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

COMMERCIAL APPEAL (L) NO. 11922 OF 2025

IN

INTERIM APPLICATION (L.) No. 10415 OF 2024

IN

COMMERCIAL SUIT (L.) NO. 8875 OF 2024

Schenker India Pvt. Ltd. ….*Appellant*
(Original Plaintiff)

: Versus :

SKAPS Industries Pvt. Ltd. ….*Respondent*
(Original Respondent)

Mr. Virag Tulzapurkar, Senior Advocate *with Ms. Naira Jeejebhoy, Mr. Mohit Goel, Mr. Siddhant Goel, Ms. Aishna Jain, Ms. Karmanya Dev Sharma, Mr. Ishaan Pratap Singh, Ms. Meghana Rao, and Ms. Mahek Saudagar i/by. Mr. Yash J. Jariwala, for the Appellant.*

Mr. Ashish Kamat, Senior Advocate, *with Ms. Simantini Mohite, Mr. Abhinav Mathur, Mr. Lokesh Pavaskar and Ms. Priyanka C. i/by. Chir Amrit Legal LLP, for the Respondents.*

CORAM : ALOK ARADHE, CJ. &
SANDEEP V. MARNE, J.

RESERVED ON : 25 JULY 2025.

PRONOUNCED ON : 1 AUGUST 2025.

JUDGMENT :- *(Per Sandeep V. Marne, J.)*

1) This Appeal is filed under the provisions of Section 13 (1-A) of the Commercial Courts Act, 2015 challenging the order dated 26 March 2025 passed in Interim Application (L.) No. 10415/2024 filed in Commercial Suit (L.) No. 8875/2024. By the impugned order, the learned Single Judge of this Court has rejected the prayer of the Appellant/Plaintiff for temporary injunction to restrain the Defendant from exporting cargo through freight forwarders (carriers) other than the Plaintiff and from breaching the terms of or acting contrary to the Transportation Services Agreement dated 5 January 2022. The Appellant had also sought a direction against the Defendant to secure the amount of Compensatory Freight Charges **(CFC)** claimed in the suit. Since the application for temporary injunction filed under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 **(the Code)** is rejected, the Appellant has filed the present Appeal.

2) A brief factual narration of the case is stated thus:

Plaintiff claims to be one of the world's leading global logistic providers. The Defendant is engaged in manufacture and distribution of wide array of textile products, which are geosynthetic products and technical textiles made from extruded materials (geo-textiles). The Defendant desired to engage services of the Plaintiff for exporting geo-textiles to USA. Parties executed Transportation

Services Agreement **(TSA)** on 5 January 2022, under which Plaintiff agreed to provide freight forwarding services to the Defendant for a period of 3 years from 1 May 2022 to 30 April 2025. Clause-4.5 of the TSA provides for guaranteed volume commitment throughout the entire contract period as 10 containers of 40 feet high cube per calendar week for the port pairs as captured in Exhibit-A to the TSA. The clause further provided that in the event of Defendant not providing the cargo for movement in accordance with the agreed quantity, it shall be liable to pay CFC for the difference against weekly continuation as specified in the said Clause. It appears that from May 2022 till December 2022, parties performed their respective obligations under the TSA. From December 2022, the Defendant could not supply the agreed volume of cargo for transportation to the Plaintiff. Plaintiff accordingly raised invoices for payment of CFC. By letter dated 8 April 2023, Defendant invoked Clause-4.3 of the TSA on the ground that by virtue of the Build America Buy America Act (**BABA Act**), shipment of geo-textiles to USA by Defendant had become impossible which constituted a *force majure* event. Plaintiff responded vide letter dated 8 May 2023 and disputed the claim of the Defendant. Defendant issued notice dated 27 June 2023 reiterating the contents of the first letter and in the above background, Plaintiff has filed Commercial Suit (L.) No. 8875/2024 seeking specific performance of TSA dated 5 January 2022. Plaintiff has also sought recovery of CFC from the Defendant. In the suit, Plaintiff filed Interim Application (L.) No. 10415/2024 seeking temporary injunction under Order XXXIX Rules 1 and 2 read with

Section 151 of the Code and sought following prayers (a) restraining the Defendant from exporting cargo through any other carrier/transporter and from committing breach of TSA, (b) to render accounts and (c) to secure amount of USD 3,445,470.00 as well as monthly CFC from the date of filing of suit.

3) Defendant appeared in the suit and opposed the application for temporary injunction by filing Affidavit-in-Reply. After hearing both the sides, the learned Single Judge has proceeded to dismiss Plaintiff's application for temporary injunction vide order dated 26 March 2025, which is the subject matter of challenge in the present Appeal.

4) Mr. Tulzapurkar, the learned Senior Advocate appearing for the Appellant/Plaintiff would submit that the learned Single Judge has grossly erred in rejecting Plaintiff's application for temporary injunction. That the learned Single Judge has recorded findings in favour of the Plaintiff in para-28 of the judgment holding that clause-4.5 of the TSA is in the nature of 'take or pay' clause and that a *prima-facie* case is made out by the Plaintiff of termination of TSA being unjustified. That the learned Single Judge has also not accepted Defendant's defence of invocation *force majuere* clause. That on these findings, injunction in Plaintiff's favour ought to have been granted.

5) Mr. Tulzapurkar would further submit that the learned Single Judge has grossly erred in holding that Plaintiff's suit is essentially for recovery of liquidated damages. That the learned Single Judge failed to appreciate the position that Plaintiff's claim for recovery of CFC is actually towards specific performance of contract. That payment of CFC is an alternate method of performance of contract. That specific performance of contract is in two parts viz. Defendant's obligation to pay CFC from December 2022 till the date of filing of the suit and its continued obligation to pay CFC post filing of the suit. That Plaintiff was therefore entitled to seek injunction against the Defendant under Order XXXIX Rule 2 by restraining it from committing breach of the contract by securing amount of CFC payable towards performance of contract. That therefore the learned Single Judge ought to have granted the relief of provision of security by the Defendant for breach of contract committed by it in not paying CFC to the Plaintiff. That Defendant has contractually agreed to pay CFC to the Plaintiff in the event of its failure to make available agreed volume of cargo for transportation. That the law recognizes the principle that a clause providing for payment of specified sum, in the event of inability to perform contractual obligation, becomes alternate way of performance of contract. In support, he would rely upon judgment of the Apex Court in ***M. L. Devender Singh and others Versus. Syed Khaja***[1]. That though the learned Single Judge has recognised the position that Plaintiff is seeking specific performance of TSA from the date of filing of the suit till the term of TSA, it has erroneously held that the

[1] (1973) 2 SCC 515

claim for recovery of CFC is by way of liquidated damages. That in aid of Plaintiff's prayer for specific performance, the learned Single Judge ought to have allowed the prayer of the Plaintiff for provision of security by the Defendant for agreed amount of CFC under Rule 2 of Order XXXIX of the Code. It is submitted that the learned Single Judge grossly erred in rejecting Plaintiff's prayer for temporary injunction on the ground of delay without appreciating the position that the Defendant had continuous obligation of payment of CFC under the TSA as on the date of filing of the suit. That even if the aspect of delay could be used for non-grant of injunction *qua* the amount of CFC prior to the date of filing of the suit, the ground of delay would not come in Plaintiff's way qua Defendant's continuous obligation of payment of CFC after the date of filing of the suit.

6) Mr. Tulzapurkar would submit without prejudice that even if Plaintiff's claim for recovery of CFC is treated as for damages, the same can only be upto the date of institution of the suit. That post institution of the suit, the claim is clearly for specific performance of contractual obligation of payment of CFC. That claim for recovery of CFC is not a claim for damages but a claim for specific performance. It is not a consequence arising out of breach of contract but a specific contractual term. That there is no delay on facts in respect of the claim post institution of suit. Alternatively, even if any delay is to be assumed, the same could have no consequence on Plaintiff's entitlement for injunction as Defendant has not suffered any prejudice on account of such delay. That the learned Single Judge has grossly erred in relying on judgment of the Apex Court in ***Rajesh***

Kumar Versus. Anand Kumar and others[2]**.** That Plaintiff satisfied the trinity test for grant of temporary injunction. In support of the contention that the Court has broad discretion to issue necessary orders to prevent breach of contract, as well as for deposit of security, reliance is placed on judgment of Division Bench of Calcutta High Court in ***Kailash Sadhu Versus. Sushil Kumar Agarwal***[3]**.** That Defendant has no possible defence and that therefore an order for provision of security under Order XXXIX Rule 2 read with Section 151 of the Code ought to have been made and in support reliance is placed on ***Valentine Maritime Ltd. Versus. Kreuz Subsea Pte Limited and another***[4]**.** That there is no impediment under the Code from preventing the ends of justice being defeated by dishonest parties and in support reliance is placed on Division Bench judgment of this Court in ***Rajaram Chavan Real Estate Pvt. Ltd. Versus. Mohammed Anwar Kutubuddin Siddiqui and others***[5]**.** Reliance is also placed on judgments in ***Mahavir Khandsari Sugar Mill and others Versus. Maharashtra State Electricity Board and others***[6]**,** ***White and Carter (Councils) Ltd. Versus. McGregor***[7]**,** ***Amoco (U.K.) Exploration Company (A Company incorporated in Delaware, USA) and others Versus. Teesside Gas Transportation Limited***[8] and ***Maharashtra State Electricity Board Versus. Shashibala Jagmohandas Saraf (L.R.)***[9]**.** That the learned Single Judge has failed to appreciate distinction between pre-suit period and post-suit

2 2024 SCC OnLine SC 981
3 2005 SCC OnLine Cal 101
4 2021 SCC OnLine Bom 75
5 2023 SCC OnLine Bom 1931
6 1993 Mh.L.J. 544
7 [1962] A.C. 413
8 [2001] UKHL 18
9 1981 SCC OnLine Bom 165

period claims and has wrongly clubbed them together for damages. In support, reliance is placed on judgments in the ***State of Kerala Versus. Cochin Chemical Refineries Ltd.***[10] and ***P. R. & Co. Versus. Bhagwandas Chaturbhuj***[11]. On above broad submissions, Mr. Tulzapurkar would pray for setting aside the order passed by the learned Single Judge and for grant of relief of provision of security by the Defendant for performance of contractual obligation of payment of CFC.

7) The Appeal is opposed by Mr. Kamat, the learned Senior Advocate appearing for the Respondent/Defendant. He would submit that the bare reading of the plaint clearly indicates that Plaintiff's claim is for recovery of liquidated damages. He would rely upon the provisions of Sections 73 and 74 of the Indian Contract Act, 1872 (**the Contract Act)** in support of his contention that the figure indicated in the TSA would, at the highest, constitute genuine pre-estimate of damages under Section 74 of the Contract Act and that the Plaintiff will have to prove sufferance of damages by leading evidence as held by the Apex Court in ***Kailash Nath Associates Versus. Delhi Development Authority and another***[12]. That the entire claim of the Plaintiff upto 30 April 2025 is for liquidated damages as specifically admitted in para-7(f) of the plaint. That the findings recorded by the learned Single Judge in paragraph-28C about specific performance of TSA from the date of filing of the suit till term of the TSA is referable to grant of business of transportation and

[10] 1968 SCC OnLine SC 240
[11] 1909 SCC OnLine Bom 19
[12] (2015) 4 SCC 136

not to payment of CFC. That since specific performance of TSA for grant of business of transportation can no longer be granted on account of expiry of term of TSA, there is no question of granting any direction for security for performance of the contract. That TSA cannot otherwise be specifically enforced as it is in the nature of personal service requiring continuous supervision of the Court and is also determinable. Reliance is placed on judgments in ***Indian Oil Corporation Ltd. Versus. Amritsar Gas Service and others***[13] and ***Government of Goa, Represented by the Director of Tourism Versus. Jaisu Shipping Co. Pvt. Ltd.***[14] That since no final relief can be granted, there is no question of grant of any temporary injunction and in support, reliance is placed on ***Percept D'Mark (India) (P) Ltd Versus. Zaheer Khan and another***[15]. That there are admissions in the plaint about the claim being for liquidated damages which are judicial admissions requiring waiver of proof. Reliance is placed on ***Nagindas Ramdas Versus. Dalpatram Ichharam alias Brijram and others***[16] and ***T. D. Vivek Kumar and another Versus. Ranbir Chaudhary***[17]**.** That even otherwise, Appellant's claim for CFC constitutes a claim for damages as held in ***Maharashtra State Electricity Board Versus. Shashibala Jagmohandas Saraf (L.R.)***[18]. That claim for liquidated damages is not a debt unless decree is passed as held in ***Union Of India Versus. Raman Iron Foundry***[19]**.** That there can be no temporary injunction in aid of damages claimed

13 (1991) 1 SCC 533
14 (2010) 6 Mah LJ 612
15 (2006) 4 SCC 227
16 (1974) 1 SCC 242
17 2023 SCC OnLine SC 526
18 1981 SCC OnLine Bom 165
19 (1974) 2 SCC 231

as held in ***Multichannel (India) Limited Versus. Kavitalaya Productions Pvt. Limited***[20]. That provisions of Order XXXIX Rule 2 cannot be relied upon to obviate requirements under Order XXXVIII Rule 5. That power of the Court under Order XXXVIII Rule 5 is drastic and extraordinary and must be used sparingly and strictly in accordance with the Rules as held in ***Raman Tech. & Process Engg. Co. and another Versus. Solanki Traders***[21] and ***Trent Limited Versus. Mr. Nanasaheb Govindrao Aher & Ors.***[22] That even otherwise the trinity test is not satisfied in the present case. On above broad submissions, Mr. Kamat would pray for dismissal of the Appeal.

8) Rival contentions of the parties now fall for our consideration.

9) The Appeal is filed by the Plaintiff challenging the order dated 26 March 2025 passed by the learned Single Judge of this Court dismissing its application for temporary injunction during pendency of the suit. The Interim Application was filed by the Plaintiff under provisions of Order XXXIX Rules 1 and 2 of the Code. The prayers in the Interim Application are extracted for facility of reference as under :-

> a) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to restrain the Defendants and / or any associated/group/affiliate companies of the Defendant including but not limited to the companies mentioned in Exhibit C of the Agreement, and their principal officers, directors, promoters, shareholders, managers, assigns, successors in interest,

[20] 1998-3-L.W.-613
[21] (2008) 2 SCC 302
[22] Arbitration Petition (L) No. 513 of 2017 decided on 1 August 2017. (OS)

representatives, servants, agents, employees and / or any other person(s) on their behalf from:

(i) Directly or indirectly exporting cargo through any freight-forwarders/carriers other than the Plaintiff for the remaining term of the Agreement; and
(ii) Directly or indirectly in any other manner breaching the terms of or acting contrary to the Transportation Services Agreement dated 5 January 2022.

b) pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to order and direct the Defendants to render accounts and disclose on oath to the Plaintiff company:

(i) the names, shareholding and directorships of all associated/group/affiliate companies of the Defendant including but not limited to the companies mentioned in Exhibit C of the Agreement, and their principal officers, directors, promoters, shareholders, managers, assigns, successors in interest, representatives, servants, agents, employees and / or any other person(s) on their behalf through which the Defendant or any of them are exporting geo-textiles to the United States of America;
(ii) the full particulars of all shipments of geo-textiles to the United States made during the tenure of the Transportation Services Agreement dated 5 January 2022 (i.e. from 1 May 2022 onwards) by the Defendant and all associated/group/affiliate companies of the Defendant including but not limited to the companies mentioned in Exhibit C of the Agreement, and their principal officers, directors, promoters, shareholders, managers, assigns, successors in interest, representatives, servants, agents, employees and / or any other person(s) on their behalf;
(iii) copies of all bills of lading or other documents evidencing the contract of carriage pertaining to shipments of geo-textiles to the United States made during the tenure of the Transportation Services Agreement dated 5 January 2022 (i.e. from 1 May 2022 onwards) by the Defendants and all associated/group/affiliate companies of the Defendant including but not limited to the companies mentioned in Exhibit C of the Agreement, and their principal officers, directors, promoters, shareholders, managers, assigns, successors in interest, representatives, servants, agents, employees and / or any other person(s) on their behalf;

c) pending the hearing and final disposal of the Suit this Hon'ble Court be pleased to order and direct the Defendant to jointly and severally secure the Plaintiff by depositing before this Hon'ble Court or otherwise securing the following amounts:

> (i) amount of USD 3,445,470.00 being the outstanding compensatory charges payable for the months of December 2022 to February 2024 under the Transportation Services Agreement dated 5 January 2022 read with the Plaintiffs invoices (as exhibited 31 December 2022, 31 January 2023, 31 January 2023, 09 February 2023, 27 February 2023, 31 March 2023, 09 August 2023, 09 August 2023, 09 August 2023,09 August 2023, 09 August 2023, 16 August 2023, 26 September 2023, 05 October 2023, 31 October 2023, 30 November 2023, 26 December 2023, 01 February 2024 and 26 February 2024;
> (ii) the compensatory charges payable on a monthly basis under the Transportation Services Agreement dated 5 January 2022 from the date of filing of the Suit till 30 April 2025;

10) It must be observed at the very outset that though the Petitioner had sought interim injunction to restrain the Defendants from exporting cargo through any other freight forwarder and/or from committing breach of the TSA and for rendering of accounts, what is mainly pressed before us is prayer clause (c) of the Interim Application (L.) No. 10415/2024, in which the Appellant/Plaintiff had sought a direction against the Defendant for securing of various amounts during pendency of the suit. The reason why the Plaintiff no longer presses for temporary injunction to restrain the Defendant from exporting cargo or from breaching the terms and conditions of the TSA is because the tenure of TSA has come to an end on 30 April 2025. The Plaintiff has accordingly pressed the present Appeal only for the purpose of securing an order of temporary injunction directing Defendants to provide for a security in respect of the amounts due from the Plaintiff during pendency of the suit. This relief is sought by the Plaintiff under the provisions of Rule 2 of Order XXXIX of the Code.

11) It must also be observed that the learned Single Judge has made following *prima-facie* observations in favour of the Plaintiff in the impugned order dated 26 March 2025 :-

> 28) After having considered the rival contentions as well as the case law upon which reliance has been placed and the pleadings, I find that I am unable to grant the Plaintiff interim relief despite the fact that Mr. Tulzapurkar has made out a compelling case that clause 4.5 of the TSA is in the nature of a take or pay clause and that I am of the *prima facie* view that the termination of the TSA is entirely unjustified. I say so because while the Defendant's sole reason for invoking the *force majeure* clause in the TSA was on account of the BABA Act, it is not in dispute that (i) the BABA Act was enacted even before the TSA was executed (ii) the BABA Act did not in any manner ban the imports of Geo Textiles into the USA but only restricted the use of imported Geo Textiles in federally funded infrastructure projects in the USA; and (iii) the Defendant did not terminate the TSA in November 2022 when the BABA Act come into force but did so only in April 2023, which was 5 months thereafter. It is thus that I *prima facie* find the termination of the TSA to be entirely unjustified.

12) The learned Single Judge has thus held that Plaintiff has made out a compelling case that clause-4.5 of the TSA is in the nature of a 'take or pay' clause. The learned Single Judge has further held that termination of the TSA is *prima-facie* unjustified. He has refused to *prima facie* accept Defendant's pretext of coming into force of BABA Act for discontinuance of cargo export to USA. However, despite recording these *prima-facie* findings in favour of the Appellant, the learned Single Judge has still proceeded to dismiss Plaintiff's application for temporary injunction broadly on account of the following factors :-

(i) Plaintiff admissions in the Plaint that its claim is for liquidated damages and impermissibility to take inconsistent stand that the suit is for recovery of CFC as debt in a suit for specific performance.

(ii) Nature of Plaintiff's claim for recovery of CFC as liquidated damages, which is yet to crystalize into a debt.

(iii) Non-exclusivity of arrangement for transportation of cargo between parties.

(iv) Pressing of application for injunction at the fag end of TSA's tenure.

(v) Impermissibility to grant injunction on account of alternate remedy of payment of compensation/damages.

(vi) Delay in seeking injunction as Plaintiff did not approach the Court immediately after Defendant stopped exporting the cargo.

13) It would be apposite to reproduce findings recorded by the learned Single Judge for declining temporary injunction, which read thus :-

> A. *First*, while the Plaintiff's submissions were entirely premised on the basis that clause 4.5 of the TSA was a take-or-pay clause breach of which (by the Defendant) would entitle the Plaintiff to payment of the compensatory freight charges (specified therein) as a debt, the Plaint is entirely bereft of any such pleading. The case pleaded in the Plaint is

infact to the contrary, as is evident from the following paragraphs of the Plaint, viz.

i. In paragraph 3

"Cause of Action

.....The Defendant's continuing failure and / or refusal to comply with its obligation to provide a minimum guaranteed volume of containers for transportation under the Agreement or, in the alternative, to pay the compensatory charges due under the Agreement is a breach of the Agreement. On account of the Defendant's breach of the Agreement, the Plaintiff has and is continuing to suffer loss. The total loss being suffered by the Plaintiff is not easily quantifiable. *Accordingly, the Plaintiff is claiming liquidated damages as set out in the Agreement for the period of breach* and, further, is seeking to specifically enforce the Agreement against the Defendant for the remainder of its term.....…"

ii. In paragraph 37

"..... The Plaintiff is entitled to recover dead freight charges from the time that the Defendant began acting in breach of the Agreement, and until the duration of the Agreement as that represents the genuine pre-estimate of the *damages which the Plaintiff would be incurred due to the breach of the Agreement* by the Defendants".

iii. In paragraph 38

"..... In any case, the Plaintiff has suffered actual, direct and indirect damages, which are attributable to the Defendants but not easily quantifiable, and therefore *the Plaintiff is entitled to the liquidated damages as set out in the Agreement.*"

B. *Second*, apart from clause 4.5, there is no other clause in the TSA which mentions a liquidated amount to be paid by the Defendant to the Plaintiff in case of breach of the TSA by the Defendant. Thus, given the specific pleadings in the Plaint (reproduced above), it would, in my view, therefore not be open for the Plaintiff to contend to the contrary or take a stand which is inconsistent with what has been expressly pleaded in the Plaint. Hence, I find the Defendant's reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Nagindas Ramdas*** to be well founded. Given that the Plaintiff has not sought to recover compensatory freight charges as a debt due *in praesenti* but has in fact sought to recover the compensatory freight charges as damages, the judgements in the case of ***White and Carter (Councils) Ltd.*** as also in the case of ***Cochin Chemical Refineries Ltd*** and ***P. R. &***

Co. will be of no assistance to the Plaintiff. Equally, the judgements in the case of ***Indiabulls Properties Ltd. Properties Ltd, Amoco (U.K.) Exploration Co. Ltd. & Ors, La-Fin Financial Services Ltd., Adhunik Steels Ltd.,*** and ***Kalidas Sadhu*** would also be of no assistance to the Plaintiff.

C. *Third*, The Plaintiff's reliance upon paragraphs 35 and 39 of the Plaint read with Prayer clause 50 (b), (d) and (e) to contend that the compensatory freight charges are sought to be recovered as a "debt" since the Plaintiff has sought specific performance of the TSA, is also entirely misplaced. Firstly, a conjoint reading of paragraphs 35 and 39 of the Plaint would make it clear that the Plaintiff is seeking specific performance of the TSA only from the date of filing the Suit till the term of the TSA and is seeking to recover the compensatory charges as damages for the period prior to filing of the Suit. *Secondly*, this contention is also contrary to what has been pleaded by the Plaintiff in paragraph 37 and 38 of the Plaint (quoted above). A plain reading of paragraphs 35 and 39 of the Plaint would therefore not, in my *prima facie* view *ipso facto* make the Plaintiff's claim one which is for enforcement of debt due under the TSA. A plain reading of the Plaint as a whole clearly suggests that the Plaintiff has sought to recover compensatory freight charges as damages and not as a debt which is presently due. It is well settled that the claim for the damages does not crystallise into a debt until such time that a decree is passed in favour of the Plaintiff.

D. *Fourth*, insofar as prayer clauses (a) and (b) of Interim Application are concerned, I find that the question of granting any interim relief does not arise essentially for the following reasons. (i) the TSA did not stipulate that the Defendant would exclusively ship Geo Textiles or, for that matter, all cargo exported to the USA only through the Plaintiff, (ii) the Plaintiff, who has admittedly not received any cargo since December 2022, has only sought an injunction against the Defendant shipping the Geo Textiles goods through a third party carrier at the fag end of the TSA and, (iii) Section 41(h)28 of the Specific Relief Act, 1963 bars the grant of an injunction in cases when an equally efficacious remedy is available. In the present case, admittedly, the Plaintiff has quantified and claimed damages occassioned on account of breach of the TSA. Thus, all these factors, even when considered individually, would, in my view, disentitle the Plaintiff to interim relief in terms of prayer clauses (a) and (b).

E. *Fifth*, on the aspect of delay, the judgment in ***Kewal Kiran Clothing Ltd.*** would be of no assistance to the Plaintiff since it was rendered in

> the context of a trademark infringement Suit, wherein the cause of action is of a continuous nature. Equally, the judgements in *Madamsetty Satyanarayana, Rajiv Sanghavi* and *Lindsay Petroleum Co.* would also be of no assistance to the Plaintiff since, the Plaintiff having sought specific performance of the TSA, it was incumbent upon the Plaintiff to have approached this Court with far greater dispatch, as held by the Hon'ble Supreme Court in the case of *Rajesh Kumar*. The Plaintiff has, in my view, not done so and hence is not entitled to interim relief in terms of prayer clause (a) and (b).

14) So far as the reasons recorded by the learned Single Judge in para 28-D of the Order are concerned, no serious grievance is raised before us as Plaintiff is now not pressing for injunction in terms of prayer clauses (a) and (b). Since TSA's tenure is over on 30 April 2025, Plaintiff cannot now seek injunction against Defendant from transporting cargo through other carrier. Plaintiff's entire thrust now is on seeking security from the Defendants to cover the claim for recovery of CFC, in respect of which, the Plaintiff believes that Defendant has no valid defence.

15) Mr. Tulzapurkar has clarified during the course of his submissions that the relief of security during pendency of suit is not sought by Plaintiff under provisions of Order XXXVIII Rule 5 of the Code. He would submit that since Plaintiff's claim in the suit is for specific performance of contract for payment of CFC, temporary injunction for provision of security is sought under the provisions of Order XXXIX Rule 2 of the Code. Therefore, for deciding Plaintiff's entitlement for injunction in terms of prayer clause (c) of the Application, it would be necessary to consider the provisions of Order XXXIX Rule 2 of the Code, which provide thus :-

> **2. Injunction to restrain repetition or continuance of breach.-**
>
> (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract or injury of a kind arising out of the same contract or relating to the same property or right.
>
> (2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit.

16) Perusal of the provisions of Rule 2 of Order XXXIX would indicate that the same empowers the Court to temporarily restrain the Defendant from committing breach of contract or injury complained of in a suit filed for restraining the Defendant from committing breach of contract or other injury, whether or not compensation is claimed in such suit. Sub-rule (2) of Rule 2 empowers the Court to grant injunction by imposing terms, *inter-alia* of giving security. Thus, Court's power to direct a party to give security under sub-Rule (2) of Order XXXIX Rule 2 is essentially to be exercised only while granting injunction under sub-Rule (1). This follows that in a case where the Court does not grant injunction under sub-Rule (1), there is no question of making an order for security under sub-Rule (2). This is because Court's power to direct a party to give security under sub-Rule (2) is clearly dependent on an order of injunction passed under sub-Rule (1). The condition of provision for security can be imposed by the Court only in aid of

grant of temporary injunction under sub-Rule (1). Therefore, in absence of an order of injunction being made under sub-Rule (1), there is no question of the Court independently exercising power under sub-Rule (2) by directing the party to give security. In other words, Court's power under sub-Rule (2) of Order XXXIX Rule 2 to impose condition of provision of security is not an independent standalone provision and the occasion for imposition of such condition does not arise when Court does not grant injunction in terms of sub-Rule (1). Sub-rule (2) is thus not an independent provision to secure Plaintiff's claim for performance of contract during pendency of the suit. An order directing provision of security can only be made where the Court thinks it appropriate to pass an order of injunction restraining the Defendant from committing breach of contract or injury to the Plaintiff. In a case where the Court either refuses to grant injunction or where there is no occasion for grant of injunction under sub-Rule (1), the question of making an order for grant of security under sub-Rule (2) would not arise.

17) As observed above, in the present case, the Defendant has stopped exporting goods through the Plaintiff from December 2022. The suit was filed by the Plaintiff on/or about 11 March 2024 and by the time the Plaintiff's application for temporary injunction was decided, the TSA's tenure was coming to an end by 30 April 2025. The impugned order has been passed on 26 March 2025 i.e. few days before the tenure of TSA was to come to an end on 30 April 2025. Plaintiff's argued case before us is that the

security was sought by the Plaintiff for ensuring performance of contractual obligation of Defendant to pay CFC under the TSA. However, even that alleged contractual obligation of the Defendant came to an end on 30 April 2025. Therefore, after 30 April 2025, there would have been no occasion for the Court to direct the Defendant to continue performing alleged contractual obligation of payment of CFC to the Plaintiff. Since application for temporary injunction was pressed at the fag end of the TSA's tenure on 26 March 2025, the question of grant of any injunction under sub-Rule (1) of Order XXXIX Rule 2 did not arise. If there was no occasion for the Court to grant of injunction in terms of sub-Rule (1) of Order XXXIX Rule 2, in our view, there was no question of the Court even considering grant of any order securing amount from the Defendants under sub-Rule (2).

18) As observed above, sub-rule (2) of Order XXXIX Rule 2 is not a standalone provision empowering the Court to direct provision of security by the Defendant by way of temporary injunction. The power under sub-Rule (2) of requiring Defendant to give security is only in the aid of grant of injunction under sub-Rule (1). This is because the relief which the Court can grant under sub-Rule (2) can only be in the form of a condition while granting injunction under sub-Rule (1). This is clear from use of the opening words of sub-Rule (2) that '*The Court may by order grant* ***such*** *injunction,* ***on such terms*** ….' 'Such injunction' means the injunction under sub-Rule (1). Therefore 'such terms' can be imposed under sub-Rule (2) only when

the Court grants 'such injunction' under sub-Rule (1). Grant of injunction under sub-rule (1) is thus *sine qua non* for imposition of condition of providing security under sub-Rule (2). If there is no injunction under sub-Rule (1), there is no question of imposing any condition under sub-Rule (2). This is the reason why sub-rule (2) cannot be an independent standalone provision requiring the Defendant to secure the amount payable to the Plaintiff. Such standalone provision can be traced in the provisions of Order XXXVIII Rule 5, under which the Court can direct the Defendant to furnish security. The provision reads thus :-

> **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.

Thus, Order XXXVIII Rule 5 is a provision under which a Plaintiff can apply to the Court seeking direction against the Defendant *inter alia* for provision of security. Such security under Order XXXVIII

Rule 5 is not dependent on an order of temporary injunction, which is the case under sub-Rule (2) of Order XXXIX Rule 2.

19) However, in the present case, the Plaintiff did not file application under Order XXXVIII Rule 5 but merely sought security in respect of its alleged claim for specific performance of TSA under Order XXXIX Rule 2. We are therefore of the view that once the occasion for grant of temporary injunction to restrain the Defendant from committing breach of TSA (even for payment of CFC) had almost elapsed as on the date of passing of impugned order, there could have been no occasion for the learned Single Judge to either consider or grant an order for providing security under sub-Rule (2) of Order XXXIX Rule 2.

20) Even otherwise, we are in broad agreement with the reasonings recorded by the learned Single Judge while rejecting Plaintiff's application for temporary injunction. It is strenuously submitted by Mr. Tulzapurkar that the learned Single Judge has erred in understanding the exact frame of the suit by treating the same as a claim for liquidated damages. It is contended before us that the TSA provided for alternate manner of performance and that therefore contractual obligation to pay CFC is just another form of performance of the contract, rather than it being a penalty for failure to export agreed volume of cargo. Reliance is placed on judgment of the Apex Court in ***M.L. Devender Singh*** (supra) in support of the contention that mere reflection of sum payable in the event of breach of promise does not make such sum a penalty or liquidated damages

and promise to pay such specified sum becomes an express contract to be performed by the parties. It is held in para-13 of the judgment as under :-

> 13. If the Legislative intent was that the mere proof that a sum is specified as liquidated damages or penalty for a breach should be enough to prove that a contract for the transfer of immovable property could be adequately compensated by the specified damages or penalty, Section 20 of the old Act will certainly become meaningless. It is true that Section 20 of the old Act does not mention the case of an express contract giving an option to a promisor to either carry out the contract to convey, or, in the alternative, to pay the sum specified, in which case the enforcement of the undertaking to make the payment would be an enforcement of the contract itself and no occasion for rebutting the presumption in the explanation to Section 21 would arise. In such cases the contract itself is specifically enforced when payment is directed in lieu of the conveyance to be made.

21) In the facts of some other case, what is sought to be contended by Mr. Tulzapurkar may have been correct and it is possible for a Court to hold that promise to pay CFC is an alternate method of performance. In every case agreement to pay specified sum upon failure to perform main contract, may not be in the nature of damages and in a given case, such agreement can also be an alternate form of performance of contract. However, in the facts of the present case, we are *prima facie* unable to hold so, at least at this stage. There is serious dispute amongst parties about the nature of obligation to pay CFC, which is the hotbed of controversy. It is Defendant's contention that contractual clause for payment of CFC is nothing but penalty/liquidated damages payable under Section 74 of the Contract Act. On the other hand, it is contended by the Plaintiff that the said contractual obligation to pay CFC is a mere alternate

method of performance of contract and that therefore Plaintiff's claim to recover CFC from Defendant is nothing but a claim for specific performance of TSA. In our view, however, it is not necessary to delve deeper into this controversy on account of pleadings in the Plaint. The learned Single Judge has already culled out averments of para-3 of the plaint, in which it is specifically pleaded that '*Accordingly, the Plaintiff is claiming liquidated damages as set out in the Agreement for the period of breach'*. Similar pleadings are repeated in paras-37 and 38 of the plaint where Plaintiff itself has given flavour of liquidated damages to its claim. To make things worse, para-7(f) of the plaint contains following pleadings :-

> This would be calculated on the basis of the difference between the minimum guaranteed cargo commitment and the actual cargo supplied and in the following manner:
>
> > i) USD 6500 per 40 feet container for year 1 being 01 May 2022 to 30 April 2023;
> > ii) USD 6000 per 40 feet container for year 2 being 01 May 2023 to 30 April 2024; and
> > iii) USD 5500 per 40 feet container for year 3 being 01 May 2024 to 30 April 2025.
>
> **These dead freight charges were a genuine and reasonable pre-estimate of the loss and damages that the Plaintiff would suffer in the event of the Defendant breaching its minimum guaranteed commitment under the Agreement**, in light of the nature and structure of the transaction including the further commitments with third parties and other arrangements that the Plaintiff was making in order to provide the Services under the Agreement for the agreed term.
>
> *(emphasis and underlining added)*

22) Strenuous attempts are made before us to distinguish Plaintiff's claim into two categories of (i) the pre-suit claim and (ii)

post suit claim, by suggesting that the pre-suit claim could be treated as claim for damages but claim post suit is for specific performance of contractual obligation. However, the pleadings in para-7(f) contain a clear admission that the entire claim comprising of '*These dead freight charges*' is towards '*genuine and reasonable pre-estimate of the loss and damages*'. The word '*these*' is used in para 7(f) of the plaint to describe whole of claim for the period from 1 May 2022 to 30 April 2025. Thus, what is sought to be argued before us is contrary to pleadings in the Plaint.

23) In our view, Plaintiff has made judicial admissions in the pleadings and the learned Single Judge has rightly relied upon the judgment of the Apex Court in ***Nagindas Ramdas*** (supra), in which it is held that judicial admissions, which are admissions given in pleadings, stand on a higher footing than evidentiary admissions and constitute waiver of proof. Plaintiff cannot now give a different flavour to its claim, whole of which is admitted to be a claim for liquidated damages in the plaint. Reliance in this regard by the Defendant on the judgment of ***T. D. Vivek Kumar*** (supra) is also apposite.

24) We are therefore of the *prima-facie* view that Plaintiff itself has described its claim as the one for liquidated damages in the plaint and cannot now take a *volte face* and contend that its claim post institution of the suit is for specific performance of contractual obligation to pay CFC. In our view, once it is held that the Plaintiff's pleaded case in the plaint is not for specific performance of

contractual obligation to pay CFC, but the same is for liquidated damages, Plaintiff faces twin difficulties. Firstly, it's very prayer for stopping Defendant from committing breach of the contract under Order XXXIX Rule 2 loses the basis. If the claim is not for specific performance of contractual obligations to pay CFC, there is no question of restraining the Defendant from committing breach of such contractual obligation by making an order under Order XXXIX Rule 2. Since such an injunction cannot be granted in the first place under sub-rule (1) of Order XXXIX Rule 2, the question of imposing any condition for grant of such injunction under sub-rule (2) does not even arise. Secondly, as rightly held by the learned Single Judge, Plaintiff's claim for liquidated damages would crystallize into a debt only when a decree is passed in its favour. Therefore, there is no question of making any provision for security in favour of the Plaintiff till its claim for liquidated damages is determined at the time of final hearing of the suit.

25) Plaintiff itself has pleaded in para-7(f) of the plaint that the freight charges are genuine and reasonable pre-estimate of loss and damages that the Plaintiff has suffered. Therefore, the provisions of Section 74 of the Contract Act would come into play and as held by the Apex Court in ***Kailash Nath Associates*** (supra), the Plaintiff will have to lead evidence to prove actual cause of loss. This is yet another reason why no order of injunction can be made in favour of the Plaintiff under sub-Rules 1 or 2 of Order XXXIX Rule 2.

26) We are also in agreement with the reasonings adopted by the learned Single Judge that Plaintiff did not approach the Court with sufficient alacrity for seeking injunctive relief against the Defendant. As pleaded in the Plaint, the Defendant stopped exporting cargo through the Plaintiff from December 2022. In that view of the matter, if Plaintiff really wanted to stop the Defendant from exporting its cargo through third party transporters, it should have applied for injunction immediately after December 2022.

27) Even if it is to be momentarily assumed that Plaintiff's claim for recovery of CFC under TSA is a claim for specific performance, Plaintiff has not shown urgency in approaching the Court for grant of injunctive relief in the form of security in its favour. It is only at the fag end of TSA that Plaintiff pressed its application for temporary injunction. The tenure of TSA was coming to an end on 30 April 2025 whereas order refusing injunction is passed by the learned Single Judge on 26 March 2025. Plaintiff thus whiled away time and did not file suit nor moved an application for temporary injunction with requisite dispatch. The learned Single Judge has rightly held the factor of delay against the Defendant. Though strenuous efforts are made to distinguish the judgment of the Apex Court in ***Rajesh Kumar*** (supra), in our view factor of delay can be held against the Plaintiff without considering the ratio of the judgment in ***Rajesh Kumar.*** Plaintiff contends that the factor of delay needs to be ignored in absence of cause of any prejudice to the Defendant and reliance in this regard is placed on the judgment of the Apex Court in ***Madamsetty Satyanarayana Versus. G. Yellogi***

Rao[23]. In our view, the said judgment would have no application to the peculiar facts of the present case, where the tenure of TSA was coming to an end on 30 April 2025 and pressing the application for temporary injunction at that point of time was itself a sufficient reason for declining the injunctive relief.

28) After considering the overall conspectus of the case, we are of the view that no case is made out for interference in a well-considered decision of the learned Single Judge. The use of discretion by the learned Single Judge in denying injunction in Plaintiff's favour is not arbitrary, capricious or perverse nor has the learned Single Judge ignored the settled law regulating grant or refusal of temporary injunction. In Full Bench Judgment of this Court in ***UTO Netherlands B.V. & Anr. Versus. Tilaknagar Industries Ltd.***[24] authored by one of us (*The Chief Justice*) it is held as under :-

> The scope and ambit of an appeal from an order passed by the trial Judge has already been delineated by the Supreme Court in WANDER LTD. (SUPRA), SHYAM SEL AND POWER LIMITED (SUPRA) and RAMAKANT AMBALAL CHOKSI (SUPRA). In view of aforesaid enunciation of law by Supreme Court, it is evident that the appellate court will not interfere with exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. **The Appellate Court while deciding an appeal, has to examine whether the discretion exercised is not arbitrary, capricious or contrary to the principles of law and the appellate Court may, in a given case, has to adjudicate on facts even in such discretionary orders.**
>
> *(emphasis added)*

[23] AIR 1965 SC 1405

[24] 2025 SCC Online BoM 2658

Applying the settled principles of scope of Appellate Court deciding an appeal against order granting or refusing to temporary injunction, we see no reason to interfere in exercise of discretion by the learned Single Judge.

29) We not only agree with the findings recorded by the learned Single Judge while rejecting Plaintiff's application for temporary injunction, but also have also added an additional reason of sub-Rule (2) of Order XXXIX Rule 2 not being an independent standalone provision for directing the Defendant to provide for security to cover Plaintiff's claim. The additional reason is necessitated in view of changed stance of the Plaintiff before us after expiry of tenure of TSA, where the only relief for provision of security by the Defendant is pressed before us. Both the sides have relied on several judgments referred to *supra*. However, considering the narrow scope involved in the appeal we find it unnecessary to burden this judgment by discussing the ratio of every judgment relied upon by them.

30) We accordingly find the impugned order passed by the learned Single Judge to be unexceptional. The Appeal, being devoid of merits, is accordingly **dismissed.**

[SANDEEP V. MARNE, J.] **[CHIEF JUSTICE]**