proved by affidavit or otherwise-*

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,

[(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

26. At this juncture, I propose to examine in detail some of the judgments relied upon by all the parties. In the case of ***Manohar Lal Chopra (supra)*** the Supreme Court was dealing with an anti suit injunction issued by the Civil Court in Indore restraining the defendant appellant from proceeding with an earlier suit filed in Asansol. The Supreme Court allowed the appeal and set aside the order restraining the appellant from proceeding with the suit at Asansol. It is in this context after approving the judgments passed in ***Chinese Tannery Owners' Association (supra)*** and ***Bhagat Singh Bugga (supra)*** the Hon'ble Supreme Court, inter alia, held that there is no expression in Section 94 which prohibits the issue of temporary injunction in circumstances

not covered by Order 39 of the Code. It was held that the inherent powers of the Court are in addition to the powers specifically conferred by the Code and are complementary. It was further held that the High Courts, especially chartered High Courts had the inherent powers to pass orders of injunction when no such power existed in the Code of Civil Procedure. Finally, the Supreme Court held that the situations contemplated under Order 39, Rule 1 and 2 were not exhaustive and could not encompass or apprehend all situations that may arise for the grant of injunctions. The relevant paragraphs of the above majority and minority view of the judgment are delineated below:

> "17. On the first question it is argued for the appellant that the provisions of clause (*c*) of Section 94 CPC, make it clear that interim injunctions can be issued only if a provision for their issue is made under the rules, as they provide that a Court may, if it is so prescribed, grant temporary injunctions in order to prevent the ends of justice from being defeated, that the word "prescribed", according to Section 2, means "prescribed by rules" and that Rules 1 and 2 of Order 39 lay down certain circumstances in which a temporary injunction may be issued.
>
> 18. There is difference of opinion between the High Courts on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code: *Varadacharlu* v. *Narsimha Charlu* [AIR 1926 Mad 258] ; *Govindarajulu* v. *Imperial Bank of India* [AIR 1932 Mad 180] *Karuppayya* v. *Ponnuswami* [AIR 1933 Mad 500 (2)] ; *Murugesa Mudali* v. *Angamuthu Mudali* [AIR 1938 Mad 190] and *Subramanian*v. *Seetarama* [AIR 1949 Mad 104] . The other view is that a Court can issue an interim injunction under circumstances which are not covered by Order 39 of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction: *Dhaneshwar Nath* v. *Ghanshyam Dhar* [AIR 1940 All 185] ; *Firm Bichchha Ram* v. *Firm Baldeo Sahai* [AIR 1940 All 241] ; *Bhagat Singh* v. *Jagbir Sawhney* [AIR 1941 Cal 670] and *Chinese Tannery Owners' Association* v. *Makhan Lal* [AIR 1952 Cal 560] . We are of opinion that the latter view is correct and that the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC. There is no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. 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 effect of the expression "if it is so prescribed" is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

19. There is nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

20. Further, the provisions of Section 151 of the Code make it clear that the inherent powers are not controlled by the provisions of the Code. Section 151 reads:

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

21. A similar question about the powers of the Court to issue a commission in the exercise of its powers under Section 151 of the Code in circumstances not covered by Section 75 and Order 26, arose in *Padam Sen* v. *State of Uttar Pradesh*[(1961) 1 SCR 884] and this Court held that the Court can issue a commission in such circumstances. It observed at p. 887 thus:

> "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 purposes 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."

These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been

specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be persumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice.

23. The case reported as *Maqbul Ahmad* v. *Pratap Narain Singh* [LR 62 IA 80] does not lay down that the inherent powers of the Court are controlled by the provisions of the Code. It simply holds that the statutory discretion possessed by a Court in some limited respects under an Act does not imply that the Court possesses a general discretion to dispense with the provisions of that Act. In that case, an application for the preparation of a final decree was presented by the decree-holder beyond the period of limitation prescribed for the presentation of such an application. It was however contended that the Court possessed some sort of judicial discretion which would enable it to relieve the decree-holder from the operation of the Limitation Act in a case of hardship. To rebut this contention, it was said at p. 87:

> "It is enough to say that there is no authority to support the proposition contended for. In Their Lordships' opinion it is impossible to hold that, in a matter which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that Section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings."

These observations have no bearing on the question of the Court's exercising its inherent powers under Section 151 of the Code. The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

24. Further, when the Code itself recognises the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

> 27. The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure.
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> ***Dissenting view (Per J.C. Shah, J.)***
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> 42. It is true that the High Courts constituted under Charters and exercising ordinary original jurisdiction do exercise inherent jurisdiction to issue an injunction to restrain parties in a suit before them from proceeding with a suit in another court, but that is because the Chartered High Courts claim to have inherited this jurisdiction from the Supreme Courts of which they were successors. This jurisdiction would be saved by Section 9 of the Charter Act (24 and 25 Vict. c. 104) of 1861 and in the Code of Civil Procedure, 1908 it is so expressly provided by Section 4. But the power of the civil courts other than the Chartered High Courts must be found within Section 94 and Order 39 Rules 1 and 2 of the Civil Procedure Code."
>
> (underlined by me for emphasis)

27. In ***Bhagat Singh Bugga (supra)***, the Calcutta High Court was dealing with a case of an anti injunction suit. In this case, the defendant had filed a prior suit in the Court of the sub-ordinate judge Gujranwala. The issue was decided by the Calcutta High Court staying the previously instituted suit at Gujranwala relying on the inherent powers of the Calcutta High Court. The High Court held that the law cannot make express provisions against all inconveniences and the Court, therefore, had inherent power to act *ex debito justitiae* where the circumstances of the case required. The Court held that the balance of convenience enabled the Court to pass the interim order of injunction. The relevant extracts are provided below:

> "In Durga Dihal Das –v- Anoraji (3) it was said by Blair J. that the Code is not exhaustive, there are cases which are not provided for in it, and he declined to believe that the High Court must fold its hands and allow injustice to be done.
>
> These words were adopted by Woodroffe J. in the case of Hukum Chand Boid v. Kamalanand Singh (4) and he added that the law

> cannot (as pointed out by Sir Barns Peacock C.J.) make express provisions against all inconveniences, and that the Court had, therefore, in many cases where the circumstances warranted it, and the necessities of the case required it, acted upon the assumption of the possession of an inherent power to act ex debito justitice and to do that real and substantial justice for the administration of which it alone exists.
>
> These observations were adopted and followed in Manohar Lal Mahabir Pershad v. Jai Narain Babu Lal (5); Dhaneshwar Nath Tewari v. Ghanshyam Dhar Misra (1) and Becharam Baburam v. Baldeosahai Surajmal (supra).
>
> In the present case the balance of convenience is all one way, and I have no doubt about the orders which I ought to make, or that I have power to make them."

28. In ***Chinese Tannery Owners' Association (supra)*** the Calcutta High Court was examining an interim order of injunction that had been granted in favour of the plaintiff in a suit for money decree. The defendant appellant raised the plea that the provisions of order 39 Rule 1 of the Code was not attracted and the Civil Court should not have drawn upon its inherent powers under Section 151 of the Code. The Division Bench held that the mere fact that there are certain provisions as regards the issue of injunctions in Order 39 of the Code does not debar the Court from passing temporary injunctions from doing justice in the exercise of its power under Section 151 of the Code. The relevant paragraphs are delineated below:

> "3. It is necessary to consider first the point taken by Mr. Sen on behalf of the appellants that it is not open to the Court to pass any order of injunction in the exercise of its inherent jurisdiction under Section 151 of the CPC. His argument is that where the Code has clearly and fully dealt with a matter, there is no scope for any action under inherent jurisdiction. He further argues in this connection that a reading of S. 94 of the Code makes it clear that the provisions of O. 39 of the CPC were intended to be exhaustive as regards this matter of temporary injunction. For this proposition he has relied upon the decisions in the case of '*Hemendralal Roy* v. *Indo Swiss Trading Co. Ltd.*', 24 Pat 496, and in the case reported in '*Nagabhushan Reddy* v. *Narasamma*'. (1950) 2 Mad LJ 482. Quite clearly an opposite view was taken in the Allahabad case of '*Dhaneshwar Nath* v. *Ghanshyam Dhar*', ILR (1940) All 201.

4. Notice must also be taken of an observation by Mookerjee, J. in the case of '*Nirode Barani Debi* v. *Chamatkarini Devya*,' 19 Cal W.N. 205. While it is true that the Court was not, in this case, directly dealing with the point whether an injunction could be granted and the observation therein might be considered obiter, there can be no doubt as to what the learned Judges thought in the matter. Their view clearly was that in a suitable case the Court could give an order of injunction in the exercise of its jurisdiction under Section 151 of the CPC even though the provisions of O. 39 of the CPC might not give it any authority to do so.

5. The principles that underlie a decision of the question whether on a certain matter there are certain provisions in the Code that bar the exercise of powers under Section 151 of the CPC were considered by this Court in the Full Bench case of '*Abdud Karim Abu Ahmad Khan Ghauznavi* v. *Allahabad Bank Ltd.*,' 44 Cal. 929. Dealing with the argument similar to what has been addressed to us here Woodroffe, J. observed:

> ".....Doubtless this exercise of inherent jurisdiction must be exercised with care subject to the general legal principles and to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power. But it is argued here that the Court has dealt with the subject of remand and has therefore indicated that it is not to be ordered except in the one specific instance mentioned in O. 41, R. 23. I am not prepared to hold this, the more so that S. 564 of the previous Code has not been re-enacted. The mere fact that S. 107 deals with remand does not exclude the Court's inherent jurisdiction to make orders of remand in cases other than those covered by O. 41, R. 23. I am of opinion, therefore, that the powers of the appellate Court as regards remand are not limited to the specific case mentioned in O. 41, R. 23 and that the Court, under its inherent jurisdiction, may order a remand to do what is right and necessary in cases other than those covered by that order if justice so requires it. Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise: which, if applied, will meet the justice of the case."

6. I respectfully agree with the principle as laid down in these words. Applying this principle to the case before us, we are clearly of opinion that the mere fact that there are certain provisions as

> regards the issue of injunction in O. 39 of the CPC does not debar the Court from passing orders of temporary injunction for doing justice in the exercise of its powers under Section 151 of the CPC. It cannot in our opinion reasonably be argued that the provisions of Order 39 of the CPC were intended by the Legislature to be exhaustive."

29. In ***M. V. Elisabeth and Others (supra)*** the Supreme Court examined in detail the powers of the High Court in relation to the admiralty jurisdiction and came to the conclusion that the High Courts in India being Courts of unlimited jurisdiction are the repository of all judicial power under the Constitution except what is specifically excluded, and are, therefore, competent to issue directions for arrest of a foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction. The relevant paragraph is delineated below:

> "101. Law of 1890 apart, can the Indian High Courts after 1950 be denied jurisdiction to arrest a foreign ship to satisfy the claim of owner of a bill of lading for cargo taken outside the country? Without entering into any comparative study of jurisdiction of High Court of England and the High Courts in our country the one basic difference that exists today is that the English courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under it Article 225 preserved the jurisdiction, including inherent jurisdiction, which existed on the date the Constitution came into force and Article 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but as repository of power to reach its arms to do justice. A citizen carrying on business which is a fundamental right cannot be rendered helpless on the premise that the jurisdiction of High Courts stood frozen either under statute of England or any custom or practice prevailing there or the High Court of England cannot exercise the jurisdiction. Brother T.K. Thommen, J., while dealing with right of *rem* and *in personam* has considered the justification for conferment of such right to a claimant in respect of a merchant ship travelling from port to port. Can it be successfully urged today that such a ship or its master and owner is immune from tort or breach of contract committed by him in respect of cargo taken out of port. A citizen of a colonial state may or may not but a citizen of an independent republic cannot be left high and dry. The construction of law has to be in consonance with sovereignty of a State. The apprehension that assumption of such jurisdiction would be on general attributes of sovereignty is not well founded.

> This coupled with expansive jurisdiction that the High Courts enjoyed in relation to Admiralty under 1890 Act preserved under Article 225 provided justification for direction to arrest the ship, for the tortious act done by master or owner of the ship in respect of goods carried outside the port even if there was no specific provision like Section 6 of the 1861 Act. Entertaining a claim arising out of breach of contract in relation to cargo taken out of any Indian port pertains to jurisdiction. It must arise out of statute. But the power to direct arrest of a ship in exercise of the jurisdiction is one relating to competency. The High Courts in India being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction. Since the jurisdiction to entertain a suit on tort or contract in relation to cargo going out of the country in a ship is found to exist under the 1890 Act the High Court of Andhra Pradesh was competent to direct arrest of the foreign ship when it appeared in Indian waters. The High Court, therefore, rightly negatived the objection to issue direction to arrest the ship."

30. In ***Nanda Roy & Ors. (supra)*** the Coordinate Bench of the Calcutta High Court examined minutely the origin and genesis of the remedy of injunction and also relied upon ***Manohar Lal Chopra (supra)*** to arrive at the ratio that the power to grant injunction stems from Section 94(c) of the Code and Order 39 indicates the circumstances in which the Court may exercise such powers. The Court held that the circumstances are by no means exhaustive and the Courts' power to issue a temporary injunction is not limited to the circumstances prescribed in Order 39. The Court further held that the powers to grant injunction as always inhere in a Court of law and may be exercised for doing complete justice between the parties. The relevant paragraphs are delineated below:

> "23. Before going into the question which is before this Court, it may be interesting to trace the origin and genesis of the remedy of injunction.
>
> 24. In England, under the old Chancery practice an injunction was a writ, issued by the order and under the seal of a court of equity. It was of two kinds. One was the Writ Remediat. This was issued for a variety of purposes including to stay proceedings in

courts of law, in the spiritual courts, the courts of admiralty or in some other court of equity: to restrain the indorsement or negotiation of notes and bills of exchange, sale of land, sailing of ship, transfer of stock, alienation of a specific chattel etc.

25. Under the old procedure followed prior to 1864, the Curt of Chancery was the only court which had jurisdiction to restrain the doing of wrongful acts by injunction. The Common Law Procedure Act 1864 (which was subsequently repealed by the Statute Law Revision Act, 1883) empowered the common law courts to grant injunction in particular cases. It also authorised those courts to grant injunctions in patent cases. But until the passing of the Judicature Act of 1873, the remedy of injunction continued to be, with the aforesaid exceptions, a remedy peculiar to the Court of Chancery.

26. By section 16 of the Judicature Act of 1873 the entire jurisdiction of the Court of Chancery was transferred to and stood vested in the High Court of Justice. Section 25(8) of the Judicature Act of 1873 provided that a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appeared to the High Court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just and if an injunction is asked for either before, or during, or after the hearing of any matter, to prevent any threatened or apprehended waste or trespass such injunction may be granted if the court shall think fit. Such power together with the jurisdiction formerly exercised by the Court of Chancery in granting injunctions were, by the Judicature Act, 1873 conferred upon all the divisions of the High Court. However, this did not create a new jurisdiction in the sense it did not give the right to an injunction to parties who previously had no legal right, but simply gave to the court when dealing with legal rights which were under its jurisdiction power to grant relief by way of injunction in fit and proper cases.

27. In India, the first statutory provision for grant of injunction was made by Sections 92, 93, 95 and 96 of the Civil Procedure Code, 1859. Section 92 laid down that in any suit in which it shall be shown to the satisfaction of the court that any property which is in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, it shall be lawful for the court to issue an injunction to such party commanding him to refrain from doing the particular act complained of or to give such other orders for the purpose of preventing him from wasting, damaging or alienating the property as to the court may seem fit. Section 93 provided that in any suit for restraining the defendant from the committal of any breach of contract or other injury, and whether the same may be accompanied with any claim for damages or not, it shall be lawful for the plaintiff at any

time after the commencement of the suit, and whether before or after judgment, to apply to the court for an injunction to restrain the defendant from the repetition or continuance of the breach of contract and wrongful act complained of or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right; and such injunction may be granted by the court on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as to such court shall seem reasonable and just, and in case of disobedience, such injunction may be enforced by imprisonment in the same manner as a decree for specific performance; provided always, that any other for an injunction may be discharged or varied or set aside by the court on application made thereto by any power dissatisfied with such order. Section 95 provided that before granting injunction, the court may direct reasonable notice to be given to the opposite party. By section 96 provision was made for compensating the defendant for needless and unjustifiable issue of injunction.

28. The Civil Procedure Code of 1877, chapter XXXV made more complete provision for issue of temporary injunctions. The law relating to grant of permanent injunction was contained in the Specific Relief Act of 1877 and in particular Sections 54 and 55 of that Act (presently Sections 38 and 39 of the Act of 1963). Those Sections were understood not to be introducing new principles of law in India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England and long since introduced in the country, not because they were English, but because they were in accordance with equity and conscience. Presently the law relating to injunction in this country is contained, in so far as temporary injunction is concerned, in the Code of Civil Procedure, 1908, and in so far as permanent injunction is concerned, in the Specific Relief Act, 1963. In the instant case we are concerned with temporary injunction only.

29. Section 94 of the CPC provides, inter alia, that in order to prevent the ends of justice from being defeated the court may, if it is so prescribed, inter alia, grant a temporary injunction and in case of disobedience committt a person guilty thereof to the civil prison and/or make such other interlocutory orders as may appear to the court to be just and convenient. Section 94 inescapably refers to Rules 1 and 2 of Order 39 of the CPC which have been set out hereinabove.

30. It may not be proper to say that the court derives its jurisdiction to pass an order of injunction from Section 94. It is too well established that the Court has an inherent power to pass an order of injunction where the facts and circumstances of a case so warrant to do complete justice between the parties. Section 151 of the CPC recognises such inherent power. Section 94 of the CPC expressly recognises the court's power to issue an

order of injunction and Order 39 Rules 1 and 2 indicate the circumstances in which the court may exercise its power to grant temporary injunction. If circumstances which are not covered by Rules 1 and 2 of Order 39, warrant issuance of injunction, the court can still do it in exercise of its inherent jurisdiction.

31. In the case of Manoharlal –v- Seth Hiralal reported in AIR 1962 SC 527 it was held as per the majority view that 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 effect of the expression 'if it is so prescribed' in Section 94 of the code is only this that when the Rules in Order 39 prescribe the circumstances in which temporary injunction can be issued, ordinarily the court is not to use its inherent power to make the necessary orders in the interest of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incidence of the exercise of the power of court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and in not taking away the right of the court to exercise its inherent power. The court has inherent jurisdiction to issue temporary injunctions which are not covered by the provisions of Order 39 of the Code if the court is of the opinion that the interest of justice requires the issuance of such interim injunction.

32. On a meaningful reading of the Code of Civil Procedure, 1908 and upon careful consideration of the precedents discussed above I am of the view that the body of the Code comprising the Sections confer substantive powers on the Court whereas the Orders and Rules contained in the first schedule to the Code prescribe the manner in which such powers are to be exercised. In certain cases, the Orders and Rules also indicate the circumstances in which the powers under the Sections should be exercised. To this extent, the Sections of the Code are substantive in nature and the Orders and Rules in the First Schedule thereto are procedural in nature.

33. Sections 94 (c) of the Code empowers the Court to grant a temporary injunction. This, according to me, is the parental source of the Court's power to grant an order of injunction under the Code. Order 39 Rules 1 and 2 indicate the circumstances in which the court may exercise its power under Section 94 of the Code. These circumstances are by no means exhaustive in the sense that the Court's power to issue a temporary injunction is not limited to the circumstances prescribed by Rules 1 and 2 of Order 39. In any other facts and circumstances not covered by

> Rules 1 and 2 of Order 39, if justice do demands, the court can issue a temporary injunction in the exercise of its inherent power. Such power has always inhered in a court of law to be exercised for doing complete justice between the parties. Justice is above all and cannot be thwarted or defeated by technicalities. Section 151 of the Code recognises such inherent power of the Court. Such inherent power of the Court must be recognized as it is impossible to visualize all the circumstances that may arise in future while enacting a law or framing procedural rules. The inherent power is generally exercised to fill up a lacuna in the law and mainly on equitable considerations when the circumstances of a case so warrant."

31. The Supreme Court of the Unites States in ***Deckert et al. (supra)*** was dealing with an issue wherein the petitioner had prayed for the appointment of a receiver to take possession of the assets of the defendants and had also sought injunction restraining the defendants from transferring and disposing of any of the assets of the defendants. The case made out by the petitioner was that the defendants were guilty of fraudulent misrepresentations and concealments in their sale and advertisement of contract certificates to the petitioner in violation of the Securities Act of 1933. In this factual background, the Supreme Court held that a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity at least where there are circumstances making the legal remedy inadequate. The relevant paragraphs are provided below:

> "2. Two important questions are presented by these petitions. The first is whether the Securities Act of 1933, 48 Stat. 74, 15 U.S.C.A. § 77a et seq., authorizes purchasers of securities to maintain a suit in equity to rescind a fraudulent sale and secure restitution of the consideration paid, and to enforce the right to restitution against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor. The second question is whether such purchasers must show that the amount in controversy exceeds $3,000 exclusive of interest and costs as required by Section 24 of the Judicial Code, as amended, 28 U.S.C. § 41, 28 U.S.C.A. § 41.
>
> 15. The principal objects of the suit are rescission of the Savings Plan contracts and restitution of the consideration paid, including recovery of the balance, held by Pennsylvania for account of Independence, which consisted in part of the payments alleged to

> have been procured by the fraud of Independence. That a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate, is well established. Tyler v. Savage, 143 U.S. 79, 12 S.Ct. 340, 36 L.Ed. 82; Montgomery v. Bucyrus Machine Works, 92 U.S. 257, 23 L.Ed. 656; Boyce v. Grundy, 3 Pet. 210, 7 L.Ed. 655. See Black, Rescission and Cancellation, 2d Ed., § 643 et seq.; Williston, Contracts, 3d Ed., § 1525 et seq.; Pomeroy, Equity Jurisprudence, 4th Ed., §§ 881, 1092. [In Falk v. Hoffman, 233 N.Y. 199, 202, 135 N.E. 243, 244, Judge Cardozo said: 'Equity will not be overnice in balancing the efficacy of one remedy against the efficacy of another, when action will baffle, and inaction may confirm, the purpose of the wrongdoer.']
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> 16. It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. Whether or not they sufficiently allege or prove their right to all of the relief prayed in the bill we do not decide because the question is not before us. Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill.
>
> 18. We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. 'It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.' Prendergast v. New York Telephone Co., 262 U.S. 43, 50, 51, 43 S.Ct. 466, 469, 67 L.Ed. 853; Meccano, Ltd., v. Wanamaker, 253 U.S. 136, 141, 40 S.Ct. 463, 465, 64 L.Ed. 822. As already stated, there were allegations that Independence was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate. The injunction was framed narrowly to restrain only the transfer of $38,258.85, and the trial judge required petitioners to furnish security for any losses respondents might suffer. In view of this we cannot say that the trial judge abused his discretion in granting the temporary injunction."

32. In ***Abheya Realtors Pvt. Ltd. (supra)***, a Coordinate Bench of this High Court in its original jurisdiction was dealing with the rights of parties in a lease deed that contained a lock in period for three years. The lock in period clause stipulated that if the lessee (defendant) desired to

surrender the lease during the lock in period of three years it would have to pay monthly rent for the remaining lock in period. The Court held that an agreement which related to a commercial matter with a person binding himself to pay lease rent at an agreed rate and covenanting to make payment of an ascertainable amount for a breach on his part may not be altogether let off by citing non compliance of a statutory section. Such conduct, it was held tilted the balance in favour of the plaintiff for the issue of an injunction directing the defendant to secure the plaintiff's claim by way of a bank guarantee. The relevant paragraphs are provided below:

> "24. Two aspects need to be seriously considered. At the time that the Civil Procedure Code came to be made suits would not take years or decades to be brought to trial as is usually the case these days. The strength of the principle that an apparently good claim would not justify an order for attachment to be made before final judgment is rendered, needs to be seen with reference to the time and place in which such principle was born. The second aspect is that even without a defendant attempting to defraud its creditors or the plaintiff, the vicissitudes of the commercial market may leave the defendant with little to offer as judgment-debtor upon the decree being made. The sheer passage of time between the institution of an action and the trial thereof that has now come to be accepted as par for the course may make the claim irrelevant or even the claimant disinterested. That would result in an erosion of the confidence in the system and lead suitors to undesirable quarters for more effective results. But this may not be the ideal action for such considerations to have a bearing.
>
> 25. As observed earlier, the plaintiffs analogy of a Mareva injunction may be inapposite in a case for attachment before judgment of the present kind. Strictly speaking, the plaintiff has not sought to stop the first defendant from taking any of its assets beyond the territorial jurisdiction of this Court. The attachment that it sought and obtained at the ad interim stage relates to a bank account of the first defendant in New Delhi as would appear from paragraph 29 of the petition. The plaintiff is right when it asserts that section 136 and Rule 5(1)(a) of Order 38 of the Code contemplate the attachment before judgment of a property beyond the local limits of jurisdiction of a Court. Order 39 Rule 1(b) also permits a Civil Courts, without any limitation on the grounds of territorial jurisdiction, to issue an injunction to rein in a defendant who threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors.

> 26. Since the execution of the agreement is not in dispute, the onus would be on the first defendant to demonstrate that the relevant clause providing for liquidated damages in the event of the lessee determining the lease within the lock-in period, is a penalty that would fall foul of the Contract Act. It would also be the first defendant's obligation to establish what the plaintiff could have done to mitigate its damages and the consequential reduction, if at all, of the first defendant's liability as to liquidated damages. The agreement here relates to a commercial matter and a person binding himself to pay lease rent at an agreed rate and covenanting to make payment of an ascertainable amount for a breach on his part may not be altogether let off merely by citing the non-compliance of a statutory provision that such person was liable, in the first place, to comply with. It is such conduct of the first defendant that, in the ultimate analysis, tilts the balance in the manner in which the discretion is exercised in this case. Though the first defendant's offer to secure the claim by way of a bank guarantee was undoubtedly made without prejudice, in the light of its attempt to deny its obligation in respect of the liquidated damages by taking advantage of its fault for not having registered the deed, the first defendant gives credence to the ill motive that the plaintiff imputes. It would be equitable, in the circumstances, that the first defendant be required to furnish a bank guarantee to secure the claim."

33. In ***Sourav Ganguly (supra)*** a Coordinate Bench of this High Court was dealing with an application under Section 9 of the Arbitration and Conciliation Act seeking to restrain the respondent from disposing of or selling or transferring or encumbering or letting out of the respondent's property at Salt Lake, even though the property was not the subject matter of the suit. The Calcutta High Court held that a claimant can seek the extraordinary power restraining a defendant from using his assets not connected with the agreement only upon a clear claim being demonstrated and upon being established that the respondent was taking steps to improperly deny the realization of the claim. The Court relied upon ***Abheya Realtors Pvt. Ltd. (supra)*** to justify that attachment of property was necessary in a clear cut case even without the defendant trying to defraud the creditors because the vicissitudes of the commercial markets may leave the defendant with no money to pay the plaintiff/creditor. The Court also relied upon the case of

Rajendran and Others –v- Shankar Sundaram and Others *[Coram: S. B. Sinha and H. S. Bedi, JJ.]* reported in ***(2008) 2 SCC 724*** for the proposition that 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. The relevant paragraphs in ***Sourav Ganguly (supra)*** are delineated below:

> "10. Fundamentally, a claimant can seek such an extraordinary and drastic order that impedes the respondent's use of one or more assets not forming part of the agreement upon an unimpeachable liquidated claim being demonstrated and upon it being established that the respondent was taking steps to improperly deny the realisation of the claim.
>
> 11. The petitioner has referred to three judgments in support of his contention that a broader view of the matter must now be taken in the present day and age since claims do not get resolved or adjudicated upon within any reasonable time of their institution. In the first of the judgments relied upon by the petitioner, reported at 2010(2) CHN 203, inter alia, the following passage from the report has been relied on:
>
> > "24. Two aspects need to be seriously considered. At the time that the Civil Procedure Code came to be made suits would not take years or decades to be brought to trial as is usually the case these days. The strength of the principle that an apparently good claim would not justify an order for attachment to be made before final judgment is rendered, needs to be seen with reference to the time and place in which such principle was born. The second aspect is that even without a defendant attempting to defraud its creditors or the plaintiff, the vicissitudes of the commercial market may leave the defendant with little to offer as judgment-debtor upon the decree being made. The sheer passage of time between the institution of an action and the trial thereof that has now come to be accepted as par for the course may make the claim irrelevant or even the claimant disinterested. That would result in an erosion of the confidence in the system and lead suitors to undesirable quarters for more effective results. But this may not be the ideal action for such considerations to have a bearing."
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> 12. The petitioner also refers to a recent, and yet unreported, judgment of a Division Bench of this Court rendered on July 10, 2012 in APO No. 32 of 2012, APO No. 33 of 2012 and APO No. 77 of 2012 where the Court observed as follows:

> "If we proceed having a strict interpretation of law we would have to allow the cross-objection. Can we be a mere onlooker when the Church property was virtually under the control of the Court? Our conscience prick to notice the sorry state of affairs as depicted above. In 2012 the Courts, in our view, must strive to find out ways and means to do substantial justice instead of going into the niceties of law and extent support to those who wish to take shelter under the flaws of the law and remains scot free despite wrong being committed."

13. The third judgment carried by the petitioner on this aspect is the one reported at (2008) 2 SCC 724 where the observations at paragraphs 12 and 13 of the report indicate that if there is a huge sum which is claimed and is, prima facie, established the plaintiff would be
"entitled to secure his interest keeping in view the amount involved in the suit."

14. There is no doubt that there is a substantial sum which is due from the respondent to the petitioner. It is also evident from the report of the Special Officer that there is almost no commercial activity or any work at all in the Salt Lake office of the respondent. It is also the respondent's contention that the Friends Colony office that used to be registered office of the respondent company is no longer with the respondent. The earlier orders passed herein record the difficulty in effecting service on the respondent and the affidavits of service filed by the petitioner also reveal the manner of functioning of the respondent. It also appears from the correspondence exchanged between the parties and particularly, the letters addressed by the petitioner to the respondent, that even the guests who have been invited and who attended the programmes on the petitioner's request have not been paid the travel expenses, leave aside the honorarium. Certain prizes announced to participants in the programmes have also not been paid.

It is also the admitted position that some of the key functionaries of the respondent company have been arrested. The petitioner has also referred to several creditors of the respondent company having instituted proceedings against the respondent.

15. The two channels aired by the respondent have been closed down. There is hardly any functioning at the offices of the respondent in Calcutta. An affidavit has been filed in a rather cavalier manner on behalf of the respondent where an officer who was not associated with the respondent at the time that the agreement was executed between the parties has made statements as to what transpired at that time and has verified the statements to be true to his knowledge.

> 16. There is a justifiable apprehension, in the circumstances, as to whether the petitioner will be entitled to realise the money upon the arbitral reference being concluded, particularly, since there does not appear to be any defence at all to the substantial money claim of the petitioner.
>
> 17. The respondent says that some of the properties over which the subsisting orders operate do not belong to the respondent. To such extent, the orders may not be effective but the respondent is not prejudiced if there are orders that operate on properties which are not owned by the respondent. The conduct of the respondent does not inspire any confidence and it is just and expedient that the subsisting orders continue till the respondent is able to deposit at least a sum of Rs. 20 crore in aid of the petitioner's claim in the reference."

34. In ***Padam Sen (supra)***, an order was passed by the additional munsif for ceasing the books for accounts of the defendant in exercise of the powers under Section 151 of the Code, though under Section 75 and Order 36 of the Code such powers were not available to the Court to appoint a Commissioner. In that context, the Court held that the inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code but these powers are not to be exercised when they are in conflict with what has been expressly provided in the Code or against the intentions of the legislature. The relevant paragraphs are provided below:

> "…….. 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 purposes mentioned in S. 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."…….
>
> …….. The inherent powers saved by S. 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in matters of procedure, which powers have their source in the Court

possessing all the essential powers to regulate its practice and procedure."

35. In ***Sunil Kakrania (supra)*** the Division Bench was sitting in appeal against an order of injunction restraining the defendants from transferring or alienating the suit property described in the plaint and from creating any third party interest in respect of the suit property till the disposal of the suit. The respondents relied heavily on this judgment to show that the Division Bench had in answer to the question "whether in a money suit merely because the plaintiff has a strong case on merit, a Court can restrain the defendant from transferring or alienating his movable or immovable property during the pendency of the suit" held in the negative on the ground that the power under Section 151 of the Code cannot be exercised with reference to the substantive rights of property of a defendant. The relevant paragraphs are delineated below:

> "30. The sum and substance of those two decisions of the Supreme Court is that in exercise of power under Section 151 of the Code, a Court can pass such order which is not in conflict with substantive right of a party and that such order is necessary for ends of justice provided further that there is no bar in the Code for passing such order which must be procedural in nature.
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> "31. In the case of Manohar Lal (AIR 1962 SC 527) (supra), the Court was considering whether a party should be restrained from proceeding with his suit which was earlier in point of time till the disposal of a later suit filed by the other party in exercise of inherent power when Section 10 of the Code was not attracted. The Court answered the question in negative but made the observations quoted earlier regarding power of the Court to grant injunction under inherent power.
>
> 32. In the case before us, the plaintiff wants an injunction restraining the defendant from transferring or alienating his own property over which the plaintiff has no right or for attaching the said property. An owner of a property has unrestricted right of alienation and such power cannot be curtailed unless law provides for putting any such restriction. Section 94 of the Code which is in the substantive part of the Code (as opposed to the procedural part) gives power to the Court to restrict such substantive right of an owner in the circumstances mentioned in

> the Schedule of the Code (the procedural part of the Code) of which Order 38 and Order 39 are inter alia part. If those circumstances under O. 38, 39 do not exist, the Court in exercise of inherent power cannot pass any order the effect of which would be to interfere with the substantive right of a litigant as was the case in the case of Padam Sen (supra). Therefore, the prayer of the plaintiff in these appeals cannot be granted in exercise of inherent power of a Court because it will have overriding effect over the substantive right of the defendant over its property. We, thus, find that the decision in the case of Manohar Lal (supra) does not help the plaintiff in any way in view of the nature of the relief claimed in this suit."

36. In ***Kohinoor Steel Private Ltd. (supra)*** the Division Bench of this High Court was sitting in appeal filed by the defendant in a suit for recovery of money. The order assailed before the Division Bench was an order passed by the Civil Judge (Senior Division) restraining the defendant from transferring or alienating plant and machinery that had been sold by the plaintiff to the defendant. The Division Bench held that the plant and machinery would not amount as suit property and therefore, the claim was a mere money suit. The Division Bench further held that there was no averment in the plaint or the application for injunction that the defendant intended or threatened to remove or dispose of his property with a view to defrauding his creditors, and accordingly, held that Order 39 Rule 1 had no application to the case. The Division Bench also followed ***Raman Tech (supra)*** and held that in the facts and circumstances the test laid down in ***Raman Tech (supra)*** were not fulfilled and therefore no order of attachment before judgment can be made. The relevant paragraphs are delineated below:

> "23. Applying the aforesaid principles to the facts of the present case, we find that the sum and substance of the allegation that has been made in the application for temporary injunction was that the defendant is in a penurious condition, that it is unable to pay back its debts to the creditors and that if the decree was passed in the suit, the plaintiff would not be in a position to execute the decree if the defendant was able to transfer or alienate the property mentioned in the application. On the basis of such vague allegation, in our view, no order or direction to give

security or injunction in the form of attachment can be passed as held above. The names of the alleged creditors whose debts the defendant is unable to pay have not been disclosed. Simply because in the overdraft account of the banks, there is no credit balance, such fact does not necessarily imply that the defendant is unable to pay its debts when it is the finding of the learned Trial Judge that the profit of the defendant in current financial year is about Rs. 81.89 lakh. There is even no allegation that the defendant is trying to remove or dispose of its properties in order to obstruct or delay the execution of the decree that may be passed against it. The goods having been sold and delivered on acceptance of 90% of the price and the dispute having been raised over the balance 10% and the bank-guarantee to the extent of that 10% having been enforced by the defendant, at this stage the plaintiff can in no case claim ownership over the goods in question. Whether the balance amount is at all payable according to the conditions of the contract in the facts of the present case and whether the defendant was justified in invoking the bank-guarantee, are the facts to be adjudicated in the suit. The learned Single Judge after recording in the order impugned that the profits of the defendant for the year 2008-09 before payment of tax is Rs. 81.89 lakh treated such fact as a discredit to the defendant because according to the learned Single Judge, the said amount was less than the profits of the defendant for the previous year and as the claim of the plaintiff on account of 10% balance price is Rs. 75 lakh, the learned Trial Judge was of the opinion that it was a fit case for passing the order of injunction.

24. In our opinion, it is not the law of the land that a defendant in a money suit must show that his earning is sufficient to pay off the decretal amount if the suit is ultimately decreed, otherwise, he should suffer an order of injunction in the form of attachment before judgment or should give security during the pendency of the suit.

25. The next question is whether by invoking section 151 of the Code, the Court should pass an order of injunction or attachment even though the ingredients of Order 38 Rule 5 are absent.

26. The aforesaid question has recently been answered by a Division Bench of this Court in the case of *Sunil Kakrania* v. *Saltee Infrastructure Ltd.*, reported in 2009 (3) CHN 417 : 2009 (3) CLT 671 : 2010 (1) ICC 204, in negative by giving detailed reasons and we find no reason to take a different view from the one taken therein.

27. In the case of *Albert Judah Judah* (supra), relied upon by Mr. Mitra, a learned Single Judge of this Court in paragraph 16 of the judgment held that in a money suit, the Court in exercise of power conferred under Order 39 Rule 1(b) of the Code can

> restrain a defendant from disposing of his property which is not the subject-matter of the suit if it appears that the defendant intended or threatened to dispose of his property with a view of defraud his creditors. We do not for a moment dispute the said provision and we have already indicated that in this case, there is no averment in the application for injunction in terms of Order 39 Rule 1(b) of the Code that the defendant threatened or intended to dispose of his property with a view to defraud his creditors. Thus, the said decision does not help the plaintiff in any way.
>
> 28. On consideration of the entire materials on record we find that the plaintiff having failed to make out any case of attachment before judgment as provided in Order 38 of the Code, the learned Single Judge should have dismissed the application itself instead of calling upon the defendant to show cause and granting *ad interim* order of injunction in the nature of attachment before judgment."

37. From a plain reading of the judgments discussed above it appears that the Supreme Court has held that Section 94 read with Order 39, Rule 1 is not exhaustive and circumstances may be present that are beyond the provisions. In such circumstances, the Courts have held that power may be exercised by the Civil Courts under Section 151 of the Code for the ends of justice and to prevent the abuse of the process of the Court. ***Manohar Lal Chopra's (supra)*** judgment clearly enunciates the ratio that Civil Courts have the power to fill in the loopholes/ gaps that may be there in the Code for the ends of justice. According to the above judgment, this power is inherent and is not stultified when it comes to delivering justice. The minority judgment in ***Manohar Lal Chopra (supra)*** disagrees with the above view with regard to the powers available to Civil Courts, but agrees to the majority view with reference to the powers being inherent in the Chartered High Courts. One must keep in mind that in ***Manohar Lal Chopra (supra)*** the case involved was an anti suit injunction, and the Courts held that in exceptional cases, the Civil Courts have the right to injunct a party from proceeding with a suit in another jurisdiction. One may note here that the right to file a suit is a substantive right of a litigant, and the judgment in ***Manohar Lal Chopra (supra)*** makes no

distinction with regard to the power of the Civil Courts to exercise its inherent power in relation to procedural and substantive rights of a party and to pass injunctions in such cases. Peculiarly, the ratio in ***Padam Sen's (supra)*** judgment that the Civil Courts' inherent power is restricted to procedural aspects and cannot affect the substantive rights of a party was considered in ***Manohar Lal Chopra (supra)*** and the Larger Bench therein upheld the Calcutta High Court views in ***Chinese Tannery Owners' Association and others (supra)*** and ***Bhagat Singh Bugga (supra)***. Furthermore, the Supreme Court in ***Manohar Lal Chopra (supra)*** did not distinguished between procedural and substantive rights with reference to the inherent powers of the Civil Court. Following the ratio, one may see that the Supreme Court has upheld injunctions granted in cases of anti suit injunctions, right to arrest a ship, bank guarantee matters involving fraud etc. that affect the substantive rights of parties. In light of the same, I am of the view that in rare and exceptional cases, Civil Courts may grant injunctions with regard to the procedural and substantial rights of the parties in fit cases for the ends of justice. The only exception is that the Civil Courts cannot in the guise of inherent powers available under Section 151 of the Code pass orders that are in conflict and are in contravention to the provisions of the Code. With regard to the inherent powers of the Chartered High Court, the minority judgment of Justice J. C. Shah read with the majority judgment therein clearly poses no restriction on the Calcutta High Court. The Calcutta High Court judgment in ***Nanda Roy (supra)*** also deals with the *raison d'etre* and the source of the inherent powers of Chartered High Courts.

38. In the present case, I shall first examine whether there is a need for this Court to resort to the inherent powers of the Chartered High Court or the power under the Code itself is sufficient to pass orders in the

facts and circumstances of this case. The respondents have argued that an order of attachment under Order 38 Rule 5 cannot be passed unless the test laid down in ***Raman Tech (supra)*** are complied with. Time and again the principles laid down in ***Raman Tech (supra)*** have been followed by the Supreme Court and High Courts. In the present case, the tests laid down in ***Raman Tech (supra)*** have not been fulfilled, and therefore, no order for attachment before judgment can be passed by this Court. With regard to Order 39, Rule 1, one may only examine Rule 1(b) in the present context as Rule 1(a) and 1(c) have no application to the facts of this case. Rule 1(b) states that an injunction can be granted only *where in any suit it is proved by affidavit or* ***otherwise*** *that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors*. On a plain reading of this provision, I am of the view that the Court is required to firstly come to a subjective finding with regard to the threat or intention of the defendant to remove or dispose of his property, and secondly, come to a subjective finding that such alienation of property is with a view to defrauding his creditors. In the present factual matrix, the plaintiff/petitioner steps into the shoes of the creditors and it is with reference to the petitioner that one has to make this subjective finding. The petitioner in the present case has clearly demonstrated the prima facie case of fraud having been committed on him by the defendants. The petitioner has also averred and made pleadings in the plaint and the interlocutory applications with regard to the grave apprehension of disposal of the properties by the defendants in continuation of the fraud that has been committed on the petitioner. In my view, in a case of fraud the ***threshold to be crossed to come to a subjective finding*** of the above threat to alienate property is significantly reduced. This view of mine is buttressed by the ratio of the House of Lords in ***American Cyanamid Co –v- Ethicon Ltd.*** *[Coram:* Lord Diplock, Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon

and Lord Edmund-Davies] reported in ***(1975) AC 396***. In ***American Cyanamid Co (supra)***, that involved an issue in relation to prohibitory injunctions, the House of Lords held that the plaintiff needed to establish only a real possibility of success, and not a probability. The House of Lords in ***American Cyanamid Co (supra)***, held that there may be special circumstances wherein the general principle, that no injunction would lie if the plaintiff would be adequately compensated by an award of damages if he succeeds at the trial, would not apply. In the present scenario, the petitioner has brought down the threshold required for the subjective satisfaction of this Court required under Rule 1(b) by prima facie proving a case of collusion and fraud by the defendants. Furthermore, the conduct of the defendants as established in the prima facie findings gives further credence to the threat and perception of the petitioner that the defendants shall alienate their property in such a manner that the fruits of the decree shall not be available to the petitioner. It is to be further noted that the claim of the plaintiff is not predicated on a claim of simpliciter damages and losses caused to him but specific sums of money that have been passed on in an illegal and fraudulent manner by the employee to the distributors. The reports of KPMG and BDO are based on a careful audit of the documents in relation to the transactions. Upon such audit, the exact figures of excess credit have been ascertained, and therefore, the claim of the plaintiff is of an ascertained sum of money that has been illegally and fraudulently siphoned off by the employee in favour of the distributors. Ergo, in my view this is a fit case for granting an ad interim injunction against the defendants, in the manner discussed hereinafter, to secure the claim of the plaintiff.

39. I shall now deal with the two Division Bench judgments of the Calcutta High Court heavily relied upon by the respondents being ***Sunil***

Kakrania (supra) and ***Kohinoor Steel Private Ltd. (supra)***. The Division Bench in ***Sunil Kakrania (supra)*** heavily relied on ***Padam Sen (supra)*** and held that in exercise of power under Section 151 of the Code, a Court can pass such orders which is not in conflict with substantive rights of a party and that such order is necessary for ends of justice, provided further that there is no bar in the Code for passing such order which must be procedural in nature. The Division Bench also referred to ***Manohar Lal Chopra (supra)***, but unfortunately did not examine the said judgment in detail. The Division Bench also failed to appreciate that ***Padam Sen (supra)*** had been referred to in ***Manohar Lal Chopra (supra)*** and the ratio of ***Manohar Lal Chopra (supra)*** that related to grant of an anti suit injunction that affected the substantive rights of a litigant, did not, in any manner curtail the power of a Civil Court, to pass orders on substantive rights of a party. The only prohibition noted in ***Manohar Lal Chopra (supra)*** is that orders cannot be passed that are in conflict and contravention to the Code. Furthermore, in ***Sunil Kakrania (supra)***, the Court was neither dealing with a case of fraud nor an ascertained sum of money. Finally, the observations of the Court relate to the powers of a Civil Court and not of a Chartered High Court. In view of the above observations, the ratio in ***Sunil Kakrania (supra)*** is clearly distinguishable and has no application to the facts and circumstances of the case in hand.

40. In ***Kohinoor Steel Private Ltd. (supra)*** the Division Bench followed its earlier judgment delivered in ***Sunil Kakrania (supra)***. Furthermore, in that case, the trial court had come to a finding that the defendant had earned a profit of Rs. 81.89 lakhs in the financial year coupled with the fact that the averments in the plaint with regard to Order 39 Rule 1(b) were vague and ambiguous. In fact, in this judgment, the Division Bench completely failed to examine the ratio laid down by the Supreme

Court in ***Manohar Lal Chopra (supra)***. It is to be further noted that the Division Bench had approved the ratio passed in ***Albert Judah Judah –v- Rampada Gupta*** reported in ***AIR 1959 Cal 715*** *[Coram: P. C. Mallick, J.]* that had held that in a money suit, the Court in exercise of power conferred under Order 39, Rule 1(b) of the Code can restrain the defendant from disposing of the property which is not the subject matter of the suit if it appears that the defendant intended or threatened to dispose of his property with a view to defraud his creditors. The Court, however, in the facts of the above case felt that there were no averments in the application for injunction in terms of Order 39, Rule 1(b) of the Code that the defendant threatened or intended to dispose of his property with a view to defraud his creditors, and accordingly, set aside the order of injunction passed by the trial court below [see paragraph 27 of ***Kohinoor Steel Private Ltd. (supra)***]. This judgment also does not deal with the powers of a Chartered High Court. In view of the fact that the factual matrix therein was completely different, no case for fraud had been made out and the fact that the Division Bench in ***Kohinoor Steel Private Ltd. (supra)*** was dealing with the powers of the Civil Court, I am of the view that this judgment has no application in the present facts and circumstances, and is accordingly, distinguishable on facts and in law.

41. My view, that in cases of fraud and claim for specified damages, an ad interim injunction would lie, is further reiterated and supported by the ratio of two coordinate bench judgments in ***Abheya Realtors Private Limited (supra)*** and ***Saurav Ganguly (supra)*** wherein the Court had directed the defendant to secure the claim of the plaintiff. Further, the Division Bench judgment of this Court in ***Ajay Kumar Agarwal (supra)*** is also a case in point where the defendants were asked to secure the plaintiffs for a sum of Rs. 87.46 lakhs even though the defendants had categorically disputed the said claim. In a recent

judgment of the Division Bench of the Calcutta High Court in ***Santosh Promoters Pvt. Ltd. –v- Intrasoft Technologies Ltd.*** reported in ***2017(1) CHN (CAL) 189*** *[Coram: Jyotirmay Bhattacharya and Ishan Chandra Das, JJ.]*, the Court after examining the provisions of Order 38 and 39 held that the standard of proof in case of attachment before judgment is higher than the standard of prove necessary to be discharged in case of a temporary injunction. The Court further held that if a prima facie case is made out, there is no bar to grant injunction under Order 39, Rule 1(b) in a suit for recovery of outstanding amounts, that is, a money suit. One may further keep in mind the judgments in ***Chinese Tannery Owners' Association and others (supra)*** and ***Bhagat Singh Bugga (supra)*** of this High Court that were specifically approved in ***Manohar Lal Chopra (supra)***. Both the above Calcutta High Court judgments dealt with the issue of inherent powers of the High Court in granting injunctions in appropriate cases, one in relation to a claim for a money decree and the second with respect to an anti injunction suit, respectively.

42. Before proceeding further, I would like to refer to ***L.C. Quinn –v- Leathem*** *[Coram:* Earl of Halsbury L.C., Lord Macnaghten, Lord Shand, Lord Brampton, Lord Robertson, and Lord Lindley.] reported in ***1901 AC 495*** wherein the House of Lords observed as follows:

> "……..that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. ……."

43. I have to point out that umpteen number of judgments have been relied upon by the respondents on different principles of law. Keeping

in view the principles in ***L. C. Quinn (supra)*** I am of the view that some of these judgments are, simply reiterating the principles of the judgments that have been dealt by me in detail while some of the judgments relate to issues that have no bearing on the instant facts. In relation to the submission that there has been considerable delay on the part of the petitioner in approaching the High Court, I am of the view that such is not the case. In July, 2017 the fraudulent transactions were discovered and the plaintiff immediately suspended the employee and moved to a different mechanism of delivery on cash with the distributors. The petitioner immediately appointed KPMG to unearth the truth of the fraudulent transactions. Upon receipt of the report of KPMG on March 20, 2018 the employee was terminated and a criminal case was filed in the month of May 2018 against the employee and the distributors. The petitioner also, thereafter, appointed BDO to quantify the extent of excessive credits passed on to the distributors. The BDO report was received on February 4, 2019 and immediately, thereafter, on March 8, 2019 both the suits and interlocutory applications were filed. As can be seen from the above dates discussed, the petitioner upon discovery of the fraud took action against the employee and the distributors and appointed auditors to quantify the extent of damage caused by the respondents. Upon such examination being completed in February 2019, the petitioner filed the instant suits. It is to be noted that the petitioner has filed the suits well within the period of limitation and as such cannot be faulted for any delay on its part. In light of the same, the judgment in ***Zenit Mataplast Private Limited (supra)*** has no application to this case.

44. 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.

46. As the present order has been passed at the ad interim stage, the respondents are directed to file their affidavit in opposition within four weeks, reply, if any, within two weeks thereafter. Parties shall be at liberty to mention for inclusion in the list for final hearing.

47. As an epilogue I would like to pen down a few thoughts. In the present case I have found that the temporary injunction under Order 39, Rule 1(b) could be granted even in a money suit and therefore, there was no need for this Court to dive into its inherent powers. The question that arises to answer at this juncture is whether the courts, and specifically a chartered High Court like the present one, is shackled with the above limitations or a chartered High Court having the plenary jurisdiction has inherent powers to pass any order for the ends of justice, equity and good conscience. The question I ask to myself is whether the court is required to restrain itself in spite of the plaintiff having demonstrated a prima facie case of fraud having been committed by the defendants? Is the plaintiff entitled to no security and/or protection till the completion of trial and passing of a decree when the past conduct of the defendants clearly point to fraud and collusion? I am of the view that in the commercial world as exists today, the

citizens have a right to expect that the judiciary shall come to their rescue at the very first instance when a fraud is committed on them. The law cannot be so narrow minded that it shall wait for umpteen years to give relief to a plaintiff that approaches the court and prima facie proves that fraud has been committed on him. It is a well established principle that fraud unravels all and no man can be allowed to take advantage of such fraud. I am well aware of the slow pace at which suits proceed and the fact that it can take over 15 years to 20 years for a decree to be passed in a suit. Owing to this delay, many a decree becomes infructuous and cannot even be executed. In my view, the Chartered High Courts have derived its powers from the Constitution of India. Article 225 of the Constitution preserved the jurisdiction, including inherent jurisdiction which existed on the date when the Constitution came into force, and accordingly, the High Court is the repository of power enabling it to reach its arms to do justice. Such being the case, I am of the view that the High Court has a duty to use its inherent powers, in appropriate cases for the ends of justice, equity and good conscience. Furthermore, in the commercial world of today it is the duty of the High Court to protect the honest businessman against persons who use unscrupulous means to cheat such a businessman. Failure to do so, would amount to eroding the confidence of the citizens in the High Court.

48. I would like to put on record the painstaking spadework done by Counsel and the sublime assistance provided by learned Senior Advocates Mr. S. N. Mookherjee and Mr. Ratnanko Banerjee appearing for the petitioner as also Mr. Aniruddha Roy, Mr. Jishnu Chowdhury and Mr. Anirban Ray appearing on behalf of the respondents in this matter.

49. Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)

Later

Respondents in both the interlocutory applications prayed for stay of operation of the judgment. The same is considered and refused.

(Shekhar B. Saraf, J.)