IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION NO.1915 OF 2023
IN
COMM. SUIT NO.132 OF 2022

Shrikant G. Mantri of Mumbai Indian Inhabitant, residing at 601, Shanti Vimal, P. M. Road, Vile Parle (E), Mumbai 400 057.	]]]] ..	Applicant/ Plaintiff.
In the matter of Shrikant G. Mantri of Mumbai Indian Inhabitant, residing at 601, Shanti Vimal, P. M. Road, Vile Parle (E), Mumbai 400 057.	]]]]] ..	Plaintiff
v/s.		
Punjab National Bank a Banking Company registered under the Indian Companies Act, 1956, having its zonal office at 11th Floor, Dalamal House, Jamnalal Bajaj Marg, Nariman Point, Mumbai 400 021.	]]]]]] ..	Respondent/ Defendant.

Mr. Gaurav Joshi, Sr. Advocate with Ms. Neeta Jain, Mr. Sunil Gangan, Mr. Shrikant Seegarla and Ms. Swapnil Shikhare i/b. RMG Law Associates, for the Applicant/Plaintiff.
Mr. Simil Purohit, Sr. Advocate with Mr. Atul Desai (Partner), Mr. Pranav Monani and Mr. Vishal Pattabiraman i/b. Kanga & Co., for the Defendant.

CORAM: FIRDOSH P. POONIWALLA,J.
RESERVED ON : 17th DECEMBER, 2024.
PRONOUNCED ON : 10th MARCH, 2025.

JUDGEMENT:-

This Interim Application has been filed by the Plaintiff under the provisions of Order XIIIA of the Code of Civil Procedure, 1908 ("the CPC"), seeking the following reliefs:-

> *"(a) a summary judgment be passed under Order XIII-A of the Code of Civil Procedure, 1908 decreeing to direct the Defendant by an order of mandatory injunction to hand over/ transfer to the Applicant the subject shares 11,25,000 shares of ITC Ltd. as more particularly mentioned in the chart Exhibit "VV" to the Plaint and all further accruals thereon (whether by way of bonus, rights, dividends) and to do all things necessary for that purpose including signing transfer / Demat forms;*
>
> *(b) a summary judgment be passed under Order XIII-A of the Code of Civil Procedure, 1908 decreeing the Defendant to pay to the Plaintiff the accrued dividend on the subject shares from the date of declaration of each such installment dividends by ITC till the date hereof aggregating to Rs.9,64,00,000/- as more particularly mentioned in the chart annexed as Exhibit "WW" to the Plaint and Exhibit "I" hereto;*
>
> *(c) a summary judgment be passed under Order XIII-A of the Code of Civil Procedure, 1908 decreeing that this Hon'ble Court be pleased to direct the Defendants to pay to the Applicant the accrued dividend on the subject shares with interest thereon @ 18% p.a. from the date of the declaration of each such installment dividends by ITC till the date aggregating to Rs.19,06,15,369/- as per the Particulars of Claim being Exhibit "XX" to the Plaint and Exhibit "K" hereto alongwith further interest thereon @ 18% p.a. from the date hereof till payment and/or realization thereof under Order XIII-A of the Civil Procedure Code, 1908 as applicable to Commercial Suits."*

2 The present suit has been filed seeking a decree against the Defendant to hand over to the Plaintiff 11,25,000 shares of ITC Limited and all further accruals thereon (whether by way of bonus, rights and dividends) and to do all things necessary for that purpose, including signing transfer/ demat forms.

3 The Plaintiff is a Stockbroker by profession and a registered member of the Bombay Stock Exchange Limited. The Defendant is a banking company Nedungadi Bank Limited merged with the Defendant on 2nd March, 2003 in terms of the Acquisition / Merger Order dated 16th November, 2002 issued by the Reserve Bank of India.

4 The Plaintiff had a Current Bank Account No.502 with Nedungadi Bank Limited. By a letter dated 25th April, 1998 addressed to Nedungadi Bank Limited, the Plaintiff applied for overdraft facilities of Rs.1 Crore. Nedungadi Bank Limited sanctioned overdraft facilities of Rs.1 Crore and the Plaintiff executed various documents in favour of Nedungadi Bank Limited.

5 In December, 1999, the Plaintiff sought an enhancement of the said overdraft facility. By its letter dated 13th December, 1999,

Nedungadi Bank Limited enhanced the overdraft facility from Rs. 1 Crore to Rs.5 Crore.

6 The Plaintiff was the beneficial owner of 37,50,000 equity shares of Ansal Hotels Limited and possessed blank transfer forms in respect of the said shares duly signed by the then registered owner M/s. BEC Impex International Private Limited.

7 On 18th April, 2005, Ansal Hotels Limited merged with ITC Limited. Consequent to the merger, 25,000 shares of Rs.10/- each of ITC Limited were issued in lieu of shares of Ansal Hotels Limited. On 21st September, 2005, in view of the split and bonus shares issued by ITC Limited, 25,000 shares became 3,75,000/- shares. On 3rd August, 2010, in view of a further issue of bonus shares by ITC Limited, the said 3,75,000 shares became 7,50,000 equity shares. Similarly, on 4th July, 2016, in view of further bonus shares issued by ITC, the shares increased to 11,25,000 equity shares of ITC Limited.

8 The Plaintiff approached Nedungadi Bank Limited for a further temporary increase in the overdraft facility only till 14th March, 2001 by its letter dated 17th March, 2001. Nedungadi Bank Limited

temporarily enhanced the overdraft facility from Rs.5 Crores to Rs.6 Crores.

9 By its letter dated 23rd March, 2001, Nedungadi Bank Limited renewed the overdraft facility of Rs.5 Crores up to 28th February, 2002. For the sanction of this overdraft facility, Nedungadi Bank Limited demanded an additional margin of 25%.

10 In March, 2001, due to a sudden and steep fall in the price of shares, there was a steep erosion in the value of the shares then pledged as security by the Plaintiff with Nedungadi Bank Limited to secure the overdraft facility.

11 By its letter dated 16th March, 2001, Nedungadi Bank Limited called upon the Plaintiff to regularize its account by pledging additional shares in favour of Nedungadi Bank Limited or by making payment in his account.

12 By a letter dated 27th March, 2001 addressed to the Plaintiff, Nedungadi Bank Limited once again called upon the Plaintiff to regularize its account with Nedungadi Bank Limited.

13 On 30th March, 2001, the Plaintiff met the then Chariman of Nedungadi Bank Limited – one Mr. A. R. Moorthy, along with the Branch Manager of the Fort Branch, and expressed his disability to pledge any additional shares which were on the approved list of the Bank. However, the Plaintiff offered additional security by way of the said shares of Ansal Hotels Limited.

14 By a letter dated 30th March, 2001 addressed to Nedungadi Bank Limited, the Plaintiff forwarded to Nedungadi Bank Limited the original Share Certificates of 37,50,000 shares of Ansal Hotels Limited along with the duly signed transfer deeds. By another letter dated 30th March, 2001, the Plaintiff informed Nedungadi Bank Limited that it could keep 37,50,000 shares of Ansal Hotels Limited as a security against the Plaintiff's dues to the Bank.

15 By its Advocate's letter dated 14th September, 2001, Nedungadi Bank Limited called upon the Plaintiff to pay Rs.6,16,00,000/- towards the overdraft facility with interest.

16 By its Advocate's letter dated 4th July, 2002, Nedungadi Bank

Limited once again called upon the Plaintiff to make payment of the outstanding amounts under the overdraft account which had became irregular and a Non Performing Asset. Nedungadi Bank Limited stated that if the outstanding amounts were not paid, the shares pledged with the bank as security would be sold at the risks and costs of the Plaintiff.

17 By his Advocate's letter dated 22nd July, 2002 addressed to the Advocate for Nedungadi Bank Limited,the Plaintiff called upon the bank to refrain from selling the pledged shares.

Recovery proceedings field by the Defendant before the Debt Recovery Tribunal against the Plaintiff in respect of the overdraft facility:-

18 In 2003, the Defendant filed proceedings before the DRT, Mumbai, against the Plaintiff, *inter alia*, seeking recovery of a sum of Rs.4,75,24,202.47 under the overdraft facility, being OA No. 7 of 2003.

19 By a Judgement dated 26th May, 2004, the DRT directed the Plaintiff to pay a sum of Rs.4,75,24,202.47 to the Defendant, with future interest at the rate of 15% p.a., with quarterly rests, from 26th December, 2002 till realization of the amount.

20 Prior to the filing of the proceedings in DRT, Nedungadi Bank Limited had already realized an amount of Rs.2,89,69,215.79 by selling some of the pledged shares (other than the shares of Ansal Hotels Limited which could not be immediately sold as they were unlisted).

21 By a letter dated 11th February, 2004 addressed to the Defendant, the Plaintiff submitted a One Time Settlement (OTS) proposal to the Defendant.

22 By its letter dated 31st March 2005, the Defendant approved the OTS proposal of the Plaintiff.

23 Thereafter, the Plaintiff made necessary payments under the said OTS, and by its letter dated 10th May, 2005, requested the Defendant to issue a No Dues Certificate and arrange to release the Plaintiff's shares which were pledged to the Defendant immediately.

24 By a letter dated 14th May, 2005, the Defendant issued a No Dues Certificate to the Plaintiff.

25 By his letter dated 29th May, 2005, addressed to the Defendant, the Plaintiff once again called upon the Defendant to return 3,75,000 unlisted equity shares of Ansal Hotel Limited. The said demand was repeated by the Plaintiff by his letter dated 14th June, 2005 addressed to the Defendant. However, the Defendant continued to ignore the repeated requests of the Plaintiff.

Share Trading Account Claims and Disputes:-

26 Independently of the aforesaid overdraft facility, Nedungadi Bank Limited had availed services of the Plaintiff as a Stock Broker to carry out transactions on the Bombay Stock Exchange and the Plaintiff had carried out the said transactions.

27 By its letter dated 4th May, 2001, Nedungadi Bank Limited made a claim of Rs.30,72,13,322.20, as being the amount due and payable by the Plaintiff under the said Share Trading Transactions. Further correspondence was exchanged between the parties in respect of these claims, which were denied by the Plaintiff. In August 2001, the Plaintiff filed a suit against Nedungadi Bank Limited in this Court, being Suit No. 1947 of 2001, *inter alia*, seeking to recover a sum of Rs.1.78

Crores in respect of the share trading transactions.

Arbitration proceedings filed by Nedungadi Bank Limited against the Plaintiff with respect to the Share Trading Account:-

28 Nedungadi Bank Limited initiated arbitration proceedings against the Plaintiff before the Arbitration Forum of the Bombay Stock Exchange, under the Bye Laws of the Bombay Stock Exchange, inter alia, seeking to recover a sum of Rs.32,64,59,988/- on account of certain transactions/ contract notes. In the said arbitration proceedings, Nedungadi Bank Limited claimed that the Plaintiff had handed over the said shares of Ansal Hotels Limited as additional security against its dues in respect of the share trading transactions. In the arbitral proceedings, the Plaintiff filed a Written Statement and *inter alia* denied that the said shares of Ansal Hotels Limited were given as a security to Nedungadi Bank Limited against any alleged share trading transactions dues. It was stated that the said shares were given as security against the overdraft facility. The Arbitral Tribunal passed an Award dated 27th April, 2004, rejecting the claims of the Defendant.

29 The Defendant filed an Appeal before the Appellate Bench. By

an Order dated 16th July, 2004, the said Appeal was dismissed and the Award dated 27th April, 2004 was upheld. In the said Order, the Appellate Bench held that, in the absence of any scrap of any evidence to substantiate the fact that the deposit of 37,50,000 equity shares of Ansal Hotels Limited was made by the Plaintiff with the Defendant towards security for payment of the share trading account, the plea of the Defendant on the same could not be accepted.

30 Thereafter, the Defendant filed an Arbitration Petition in this Court, being Arbitration Petition No.437 of 2004, challenging the Award dated 16th July, 2004 of the Appellate Bench. By an Order dated 15th September, 2008 passed by this Court, the said Arbitration Petition was dismissed.

31 The Defendant, thereafter, filed an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), being Appeal No. 499 of 2008, before the Division Bench of this Court. By an Order dated 2nd May, 2009, the said Appeal was also dismissed.

32 The Defendant, thereafter, filed SLP (Civil) No. 20677 of 2009 before the Hon'ble Supreme Court. In the said SLP, the Defendant

challenged the findings of the Appellate Bench of the Bombay Stock Exchange holding that there were no evidence that the said shares of Ansal Hotel Limited were given as security towards the share trading account.

33 By an Order dated 8th November, 2010, the Hon'ble Supreme Court dismissed the SLP.

Proceedings for recovery of the subject shares by the Plaintiff:-

34 The Plaintiff filed an Arbitration Petition, under Section 9 of the Arbitration Act, being Arbitration Petition No.256 of 2005, before this Court, *inter alia*, seeking release of the said shares of Ansal Hotels Limited. The said Petition was withdrawn with liberty to adopt appropriate proceedings.

35 On 15th June, 2006, the Plaintiff filed proceedings before the National Consumer Dispute Redressal Commission ("National Consumer Commission"),New Delhi, being Consumer Complaint No. 55 of 2006, seeking return of the then existing 3,75,000 shares of ITC Limited together with all further rights, bonuses and dividends as well as for

deficiency of services.

36 By an Order dated 13th July, 2006, the National Consumer Commission issued notice and restrained the Defendant from transferring the disputed shares.

37 In the said Consumer Complaint before the National Consumer Commission, the Defendant filed its Written Statement.

38 By an Order dated 15th May, 2005, the National Consumer Commission listed the matter on 8th December, 2015.

39 The Plaintiff filed a SLP, being SLP No. 1688 of 2015, challenging the said Order dated 15th May, 2015 passed by the National Consumer Commission, listing the matter on 8th December, 2015.

40 By an Order dated 1st June, 2016, the National Consumer Commission dismissed the complaint filed by the Plaintiff on the basis of the preliminary objection raised by the Defendant that the Plaintiff was not a consumer and, hence, the National Consumer Commission did not have jurisdiction to entertain the complaint. The Commission, however,

granted liberty to the Plaintiff to avail of the appropriate remedy by approaching the appropriate forum having jurisdiction.

41 Being aggrieved by the said Order dated 1st June, 2016, the Plaintiff field a Statutory Appeal before the Hon'ble Supreme Court of India. By an Order dated 28th November, 2016, the Hon'ble Supreme Court admitted the said Appeal.

42 By Judgement dated 22nd February, 2022, the Hon'ble Supreme Court dismissed the Appeal and recorded that the National Consumer Commission had already granted liberty to the Plaintiff to avail of his remedy by approaching the appropriate forum having jurisdiction.

43 In these circumstances, the Plaintiff filed the present Suit on 5th May, 2022. In the present suit, the Plaintiff filed an Interim Application, being Interim Application No. 2807 of 2022. By an Order dated 7th July, 2022 passed in the said Interim Application,the Defendant was directed to maintain status-quo in respect of the 11,25,000 shares of ITC Limited and accruals thereto. Further, by an Order dated 16th November, 2022 passed in the said Interim Application, the status-quo order in respect of 11,25,000 shares of ITC Limited and accruals thereto was continued till the hearing and final disposal of the said Interim

Application. By the said Order, a statement was recorded on behalf of the Defendant that a separate account, being an internal account of the Defendant-bank, wherein the nomenclature would be *"Sundry Provision Dividend ITC",* would be opened for the purpose of crediting the future dividend in respect of the 11,25,000 shares of ITC Limited. A further statement was recorded that the debiting of the said account would be frozen and the credits to that account would be restricted to future dividends from the shares of ITC Limited. A statement was also recorded that the dividend which was initially credited to the main bank account would, within 5 days, be transferred and credited to the separate account to be opened. A further statement was also recorded that credits to the separate account would not be shown as income accrued to the Defendant-bank but would be classified as a liability.

44 On 29th March, 2023, the present Interim Application was filed by the Plaintiff.

45 The Defendant has filed an Affidavit in Reply dated 7th August, 2023 to the present Application and also filed a Written Statement in the suit.

46 Mr. Gaurav Joshi, the learned Senior Advocate appearing on behalf of the Plaintiff, made submissions in support of the Interim Application. Mr. Joshi referred to a judgement of the Delhi High Court in ***Deepali Designs and Exhibits Private Limited v/s. Encompass Events Private Limited***[1] and submitted that it was held by the said judgement that the twin tests provided for a summary judgement are that there is no real prospect of succeeding or of defending the claim and there are no other compelling reasons as to why the claim should not be disposed of before recording of oral evidence. In the context of order XIII-A Rule of the CPC, Mr. Joshi also relied upon the judgements of the Delhi High Court in ***Sudarshan Dhoop Pvt. Ltd., v/s. Hotel Queen Road Private Limited and Others*** [2] and ***Su-kam Power Systems Ltd., v/s. Kunwer Sachdev and Another***[3]. Mr. Joshi also relied upon a judgement of this Court in ***Indian Tobacco Company v/s. Jayant Industries***[4]

47 Mr. Joshi submitted that an application under Order XIII-A of the CPC can be filed when the Defendant has no real prospect of

1(2022) SCC Online Del. 3269

2(2022) SCC Online Del. 2863

3(2019) SCC Online Del. 10764.

4(2022) SCC Online Bom. 64.

succeeding or defending the claim of the Plaintiff, which can be allowed without leading any evidence orally or documentary. Mr. Joshi submitted that such an application is also to be allowed when the averments made in the plaint are deemed to be admitted by the Defendant. Mr. Joshi submitted that the facts in the present case shows that the Defendant has not disputed that he is not entitled in law to dispute the case of the Plaintiff and has not raised any defence which requires parties to lead any oral evidence. Mr. Joshi submitted that the documents relied upon by the Plaintiff are also not disputed by the Defendant. He submitted that most of the documents relied upon by the Plaintiff are basically court proceedings and the orders passed therein.

48 Mr. Joshi submitted that the Court can grant summary judgement when the Plaintiff proves that there is no genuine defence as to any material fact of the case pleaded by the Plaintiff.

49 Mr. Joshi further submitted that the Defendant had filed his Reply dated 7th August, 2023 to the present Interim Application and also Written Statement dated 11th August, 2022. Mr. Joshi submitted that, from the same, it is clear that the Defendant has merely raised the following defences in the present suit i.e. (i) the suit filed by the Plaintiff

is barred by the law of limitation, and, therefore, is liable to be dismissed; (ii) the said shares of ITC Limited were pledged by the Plaintiff in favour of the Defendant to secure due repayments of all dues; and (iii) the reliefs sought for by the Plaintiff arose under three contract notes which have been held to be illegal by the Hon'ble Supreme Court.

50 With respect to the defence whether the suit is barred by law of limitation, Mr. Joshi referred to Section 14 of the Limitation Act, 1963. In this context, Mr. Joshi submitted that, on 14th May, 2005, the Defendant issued No Dues Certificate to the Plaintiff towards full and final settlement of the overdraft facilities under the OTS Scheme. The Defendant, on 10th June, 2005, withdrew the recovery proceedings filed against the Plaintiff before the DRT. The Plaintiff called upon the Defendant to return the shares on 29th May, 2005 and, thereafter, on 14th June, 2005.

51 The cause of action arose for the first time when the Defendant failed to release the said shares. The Plaintiff acted bonafidely and with due diligence, and within the period of limitation, on legal advice, filed Complaint No.55 of 2006 before the National Consumer Commission on 15th June, 2006.

52 Mr. Joshi further submitted that the said proceedings before the National Consumer Commission were filed and diligently pursued by the Plaintiff from 2006 till their disposal on 1st June, 2016, when the Order dated 1st June, 2016 was passed by the National Consumer Commission rejecting the Complaint on the grounds of lack of jurisdiction. Mr. Joshi submitted that, however, liberty was granted to the Plaintiff to avail of his remedy by approaching the appropriate forum having jurisdiction. Further, Mr. Joshi submitted that, on legal advice and a bonafide belief of the jurisdiction of the National Consumer Commission, the said Order was bonafidely challenged before the Hon'ble Supreme Court by way of a statutory appeal, being Civil Appeal No.11397 of 2016. The said Civil Appeal was filed on 18th November, 2016. On 28th November, 2016, the said Civil Appeal was admitted by the Hon'ble Supreme Court. Mr. Joshi submitted that the said Civil Appeal was also diligently pursued by the Plaintiff but was ultimately rejected on 22nd February, 2022, holding that the National Consumer Commission had no jurisdiction and reiterating the liberty granted to the Plaintiff by the National Consumer Commission to avail his remedy by approaching the appropriate forum having jurisdiction.

53 Mr. Joshi relied upon the judgement of the Hon'ble Supreme

Court in ***M. P. Steel Corporation v/s. Commissioner of Central Excise***[5] to submit that Section 14 of the Limitation Act would save limitation if the lis is bonafidely pursued and not decided on merits.

54 As far as the Plaintiff bonafidely pursuing legal remedies is concerned, Mr. Joshi submitted that, by SLP No. 1688 of 2015, the Plaintiff had applied to the Hon'ble Supreme Court for expeditious hearing before the National Consumer Commission. He submitted that, by an Order dated 18th September, 2015, the Hon'ble Supreme Court expedited the hearing before the National Consumer Commission.

55 Mr. Joshi further submitted that the Plaintiff also filed Applications dated 29th November, 2019 and 9th November, 2021 before the Hon'ble Supreme Court to expedite Civil Appeal No. 11397 of 2016 pending before Hon'ble Supreme Court. The Hon'ble Supreme Court vide its Orders dated 24th February, 2020 and 29th November, 2011 expedited the hearing of the Civil Appeal.

56 Mr. Joshi submitted that all these facts established beyond doubt that the Plaintiff was diligently pursuing both the proceedings

5 (2015) 7 SCC 58

before the National Consumer Commission and before the Hon'ble Supreme Court.

57 Mr. Joshi further submitted that the National Consumer Commission and the Hon'ble Supreme Court had also granted liberty to the Plaintiff to avail of his remedies by approaching the appropriate forum having jurisdiction. He submitted that, therefore, the time taken from 15th June, 2006 till 1st June, 2016 and thereafter from 18th November, 2016 to 22nd February, 2022 in pursuing the complaint before the National Consumer Commission and, thereafter, the statutory appeal before the Hon'ble Supreme Court, was required to be excluded under Section 14 of the Limitation Act, 1963, whilst computing the period of limitation. He submitted that, in the present case, the Plaintiff had bonafide and diligently pursued legal civil proceedings for recovery of the shares before the National Consumer Commission and the Hon'ble Supreme Court, which was ultimately held to have no jurisdiction.

58 Mr. Joshi submitted that the proceedings were between the same parties i.e. the Plaintiff and the Defendant. The subject matter of the proceedings before the National Consumer Commission and the Hon'ble Supreme Court was for release and return of the subject shares.

He submitted that the dispute regarding return of shares was not decided on merits of the case in the National Consumer Commission or the Hon'ble Supreme Court and was merely rejected on the ground of non-maintainability with liberty to file the disputes before the appropriate Court.

59 Mr. Joshi also submitted that the cause of action is a continuing cause of action and, therefore, the present suit is within time and no claim in the present suit is barred by law of limitation.

60 Mr. Joshi also submitted that the subject shares with the accruals thereon were withheld by the Defendant in breach of trust/ fiduciary duties. The shares were handed over in trust as and by way of pledge for the overdraft dues (i.e. bailment). After issuance of the No Dues Certificate, the Defendant was bound to return the same which it failed to do so in breach of its fiduciary duties/ duties as trustee, and, therefore, Section 10 of the Limitation Act, 1963, was applicable, and the suit was not barred by the law of limitation.

61 Mr. Joshi further submitted that the other defences raised by the Defendants were barred in law by the principles of res judicata/

constructive res judicata/ issue estoppel as was clear from the facts of the case. In this context, Mr. Joshi submitted that Nedungadi Bank Limited initiated Arbitration Proceedings, being Reference No. 883 of 2001, against the Plaintiff, before the Arbitral Forum of the Bombay Stock Exchange, *inter alia,* seeking to recover a sum of Rs.32,64,59,988/- allegedly due and payable by the Plaintiff on account of certain transactions between the Plaintiff and the Nedungadi Bank Limited. Mr. Joshi submitted that Nedungadi Bank Limited dishonestly alleged that the Plaintiff had handed over the shares of Ansal Hotels Limited as additional security against its alleged dues in respect of share trading. However, in the present proceedings, the Defendant had conveniently changed its stand and claimed that the said shares were pledged by the Plaintiff in favour of the Defendant to secure due repayments of all the dues payable by the Plaintiff to the Defendant and not just the dues under the said overdraft facilities.

62 Mr. Joshi submitted that this change of stand did not help the case of the Defendant as the Defendant had admittedly issued a No Dues Certificate for the overdraft facilities.

63 Mr. Joshi further submitted that, on 27th April, 2004, the

Arbitral Tribunal passed an Award rejecting the arbitration claim of the Defendant.

64 Being aggrieved by the Award dated 27th April, 2004, the Defendant filed an Appeal before the Appellate Tribunal of the Bombay Stock Exchange. On 16th July, 2004, the Appellate Tribunal dismissed the Appeal and upheld the Award. In its Award, the Appellate Tribunal had recorded that the Defendant had failed to produce any evidence to substantiate its claim that the shares of Ansal Hotels Limited were given as security for claims under the share trading account.

65 Mr. Joshi submitted that, thus, the Defendant's case that the shares were pledged for the share trading account dues was rejected as not proved.

66 Mr. Joshi further submitted that, thereafter, the Defendant filed an Arbitration Petition in this Court, being Arbitration Petition No. 437 of 2004, challenging the Award of the Appellate Tribunal. Mr. Joshi submitted that, in the said Petition, the Defendant specifically challenged the findings of the Appellate Tribunal in respect of the rejection of the Defendant's claim relating to the deposit of the Ansal shares as security

towards share trading account.

67 Mr. Joshi submitted that, by an Order dated 15th September, 2008, the said Arbitration Petition filed by the Defendant was dismissed. The Defendant filed an Arbitration Appeal, being Arbitration Appeal No. 499 of 2008, where once again Defendant challenged the findings recorded by the Appellate Tribunal of the Bombay Stock Exchange in respect of the deposit of the shares as security towards the share trading account. Mr. Joshi submitted that the Arbitration Appeal was also rejected by an Order dated 2nd May, 2009 passed by this Court.

68 Mr. Joshi submitted that the Defendant thereafter filed SLP, being SLP (Civil) No.20677 of 2009, before the Hon'ble Supreme Court. In the said SLP, the Defendant had once again challenged the findings of the Appellate Tribunal of the Bombay Stock Exchange in respect of rejection of its claim that the Ansal shares were given as security towards share trading account.

69 Mr. Joshi submitted that, by an Order dated 8th November, 2010, the Hon'ble Supreme Court dismissed the said SLP.

70 Mr. Joshi submitted that the pleadings filed by the Defendant in various proceedings with respect to the subject shares would demonstrate that the issue that the subject shares were given as security towards alleged share trading account was considered and rejected with a specific finding that there was no evidence to show that the said shares were given as security.

71 Mr. Joshi further submitted that the Defendant is barred by principles of res judicta/issue estoppal from claiming that it has any claim under the said share trading account or that the subject shares were given as security toward its claims for the share trading account or raising any similar contention / defence or in refusing to hand over the subject shares, with accruals thereon, to the Plaintiff.

72 Mr. Joshi further submitted that the Defendant had in breach of its fiduciary duties and/or breach of trust withheld/ converted the subject shares and continues to unlawfully and illegally withhold the same. Mr. Joshi submitted that the Defendant was under a legal obligation to hand back the original share certificates to the Plaintiff upon the Plaintiff paying the settlement dues and on the Defendant issuing a No Due Certificate dated 14th May, 2005.

73 Mr. Joshi submitted that, since the Defendant failed to do so, it was now holding the shares in trust for and on behalf of the Plaintiff.

74 Mr. Joshi submitted that, in these circumstances, the Interim Application ought to be allowed and Summary Judgement, as prayed for, be passed in favour of the Plaintiff.

75 Mr. Simil Purohit, the learned Senior Advocate appearing on behalf of the Defendant, opposed the grant of any reliefs in the Interim Application. Mr. Purohit submitted that the present suit cannot be decided without oral evidence. Mr. Purohit referred to the letter dated 30th March, 2001 addressed by the Plainitiff to Nedungadi Bank Limited where by the Plaintiff had informed Nedungadi Bank Limited that it can keep the 37,50,000 equity shares of Ansal Hotels Pvt. Ltd. as security against the Plaintiff's dues to the bank till the sale procedure in respect of these shares was completed.

76 Mr. Purohit submitted that it was clear from the said letter that the said shares did not form part of the earlier overdraft facility. Mr.

Purohit further submitted that the said letter does not state that the shares were given as security to secure the overdraft account.

77 Mr. Purohit further submitted that the letter dated 27th March, 2001, at page 73 of the Plaint, showed that the total outstanding dues of the Plaintiff in respect of the overdraft facilities were Rs.5.98 Crores, while the value of the shares was Rs.26.75 Crores. Mr. Purohit submitted that this showed that the said shares were not given only towards the overdraft facility.

78 Mr. Purohit further referred to the letter dated 22nd July, 2002 which was addressed by the Advocates for the Plaintiff to the Advocates for the Defendant (Exhibit U to the Plaint at page 81). Mr. Purohit submitted that it was important to note that, although the said letter was addressed in respect of the overdraft facility, it did not make any reference to the shares of Ansal Hotels Limited, thereby clearly showing that the said shares were not pledged as security towards the overdraft facility.

79 Mr. Purohit further submitted that in the arbitration proceedings before the Bombay Stock Exchange, the Arbitral Tribunal of

the Bombay Stock Exchange had specifically framed an issue as to whether the shares of Ansal Hotels Limited were offered as security towards the share trading account or to secure the overdraft account. However, the Award does not give any findings on the said issue and the claims of the Defendant were rejected on other grounds. Further, Mr. Purohit submitted that even the Appellate Tribunal did not adjudicate whether the Ansal shares were given towards other transcations.

80 Mr. Purohit submitted that that, therefore, it still has to be adjudicated whether the Ansal shares were given only towards the overdraft facility as submitted in the Plaint.

81 On the question of limitation, Mr. Purohit submitted that the Plaintiff has relied upon Section 14 of the Limitation Act, 1963, and had submitted that he was bonafidedly purusing his case before the National Consumer Commission and the Hon'ble Supreme Court. Mr. Purohit submitted that, whether the Plaintiff was bonafidely purusing these proceedings, is a question of fact which was required to be pleaded and proved.

82 Mr. Purohit also submitted that the Plaintiff was put to notice by the Defendant that the proceedings would not lie before the National Consumer Commission by raising a preliminary objection to that effect but, despite the same, the Plaintiff pursued the said proceedings.

83 Mr. Purohit submitted that therefore it cannot be stated that the Plaintiff was bonafidely pursuing the said proceedings. In support of his submission, Mr. Purohit relied upon the judgement of the Kerala High Court in ***Mac-N-Hom Systems v/s. Vaidya Ratnam P. S. Varrier's Aryavaidyasala***[6]

84 Mr. Purohit further submitted that the filing of the Appeal before the Hon'ble Supreme Court by the Plaintiff also showed that the Plaintiff was not bonafidely pursuing the case, and, therefore, the Plaintiff is not entitled to rely upon Section 14 of the Limitation Act, 1963.

85 Mr. Purohit further submitted that the National Consumer Commission had only given the Plaintiff the liberty to adopt appropriate proceedings as applicable in law and the Hon'ble Supreme Court had only reiterated the same. Mr. Purohit submitted that the same does not

6 (2003) SCC Online Ker 255

absolve the Plaintiff from pleading and proving that he was bonafidely pursuing the proceedings before the National Consumer Commission and the Hon'ble Supreme Court. Mr. Purohit reiterated that this was a question of fact which had to be pleaded and proved. Hence, the Plaintiff would have to lead evidence in order to prove this fact and the Plaintiff could not succeed in the suit without proving the said fact by leading evidence.

86 Mr. Purohit submitted that, for all the aforesaid reasons, the Plaintiff was not entitled to a summary judgement as claimed by him.

87 In rejoinder, Mr. Joshi submitted that the grounds in the SLP filed by the Defendant shows that the Defendant understood the findings of the Appellate Tribunal of the Bombay Stock Exchange to mean that Ansal shares were not given towards other transactions.

88 As far as limitation is concerned, Mr. Joshi submitted that neither the National Consumer Commission nor the Hon'ble Supreme Court had stated that the proceedings before them had not been pursued bonafidely by the Plaintiff. He submitted that, on the contrary, they had given the Plaintiff liberty to file appropriate proceedings.

89 Mr. Joshi further submitted that the Plaintiff had filed multiple applications for early disposal of the proceedings before the National Consumer Commission and the Hon'ble Supreme Court. Mr. Joshi submitted that this clearly showed that the Plaintiff was bonafidely pursuing these proceedings and no oral evidence was required to be led by the Plaintiff in that regard.

90 Mr. Joshi further referred to paragraphs 33 and 34 of the Written Statement and submitted that the Defendant had not specifically contended that the Plaintiff was not pursuing proceedings with due diligence. Further, Mr. Joshi also submitted that the Defendant had no answer to the other submissions on limitation made by the Plaintiff.

91 In sur-rejoinder, Mr. Purohit referred to a judgement of this Court in ***Foreshore Co-operative Housing Society Ltd., v/s. Praveen Desai and Others***[7] to submit that, in order to rely upon Section 14, the Plaintiff would have to plead and prove by leading evidence that he was bonafidely pursuing proceedings before the National Consumer Commission and the Hon'ble Supreme Court. Mr. Purohit submitted that

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the burden of proof would be on the Plaintiff and the said burden cannot be discharged by the Plaintiff except by leading evidence.

92 I have heard the learned counsel for the parties and perused the documents on record.

93 Rule 3 of Order XIII-A reads as under:

> *"3. Grounds for summary judgment. - The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that-*
>
> *(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and*
>
> *(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence."*

94 In its judgement in **Su-kam Power Systems Ltd.** (Supra), the Hon'ble Delhi High Court has discussed as to how Rule 3 of Order XIIIA has to be interpreted. Paragraphs 39 to 52 of the said judgement are relevant and are set out hereunder.

> *"39. The Commercial Courts Act, 2015 has been enacted with the intent to improve efficiency and reduce delay in disposal of commercial cases. The relevant portion of the Statement of Objects and Reasons of the Commercial Courts Act, 2015 is reproduced hereinbelow:—*

"to have a streamlined procedure which is to be adopted for the conduct of cases in the Commercial Courts and in the Commercial Divisions by amending the Code of Civil Procedure 1908, so as to improve the efficiency and reduce delays in disposal of commercial cases. The proposed case management system and provisions for summary judgment will enable disposal of commercial disputes in a time bound manner."

(emphasis supplied)

40. Amended Order XIIIA of CPC, as applicable to commercial disputes, enables the Court to decide a claim or part thereof without recording oral evidence. Order XIIIA of CPC seeks to avoid the long drawn process of leading oral evidence in certain eventualities. Consequently, the said provision enables disposal of commercial disputes in a time bound manner and promotes the object of the Commercial Courts Act, 2015.

41. Rule 3 of Order XIII-A of CPC empowers the Court to grant a summary judgment against a defendant where on an application filed in that regard, the Court considers that the defendant has no real prospect of successfully defending a claim, and there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. Order XIIIA (3) of CPC, as applicable to commercial disputes, is reproduced hereinbelow:—

"3. Grounds for summary judgment.—The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that-
(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and
(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence."

(emphasis supplied)

42. Consequently, the new Rule, applicable to commercial disputes, demonstrates that trial is no longer the default procedure/norm.

43. Rule 24.2 of Civil Procedure Rules in England is identical to Rule 3 of Order XIIIA of CPC. It refers to the words 'no real

prospect' of being successful or succeeding. Rule 24.2 of Civil Procedure Rules in England is reproduced hereinbelow:—

"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
(a) it considers that-
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of defending the claim or issue;'and
(b) there is no other reason why the case or issue should be disposed of at a trial."

(emphasis supplied)

44. While deciding the test for summary judgment under Rule 24.2, House of Lords in Three Rivers District Council v. Governor and Company of the Bank of England, [2003] 2 A.C. 1, reiterated the observation in Swain v. Hillman, [2001] 1 All ER 91 that the word 'real' distinguishes 'fanciful' prospects of success and it directs the Court to examine whether there is a 'realistic' as opposed to a 'fanciful' prospect of success. The House of Lords in Three Rivers District Council (supra) also held that the Court while considering the words 'no real prospect' should look to see what will happen at the trial and that if the case is so weak that it has no reasonable prospect of success, it should be stopped before great expenses are incurred. The relevant portion of the Three Rivers District Council (supra) judgment is reproduced hereinebelow:—

> *"[90] The test which Clarke J applied, when he was considering whether the claim should be struck out under RSC Ord 18, r 19, was whether it was bound to fail: see p 171 of the third judgment. Mr.Stadlen submitted that the court had a wider power to dispose summarily of issues under CPR Part 24 than it did under RSC Ord 18, r 19, and that critical issue was now whether, in terms of CPR rule 24.2(a)(i), the claimants had a real prospect of succeeding on the claim. As to what these words mean, in Swain v. Hillman [2001] 1 All ER 91, 92, Lord Woolf MR said:*
>
> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where*

appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[91] The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain v. Hillman, at p 4, Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v. Tilly The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No. 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v. Midland Bank Trust Co. Ltd. 21 July 1999 he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

[92] The overriding objective of the CPR is to enable the court to deal with cases justly: rule 1.1. To adopt the language of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the Rules or interprets any rule: rule 1.2. While the difference between the two tests is elusive, in many cases the practical effect will be the same. In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important than a search for the precise meaning of the rule. As May LJ said in Purdy v. Cambran (unreported) 17 December 1999: Court of Appeal (Civil Division) Transcript No. 2290 of 1999:

"The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed."

[93] In Swain v. Hillman Lord Woolf MR gave this further guidance:
"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." (See [2001] 1 All ER 91 AT 94-95.)

(emphasis supplied)

45. The Supreme Court of Canada in Robert Hryniak v. Fred Mauldin, 2014 SCC OnLine Can SC 53 has also held that trial should not be the default procedure. In the said case, which was an action for civil fraud against the appellant and a corporate lawyer, who acted for the appellant, the allegation was that the appellant, through that company, had transferred more than US $10 million to an offshore bank following which he claimed that the money had been stolen. That money had initially been transferred to the appellant's

company, by the respondents therein, in respect of an investment opportunity.

46. The Trial Court as well as the Court of Appeal considered Rule 20 of the Ontario Rules of Civil Procedure (RCP) and the appropriate standard of review in granting a summary judgment. Rule 20 of RCP reads as: "....(1) The court shall grant a summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties.....". It is pertinent to mention that the amendments to the RCP in December 2008 changed the test from "a genuine issue for trial" to whether "there is a genuine issue requiring trial". The case was thereafter referred to the Supreme Court of Canada by way of an appeal from the Court of Appeal.

47. The Supreme Court of Canada, despite allegation of fraud, did not exercise the power to record oral evidence. Instead, the Court granted summary judgment in favour of the respondents/plaintiff on the basis of the material/pleadings already available with it. The Court held that there is no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. The Court further held that that is the case when the process allows the judge to make necessary findings of fact, allows the judge to apply the law to such facts and when such a process is proportionate, more expeditious and a less expensive means of achieving a just result. Consequently, when a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, it would not be necessary to proceed to trial. In this regard the standard for fairness is whether or not the procedure involved in a summary judgment would give the judge the confidence to find necessary facts and apply the relevant legal principles to resolve the dispute. The relevant portion of the said judgment is reproduced hereinbelow:—

"[8] More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money

in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital Inc., which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

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[11] Beyond a small payment of US$9,600 in February 2002, the Mauldin Group lost its investment.

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[14] The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

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[19] The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

[20] Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

[21] In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

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IV. Analysis

A. Access to Civil Justice: A Necessary Culture Shift

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[24] However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes.

The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in Bruno Appliance) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

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[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their

respective rules of civil procedure. Generally, summary judgment is available where there is no genuine issue for trial.

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[42] Rule 20.04 now reads in part:
20.04 ...
(2) [General] The court shall grant summary judgment if,
(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
(2.1) [Powers] In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.
(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in sub-rule
(2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
[43] The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

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[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the

law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."

(emphasis supplied)

48. In fact, the Federal Court Ottawa, Ontario in Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc., 2011 FC 776 and High Court of Ireland in Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd., [2012] IEHC 374, have held that even damages as well as unliquidated compensation can be awarded by way of summary judgment. The relevant portion of the said judgments are reproduced hereinbelow:—
A. Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc. (supra):—
"[96] Further, the British Columbia Court of Appeal has confirmed that if the judge on a Rule 18A application can find the facts as he or she would upon a trial, the judge should give judgment, unless to do so would be unjust, regardless of complexity or conflicting evidence. In determining whether summary trial is appropriate, the court should consider factors such as the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters that arise for consideration. See Inspiration Management Ltd. v. McDeermind St. Lawrenc Ltd. (1989), 36 B.C.L.R. (2d) 202, [1989] B.C.J. No. 1003 at paragraphs 48 and 53-57 (C.A.).

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[98] In this case, it is my view that summary trial judgment is

appropriate, having regard to all of the evidence and jurisprudence. The British Columbia Supreme Court has itself granted judgment on summary trial in cases of the manufacture, importation, distribution, sale and offer for sale of counterfeit goods, even in cases with multiple defendants, a complex fact pattern, numerous investigations and affidavits, and relatively large damage awards, thereby confirming the appropriateness of doing so. See Louis Vuitton Malletier S.A. et al. v. 486353 B.C. Ltd. et al., 2008 BCSC 799, [2008] B.C.W.L.D. 5075 at paragraphs 42-48."

(emphasis supplied)

B. Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd.(supra):—

"15. But is it open to a plaintiff to seek summary judgment in respect of the un-liquidated claims?
16. I am satisfied that the answer to that question is in affirmative. I come to that conclusion by reference to both the inherent jurisdiction of the court and the specific rules which apply to cases transferred to the Commercial List.
17. I can see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but, not be so in the case of an action seeking unliquidated damages or other substantive relies.
18. In proceedings seeking liquidated sums, a defendant has to put his defence on affidavit within a short period of time and have it judicially tested by reference to the - admittedly low-standard of proof which has to be achieved in order to avoid summary judgment. In the absence of an ability to seek summary judgment in a non-liquidated claim an unmeritorious defendant can procrastinate for months or perhaps years. That would be an obvious injustice to a plaintiff in such a case.
19. I believe there to be an inherent jurisdiction in the court to enable a plaintiff to seek summary judgment in such circumstances. It is true that there is no specific provision in the Rules of the superior Courts to enable such an application to be brought, save in respect of cases in the Commercial List to which I will turn in due course. But the absence of a specific rule should not deny a meritorious plaintiff from speedy relief against an unmeritorious defendant in an appropriate case."

(emphasis supplied)

49. Consequently, this Court is of the view that when a summary judgment application allows the Court to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. It bears reiteration that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the Court the confidence that it can find the necessary facts and apply the relevant legal principles so as to resolve the dispute as held in Robert Hryniak (supra).

50. In fact, the legislative intent behind introducing summary judgment under Order XIIIA of CPC is to provide a remedy independent, separate and distinct from judgment on admissions and summary judgment under Order XXXVII of CPC.

51. This Court clarifies that in its earlier judgment in Venezia Mobili (India) Pvt. Ltd. v. Ramprastha Promoters & Developers Pvt. Ltd., 2019 SCC OnLine Del 7761 while deciding two applications, both filed by the plaintiff in the said case (one under Order XII Rule 6 and other under Order XIIIA) it had applied the lowest common denominator test under both the provisions of the Code of Civil Procedure and held that the suit could be decreed by way of a summary judgment.

52. Consequently, this Court is of the opinion that there will be 'no real prospect of successfully defending the claim' when the Court is able to reach a fair and just determination on the merits of the application for summary judgment. This will be the case when the process allows the court to make the necessary finding of fact, apply the law to the facts, and the same is a proportionate, more expeditious and less expensive means to achieve a fair and just result."

95 In the judgements in **Deepali Designs and Exhibits Private Limited** (Supra) and **Sudarshan Dhoop Pvt. Ltd.** (Supra), the Delhi High Court has reiterated what has been discussed in ***Su-kam Power Systems Ltd.*** (Supra).

96 In the light of this position in law, one will have to consider as to whether the Plaintiff is entitled to a summary judgement under Order XIII-A.

97 One of the defences raised by the Defendant is that the Plaintiff has not prosecuted with due diligence the proceedings before the National Consumer Commission and the Hon'ble Supreme Court, and therefore, the time spent by the Plaintiff in these proceedings ought not to be excluded. The Defendant has submitted that, if the said time is not excluded, then the Suit would be barred by limitation.

98 In this context, the averments of the Plaintiff are found in paragraph nos.19 and 20 of the Plaint, which read as under:

> *"19. The cause of action to file the present suit initially arose in May 2005 when the Plaintiff made payment of Rs.1 Crore to the Defendant towards the full and final settlement of the Overdraft Facility under the One Time Settlement Scheme and the Defendant issued the No Due Certificate and became liable to return the subject shares. The Plaintiff called upon the Defendant to return the subject shares on 29(th) May 2005. The Defendant on 10(th) June 2005, withdrew the recovery proceedings against the Plaintiff. The Plaintiff, once again on 14(th) June 2005, requested the Defendant to hand over the shares. The cause of action once again arose when the Defendant refused to release the said shares and did not*

even reply to the aforesaid letters of the Plaintiff. The Plaintiff, acting bonafidely and with due diligence, within the period of limitation, on legal advice filed a Complaint No.55 of 2006 before the National Consumer Disputes Redressal Commission on 15(th) June 2006. As set out hereinabove, the said proceedings were filed and diligently pursued by the Plaintiff from the year 2006 till their disposal on 1st June 2016 when the order dated 1st June 2016 was passed by the Hon'ble NCDRC, rejecting the Complaint on the grounds of lack of jurisdiction. On legal advice and a bonafide belief of the jurisdiction of NCDRC, the said order was challenged before the Hon'ble Supreme Court of India by way of a statutory appeal being Civil Appeal No.11397 of 2016. The Civil Appeal was filed on 18.11.2016. The said Civil Appeal was also diligently pursued but was ultimately rejected on 22nd February 2022 holding that NCDRC had no jurisdiction.

20. It is submitted that the NCDRC and the Hon'ble Supreme Court were pleased to grant liberty to the Plaintiff to avail his remedies by approaching appropriate forum having jurisdiction. It is, therefore, respectfully submitted that the time taken from 15th June 2006 upto 1st June 2016 and thereafter from 18th November 2016 to 22nd February 2022 in pursuing the Complaint before NCDRC and thereafter statutory appeal before the Hon'ble Supreme Court, is to be excluded under Section 14 of the Limitation Act whilst computing the period of limitation. In the present case, the Plaintiff bonafide pursued legal civil proceedings for recovery of the said shares in a Court / Tribunal / Commission which was ultimately held to have no jurisdiction."

99 The averments in the Plaint show that, in order to contend that the Suit is filed within the period of limitation, the Plaintiff has relied on Section 14 of the Limitation Act, 1963, and has averred that the Plaintiff was bonafidely pursuing legal civil proceedings before the National Consumer Commission and the Hon'ble Supreme Court. Section 14(1) of the Limitation Act reads as under:

> *"**14. Exclusion of time of proceeding bona fide in court without jurisdiction.** - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*

100 In its judgement in **Foreshore Co-operative Housing Society Ltd.** (Supra), this Court has, in the context of Section 14 of the Limitation Act, 1963, laid down as under:

> *"13. Insofar as the present suit is concerned, I have already held that the matter in issue in two suits is the same. The only question, therefore, that is to be considered is whether the City Civil Court suit was prosecuted with due diligence and in good faith. Order VII Rule 6 of Civil Procedure Code provides that where a suit is instituted after the period of limitation, the plaint must show the grounds upon which the exemption from such law is claimed. Admittedly, when the present suit was filed the plaintiffs did not plead any ground claiming exemption of any period in computing the period of limitation laid down by the law of limitation. As observed above, after the preliminary issue was framed the plaint was amended and along with other paragraphs, paragraph 31 (c) was introduced. Paragraph 31(c) reads as under:-*
>
> > *31C. The plaintiffs filed a suit in the Hon'ble Bombay City Civil Court being Suit No. 6734 of 1994 to challenge the revalidation permission granted to the defendant 1 to 6 and/or 8 by the defendant No. 7 to carry out construction on the shell of the Divya Prabha structure or claim any additional F.S.I. available in respect of the said property. The plaintiffs submit that while the abovementioned Suit*

was pending for hearing and final disposal the Bombay Municipal Corporation revalidated the Commencement Certificate and IOD of the building "Divya Prabha" on 28-6-1996 and have thereafter once again revalidated the same on 5-10-1998. It is submitted that each revalidation of the Commencement Certificate and IOD creates a fresh cause of action in favour of the plaintiffs. Without prejudice and in the alternative to what is stated hereinabove, it is submitted that several applications for interim reliefs were made by the plaintiffs in the said Suit No. 6734 of 1994 and the Hon'ble City Civil Court was pleased to grant interim reliefs to the plaintiffs. The said suit was prosecuted with due diligence and in good faith by the plaintiffs. All the defendants therein are also the defendants in the present suit. The matters in issue in both suits are the same. Defendants No. 1 and 2 took out Notice of Motion on 16th March, 1999 and raised the preliminary issued of jurisdiction of the Hon'ble City Civil Court to try and entertain the suit. The Hon'ble City Civil Court was pleased to pass an Order dated 16th/17th March, 1999 for return of the plaint on the ground that the Hon'ble City Civil Court had no jurisdiction to entertain the same. The plaintiffs filed an appeal against the said Order dated 16th/17th March, 1999. The plaintiffs withdrew their Appeal' on 5th May, 1999. On 18th May, 1999 the plaintiffs filed the present suit in this Hon'ble Court. In the abovementioned circumstances it is submitted that even if April, 1994 is to be taken as the date when the plaintiffs cause of action to file a suit against the defendants arose the time spent in prosecuting Suit No. 6734 of 1994 in the Hon'ble City Civil Court i.e. from 8th November, 1994 to 16th/17th March, 1999 is required to be excluded and the present suit is accordingly filed within the period of limitation.

14. It is clear from paragraph 31(C) quoted above that the plaintiffs claim exclusion of period spent in prosecuting the suit in City Civil Court on the ground that the said suit was prosecuted with due diligence and in good faith. At the hearing exclusion of time on any ground other than the one mentioned in paragraph 31(C) was not claimed. Therefore, in the present case proviso to Rule 6 of Order VII does not come into play. Therefore, I have to see whether the plaintiffs are entitled to claim exclusion of time on the ground which is

pleaded in paragraph 31(C). Perusal of paragraph 31(C) shows that in that paragraph the plaintiffs do not claim that the suit in the City Civil Court was instituted in good faith, however, it is claimed that the plaintiff prosecuted the suit in the City Civil Court with due diligence. This averment may amount to the plaintiffs claiming that they instituted and prosecuted the suit in City Civil Court with due diligence and in good faith. But making averments in the plaint would not be enough. The plaintiffs will have to lead evidence to establish that the suit in the City Civil Court was instituted with due care and attention. The roznama of the suit maintained by the City Civil Court may show that the plaintiffs prosecuted the suit with due diligence. But it will not show that the suit was instituted with due diligence and due care. So far as the contention of the plaintiffs that for the purpose of claiming benefits of section 14 of the Limitation Act, it is not necessary for the plaintiffs to show that the suit was instituted with due care and attention, is concerned, in my opinion, in view of the judgment of the Supreme Court in the case of Madhavrao Patawardhan referred to above and the provisions of section 14 of the Limitation Act read with section 2(h), leaves one in no manner of doubt that the plaintiffs will have to lead evidence to show that the earlier suit was instituted with due care and attention. Perusal of the provisions of section 14 shows that the plaintiff has to establish that he was prosecuting the earlier civil proceedings in good faith. When one says that I was prosecuting the proceedings in good faith, it implies that he also claims that he instituted the proceedings in that Court in good faith. Therefore for claiming the benefits of the provisions of section 14, the plaintiffs have to establish by leading evidence that firstly the proceedings were instituted by them in good faith and thereafter were being prosecuted in good faith. The term "good faith" is defined by section 2(h). Section 2(h) reads as under:-

> *2(h) "good faith" nothing shall be deemed to be done in good faith which is not done with due care and attention;*

15. Therefore, in order to establish that the plaintiffs instituted the suit in City Civil Court in good faith, the plaintiffs will have to establish by leading evidence that they instituted the suit in City Civil Court after due care and paying due attention. The contention raised on behalf of the plaintiffs

that for the purpose of claiming benefits of section 14 of the Limitation Act, all that the plaintiffs have to show that they were prosecuting the proceedings in good faith and it is not necessary for the plaintiffs to show that they had instituted the proceedings in good faith, in my opinion, has no substance. Because for claiming that the plaintiffs were prosecuting the proceedings in good faith, they have to first show that they instituted the proceedings in good faith. Because, if the institution of the proceedings is not in good faith, there cannot be prosecution of those proceedings in good faith. It is now not in dispute that the plaintiffs had not valued the suit properly in the City Civil Court. Therefore, in order to establish that they were prosecuting the suit in City Civil Court with due diligence, the plaintiffs have to establish that it was not possible for them while the suit remained pending in the City Civil Court to discover and find out that they have wrongly valued the suit any time before the defect was pointed out to them. In other words, in order to claim that they were persecuting the suit in the City Civil Court in good faith the plaintiffs will have to show not only that while instituting the suit they had taken due care and paid due attention, but even after due diligence it was not possible for them to discover the mistake committed by them in valuing the suit any time before the defect was pointed out to them. The Supreme Court has in detail considered this aspect of the matter in its judgment in the case of Madhavrao Patwardhan referred to above. In my opinion, paragraphs 7 and 8 of that judgment are relevant. They read as under:

> *7. The conclusion of the learned trial judge on this part of the case, is in these words:-*
>
> *"The plaintiffs mala fides are therefore not established and the period occupied in prosecuting the former suit must be excluded under section 14 of the Limitation Act."*
>
> *The observations of the High Court are as follows:*
>
> *"We do not see our way to accuse the plaintiff of want of good faith or any mala fides in the matter of the filing of the suit in the Subordinate Judge's Court at Miraj. There is nothing on the record to show that he was really guilty of want of good faith or non-prosecution of the suit with the diligence in the Court of the Subordinate Judge at Miraj."*

Both the courts below have viewed the controversy under section 14 of the Limitation Act, as if it was for the defendant to show mala fides on the part of the plaintiff when he instituted the previous suit and was carrying on the proceedings in that Court. In our opinion, both the Courts below have misdirected themselves on this question. Though they do not say so in terms, they appear to have applied the definition of "good faith" as contained in the General Clauses Act, to the effect that "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But the Indian Limitation Act contains its own definition of good faith to the effect that "nothing shall be deemed to be done in good faith which is not done with due care and attention" [Section 2(7)). We have, therefore, to see if the institution and prosecution of the suit in the Munsiff s Court at Miraj was done with due care and attention. We know that the plaint in the Tikoni suit filed by the same plaintiff in the same Court, did contain a statement as to the value of the subject-matter, but it was conspicuous by its absence in the plaint in the suit as originally filed in the Munsiff's Court at Miraj. All the facts alleged in the plaintiffs petition for the return of the plaint, were known to the plaintiff ever since the institution of the suit. Nothing fresh was discovered in 1940. On the other hand, we know definitely that the Tikoni suit had been dismissed by the trial Court on merits. The suits were of an analogous character in the sense that the controversy was similar in both of them. The appellants' contention that on the dismissal of the plaintiffs Tikoni suit in November, 1939, he, naturally, became apprehensive about the result of the other suit, and then moved the Court for the return of the plaint on the ground of pecuniary jurisdiction, appears to be well-founded. The plaintiff knew all the time that the value of the properties involved in the suit, was much more than Rs. 5,000 which was the limit of the pecuniary jurisdiction of the Subordinate Judge's Court. Can an omission in the plaint to mention the value of the properties involved in the suit, be brought within the condition of 'due care and attention' according to the meaning of "good faith" as understood in the Limitation Act? It has to be remembered that it is not one of those cases which usually arise upon a revision of the valuation

as given in the plaint, on an objection raised by the defendant contesting the jurisdiction of the Court to entertain the suit. Curiously enough the defendant had not raised any objection in his written statement to the jurisdiction of the Court to entertain the suit. Apparently, the plaintiff was hard put to it to discover reasons for having the case transferred to another Court. The question is not whether the plaintiff did it dishonestly or that his acts or omission in this connection, were mala fide. On the other hand, the question is whether, given due care and attention, the plaintiff could have discovered the omission without having to wait for about 10 years or more. The trial Court examined the plaintiffs allegation that the omission was due to his pleader's mistake. As that Court observed "he makes this contention with a view to shield himself behind a wrong legal advice." That Court has answered the plaintiffs contention against him by observing that the plaintiff was not guided by any legal advice in this suit; that the plaint was entirely written by him in both the suits, and that he himself conducted those suits in the trial Court "in a manner worthy of a senior counsel." The Court, therefore, rightly came to the conclusion that the plaintiff himself "was responsible for drafting the plaint and for presenting it in Court, and that no pleader had any responsibility in the matter. No reason was adduced why, in these circumstances, the value of the subject-matter of the suit, was mentioned in the plaint in the Tikoni suit but not in the plaint in respect of the present suit.

8. There is another serious difficulty in the way of the plaintiff. He has not brought on the record of this case any evidence to show that he was prosecuting the previously instituted suit with "due diligence" as required by section 14. He had not adduced in evidence the order-sheet or some equivalent evidence of the proceedings in the Sub-Judge's Court at Miraj, to show that in spite of his due diligence, the suit remained pending for over ten years in that Court, before he thought of having the suit tried by a Court of higher pecuniary jurisdiction. In our opinion, therefore, all the conditions necessary to bring the case within section 14 have not been satisfied by the plaintiff. There could be no doubt about the legal position that the burden lay on the plaintiff to satisfy those conditions in

order that he may entitle himself to the deduction of all that period between 31st January, 1929, and 4th July, 1940. It is also clear that the Courts below were in error in expecting the contesting defendant to adduce evidence to the contrary. When the plaintiff has not satisfied the initial burden which lay upon him to bring his case within section 14, the burden would not shift, if it ever shifted, to the defendant to show the contrary. In view of this conclusion, it is not necessary for us to pronounce upon the other contention raised on behalf of the appellants that, even after giving the benefit of section 14, the suit is still barred under Art. 142 of the Limitation Act. This is a serious question which may have to be determined if and when it becomes necessary.

16. It is to be noted here that perusal of the provisions of Order VII, Rule 1 shows that it is the requirement of the law that the plaint should contain a statement of the value of the subject matter of the suit for the purpose of jurisdiction and Court fee, showing the provisions of law under which the valuation of Court fees and jurisdiction is separately made. Thus, Order VI, Rule 1 requires the plaintiff to pay attention to the law governing the valuation of the suit for the purpose of Court fees while drafting the plaint. Therefore, in order to claim that the suit was instituted with due care and attention, the plaintiff will have to show that while instituting the suit the plaintiff had committed a mistake in valuing the suit, despite taking due care and paying due attention. In the present case, the plaintiffs have not cared to lead any evidence to show that the City Civil Court suit was instituted with due care and attention. The contention of the plaintiffs relying on the judgment of the Supreme Court in the case of Vijay Kumar Rampal v. Diwan Devi, AIR 1985 SC 1669, that an error in judgment in valuing the suit in a Court which is ultimately found to have no jurisdiction, has nothing to do with the question of jurisdiction in prosecuting the suit cannot be accepted. In view of the clear judgment of the Supreme Court in the case of Madhavrao Patwardhan, if an error in valuing the suit is a bona fide error, obviously, institution of the suit would be in good faith. But for that the plaintiffs will have to lead evidence to show that the error in valuing the suit was a bona fide error. In the present case, I find that the conduct of the plaintiffs shows that the plaintiffs do not deserve any leniency from the Court. Though the plaintiffs

needed benefit of section 14 of the Limitation Act to bring his suit within limitation there were no pleadings found in the plaint. Even after reply was filed in the Notice of Motion and an objection was raised that the suit is barred by the law of limitation, still no attempt was made to amend the plaint. Application for amendment in the plaint was made not only after the preliminary issue was framed, but after the Court started hearing the parties on the preliminary issue. Ultimately, the Court granted the amendments. But even in the amended plaint, though claim was made that the City Civil Court suit was prosecuted in good faith, no particulars were given. Though, in my opinion, it was necessary for the plaintiffs to disclose particulars of the due care and due attention. The defendants deny that the proceedings in the City Civil Court were prosecuted with due diligence, therefore, the burden was on the plaintiff to lead the evidence to show that the suit was prosecuted with due diligence. But the plaintiffs did not even make an attempt to lead any oral evidence.

17. Taking overall view of the matter, therefore, it is clear that the plaintiffs have not been able to establish that the plaintiffs are entitled to claim benefits of section 14 of the Limitation Act. I have already observed above that the matter in issue in both the suits is the same. It is the case of the plaintiffs also that the matter in issue in both suits is the same and therefore obviously the cause of action for instituting the present suit arose in 1994 and as the plaintiffs are not entitled to claim benefits of section 14 of the Limitation Act, the suit is barred by the law of Limitation. Issue No. 1 is, therefore, answered accordingly.

As I have found that the suit as framed and filed is barred by the law of limitation, the suit is dismissed with no order as to costs. As the suit is dismissed, Notice of Motion does not survive for consideration. Hence, disposed of.

At the request of the learned Counsel appearing for the plaintiffs, it is directed that despite disposal of the Notice of Motion, ad-interim order passed in this Notice of Motion which is presently operating shall continue to operate for a period of four weeks from today."

101 From the said judgement, and even otherwise in law, it is very clear that whether the Plaintiff was prosecuting the proceedings before the National Consumer Commission and the Hon'ble Supreme Court with due diligence and good faith is a matter of fact and the Plaintiff would have to plead and prove by leading oral evidence that it was prosecuting the proceedings in the National Consumer Commission and the Hon'ble Supreme Court with due diligence and good faith. The burden of proof in that regard is on the Plaintiffs.

102 This is more so when a preliminary objection was raised by the Defendant before the National Consumer Commission that the National Consumer Commission did not have jurisdiction to entertain the Complaint of the Plaintiff. In this context, it would be apt to refer to the following passage from the judgment of the Kerala High Court in **Mac-N-Hom Systems** (Supra).

> *"It is evident from the above mentioned facts that the respondent all along had alerted the petitioner that the Sub-Court, Ernakulam had no jurisdiction and only the Sub-Court, Tirur had got jurisdiction. Lawyer notice, counter affidavit to TA. 4190/98 and the preliminary objection were filed within the period of limitation and therefore within the period of limitation itself petitioner could have got the petition withdrawn and file it before Sub-Court, Tirur. Petitioner prosecuted the suit without due diligence, any care and attention in spite of the fact that he was alerted about the wrong filing of the suit before the Sub Court, Ernakulam. In*

connection we may refer to the Division Bench decision of the Delhi High Court which examined the scope of Section 14 of the Limitation Act in ILR (1970) 2 Delhi 60, Delhi High Court took the view that a wrong legal advice is not a ground to exclude the period of limitation. Appellant submitted he was advised to institute the suit at Ernakulam Sub-Court. We are of the view even if there is a wrong advice and party has acted by that advice that itself is not a ground to get the benefit of Section 14 of the Limitation Act."

103 In the light of the aforesaid discussion, in my view, the Plaintiff would have to prove by leading oral evidence that he was prosecuting the proceedings before the National Consumer Commission and the Hon'ble Supreme Court with due diligence and in good faith. In my view, until the aforesaid is proved by the Plaintiff, it cannot be said that the Defendant has no real prospect of successfully defending the claim as provided in Rule 3 of Order XIII-A. If the Plaintiff fails to prove the aforesaid, then the Defendant may succeed in its defence that the claim in the present Suit is barred by the law of limitation.

104 Further, since the Plaintiff would be required to prove by leading oral evidence that he was prosecuting the proceedings before the National Consumer Commission and the Hon'ble Supreme Court with due diligence and in good faith, in my view, this is a compelling reason as to why the claim of the Plaintiff should not be disposed of before recording

of oral evidence.

105 In my view, for this reason, in light of Rule 3 of Order XIII-A, a summary judgement cannot be passed in favour of the Plaintiff.

106 The Plaintiff has relied upon the judgement of the Hon'ble Supreme Court in **M.P.Steel Corporation** (Supra), and, in particular, to paragraph 10 thereof, which reads as under:-

> *"10. We might also point out that Conditions 1 to 4 mentioned in the Consolidated Engg. cases have, in fact, been met by the appellant. It is clear that both the prior and subsequent proceedings are civil proceedings prosecuted by the same party. The prior proceeding had been prosecuted with due diligence and in good faith, as has been explained in Consolidated Engg. itself. These phrases only mean that the party who invokes Section 14 should not be guilty of negligence, lapse or inaction. Further, there should be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. On the facts of this case, as the earlier Supreme Court order dated 12-3-2003 itself points out, there was some confusion as to whether what was appealed against was the Superintendent's order or the Collector's order. The appellant bona fide believed that it was the Collector's order which was appealed against and hence an appeal to CEGAT would be maintainable. This contention, however, ran into rough weather in this Court. Further, the time taken between 3-4-1992 and 22-6-1992 to file an appeal cannot be said to be inordinately long. Thus, neither was there any negligence, lapse or inaction on facts nor did the appellant delay proceedings to harass the Department by pretending that there was a mistake. Condition 3 was also directly met - this Court in the order dated 12-3-2003 set aside CEGAT's order on the ground that it was without jurisdiction. It is*

> *indisputable that the earlier proceeding and the later proceeding relate to the same matter in issue and thus Condition 4 is also met. Condition 5, however, has not been met as both the proceedings are before a quasi-judicial tribunal and not in a court. This, however, is not fatal to the present proceeding as what is being held by us in this judgment is that despite the fact that Section 14 of the Limitation Act may not apply, yet the principles of Section 14 will get attracted to the facts of the present case. It is in this way that we now proceed to consider the law on the subject."*

107 By relying on the said judgement, the Plaintiff has sought to contend that, for the test laid down in the said judgement, no oral evidence is required to be led. In my view, the said judgement is of no assistance to the Plaintiff. Firstly, paragraph 10 of the said judgement, relied on by the Plaintiff, proceeds on the basis that the prior proceeding had been prosecuted with due diligence and in good faith. In my view, it is not possible to accept the submission of the Plaintiff that, for the test laid down in the said paragraph 10, no oral evidence is required to be led. At the cost of repetition, I would like to state that, whether or not the Plaintiff has been prosecuting with due diligence and in good faith the proceedings before the National Consumer Commission and the Hon'ble Supreme Court, is a question of fact, the burden of which is on the Plaintiff, and in order to prove this question of fact, necessary oral evidence will have to be led by the Plaintiff.

108 In the aforesaid circumstances, and in the light of the aforesaid discussion, in my view, the Plaintiff is not entitled to a summary judgement under Order XIII A of the CPC. Since I have come to this conclusion in respect of one of the defences raised by the Defendant, I have not dealt with the other defences raised by the Defendant for considering whether the Plaintiff is entitled to a summary judgement or not.

109 In the aforesaid circumstances, and for the aforesaid reasons, the following order is passed:

a. The Interim Application is dismissed.

b. In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA,J.)