SPECIAL COURT JUDGMENTS

SR. NO.	CASE NO.	PARTY	JUDGE	JUDGMENTS DATED	PARAS
1	MA NO. 185 OF 1993	A K MENON, CUSTODIAN Vs. SBI CAPITAL MARKETS LTD. & ORS.	S N VARIAVA J.	24.10.1996	10, 13, 15, 20, 23, 25, 27, 28, 29, 30, 31, 34, 37, 40
2	MA NO. 198 OF 1993	PNB CAPITAL SERVICES LTD. VS. THE CUSTODIAN & ORS.	S N VARIAVA J.	03.02.1995	12, 15, 17
3	MA NO. 221 OF 1993	A K MENON, CUSTODIAN VS. HARSHAD S MEHTA & ANR.	S N VARIAVA J.	18.09.1995	49, 50, 59
4	MA NO. 255 OF 1994	HARSHAD S MEHTA VS. PNB MUTUAL FUND & ANR.	S N VARIAVA J.	15.09.1995	3, 6, 11, 12, 13, 14, 18
5	MA NO. 400 OF 1994	STANDARD CHARTERED BANK VS. CANBANK FINANCIAL SERVICES LTD. & ORS.	S N VARIAVA J.	28.03.1995	7, 8

Certified Copy Charges Rs. 5/-

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 185 OF 1993

A. K. Menon, Custodian .... Applicant

Vs.

1. SBI Capital Markets Ltd.
2. State Bank of India
3. Harshad S. Mehta .... Respondents

Mr. G. R. Joshi i/b P. M. Mithi & Co. for the Applicant.

Mr. Sunip Sen with Mr. V. R. Dond i/b Little & Co. for Respondent No. 1.

Mr. D. R. Zaiwalla with Mr. T. K. Cooper i/b Little & Co. for Respondent No. 2.

Mr. M. R. Jethmalani with Mr. A. D Chaugule i/b Kanga & Co. for Respondent No. 3.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA,
JUDGE, SPECIAL COURT.

24th October 1996.

ORAL ORDER :

1. By this Application the Custodian seeks directions against Respondent No. 1 to hand over to him 3.71 crore Units or the market value thereof along with dividends receivable thereon at the rate of Rs. 2.5 per Unit for the year ended June 1992 and Rs. 2.6 per Unit for the year ended June 1993. The 1st Respondents are a Company which is wholly owned by the 2nd Respondents. The 2nd Respondents are the State Bank of India. The 3rd Respondent is a Notified Party. The claim of the Custodian is on the footing that the 3.71

crore Units belong to the 3rd Respondent.

2. Before facts are set out a submission of Mr. Zaiwalla must be considered. Mr. Zaiwalla submitted that this is not a matter which can be decided on Affidavits. He submitted that this is a matter which must be decided on evidence. He submitted that according to Respondent Nos. 1 and 2 the 3rd Respondent merely acted as a broker in these transactions. He submitted that the question as to whether or not the 3rd Respondent acted as a broker and/or principal has to be decided on evidence. He submitted that the question as to whether or not the amounts used for payment for these Units have come out of the account of the 3rd Respondent cannot be decided on Affidavit. He submitted that the 3rd Respondent must step into the witness box and show how his monies have been used for payment of the securities. He submitted that this would enable the 2nd Respondents to cross-examine the 3rd Respondent and show that these are not his monies.

3. Mr. Zaiwalla further submitted that one of the aspects which the 2nd Respondents desire to establish is collusion between the 3rd Respondent and an employee of the 2nd Respondent viz. one Mr. Sitaraman. He submitted that this aspect of collusion would also require evidence.

4. I am unable to accept the submission of Mr. Zaiwalla.

5. This Court has been established to try both civil and criminal matters. One of the objects for establishment

of this Court is to ensure speedy disposal of matters. With this view in mind the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter called the said Act) provides that the Code of Civil Procedure does not apply to this Court. This Court has to evolve its procedure keeping in mind principles of natural Justice.

6. This Court has pending before it 20 criminal cases. All criminal matters have to be tried as per the Code of Criminal Procedure. Each trial is likely to take time. There are also pending 65 Suits. The 65 Suits are also matters where evidence is to be led. In other matters, if facts are admitted or can be clearly established from the material before the Court, this Court cannot waste time by allowing parties to lead evidence merely because they want the luxury of a lengthy trial and/or because they want to delay.

7. This Court has before it Reports prepared by the Joint Parliamentary Committee. Parties have deposed before the Joint Parliamentary Committee on oath. It's report is a Public Document. Similarly Court has before it the Report of the Janakiraman Committee. As has been held by this Court in its Order dated 9th/10th February 1995 in Suit No. 13 of 1994 that Report is also a Public Document. These Public Documents throw light and establish the manner in which certain Banks, including Respondent Nos. 1 and 2 have undertaken security transactions and maintained records. The findings in these Reports are fully corroborated by admitted documents and material on record in this matter. Court also

has before it admitted correspondence. This correspondence was carried on at a time when there was no controversy. The correspondence is addressed to statutory authorities like the Reserve Bank of India and the Custodian. It needs not be stated that in replying to such authorities there was absolute necessity to speak the truth. This correspondence also discloses facts. Facts are also corroborated by answers, to questions from Court, fairly given by Counsel after taking instructions in Court. Even without the answers, the material on record, clearly leads to the conclusion drawn hereafter.

8. Further Court takes, where necessary, assistance from experts. In this case Court has had a firm of reputed Chartered Accountants to look into various aspects. They have done so and put up a Report. In such circumstances, in my view no evidence is necessary.

9. The aspect of collusion between Respondent No. 3 and Mr. Sitaraman is of no relevance in this Application. If at all it would be relevant in Suit No. 41 of 1995 filed by Respondent No. 2 against Respondent No. 3.

10. Further in my view the question whether the 3rd Respondent was a principal or acted as an agent, does not need any evidence. This Court has seen how these transactions are undertaken. This question is dealt with in greater detail hereafter. However at this stage it is sufficient to say that this depends entirely on who paid for the securities. An agent would never pay for the security. If the monies for these securities have come out of the Account of the 3rd Respondent then this would be the

securities of the 3rd Respondent. If not, then these are not securities of the 3rd Respondent. In the last four years that this Court has functioned, it has seen that the Contract Note has always been in Form A. In spite of Contract Note being in Form A, many Banks have honestly come to Court and admitted that the Notified Party was the Principal. Thus the Form of the Contract Note is of no relevance.

11. The facts are as follows :

The Custodian has based this Application upon a letter dated 22nd February 1993 received from the 3rd Respondent. In the letter the 3rd Respondent claims that the 1st Respondents had to deliver 3.70 crore Units of Unit Trust of India to the 3rd Respondent.

12. The Custodian by his letter dated 29th April 1993 asks the 1st Respondents to comment on the claim of the 3rd Respondent. By their letter dated 29th April 1993 the 1st Respondents, inter alia, state as follows :-

> "We have already advised CBI and RBI in detail in regard to the excess of 3.71 crore Units (f.v. Rs. 37.10 cr.) in our stocks. A copy of our letter No. TR/SPL/130 dated January 12, 1993 addressed to Reserve Bank of India in this regard is enclosed for your information. As the excess position in Units had arisen through BRs received by us from SBI, Bombay Main Branch, we have reflected the book value of excess holdings amounting to Rs. 51.49 crore as liability to SBI in our accounts and

informed SBI accordingly. We await advices from SBI on the actual disposal of this sum."

With this letter the 1st Respondents also annexed a copy of their letter dated 12th January 1993 to the Reserve Bank of India. What the 1st Respondents have stated to the Reserve Bank of India is very relevant because now in arguments a contrary position is being sought to be taken. The relevant portion reads as follows :-

> " As you are aware, our Securities transactions were conducted through the State Bank of India, Bombay Main Branch, Securities Division and they used to receive, retain custody and effect deliveries of all Bank Receipts/Physical scrips on our behalf.
>
> 2. In connection with the usual annual inter-party settlement of units transactions due in May 1992, we took an inventory of the BRs and Physical Certificates in Units standing in the name of SBICAP that were held in the custody of SBI, Bombay Main Branch on 21-5-92. As per the inventory so made, the above Branch delivered to us Bank Receipts, Physical Certificates, etc. in Units relating to SBICAP. All the BRs standing in the name of SBICAP so received from SBI, Bombay Main Branch, were presented by us to the respective issuers in the course of the units settlement

that took place in the last week of May 1992 and these were accepted by the respective issuers.

3. Subsequent to the units settlement, in the course of our Annual Statutory Audit that took about 5 to 6 months, while reconciling our Units Investment Register, we noticed that three Bank Receipts received from SBI, Bombay Main Branch, in the lot delivered to us, were in excess of our stocks arrived at from the Investment Register. Although these BRs had been issued in the name of SBICAP, the transaction amounts thereof were not found debited to our account with SBI, Bombay Main Branch. The three BRs in question were :-

	Particulars	No. of Units in crores	Face Value Rs./Cr.
i)	BR No. 49 dated 29-7-91 of BOI Finance	0.50	5.00
ii)	BR No. 1398 dated 30-12-91 of Canbank Financial Services Limited	2.00	20.00
iii)	BR No. 1616 dated 5-3-92 of Canbank Financial Services Ltd.	1.00	10.00
		3.50	35.00

Photocopies of the three BRs are enclosed for your information.

4. While accepting delivery of our securities from SBI, Bombay Main Branch on 21-05-92,

we were also delivered physical Unit Certificates of 14 lac units against actual purchase of 13 lac Units effected by us on 13-4-92. Apparently, the counter-party (ANZ Bank) and/or the broker (Harshad S. Mehta) delivered the excess 1 lac Units as they did not have the required small lots on the transaction date. Accordingly, we are holding these Units also in excess.

5. In this connection, it is observed from the verifications of the relative transactions that -

(i) We had issued a BR No. 172 dated 31st August 1991 in favour of NHB for sale of 5 lac Units which has been returned to us, although we have not made any corresponding repayment to NHB, and

(ii) we had issued a BR No. 181 dated 5th September, 1991 for 25 lac Units in favour of Standard Chartered Bank and SBI, Bombay Main Branch has reduced the BR to 20 lac Units although we have not effected any payment to Stanchart for re-purchase of 5 lac Units.

(Photocopies of these BRs are also enclosed)

6. The above items together account for 361 lac Units (Rs. 36.10 crores in face value). However, as per the reconciliation of our registers carried out during the audit, the aggregate excess physical position in units amounted to 371 lac Units (Rs. 37.10 crores in face value). We have not been able

to locate the reasons for the differences of 10 lac Units till now. We note to advise you as and when we are able to locate the details in respect of these 10 lac Units."

13. Thus it is to be seen that all Bankers Receipts for which the 1st Respondents had actually entered into transactions were presented in the course of Units Settlement in May 1992. They were all accepted by the respective users. It is to be seen that after these Units settlement and in the course of a statutory audit which took 5 to 6 months it was noticed that the 1st Respondents had received three Bankers Receipts bearing Nos. 49, 1398 and 1616. It is to be seen that even though these Bankers Receipts were in the name of the 1st Respondents the amounts for these Bankers Receipts were admittedly not debited into the Account of the 1st Respondents. Therefore, admittedly the 1st Respondents had not paid for the securities covered by these Bankers Receipts. Admittedly, therefore, the 1st Respondents neither had any right to the securities nor to the value of the securities covered by these Bankers Receipts. These 3 Bankers Receipts are for 3.50 crore Units.

14. Apart from the above, admittedly an excess of 1 lac Units was received either from ANZ Bank or from Respondent No. 3. It must be stated that ANZ Bank has not made any claim to these Units. Further the 1st Respondents had excess of 5 lac Units under Bankers Receipt No. 172. Even though they did not make repayment nor delivered the Units

the Bankers Receipt had somehow been returned to them. Respondent No. 1 had a further excess of 5 lac Units in the transaction covered by BR No. 181.

15. Thus in transaction where the 1st Respondents had not made any payments, the 1st Respondents had an excess of 3.61 crore Units. They also had an excess of 10 lac Units which they were not in a position to understand how they received. The fact remains that these were all excess Units in the hands of the 1st Respondents. These Units were not received by them under any transaction of their own and certainly not received by them, as now claimed, under certain transactions in respect of 7.5 crore Units.

16. As this case involved looking into transactions and Accounts, by an Order dated 22nd February 1994, for reasons set out therein the Court directed the Custodian to appoint independent Chartered Accountants or a suitable person or agency to investigate into the Accounts of Respondent Nos. 1 and 3 with the 2nd Respondents. The Chartered Accountants were and to submit a Report to this Court in respect of the ownership of 3.70 crore Units. The Custodian appointed the firm of Kalyaniwalla & Mistry, Auditors to investigate. Kalyaniwalla & Mistry have now submitted a Report. Parties have filed their Affidavits on the Report. The Report confirms the case made out by the 1st Respondents in their letter dated 12th January 1993 to the Reserve Bank of India. The Report confirms the fact that the 1st Respondents had not placed any Orders nor made any

payments for the transactions covered by Bankers Receipt Nos. 49, 1398 and 1616. Thus neither the securities under these Bankers Receipts nor the value of the securities belonged to the 1st Respondents.

17. It must be mentioned, in fairness to Mr. Sen that it was not suggested that Bankers Receipt Nos. 49, 1398 and 1616 were in respect of transactions of the 1st Respondents. It was fairly admitted that the 1st Respondents' Account with the 2nd Respondents was not debited with amounts due under these Bankers Receipts.

18. Mr. Sen however submitted that the 1st Respondents had placed Orders with the 2nd Respondents for the following transactions :

P.O.No.	Date	No. of Units in crore	Value	Counter Party
318A	29-7-91	.25	3,37,75,000	UCO Bank
559/562 568/569	2-9-91	5.00	67,83,00,000	NHB
4327/28/ 39/40	31-3-92	1.25	18,75,00,000	Canfina
4387/81 4389/90	6-4-92	1.00	15,15,00,000	Canfina
		7.50	105,10,75,000	

Mr. Sen submitted that even though the 2nd Respondents had debited the 1st Respondents' Account for the sum of Rs. 105,10,75,000/-, the 2nd Respondents did not purchase the Units covered by these transactions. He submitted that the 2nd Respondents did not deliver the 7.50 crore Units or any

part thereof to the 1st Respondents under these transactions. Mr. Sen submitted that as these 7.50 crore Units were not delivered the 1st Respondents were entitled to assume that the excess delivered Units were towards these transactions.

19. What this argument fails to take into account is the admitted fact that as these transactions had never taken place, the 2nd Respondents subsequently credited the 1st Respondents' Account with the sum of Rs. 105,10,75,000/-. Thus these transactions stood cancelled/squared off. Nothing was now payable/deliverable under these transactions. That the 1st Respondents knew that these were not against these transactions is clear from the letter dated 12th January 1993. In spite of the fact that these Bankers Receipts had nothing to do with those transactions, the 1st Respondents purported to adjust the value of these 3.5 crore Units against the sum of Rs. 105,10,75,000/- and purported to give to the 2nd Respondents a credit in a sum of Rs. 51,99,30,530/-.

20. Mr. Sen on behalf of the 1st Respondents sought to justify the action of the 1st Respondents. He submitted that as these 3.5 crore Units were lying with the 1st Respondents, they obviously had to be against the transactions under which Rs. 105,10,75,000/- was paid. In my view, this is an argument which merely needed to be stated to be rejected. It being absolutely clear that these 3.5 crore Units or the value thereof are under Bankers Receipt Nos. 49, 1398 and 1616. None of these Bankers Receipts are in respect of the

transactions for which Rs. 105,10,75,000/- had been paid. The dates of these Bankers Receipts and more importantly the quantities are completely different. Further as seen above, the transactions of 7.5 crore Units were cancelled/squared off by the 2nd Respondents. The amounts were recredited into the accounts of the 1st Respondents. The 1st Respondents had admittedly not paid for the transactions under Bankers Receipt Nos. 49, 1398 and 1616. They therefore could in no manner claim any ownership to the Units covered by these Bankers Receipts. They could therefore not purport to give any benefit to their parent Company by adjusting the value of these 3.5 crore Units against the sum of Rs. 105,10,75,000/- which had been recredited into their account. By so doing they had sought to appropriate somebody else's property i.e. the property to which they had absolutely no title and give benefit to their parent Company. The 1st Respondents were wrongfully converting somebody else's property.

21. Mr. Sen next submitted that in any event the 3rd Respondent has no right to these 3.5 crore Units. He submitted that it is for the 3rd Respondent to establish that he has a right to these 3.5 crore Units. He submitted that so far as the 1st Respondents are concerned, they always dealt only through the 2nd Respondents. He submitted that in respect of these 3.5 crore Units there had been no transaction between the 1st Respondents and the 3rd Respondent on a principal to principal basis. He submitted that the 3.5 crore Units belonged to BOI Finance Limited and

Canfina resp. in the proportion of 0.50 crores and 3 crores respectively. He submitted that if the 3rd Respondent had no right to these Units then neither the 3rd Respondent nor the Custodian could claim these Units from the 1st Respondents. He submitted that it was only the real owner who could make a claim. He submitted that if the real owner had not made a claim, this Court could not call upon the 1st Respondents to hand over these Units to the Custodian. He submitted that so long as the real owner made no claim, Court was not concerned with what the 1st Respondents did with these Units on the value thereof. He submitted that in that case even though a wrong appropriation/conversion may have taken place the Court could not sit in Judgment over that. He submitted that for this reason also the Court could not direct the 1st Respondents to bring back the Units.

22. Mr. Sen is right to the extent that if it is not shown that these are attached assets then this Court will not be concerned with the question as to whom they belong and how the 1st Respondents dealt with them. However if it is shown to the Court that the 3.5 crore Units or any part thereof are attached assets then the 1st Respondents cannot be allowed to get away. If it is shown to the Court that these Units or any part thereof are attached assets then the 1st Respondents must be directed to bring back those Units into Court. Whatever claim or adjustment the 1st Respondents have to make with the 2nd Respondents would then be an internal matter between the 1st and 2nd Respondents. The

mere fact that the 1st Respondents had wrongly appropriated/converted and given credit to the 2nd Respondents would then be no defence against the claim of the Custodian.

23. The question then is whether these Units or any part thereof belong to the 3rd Respondent. On this aspect the Auditors have given their Report. Before the Report of the Auditors is looked at one must see what the 3rd Respondent has himself claimed. The 3rd Respondent in his Affidavit has claimed that he had a large number of transactions and volume of business, both as a broker and as a principal with Respondent Nos. 1 and 2. He has claimed that Respondent No. 2 were maintaining two Current Accounts at the Main Branch at Bombay, one of which was bearing No. 4/8710. He has claimed that Respondent No. 2 had offered him a facility to undertake ~~these~~ his money market transactions as and by way of a routing facility. He has claimed that under this facility his money market transactions were being carried out by Respondent No. 2 inasmuch as they were receiving and making payments on his behalf and they were receiving and tendering deliveries on his behalf. He has claimed that under these arrangements Respondent No. 2 also used to keep custody of his assets, including physical and Bank Receipts. He has claimed that the Bankers Receipts would be drawn in favour of either Respondent No. 1 or Respondent No. 2 or in the name of some other client of his. He has claimed that all assets covered by these Bank Receipts were

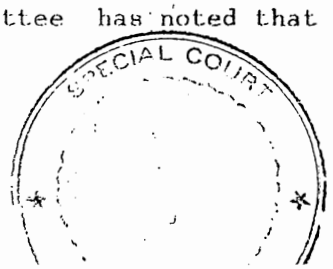
his and were being utilised for performance of his transactions.

24. The 2nd Respondents have filed a Rejoinder dated 20th April 1996 to the Affidavit of the 3rd Respondent. The 2nd Respondents have denied that they had given any such routing facility to the 3rd Respondent. Mr. Zarwalla sought to submit that the denial in the Affidavit must be taken in the context of the 2nd Respondents claim that there was collusion between the 3rd Respondent and the employee of the 2nd Respondents i.e. Mr. Sitaraman. He submitted that the denial only meant that officially that no such routing facility had been granted. When asked by Court, whether factually, in collusion with Sitaraman such a facility was being enjoyed or not, no clear answer was given. In my view it is amply clear that the 3rd Respondent was enjoying such a routing facility. That the 3rd Respondent was enjoying such a routing facility is borne out from public documents like the Janakiraman Committee Report and the Report of the Joint Parliamentary Committee.

25. That Banks so lent their names and carried on transactions of the brokers has been noted by the Joint Parliamentary Committee in its Report. In para 12.24 the Joint Parliamentary Committee has noted that many brokers, including the 3rd Respondent, used banks as routing banks to carry on a large volume of securities transactions on their behalf. The Joint Parliamentary Committee has noted that the banks provided special privilege to few brokers by lending

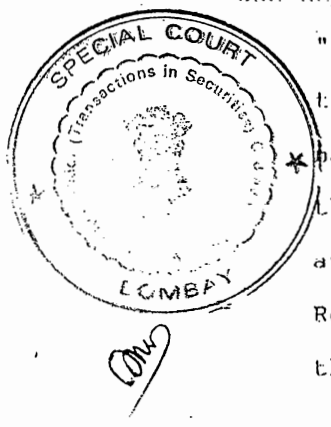
their names to the transactions of those brokers and that the banks thus exposed themselves to risk by irregularly issuing BR and SGL Transfer Forms which always stood in the name of the bank. In para 12.25 the Joint Parliamentary Committee has noted the fact that the Account of the broker was being used as a conduit for diversion of funds in the guise of the securities transactions. In para 12.27 the Joint Parliamentary Committee has also noted an unhealthy accounting practice of netting was being followed. The Committee has noted that this camouflaged the true nature of the various transactions. The Joint Parliamentary Committee has noted that if the bank had put through several purchases/sales transactions of different securities during a day only the net position was then reflected in the account. The Joint Parliamentary Committee has noted that by this method details of various transactions were being concealed. The Joint Parliamentary Committee has noted that by this method the loss incurred in individual deals and the reasons for this loss / UTIS being concealed. The Joint Parliamentary Committee has noted that this practice prevented scrutiny of the genuineness of the deals.

26. At this stage, it will also be pertinent to see what Janakiraman Committee has to say about the transactions of the 1st Respondents. The Janakiraman Committee notes that in respect of these transactions a deal book would be prepared and the brokers note subsequently issued. The Janakiraman Committee has noted that the broker's note may



not contain the counter-party name. The Janakiraman Committee has noted that inasmuch as 152 contracts had been entered into during which period the 3rd Respondent has acted as broker. The Janakiraman Committee has noted that deals were being entered into the Transaction Ledger. The Janakiraman Committee has noted that the 1st Respondent was maintaining an account with the 2nd Respondents at its Bombay Main Branch. The Committee has noted that the Bombay Main Branch received from the broker the securities addressed to the 1st Respondents and handed over cheques favouring the counter-party banks through the broker. The Committee has noted that the 2nd Respondents would debit or credit the account of the 1st Respondents. The Committee has noted that in several transactions the counter-party was merely in name as no such transaction existed in the books of those counter-parties. The Committee has noted that in several of these transactions the credit had been given to the account of the 3rd Respondent in the Main Branch of the 2nd Respondents.

27. The Janakiraman Committee on pages 271 and 272 of the Report holds as follows :-



"(b) The 'routing' banks purchased securities in their own name and sold securities in their own name without indicating that they were acting for the brokers. Where securities were not readily available, they even issued their own Bankers Receipts. The cost of the purchase was debited to the broker's account and the sale proceeds were

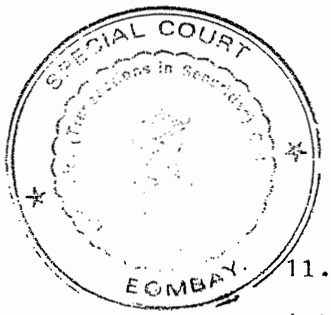
credited to the broker's account. The major 'routine' banks and the brokers for whom they acted are as under :

Bank	Brokers
Andhra Bank	i) Hiten P. Dalal
	ii) Batliwala & Karani
	iii) M/s. V. B. Desai
	iv) N. K. Aggarwala & Co.
	v) Mukesh Babu
Bank of Karad Ltd.	i) A. D. Narottam
	ii) Excel & Co.
	iii) Bhupen Champaklal Devidas
	iv) Darashaw and Co.
State Bank of India	Harshad S. Mehta.
UCO Bank	Harshad S. Mehta
State Bank of Saurashtra	Harshad S. Mehta
Bank of Madura	Chandrakala & Co.
Karnataka Bank, Syndicate Bank	Fairgrowth Financial Services Ltd. and Fairgrowth Investments Ltd.
Vijay Bank	Kotak Mahindra Finance Ltd. and Komaf Financial Services Ltd.

10. Brokers also arranged contracts with banks where the name of a bank was given as a counterparty selling bank without the knowledge of the bank concerned. The proceeds received from the

purchasing bank in the form of bankers' cheques in the name of the alleged counterparty bank were credited by that bank to the broker's account by virtue of an existing arrangement. Thus, the purchasing bank was unaware that it was in fact dealing with a broker and not with a counterparty bank. When delivery was not effected for securities for which payments had been made, liability was denied by the bank whose name was shown as the counterparty bank. A significant part of the problem exposure has arisen on this account. Some of the brokers and the banks with whom they had such arrangements were as under:

Broker	Bank
Harshad S. Mehta	State Bank of India
	State Bank of Saurashtra
	UCO Bank
	ANZ Grindlays Bank
Hiten P. Dalal	Andhra Bank
N. K. Aggarwala & Co.	Hongkong & Shanghai Banking Corporation Ltd.



11. The role of a broker is to act as an intermediary between the purchasing bank and the selling bank. However, in a large number of cases, brokers started dealing on their own account. This is reflected in the fact that there were wide

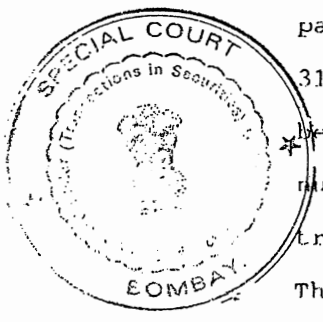
variations between the rates at which the transactions were recorded by the purchasing bank and the rates at which the transactions were recorded by the selling bank and the difference in rates running sometimes into crores of rupees were recovered from or paid to brokers."

28. All this clearly shows that the banks, both the 1st Respondents and the 2nd Respondents were merely lending their names. In many instances the transactions were not theirs. The transactions were the transactions of the brokers but carried out in their name. This is also clear from facts set out hereafter i.e. in respect of many transactions, payments and receipts have ultimately been credited and debited into account of Respondent No. 3, i.e. Account No. 4/8710.

29. The question as to whose transaction it really was would depend on the question as to who had paid for the securities covered by the Bankers Receipt or the SGL Transfer Form. As seen above the cheque will have been issued by the 2nd Respondents. However the question would be whether the amount of that cheque came out of an account of the 2nd Respondents themselves or from the account of the 3rd Respondent. It is clear that if a person/body was merely acting as a broker, he/they would not make payment for the concerned security. Payment will always be made by the principal party only. If the Bank had acted as principal party then the amount of the cheque would be debited into

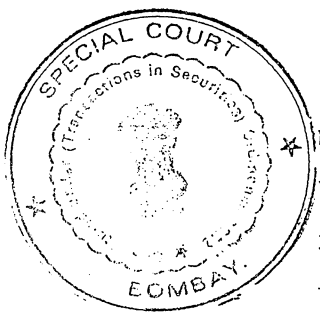
their own account. If however the 2nd Respondents were acting for and on behalf of the broker, then entries for these transactions were first being made into a waste book, which the Court has seen. Thereafter only the total debit or credit was entered into the 3rd Respondent's account. Thus by this method, entries in respect of all transactions were not being made in any book statutorily required to be maintained. However by total debit or credit being entered into account of the 3rd Respondent, in effect payments were made from or credited into account of the 3nd Respondent.

30. Thus the question as to whom the securities covered by Bankers Receipt Nos. 49, 1398 and 1616 belong to can easily be resolved by seeing who made payments for those securities. It must be remembered that BOI Finance Limited and Canfina when presented with these Bankers Receipts, honoured them. Thus it is clear that BOI Finance Limited and Canfina had received the consideration under these Bankers Receipts. The persons whose account is debited with those payments is the real owner.



31. This Court, during the last four years that it has been operating, has also seen the manner in which a large number of such transactions have been put through. In all transactions the broker would have issued a Contract Note. The Contract Notes can be of two types. Form A is a form which is used when the broker is acting as a broker on behalf of somebody. Form B is the form where the broker has acted as a principal. In the last four years the Court has not

seen a single Contract Note in Form B. Court has seen that all Contract Notes issued by all brokers are always in Form A. In spite of the Contract Note being in Form A, a large number of Banks have honestly come before this Court and admitted that the broker had acted as a principal. A large number of other Banks and Institutions have also taken a contrary stand. The Court had occasion to consider the question whether merely because the Contract Note was in Form A that necessarily mean that the person was a broker. In an Order dated 19th August 1995 in Chamber Summons No. 34 of 1994 in Misc. Application No. 219 of 1993 this Court has held that merely because a Contract Note is in Form A that by itself does not mean that the party has not acted as a principal. Thereafter in Judgment dated 18th September 1995 in Misc. Application No. 221 of 1993 this Court again held that the question as to whether he has acted as a principal or a broker will depend upon whether he had made payments for the securities or not. As stated above it is quite clear that if the party had merely acted as a broker he would never pay the consideration amount. It is only the principal party to the contract who would pay the consideration amount. Court has seen that in many matters even though the Contract Note was in Form A, the consideration had been paid by the broker.



32. Mr. Zaiwalla relied upon Sections 91 and 92 of the Indian Evidence Act, 1872. He submitted that only the Contract Note can be looked at. He submitted that if the Contract Note showed the person to be a broker then a

contrary position could not be established in a Court of Law. In my view proviso (2) to Section 92 applies here. The existence of a separate oral agreement in a matter on which the document is silent can always be proved. As seen above in all such cases the understanding between the parties was that the banks would be lending their names and would effect business of the broker in their name. Also this was the practice or custom which was being followed on a large scale by a bank. This would thus also fall under proviso (5) to Section 92. As stated above, both the Janakiraman Committee and the Joint Parliamentary Committee have taken note of this practice. Also the factual position as set out hereafter shows that after debiting and crediting entries in respect of various transactions the balance has been put into the account of Respondent No. 3.

33. Very fairly, on a question from Court it is admitted that the 2nd Respondents were maintaining what is known as a Waste Book. That Waste Book was shown to Court. In that Waste Book details of amounts under various purchase and sale transactions were entered. At the end of the day the purchase and sale transactions were netted off. Only the netted figure was then entered in the account. The 2nd Respondents were thus following the practice which has been deprecated by the Joint Parliamentary Committee. It was following the unhealthy practice of camouflaging the true nature of the transactions.

34. Mr. Zaiwalla submitted that there was nothing to show that the amounts paid for Bankers Receipt Nos. 49, 1398

and 1616 were debited into the account of Respondent No. 3. Mr. Zaiwalla submitted that merely because the net amounts were credited and/or debited into the account of Respondent No.3 did not mean that these amounts were debited into that account. I am unable to accept this submission. It is fairly admitted that the netted figure was put into the account of the 3rd Respondent. The netted figure was arrived at, by taking into consideration the various purchase and sale transactions of those days. Thus the netted figure consists of the debits and credits as appearing in the Waste Book. The debits and credits are in respect of various transactions including the transactions covered by Bankers Receipt Nos. 49, 1398 and 1616. Thus in effect by putting, into the account of Respondent No. 3, the netted figure, debit and/or credit was effectually being given for the concerned transactions. The denial in the Affidavit-in-Reply of the 2nd Respondents that the amounts under Bankers Receipt Nos. 49 and 1398 have come out of the account of the 3rd Respondent is to say the least incorrect. As stated above Mr. Zaiwalla on a question from Court very fairly admitted that the netted figure had been put into the account of the 3rd Respondent on the days when the transactions under Bankers Receipt Nos. 49 and 1398 took place and the netted figure took into account the figures in respect of these two Bankers Receipts.

35. Thus it is very clear that payment for Bankers Receipt Nos. 49 and 1398 has been debited into the account

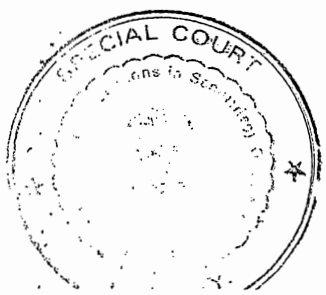
of the 3rd Respondent. Of course the account of the 3rd Respondent would not reflect these debits. This because the 2nd Respondents followed the unhealthy practice of only putting in the netted figures. The 2nd Respondents were thus hiding from scrutiny the various purchase and sale transactions. But it is also clear that it is the 3rd Respondent who has been debited with and who has thus paid consideration for those 2 Bankers Receipts i.e. Bankers Receipt No. 49 and 1398.

36. Mr. Zaiwalla however submitted that it could not be said that the 3rd Respondent had paid for these 2 Bankers Receipts. He submitted that there was a fraud played on the 2nd Respondents by the 3rd Respondent in collusion with one Mr. Sitaraman. He submitted that various amounts received from the 1st Respondents, under transactions of the 1st Respondents were wrongly credited into Waste Book account of the 3rd Respondent. Mr. Zaiwalla submitted that what the 3rd Respondent was doing was using monies of the 1st and 2nd Respondents. He submitted that for this reason it could not be said that the monies, which were used for payment of these 2 Bankers Receipts were monies belonging to the 3rd Respondent. He submitted that, as monies of the 1st or 2nd Respondents were used, any property/security purchased by the use of such monies also belonged to the 1st or the 2nd Respondents. Mr. Zaiwalla submitted that from this point of view also it would be clear that the 3rd Respondent was merely acting as a broker for these parties.

37. That monies of the 1st and 2nd Respondents may have been siphoned is being denied by the 3rd Respondent. The 2nd Respondents have filed Suit No. 41 of 1995 for recovery of amounts from the 3rd Respondent. This question will have to be decided therein. However apart from making this bold allegation Mr. Zaiwalla is not in a position to show that any specific money of the 1st or 2nd Respondents has been used for payment of the securities under Bankers Receipt Nos. 49 and 1398. As seen above, what has been happening is that monies were credited or debited in the Waste Book Account. From the Waste Book Account the net balances was being credited or debited into the account of the 3rd Respondent. These appear to be under various transactions. There are a large number of transactions. Many of the entries are in respect of genuine transactions. Today the 2nd Respondents are not in a position to show which transaction is not genuine and which transactions have been shown only for purposes of siphoning out monies as claimed. Also to be remembered that the transactions under Bankers Receipt Nos. 49, 1398 and 1616 are obviously genuine. Payment has been made to the counter-party Banks. Those Banks have honoured the Bankers Receipts when presented and delivered the Units.

38. Even otherwise, even if Mr Zaiwalla had been in a position to show, that monies of Respondent Nos. 1 and 2 were siphoned off, it cannot help Respondent Nos. 1 and 2 in this case. They would then have to make a claim against

Respondent No. 3 which, they have done. The properties purchased would not become properties of the Banks. The only right of the 1st or 2nd Respondents would be for monies had and received. Once they were credited into the account of the 3rd Respondent, it could no longer be said that these remained monies of the 1st or the 2nd Respondents. The claim of the 1st and 2nd Respondents, if any, can only be a claim for return of monies. As stated above the 2nd Respondents have already filed Suit No. 41 of 1995 for recovery of the amounts claimed to have been wrongly credited into the account of the 3rd Respondent. In that Suit the claim is of Rs. 105,10,75,000/-. Thus, it is clear that the 2nd Respondents themselves consider their claim to be a mere money claim. I am thus unable to accept this submission of Mr. Zaiwalla that the securities would become securities of the 2nd Respondents. What has happened is very analogous to the following example. If a bank were to give a loan to a particular person and credit his account with the amount of that loan. Then some property is bought from that loan amount. It could never be said that the property belongs to the bank. All that the bank would have is a claim for the return of money. In this case even if Mr. Zaiwalla's case is correct, this is exactly what has happened. Amounts may have been wrongly credited into the account of the 3rd Respondent. Yet once they were credited, the only right, if any, is to return of monies. No claim can be made to securities purchased by use of such monies.



39. It must be mentioned that in support of the argument that the securities belong to the 2nd Respondents, Mr. Zaiwalla has relied upon Sections 196 and 197 of the Contract Act which reads as follows :-

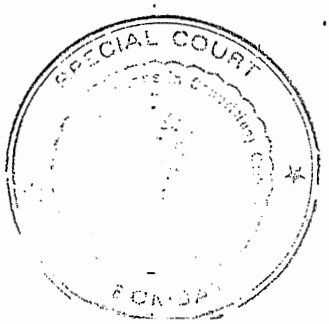
> "196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.
>
> 197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done."

Mr. Zaiwalla submitted that the 3rd Respondent had acted merely as a broker. He submitted that even if it was held that the transactions were without the knowledge or authority of the 1st Respondents, still the 1st Respondents could ratify. He submitted that presenting the 3 Bankers Receipts, the 1st Respondents had ratified. He submitted that on such ratification the securities belonged to the 1st Respondents.

40. In my view this argument of Mr. Zaiwalla merely needs to be stated to be rejected. As already held above the 3rd Respondent has not acted as a broker. It is clear that the 3rd Respondent has acted as a principal in these transactions. What is worse is that even presuming that the 3rd Respondent had acted as a broker there is no ratification. The 1st Respondents have not claimed even in

this Application that they had ratified or are ratifying. They have not claimed that they were accepting transactions under these 3 Bankers Receipts as being their own transactions. Admittedly those Units were excess in their hand. All they did was to try and give the 2nd Respondents credit for the value of the securities under the transaction of 7.5 crore Units. In respect of the sum of Rs. 105,10,75,000/-, the 2nd Respondents have filed Suit No. 41 of 1995 and made a money claim. Thus the transaction has been disowned. Thus in fact, the 1st and 2nd Respondents are disowning the act of the 3rd Respondent. Also it must also be mentioned that nowhere on Affidavit it is stated that the 2nd Respondents or the 1st Respondents are ratifying the action of the 3rd Respondent in purchasing the securities on their behalf. This is a case made orally for the first time in submissions.

41. Mr. Zaiwalla also relied upon paragraphs 60 and 61 of Order dated 12th/18th September 1996 in Misc. Petition No. 38 of 1996 wherein this Court has held that these are not properties of a Notified Party but properties belonging to the Financial Institutions whose monies have been siphoned out and used. Undoubtedly this Court has taken that view and still holds that view. But that is a view taken in respect of property being available for distribution under Section 11 of the said Act. That general view cannot be used in individual cases unless it can be specifically shown that some particular monies have been used for purchase of some



specific property. In this case the difficulty of the 2nd Respondents has been that they have not been able to pin point which monies had used for purchase of the securities Bankers Receipt Nos. 48, 1398 and 1616.

42. Under these circumstances, it is clear that these are securities belonging to the 3rd Respondent, inasmuch as monies which have been used for payment of these securities have been ultimately debited into the account of the 3rd Respondent. If that be so then these 2.50 crore Units are attached assets. If they are attached assets, neither the 1st Respondent nor the 2nd Respondents can hold on to them.

43. It was submitted by both Mr. Sen and Mr. Zaiwalla that the 1st Respondents did not really have 2.50 crore Units. It was submitted that the Bankers Receipts had been presented and honoured by the respective issuing Banks. It was submitted that the 1st Respondents had received the value thereof by way of a set off. It was claimed that the 1st Respondents had received monies. It was submitted that the 2nd Respondents were also given credit in terms of monies. It was submitted that as Units were not available the 1st Respondents could not be asked to bring back Units.

44. In my view whether the 1st Respondents received Units or monies is irrelevant. What belonged to the 3rd Respondent were Units under Bankers Receipt Nos. 49 and 1398. If the 1st Respondents purported to surrender these Bankers Receipts they have wrongly converted property of the 3rd Respondent. Even in that case they are liable in

damages. If Units had been held, as they should have been, then there would have been accretion by way of dividends. Merely because the 1st Respondents chose to accept a set off cannot absolve them from making good the Units along with all loss suffered by the 3rd Respondent by the wrongful action of the 1st Respondents. This would include making good the accretions which the 3rd Respondent would otherwise have received on such Units. This by way of damages for wrongful conversion. It was not denied that there were two accretions inasmuch as the dividends were declared at the rate of 2.5 per Unit for the year ended June 1992 and at the rate of 2.6 per Unit for the year ended June 1993. The 1st Respondents must also make good the Units, if necessary, by purchase from the market.

45. So far as 1 lac Units are concerned, the 1st Respondents admit that they had been excess received either from ANZ Bank or from the 3rd Respondent. Those Units were deposited in Court pursuant to an Order dated 4th March 1996. Those Units have been deposited along with all accretions thereon.

46. So far as the balance 1.20 crore Units are concerned, in my view the Custodian has not been able to show that they belong to the 3rd Respondent. Unfortunately the auditors have not gone into that question in detail. The 1st Respondents appear to have had some transactions with one Mr. Mukesh Babu. Those transactions were on a Ready Forward basis. Thus on the reversal leg the transactions should have

been reversed. In that case the 1st Respondents would not have in their hands any excess Bankers Receipts or excess Units. The fact that the Bankers Receipts have remained in the hands of the 1st Respondents itself indicates that some other Bankers Receipts or Units of some other persons had been used to satisfy the transactions of Mr. Mukesh Babu. Under these circumstances, one cannot rule out the possibility that the case of the 3rd Respondent that the 1st Respondents have used his assets to satisfy the claim of Mr. Mukesh Babu. In my view it is for the 3rd Respondent to establish this claim. The Custodian can only recover what he can clearly show to be attached property.

47. I, therefore, direct the 3rd Respondent, if he so chooses, to make a separate claim in respect of these 1.20 crore Units. It is also clarified in that claim that the 3rd Respondent will also be at liberty, if he so chooses, to claim further accretion on the 2.50 crore Units which have not been claimed by the Custodian in this Application.

48. Accordingly, the 1st Respondents are directed to hand over to the Custodian 2.50 crore Units along with accretion thereon at the rate of 2.5 per Unit for the year ended June 1992 and 2.6 per Unit for the year ended June 1993. The 1st Respondents to so hand over within a period of 16 weeks.

49. Respondent No. 1 had initially paid costs of the auditors. In my view, it being held that they had wrongly appropriated they must now bear these costs.

50. Mr. Joshi and Mr. Jethmalani also apply for costs against the 1st and 2nd Respondents for wrongly trying to hold on to 2.5 crore Units. In my view this is a fit case where there should be no Order as to costs.

****

Applied on 25/10/96
Pages (34)
Examined by R.M. Kubal
Compared with M.R Pawas
Ready on 27.11.96
Delivered on 27.11.96

SPECIAL COURT (Trial of Offences relating to Transactions in Securities) Ordinance, 1992 BOMBAY

Certified to be a true copy
27-11-96
OFFICER ON SPECIAL DUTY
Office of the Special Court
Bombay.

CANCELLED

Certified Copy Charges Rs. 19.50

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 198 OF 1993

PNB Capital Services Ltd. ... Applicants.

Vs.

1. The Custodian,
2. ANZ Grindlays Bank p. l. c.,
3. Harshad S. Mehta,
4. Growmore Leasing & Investment Pvt. Ltd.,
5. Indian Railway Finance Corpn.Ltd. ... Respondents.

Mr. Jai Chinai with Mr. Kumar Desai i/b Desai Diwanji for Applicants.
Mr. A. M. Setalwad with Mr. G. R. Joshi i/b P. M. Mithi & Co. for Respondent No. 1.
Mr. C. S. Balsara i/b Little & Co. for Respondents No. 2.
Mr. M. R. Jethmalani i/b Kanga & Co. for Respondents Nos. 3 and 4.
Respondents No. 5 absent.

ALONG WITH

MISC. APPLICATION NO. 315 OF 1994

Harshad S. Mehta. ... Applicant.

Vs.

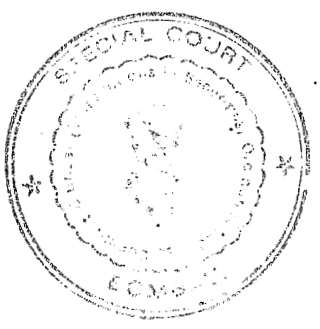
1. PNB Capital Services Ltd.,
2. The Custodian. ... Respondents.

Mr. M. R. Jethmalani with Mr. Anand Desai i/b Mahimtura & Co. for Applicant.
Mr. Jai Chinai with Mr. Kumar Desai i/b Desai Diwanji for Respondents No. 1.
Mr. A. M. Setalwad with Mr. G. R. Joshi i/b P. M. Mithi & Co. for Respondent No. 2.

CORAM: HON'BLE MR. JUSTICE S. N. VARIAVA.
3rd February 1995.

ORAL ORDER:

1. These two Applications can be disposed



off by a common Order.

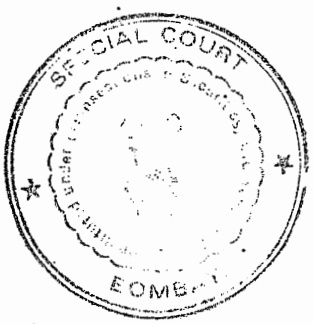
2. Misc. Application No. 198 of 1993 is by the PNB Capital Services Ltd. for specific performance of a Ready Forward Contract and for a declaration that 9% IRFC Bonds of the face value of Rs. 8 crores do not stand attached. The Applicants claim that they are the sole and absolute owners of these Bonds. Misc. Application No. 315 of 1994 has been filed by Harshad S. Mehta against PNB Capital Services Ltd. for a declaration that 9% IRFC Bonds of the face value of Rs. 30 crores along with the tax benefits and approved tax free interest should be handed over by PNB Capital Services Ltd. to the Custodian.

3. For the sake of convenience in this Order the parties are referred to in their capacity in Misc. Application No. 198 of 1993.

The facts are as follows:

4. On 24th April 1992 a Ready Forward Contract was entered into by which Applicants purchased 9% IRFC Bonds of the face value of Rs. 30 crores. The same were to be re-sold on 25th May 1992.

5. That the Applicants have entered into a Ready Forward Contract is an admitted position. The only dispute is whether the Ready Forward Contract had been entered with 3rd and 4th



Respondents i.e., Harshad Mehta and Growmore Leasing and Investment Pvt. Ltd. or whether the Ready Forward Contract was entered into with the 2nd Respondents i.e., the ANZ Grindlays Bank.

6. The Applicants rely upon the Contract Notes which are at Exs. A1 and A4. They also rely upon the Cost Memo which is at Ex. A2. They further rely upon the cheque for payment of the Ready Leg which is at Ex. A7. This cheque is made out in favour of the 2nd Respondents ~~and which is at Ex. A7~~. Based on these documents, the Applicants claim that the contract was only between them and the 2nd Respondents. To be immediately noted that the name of the 2nd Respondents appears only in this cheque. In the other documents, there is no name of any counter-party.

7. The Applicants by their letter which is annexed as Ex. A10 forwarded all the Bonds to the Indian Railway Finance Corporation Ltd. for transfer into their name. Pursuant to this, Bonds of the face valuer of Rs. 22 crores have been transferred into the name of the Applicants. This transfer has however taken place after 15th June 1992.

8. Bonds of the face value of Rs. 8 crores stood in the name of the 4th Respondents. As 4th Respondents had already been Notified, the Indian

Railway Finance Corporation Ltd. refused to transfer these Bonds.

9. The Applicants filed Misc. Application No. 198 of 1993 on 22nd September 1993. This Court has held by Judgments dated 14th December 1993 in M. A. No. 11 of 1993 along with M. P. No. 23 of 1993 held that Ready Forward Transactions are illegal. The 2nd Respondents filed their reply to this Application on 9th March 1993. The 3rd and 4th Respondents filed their reply to this Application on 29th March 1994. Thereafter, on 6th July 1994 the 3rd Respondent filed Misc. Application No. 315 of 1994.

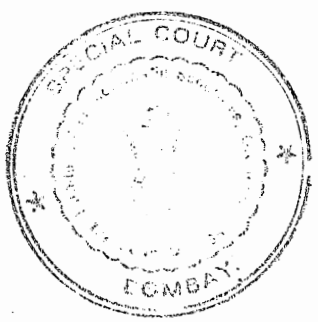
10. As stated above, the short question for consideration is whether the Ready Forward Contract was between the Applicants and 2nd Respondents or whether it was between the Applicants and 3rd/4th Respondents.

11. Mr. Chinai has submitted that the Contract Notes, Cost Memo and the Delivery Order all indicate that the contract is only between the Applicants and the 2nd Respondents. He submits that these are the documents evidencing the contract. He submits that a contrary position cannot be allowed to be taken. He submitted that the Contract Note clearly shows that 3rd Respondent merely acted as a broker in the transaction. He

submits that the cheque has been issued by the Applicants in favour of the 2nd Respondents. He submits that the cheque is a crossed cheque which is also an account payee cheque. He submits that this clearly establishes that the Contract was only between the Applicant and the 2nd Respondents.

12. I am afraid that things are not as simple as Mr. Chinai seeks to make them out to be. This Court was established only because Banks and Financial Institutions indulged in large scale irregularities which led to diversion of public funds into private pockets. This Court has, during the last two years seen that one of the methods has been that the transaction, supposedly in name of a Bank or Financial Institution, was in fact a transaction of the Broker. The Court has seen that Brokers have entered into transactions in Securities through the medium of Banks and Financial Institutions. The Court has seen that the Contract Notes would only bear the names of Banks and/or Financial Institutions. Cheques would be issued in names of Banks and/or Financial Institutions. Yet the transaction has been the transaction of the Brokers. The Bank/Financial Institution has merely acted for and on behalf of the Broker.

13. In this case the 2nd Respondents have,



on Affidavit, stated that on 24th April 1992 they have had no transaction with the Applicant in respect of 9% IRFC Bonds of the face value of Rs. 30 crores. The 2nd Respondents have disclosed on Affidavit a pay-in-slip whereby the cheque issued by the Applicants has been deposited into the account of the 3rd Respondent. This in spite of the fact that the cheque was in the name of the 2nd Respondents and it was a crossed cheque. The 2nd Respondents have also disclosed Current Account of the 3rd Respondents for the relevant period. The Current Account bearing No. 01CBM8537700 shows that the cheque issued by the Applicants has been credited into this account. It is not disputed by the 2nd Respondent that Securities belonged to the 3rd and 4th Respondents.

14. The 2nd Respondents have, in their Affidavit dated 9th March 1994, also disclosed a letter dated 13th April 1993 addressed by the Applicants to them whereunder a claim is made for some interest warrants and in respect of balance Bonds of the face value of Rs. 8 crores. The 2nd Respondents have annexed their reply to this letter. They have annexed a letter dated 22nd April 1993 wherein they have informed the Applicants that they never had any transaction in respect of these 9% IRFC Bonds of the face value of

Rs. 30 crores with the Applicants. No rejoinder has been filed by the Applicants till date. There is thus no denial of any of these facts.

15. That is not all. The Applicants have, in the Petition, annexed as Ex. A8 a letter dated 24th April 1992, ~~as Ex. A8.~~ This letter is from 3rd Respondent to the Applicants. This letter reads as follows:

> "We confirm that the reversal of the above mentioned deal with you is due on 25th May, 1992, through ANZ Grindlays Bank".

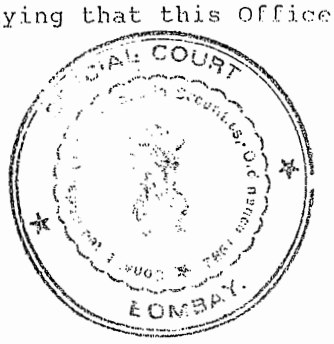
16. That this letter is received is an admitted position. This letter clearly shows that the 3rd Respondent is confirming that the Ready Leg would be falling due on 25th May 1992. If as now claimed the 3rd Respondent was merely a Broker, there was no question of his so confirming. Not only that 3rd Respondent is confirming that the Ready Leg would be completed "through the 2nd Respondents". If Contract was with the 2nd Respondents, where is the question of completing "through 2nd Respondents". Admittedly no reply is sent by the Applicants claiming that there was no question of the 3rd Respondent confirming the Contract or that there was no question of the transaction being through 2nd Respondents. No

reply is sent claiming that the transaction is with the 2nd Respondents. On the contrary, on the 3rd Respondent's copy of this letter, an Officer of the Punjab National Bank has made the following endorsement:

> "Received. Please note that the above deal is direct with you. Sd/- 24-4-92".

17. On Affidavit the authority of this Officer, to deal on behalf of Applicants is not denied. There is no denial that such an endorsement is made. This shows that to the knowledge of the Applicants, the transaction was between the Applicants and 3rd/4th Respondents. But due to Reserve Bank of India Regulations, it had been routed through the 2nd Respondents and in the name of the 2nd Respondents.

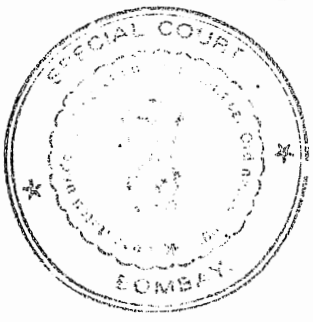
18. Before the final Order is passed, certain other facts must be stated. These two Applications were argued before me by Mr. Dhond (who then appeared on behalf of the Applicants) some time in September 1994. At that time, it was orally sought to be submitted that this Officer of the Punjab National Bank had no authority on behalf of the Applicants. The Court had then enquired whether there was any such denial on Affidavit. It was fairly admitted that no Affidavit had been filed denying that this Officer had an authority to



act on behalf of the Applicants. It was also fairly admitted that the Applicants were a wholly owned subsidiary of the Punjab National Bank. This Application was then adjourned. Till date no Affidavit is filed denying that this Officer had an authority to act on behalf of the Applicants. This Officer is still available. No Affidavit has been filed by him also. This in spite of fact that the matter has been adjourned on numerous occasions after that.

19. What is worse is that in Misc. Application No. 315 of 1994, the Applicant (Harshad S. Mehta) has specifically averred that this Contract was with him. There is no denial of averments made in Misc. Application No. 315 of 1994.

20. Mr. Chinai submitted that it is for the Respondents to show that the Officer of Punjab National Bank had an authority to act on behalf of the Applicants. He submitted that it was not at all necessary for the Applicants to file any Affidavit denying this position. I am unable to accept this submission. It is an admitted position that at that time the Applicants had no office in Bombay. In respect of this very Contract the Delivery Order (Ex. A3) was handed over to the Punjab National Bank. They took delivery of the



Securities from the 2nd Respondents at Bombay. This shows that in Bombay, Punjab National Bank was acting for and on behalf of the Applicants. The Delivery Order even though it is addressed to the Applicants bears a stamp of the Punjab National Bank at Bombay. It is not denied that the Delivery Order was delivered to Punjab National Bank in Bombay. It is not denied that the Punjab National Bank collected these Bonds from the 2nd Respondents. Not only that the cheque (Ex. A7) has been issued by the Punjab National Bank at Bombay. In face of this, it was absolutely necessary for the Applicants to deny that the Officer of the Punjab National Bank did not have an authority to act on their behalf. In the absence of any such denial, the specific averments must be deemed to have been admitted.

21. Mr. Chinai next submitted that even if the Officer of the Punjab National Bank had authority, he could not change the terms of the contract. He submitted that the contract was between the Applicants and the 2nd Respondents. He submitted that the Officer of Punjab National Bank could never change that contract into a contract between the Applicants and the 3rd Respondent. This argument proceeds on the footing that the contract was between the Applicants and the 2nd

Respondents. As stated above, in the two Contract Notes the name of the counter-party is not indicated. Similarly in the Cost Memo the name of the counter-party is not indicated. The only document in which the counter-party is indicated is the cheque. The cheque admittedly has been deposited into the account of the 3rd Respondents. Also as stated above, even without the endorsement, the letter dated 24th April 1992 clearly indicates that to the knowledge of the Applicants, the transaction was between them and the 3rd Respondent. There is thus no change in nature of this contract by the Officer of the Punjab National Bank. He has merely confirmed what was true and original contract between the parties.

22. Under these circumstances, I hold that the Contract was between the Applicants and the 3rd/4th Respondents. As admittedly it is a Ready Forward Transaction, the Judgment dated 14th December 1993 in M. A. No. 11 of 1993 along with M. P. No. 23 of 1993 applies to this case also.

23. As stated above, the Applicants have managed to get transferred into their name bonds of the face value of Rs. 22 crores. Mr. Chinai submits that this is a completed contract. He submitted that being a completed Contract, there is no question of return of these Bonds. He submitted

that the Order, if any, can only be passed in respect of the Bonds of the face value of Rs. 8 crores.

24. I am unable to accept this submission also. The 3rd and 4th Respondents were Notified on 8th June 1992. The moment that they were Notified, all their assets stood attached. After the date of attachment, there could be no transfer. If any transfer has taken place after that date, such transfer is an illegal transfer. It would create no rights in favour of the third party. In this case, admittedly the transfer has taken place after 15th June 1992. There is thus no valid transfer. There is thus no completed contract.

25. There is another reason also why this argument cannot be accepted. To accept the argument that there was a completed contract would necessitate a breaking up of original Ready Forward Contract into two parts - one part being ready part and the other part being the forward part. As set out in detail in the Judgment dated 14th December 1993 in M. A. No. 11 of 1993 along with M. P. No. 23 of 1993, this cannot be done. The original contract remains one composite contract. For these reasons also, there could never have been any completed contract of merely only the ready part.

26. For the above reasons, Misc. Application No. 198 of 1993 stands dismissed. Misc. Application No. 315 of 1994 is made absolute in terms of prayer (a), except the bracketed portion, i.e., ".... along with loss of tax benefit and accrued tax-free interest of Rs. 5,40,00,000/- which works out to an equivalent taxable interest of Rs. 12,70,58,820/- together with an appropriate interest thereon;". Applicants PNB Capital Services Ltd. (i.e., Respondents No. 1 in Misc. Application No. 315 of 1994) to comply with this Order within a period of 16 weeks from today.

27. Mr. Jethmalani says that for the present he is not pressing prayer (b).

28. The Applicants at liberty to apply for restitution. The question whether they are entitled to restitution is left open to be decided in such application, if made.

29. At this stage Mr. Chinai applies for time till Monday, 6th February 1994 to consider the question of interest payable. On this limited point, adjourned till Monday, 6th February 1995.

-.oOo.-

Applied on 10.2.95
Pages (13)
Examined by R.M.Kubal
Compared with P.V.Sohoni
Ready on 20.2.95
Delivered on 13.3.95

SPECIAL COURT BOMBAY

Certified to be a true copy

OFFICER ON SPECIAL DUTY
Office of the Special Court
Bombay.

Certified Copy Charges Rs 3/2-

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 221 OF 1993

Mr. A. K. Menon, Custodian .. Applicant

Vs.

1) Harshad Mehta
2) Citi Bank N.A. .. Respondents

Mr. Gaurav R. Joshi with Mr. Hormaz C. Daruwalla & Ms. Swati Ghatalia i/b. P. M. & Mithi & Co. for Applicant.

Mr. Mahesh R. Jethmalani with Mr. Amol D. Chaugule, Mr. Anand Desai & Mr. K. G. Desai i/b. M/s. Mahimtura & Co. for Respondent No. 1.

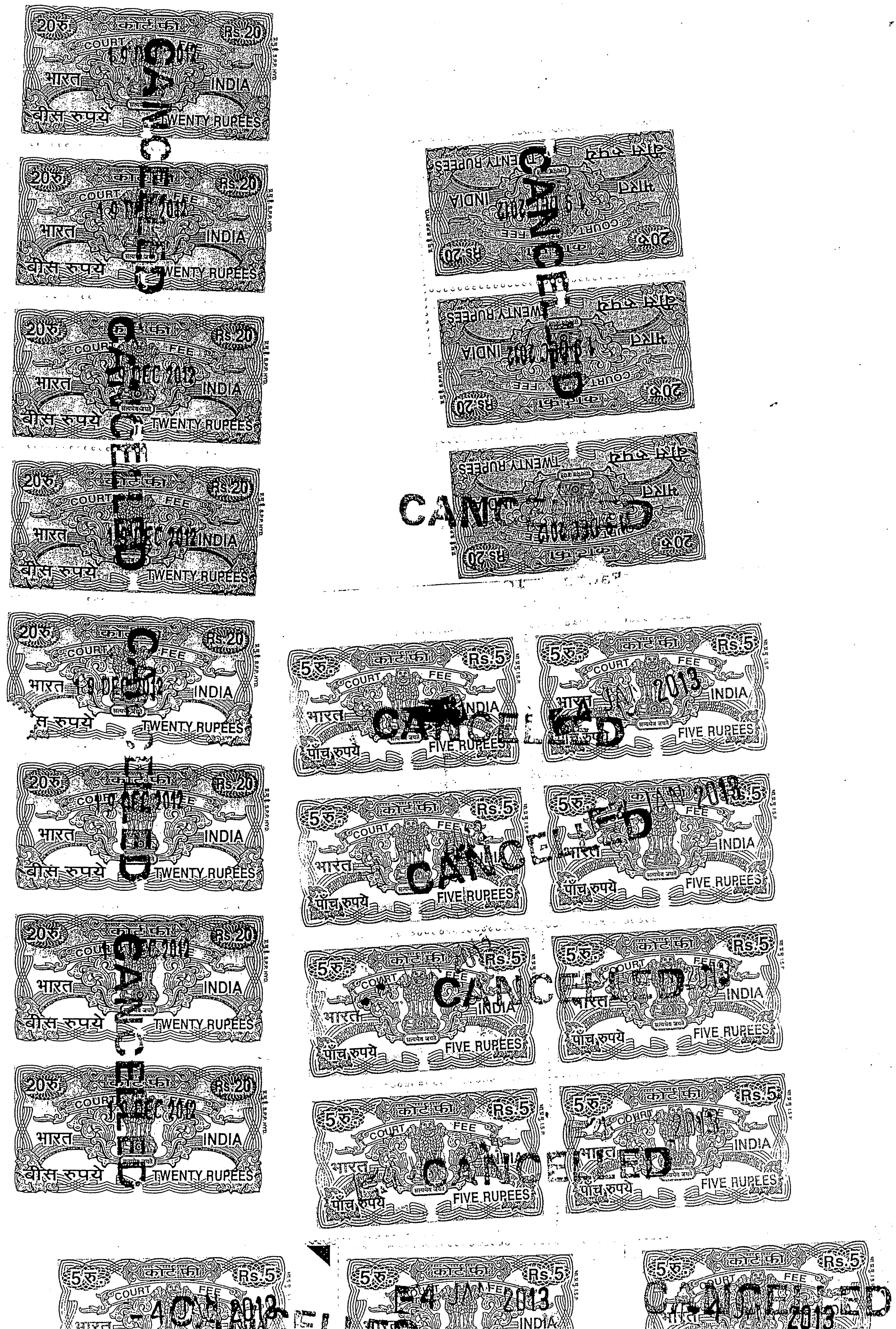
Mr. Navneet A. Shah with Mr. Virag Tulzapurkar & Ms. Ferzana Madan i/b. M/s. Wadia Ghandy & Co. for Respondents No. 2.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA.
18TH SEPTEMBER 1995.

ORAL ORDER

1. By this Application the Custodian is seeking directions for recovery, from the 2nd Respondents, of 3.5 Cr. Units (1964 Scheme) on the ground that these belong to a Notified Party viz the 1st Respondent. By this Application the Custodian is bringing to notice of Court that the 2nd Respondents are holding on to attached property. The Custodian claims that there was a Ready Forward transaction under which on 18th May 1991 the 2nd Respondent purchased from the 1st Respondent 3.5 Cr. Units (1964 Scheme) with a firm commitment to resell them to the 1st Respondent on 18th May 1992. According to the Custodian Ready Forward Transactions are illegal and void and no property in the

SPECIAL COURT
Trans. Relating to Transactions in Securities



20 रु. कोर्ट फी Rs.20
COURT FEE
भारत INDIA
बीस रुपये TWENTY RUPEES
CANCELLED
19 DEC 2012
5 रु. कोर्ट फी Rs.5
COURT FEE
भारत INDIA
पाँच रुपये FIVE RUPEES
CANCELLED
4 JAN 2013

securities could pass to the purchaser under such transactions. The 1st Respondent is the sole proprietary concern of Mr. Harshad Mehta. The 2nd Respondents are a Banking Company having a branch in Bombay.

2. After the filing of this Application this question has been decided by a Judgment of this Court dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993. By this Judgment it has been held that all Ready Forward Contracts are illegal and void and that no right, title or interest would be transferred in favour of third parties under Ready Forward Contracts with Notified Parties.

3. 'eading upto this Application are as follows:

By letter dated 4th March 1993, the 1st Respondent informed the Custodian that on 18th May 1991 a Ready Forward Transaction was entered into by the 2nd Respondents with the 1st Respondent. The 1st Respondent claims that under this transaction, on 18th May 1991, the 1st Respondent sold to the 2nd Respondents 3.5 Cr. Units at the rate of Rs. 14.85 per Unit. The 2nd Respondents were to resell the 3.5 Cr. Units to the 1st Respondent on 18th May 1992 at the same rate i.e. Rs. 14.85 per Unit. According to the 1st Respondent on 18th May 1991 payment was made and delivery was effected. According to the 1st Respondent, on 18th May 1992, the transaction was not reversed by the 2nd Respondents. The 1st Respondent thus asked the Custodian to make a claim on the

2nd Respondents. The heading of the letter reads as "Claim on Citibank for reversal of 3.5 Cr. units".

4. The Custodian by his letter dated 16th March 1993 forwarded 1st Respondent's letter dated 4th March 1993 to the 2nd Respondents for their comment. The 2nd Respondents replied to the Custodian by their letter dated 29th April 1993. By this letter they admit that there is a contract under which they were to sell on 18th May 1992 Units at the rate of Rs. 14.85 per Unit. They however claim that the 1st Respondent has committed a breach of the Contract. They rely on an opinion given by Justice V. D. Tulzapurkar (Retd.) and contend that the 1st Respondent can have no claim on the 2nd Respondents. They inter-alia contend as follows:

> "1. On 18th May 1991 Citibank N. A. ("the Bank") entered into Contract **with Harshad Mehta for sale** of 3.5 Cr. Units (1994 Units of UTI) at the rate of Rs. 14.85 ps. per Unit (hereinafter referred to as "the Units Contract"). The date of delivery of the Units under the Units Contract was 18th May 1992. **(The Contract Note is incorrectly dated by Harshad Mehta** as 18th May 1992 although it should have been dated 18th May 1991 as the contract was entered into on 18th May 1991 with delivery date as 18th May 1992).
> 2. As per the practice prevalent in the securities market, in respect of transactions in Units (which are not listed on the Exchange), it is for the buyer/buying broker to apply to the seller for delivery on the delivery date or to give delivery instructions to the seller on or before the delivery date and the seller of the goods is not bound to deliver them until the buyer applies for delivery. Moreover payment is to be made by the buyer/buying broker to the seller against delivery.
> 3. On 18th May 1992 (being the delivery date of the Units Contract) while the bank was ready and willing to perform its part of the contract, **Harshad Mehta did not apply** to the bank for delivery of the Units nor had given any instructions for delivery of the Units **nor was** any

payment tendered or made by Harshad Mehta to the bank. Therefore the Units were not delivered to Harshad Mehta. In other words, Harshad Mehta committed breach of the contract on 18th May 1992 by not giving instructions for delivery nor applying for delivery of the Units nor tendering payment therefore.

4. **As the breach is on the part of Harshad Mehta and not the bank, we have been advised that Harshad Mehta can have no claim against the bank.** A copy of the written opinion of Mr. V. D. Tulzapurkar, Retired Judge of the Supreme Court of India, is enclosed herewith for your information and assistance. Your attention is drawn to paragraph 12 of the opinion.

.....

9. Without prejudice to what is stated above, the bank says that prior to the aforesaid Units Contract, on 8th April 1991 the bank entered into a contract with Harshad mehta for purchase of 25000 equity shares of Ruchi Soya Industries Limited (Ruchi Soya) at the rate of Rs. 275 per equity share. Though price was to be paid against delivery and though delivery was not given by Harshad Mehta, the bank through mistake arising as a result of miscommunication between the bank and its Share Custody Agent paid to Harshad Mehta the price of Rs. 68,75,000/- on 28th April 1992 in respect of the Ruchi Soya shares. As a result the bank became entitled to recover from Harshad Mehta the sum of Rs. 68,75,000 being payment made by the bank to him by mistake. **The bank has been advised that it is entitled to set off its claim of Rs. 68,75,000/- against Harshad Mehtas alleged claim** for damages under the Units Contract. The bank has been advised that since the set off of the bank exceeds the alleged claim in damages of Harshad Mehta under the Units Contract, there remains no property belonging to Harshad Mehta which could stand attached under Section 3(3) of the Special Courts (Trial of Offences Relating to Transaction in Securities) Act, 1992 so far as the dealing between Citibank and Harshad Mehta are concerned. Your attention is drawn to paragraph 16 of the enclosed opinion." (emphasis supplied).

5. At this stage it is relevant to note that in their reply dated 29th April 1993 the 2nd Respondents

a) Do not deny existence of the Ready leg even though the claim is on basis of "reversal of 3.5 Cr. units" i.e. a Ready

Forward Contract

b) Do not deny 1st Respondent's allegation of payment and delivery in the Ready Leg on 18th May 1991

c) Admit that there is an outstanding Contract for Sale of 3.5 Cr. Units at Rs. 14.85 per Unit on 18th May 1992

d) Admit that the Contract is with the 1st Respondent as a principal and

e) Claim that breach is by 1st Respondent and/or that they are entitled to set off their liability, if any, against what is due from Mr. Harshad Mehta.

Thus in their reply the fact that there was a Ready Forward Contract with Mr. Harshad S. Mehta is admitted. This because at this stage Court has not yet given it's Judgment dated 14th December 1993 in Misc. Application 11 of 1993 and Misc. Petition No. 23 of 1993.

6. At this stage it must also be set out that in the Opinion given by Justice Tulzapurkar, a copy of which was forwarded by the 2nd Respondents to the Custodian, it is inter-alia mentioned as follows:

> "1. In this case, the following queries have been raised for my consideration and opinion:
> (1) Whether the Querist has committed any breach of the said Units Contract?
> (2) If the answer to Query No. (1) is in the affirmative, how are the damages, if any, payable **by the Querist to Harshad Mehta** to be calculated?
> (3) If the answer to Query No. (1) is in the affirmative, **is Harshad Mehta entitled to compel specific performance** of the said Units Contract?
> (4) If the answer to Query No. (1) is in the negative, **would Harshad Mehta be entitled to recover damages** from the Querist?
> (5) Assuming that the answer to Query No. (1) is in the affirmative and the **Querist is liable to pay damages to Harshad Mehta,** in view of the sum of Rs.

68,75,000/- paid by mistake to Harshad Mehta on 28th April 1992 in respect of 25,000 Ruchi Soya Shares -

(a) would the Querist be entitled to set off the said sum of Rs. 68,75,000/- against the damages payable by the Querist to Harshad Mehta ? and

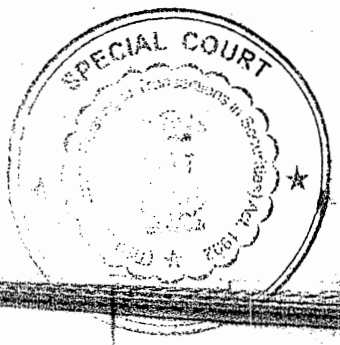
(b) with reference to the said Units Contract and the Ruchi Soya Shares transaction, **what would be the `property' belonging to Harshad Mehta** in the hands of the Querist which would stand attached under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992, read with the Notification of the name of Harshad S. Mehta of 18th June 1992?

2. Facts giving rise to the aforesaid queries lie in a narrow compass and may be stated: The Querist is a banking company carrying on business inter alia, in India. Harshad S. Mehta is a Member of the Stock Exchange, Bombay and carries on business as a stock, securities and finance broker.

3. **On 18th May 1991 the Querist sold to Harshad Mehta 3.5 Cr. Units (1964 Units of UTI) at Rs. 14.85 ps. per Unit** (hereinafter referred to as `the Units Contract'). The date of the delivery of the said Units thereunder was 18th May 1992. A copy of the relevant Contract Note issued by Harshad Mehta to the Querist has been annexed to the brief for my perusal. (It appears that by mistake the Contract Note is dated 18th May 1992 which should have been 18th May 1991, as admittedly and on Harshad Mehta's own showing, the contract was entered into on 18th May 1991 with delivery date as 18th May 1992).

4. In the conference two things were clarified to me that Units of UTI are not listed on the Stock Exchange **and that the transaction of sale to Harshad Mehta was between the Querist and Harshad Mehta as principal to principal."** (emphasis supplied).

7. The Custodian filed this Application on 25th October 1993. The 1st Respondent filed their Affidavit in Reply dated 31st March 1994 supporting the Custodian. In the Affidavit the 1st Respondent sets out copies of the relevant Contract Notes. The 1st Respondent claims that the Ready Forward Transaction was by way of a Dividend Stripping Contract. The 2nd Respondents filed two Affidavits in Reply,



both dated 11th November 1994. One was in reply to the Application and one in reply to Affidavit of the 1st Respondent. Both basically set out same facts. The Affidavit in Reply to Affidavit of 1st Respondent is more detailed. For purposes of this Judgment reference is made only to the Affidavit in reply to Affidavit of 1st Respondent.

8. For the 1st time 2nd Respondents contend that there was no contract for purchase of 3.5 Cr. Units on 18th May 1991. They claim that in their records there is no Contract Note for purchase of 3.5 Cr. Units on 18th May 1991. They claim that in their records there is no material to show that payment had been made for 3.5 Cr. Units and that delivery was received of 3.5 Cr. Units. They claim that on 18th May 1991 2nd Respondents purchased only 1.5 Cr. Units from SBI Capital Markets Ltd. on behalf of a Portfolio Management Customer viz the Shipping Credit and Investment Company of India (hereinafter referred to as SCICI). They claim that their records show that, on 18th May 1991, they paid for and received delivery of only these 1.5 Cr. Units. They claim that in this transaction the 1st Respondent was only a broker. They admit that the contract for sale of 3.5 Cr. Units was entered into on 18th May 1991 with delivery to be made on 18th May 1992. They now claim that in this contract 1st Respondent is only a broker. They contend that this contract is a Ready/Spot Delivery Contract. They contend that this contract is between the 2nd Respondents and United Commercial Bank on a principal to principal basis. Thus now

there is total denial of the existence of the Ready Leg and a denial that the Forward contract is with the 1st Respondent as a principal. Thus now a stand contrary to what was stated in the letter dated 29th April 1993 and contrary to what is recorded in the Opinion of Justice Tulzapurkar is taken. This undoubtedly because, after the Judgment dated 14th December 1993 in Misc. Application 11 of 1993 and Misc. Petition 23 of 1993, it was no longer convenient to admit that the transaction was Ready Forward and that the 1st Respondent was a principal therein.

9. The 1st Respondent filed an Affidavit in Rejoinder pointing out that on 18th May 1991 2nd Respondents had 4 transactions in Units in which 1st Respondent had a part to play viz;

i) The concerned transaction i.e a Ready Forward Transaction of Purchase, by the 2nd Respondents, of 3.5 Cr. Units at Rs. 14.85 per Unit with the 1st Respondent as principal, reversal being on 18th May 1992

ii) A Ready Forward Transaction of Sale, by 2nd Respondents, of 2 Cr. Units at Rs. 14.85 per Unit with the 1st Respondent as principal, reversal being on 16th August 1991 (thereafter extended to 19th August 1991)

iii) Another Ready Forward Transaction of Sale, by the 2nd Respondents, of 3.5 Cr. Units at Rs. 14.75 per Unit with SBI Capital Markets as principal, reversal being within 3 days. It is admitted that in this transaction the 1st Respondent acted only as a broker and

iv) A Ready Forward Transaction of Sale, by 2nd Respondents, of 1.2 Cr. Units at Rs. 14.85 per Unit with the 1st Respondent as principal, reversal being within 4 days.

10. In the Affidavit in Rejoinder the 1st Respondent avers that on the suggestion of one Mr. Prashant Purkar, a dealer of the 2nd Respondents, the payment and delivery in the first two transactions were netted off i.e. the transaction of purchase of 3.5 Cr. Units at Rs. 14.85 per Unit was netted off with the transaction of sale of 2 Cr. Units at Rs. 14.85 per Unit. It is averred that it is under these circumstances that payment and delivery has been made for only 1.5 Cr. Units. The 1st Respondent annexes copies of all relevant documents.

11. These then are the rival contentions. In view of the rival contentions this Application was adjourned to Court for recording evidence. On the pleadings the following Issues were raised:

1. Whether SBI Capital Market Ltd. is alone entitled to maintain an action for the reliefs claimed?

2. If answer to Issue No. 1 is in affirmative, whether the application is bad for non-joinder of necessary party, as alleged in para 5 of the Affidavit-in-Reply of the Respondents No. 2?

3. If answers on Issues Nos. 1 and 2 are in affirmative, whether the Application is maintainable and/or does not disclose cause of action as alleged in para 6 of Affidavit-in-Reply of Respondents No. 2?

4. Whether on 18th May 1991 the Respondent No. 1 entered into an Agreement for the sale of 3.5 Cr. Units of Unit Trust of India as alleged in para 2 of the Application?

5. Whether Respondent No. 1 delivered, to Respondents No. 2, 3.5 Cr. Units on 18th May 1991 and received payment for the same as alleged in para 2 of the Application?

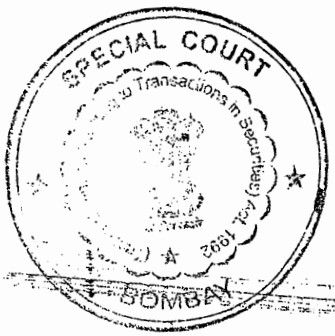
6. Whether the Respondent No. 1 as the principal party entered into the alleged transaction of sale with Respondents No. 2 of 3.5 Cr. Units as a Ready Forward Transaction as alleged by the Applicant in para 4 of the Application and para 2 of the Affidavit-in-Reply of Respondent No. 1?

7. Whether the transaction mentioned in Application is wholly illegal and void as alleged in paras 5(2) and 6 of the Application?

8. If answer on Issue No. 7 is in the affirmative, whether Respondents No. 2 cannot claim any title to 3.5 Cr. Units as alleged in para 7 of the Application?

9. Whether Respondent No. 1 committed breach of contract by not applying for delivery of 3.5 Cr. Units on 18th May 1992 or making payment for the same as alleged in para 7 of the Affidavit-in-Reply to the Application of Respondents No. 2?

10. Whether on 18th May 1991 Respondents No. 2 entered into Forward Sale of 3.5 Cr. Units where purchaser was UCO Bank as intimated by Respondent No. 1, who was broker in the transaction as alleged in para 6(h) of the Affidavit-in-Reply of Respondents No. 2 to the Affidavit-in-Reply of Respondent



No. 1?

11. Whether on 18th May 1991 Respondents No. 2 purchased only 1.5 Cr. Units from SBI Capitals as alleged in sub-para (d) of para 9 and sub-para (g) of para 6 of the Affidavit-in-Reply of Respondents No. 2 to the Affidavit-in-Reply of Respondent No. 1?

12. Whether the Applicant is entitled to return of 3.5 Cr. Units from Respondents No. 2 as alleged in para 7 of the Application?

13. To what reliefs, if any, the Applicant is entitled to?

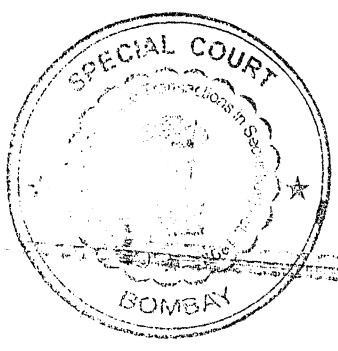
14. What Orders?

12. Before the Issues are answered one more fact needs to be mentioned. To knowledge of this Court, since before it started functioning, the computers of the 1st Respondent are lying seized and sealed by the Income Tax Department. Under an Order of this Court a copy of the hard disks has been supplied by the Income Tax Department to the Custodian. The 1st Respondent has no access to this copy also. Just prior to the beginning of trial, in the presence of all parties, the Custodian printed out Deal Slips pertaining to this Application from the copy of the hard disk in his possession. As is set out hereafter 1st Respondents' witness has given evidence of the seizure by the Income Tax Department. There is no cross-examination on that point.

13. The Issues are answered accordingly:

Issue No. 1 : In the Negative

Issue No. 2 : Does not arise in view of Issue No. 1 being



answered in the Negative

Issue No. 3 : Does not arise in view of Issue No. 1 being answered in the Negative

Issue No. 4 : In the Affirmative

Issue No. 5 : In the Affirmative

Issue No. 6 : In the Affirmative

Issue No. 7 : In the Affirmative

Issue No. 8 : In the Affirmative

Issue No. 9 : In view of Issues 4 to 8 being answered in the Affirmative and on principles laid down in Judgment dated 14th December 1993 in Misc. Application 11 of 1993 and Misc. Petition 23 of 1993, this does not arise

Issue No. 10 : In the Negative

Issue No. 11 : In the Negative

Issue No. 12 : In the Affirmative

Issues Nos. 13 and 14 : As per final Order set out hereafter.

REASONS:

14. The Custodian led no oral evidence. The Custodian only tendered the correspondence. The documents tendered by the Custodian are marked alphabetically. The 1st Respondent led evidence of Mr. Ashwin Mehta, the brother of Mr. Harshad Mehta. He deposed that he had entered into the four transactions on 18th May 1991. Evidence was also led of a delivery boy, one Mr. Shivraj Lenghti to prove that the Contract Notes, for the Ready leg of the 3.5 Cr. and 2 Cr. Units Contracts, were delivered to the 2nd Respondents and

that one Mr. Nagnath a dealer of the 2nd Respondents had initialed on copies in acknowledgement thereof. Thus the 1st Respondent led evidence of persons having personal knowledge. The oral evidence of these persons is supported by numerous contemporaneous documents. The documents tendered by the 1st and 2nd Respondents are also marked alphabetically but with the prefix `R-1' and `R-2' respectively.

15. The 2nd Respondents have led the evidence of one Mr. G. Shiva, Vice President of the 2nd Respondents. He claimed to be familiar with the computer system of the 2nd Respondents. He claimed that from 1990 onwards records were computerised and all records of the 2nd Respondents are now on the back office computer. In essence his evidence was that the back office computer records were supreme and that if a transaction was not reflected in those records, it did not exist. His evidence was to the effect that as there were no records in the back office computer, for the transactions of 3.5 Cr. Units and 2 Cr. Units, they did not exist. He admitted that he had no personal knowledge about the transactions in question and that he was deposing only on basis of records. To be immediately noted that he chose to ignore the front office computer and its records. When asked about the front office computer records he claimed that he was not familiar with them and did not know about them. He did not say outright that there were no records maintained in the front office computers, but he repeatedly insinuated that there were no such records. On at least three occasions he

stated that he was not sure whether data was stored in the front office computer. How false this insinuation was can be seen from what the Jankiraman Committee found during their inquiry. The relevant portion of the Report reads as follows:

> "8. Citibank entered into a number of Forward Contracts in respect of its PMS clients. These Contracts were recorded in a PC (data-base) operated by the traders and were not entered in the main frame computer system. Thus the knowledge of these Contracts was confined to the treasury group comprising the treasury head, local currency head, treasury in-charge and the traders. Consequently, the back-up and operations departments remained unaware of these contracts nor were the same subjected to audit. Thus, as per the print-out furnished by the then local currency head, forward commitments aggregating to Rs. 14,757.72 Crores booked during 1990-91 and till 29 June 1992 on the PC (data-base) were not brought into the main frame computer system. Information regarding these unsettled contracts and certain particulars regarding inhouse transactions are not given to fiduciary clients, thereby impairing transparency.
>
> On account of impairment/erosion of the corpus and/or returns, the bank entered into deeds of settlement with various PMS clients and in the process the bank has suffered a loss of Rs. 105.95 Crores, which is being accounted for in the bank's balance sheet for the year ended 31 March 1993. Identification and crystalisation of losses for the next financial years is in progress. Thus the bank has mismanaged the fiduciary customers' accounts."

16. The PC operated by the traders are the front office computers. Thus a large number of transactions were not even recorded on the back office computer and yet Mr. Shiva claims that the records contained in the back office computer are the only records which the 2nd Respondents would consider and which are supreme. The said Mr. Shiva also deposed, on the basis of records, that the 1.5 Cr. Units purchased by 2nd Respondents on 18th May 1991, were on behalf

of its customer SCICI. Thus 2nd Respondents do not lead evidence of any bank personnel who actually dealt with these transactions and who had personal knowledge. This in spite of fact that, as set out hereafter in greater detail, persons having knowledge particularly one Mr. Prashant Purkar, a dealer of the 2nd Respondents who had entered into the Contracts for 3.5 Cr. and 2 Cr. Units were available to give evidence. The 2nd also led the evidence of one Mr. Dhundiraj G. Vernekar, Sr. Project Executive of Canbank Financial Services Ltd. This to prove that in the part reversal of the 2 Cr. Units Transaction in August 1991, the 1st Respondent was only a broker. The Court has found 2nd Respondents' method of disproving positive evidence or proving their own case most strange. Even after having miserably failed to discredit 1st Respondent's witnesses in cross-examination, the only attempt has been to merely produce in Court such records which 2nd Respondents call "Records of Citibank'. Then without making any effort to prove those records through any person having personal knowledge, seek to rely on these records and tender them as Exhibits. Literally the case has been that the records of the 2nd Respondents, as produced, must be taken to be the gospel truth. As is set out above the only record relied upon is the back office computer record. All other documents showing existence of these Contracts, even though they were shown to be in possession and custody of the 2nd Respondents, were conveniently not "Records of Citibank". Thus not all record was to be treated as gospel

truth but only that which the 2nd Respondents found convenient to call "Records of Citibank". **This therefore is a case where Court has before it positive oral evidence of persons who personally dealt with the transactions in question, supported by contemporaneous documents, on one side and virtually no evidence on the other.**

17. In my view it would be appropriate to set out at this stage how transactions like these are normally undertaken and what sort of documents will be normally prepared. Generally oral negotiations would first take place between parties. These would take place between persons designated as dealers. All banks had dealers. The big brokers also had dealers. Where there is segregation of office into Front Office and Back Office, as in case of 2nd Respondents, these dealers would always sit in the Front Office. Of course a broker may directly negotiate with a dealer. When a deal is finalised both parties would record the terms, including type of security, quantity, rate, name of counter-party, name of broker if any, nature of transaction etc. on their own Deal Slips. The Deal Slips would thus show all details in respect of a transaction. These however, are internal documents which are not sent to the other side. Normally therefore the Deal Slips would have only corroborative value. Thereafter a Contract Note will be sent. This will be followed by Delivery Orders. This after delivery instructions are finalised. These would be followed by delivery and payment. Delivery may be by delivery of actual physicals or by means of Bankers Receipt

or by means of SGL Transfer Forms. Banks would also issue Costs Memos. Thus proof of existence of Contracts would normally be available by means of Contract Notes, Delivery Orders, Costs Memos, Delivery documents like Bankers Receipts, SGL Transfer Forms etc. and payment documents like bankers Cheques or Pay Orders. Internal documents like Deal Slips would also exist. These however are internal documents which have to be accepted with caution and generally only as corroborative evidence.

18. Mr. Shiva of the 2nd Respondents however suggested that in respect of Contracts undertaken by the 2nd Respondents on behalf of its Portfolio Management Customers a different practise was followed. According to him there was segregation of front Office dealers into those dealing with PMS transactions and those dealing with Banks own transactions. Of course when asked to produce any document showing/authorising such segregation of Front Office dealers none could be produced. He also had to admit, in cross-examination, that third parties were not informed about any such segregation. According to him, in respect of PMS transactions a Deal Slip would not be prepared till the name of the counter-party or delivery instructions were received by the dealer. He could give no satisfactory answer why such difference should be made between Banks own transactions and transactions of PMS Customers. It was clear that the whole idea was to claim that there are no Ready Contracts for 3.5 Cr. Units and 2 Cr. Units as there were no Deal Slips. The

whole idea was to say that the Deal Slip, an internal document was paramount and supreme and that if there was no Deal Slip then there was no Contract. This meant that 2nd Respondents would have to produce the Deal Slip for the Forward Contract of 3.5 Cr. Units as that admittedly was entered into. It was clear that the whole attempt was to say that there was no Deal Slip for the Forward Contract for 3.5 Cr. Units which admittedly existed. It was clear that the whole idea was to suppress the Deal Slip as it would probably show that it was a Ready Forward Contract. The whole idea of this theory is to get out of the Contract Notes and of Delivery Orders, in respect of the 3.5 Cr. and 2 Cr. which were shown to exist. In other words the case of 2nd Respondents has been to assert that there is no transaction because there is no Deal Slip and when asked why there is no Deal Slip to say that this is because there is no transaction. In other words deny the transactions at any costs.

19. Even though there are so many Issues, the real questions before the Court are:

(a) whether there was a Ready Contract for purchase by 2nd Respondents of 3.5 Cr. Units. To be remembered that the Forward Contract of Sale by 2nd Respondents of 3.5 Cr. Units is admitted.

(b) Whether there was a Ready Forward Contract of Sale by 2nd Respondents of 2 Cr. Units

(c) whether there was netting off and

(d) Whether the 1st Respondent is the principal counter-party in these two transactions.

20. Thus the first question to be considered is whether there is a Ready Forward Transaction of Purchase and Sale of 3.5 Cr. Units by 2nd Respondents. As set out above 2nd Respondents deny existence of any such Ready Forward Contract. In paras 6(c), (d) and (e) of their Affidavit in Reply the 2nd Respondents state as follows:

> "6. .....
> (c) On 18th May 1991, Citibank purchased for and on behalf of its PMS Customer SCICI, 1.5 Cr. Units from SBI Capital Markets Ltd. at the rate of Rs. 14.85 per Unit, for which Citibank made payment by Banker's Cheque in favour of SBI who is the Banker of SBI Capital Markets Ltd. Hereto annexed and marked Exs. 5, 6 and 7 respectively are copies of the relevant `Deal Slips', `the Cost Memo' and the `Banker's Cheque' in the sum of Rs. 22,27,50,000/- drawn in favour of SBI, all of which form part of the records available with Citibank with reference to the said transactions of 18th May 1991.
> (d) The said amount of Rs. 22,27,50,000/- was paid as aforesaid by debiting Citibank's said PMS Customer SCICI. The said 1.5 Cr. Units were thereafter considered as belonging to and the property of the said PMS Customer SCICI.
> (e) The said purchase of 1.5 Cr. Units was not made from Harshad Mehta nor was the payment made to Harshad Mehta. Harshad Mehta was merely acting as a broker in respect of the said purchase of 1.5 Cr. Units. Harshad Mehta, therefore, is not entitled to maintain any claim in respect of the said purchase of 1.5 Cr. Units on any ground or basis whatsoever. Further, even this purchase of 1.5 crores was not a purchase by Citibank as such but was a purchase by the PMS Customer SCICI."

21. To be remembered that till this stage there has been no mention of any netting off. There has been no mention of any Contract for 1.5 Cr. Units. Thus there must be something in their records which connects this to the 3.5

crores Contract which compelled 2nd Respondents to try and explain this transaction as being an independent Contract and on behalf of a PMS Customer. It is not as if the 2nd Respondents had only this transaction in Units on 18th May 1991. Also, at the cost of repetition, it must be again mentioned that in their reply dated 29th April 1993 to the Custodian the 2nd Respondents had not denied the existence of the Ready Leg even though the claim was on basis of "reversal of 3.5 Cr. units" i.e. a Ready Forward Contract. The 2nd Respondents had not denied 1st Respondent's allegation of payment and delivery in the Ready Leg on 18th May 1991. That 1st Respondent's letter dated 4th March 1993 (part of Ex. A) dealt with a Ready Forward Transaction had to be ultimately admitted by Mr. Shiva. After prevarication and attempt to deny the obvious, on Pg. 244 of the Notes of Evidence, Mr. Shiva is forced to ultimately admit as follows:

> "(Witness is shown letter dated 4.3.93 part of Exh. A.)
> Q: Particularly in view of the words "reversal of 3.5 Cr. Units" in the title of this letter and the words "forward sale of same 3.5 Cr. Units" in the last sentence of the first paragraph, according to you could the forward leg be performed, if the ready leg was not performed ?
> A: It is correct it could not be performed.
> I deny that it follows that there could not be two independent spot delivery contracts. I say that the reference could be to the same Units which were delivered in the first contract.
> Question from Court : If the same physical Units have to go back under the forward contract how can the forward contract be performed if the ready leg is not performed ?
> A: I now agree that the performance of the forward leg would depend upon the performance of the ready leg."

This clearly establishes that at the very first opportunity

it was not denied by the 2nd Respondents that there was a Ready Forward Contract. Thus at the very first opportunity there is a deemed admission.

22. In their Affidavit in Reply to Affidavit of 1st Respondent the 2nd Respondents claim that the Contract Note for the ready Leg of 3.5 Cr. Units Contract does not exist in their records and accounts. They however do not deny the existence of the Delivery Order Ex. R-1-F. This even though 1st Respondent had relied upon a copy of the Delivery Order in his Affidavit and claimed that it had been sent to the 2nd Respondents. Thus the fact that the Delivery Order was received by them is a deemed admitted position in the Pleadings. Now of course the Delivery Order has come from possession of 2nd Respondents. It is marked as Ex. R-1-F.

23. Mr. Ashwin Mehta has given evidence of the existence of the Ready Forward Contracts of 3.5 Cr. and 2 Cr. Units. It would be preferable to briefly set out his deposition and the documents which have been brought on record during his evidence.

24. Mr. Ashwin Mehta deposed that Mr. Harshad Mehta was out of India from the 1st week of May to the third week of May 1991. He has deposed that he concluded the aforesaid four transactions, on 18th May 1991, with the 2nd Respondents. He has deposed that on behalf of the 2nd Respondents Mr. Prashant Purkar had acted. It is not denied that Mr. Prashant Purkar was a dealer of the 2nd Respondents. Mr. Ashwin Mehta has deposed that the transactions of 3.5 Cr.

Units and 2 Cr. Units were Dividend Strip Transactions. He has deposed that out of the four transactions, in three transactions Harshad S. Mehta had acted as a principal. He has deposed that the first Contract was a Dividend Strip Contract for 3.5 Cr. Units in which 2nd Respondents purchased 3.5 Cr. Units in the Ready leg and sold the same in the Forward Leg. He has deposed that the reversal was to be after 1 year i.e. on 18th May 1992 at level rate i.e. at Rs 14.85 per Unit. He has deposed that the Contract Note was issued by Harshad S. Mehta. He has deposed that he signed the Contract Note on behalf of Harshad S. Mehta. He has deposed that the Contract Note was sent to the 2nd Respondents. He produces his copy of the Contract Note. This copy contains an initial of some person. He deposes that this is the initial of one of the dealers of 2nd Respondents. He fairly admits that from his personal knowledge he cannot identify the initials. He deposes that his delivery boy has informed him that the initials are of a dealer of the 2nd Respondents, one Mr. Nagnath. It is an admitted position that Mr. Nagnath was at that time a dealer of the 2nd Respondents. Of course as must be expected it was claimed by Mr. Shiva that Mr. Nagnath was a dealer in the PMS Unit of the 2nd Respondents. It must also be mentioned that the second witness of 1st Respondent i.e. the delivery boy Mr. Lenghti has proved delivery of the Contract Note and the initial of Mr. Nagnath in acknowledgement of receipt of the Contract Note. The 1st Respondents copy of the Contract Note is marked as Ex. R-1-

A. Needless to state 2nd Respondents deny existence of any such Contract Note in their records. As delivery is proved and as it could not be seriously denied that the 1st Respondent's copy does contain initials of Mr. Nagnath, it will have to be presumed that the 2nd Respondents are not producing the original because if produced it would go against them. Probably the original contains endorsements which establish 1st Respondent's case of netting off. This presumption is further strengthened by fact that even though it is admitted that the 2nd Respondents had received a Contract Note for the Forward Contract of 3.5 Cr. Units, the original of that is also not being produced. At this stage it must be mentioned that on the very first day of trial Mr. Jethmalani had called upon Mr. Shah to produce the original Contract Note for the admitted Forward Contract of 3.5 Cr. Units. As set out on pg. 5 of the Notes of Evidence the first statement was that this Contract Note was, at present, not available in Court. Thereafter this Contract Note was not produced at all. Thereafter it was stated that the original Contract Note could not be found.

25. Mr. Ashwin Mehta has deposed that every year Unit Trust of India declares dividends in June. He has deposed that any transaction which has been entered into prior to June with the reversal date being post the declaration of dividend is a Dividend Strip Transaction. He has deposed that the 2nd Respondents got dividend for the year ending 30th June 1991 in this Contract. He has deposed that dividends of

Unit Trust of India enjoy tax exemption.

26. Mr. Ashwin Mehta has deposed that the 2nd Contract was also a Dividend Strip Transaction in Units. He deposes that in this Contract the 2nd Respondents sold to 1st Respondent 2 Cr. Units at Rs. 14.85 per Unit. He deposes that the reversal was to be after 90 days. He deposed that in this Contract the reversal was to be at Rs. 13.85 per Unit. He deposes that he has signed the Contract Note for the Ready Leg of this Contract. On being called upon to do so Mr. Shah produced the original Contract Note for the Ready Leg of this Contract. Thus from the records of the 2nd Respondents has come the Contract Note which is marked as Ex. R-1-C. Mr. Ashwin Mehta also deposes that he has signed the Contract Note for the Reversal leg of this Contract. On being called upon to do so Mr. Shah produced the original Contract Note for the Forward leg of this Contract. Thus from the records of the 2nd Respondents has come the Contract Note which is marked as Ex. R-1-D. Mr. Ashwin Mehta also produces 1st Respondents copy of Ex. R-1-D. He deposes that this also contains initials of the same person who initialed Ex. R-1-A. The 1st Respondents copy of the Contract note is marked as Ex. R-1-E.

27. Mr. Ashwin Mehta deposes that in this Contract Harshad S. Mehta was the principal. Mr. Ashwin Mehta deposes that 1st Respondent delivered the 3.5 Cr. units by delivering physicals of 1.5 Cr. Units and netting off 2 Cr. Units. On being called upon to do so Mr. Shah produces a

Delivery Order dated 18th May 1991 for 3.5 Cr. Units. This is marked as Ex. R-1-F. The 1st Respondents copy of Ex. R-1-F is marked as Ex. R-1-G. Under this Delivery Order 2nd Respondents were to receive 3.5 Cr. Units from SBI Capital Markets Ltd. The Delivery Order is issued by Harshad S. Mehta. Mr. Ashwin Mehta deposes that the Delivery Order is signed by one Mr. Atul Parekh. He deposes that he is familiar with the signature of Mr. Atul Parekh. On Ex. R-1-G there is an endorsement. Mr. Ashwin Mehta deposes that the endorsement is of the delivery boy Mr. Parag Mehta. He states that he is familiar with the hand writing of Mr. Parag Mehta. On being called upon to do so Mr. Shah also produces another Delivery Order dated 18th May 1991 for 2 Cr. Units. This is marked as Ex. R-1-H. 1st Respondents copy of this Delivery Order is marked as Ex. R-1-J. Under this Delivery Order 2nd Respondents are to deliver 2 Cr. Units to UCO Bank. Mr. Ashwin Mehta deposes that this Delivery Order is signed by one Mr. Atul Parekh. He deposes that he is familiar with the signature of Mr. Atul Parekh. On Ex. R-1-J there is an endorsement. Mr. Ashwin Mehta deposes that the endorsement is of the delivery boy Mr. Parag Mehta. He states that he is familiar with the hand writing of Mr. Parag Mehta. Mr. Ashwin Mehta deposes that the 2nd Respondents did not deliver 2 Cr. units to UCO Bank as the 2 Cr. Units were netted off against the purchase of 3.5 Cr. Units. He deposed that ultimately only one Bank was used i. e. State Bank of India. He deposes that the netting off was suggested by 2nd Respondents' dealer

who concluded these transactions viz Mr. Prashant Purkar. What is important to note is that all Delivery orders have come from the possession of 2nd Respondents.

28. Mr. Ashwin Mehta deposes that the 1.5 Cr. Units delivered to the 2nd Respondents belonged to Harshad S. Mehta. He deposes that 2nd Respondents made payment at the rate of Rs. 14.85 per Unit. He deposed that the Pay Order in sum of approximately Rs. 22 Crs., issued by the 2nd Respondents for the 1.5 Cr. Units, was deposited into Harshad S. Mehta Account No. 8710 with State Bank of India. At this stage it must be mentioned that, on this statement and other statements of Mr. Ashwin Mehta to the effect that other payments in respect of the reversal leg of 2 Cr. Units Contract have been credited in the Account of Harshad S. Mehta, there has been no cross-examination. They have not been challenged at all. All that was done was to call upon Mr. Jethmalani to produce the Bank statement of Account No. 8710. How this does not disprove above statements is set out hereafter whilst dealing with Mr. Shah's arguments.

29. Mr. Ashwin Mehta deposed that on 28th February 1992 the Income Tax Department raided and seized data and records of Harshad S. Mehta. He has deposed that the computers were also seized and sealed by the Income Tax Department. He deposed that since that day the seized data is lying with the Income Tax Department. He has deposed that Harshad S. Mehta has had no access to that data. At this stage it must be mentioned that there is no cross-examination

on this aspect. There is thus no challenge to the fact that 1st Respondents data is lying seized and that they have had no access to that data since 1992. On being called upon to do so Mr. Joshi produced the Deal Slips which the Custodian had retrieved from the copy of the Hard Disk of 1st Respondents computer, which copy had been furnished by the Income Tax Department to the Custodian under an Order of this Court.

30. Mr. Ashwin Mehta then deposes about the Deal Slips. He explains the particulars on the Deal Slips. This evidence is from Pg. 13 (of the Notes of Evidence) onwards. This evidence need not be set out herein except to state that he has deposed that the Deal Slips for the 3.5 Cr. and 2 Cr. Units Transactions were prepared under his instructions and that these Deal Slips indicate the transactions to be Ready Forward. The Deal Slips fully corroborate Mr. Ashwin Mehta's oral evidence, including the evidence of Harshad S. Mehta being the Principal in these transactions and the evidence of netting off. The Deal slip for the Ready leg of the 3.5 Cr. Units is marked as Ex. R-1-K. The Deal slip for the Forward Leg of the 3.5 Cr. Units is marked as Ex. R-1-L. The Deal slip for the Ready leg of the 2 Cr. Units is marked as Ex. R-1-M. To be remembered that these Deal Slips have been taken out by the Custodian. To be remembered that 1st Respondent has had no access to the computers or this copy of the hard disk since 1992. There has thus been no opportunity to tamper with the data which was fed in in 1991 i.e. at a time when there were no disputes between the parties.

31. For reasons set out hereafter, what happened at the reversal leg of the 2 Cr. Units Contract is not very relevant for this Application. However it must be mentioned that according to Mr. Ashwin Mehta, the reversal date was extended to 19th August 1991 from 16th August 1991. According to Mr. Ashwin Mehta the 2 Cr. Units were returned by breaking the Contract into two 1 Cr. Units Contracts and routing them through two Banks. According to him one was through SBI Capital Markets Ltd. and the other through Canbank Financial Services Ltd. The Deal Slips for the reversal leg are marked as Exs. R-1-O and R-1-P respectively. Mr. Ashwin Mehta honestly admits that he played no part at time of reversal of 2 Cr. Units.

32. At this stage it must be mentioned that Mr. Shah had submitted that the evidence of Mr. Ashwin Mehta was unreliable and untruthful. These submissions are set out in paras 67 to 78 hereafter. For reasons set out therein I am unable to accept the submissions of Mr. Shah. It must also be mentioned that Mr. Ashwin Mehta has been extensively cross-examined. The Notes of Evidence of the cross-examination run into almost a hundred pages. In spite of this extensive cross-examination, except for establishing minor discrepancies the evidence of Mr. Ashwin Mehta could not be shaken. In my view this is only possible when a person is telling the truth. The evidence of Mr. Shiva of the 2nd Respondents shows how difficult it is to maintain untruth in a sustained and extensive cross-examination. In cross-examination Mr.

Shiva found it extremely difficult to maintain his evidence of the practise allegedly followed by the 2nd Respondents for PMS Transactions. He continuously had to keep changing and modifying his initial deposition. This is what happens when evidence is untrue and molded to meet the parties own case.

33. The 1st Respondent also led evidence of their delivery boy Mr. Lenghti. He proved that the two Contract Notes for the Forward Legs of 3.5 Cr. Units and 2 Cr. Units (Exs. R-1-A and R-1-D) were delivered to the 2nd Respondents. He also proved that the 2nd Respondents dealer Mr. Nagnath acknowledged receipt by initialing on the 1st Respondents copies. He identified the initials of Mr. Nagnath. Thus the evidence of these persons establishes the entering into of Ready Forward Contracts for 3.5 Cr. and 2 Cr. Units and delivery of the respective Contract Notes. This is supported by Contract Notes Exs. R-1-A, R-1-B, R-1-C and R-1-D. This is further supported by Delivery Orders Exs. R-1-F and R-1-H. These show that documents, of the type normally prepared in such Contracts, exist.

34. Now let us see what Mr. Shiva had to say about these documents in cross-examination. In respect of the Contract Note for the Forward Leg of the 3.5 Cr. Units Contract i.e. Ex. R-1-A, on Pg. 259 of the Notes of Evidence this is what is ultimately admitted:

> "(Witness is shown Exh. R-1-A)
> The original of this Contract Note does not exist in the records of Citi Bank.
> Q: According to you does it not exist today or was it never received by Citi Bank?
> A: My answers are based on the records as they

exist today.

It is possible that the original of Exh. R-1-A may have been received by Citi Bank.

I have not personally searched for original of Exh. R-1-A."

Thus it is admitted that the Original Contract Note (Ex. R-1-A) may have been received by the 2nd Respondents. Similarly in respect of the Delivery Order (Ex. R-1-F) Mr. Shiva admits that it may have been received on 18th May 1991.

35. So far as the Forward Contract for 3.5 Crs. Contract is concerned, it is admitted that there is such a Contract. In their Affidavit in Reply the case of the 2nd Respondents is that this is an independent Contract. In the Affidavit it is claimed by the 2nd Respondents that this Contract is between themselves and UCO Bank on a principal to principal basis. In the Affidavit it is claimed that in this Contract Mr. Harshad S. Mehta is only a broker. It is claimed that this Contract was entered into by a PMS dealer on behalf of a PMS Customer. This is sought to be supported by Mr. Shiva in his Evidence in Chief.

36. In respect of this Contract the evidence of the 1st Respondent has been as set out above. Now let us see the evidence of Mr. Shiva, during cross-examination, in respect of this Forward Contract. To be remembered that Justice Tulzapurkar mentions in his Opinion that he had been informed that Harshad S. Mehta was the principal in this Contract. Also to be remembered that in their reply to the Custodian 2nd Respondents admit that this Contract was with Harshad S. Mehta as a Principal. On Pgs. 206 to 209 of the

Notes of Evidence Mr. Shiva deposes as follows:

"Based on records I deny that in the forward contract for sale of 3.5 Cr. Units on 18.5.92, Mr. Harshad S. Mehta was the principal.

(Witness is shown letter dt. 29.4.93 [part of Exh. "A"].)

Q: Why is it stated in this letter that Citi Bank has entered into this forward contract with Harshad S. Mehta ?

A: This does not necessarily mean that Harshad S. Mehta was the principal. From the Contract Note it is difficult to find out who is the principal/counterparty. This may therefore be referring to Harshad S. Mehta as a broker. According to me the words" With" could read as "through".

Q: Would it be correct to say that at the time Citi Bank took a written Opinion from Justice V.D. Tulzapurkar (Rtd.) the Opinion was taken on the basis that this contract was with Harshad S. Mehta as a principal ?

A: I am not aware of all the details but I can say that the Opinion was taken on the basis of records then available with Citi Bank.

I now say that Opinion was sought on the basis of incomplete records.

Mr. Prashant Purkar was not in the employment of Citi Bank on the date that the Opinion of Justice V. D. Tulzapurkar (Retd.) was taken.

Citi Bank had made enquiries from Mr. Prashant Purkar, about the forward contract of 3.5 Cr. Units, before Mr. Purkar left Citi Bank. Mr. Purkar had mentioned that Harshad S. Mehta was a broker in the transaction.

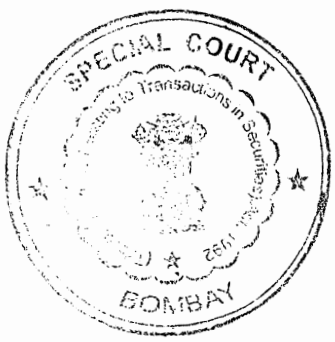
Q: If Mr. Purkar had already informed Citi Bank that Harshad S. Mehta was merely a broker, why did Citi Bank inform Justice V.D. Tulzapurkar (Retd.) that Harshad S. Mehta was a principal in that transaction ?

A: Firstly, Mr. Purkar was no longer available with Citi Bank. Secondly Citi Bank was still searching for the relevant documents.

I do not know whether, at the time of writing the letter dt. 29.4.93, Citi Bank was aware of, who the counter party was .

Our computer does not have any records of this forward contract. Therefore the name of the counterparty would not be available in the computer.

We came to know the name of the counterparty from a note which Mr. Prashant Purkar had prepared. I personally do not know when the note was prepared. It must have been prepared prior to



his leaving Citi Bank. I cannot say whether the note was available in the records of Citi Bank when the letter dt. 29.4.93 was written by Citi Bank.

(Witness adds: Presumably the note was not available, otherwise the letter would have been written differently.)

(Cross examination continued.)

It will be correct to say that, except for the note of Mr. Prashant Purkar , the other Bank records did not show whether Harshad S. Mehta had acted as a principal or as a broker in the forward contract of 3.5 Cr. Units.

Q: Why is it that Citi Bank expected delivery and performance from Mr. Harshad S. Mehta instead of from the alleged counterparty ?

A: In the absence of disclosure of the counterparty by Harshad S. Mehta, it was only natural to expect delivery and performance from the broker Harshad S. Mehta.

(Witness adds : The broker is the intermediary in the contract and he is to be approached in the event of non performance in order to complete the contract.

(Witness further adds: The broker is to be approached in order to find out the counter party and to complete the contract.)

(Cross examination continued.)

Based on records I can say that Citi Bank has not sought performance from the alleged counterparty.

I deny that, as per our records, Harshad S. Mehta was a principal in the forward contract of 3.5 Cr. Units.

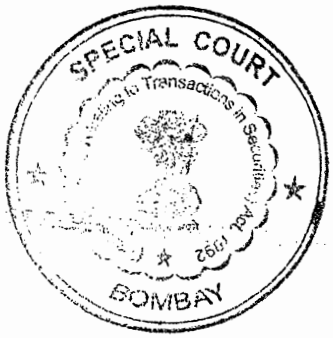
I deny that the only record available with Citi Bank to show that Harshad S. Mehta is a broker is the note prepared by Prashant Purkar.

(Witness adds : The Bank had received a Contract Note from Harshad S. Mehta in respect of the 3.5 Cr. Units forward leg. However we are still unable to trace that Contract Note. Therefore the Note is not the only record of the Bank.)"

Then on Pgs. 218 to 222 of the Notes of Evidence it is stated as follows:

"The statement on page 207 of the Notes of Evidence to the effect that Mr. Purkar had mentioned that Harshad S. Mehta was the broker in the transaction is based upon the note.

As far as I know, at present, Mr. Nagnath is in Hongkong. I do not have his address and telephone number. It would not be possible to



communicate with him. I did not speak to Mr. Nagnath before coming to give evidence.

I had no role in the preparation of letter dt. 29.4.93 (part of Exh. "A" (Colly.)

I had no role to play in the preparation of the two Affidavits in Reply, both dt. 11.11.1994, filed by Citi Bank in this Application.

I did not attend any conferences with Justice V.D. Tulzapurkar (Retd.) prior to his giving his Opinion.

I played no role in the preparation of the Affidavits of Documents filed by Citi Bank in this Application.

I played no role in any of the above mentioned activities because I had my own work and these were handled by designated people.

The designated people have prepared everything on the basis of records of Citi Bank. I am also deposing on the basis of records of Citi Bank. It would be correct to say that Mr. Pareejat Singhal and Mr. Rajagopal Jayaram have had access to the same record to which I have had access.

Mr. Parthasarthy is today not in the services of Citi Bank. I am not sure where he is today.

Recess:

After Recess:

(Cross examination continued.)

Mr. Prashant Purkar's Note does not bear any date.

It is not on any letter head.

The note does not indicate that Citi Bank had made enquiries with Prashant Purkar.

I do not know whether the note is a voluntary note prepared by Mr. Prashant Purkar.

Mr. Nagnath left Citi Bank on 8.2.94. I have still not been able to get the exact date on which Mr. Purkar left Citi Bank.

The forward contract of 3.5 Cr. Units has not, till date been appropriated towards any PMS customer.

I deny that the contract is first entered into on behalf of the Bank and that subsequently if found necessary it would be appropriated towards a PMS customer.

Q: Would it be correct to say that till date in the forward contract of 3.5 Cr. Units, one of the parties is Citi Bank ?

A: It is incorrect to say that Citi Bank is one of the parties except that the contract is now outstanding and all the PMS Accounts have been closed.

I deny that on the day that the Deal Slip is drawn, in respect of transactions entered into by dealers in the Front Office, the name of the PMS

customer will not be entered in the Deal Slip on the same day.

It is correct that till date today I cannot say for which PMS customer the forward contract of 3.5 Cr. Units was not intended.

(Witness is shown para 6(h) of Affidavit in Reply dt. 11.11.94 filed by Citi Bank wherein in it is stated that the forward contract of 3.5 Cr. Units is not on behalf of S.C.I.C.I)

Such an assertion could have been made as the contract has not been assigned to any PMS customer.

It is correct that the same could be said in respect of any other PMS customer."

Thus now the record of the 2nd Respondents, on the basis of which it is denied that Harshad S. Mehta is the Principal in the Forward Contract of 3.5 Cr. Units, is an alleged Note prepared by Mr. Prashant Purkar. Very significantly no such Note has been tendered in evidence. This even though it is disclosed in the Affidavit of Documents. Importantly it is admitted that except for the alleged Note of Mr. Prashant Purkar there is no other record of the 2nd Respondent to show whether 1st Respondent acted as a principal or as a broker. If the Note is now not being relied upon, then on what basis can it still be maintained that 1st Respondent was only a broker. Finally on Pgs. 285 and 286 of the Notes of Evidence it is stated as follows:

"(Witness is shown letter dated 29th April 1993 part of Exhibit A (Collectively) and page 206 of the Notes of Evidence wherein he has deposed that the word "with" could be read as "through".)

In para 9 of the letter dated 29th April 1993, in the context in which it is written, the word "with" will mean with Mr. Harshad Mehta as a principal.

Q: Therefore according to you, in this letter was Citi Bank claiming a set off of a transaction in which Harshad Mehta was merely a broker against a transaction in which Harshad Mehta was a principal?

A: Firstly, I cannot say as I had no role

to play in the drafting of this letter. Secondly, it is not clear as to whether the reference to the RUCHI SOYA transaction was settled through the Stock Exchange.
(Question is repeated to the witness.)
A: In the letter there appears to be a presumption that Mr. Harshad Mehta was a principal in the first contract also.

Even today Citi Bank does not have the Contract Note for the forward contract of sale of 3.5 Cr. Units by Citi Bank.

It is correct that neither in the letter dated 29th April 1993 nor in the Affidavit in Reply dated 11th November 1994 filed by Citi Bank in reply to Harshad S. Mehta's Affidavit, is there any statement that the original Contract Note (the copy of which is at Exhibit R-1-B) was not available with Citi Bank.

I cannot say why it has not been stated that this document did not exist in the records of the Citi Bank.

I cannot say, whether or not, on 29th April 1993 or on 11th November 1994 the original of Exhibit R-1-B was available in the records of Citi Bank.

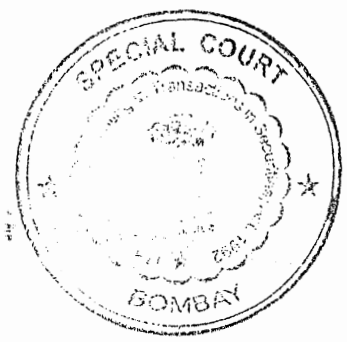
I understand that on 19th June 1995 the original of Exhibit R-1-B was not available in the records of Citi Bank.

(Witness is shown page 5 of the Notes of Evidence wherein Counsel on behalf of Citi Bank has stated that the original of Exhibit R-1-B was not available in Court at present.)

I understand that on the date that this statement is made in Court the original was not available with Citi Bank at all.

I deny that the original has all along been available with Citi Bank but is being suppressed."

In my view, the evidence makes it clear that there is no denial of fact that Justice Tulzapurkar (Retd.) had been informed that the 1st Respondent was a Principal in this Contract. This coupled with the fact that in their reply to the Custodian, the 2nd Respondents admit that the 2nd Respondent is the Principal counter-party, leaves no room for doubt that there is some material in their records which



indicates this but that material is now being suppressed. Very likely the Contract Note has some endorsement which indicates this or the fact of netting off on the Ready Leg. Also it is clear that in everything Mr. Shiva is prevaricating.

37. As regards the Ready Forward Contract for 2 Cr. Units the evidence of 1st Respondent is as set out above. The Contract Note for the Forward Leg is Ex. R-1-C. In this case there are two Delivery Orders viz Ex. R-1-H and Ex. R-2-D. By Ex. R-2-D Respondents No. 2 are called upon to deliver 2 Cr. Units to SBI Capital Markets Ltd. The rate shown in this Delivery Order is Rs. 14.50 per Unit. By Ex. R-1-H Respondents No. 2 are called upon to deliver 2 Cr. Units to UCO Bank. The rate shown in this Delivery Order is Rs. 14.85 per Unit. There are two Delivery Orders because, as per Mr. Ashwin Mehta, initially the Contract for 2 Cr. Units was at Rs. 14.50 per Unit and subsequently the rate was refixed at Rs. 14.85 per Unit. Both the Delivery Orders have come from custody and possession of 2nd Respondents. The Deal Slip is Ex. R-1-M. On Pg. 154 of the Notes of Evidence Mr. Shiva admits receipt by the 2nd Respondents of the Contract Note and the two Delivery Orders.

38. In para 7 of their Affidavit in Reply to the Affidavit of 1st Respondent the 2nd Respondents state as follows:

> "..... Similarly on going through the records of Citibank relating to Citibank's transactions of May 1991 we have come across a contract note and delivery order both dated 18th May 1991 issued by

> Harshad Mehta as a broker under which Citibank has purported to sell 2 Cr. Units to UCO Bank. We say that this contract and delivery orders of 18th May 1991 were not acted upon. Citibank's records do not show/reflect sale/delivery of 2 Cr. Units by Citibank to UCO Bank. Further the records also do not show receipt by Citibank from UCO Bank the consideration for the purported sale of 2 Cr. Units. ..... "

To be remembered that till this stage there has been no mention of the Contract for 2 Cr. Units. Thus there must be something in their records which connects this to the 3.5 Cr. Units Contract. Otherwise why mention this. Also to be noted that in the Affidavit the existence of this Contract is not denied. What is suggested is that this Contract was not acted upon. Also to be noted that even though there are two Delivery Orders mention is made of only one Delivery Order i.e. Ex. R-1-H. This shows that to the knowledge of 2nd Respondents Ex. R-2-D had been substituted by Ex. R-1-H. This shows that to the knowledge of 2nd Respondents the rate had been refixed. If as claimed the Contract was not acted upon why refix the rate. It is because the 2nd Respondents realise that the presence of two Delivery Orders belies their case of this Contract not being acted upon that they do not refer to the first Delivery Order Ex. R-2-D. On Pgs. 229 and 230 of the Notes of Evidence Mr. Shiva states as follows:

> 'Q: Is there any Deal Slip for the ready leg of the transaction for 2 Cr. Units between Citi Bank and Harshad S. Mehta ?
> A: There is no such transaction and therefore there is no such Deal Slip.
> Based on records I can say that such a contract was never entered into.
> (Witness is shown Exh. R-1-C.)
> It is correct that this Contract Note has come from the custody of Citi Bank.

In spite of this Contract Note I say that no such contract was ever entered into.

I do not know whether Citi Bank responded to the receipt of this Contract Note and inquired why such a Contract Note was sent when there was no such contract.

(Witness is shown Exh. R-1-H.)

It is correct that this Delivery Order has also come from the custody of Citi Bank.

In spite of this Delivery Order, read with the Contract Note, I still maintain that such a contract was never entered into.

I say so because Citi Bank does not go by counterparty documents. Citi Bank only goes by its own documents. In respect of this contract there is no valid and duly authorised Deal Slip in the records of Citi Bank. I therefore say that there was no such contract.

I do not know whether Citi Bank on receipt of the Delivery Order contacted Harshad S. Mehta to find out why a Delivery Order in respect of a non existing contract, was sent.

(Witness is shown paragraph 7 of Affidavit dated. 11.11.94 filed by Citi Bank wherein it has been stated that the Contract [Exh. R-1-C] and the Delivery Order [Exh. R-1-H] were not acted upon.)

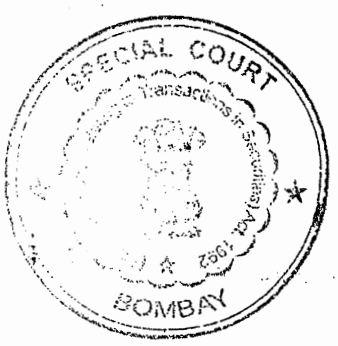
I do not agree that in this Affidavit the existence of the contract has been admitted. According to me the Affidavit states that Citi Bank's records do not show or reflect any sale or delivery of 2 Cr. units by Citi Bank to UCO Bank. According to me this necessarily means there was no such contract.

Based on records I deny that on 18.5.91 a contract for sale of 2 Cr. Units by Citi Bank to Harshad S. Mehta was entered into.

Citi Bank had preserved the Contract Note (Exh. R-1-C) and the Delivery Order (Exh. R-1-H) even though there was no such contract because Bank preserves all records in the usual course of business.

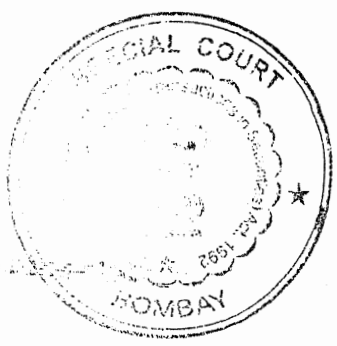
I deny that records of Citi Bank have been fabricated in order to eliminate all trace of this transaction."

Thus the only reason for denying existence of the Contract, in spite of documents being admittedly available, is because the Contract is allegedly not reflected in the records of 2nd Respondents. In this case the only reason for denying the



Contract is the absence of a Deal Slip. To be remembered that a Deal Slip is an internal document which is not sent to the other side. It is a document which can be easily suppressed. Even otherwise the Jankiraman Committee report shows that no back office records existed for transactions worth app. Rs. 14,757/- Crs. Thus the case that if there is no transaction there will be no Deal Slip and if there is no Deal Slip there will be no transaction cannot be accepted. If there is Contract Note and Delivery Order, then these show existence of Contract. If Contract existed, then in the absence of documents evidencing cancellation of the Contract, it could only mean that Contract was performed by delivery and payment. Admittedly there is no actual delivery of and payment for 2 Cr. Units. It could thus only be performed by netting off.

39. For the Forward Contract of 2 Cr. Units the Contract Note is Ex. R-1-D. As stated above the delivery, in this Forward Contract, is broken up into two contracts of 1 Cr. each. To be noted that Exs. R-1-D has come from the custody of 2nd Respondents. In respect of the Forward Leg the Deal Slips are Exs. R-1-O and R-1-P. The Deal Slip Exh. R-1-O shows that the delivery date has been extended from 16th August 1991 to 19th August 1991 and that the contract for 2 Cr. Units has been broken up into two contracts of 1 Cr. Units each. On Exh. R-1-D also there is an endorsement in ink which reads as follows: "19/A deal 542". This endorsement tallies with what is shown on Exh. R-1-O, i.e.,



that the delivery date has been extended to 19th August 1991. Mr. Shah submitted that the endorsement on Ex. R-1-D has not been proved and cannot be looked at. This submission overlooks the fact that this document has come from the possession of 2nd Respondents. The endorsement could only have been made by somebody in 2nd Respondents' office. Obviously 2nd Respondents are not interested in proving the endorsement. This document has been marked without any protest. In my view, the Court can, therefore, look at the endorsement on Exh. R-1-D.

40. On page No. 154 of Notes of Evidence, Mr. Shiva states that Exh. R-1-D is the Contract Note for the Forward Leg of the Contract. Thus Mr. Shiva is admitting that the contract of 2 Cr. Units in August 1991 is the Forward Leg of the Contract. This necessarily mean that there was a Ready Leg. By admitting that Ex. R-1-D is the Contract Note Mr. Shiva is admitting that there is one contract for 2 Cr. Units. To be noted that these admissions on Pg. 154 of the Note of Evidence are in the examination-in-chief. Thus it is in examination-in-chief that it is first admitted that Exh. R-1-D is the Contract Note and that this is Forward Leg of the Contract. Mr. Shiva then realizes that he has made fatal admissions. He therefore, then tries to prevaricate and get out of his admission. In cross-examination at Pg. 280 of the Notes of Evidence, this is what he states:

> Q: On what basis do you say that this is a Contract Note for the forward leg ?
> A: Citi Bank did purchase on behalf of its PMS customers 2 Cr. Units, 1 Cr. each from SBI Capital

Markets and Canbank Financial Services on 19.8.1991. Contract Note Exh. R-1-D may have been the Contract Note representing Citi Bank's purchase of the said 2 Cr. Units on 19.8.1991. Since Contract Note is dt. 16.8.1991 and reference to 2 Cr. purchases were on 19.8.1991, the Contract Note Exh. R-1-D could represent a forward contract for Units purchased.

Question is repeated to the witness.

A: I now say that what I meant was that it was a forward contract and not a forward leg of a contract.

(Witness adds : In the Notes of Evidence the terms "leg" and "contract " in the context of ready leg/ready contract and forward leg/forward contract have been used interchangeably sometimes.)

(Witness is asked to point out at 2.45 pm., today from the Notes of Evidence, any instance where the term "leg" and the term "contract" have been interchangeably used in the Notes of Evidence.)

I have no personal knowledge and therefore cannot say when the forward contract for purchase of 2 Cr. Units by Citi Bank was entered into.

Q: Based on records can you tell us when the alleged forward contract for purchase of 2 Cr. Units was entered into by Citi Bank ?

A: I have already stated that in respect of forward contracts of the PMS Unit Citi Bank does not have a record indicating the time at which the contract had been entered into.

Q: Therefore it is possible that all the contracts under all the Deal Slips produced by Citi Bank, in this Court, could have been forward contracts ?

A: I cannot say.

Q: I put it to you that the endorsement on Exh. R-1-D had been made by an employee in the Back Office of Citi Bank ?

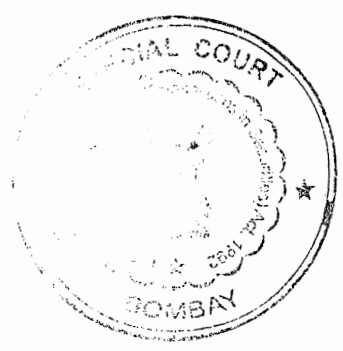
A: I cannot say.

I cannot say from what date the Contract Note (Exh.R-1-D) has been available in the records of Citi Bank.

Q: I put it to you that the dealer who negotiated the contract for 2 Cr. units prepared only one Deal Slip viz Deal Slip No. 542 on 18.5.1991 and that this Deal Slip covered even the contract evidenced by Exh. R-1-D.

A: I do not have personal knowledge. Although it is unlikely that a Deal Slip would have been prepared on 18.5.1991 for a Contract Note dt. 16.8.1991.

I deny that the original Deal Slip No. 542 has been destroyed by Citi Bank.



Q: I put it to you that after April 1993 Citi Bank has created 4 Deal Slips in respect of the transaction of 2 Cr. Units.
A: I deny that.

Thus now in cross-examination, Mr. Shiva tries to suggest that the words "Leg" and "Contract" had been interchangeably used. This obviously to get out of the admission which he had made in his examination-in-chief. As regards his theory that the words "leg" and "contract" had been used interchangeably, the following is the evidence on Pgs. 283 and 284 of the Notes of Evidence:

(Witness is asked to show where in the Notes of Evidence the word "leg" and "Contract" have been interchangeably used.

Witness point out page 217 of the Notes of Evidence wherein he has deposed as follows:

"In case of the ready leg of a transaction of the PMS Unit the primary document of the Bank will be the Deal Slip."

He also points out page 218 of the Notes of Evidence wherein he has deposed as follows :-

"The distinction is made because the terms of delivery and counterparty are known in the ready leg and they are unknown in the forward leg."

Witness also points out page 235 of the Notes of the Evidence wherein he has deposed as follows:-

"I deny that the distinction made by me between a ready leg and a forward leg of transactions of the PMS unit (on pages 217 and 218 of the Notes of Evidence) does not exist.

(Witness adds: The reference on pages 217 and 218 of the Notes of Evidence is to the operating process of a ready leg and a forward leg of a transaction of the PMS Unit.)"

(Witness also points out page 243 of the Notes of Evidence wherein he has deposed as follows "(Witness adds :- It is also likely that these could be two independent contracts, one a ready contract and the other a forward contract)"

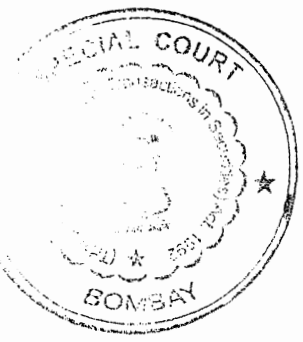
In respect of this deposition on page 243 the witness states that the Court had initially dictated the words "ready leg" and "forward leg " but on this being pointed out by Mr. Tulzapurkar these were corrected to "ready contract" and "forward contract" . The witness states that this also shows that the two words are being

interchangeably used.

Witness also states that these were all the instances he could find.)

Note : Witness was asked to point out instances where the words "leg" and "contract" were interchangeably used in the Notes of Evidence because he tried to justify his use of the word "leg" on page 154 of the Notes of Evidence on the ground that the word "leg" had been interchangeably used in the Notes of Evidence with the word "contract". If at that stage Witness used the word "leg" instead of "contract" because he understood that in the Notes of Evidence these words were interchangeably used, it could only be if this was done prior to his so using the word. Significantly not a single instance has been shown when prior to page 154 of the Notes of Evidence, the words "leg" and "contract" were interchangeably used. The witness was thus specifically asked whether prior to page 154 of the Notes of Evidence these two words were interchangeably used. It must be remembered that this is still the evidence in chief of this witness. Witness now admits that prior to page 154 of the Notes of Evidence the words were not interchangeably used. Thus upto this stage there was nothing in the Notes of Evidence which could have prompted this witness to believe that the words "leg" and "contract" could be used interchangeably. To be also remembered that the witness is a a Banker. He is a professional who understands very well what a "forward leg" is. He knows very well that a "forward leg" is completely different from a "forward contract". Yet in his examination in chief he uses the words "forward leg". It must also be mentioned that all the instances pointed out by the witness are in cross-examination. The cross-examiner knowingly used the word "leg". The cross examiner meant "leg" as distinct from a "contract" simpliciter. Thus in effect, not a single instance of use of the two words having been used interchangeably has been shown. That the words have not been used interchangeably even in cross examination is clear from page 243 of the Notes of Evidence. As stated by the witness, the Court mistakenly used the word "leg" for "contract". Immediately Counsel for Citi Bank pointed out the mistake. If the words were being used interchangeably, the Counsel would not have corrected Court. The need to correct Court only arose because the words were not being used interchangeably.)"

This makes it clear that the witness was only prevaricating



and trying to get out of his admission.

41. Thus it is to be seen that in the contract for 2 Cr. Units, Exh. R-1-D is the Contract Note for the Forward Leg. If this is the Forward Leg, then there has to be a Ready Leg. The only Ready Leg, which is shown to exist is the Contract evidenced by Ex. R-1-C. Of course as stated above Mr. Shiva tried to suggest that this was not a "Forward Leg" but a "Forward Contract". Even if the evidence of Mr. Shiva is to be accepted, it was at least a "Forward Contract". In support of the case that the 2 Cr. Units Contract in August 1991 was on behalf of PMS Customers and that it was an independent contract, the 2nd Respondents have produced 4 Deal Slips which are marked as Exs. R-2-S and R-2-U. If these Deal Slips are looked at, it will be found that all these Deal Slips show the transactions contained therein to be Ready Contracts. To the extent that it is an admitted position that the 2 Cr. Units Contract was a "Forward Contract", it is clear that these Deal Slips are false. Why should false Deal Slips have been prepared to show this transactions to be Ready Contract. Obviously because it was not just a "Forward Contract" but a "Ready Forward Contract". Why prepare Deal slips which do not reflect the correct position. Obviously because after the Judgment dt. 14th December 1993 in Misc. Application 11 Of 1993 and Misc. Petition 23 of 1993 it is clear that all such transactions would be held illegal. It is also clear that on the evidence of Mr. Shiva, that these were Forward Contracts, the Deal

Slips Exs. R-2-S and R-2-U cannot be relied upon. This because now they admittedly do not reflect the true nature of the transactions contained therein. The nature of the transaction is one of the most important aspect. If in an important aspect they are admittedly untrue, how can they be accepted as true in other respects.

42. There is one other factor which shows that the Transactions were Ready Forward Transactions. Normally transactions would be at prevailing market rates. Normally nobody would sell below the market rate. However if the transaction is a funding transaction or for some other purpose like Dividend Stripping then it is possible that the transaction may be at off market prices. This particularly so when it is a Ready Forward Transaction in which the security is being recovered back at the same price or almost the same price. Mr. Ashwin Mehta has on Pgs. 74, 75 77 and 83 of the Notes of Evidence deposed that the Transactions of 3.5 Cr. Units and 2 Cr. Units were at off market rates. He has deposed that this also indicates that these were Ready Forward Transactions. There is no challenge to this evidence. It is in evidence that the rate, at that time was in the region of Rs. 15.00 to 15.10 per Unit. Why should the two Transactions have been at Rs. 14.85 per Unit. The difference in rate amounts to almost Rs. 87 lakhs. This also indicates that the transactions were Ready Forward Contracts.

43. This is the evidence in respect of the Contracts of 3.5 Cr. Units and 2 Cr. Units. The oral evidence on behalf

of the 1st Respondent has been very consistent and is definitely to be preferred to the oral evidence on behalf of the 2nd Respondents. However the clinching piece of evidence is the documents on record, namely the Contract Notes and the Delivery Orders. These are proof of existence of the Contracts themselves. As set out above most of these have come from the custody and possession of the 2nd Respondents. Such documents cannot exist unless there are Contracts evidenced by them. The only answer to this positive evidence of existence of Contracts is that in their records there is no trace of such Contracts. To support this it necessarily has to be asserted that documents sent by counter-parties, admittedly received by 2nd Respondent and still lying in possession of 2nd Respondents, are not documents of 2nd Respondents. In other words 2nd Respondents have to go to the absurd length of asserting that only their back office computer records are records of 2nd Respondent. The records contained in the Front Office computer are also ignored. As stated above not a single person who had personal knowledge of the transactions was examined, even though available. In my view, it is not possible to accept case that even though such documents exist, still there are no such Contracts. It must also be mentioned that if Contracts are not to be performed and/or are to be cancelled then on the face of the documents two parallel lines will be drawn with the word `Cancelled'. That this is so is stated by Mr. Shiva on Pg. 135 of the Notes of Evidence. Also if the bunch of documents

tendered by the 2nd Respondents at Ex. R-2-KK (Colly.) are seen one would find that there are some documents which bear the two parallel lines with the word `Cancelled' in them. None of the concerned Contract Notes or Delivery Orders bear any such endorsement. It will thus have to be held that, it is proved that there were Ready Forward Contracts for 3.5 Cr. and 2 Cr. Units.

44. That there were such contracts is supported by the fact that on 18th May 1991 admittedly 2nd Respondents received 1.5 Cr. Units. The case of the 1st Respondent has been that 1.5 Cr. Units were received because there was netting off of delivery and payment between 3.5 Cr. Units Contract and the 2 Cr. Units Contract. In this behalf, as set out above, Mr. Ashwin Mehta has given positive oral evidence. This oral evidence is corroborated by the Deal Slips produced by the Custodian. To this positive evidence that there was netting off, there is no cross-examination at all. All that has been done is that on page 121 of the Notes of Evidence, a suggestion has been made, which was denied by Mr. Ashwin Mehta, that his deposition about the netting off was false.

45. In his examination-in-chief on page 145 of the Notes of Evidence, Mr. Shiva admits that the transaction can be netted off at the delivery level and that payments can also be netted off. He however deposes that it is the back office which deals with delivery and transaction settlement. He deposes that the back office would have clearer picture

of all outstanding deliveries. He deposes that therefore it is the back office which would decide whether netting off was to take place. He deposes that to his knowledge the front office would not be concerned with netting off in any manner. The suggestion clearly is that there could be no netting off by the front office dealers. This however could not be sustained by him and in cross-examination on page 278 of the Notes of Evidence, he had to admit the following:

> " The front office personnel had authority to negotiate terms of delivery.
> The front office personnel had authority to negotiate terms of payment.
> Q. Would a netting off be a term of payment or a term of delivery or not?
> A. It is a term of settlement. It can refer to delivery or payment or both.
> The front office personnel had authority to negotiate netting off of either delivery or payment or both."

46. In respect of contract of 1.5 Cr. Units, 2nd Respondents have not been able to produce any Contract Note or Delivery Order. To be remembered, if there was an independent contract for 1.5 Cr. Units, as claimed by 2nd Respondents, then necessarily there would be a Contract Note and a Delivery Order. Realising this position, Mr. Shiva deposes on page 231 of the Notes of Evidence that in a Ready Contract, a Deal Slip would be prepared without waiting for the Contract Note. He thus implies that there may be no Contract Note without actually saying so. Thereafter on page 240 of the Notes of Evidence, forgetting what he has stated earlier, Mr. Shiva volunteers that instances of other party not sending a Sale Note (i.e. a Contract Note) or Cost Memo

are very rare. Ultimately, on pages 273 and 274 of the Notes of Evidence, Mr. Shiva had to admit that in respect of contract of 1.5 Cr. Units in the record of 2nd Respondents, he had not seen any Contract Note either from 1st Respondent or from any other broker. He had to admit that he had not seen any Delivery Order in respect thereof. He also had to admit that he has no personal knowledge whether 1st Respondent acted as a Broker in this transaction or not. Taking all the above mentioned factors into consideration and particularly the fact that documents which would exist, if the 1.5 Cr. Units Contract was an independent contract, are not there it will have to be held that there was no independent contract for 1.5 Cr. Units. It is clear that 1.5 Cr. Units were received by 2nd Respondents as and by way of netting off between Ready Leg of the 3.5 Cr. Units Contract and the Ready Leg of the 2 Cr. Units Contract.

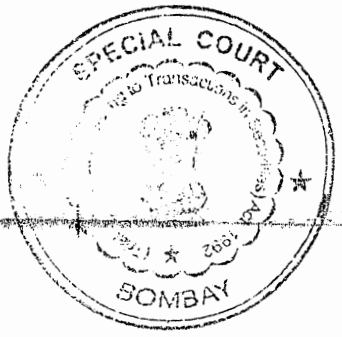
47. Mr. Shah during his submissions submitted that according to the 1st Respondent, on 18th May 1991, there was also another contract whereunder 2nd Respondents sold to 1st Respondent 1.2 Cr. Units. This is transaction No. (iv) mentioned in para 9 above. Mr. Shah submitted that the whole theory of netting off is proved to be false by this 4th transaction. He submitted that if there was netting off, then there was no reason why this transaction, which was at the same rate, was not netted off. I am unable to accept the submission of Mr. Shah. The Contracts for 3.5 Cr. Units and the 2 Cr. Units were Dividend Strip Contracts where the

reversal is after declaration of dividends by the Unit Trust of India in June 1992. This transaction is a simple Ready Forward Contract where the reversal is within four days, i.e., it was to be reversed prior to dividend being declared by the Unit Trust of India. As the transaction was to be reversed within four days, it is a simple financing transaction and thus it could never have been netted off against other Dividend Strip Transactions.

48. It must be mentioned that Mr. Shah had submitted that the existence of these documents does not show existence of Contract. He refers to Mr. Ashwin Mehta's evidence on Pgs. 10, 94, 97 to 99 and 112 of the notes of Evidence and submits that Mr. Ashwin Mehta has admitted that documents were not acted upon. he submits that once it is admitted that documents were not acted upon, then mere existence of some documents does not lead to the conclusion that the Contracts existed. He submits that it is established that these documents were not acted upon. I am unable to accept this submission. To be noted that, on a question from Court, Mr. Shah fairly conceded that the only documents which were not acted upon are the three delivery Orders i.e. R-1-F, R-1-H and R-2-D. Mr. Shah could not show any other document which was admitted to have been not acted upon. In fact he could show no evidence of any other document not having been acted upon. 2nd Respondents have tendered a number of documents. They could not produce, from their records any other document which was not cancelled and which was not acted upon. The fact

that the Delivery Orders were not acted upon is a circumstance which goes against 2nd Respondents. Why should Delivery Orders, in respect of Contracts which are proved to exist, not have been acted upon. It could only be because the Contracts were cancelled or because an alternate method of delivery was found. If the Contract was not to be performed then it would bear a cancellation mark. The Contracts have not been cancelled. Thus the Delivery Orders not having been acted upon shows that there was delivery by some other method. The other method is netting off. Thus the fact of Delivery Orders not being acted upon also proves netting off.

49. The next question which arises is whether 1st Respondent was the principal in the Ready Forward Transaction of 3.5 Cr. Units and in the Ready Forward Transaction of 2 Cr. Units. Here also there is a positive evidence of Mr. Ashwin Mehta which has not been shaken at all. This positive evidence is supported by the Deal Slips which have been produced by the Custodian. This is further supported by the fact that Contract Notes have been issued by 1st Respondent. As against this, the only evidence on behalf of 2nd Respondents has been to try and show that in the reversal leg of the 2 Cr. Units Contract, 1st Respondent had not acted as a principal. As stated above, the statement of Mr. Ashwin Mehta that the amount of approximately Rs. 22 Crs. has been deposited into Mr. Harshad Mehta's Account No. 8710 with State Bank of India and that payments in respect of Reversal Leg of 2 Cr. Units Contract have also been credited in this



Account has not been challenged in cross-examination at all.

50. The other factors which are to be kept in mind are that all the Contract Notes are by 1st Respondent. They appear to be in Form "A" as prescribed by the Bombay Stock Exchange. The fact that they appear to be in Form "A" has been strongly relied upon by Mr. Shah. Mr. Shah submitted that the Form "A" is used by Brokers. He submitted that it is an admitted position that at least in one transaction of 18th May 1991, 1st Respondent acted as a Broker. He submitted that in that transaction admittedly the Contract Note was in Form "A". He submitted that this also shows that Form "A" is used by brokers. He submitted that the oral evidence of Mr. Ashwin Mehta that 1st Respondent was a principal in these alleged Contracts is based upon the internal Deal Slips of the 1st Respondent. He submits that if it is shown that 1st Respondent was not a principal, then it would be proved that the alleged Deal Slips are false documents.

51. Mr. Shah submitted that under Section 15 of the Securities Contract Regulation Act, a broker cannot act as a principal without first obtaining the written consent of the counterparty. He submits that Bye-law 229 of the Stock Exchange also stipulates the same. He refers to Forms "A" and "B" as provided under Regulation 14.2 of the Bombay Stock Exchange. He submitted that Units of Unit Trust of India are capable of being listed on the Stock Exchange. He submits that they are securities within the definition of "Securities" as contained in Section 2(H) of the Securities

Contract Regulation Act. Mr. Shah strongly relies upon the Contract Notes and submits that all of them were in Form "A". He submitted that this is documentary evidence which shows that the 1st Respondent acted as a Broker. He submits that Mr. Ashwin Mehta, in his evidence, has admitted that no written consent had been taken from 2nd Respondents. He submits that this being the position, the Court must always presume legality of a transaction. He submits that the Court will not readily infer illegality. He submits that as the Contract Notes are in Form "A" and as no written consent has been taken, the transaction would be illegal under the Securities Contract Regulation Act as well as under the Bye-laws of the Stock Exchange, if it is shown that Mr. Harshad Mehta acted as a principal. He submits that, therefore, the Court must favour an interpretation which upholds the legality of the documentation.

52. In support of the submission that the Court would always presume in favour of legality, he relied upon the cases of **The Paper Sales Ltd. v/s Chokhani Bros.** reported in A. I. R. (1946) Bom. Pg. 429; **Satya Sri Ghoshal v/s Kartik Chandra Das** reported in (1912) XV Cal. Law Journal Pg. 227; **A. S. N. Nainapillai Marakayar v/s T. A. R. A. Rm. Ramanathan Chettiar & Ors.** reported in A. I. R. (1924) P. C. Pg. 65 and **Atyam Veeraju & Ors. v/s Pechetti Venkanna & Ors.** reported in A. I. R. (1966) S. C. Pg. 629.

53. Mr. Shah also submitted that apart from the presumption of legality, there was another presumption, i.e.,

that when a law permits an act to be done in a particular manner or subject to certain conditions, then that act could only be done in that manner. He submitted that normally a Court would not, without any evidence in that behalf, take into consideration other modes of doing that act and holding it to be illegal. In support of this submission, he relied upon the authorities in the cases of **Nazir Ahmad v/s King Emperor** reported in A. I. R. (1936) P. C. Pg. 253 and **State of Uttar Pradesh v/s Singhara Singh & Ors.** reported in A. I. R. (1964) S. C. Pg. 358.

54. Mr. Shah also relied upon the following observations in a Judgment dt. 29th/30th March 1994 in Misc. Application No. 267 of 1993:

> 14. There is another reason why this submission cannot be accepted. It is an admitted position that Respondent No. 2 is a member of the Bombay Stock Exchange.
>
> 15. Bye-law No. 229 which admittedly applies reads as follows:-
>
> "Contracts by Members as Principals.
>
> 229. A member shall not enter into any contract for the purchase or sale of securities as a principal with any constituent (other than a member of a Stock Exchange recognised under the Securities Contracts (Regulations) Act 1956) unless he has secured the consent or authority of such constituent and discloses in the note, memorandum or agreement of purchase or sale that he is acting as a principal:
>
> Provided that where the member has secured the consent or authority of such constituent otherwise than in writing he shall secure written confirmation by such constituent of such consent or authority within three days from the date of the contract:
>
> Provided further that no such consent or authority of such constituent shall be necessary for closing out any

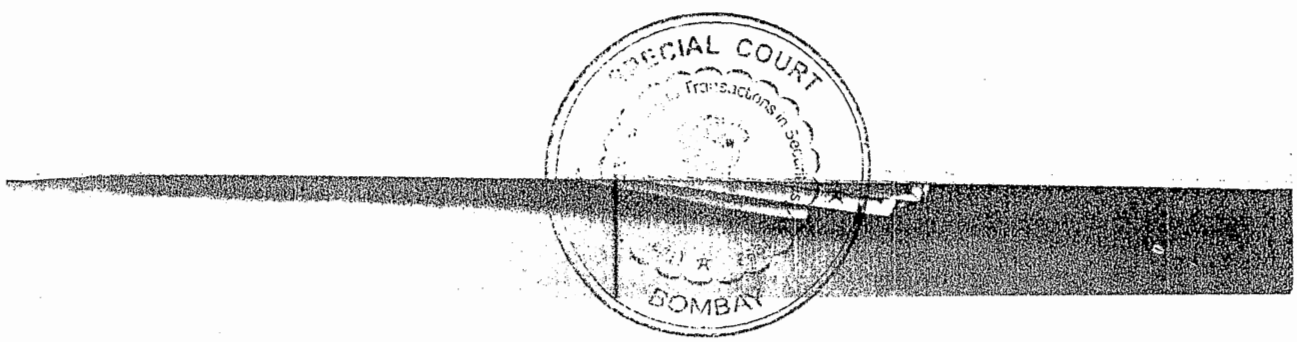
> outstanding contract entered into by such constituent in accordance with these Bye-laws and Regulations if the member discloses in the note, memorandum or agreement of purchase or sale in respect of such closing out that he is acting as a principal."

> Further, under Bye-law 228, the constituent has to indemnify the Broker. This again on the footing that the Broker is an Agent. It is nobody's case that such consent has been obtained. On the contrary as stated above the Bill dated 19th April 1992 shows that the purchase is on behalf of Respondent No. 3. It is thus clear that Respondent No. 2 has merely acted as an Agent for Respondent No. 3. There is thus no substance in the contention that the contract between Respondent No. 2 and Respondent No. 3 was on a principal to principal basis. Respondent No. 2 entered into contract to purchase the 50,000 shares from Applicant for and on behalf of Respondent No. 3. There is thus privity of Contract between Applicant and Respondent No. 3. This even though there may, in practice, be no direct contact between them."

Mr. Shah submits that this Court has thus laid down that if consent is not taken then it would show that the other party was a broker.

55. There can be no dispute with the legal submissions. But ultimately the decision has to be based on facts of each case. In Misc. Application No. 267 of 1993 the Applicant was Mr. Ashwin Mehta. The 2nd Respondent was a broker by name M/s Kishore J. Janani. The 3rd Respondent was one M/s Infrastructure Leasing and Finance Services Ltd. The facts as set out in paras 2 to 10 of that Judgment are as follows:

> "2. The facts briefly stated are as follows: On 9th April 1992 the 3rd Respondent purchased, through the 2nd Respondent acting as a Broker, 50,000 shares of Grasim Industries at the rate of Rs. 660/- per share. The 2nd Respondent in its



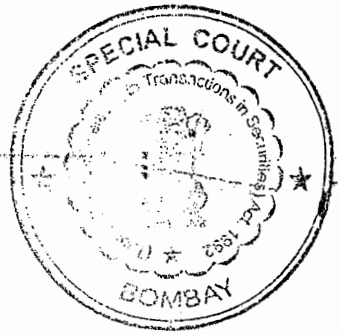
turn on the same day i.e. 9th April 1992 purchased, for and on behalf of the 3rd Respondent, 50,000 shares of GRASIM Industries from the Applicant.

3. On 29th April 1992, 27,500 shares were delivered to Respondent No. 3. Payment in respect of these 27,500 shares has been made and received by the Applicant. It may only be mentioned that in respect of these 27,500 shares the 3rd Respondents have filed Misc. Application No. 135 of 1994. Some of the arguments made today are contrary to the averments made in that Application and at the relevant time it would be necessary to refer to some of the averments in that Application. It must be mentioned that by reason of the delivery of 27,500 shares, the 3rd Respondent became aware that the Contract for purchase of these 50,000 shares was with the Applicant and his group.

4. On 8th June 1992 the Applicant was Notified. Under Section 3 of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 (hereinafter referred to as "the Special Courts Act), all property of the Applicant stood statutorily attached. Even prior to that the Central Bureau of Investigation (For short "the C. B. I.") had commenced investigation and frozen the accounts of the Applicant. Thus, as a result of the action of C. B. I. and the enactment of the Special Courts Act, the Applicant could not deliver the balance 22,500 shares. This did not mean that the Applicants were not ready and willing to perform their part of the Contract. Under Section 4 of the Special Courts Act all Contracts continue to remain valid and binding unless they are set aside on the grounds provided thereunder. The enactment of the Special Courts Act and the property of the Notified party being attached are well known. All parties including the 3rd Respondent were aware of it. Very fairly it has not been denied that Respondent No. 3 was so aware.

5. On 22nd July 1992 the Custodian/Transfer Agents of Respondent No. 3 wrote to Respondent No. 2 asking for delivery of the balance shares. Thus, it is very clear that upto 22nd July 1992 the Contract was alive and valid. It was so treated by all parties including Respondent No. 3. In view of these circumstances, the fact that the Original Contract was entered into on 9th April 1992 and no delivery had been made upto this date, looses all significance.

6. On 23rd July 1992, the 3rd Respondent wrote to the 2nd Respondent and stated that 22,500 shares had not yet been delivered and that as per their procedure they would "Square off" the

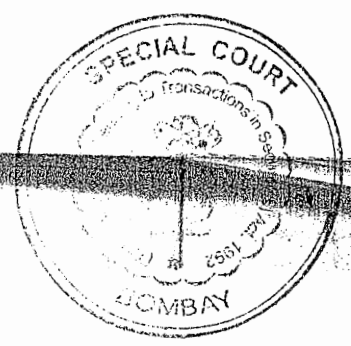


transaction. They called upon the 2nd Respondent to give a Sale Contract for 22500 shares at the same rates i.e. at the rate of Rs.660/- per share. The 3rd Respondent also stated that if within 7 days they did not receive the Sale Contract then they would treat the purchase transaction as cancelled.

7. The 2nd Respondent by a letter dated 10th August 1992 replied to the letter dated 23rd July 1992. He pointed out that he had been in contact with the Custodian/Transfer Agents of the 3rd Respondent. He pointed out that in the market there were doubts about good delivery and bad delivery. He clarified that until this position was clarified by the Stock Exchange it was not safe to deliver any shares. He pointed out that it was under those circumstances that delivery was not made. He pointed out that he was in a position and willing to deliver the shares. He pointed out that the transaction could not be squared off. He therefore called upon the 3rd Respondent to instruct their Custodian/Transfer Agents to accept delivery of shares.

8. At this stage it is pertinent to point out that in the month of July 1992 various Stock Exchanges, including the Bombay Stock Exchange had come to this Court by way of Misc. Petition Nos. 1 of 1992, 2 of 1992 and 3 of 1992. These were for directions that deliveries of shares made through the Stock Exchanges should be considered as good deliveries. This because dealings in all these Stock Exchanges had come to a stand still. In those matters the Attorney General of India intervened and a Consent Order, establishing a procedure for Certification was laid down by Order dated 27th July 1992. That Order was subsequently modified by Order dated 31st July 1992. Under those circumstances, the explanation given by Respondent No. 2 in his letter of 10th August 1992 was absolutely correct. No deliveries were being made until the question of good delivery and bad delivery was sorted out. In my view, it is safe to assume that even the 3rd Respondent who are a major Financial Institution were well aware of this situation. Therefore upto 22nd July 1992 they themselves had not treated the Contract as terminated or cancelled. Another factor which undoubtedly is very relevant in this Application is that in the mean time the prices of shares fell drastically. This undoubtedly is the reason why the 3rd Respondent was no longer interested in taking delivery of the balance at the rate of Rs. 660/- per share.

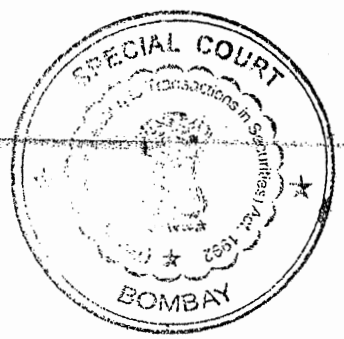
9. The 3rd Respondent by their letter dated



12th October 1992 addressed to the 2nd Respondent make a reference to their earlier letter dated 23rd July 1992 and purport to send a Sale Order for 22,500 shares at the rate of Rs. 660/- per share. Orally I am informed by Mr. Tulzapurkar that the Sale Order is dated 1st October 1992. Thus, by this ruse the 3rd Respondent purport to "Square off" the transaction for the balance 22,500 shares at the same rate i.e. Rs. 660/- per share. They thereby avoid taking delivery of these shares and making payment for them. To be noted that on 10th August 1992 delivery had been offered to them by the 2nd Respondent. There has been no reply to the letter of 10th August 1992. It is only in October 1992 that the squaring off takes place.

10. On 15th February 1993 the Applicant writes to the 2nd Respondent that the Applicant was willing to complete the transaction and effect delivery. The Applicant states that he is willing to make an Application to this Court to enable him to complete the deliveries and he asks for the names of purchaser. The 2nd Respondent by his letter dated 6th April 1993 informs the Applicant that the 3rd Respondent was the purchaser and that he had wrongly "Squared off" the transaction at the rate of Rs. 660/- per share. It is under these circumstances that this Application has been made."

Thus it was an admitted position that, the 3rd Respondents (therein) had dealt with the 2nd Respondent (therein) in his capacity as a broker. The 2nd Respondent (therein) purchased through Mr. Ashwin Mehta the concerned securities. In spite of this being an admitted position it was sought to be contended that the transaction between the 3rd Respondent (therein) and the 2nd Respondent (therein) was on a principal to principal basis. It is under those circumstances that the above observations, relied upon by Mr. Shah, were made. The Court has not held, merely on the basis of the Contract Note being in Form "A", or merely on the basis of no consent having been taken, that the 2nd Respondent (therein) was a broker. In my view this Judgment is of no assistance to Mr.



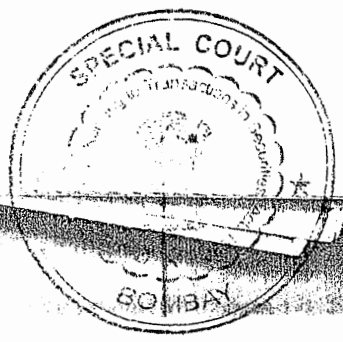
Shah.

56. Also to be noted that the above submissions of Mr. Shah are based only on the fact that the Contract Notes appear to be in Form "A". If one actually looks at Form "A" as prescribed in Regulation 14.2 of the Bombay Stock Exchange Regulations one would immediately see that the Contract Notes are not exactly in that form. In Form "A" as prescribed there also has to be a column for brokerage paid and received. In the concerned Contract Notes, there is no column for brokerage. Further the submission that the Court must presume that the 1st Respondent was a Broker because the Contract Notes are in Form "A" must be based upon some evidence of the parties. A submission contrary to evidence should not be made or entertained. In this case Mr. Ashwin Mehta has, on page 53 of the Notes of Evidence, deposed that all Contract Notes issued by 1st Respondent, irrespective of whether he acted as a principal or broker, were in Form "A". This has not been challenged in cross-examination. Mr. Ashwin Mehta has also deposed that in respect of one of the transactions entered into on 18th August 1991, Mr. Harshad Mehta was the principal, i.e., the Contract for Sale of 1.2 Cr. Units by 2nd Respondents to 1st Respondent. As set out earlier, it was Mr. Shah's submission that this transaction could also have been netted off. The statement of Mr. Ashwin Mehta that the 1st Respondent was principal in this Contract has not been challenged at all. The Contract Note for this Contract is also in Form "A".

57. What is more important is that in his examination-in-chief, Mr. Shiva does not even state or suggest that merely because a Contract Note is in Form "A", it would show that 1st Respondent was a Broker. On the contrary, during cross-examination, on pages 250 and 251 of the Notes of Evidence, when questioned in respect of the transaction of 18th May 1991 (where Mr. Harshad Mehta admittedly acted as a Broker) he admits that from the Contract Notes, it could not be said what role Mr. Harshad Mehta played in that contract. He then says that it is only the person who negotiated the Contract who would have personal knowledge as to the role which was played by 1st Respondent. Thereafter on page 262 of the Notes of Evidence, he admits that a party could only be a counter-party or an intermediary, i.e., a Broker. Mr. Shiva has admitted that in many transactions with the 2nd Respondents, Harshad S. Mehta had acted as a principal. Respondents No. 2 have not produced any Contract Notes to show that in transactions where Mr. Harshad Mehta had acted as a principal, the Contract Note was in Form "B". Thus, in evidence it is an admitted position that whether Mr. Harshad Mehta acted as a Principal or a Broker, the Contract Notes would be in Form "A". Thus, the mere fact that the Contract Note is in Form "A" does not by itself establish that Mr. Harshad Mehta was a Broker. The submissions of Mr. Shah conveniently overlook/ignore the evidence. The evidence clearly shows that merely because the Contract Note is in Form "A", that by itself cannot show whether the party was a

broker or a principal. However Mr. Shah is right when he submits that, it is an admitted position that no written consent was taken. However above mentioned facts clearly indicate that 2nd Respondents were aware that 1st Respondent was the principal. If that be so then by knowingly entering into these Contracts, they have consented. In fact to presume legality Court has to presume consent. If consent cannot be presumed, then Mr. Shah's arguments would work against 2nd Respondents. In that case, this would be an additional ground for holding that the transactions of 3.5 and 2 Cr. Units were illegal and void. If that be so, then on reasoning set out in Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993, the property in the 3.5 Cr. Units will not have passed to 2nd Respondents. For that reason also 2nd Respondents would have to return the 3.5 Cr. Units. Further on Mr. Shiva' case is that it was a Forward Contract. It would still be an illegal Contract. If on 2nd Respondents witness' own case a transaction is illegal, where is the question of presuming legality.

58. Mr. Shah had referred to the Judgment dt. 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993 and submitted that it has been held that a Ready Forward Transaction on behalf of a PMS Customer is not illegal. He submitted that in this case the transaction was on behalf of a PMS Customer. He submitted that the transaction was therefore legal. This is a submission which is not supported by any averment in pleading

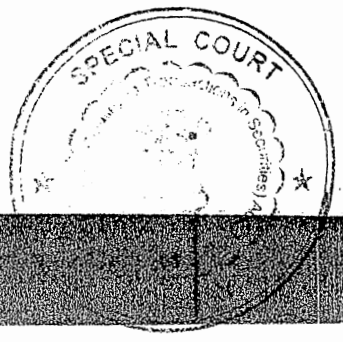


or by any evidence. It is not 2nd Respondents case either in pleading or evidence that the Ready Forward Transaction for 3.5 Cr. units was on behalf of a PMS Customer. It could not be because 2nd Respondents are denying existence of any such Contract. In trying to dishonestly deny existence, they have lost the opportunity to take up a possible defence.

59. Apart from the positive evidence of Mr. Ashwin Mehta, as corroborated by Deal Slips, there are a number of other circumstances which indicate that 1st Respondent has acted as a principal. One of the factors is that the transactions have been routed through a Bank. If the routing has taken place, then it would indicate that the 1st Respondent was a principal. In this case, for the Ready Leg of 3.5 Cr. Units Contract, initially there was a Delivery Order Ex. R-1-F. Under this, SBI Capital Markets Ltd. were to deliver 3.5 Cr. Units to 2nd Respondents. Admittedly this Delivery Order was not acted upon and 3.5 Cr. Units were not delivered. In respect of Ready Leg of the Contract for 2 Cr. Units Contract, there are 2 Delivery Orders, i.e., Exs. R-1-H and R-2-D. Under Ex. R-1-H 2nd Respondents were to deliver 2 Cr. Units to UCO Bank. Under Ex. R-2-D 2nd Respondents were to deliver 2 Cr. Units to SBI Capital Markets Ltd. The Delivery Orders Exs. R-1-H and R-2-O mention the Contract numbers. The Delivery Orders show that both are in respect of Contract Ex. R-1-C. The Contract was only one. Yet in respect of this Contract at one stage delivery was to be made to UCO Bank and at another stage delivery was to be made

to SBI Capital Markets Ltd. The fact that two separate parties have been shown as recipients in respect of the same Contract itself shows that there was routing through these Banks. If Mr. Harshad Mehta was not the principal, then there could never have been different parties shown in different Delivery Orders in respect of the same Contract. Thus in the Ready Leg of the 2 Cr. Contract there was one Contract Note with two Delivery Orders. In the Forward Leg of the 2 Cr. Contract, the Contract is split up into two Contracts of 1 Cr. each. As stated above, even though it is split up into two Contracts, there is only one Contract Note, i.e., Ex. R-1-D. Since there is only one Contract Note, it shows that there was only one Contract of 2 Cr. Units. If there was only one Contract of 2 Cr. Units, how could there be two separate counter parties? The only way that there can be two counter-parties is, if 1st Respondent is the principal and the Contract is routed through these two Banks, viz., Canbank Financial Services Ltd. and SBI Capital Markets Ltd. This also indicates that the principal counter-party was in fact the 1st Respondent.

60. Mr. Shah strongly relied upon the evidence of Mr. Vernekar. He submitted that this evidence clearly shows that the 1st Respondent was only a broker in the 1 Cr. Units contract with Canbank Financial Services Ltd. He submits that Mr. Vernekar was personally aware of the transaction and that the Cost Memo was prepared by this witness. Mr. Shah submits that the Cost Memo shows that 1st Respondent acted as

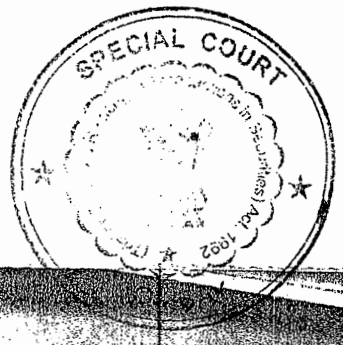


a broker. He submitted that thus it is clearly proved that Mr. Ashwin Mehta's deposition, to the effect that 1st Respondent was the principal in this transaction of 1 Cr. Units, is false. He submits that if this is shown to be false, then the other deposition of Mr. Ashwin Mehta is also false and cannot be believed.

61. Undoubtedly Mr. Vernekar claimed that in the transaction of 1 Cr. Units between Canbank Financial Services Ltd. and Citibank, 1st Respondent was only a broker. However it was clear that this witness was anxious to state this. Right at the beginning of his evidence, before any question was asked to him in this behalf, this witness showed his anxiousness to state that 1st Respondent was a broker. The questions and answers on Pg. 335 of Notes of Evidenced demonstrate this, viz.,

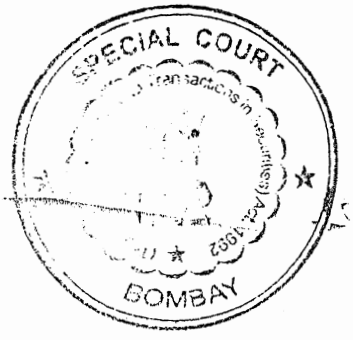
> Q. Is what is stated in the Cost Memo correct?
> A. The contract reference shows Harshad S. Mehta.
> (Question is repeated to the witness).
> A. What is stated in the Cost Memo is correct.
> (Mr. Shah tenders Cost Memo dated 19.8.1991).

In his cross-examination the witness maintains that 1st Respondent was only a broker. However it was clear to Court that the witness was only so deposing because the name of 1st Respondent appeared against the column "Contract Reference". The witness had to admit that the transaction was not concluded by him but by a Dealer. None of the Dealers were brought to give evidence. Further in evidence are Exs. R-1-U, R-1-V and R-1-W which show that even when 1st Respondent was



admittedly a principal, his name still appeared in the column "Contract Reference". Also it is established that Canbank Financial Services Ltd. received Rs. 13,85,00,000/- from 2nd Respondents and paid Rs. 13,84,175,000/- to State Bank of India, i.e., they deducted Rs. 25,000/- as their commission. The evidence of Mr. Ashwin Mehta that Rs. 13,84,75,000/- (Pg. 25 and 26 of the Notes of Evidence) was credited into 1st Respondent's Account No. 8710 with State Bank of India has not been challenged. Also as admitted by Mr. Shiva there is only one Contract Note, i.e., Ex. R-1-D. This shows that there is only one Contract for 2 Cr. Units. How could it be with two principal counter-parties. The fact that one Contract is performed through two Banks, viz.,Canbank Financial Services Ltd. and SBI Capital Markets Ltd. clearly establishes routing.

62. Another factor is that if 1st Respondent acted as a Broker, then brokerage would have to be paid to him. The brokerage amount would be reflected in the Deal Slips itself. Mr. Ashwin Mehta has stated on page 29 of the Notes of Evidence that wherever Harshad S. Mehta has acted as a Broker, brokerage was paid to him. It is not even the case of 2nd Respondents that brokerage was paid to 1st Respondent. In fact some of the Deal Slips produced by 2nd Respondents, viz., Exs. R-2-A and R-2-F show that brokerage has been paid in those cases. The Deal Slips produced by 1st Respondent corroborate fact that no brokerage has been paid in these transactions. This also shows that 1st Respondent acted as a



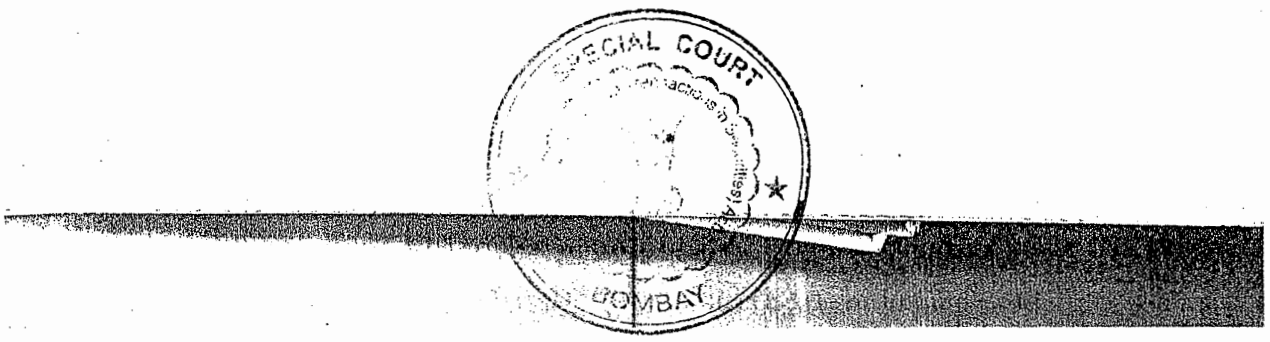
Principal.

63. One more circumstance which shows that 1st Respondent acted as a Principal is the fact of netting off. As shown above, netting off has been proved. There could have been no netting off unless 1st Respondent was the Principal in both the transactions.

64. Further it is now proved that these were Ready Forward Contracts. In respect of the Forward Leg of 3.5 Cr. Units Contract, the Opinion of Justice Tulzapurkar (Retd.) discloses that 2nd Respondents had themselves informed Justice Tulzapurkar that Harshad S. Mehta was the Principal. In their reply to the Custodian, 2nd Respondents admit that Mr. Harshad Mehta was the Principal counter-party in the Forward Contract for 3.5 Cr. Units. As these are Ready Forward Contracts, if the Forward Leg is with Harshad S. Mehta, then the Ready Leg has necessarily got to be with Harshad S. Mehta.

65. Thus the evidence, both oral and documentary, establishes the existence of Ready Forward Dividend Strip Transactions in 3.5 Cr. Units and 2 Cr. Units between 1st and 2nd Respondents on a principal to principal basis and the fact that there was netting off, of delivery and payment, in the Forward Leg of these transactions. In the background of this oral and documentary evidence let us now consider the submissions of Counsel on behalf of parties. Necessarily some submissions have already been dealt with above.

66. Mr. Shah submitted that the evidence of Mr. Ashwin



Mehta has been that Mr. Harshad S. Mehta was out of India from 1st May 1991 to 23rd may 1991. He submitted that:

i) the 1st Respondent has failed to prove that he entered into the alleged Ready Leg for 3.5 Cr. Units on 18th May 1991

ii) that, in any event, 1st Respondent has not proved that 3.5 Cr. Units were delivered on 18th May 1991 or on any other date

iii) the 1st Respondent has not proved that 2nd Respondent made payment for 3.5 Cr. Units to the 1st Respondent

iv) the 1st Respondent has not proved that the Contract for 3.5 Cr. Units was performed by the 1st Respondent either in the alleged Ready Leg or the alleged Forward Leg

v) the 1st Respondent has not proved the alleged netting off of the alleged 2 Cr. Units Contract

vi) the 1st Respondent has not proved that the transaction of 19th August 1991, in respect of 2 Cr. Units was his own transaction.

vii) the 1st Respondent has not proved routing of the alleged transactions, of 3.5 Cr. Units or 2 Cr. Units, in either the Ready Leg or the Forward Leg

vii) No reliance can be placed on the Computer data produced by the 1st Respondent because:

a) No reliance can be placed on the evidence of Mr. Ashwin Mehta on contents of computer data as regards entering into of the transactions

b) there is no evidence of the authenticity or correctness of contents of details, subsequent to entering into of the

alleged Contracts i.e in respect of delivery instructions or manner of performance of Contracts

c) No evidence that after Computer data was seized by the Income Tax Department, the 1st Respondent had no access to the Computers

d) In any event, computer record is manipulated. There are alterations, erasures and substitutions

e) the persons who fed in the data or some of the subsequent instructions were not examined and thus no reliance can be placed

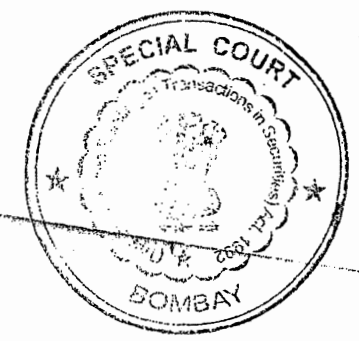
f) Mr. Vishvesh Bhatt who is alleged to have fed in the data on instructions of Mr. Ashwin Mehta has not been examined

g) Computer data being an internal record cannot have the effect of establishing the fact that the Contracts were entered into and performed, particularly when certain documents generated by the Computer and admittedly sent to the 2nd Respondent is shown to have been not acted upon

9) Even otherwise no reliance can be placed on evidence of Mr. Ashwin Mehta as it is evasive, full of contradictions and false

10) Witnesses necessary to prove case, though available, have not been examined and therefore adverse inference must be drawn against the 1st Respondent

11) Only convenient documents have been produced in Court. Other documents though available have not been produced. Therefore adverse inference must be drawn against the 1st Respondent



12) Allegation that transaction of 3.5 Cr. Units is Ready Forward Contract is not correct for the following reasons:

a) Factually not proved to be a Ready Forward transaction

b) Dates of entering into the Ready leg and the Forward leg are different

c) According to 2nd Respondent, there is no Ready leg in respect of 3.5 Cr. Units Contract. There is only a Forward Contract for 3.5 Cr. Units in which the 1st Respondent is only a broker

d) Even if there were two Contracts, one for purchase of 3.5 Cr. Units and one for Sale of 3.5 Cr. Units, they are separate and independent

e) Even if it is assumed that the 1.5 Cr. Units Contract was by the 1st Respondent, still the parties are different and the quantity would be different

f) A Dividend Strip contract cannot be a Ready Forward Contract

g) The 1.5 Cr. Units were already standing in the name of the 2nd Respondent and even otherwise, in a Dividend Strip Contract, in order to avail of dividend and tax benefits the Units have to be transferred into the name of the purchaser. Title therefore passes on conclusion of the Ready Leg.

h) The 1st Respondent has not acted as a principal in the alleged transaction. He has acted as a broker and documents and conduct support the fact that he is a broker

13) The Forward Contract of 3.5 Cr. Units exists. The 1st Respondent has committed a breach thereof. There was no

demand for delivery, there was no tender of payment. Payment is a precondition to delivery or in any event to be performed simultaneously. There can thus be no claim to specific performance

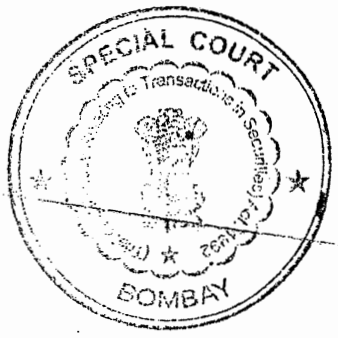
14) On 18th May 1991 the 2nd Respondent had purchased 3.5 Cr. Units on behalf of its Portfolio Management Customer viz SCICI, from SBI Capital Markets Ltd.

15) a broker is not entitled to enter into transactions of the type as alleged in this Application. Court cannot presume illegality. Court has to proceed on assumption of legality of transaction. Therefore the transactions are not illegal

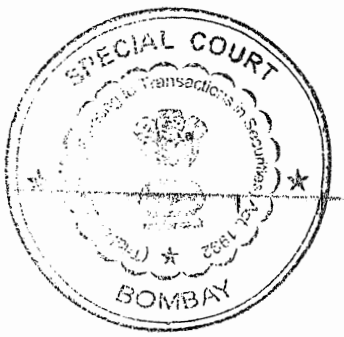
16) Applicant/1st Respondent are not entitled to return of 3.5 Cr. Units

17) In any event Court cannot Order return of 3.5 Cr. Units without Ordering automatic and immediate restoration of monies.

67. Mr. Shah submitted that the evidence of Mr. Ashwin Mehta is unreliable and not truthful. Mr. Shah submitted that in the letter dated 4th March 1993 there is no reference to netting off. He submits that similarly in Mr. Harshad Mehta's Affidavit in Reply there is no mention of netting off. He submitted that in the letter as well as the Affidavit the case is that there was delivery of and payment for the 3.5 Cr. Units. Mr. Shah submits that the letter dated 4th March 1993 and the Affidavit of Mr. Harshad Mehta belie Mr. Ashwin Mehta's evidence of netting off. He submits that in the letter and in the Affidavit the case is of delivery of and



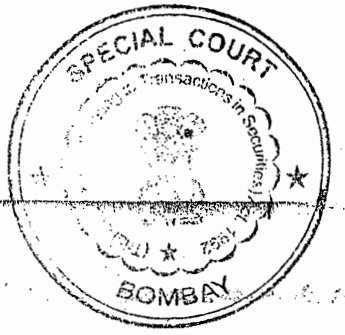
payment for 3.5 Cr. Units. He submitted that Mr. Ashwin Mehta's deposition about netting off delivery and payment is contrary to the case earlier made out. He submits that this shows that the case of netting off is false. I am unable to accept this submission. By letter dated 4th March 1993, a claim is being made "for reversal of 3.5 Cr. Units". This claim was on the admitted Forward Leg. At this stage there is no question of mentioning all details of the transaction. At this stage all that was required was to set out that there was a Ready Forward Contract and that there was delivery and payment in the Forward Leg. At this stage all that was required to be set out is that the Forward Leg is not performed. This was done. To be remembered that in their reply to the Custodian the 2nd Respondents do not deny existence of the Ready Forward Contract and admit that the transaction was with 1st Respondent on a principal to principal basis. In the reply they claim that 1st Respondent was in default and/or set off. Thus till this stage it is not denied that it is a Ready Forward Contract and that it is with the 1st Respondent. Where then was the necessity to explain details of how the transaction was performed. As we have seen there has been netting off. By this, as set out hereafter, there has been delivery of and payment for 3.5 Cr. Units. Even the stage of Affidavit of 1st Respondent the position was the same. Therefore it was sufficient to say that delivery of and payment for 3.5 Cr. Units were made, as indeed they were made. It is only when there is a denial of



the Ready Leg and denial of the fact that the transaction was with 1st Respondent, that the need to explain delivery and payment arose.

68. Mr. Shah submitted that there has been no delivery and payment of 3.5 Cr. Units. He submits that it is an admitted position that there was delivery and payment of only 1.5 Cr. Units. Mr. Shah submits that even if there was netting off, still delivery and payment was of only 1.5 Cr. Units and therefore 1st Respondent and Custodian cannot claim back 3.5 Cr. Units. I am unable to accept this submission also. By netting off there is delivery and payment of 3.5 Cr. Units. Under the Ready part of the first Contract 2nd Respondents purchased from 1st Respondent 3.5 Cr. Units at Rs. 14.85 per Unit. Under the Ready part of the second Contract they sold to 1st Respondents 2 Cr. Units at Rs. 14.85 per Unit. Thus if delivery and payment were made in both, then 2nd Respondents would have received 3.5 Cr. Units and paid app. Rs. 51.97 Crs. They would then have delivered 2 Cr. Units and received app. Rs. 29.7 Crs. Thus in effect they would have retained only 1.5 Cr. Units and paid app. Rs. 22 Crs. This is exactly what happened by netting off. Looked at from another point of view, 2nd Respondents have received 3.5 Cr. Units. This because they got delivery of 1.5 Cr. Units and they kept the 2 Cr. Units which they would have had to deliver under the 2nd Contract.

69. Mr. Shah next submitted that even if it is held that on the Ready Leg there was delivery and payment of 3.5



Cr. Units by way of netting off, still 1st Respondent or Custodian cannot claim 3.5 Cr. Units unless it is established that 1st Respondent returned 2 Cr. Units in the Forward Leg of the 2 Cr. Units Contract. He submitted that Mr. Ashwin Mehta has admitted that he was not concerned with the reversal Leg of the 2 Cr. Units Contract. He submitted that it is clearly established that 1st Respondent was not the principal in at least the 1 Cr. Units Contract between 2nd Respondents and Canbank Financial Services Ltd. He submitted that the 1st Respondent has not returned the 2 Cr. Units. He submits that this is clear from the fact that it was conceded by Mr. Jethmalani that Bank Receipt No. 53 (which was received by 2nd Respondents in the Reversal Leg) did not belong to 1st Respondent. He submitted that the Deal Slip Ex. R-1-O shows Bank Receipt No. 139. He submits that Mr. Ashwin Mehta admitted that this number was wrong. He submitted that it is admitted that the correct BR No. is 339. He submitted that it is not proved that BR No. 339 belonged to the 1st Respondent. He submits that this clearly shows that the 2 Cr. Units were not returned by 1st Respondent. He submits that if that is so, then no claim can be made for the entire 3.5 Cr. Units.

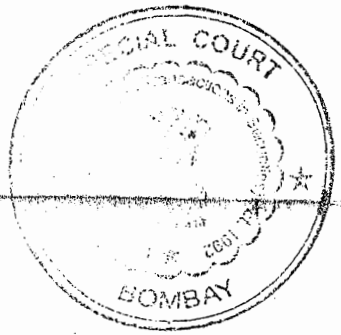
70. I am unable to accept this submission. In this Application, we are not at all concerned with the Forward Leg of 2 Cr. Units Contract. We are only concerned with the Forward Leg of the 3.5 Cr. Units Contract. Once it is shown that in the Ready Leg 3.5 Cr. Units were delivered, 2nd

Respondents have to return 3.5 Cr. Units. There is no application by 2nd Respondents for return of 2 Cr. Units. There is not even a set off claimed. Thus even if in the Forward Leg of 2 Cr. Units, 2nd Respondents had not received delivery, their only right would be to make a claim, under Section 11 of the Special Courts Act, for the 2 Cr. Units. They cannot refuse to return 3.5 Cr. Units. If their arguments were to be accepted, it would amount to giving them preference and a priority not permitted by Section 11 of the Special Courts Act.

71. Even otherwise there is fallacy in submission of Mr. Shah. As is seen there was routing. By means of routing 2nd Respondents have received 2 Cr. Units, 1 Cr. Units each from Canbank Mutual Fund Ltd. and SBI Capital Markets Ltd. It makes no difference that 1st Respondent was not the owner of Units received by 2nd Respondents. Respondents No. 2 are only concerned with recovering 2 Cr. Units. They are not concerned with 1st Respondent's arrangement with Canbank Mutual Fund and/or SBI Capital Markets Ltd. Respondents No. 2 having admittedly received 2 Cr. Units, cannot now refuse to return 3.5 Cr. Units.

72. Mr. Shah submitted that the case of there being four transactions on 18th May 1991 is for the first time made out in the Affidavit in Rejoinder and in the evidence of Mr. Ashwin Mehta. Mr. Shah submitted that for the first time in evidence the case was made out that between 1st May 1991 and 23rd May 1991, Harshad Mehta was out of India.

He submitted that this case was made out only in order to try and show that Mr. Ashwin Mehta had conducted, during this period, money market operations on behalf of 1st Respondent. He submits that in evidence it is sought to be made out that there were 4 transactions on 18th May 1991. He submits that it is admitted that in one of these 4 transactions, Harshad S. Mehta was a Broker. He submits that the evidence of Mr. Ashwin Mehta shows that in respect of the alleged transaction of sale by Respondent No. 1 to Respondent No. 2 of 3.5 Cr. Units, there is one Delivery Order. He submits that in the beginning Mr. Ashwin Mehta deposes that there were two Delivery Orders in the alleged Contract of Sale by 1st Respondent to 2nd Respondents for 3.5 Cr. Units. He submits that thereafter it is claimed that in respect of alleged Contract of Sale by Respondent No. 2 to Respondent No. 1 of 2 Cr. Units, there are two Delivery Orders. He submits that this shows how unreliable the evidence is. He submits that the evidence of Mr. Ashwin Mehta shows that the Delivery Orders were not performed and/or acted upon. He submits that there is absolutely no documentary evidence in respect of the alleged netting off. He submits that Mr. Ashwin Mehta has admitted that he had no personal knowledge about the netting off. He submits that in his examination-in-chief, Mr. Ashwin Mehta purported to prove the various Deal Slips and details contained in those Deal Slips. However in cross-examination he subsequently had to admit that certain portions at the foot of the Deal Slips, particularly those relating to



delivery instructions and actual carrying out of delivery, were not fed into the computer under his instructions. He submits that Mr. Ashwin Mehta has admitted that at the time the letter dated 4th March 1993 was addressed to the Custodian, the Deal Slips were available with Respondent No. 1. He submits that these Deal Slips are internal records of Respondent No. 1 and admittedly they have not been shown to or sent to the Counter Party, i.e., Respondent No. 2. He submits that Mr. Ashwin Mehta has admitted the existence of hand written Deal Tickets. He submits that Mr. Ashwin Mehta has admitted that, particularly in respect of the contract for 3 Cr. Units, a hand written Deal Ticket had been prepared. He submits that these hand written Deal Tickets and particularly the hand written Deal Ticket for 3.5 Cr. Units Contract have not been produced in Court and have been suppressed. He further submits that the evidence of Mr. Ashwin Mehta shows that it is not at all possible to find out whether Respondent No. 1 had sufficient stock of Units and/or capacity to fulfill the alleged contract of 3.5 Cr. Units. He submits that Mr. Ashwin Mehta has admitted that it is not possible to find out whether Respondent No. 1 had a stock. He further submits that in cross-examination it is admitted by Mr. Ashwin Mehta that no consent in writing was taken from Respondent No. 2 for Respondent No. 1 to act as a principal. He submits that in the letter to the Custodian, dated 4th March 1993, as well as in the Affidavits filed in this Court, the case of Respondent No. 1 has been that the

contract for 3.5 Cr. Units was concluded on 18th May 1991. He submits that Mr. Ashwin Mehta has then contradicted himself and stated that the alleged Ready Leg was negotiated and concluded on 8th May 1991. He submits that this is directly contrary to the case made out in the Affidavits filed before this Court and in the letter to the Custodian. He further submits that the Deal Slips (Exs. R-1-K) show that the contract for 3.5 Cr. Units was arrived at on 8th May 1991. He submits that this itself shows the falsity of the case of Respondent No. 1. He further submits that Mr. Ashwin Mehta has admitted that from time to time the entries in the computer were erased, altered or changed and that delivery instructions were subsequently fed in and also altered. He submits that in para 25(a) of the Affidavit-in-Rejoinder dated 16th January 1995 of Respondent No. 1, it is stated as follows:

> "(a) That on 18th May 1991 Citibank contracted another Ready Forward Transaction in 2 Cr. Units wherein they sold dividends for 2 Cr. Units under a dividend strip transaction for a period of 90 days. I say that it was contracted that Respondent No. 2 would sell 2 Cr. Units under the Ready Leg at a base rate of Rs. 14.85 and buy back the same 2 Cr. Units on 16.8.1991 at Rs. 13.85. I say that this deal was transacted on behalf of Respondent No. 2 by Shri Prashant Purkar, the same dealer who had contracted the aforesaid R/F transaction for the purchase of 3.5 Cr. Units. In essence on 18th May 1991 Citibank purchased dividend for 3.5 Cr. Units under a long dividend strip and sold dividend for 2 Cr. Units under a short dividend strip, both transactions being in the nature of Ready Forward only. I say that initially Respondent No. 2 agreed to tender delivery of 2 Cr. Units to UCO Bank and therefore a delivery order for the same was issued to them which was duly acknowledged as received. I say that subsequently the dealer of Respondent No. 2 suggested to minimize the deliveries and exchange

> of Bank Receipt more so since book closure was a few days away and conveyed that since both the transactions were entered into with me as a principal we should net off the delivery of the above two transactions by forwarding delivery of only 1.5 Cr. Units standing in their name and lying with me in my stock. I say that therefore a second delivery order for 2 Cr. Units in place of UCO Bank's delivery order was also issued to Respondent No. 2 whose receipt is duly acknowledged....."

He submits that the evidence of Mr. Ashwin Mehta is contrary to what is stated in para 25(a). He submits that Mr. Ashwin Mehta first tried to make out that there were two Delivery Orders in respect of the Contract of 3.5 Cr. Units. He submits that when he could not sustain that case, he admits his mistake and then claims that the Delivery Order to UCO Bank was the second Delivery Order. He submits that this is directly contrary to what is stated in the above para. He submits that Mr. Ashwin Mehta in his evidence deposes that both the Delivery Orders were issued prior to netting off having taken place. He submits that in the Affidavit it is categorically admitted that the second delivery Order was issued after netting off had taken place.

73. He further submits that during his evidence Mr. Ashwin Mehta tries to make out as if the amounts paid by State Bank of India for purchase of 1.5 Cr. Units on 18th May 1991 and 2 Cr. Units on 19th August 1991 were credited into the account No. 8710 of Harshad S. Mehta with the State Bank of India. He submits that this is proved to be false by the statement of account Ex. R-2-G. He submits that Ex. R-2-G clearly shows that on the concerned dates the amounts paid

for purchase of securities have not been credited into Harshad S. Mehta's Account No. 8710 with State Bank of India.

74. He further submits that Mr. Ashwin Mehta has admitted that one Mr. Pankaj Shah was familiar with accounts and concerned with delivery. He submits that Mr. Hitendra Mehta was allegedly concerned with the extension on 16th August 1991 and the alleged reversal on 19th August 1991. He submits that one Mr. Parag Mehta and Mr. Atul Parekh were allegedly concerned with delivery. He submits that admittedly all these persons are still available. He submits that significantly their evidence has not been led because they would not have supported Mr. Ashwin Mehta in this false story.

75. He further submits that the documents which could and should have been produced and which were within the control and possession of Respondent No. 1 have been held back from the Court. He submits that the 1st Respondent did not produce the Bank statement of account of Respondent No. 1. He submits that this was because the statement belied the evidence of Mr. Ashwin Mehta. He submits that it is the Respondent No. 2 who had to call upon the Respondent No. 1 to produce the Bank statement. He submits that for all the above reasons, the evidence of Ashwin Mehta cannot be relied upon at all. He submits that this clearly shows the evidence is entirely unreliable and full of controversies.

76. Mr. Shah further submits that the oral evidence of Mr. Ashwin Mehta must be considered in light of the fact

that documents which should have been produced and witnesses who should have been examined have not been produced and/or examined. He submits that the hand written Deal tickets, Bank Statements of Accounts, tabulated statements allegedly sent to the State Bank of India (as deposed to on page 62 of the Notes of Evidence), Contract Note of Canbank Financial Services Ltd. and second Delivery Order in respect of the Contract of 3.5 Cr. Units have not been produced. He submits that under Rule 15 of the Securities Contract Regulation Rules, every Broker is required to maintain clients' ledgers and general ledgers. He submits that this is the record which has to be mandatorily maintained. He submits that such records must exist but have not been produced because they would show that Respondent No. 1 acted as a Broker.

77. As regards documents not being produced, Mr. Shah submitted that the hand written Deal Tickets have not been produced. He has also submitted that on page 33 of Notes of Evidence it was admitted that it is not possible to find out if stock was available. He submitted that records of available stock have not been produced. He further submitted that the statement of account No. 8710 in the State Bank of India was kept back and was not produced until it was called for by the 2nd Respondents. He has also submitted that on page 46 of the Notes of Evidence of Mr. Ashwin Mehta, has admitted that in a routing transaction, there would be debit and credit vouchers and Delivery Orders. He submitted that there would also be Bank Statements given by the routing

Banks. He submitted that none of these documents have been produced in order to prove routing. He submitted that on page 46 of the Notes of Evidence, it has also been admitted that so far as State Bank of India is concerned, at the end of every day, tabulated statement was sent by Mr. Harshad Mehta to the State Bank of India. He submitted that these statements would have also shown whether there was any routing. He submitted that these tabulated statements have also not been produced. He further submitted that Mr. Ashwin Mehta has admitted on page 46 of Notes of Evidence that in respect of routing through SBI Capital Markets Ltd., there would be Purchase and Sale Contracts and Delivery Orders. He submitted that none of these have been produced. He further submitted that Mr. Harshad Mehta's books of account would show whether brokerage has been received. He submitted that significantly the books of account have not been produced. He also submitted that even in respect of Canbank Mutual Fund, there could have been Purchase and Sale Contracts and Delivery Orders. He submitted that these documents could have been got produced through Mr. Vernekar at the time he came to give evidence. He submitted that very significantly none of these documents have been produced. Mr. Shah also submitted that on page 89 of the Notes of Evidence, Mr. Ashwin Mehta has admitted that there was a second Delivery Order in respect of 3.5 Cr. Units Contract. He submitted that this Delivery Order has not been produced.

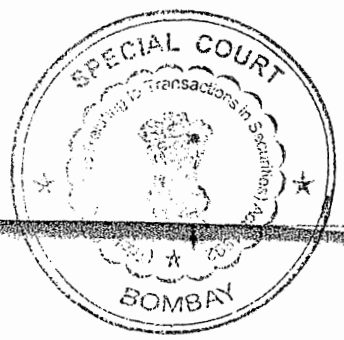
78. He submits that apart from the above documents not

being produced, Mr. Pankaj Shah, Mr. Vishwas Bhatt, Mr. Hitendra Mehta, Mr. Parag Mehta, Mr. Atul Parekh and Mr. S. Indurkar were all persons who have personal knowledge and who were available to give evidence and have not been examined. He submits that this is because had these persons been examined they would not have supported Mr. Ashwin Mehta. He submits that all the above clearly establishes that the evidence of Mr. Ashwin Mehta is unreliable.

79. Mr. Shah next submits that the computer records produced by the Respondent No. 1 are unreliable. He submits that in the Ruling which appears on pages 117-118 of the Notes of Evidence, this Court has already held that Mr. Ashwin Mehta had no personal knowledge regarding deliveries. He submits that this Ruling makes it clear that there has been no proof regarding the entries pertaining to deliveries and netting off in the alleged Deal Slips and computer records cannot be deemed to be reliable. He submits that the person who is supposed to have fed in the data into the computer was one Vishwas Bhatt. He submits that it is only Mr. Vishwas Bhatt who could have deposed to the truth of the contents of the Deal Slips. He submits that admittedly Mr. Vishwas Bhatt was still available with Respondent No. 1. He submits that the Court must therefore draw an adverse inference that if Vishwas Bhatt were examined, he would not have supported entries made in these Deal Slips. He further submits that in respect of these transactions, there would be hand written Deal Tickets. He submits that hand written Deal

Tickets would be primary evidence and the computer Deal Slips would only be corroborative evidence. He submits that significantly the hand written Deal Slips have not been produced in Court. He submits that in his evidence on pages 91, 93 and 102 of the Notes of Evidence, Mr. Ashwin Mehta has admitted that there were erasers and changes in the computer Deal Slips. He submits that Mr. Ashwin Mehta has already admitted that there is no method of verifying whether what is entered into the computer is correct. He submits that on pages 109 to 111 of the Notes of Evidence, Mr. Ashwin Mehta finally had to admit that wrong Bank Receipt No. 139 has been mentioned in the Deal Ticket. He submits that Mr. Ashwin Mehta has admitted that there are alterations, additions and alienations in the computer records.

80. To be noted that the computer records have been used only as corroborative evidence. They merely support other positive and clinching evidence. The fact that one mistake is shown does not detract from their corroborative value. Also to be noted that since 1992 1st Respondent has had no access to the Computers. It is the Custodian who has taken out the Deal Slips for purposes of this Application. These therefore are records which were fed in in 1991 i.e. at a time when there was no dispute between the parties and when nobody could have imagined that this Court would be established and/or that it would declare all Ready Forward transactions to be illegal. In my view the computer records of 1st Respondent cannot be said to be unreliable.



81. Mr. Shah submits that by reason of the above documents and evidence having been held back, an adverse inference must be drawn against Respondent No. 1. In support of his submission that an adverse inference must be drawn, he relies upon the authority in the case of **ATYAM VEERRAJU v. PECHETTI VENKANNA** reported in A. I. R. (1966) S. C. Pg. 629 wherein it has been held as follows (at Pg. 633):

> ".... The most striking feature of this case and the thing which tilts the scales against the defendants is the non-production of this Sanad. The defendants have deliberately withheld this document. We should, therefore, make every presumption against them to their disadvantage consistent with the facts. We hold that the document, if produced, would have shown that the tenancy is not permanent....."

82. He also relied upon the authority in the case of **DR. C. A. CHERIAN v. A. MENON** reported in A. I. R. (1963) S. C. Pg. 128 wherein also it has been laid down that if a document had been suppressed, it would be legitimate to assume that it was so done, it would go against a party.

83. Mr. Shah also relied upon the authority in the case of **COMMISSIONER OF INCOME-TAX v. BEST & CO. PVT. LTD.** reported in A. I. R. (1966) S. C. Pg. 1325. In this case also, the Supreme Court has held that the failure to put material in the exclusive possession of a party must lead to a drawing of an adverse inference against that party.

84. He also relied upon the authority in the case of **SITA MAHARANI v. CHHEDI MAHTO** reported in A. I. R. (1955) S. C. Pg. 328 where also it has been held that if documents are withheld that an inference might well be drawn that had they

been produced, they would have gone against a party. He submits that on the above facts and authorities of law, this Court must draw an adverse inference that if these documents had been produced or witnesses called, they would have shown that no transaction as alleged could have taken place. He submits that in any event, an inference must be drawn that Respondent No. 1 did not act as a principal in this transaction.

85 I am unable to accept the submissions of Mr. Shah. In my view, the evidence of Mr. Ashwin Mehta has been reliable and truthful. In spite of extensive cross-examination running into almost 100 pages of Notes of Evidence, the deposition of Mr. Ashwin Mehta has not been shaken at all. A minor human error like wrong Bank Receipt number appearing in Ex. R-2-O can hardly be said to discredit the evidence of Mr. Ashwin Mehta. Also to be remembered that this is at the time of delivery in the Forward Leg of the 2 Cr. Units Contract. This at the time when Mr. Ashwin Mehta was not concerned with the execution of the Contract. I see no substance in the allegation that the evidence of Mr. Ashwin Mehta has been contrary to para 25(a) of the Affidavit-in-Reply filed by Mr. Harshad Mehta. If para 25(a) is read, it is clear that there is some mistake in that para. The portion of para 25(a) which was referred to by Mr. Shah has been reproduced hereinabove. As is seen, para 25(a) seems to suggest that after it was agreed that there would be netting off a second Delivery Order for 2 Cr. Units was

issued. It is obvious that after netting off, there could never be a Delivery Order for 2 Cr. Units. In my view, Mr. Ashwin Mehta was quite right when he deposed that both the Delivery Orders in respect of Ready Contract for 2 Cr. Units were delivered prior to the netting off being agreed.

86. Let us first take Mr. Shah's first submission about the above persons being available and not being examined. In my view, it is not necessary for a party to keep on leading unnecessary evidence of numerous persons even after the case has been proved by competent witnesses. It is not at all necessary that all persons having knowledge or who have had anything to do with the transaction should always be examined. All that is necessary is to leads such evidence as is necessary to prove the case. As has already set out hereinabove, persons having personal knowledge, viz., Mr. Ashwin Mehta and the delivery boy Mr. Lenghti were examined. Relevant documents necessary to prove the case have been tendered and marked as Exhibits. The oral evidence along with documentary evidence has established the case of the 1st Respondent. If that be so, where is the question of leading evidence of other persons. There would be no purpose in leading evidence of more witnesses.

87. Mr. Ashwin Mehta has given positive evidence based on personal knowledge upto the stage of netting off on 18th May 1991. Upto this stage everything was done under his instructions. The only aspect on which Mr. Ashwin Mehta did not have any personal knowledge was in respect of the

delivery during the Forward Leg of the 2 Cr. Units Contracts. However, even in respect thereof, Mr. Ashwin Mehta has, to his personal knowledge, stated that the amounts received under the two 1 Cr. Units have been credited into Mr. Harshad Mehta's account. As stated above, this has not even been challenged in cross-examination. There being no challenge to these statements, in my view, Mr. Jethmalani is right when he submitted that it was not necessary to lead any further evidence. Mr. Jethmalani was right when he submitted that if these statements were not challenged, then the 1st Respondent could take it that the 2nd Respondents were accepting the statement of Mr. Ashwin Mehta. In my view, Mr. Jethmalani is right when he submitted that question of leading further evidence in respect of deliveries under the Forward Contracts of 2 Cr. Units would have only arisen had, the statement of Mr. Ashwin Mehta that the amounts of those transactions were credited into Mr. Harshad Mehta's account been challenged. In my view, Mr. Jethmalani was right when he submitted that if the statement, that these amounts were credited into Mr. Harshad Mehta's account were accepted, that by itself would prove that the two 1 Cr. Units Contracts were Contracts in which Mr. Harshad Mehta was a principal. Also to be noted that in their Affidavits in Reply 2nd Respondents do not deny that 1st Respondent was the principal in the Contract for 2 Cr. Units. Thereafter during his evidence Mr. Shiva nowhere states categorically that the 1st Respondent was a principal in the Contract for 2 Cr. Units. As usual Mr. Shiva only

makes the following guarded statements on Pgs. 153 and 154 of the Notes of Evidence:

> "Based on records, I can say that the contract for sale of 2 Cr. Units to Harshad S. Mehta as a principal at the rate of Rs.14.85 is not reflected in any Deal Slip, or other documents, or any computer entry or data of Citi Bank.
> Recess :
> After Recess :
> (Witness now says : By Bank records I mean the Deal Slips, the Computer Records, the Custodial Records and such other documents as per prepared by Citi Bank in usual course of business in regard to such transactions.
> (Examination in Chief continued.)
> In respect of the alleged ready contract for 3.5 Crs. Units, Citi Bank had received a Delivery Order from Harshad S. Mehta.
> (Witness is shown Exh. R-1-F.)
> This is the Delivery Order which was received by Citi Bank. As per the Bank records this transaction does not seem to have been effected.
> In respect of the alleged contract for sale of 2 Cr. Units Citi Bank had received three documents. Citi Bank had received one Contract Note and two Delivery Orders. One Delivery Order was favoring UCO Bank, the other Delivery Order was favoring SBI Capital Markets.
> (Witness is shown Exhs. R-1-C, R-1-H and R-2-D.)
> This is the Contract Note and the two Delivery Orders. These documents relate to the alleged ready leg.
> Citi Bank had also received a Contract Note for the forward leg of the alleged transaction of 2 Cr. Units.
> (Witness is shown Exh. R-1-D.)
> This is the Contract Note for the forward leg. Citi Bank has its own documents which show Harshad S. Mehta as a broker in the purchase of 2 Cr. Units by Citi Bank.
> There are no documents of Citi Bank which show Harshad S. Mehta as a principal in the contract of purchase of 2 Cr. Units."

Thus except for guarded statement that there are no documents of Citibank showing that 1st Respondent was a principal, it has not been categorically denied that 1st Respondent was the principal counter-party in the Contract

for 2 Cr. Units. This in spite of fact the in the Forward Leg of 2 Cr. Units Contract there were documents with 2nd Respondents. Even based on those documents Mr. Shiva does not categorically deny that 1st Respondent was the principal. To be remembered that evidence of Mr. Vernekar was led, but Mr. Shiva chose not to state on oath that 1st Respondent was not the principal.

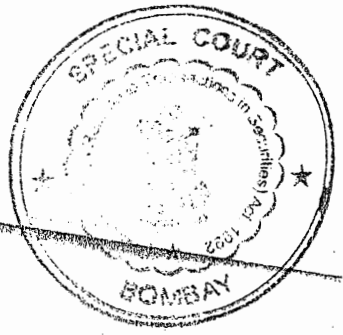
88. As regards the submission that relevant documents have not been produced, in my view, all documents necessary to prove the case have been produced. So far as hand written Deal Tickets are concerned, Mr. Ashwin Mehta has categorically stated that these were not available. Similarly in respect of records mandatorily required to be maintained, Mr. Ashwin Mehta has stated that such record was not maintained. As regards Purchase and Sale Contracts with SBI Capital Markets Ltd. and UCO Bank, these were only necessary for the purposes of proving routing. If routing has already been proved by other documents, then it was absolutely unnecessary to produce these documents. In any event, these are not documents on which the 1st Respondent was relying. If the 2nd Respondents wanted to test the case of the 1st Respondent, they could have called upon the 1st Respondent to produce those documents. Very significantly that has not been done. What these arguments about the non-production of documents overlooks is that the relevant contemporaneous documents proving the existence of the Contracts have been produced and admitted in evidence. Once

that is done, there is no necessity to produce any further documents. Under these circumstances, no adverse inference can be drawn against the 1st Respondent.

89. On the other hand, all the authorities cited by Mr. Shah apply with full vigor against the 2nd Respondents. It is quite clear that the 2nd Respondents have suppressed from Court relevant documents. It has been proved that the original Contract Note, copy of which is marked as Ex. R-1-A was sent to and received by 2nd Respondents. Very significantly the Original Contract Note is not produced. The only reason that the Original Contract Note would not be produced is because there will be an endorsement on the original showing that this Contract had been netted off. Also as set out hereinabove, the original Contract Note for Forward Contract of 2 Cr. Units has not been produced. Admittedly this was received by 2nd Respondents. As set out above, on the very first occasion, when they were called upon to produce this, a statement was made to Court was that at present it was not available in Court. Thereafter on the next day, the Court was informed that the original was not traceable. It is clear that there had been second thoughts, probably because this also showed a netting off. The Janakiraman Committee Report clearly shows that data was stored in Front Office computer. In fact an entire list of Contracts, not recorded on the Back Office computer, was submitted to the Reserve Bank of India. Yet before this Court, no data stored in Front Office computer has been

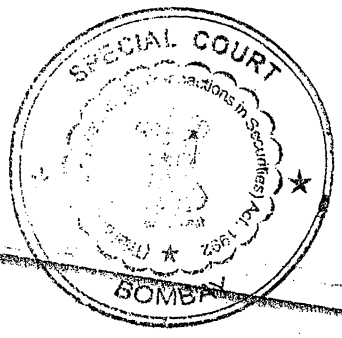
produced. It is clear that the Front Office computer data has been suppressed from this Court. The only reason why this would be done is because the Front Office computer data would show the existence of these Contracts and would show that there had been netting off. Even in respect of the alleged 1.5 Cr. Units Contract, very significantly the Cost Memo has not been produced by 2nd Respondents. This because the Cost Memo of State Bank of India would show that the 1.5 Cr. Units were delivered as and by way of netting off. To be remembered that Mr. Shiva has admitted in his evidence that it would be very rare that the Cost Memo would not be issued. Apart from the documents not having been produced, persons who had personal knowledge and who were available to give evidence have not been brought to give evidence. The person who entered into the Contracts was Mr. Prashant Purkar. He was the Dealer at the relevant time in the office of the 2nd Respondents. Initially Mr. Shiva tries to make out as if Mr. Purkar was not available to give evidence. However, in cross-examination he had to admit that Mr. Purkar is still in Bombay. Mr. Shiva is asked whether he has spoken to Mr. Purkar. His deposition makes interesting reading. This portion of the evidence is on Pgs.. 219 and 220 of the Notes of Evidence. It is as follows:

> "As far as I know Mr. Prashant Purkar works for PEREGRINE CAPITAL MARKETS. He is stationed in Bombay.
> Q: Have you personally spoken to Mr. Purkar about the transaction in question ?
> A: I cannot say.
> (Question is again repeated to the witness.)
> A: I am not in touch with him.



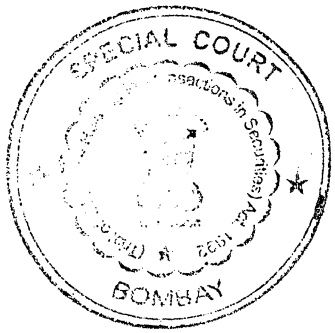
(Question is repeated to the witness.)
A: I do not remember.
P.C. It is clear that the witness is prevaricating and not answering the question.
I do not know if anybody else from Citi Bank spoke to Mr. Prashant Purkar.
(Witness is shown pg. 207 of Notes of Evidence where in he has deposed that Citi Bank had made enquiries from Mr. Prashant Purkar.)
The statement on Page 207 of the Notes of Evidence is based only on the note prepared by Mr. Prashant Purkar. I do not know when the enquiries were made and who made those enquiries.
Q: According to you does the note of Mr. Prashant Purkar show that Citi Bank made enquiries with Mr. Prashant Purkar ?
A: I do not remember."

Watching the demeanor of the witness, it was very clear to Court that Mr. Shiva has spoken to Mr. Purkar. Mr. Shiva must obviously has spoken to Mr. Purkar about the subject-matter of this Application. If Mr. Shiva had contacted Mr. Purkar about some other unconnected matters, then he would have openly said so and not prevaricated as he has done. On his own showing Mr. Shiva was not involved at a stage of taking the opinion of Mr. Justice Tulzapurkar (Retd.) or at the stage of sending a reply to the Custodian. On his own showing, Mr. Shiva starts looking at the record only in 1995. It therefore becomes very clear that having contacted Mr. Purkar, the evidence of Mr. Purkar is still not being led. It therefore becomes very clear the only reason why the evidence of Mr. Purkar was not led was because Mr. Purkar would have confirmed the transaction and the netting off.



90. Apart from Mr. Purkar, there is also one Mr. Pareejat Singhal. He is also the Vice President of 2nd Respondents. He has addressed the letter dated 19th April 1993 to the Custodian. He has made the admission to the Custodian that the 1st Respondent was the Principal Counter Party in the Forward Contract of 3.5 Cr. Units. He also is the person who along with Mr. Rajagopal Jayaram has affirmed all Affidavits in this Application. Admittedly Mr. Singhal and Mr. Jayaram are available to give evidence. Mr. Singhal would have been the best person to explain the basis on which he made the admission. For obvious reasons, he is not examined even though he is admittedly still available.

91. Further there were Officers of 2nd Respondents who sought opinion from Justice Tulzapurkar (Retd.) and who informed Justice Tulzapurkar (Retd.) that the Forward Contract of 3.5 Cr. Units was with 1st Respondent. Those Officers are still available. They have not been examined. Mr. Shiva has in his evidence admitted that some of the Back Office Dealers, who were working there in 1991, are still available. Not a single one of the Officer or Dealer working in the Back Office at the relevant time has been examined to prove the alleged computer records tendered in Court. Mr.



Shiva has also, on page 212 of the Notes of Evidence, given the names of all the Front Office Dealers at the relevant time. It is not even the case of the 2nd Respondents that all of them are not available. Yet none of them have been examined. This is a case where the 2nd Respondents have suppressed relevant documents and not led evidence of persons having personal knowledge. This even though they are available. Mr. Shah was right when he submitted that the Court has to draw an adverse inference. The only thing is that the adverse inference, which the Court has to draw, is against 2nd Respondents.

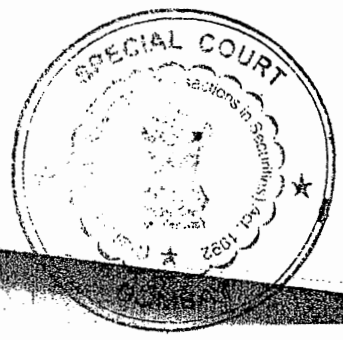
92. Mr. Shah submits that Respondent No. 2 have led the evidence of their Vice President Mr. Shiva who has deposed about the practice and procedure followed by Respondent No. 2. He submits that evidence of Respondent No. 2 establishes that there are no documents or records to prove the alleged Ready Leg of 3.5 Cr. Units Contract or the alleged Ready Forward Contract for 2 Cr. Units. He submits that Respondent No. 2 have also led evidence of one Mr. Vernekar which shows that in the part of reversal of the 2 Cr. Units Contract Canbank Financial Services were principal counter-party and Harshad Mehta was merely a Broker. Mr. Shah submitted that the evidence of 2nd Respondents is very reliable and should be accepted. As stated above the evidence of Mr. Shiva is most unreliable. He deposes to nothing from his personal knowledge. He only makes insinuations and suggestion which in most cases are shown to be false. When

cornered he regularly prevaricates. Through him a number of documents have been got produced. The Court is not making any comments on those documents as they form the subject matter of another Order which the Court is proposing to pass separately. The Court is not making any comments in this Judgment and passing a separate Order at the request of Mr. Shah. At this stage all that needs to be mentioned is that 2nd Respondents have tendered a number of documents. As these were not proved, at request of Mr. Shah and as there was no objection from Mr. Jethmalani, they were marked as Exhibits only to show that they exist today in the records of 2nd Respondents. Mr. Jethmalani had referred to the various Exhibits of 2nd Respondent to show how they were unreliable. Mr. Shah had submitted that as they were being referred to, by Mr. Jethmalani, they should now be deemed proved and should be properly marked. This contention was rejected. As the documents were marked for a limited purpose, Mr. Jethmalani was entitled to show that even for that limited purpose they were unreliable. However as stated above that will form part of a separate Order which the Court proposes to pass.

93. Mr. Shah has also submitted that what is mentioned in the Opinion given by Justice Tulzapurkar (Retd.) (Ex. R-1-N) does not amount to an admission. He drew the attention of the Court to Section 17 of the Evidence Act and submitted that the statements in Ex. R-1-N do not amount to an admission for the reasons that the Opinion does not state

whether the statements contained therein were made on the basis of personal knowledge or on record. He submitted that what is reproduced in Ex. R-1-N is merely an opinion of Justice Tulzapurkar (Retd.). He submitted that the truth of the contents of the Opinion have not been proved. He submitted that Counsel, i.e., Justice Tulzapurkar (Retd.) should have been called to give evidence and to prove the contents. He submitted that it is the possible that Justice Tulzapurkar (Retd.) may have misunderstood the facts as told to him. He submitted that had Justice Tulzapurkar (Retd.) being called to give evidence, then all these could have been clarified from him in cross-examination.

94. Mr. Shah relied upon the authority in the case of **SAHOO v. STATE OF UTTAR PRADESH** reported in A. I. R. (1966) S. C. Pg. 40. In this case, the Supreme Court has held that a statement is a genus, the admission is the species and the confession is the sub-species. The Supreme Court has held that a communication is not an essential ingredient of the concept of `confession'. The Supreme Court has held that they are placed in the category of relevant evidence by the Evidence Act, presumably on the ground that, being declarations against the interest of the person making them, they are probably true. The Supreme Court has held that their probative value does not depend upon their communication to another, though just like any other piece of evidence, they can be admitted in evidence only on proof. The Supreme Court has held that proof in case of oral



admission or confession can be offered only by witnesses who heard the admissions or confession, as the case may be.

95. Mr. Shah also relied upon the authority in the case of **DUNDABAHADUR SINGH v. DURGA PRASAD SINGH** reported in A. I. R. (1953) Patna Pg. 346. In this case it has been held that an admission cannot be proved by recitals in a Judgment.

96. Mr. Shah also relied upon the authority in the case of **MOLAR v. RAM PARSHAD** reported in A. I. R. (1927) Lahore Pg. 377. In this case it has been held that where a previous admission of a party is sought to be used against him, the statement containing the admission must be put in. It is held that the Court's Order referring to the admission is not sufficient proof.

97. Mr. Shah also relied upon the authority in the case of **M. MANOHARAN CHETTI v. C. COOMARASWAMY NAIDU & SONS** reported in A. I. R. (1980) Madras Pg. 212. In this case it has been held that the admission must be clear and unambiguous. In this case it has been held that for a Court to draw an adverse inference on the basis of what is stated to have been admitted, the admission must be unequivocal and comprehensive. It is also held that the admission must go the whole-hog, as it were, on the point of issue.

98. Based on the above authorities, Mr. Shah submitted that, even if there is an admission, in the Opinion of Justice Tulzapurkar (Retd.) this admission is only a piece of evidence. He submitted that admission has to be weighed

along with other evidence. He submitted that if the admission is contrary to the other evidence, then the other evidence must be accepted and reliance cannot be placed only on the admission. He submitted that in this case, the other evidence clearly shows that Harshad S. Mehta was merely a Broker. He submitted that in any event there was no clear and unambiguous admission. He submitted that para 2 of the opinion of Justice Tulzapurkar (Retd.) states that Harshad S. Mehta was merely a Broker. He submits that therefore Opinion does not clearly and unambiguously show that there was an admission before Justice Tulzapurkar (Retd.) that Harshad Mehta was a Principal.

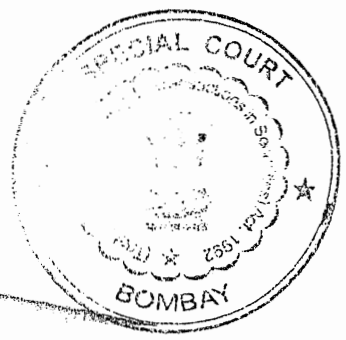
99. Mr. Shah further submits that even if it is taken for granted that the admission is proved, still the Court must consider what weight is to be given to that admission. In support of this submission, he relied upon the authority in the case of **PREM EX-SERVICEMAN CO-OP. TENANT FARMING SOCIETY LTD. v. STATE OF HARYANA** reported in A. I. R. (1974) S. C. Pg. 1121. In this case the Supreme Court has held that it is well settled that the effect of an alleged admission depend upon the circumstances in which it is made.

100. Mr. Shah also relied upon the authority in the case of **NAGUBAI AMMAL v. B. SHAMA RAO** reported in A. I. R. (1956) S. C. Pg.593. In this case, the Supreme Court has held that admission is not conclusive as to the truth of the matters stated therein. The Supreme Court has held that it is only a piece of evidence, the weight to be attached to

which must depend on the circumstances under which it is made. The Supreme Court has held that even admission can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment. Mr. Shah submitted that in this case, the opinion was sought as a result of the claim made by Mr. Harshad Mehta by his letter dated 4th March 1993. He submitted that this claim was made only on the basis of Forward Leg not having performed. He submitted that the opinion of Justice Tulzapurkar (Retd.) was taken in the context of the claim made by 1st Respondent. He submitted that reply to the Custodian is also on the basis of the claim made by 1st Respondent. He submitted that this admission, if any, must be restricted to Forward Contract of 3.5 Cr. Units.

101. Mr. Shah further submitted that merely because the opinion had been marked without any objection it does not mean that the contents of the opinion are admitted by 2nd Respondents. In support of this submission, he relied upon the authority in the case of **SANJAY COTTON CO. v. M/S. OMPRAKASH SHIOPRAKASH** reported in A. I. R. (1973) Bom. Pg. 40.

102. As against this, Mr. Joshi has submitted that there are clear, unambiguous and unequivocal admission both in the Opinion given by Justice Tulzapurkar (Retd.), as well as in the 2nd Respondents' reply to the Custodian. He submits that the admissions are clearly to the effect that in the Forward Contract, for 3.5 Cr. Units, Harshad S. Mehta is



a Principal. He submits that in the entire evidence given on behalf of the 2nd Respondents, there is not even a suggestion that the admission set out by Justice Tulzapurkar (Retd.) was not made to him. He submitted that in the evidence there is no suggestion that Justice Tulzapurkar (Retd.) had misunderstood the statement made to him.

103. Mr. Joshi relied upon the authority in the case of **THIRU JOHN v. THE RETURNING OFFICER** reported in A. I. R. (1977) S. C. Pg. 1724. In this case, the Supreme Court has held that an admission, though not conclusive, is the best evidence. The Supreme Court has held that an admission shifts the onus on to the maker and until the facts are rebutted they must be taken to be established.

104. Mr. Jethmalani supported Mr. Joshi and further submitted that once a document is marked as an Exhibit, without any objection, the party waves formal proof of two things, viz.,

(1) that the document was executed by the other; and

(2) proof of contents of that document.

He submitted that Justice Tulzapurkar (Retd.) was not called into the box because 2nd Respondents waved necessity to do so by allowing the Opinion to be marked by consent. Mr. Jethmalani submitted that having consented to the Opinion being marked as an Exhibit, it did not lie in the mouth of the 2nd Respondents to say that the contents are not proved.

105. In support of his submission, Mr. Jethmalani relied upon the authority in the case of **SHIB CHANDRA SINGHA**

v. GOUR CHANDRA PAUL reported in A. I. R. (1922) Cal. Pg. 160. In this case it has been held that where a piece of evidence, not proved in the proper manner, has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation.

106. Mr. Jethmalani also relied upon the authority in the case of **SHIVALINGAPPA MAHALINGAPPA v. SHIVALINGAPPA MURTEPPA** reported in A. I. R. (1946) Bom. Pg. 193. In this case also it has been held that where evidence is admitted in the trial Court without any objection to the reception, and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof.

107. Mr. Jethmalani further relied upon the case of **P. C. PURUSHOTHAMA REDDIAR v. S. PERUMAL** reported in A. I. R. (1972) S. C. Pg. 608. In this case, the question was whether any reliance could be placed on certain police reports which had been exhibited. The Supreme Court has held that these reports were marked without any objection and hence it was not open to the Respondents now to object to their admissibility. The Supreme Court has held that once a document is properly admitted, the contents of the document are also admitted in evidence, though those contents may not be conclusive evidence.

108. Based on these authorities, Mr. Jethmalani submitted that it is not open to the 2nd Respondents to now object to the admissibility of the opinion and/or to the

contents thereof. He submitted that in any event the admissions in the letter to the Custodian are properly proved and are clearly admissions.

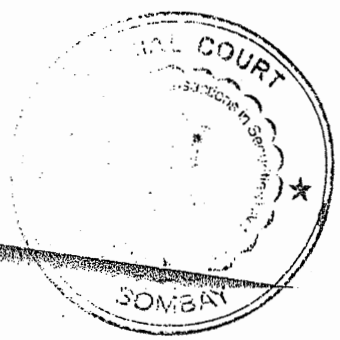
109. Mr. Jethmalani next submitted that an admissions could be rebutted, but if an admission is not rebutted or explained, then it becomes binding under Section 31 of the Evidence Act. In support of this, he relied upon the authority in the case of **NARAYAN BHAGWANTRAO GOSAVI BALAJIWALE v. GOPAL VINAYAK GOSAVI** reported in A. I. R. (1960) S. C. Pg. 100. In this case, the Supreme Court has held that an admission is the best piece of evidence that an opposite party can rely upon. The Supreme Court has held that an admission, though not conclusive, is decisive of the matter unless successfully withdrawn or proved erroneous.

110. Mr. Jethmalani also relied upon the authority of the Supreme Court in the case of **RAMJI DAYAWALA & SONS (P) LTD. v. INVEST IMPORT** reported in A. I. R. (1981) S. C. Pg. 2085. In this case also the Supreme Court has held that an admission, unless explained, furnishes best evidence.

111. Mr. Jethmalani next submitted that in any event this is a case which would fall under Section 20 of the Evidence Act. Section 20 of the Evidence Act reads as follows:

> "20. Admissions by persons expressly referred to by party to suit. - Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions."

He submitted that by their letter dated 23rd April 1991, 2nd



Respondents refer the Custodian to the Opinion of Justice Tulzapurkar (Retd.). He submitted that once the 2nd Respondents refer the Custodian to the Opinion of Justice Tulzapurkar (Retd.), then all that has been stated by Justice Tulzapurkar (Retd.) in the Opinion becomes binding on 2nd Respondents.

112. In support of this submission, he relied upon the authority in the case of **HIRACHAND KOTHARI v. STATE OF RAJASTHAN** reported in A. I. R. (1985) S. C. Pg. 998. In this case, the Supreme Court has held that Section 20 is a second exception to the Rule laid down in Section 18. The Supreme Court has held that Section 20 deals with one class of vicarious admissions that demand of persons other than the parties. The Supreme Court has held that where a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person referring.

113. In my view, Mr. Joshi and Mr. Jethmalani are right. There is clear, unequivocal and unambiguous admission in the 2nd Respondents' letter to the Custodian. In my view, there is also a clear, unequivocal and unambiguous admission set out in the Opinion of Justice Tulzapurkar (Retd.). The Opinion has been marked by consent and without any objection. Once that is done, there is waver of proof of the authorship and of the contents of the Opinion. More importantly, nobody on behalf of the 2nd

Respondents has given evidence to the effect that the statements set out in the Opinion were not made to Justice Tulzapurkar (Retd.). It has not even been suggested in evidence that Justice Tulzapurkar may have misunderstood or misconstrued. On the contrary, in the evidence, the suggestion is that the Opinion given to Justice Tulzapurkar (Retd.) was on the basis of incomplete records. Thus there is an admission that it was stated to Justice Tulzapurkar (Retd.) that the Forward Contract was with the 1st Respondent on a principal to principal basis. If that is so, then this amounts to a clear and unequivocal admission. Undoubtedly the admission is only in respect of the Forward Contract of 3.5 Cr. Units. However, as has been set out hereinabove, it is clear that this is not just a Forward Contract. It is a Ready Forward Dividend Strip Contract. If admittedly 1st Respondent is the Principal in the Forward Leg, he necessarily has to be the Principal in the Ready Leg. As laid down by the Supreme Court an admission, unless rebutted, is the best piece of evidence. In view of the admissions, both in the Opinion of Justice Tulzapurkar and in the letter to the Custodian, it was for the 2nd Respondents to establish the contrary. This has not been done.

114 Mr. Shah next submitted that it has been admitted by Mr. Ashwin Mehta on Pgs. 6, 14, 15, 85 and 86 of the Notes of Evidence that this is a Dividend Strip Contract. He submitted that Mr. Ashwin Mehta on Pgs. 85 and 86 of the Notes of Evidence deposes that in a Dividend Strip Contract,

the benefit goes to the purchaser. He thereafter points out to the deposition of Mr. Shiva on Pgs. 148 to 152 of the Notes of Evidence which reads as follows :

> "Q: What according to you is a Dividend Strip Transaction ?
> A: A Dividend Strip transaction would refer to purchase of a Dividend paying stock by one party in order to benefit from dividends and other accretions the stock would pay. The basis of a dividend strip transaction lies in the fact that dividends are taxed differently in the hands of the buyer of the stock as opposed to its seller. The buyer of the stock wishes to benefit from the differential taxation and the tax arbitrage that it offers. As per tax laws, it would be necessary for the buyer to own the stock in his own name to be able to benefit from the differential taxation. The title to the stock must therefore pass to the buyer who wishes to benefit from the dividend and other accretion.
>
> As the buyer of the stock is primarily interested in dividends and other benefits the stock would offer he may purchase the stock prior to the dividend date, hold it in his own name as of the dividend date and can later on dispose off if he so desires. The counterparty from whom he purchased the stock before the dividend date need not necessarily be the one to whom he would sell it after the dividend date because the buyers objective is to take the dividend and other benefits.
>
> Even if the stock were to be sold back after the dividend date to the counterparty, from whom he had purchased the stock earlier, by virtue of the fact that the title had passed after the initial purchase, the buyer i.e., the person who is desirous of taking the dividend, would be eligible to receive dividends as well as all the accretions that may become due on the stock since the time he purchased that stock but before the sale back to the original seller.
>
> If the stock were to be sold back at a future date after the dividend date, it would be difficult to arrive at a firm forward rate because of the uncertainty that surrounds the actual quantum of dividend pay out and other accretions like rights, etc. It may be appreciated that the longer the time gap between the purchase of Units prior to the dividend date and their sale back post dividend date, the quantum of uncertainty concerning possible accretions on the stock can go up

exponentially. Therefore it would be difficult to fix a firm forward price for such stock held across the dividend date.

More so in the case of accretions like rights etc., where the buyer of the stock is not obliged to subscribe, as at the time of entering into the purchase contract for obtaining the dividend neither the declaration of the rights nor the ratio nor the financial out lay that it would involve in the future could have been determined. The forward price therefore could not possibly have been arrived at taking such events into consideration. (Note: All the above is in answer to the last question)

In my view a Dividend Strip transaction is not a Ready Forward Transaction. The differences that exists clearly distinguish the two. In my view the differences are :-

1. The Ready Forward Transaction, as described earlier, is a Money Market Transaction where monies are lent/borrowed against securities as collateral. The focus in a Ready Forward Transaction therefore is to obtain funding with securities as collateral.

In a Dividend Strip Transaction the focus is to benefit from the differential taxation and the tax arbitrage that it offers.

2. In a Ready Forward Transaction, securities are deposited as collateral, while in the case of a Dividend Strip the ownership or title passes from the seller of the stock prior to the dividend date to the buyer.

3. Like other Money Market Transactions the cost of funding in the case of a Ready Forward Transaction is deterministic. However in the case of a Dividend Strip transaction, given the uncertainty that surrounds the accretions on the stock, the cost of funding is difficult to pre-determine.

4. A Ready Forward Transaction represents a single Money Market Transaction of lending/borrowing which can be broken into a collateralised loan on the ready leg that would be repaid at the time of the forward transaction along with the interest. By this definition of a collateralised loan the two legs of a Ready Forward Contract would be concluded between two contracting parties at the same time. In the case of a Dividend Strip transaction, as was mentioned earlier, neither it is necessary to conclude the post dividend sale of stock with the same counterparty from whom it was purchased, nor is it necessary to conclude both these transactions at the same point in time.

5. By virtue of the fact that the title to the

> stock passes to the buyer at the time of initial purchase in the case of a Dividend Strip transaction, all accretions on the stock since the time of its purchase and till it is sold back would go to the initial buyer. In the case of a Ready Forward Transaction given that the securities were deposited only as a collateral, the accretions, if any, on the stock would not be passed on to the initial buyer.
>
> 6. While it is possible to work out a precise reversal rate even at the time of concluding the ready leg in the case of Ready Forward Transactions since the rate of return to the lender is deterministic, it would not be possible to do so in the case of a Dividend Strip transaction due to the uncertainty surrounding the accretions on the stock. In the case of Ready Forward Transaction the impact of intervening cash flows between the ready and forward legs is incorporated into the forward rate, while it would be difficult to do so in the case of a Dividend Strip transaction."

He also points out the evidence of Mr. Shiva on page 205 of Notes of Evidence wherein Mr. Shiva has deposed that documentation will be the same in both a Ready Forward Transaction and a Dividend Strip Contract. He submits that in a Dividend Strip Contract, the Dividend could be claimed and tax benefit could be availed of only provided title in the Units is transferred to the Purchaser. He submits that, therefore, there is a transfer of title. He submits that Dividend Strip Contract is not a Ready Forward Contract as it is not a mere lending or borrowing transaction. He submitted that in a Dividend Strip Contract, the element of loan or security being given does not arise. He submitted that in a Dividend Strip Contract, the intention is that there should be a sale. He submits that therefore, the principle laid down in the Judgment dated 14th December 1993 in M. A. No. 11 of 1993 and M. P. No. 23 of 1993, in respect of a Ready

Forward Contract, do not apply in case of Dividend Strip Transactions.

115. Mr. Shah submitted that even if it is held that a Dividend Strip Transaction is the same as the Ready Forward Transaction, even in that case all applicable arguments made on behalf of the Purchaser in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993, as well as applicable arguments made in Misc. Application No. 269 of 1993 and Misc. Application No. 555 of 1994 in Misc. Application 312 of 1994 must be taken to have been made on behalf of 2nd Respondents herein also. He submits that in view of the Judgments in those matters, he is not repeating those arguments here.

116. On the other hand Mr. Joshi points out, and in my view correctly, that there is no real difference between a Ready Forward Transaction and a Dividend Strip Transaction. A Dividend Strip Contract is nothing but one species of a Ready Forward Transaction. Even in a Dividend Strip Transaction the motive of the seller in the Forward Leg would be to get finance for the period of the Contract. Even in a Dividend Strip Contract the Ready and Forward Legs are indivisible and unseperable. As has been set out in the Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993, the ingredients of such transactions are that there must be a simultaneous commitment to buy and resell or vice-versa. The intention or motive why such a Buy Back arrangement is entered into makes no difference. The intention may be for purposes of lending

or borrowing monies or for purposes of lending or borrowing securities or for dividend stripping or for interest stripping or for voucher stripping or to meet shortfall in SLR requirements or for purposes of exchanging securities held. Thus the intention is not important. However, the fact remains that between the same parties, on the same day or about the same time, a firm commitment to buy/sell with a firm commitment to re-sell/re-buy has been entered into. This element is present even in a Dividend Strip Contract.

117. Even presuming Dividend Strip Contract is not a Ready Forward Transaction, it would still be governed by the principles laid down in the Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993. This is because it is still an arrangement which is prohibited by the Notification dated 27th June 1969, as well as by the Reserve Bank of India Circulars. For that reason also it would be illegal. If it is illegal, then the principles set out in the above mentioned Judgment continue to apply. Even otherwise as set out in paras 51 to 57 above, this Transaction would also be illegal and void because of Section 15 of the Securities Contract (Regulation) Act and Bye-law 229 of the Bombay Stock Exchange. As was pointed out by Mr. Shah, if it is proved that this Transaction was with the 1st Respondent on a principal to principal basis, then it would be illegal. It is proved that this Transaction was with the 1st Respondent on a principal to principal basis. it is thus illegal and void. If that be so then for reasons set

out in the Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993 the title to the 3.5 Cr. units continues to remain in the 1st Respondent. Also the submission regarding passing of title has already been dealt with in this Judgment and Judgment in Misc. Application No. 269 of 1993. These Judgments are binding. They therefore are attached property. for that reason also 2nd Respondents must hand them over to the Custodian.

118. Mr. Shah next submitted one of the elements of Ready Forward Transaction is that the commitment to buy and sell should have been entered into on the same day. He submitted that in this case in the letter dated 4th March 1991 the claim of the 1st Respondent was that the transaction was concluded on 18th May 1991. He submitted that this is repeated in the Affidavit filed by Mr. Harshad Mehta. He submitted that Deal Slips produced by Mr. Ashwin Mehta clearly show that the Ready Leg of the Contract was entered into on 8th May 1991. He submits that Mr. Ashwin Mehta in his evidence has admitted that the Ready Leg was on 8th May 1991. He submits that this shows that the Ready Leg was entered into on 8th May 1991 whereas the Forward Leg was entered into on 18th May 1991. He submits that if this be so, both the Legs have not been entered into on the same day. He submits that for this reason also the ingredients necessary for a Ready Forward Contract do not exist. He submits that the two contracts having been entered into on two separate days, are two separate contracts.

119. I am unable to accept the submission of Mr. Shah. In my view, Mr. Ashwin Mehta has no where deposed that the

Ready Leg was entered into on 8th May 1991 and the Forward Leg on 18th May 1991. To be noted that this submission is not that evidence of Mr. Ashwin Mehta cannot be believed. Mr. Shah was asked at least thrice and he repeatedly informed Court that the submission is that Mr. Ashwin Mehta has deposed that the Ready Leg was entered into on 8th May 1991 and the Forward Leg on 18th May 1991. When asked to point this out, he referred to pages 13, 75, 83, 90, 91 and 92 of Notes of Evidence. I have read and re-read this evidence. In my view, no where does Mr. Ashwin Mehta say what Mr. Shah attributes to him. Mr. Ashwin Mehta's deposition is that initially on 8th May 1991, the transaction was orally contracted. It was therefore concluded on 18th May 1991. What was orally agreed to on 8th May 1991 and what was concluded on 18th May 1991 were both the Ready Leg and the Forward Leg. Thus on 8th May 1991 both the Ready Leg and Forward Leg were agreed upon and on 18th May 1991 both were concluded. This is very clear from the following evidence which appears on Pgs. 13 to 15 of the Notes of Evidence:

> What is shown to me is a Deal Slip. This Deal Slip has been received from the seized computer data. This Deal Slip pertains to the data of M/s. Harshad S. Mehta. The details are fed into the computer by our computer operator Mr. Vishwas Bhatt. I gave the details to Mr. Vishwas Bhatt for feeding into the computer. These details were fed into the computer in my presence. I am familiar with instruments and terminology used in the Deal Slips. However for feeding terminology the computer operator have developed some codes. I am not familiar with those codes which are used for feeding in the terminology.
>
> The word `QTY' on the top right hand corner stands for quantity. The words `DLY DATE' stand for delivery date. The words `DLY RATE' stand for

delivery rate.

The word `Security' on the top left hand corner means the security which is to form the subject-matter of the deal. In this case the deal is for Units 1964 Scheme. The word `VIEWING' means that on the computer on the screen it will appear exactly in the form in which we are seeing the deal slip at present. The words `SELLER SBICBRT' means the seller is Harshad S. Mehta routed through State Bank of India. The word `/RT' stands for routing. The number `48' is the number of the transaction generated by the computer on that day. The term `buyer' refers to the buyer of that particular transaction concluded with Harshad S. Mehta as principal or as a broker. The words `/DS' stand for dividend strip. The words `No. 2' is also the number of the computer generated transaction for that day. The `date 08.5.91' below the column of seller is the date on which the transaction was contracted.

Witness adds: The contract may be generated later but it is fed into the computer on the date on which it is orally agreed.

Examination-in-chief continued.

The `Rate 14.85000' is the rate at which contract was contracted. The `Date 18.5.91' under column `Buyer' is the rate on which the contract note is generated. The `Rate 14.85000' is the rate at which the contract note was drawn. There are various types of contracts. There may be a contract in which there is only one leg. There may be other contracts in which there are more than one legs. The words `CC No.' denotes contract number, i.e., the contract number for the other leg. The `No. 9205182' represents the number of the contracts for the reversal leg. The number 9205182 is made up as follows: The last `No. 2' is the number of the computer generated contract. `18' is the day, i.e., 18th. `05' is the month, i.e., May and `92' is the year, i.e., 1992.

Witness volunteers: The deal slip has 2 sides to record the two transactions. As explained above, the left hand side records the routing transaction and therefore the last column below the `Seller' is left blank. As this was a R. F. Contract the computer asked for the details regarding the contract in the column on the right hand side corner, i.e., the column containing the words `Dt. 18.5.92', etc.

Examination-in-chief continued.

The `date 18.5.92' refers to the reversal date of the forward leg. The term `days 366' is the period of the R. F. transaction. In a dividend strip contract the interest is not denoted in terms

of the percentage. Therefore, in this case the column `%age : 0.000' has been shown as a 0.000. If it was not a dividend strip contract, the rate of interest would have been shown in this column.

18.5.1992 would be a Monday. Therefore the word `Monday' appears. The `Rate 14.85000' after the word Monday denotes the reversal rate of the forward leg.

A dividend strip contract is like a R. F. Contract except that the dividend falling due during the interim period is collected by the buyer. By the interim period I mean the period between the ready and the reversal leg.

In the deal slip the words `1.5.CR PHY' denotes 1.5 Crs. physicals. The words `2CR NETOFF' means 2 Crs. had been netted out. The letters `1959' represents the number of the hand written deal tickets. The words `ASM/PURKAR' represents the dealers who negotiated the transaction on behalf of Harshad S. Mehta and Citi Bank. `ASM' stands for Ashwin Shantilal Mehta, i.e., myself. `Purkar' stands for Mr. Prashant Purkar of Citi Bank. The words `LEVEL RATE' denote that the reversal is at the same rate as in the ready leg. The term `NARRATION ON CONTRACT' is for purposes of narrating any particular terms on the contract if so required. The letter `F' against the question `Would you like to print contract note?' denotes false. If the contract note is to be printed then `Y' would be typed. If the contract note is not to be printed, then `F' would be typed. The last column deals with details about delivery. The words `1.5 PHY' denotes delivery of physical of 1.5 crores. The words `2 NO' denotes netting off of 2 crores. The words `AMOUNT PAID: 51,97,50,000.00' denotes the value of the securities as computed by the computer on the basis of the delivery rate and the quantity. This deal slip represents the ready leg of the R. F. Contract."

This is made further clear from evidence on page 83 of Notes of Evidence which reads as follows:

Q: If according to you, Citi Bank bought 3.5 cr. Units at th price of Rs. 14.85 on 18.5.1991, after taking into account the cushion, is the cushion considered whilst Citi Bank was selling 2 cr. units on the same date and at the same rate ?

A: 3.5 Cr. Units was negotiated on 8.5.1991. The 2 Cr. Units was negotiated on 16.5.1991. The margin for 3.5 cr. Units was already determined earlier and the rate was kept lower at the instance of Citi Bank. Whilst negotiating for the 2nd

contract I insisted that the same rate be kept.

The above question asked by Mr. Shah talks of "cushion" In this question Mr. Shah is therefore himself taking it for granted that the price is in respect of a Ready Forward Contract. The answer makes it clear that on 8th May 1991 what was negotiated was a Ready Forward Contract. In spite of such clear evidence and in spite of not being able to show any evidence where Mr. Ashwin Mehta had deposed that the Ready Leg was on 8th May 1991 and the Forward Leg was on 18th May 1991 Mr. Shah kept on insisting that Mr. Ashwin Mehta had said so. After the evidence was read and re-read in Court, he insisted that the evidence must necessarily be read in this manner. He submitted that if the initial case of contract having been concluded on 18th May 1991 is read along with this case, then it followed that the Ready Leg was on 8th May 1991 and the Forward Leg on 18th May 1991. To Court it appears that these are submissions in desperation. There is no basis for such a submission. In my view, they merely require to be stated to be rejected. In my view, Mr. Joshi is right when he submits that the above evidence of Mr. Ashwin Mehta does not mean that there was not a Ready Forward Transaction. This because both Legs were agreed upon on 8th May 1991 and concluded on 18th May 1991.

120. Mr. Shah submitted that in any event there should have been mitigation of damages. He submitted that the 1st Respondent should have bought the 3.5 Cr. Units in the market. He submitted that the only claim, if any, could have

been for the difference in price at which Units were purchased and Rs. 14.85. He submits that 1st Respondents are not entitled to specific performance. I am unable to accept this submission. This is not a claim for specific performance. This is a claim for return of attached property wrongly retained by the 2nd Respondents. As set out in detail in Judgment dt. 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993, the 2nd Respondents cannot hold on to attached property and are bound to hand it over to the Custodian. In such cases no question arises of mitigation of damages.

121. Mr. Shah next submitted that the relief prayed for is for return of 3.5 Cr. Units sold under the Ready Leg. He submitted that the Custodian and the 1st Respondent are claiming restitution. He submitted that restitution can only be if monies received by 1st Respondent are returned back. He submitted that the Court will therefore have to pass a simultaneous Order for return of monies if it directs 2nd Respondents to hand over 3.5 Cr. Units. I see no substance in this submission also. As stated above, this Application is on the basis decided by Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993. It is on the footing that the transaction being illegal no property/title in the Units has passed to 2nd Respondents. It is on the footing that the title to the 3.5 Cr. Units remains with 1st Respondent. If that be so, then 2nd Respondents are holding on to attached property. That it

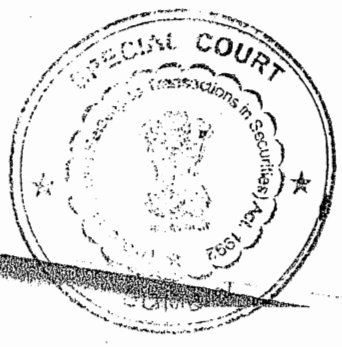
cannot do. If 2nd Respondents have any claim against 1st Respondent for return of monies, it must make its claim under Section 11 of the Special Court Act. Respondents No. 2 cannot hold on to attached properties on the ground that it has some claim against the 1st Respondent. If this is permitted, then it would amount to various parties, by this manner, claiming priorities, other than those set out under Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act. This is not a claim of restitution.

122. Faced with this situation, Mr. Shah submitted that in any event 2nd Respondents are entitled to restitution and immediate repayment of monies. In support of his submission, he relied upon the authorities in the case of **KAVITA TREHAN v. BALSARA HYGIENE PRODUCTS LTD.** reported in 1994 (5) S. C. C. Pg. 380; **UNION CARBIDE v. UNION OF INDIA** reported in A. I. R. (1992) S. C. Pg.248; in the case of **BINAYAK SWAIN v. RAMESH CHANDRA** reported in A. I. R. (1966) S. C. Pg. 948; and in the case of **JAI BERHAM v. KEDARNATH** reported in A. I. R. (1922) P. C. Pg. 269.

123. In all the above mentioned cases, some benefit had been derived by virtue of an Order of Court or from Court proceedings. It is under these circumstances that the Courts have held that there must be immediate restitution. How these cases can have any application to the facts of present case one fails to understand. In this case no advantage or benefit has been gained by virtue of any Order of Court or proceeding. In this case, 2nd Respondents, being a Scheduled

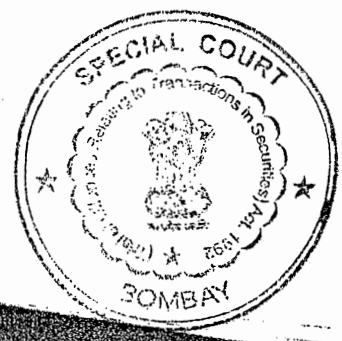
Bank and being aware of Reserve Bank of India Circulars, chose to ignore them and to enter into illegal transactions. Undoubtedly this was with motive of earning greater profits then would have been possible if they had stayed within the guidelines. Having chosen to enter into illegal transactions, they have now burnt their fingers. They have done so of their own volition. The argument of Mr. Shah amounts to saying that even though the 2nd Respondents had knowingly entered into illegal transactions the Court must still assist them. This is contrary to law. Courts cannot assist parties to illegal contracts. The loss must be allowed to lie where it falls. As has been stated in the Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993, the Court is not assisting the 1st Respondent. The Court is performing its statutory duty to recover property for the purposes of distribution. In the Order dated 28th February 1995 in Misc. Application No. 555 of 1994 in Misc. Application No. 312 of 1994, this Court has also observed as follows:

> " As has been set out above, it is not the Notified Parties who are recovering the properties. It is the Court which is recovering properties. The Court is recovering it for a specific purpose, i.e., distribution under Section 11. The Court is undoubtedly recovering as property of the Notified Party. But the Court is not recovering properties for and on behalf of the Notified Parties. Notified Parties being in pari delicto cannot enrich themselves. This recovery is for a specific purpose i.e., distribution and nothing else. If required for distribution the property will undoubtedly be used by Court. This because this Court is duty bound to recover and distribute. However no Court can be used by a party to unjustly enrich himself. Courts have ample powers to guard against that. As



> a general rule it is correct that on a surplus the Notified Party will be entitled to surplus. However that would apply to cases where clearly a property is belonging to a Notified Party and the Notified Party had under normal law a right to recover or hold that property. Such cases must be differentiated from cases, where under normal law, a Notified Party would have been precluded from recovering properties even though they belonged to him. The said act is not abrogating the normal law. The said Act does not enable a Notified Pasty to recover , even though he is pari delicto. It is merely enabling Court to recover for a specific purpose. It is only because the Court is recovering for a specific purpose that the normal law of pari delicto does not apply. Undoubtedly the Court is recovering the property on the footing that it is the property of a Notified Party. But the Court is not recovering for and on behalf of a Notified Party. The Statute is permitting recovery by the Court for a specific purpose. The recovery can only be for that purpose. In such cases the Court will only be acting as a Receiver of properties for fulfillment of the purpose. If the property is not required for that purpose, like a receiver, the Court must return the property to the party from whom it took the property. It will not hand over such property to the Notified Party. It will hand back the property to the person from whom it took the property. It will then be for the Notified Party to seek to recover the property, in normal Civil Courts, provided he can. Thus I do not agree with the broad proposition that if there is a surplus than, all properties, even properties specifically collected for distribution, would have to be handed over to the Notified Party."

Also in this case, there can be no sympathy for the 2nd Respondents. They have knowingly flouted the Reserve Bank Circulars and entered into alleged Contracts. They have in order to support a false case, suppressed documents and withheld relevant witnesses. They have sought to deny a genuine claim on the specious grounds that their records do not show existence of the contracts. This when in their records, Contract Notes and Delivery Orders exist.



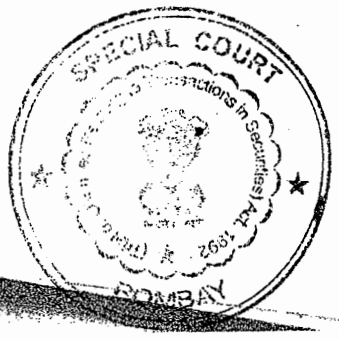
124. Mr. Shah next relied upon the authority of the Supreme Court in the case of **LALLAN PRASAD v. RAHMAT ALI** reported in A. I. R. (1967) S. C. Pg. 1322. In this case, the Supreme Court has held that pledgee cannot maintain a Suit for recovery of debt as well as retain the pledged goods. Mr. Shah submitted that the same principle will apply here. He submitted that if Court holds the Contract is void, then the Court must hold that 1st Respondent is not entitled to return of Units unless monies are also returned. In my view, above principles have no bearing to facts of the present case. This case cannot be compared to a situation where a pledgee seeks recovery of monies and to retain goods. A pledgee can only retain goods till such time as monies are repaid. Once monies are repaid, he has to hand back the goods. In this case, the 2nd Respondents are hanging on to attached properties which they cannot do. In this case statutorily they are bound to return it. In this case statutorily they must make their claim under Section 11 of Special Courts Act. They cannot claim a priority which law does not permit or give them.

125. Mr. Shah next submitted that both Units and monies cannot belong to 1st Respondent. He submits that if it is held that the Units belong to 1st Respondent, then the monies continue to belong to 2nd Respondents. Mr. Shah submits that 1st Respondent cannot be permitted to hold on to monies of 2nd Respondents. He submitted that on principles of equity, there must be simultaneous return of monies. This

in effect is a claim for restitution. The principles governing restitution are covered by Section 70 of the Indian Contract Act. As stated above, 2nd Respondents must make their claim for return of monies under Section 11 of the Special Court Act. That claim will be decided on its own merit.

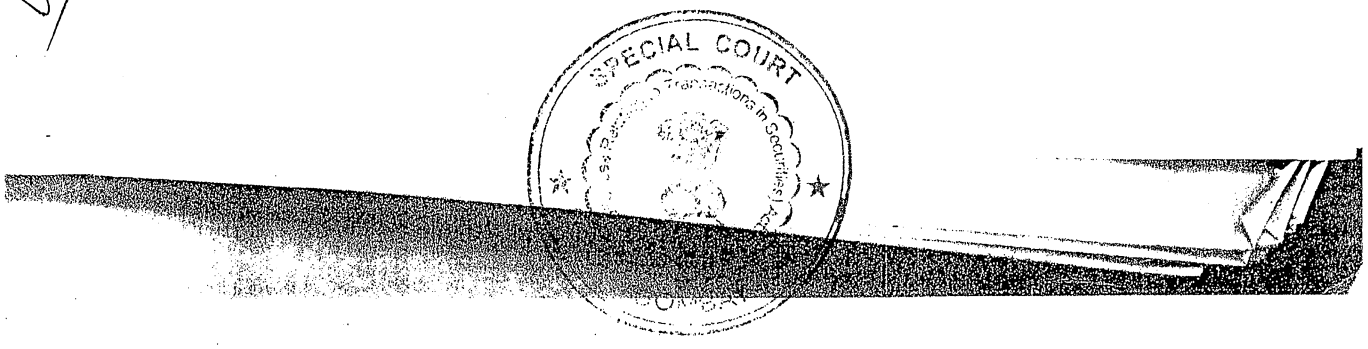
126. For all the above reasons, it is held that there were Ready Forward Dividend Strip Contracts for 3.5 Cr. Units and 2 Cr. Units between 1st and 2nd Respondents on a principal to principal basis and the Forward Leg of these two Contracts were netted off. As the Contracts were between 1st and 2nd Respondents on a principal to principal basis, Issue No. 1 has been answered in the Negative. Issues Nos. 2 and 3 thus do not arise and Issues Nos. 4 to 6 have been answered in the Affirmative. As these are proved to be Ready Forward Dividend Strip Transactions, on principles laid down in Judgment dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993 Issues Nos. 7 and 8 have been answered in the Affirmative. On same principles Issue No. 9 does not arise. For above reasons Issues Nos. 10 and 11 have been answered in the Negative and Issue No. 12 is answered in the Affirmative.

127. Under the circumstances, the Application is made absolute in terms of prayer (a). Respondents No. 2 is directed to hand over to the Custodian, for and on behalf of the 1st Respondent, 3.5 Cr. Units (1964 Scheme). That brings us to the question of costs.



128. In a Judgment dated 13th March 1995 in Special Court Suit No. 13 of 1994, this Court has observed as follows:

> "52.....The Court has been noticing that there is a growing tendency not to honor debts/commitments. The tendency nowadays is to let the creditor go to Court. The tendency is to file some defense even when there is none. In many cases the defense taken is absolutely false. The whole intention is to use laws delays. Thereafter the attempt is to delay hearings as long as possible. It is only when it is found that it is not possible to delay any longer that, in most cases consent terms or a decree on admission are taken. In some cases even at the stage of trial the false defense is persisted in with the intention of whiling away further time in Appeals. In my view this is because parties know that litigation takes a number of years. In my view this is because parties know that ultimately the Courts will only award nominal interest and costs. Also today litigation has become prohibitively expansive. Many parties with genuine cases cant afford to litigate. Just how expansive litigation is, is best indicated by this case. Because litigation is so expansive and takes so long, many parties with genuine claims are forced to settle/compromise. They are forced to give up, in many cases, a substantial part of their genuine claim. Also even if a party ultimately succeeds he does not in reality get his entire claim. The amount actually spent by him in litigating is never awarded. The successful party is thus out of pocket. Nowadays this is in a sizable amount. This hurts the genuine party. The dishonest party does not mind. He is sitting on the property or money, using it and in most cases making money out of it. This further encourages parties to be dishonest. In my view it is time that Courts actively curbed this tendency to file false cases or to take up false defenses merely with a view to delay payment or deliver up property. In my view if a Court is convinced that an absolutely false case has been filed or an absolutely false defense has been taken up, with a view to use laws delays, than the Courts should now grant a prohibitively high rate of interest. In my view the Courts must now grant actual costs incurred in conducting the litigation. In my view a dishonest litigant must be made to bear not just his own costs but also the entire costs of the other party. In other words the litigation must be at the costs and consequences of



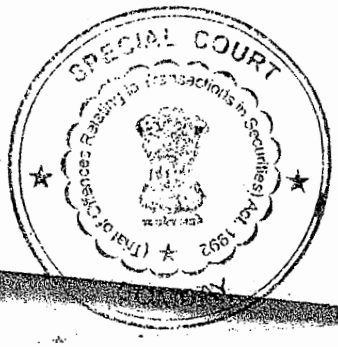
> the dishonest litigant. In my view this is absolutely necessary, in present times, to bring home the message that using laws delays is not going to be remunerative. In my view it is time the message is brought home to dishonest litigants that using laws delays is going to be an expansive proposition. Of course I hasten to add that this drastic step must be taken and used very cautiously, sparingly and only in cases where the Court is certain that there is an absolutely false case or defense. To this Court it is clear that merely because a Court does not accept a case or defense is no ground for granting high interest or costs. It must also be mentioned that the Special Courts Act provides that the Civil Procedure Code does not apply. In my view, the facts set out hereafter, show that this is a fit case where actual costs must be awarded. It may only be mentioned that this Court has framed Regulations for conduct of trials before this Court. In these Regulations the Court has clarified that costs will include actual costs."

129. In this case it is clear that the 2nd Respondents have had material to show the true state of affairs. They have suppressed relevant documents from Court. They have held back evidence of relevant witnesses. On a false and frivolous defence they have dragged on this trial for a long time. The Court thus asked the Applicants and 1st Respondent to give the figures of actual costs incurred by them in conducting this Suit. The Court has been given a statement of fees charged by Solicitors and Counsel. This brings out what fees are charged today. This clearly shows how expensive litigation is now a days. Till date, 1st Respondents Counsels fees have been Rs. 31,50,000/-. 1st Respondents Solicitors fees have been Rs. 10,00,000/-. Even though Solicitors and Counsel on behalf of the Custodian have always been charging very nominal fees, yet the Custodian will have to spend Rs.

1,04,456/- towards Solicitors' Fees and Rs. 47,550/- towards Counsel Fees, i.e., a sum of Rs. 1,52,106/- in all. The Custodian has had to fight this litigation at public costs in order to discharge the public function cast on him. The Custodian can hardly afford to bear such costs on a regular basis. The Notified party has also had to bear costs. This ultimately will come out of attached assets. Thus a large amount, which should be used for distribution to genuine creditors may have to be used for paying lawyers fees. The Court has not yet finally decided whether lawyers fees can be released in priority. That question is pending. However prima facie it does appear that the Custodian will have no evidence. The only persons who can contest and bring all facts before the Court are the Notified parties. They need to be properly represented. This costs monies. Court may therefore have to make a distinction between cases where Notified parties are litigating or defending in their own interest and cases where attached assets are being sought to be recovered. Even in cases where the assets are being augmented for distribution purposes it may be difficult to release monies towards Advocates fees as this would deprive creditors. In my view one way out would be that in cases where it is found that a genuine claim has been falsely resisted, the other side must be made to pay actual costs. This could then be handed over to Advocates. This would also be a deterrent to dishonest defenses being adopted. All parties including the 2nd Respondents are aware that litigation is expansive. Yet 2nd Respondents have chosen to take up false defenses. This undoubtedly to try and delay

handing over attached assets for as long as possible. If 2nd Respondents have chosen to do so, in my view they must bear the full cost and consequence. It is time that parties learn that full costs and consequences of false litigation are upon them. In my view this would one way of ensuring that false litigation does not come before this Court. As mentioned above this Court has framed Regulations for conduct of trials before this Court. In these Regulations the Court has clarified that costs will include actual costs. Thus before this Court at least dishonest parties have been put on guard that they would have to bear the entire costs and consequences.

130. In my view the 2nd Respondent must thus pay costs of this Application fixed at Rs.41,50,000/- to the 1st Respondent and Rs. 1,52,106/- to the Custodian. However as stated above this is on the basis that these are actual costs. They would be actual costs only if Solicitors of 1st Respondent Advocates have actually so billed and Counsel of 1st Respondent so marked on the dockets. Before paying the costs the 2nd Respondents will be entitled to demand from the Solicitors of 1st Respondent copies of bills of Solicitors and dockets of Counsel showing that these have been actually charged/marked. Solicitors/Counsel of 1st Respondent may differ actual receipt of these fees for tax planning purposes. However this cant be indefinite. Therefore at time of receipt of these costs, 2nd Respondents must also be informed by Solicitors of 1st Respondent over what period of



time the fees are to be paid and then on actual payment the Solicitors receipt should be send to the 2nd Respondents. It is clarified that if it is ultimately found that the fees or any part thereof is not actually paid, the 2nd Respondents will be entitled to claim that portion back. So far as the Custodian is concerned, as is common for Government Departments fees are paid sporadically and very often, without relation to a particular matter. Therefore a Certificate of the Custodian that the Fees indicated have been charged will be sufficient. As and when full payment is finally made, the Custodian to also give, to the 2nd Respondent, a Certificate to the effect that the fees have been paid.

131. Mr. Shah applies for stay of this Judgment. In my view stay should not be granted. However, in view of the large amount involved, time to comply can be granted. Accordingly I grant 2nd Respondents a period of 16 weeks to comply with the operative part of this Judgment including the Order of Costs.

Sd/- XXX
(S.N. VARIAVA, J.)
Judge Special Court

SPECIAL COURT
Offences Relating to Transactions in Securities
BOMBAY

Certified to be a true copy

OFFICER ON SPECIAL DUTY
Officer of the Special Court
Bombay

Typed on 10/09/2012
Pages 125
Examined by PR. Kadam
Compared with Deshmukh
Ready on 12/09/2012
Delivered on 24/01/2013

13/9 13/09

Certified Copy Charges Rs 35

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 255 of 1994

Harshad S. Mehta .... Applicant

Vs.

PNB Mutual Fund & Anr. .... Respondents.

Mr. A. D. Desai with Mr. A. D. Chaugule with Mr. K. G. Desai i/b M/s. Mahimtura & Co. for the Applicant.

Mr. V. R. Dhond i/b M/s. Little & Co. for Respondent No. 1.

Mr. G. R. Joshi i/b M/s. P. M. Mithi & Co. Respondent No. 2.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA,
JUDGE, SPECIAL COURT.

15th September 1995.

ORAL ORDER:

1. This Application is by Harshad S. Mehta for recovery of 17% N.T.P.C. Bonds of the face value of Rs. 10 crores and the interest of Rs. 3.40 crores (which has been collected by the 1st Respondent) on these Bonds. This Application is based on the Judgment of this Court dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993. By this Judgment, it has been held that all Ready Forward Transactions are illegal. It has been held that if a Ready Forward Transaction was with a Notified Party, then the title/ownership in the security would not have passed to the purchaser and that the security would continue to be owned by the concerned Notified Party.

SPECIAL COURT (Trial of Offences Relating to Transactions in Securities) Act, 1992 BOMBAY

In that Judgment it has been held that as the security continued to be owned by the Notified Party, it was attached property and the alleged purchaser could not continue to retain possession of that security. It has been held that the alleged purchaser must therefore hand over the concerned security to the Custodian.

2. This Application is on the basis that there was a Ready Forward Transaction between the Applicant and the 1st Respondent under which 17% N.T.P.C. Bonds of the face value of Rs. 10 crores were sold, by the Applicant to the 1st Respondent, with a firm commitment that they would be resold to the Applicant. This is one of a large number of such Applications which are pending before this Court. In all these matters, including this Application, normally two questions arise for consideration i.e. (1) whether there was a Ready Forward Transaction and (2) whether the transaction was between the Applicant and the concerned Purchaser, in this case the 1st Respondent, on a principal to principal basis.

3. The second question arises because the Court has found that in many matters the Notified party has routed their own transaction through some Bank. Thus the Notified broker would, on paper, act as a broker and the transaction would be shown to be between two Banks. It is because, on paper the transaction is between two Banks, that in many cases, the purchaser contends that the Notified Party was only a broker. In spite of the transaction being, on paper,

between two Banks, some Banks (Purchasers) have honestly admitted that the real counter-party was the Notified Party. However, the majority of Banks (Purchasers) are denying that the Notified Party was the principal counter-party in their transaction. The Court has had occasion to try one such Application. That trial, under the normal procedure, lasted for over 30 working days. This Court has been specially established to ensure speedy justice. If normal procedure is followed, this aim of speedy disposal would be completely negatived. The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 provides that the Code of Civil Procedure would not apply to this Court. Under this Act this Court is to evolve its own procedure keeping in mind the principles of natural justice. This Court has framed Regulations under which Affidavit Evidence, particularly evidence in chief, can be taken. Because of the very large number of such Applications, this Court has been directing all parties to serve on the other side Notice to admit facts.

4. The Applicant has served on the 1st Respondent a Notice to admit facts. In response the 1st Respondent has admitted certain facts and denied certain facts. The facts which are admitted are that (1) this was a Ready Forward Transaction for a period of 31 days with interest rate at 19% per annum and (2) that the Ready Forward Transaction was to be reversed on 19th May 1992. The 1st Respondent however denies that this Ready Forward Transaction was with the Applicant on principal to principal basis. They claim that

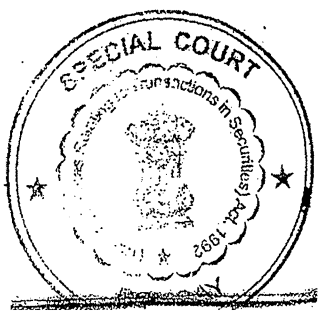
their transaction was with ANZ Grindlays Bank. Thus according to the 1st Respondent the transaction was between the 1st Respondents and ANZ Grindlays Bank on a principal to principal basis.

5. On the above admission the only question now remaining before this Court is whether the transaction was between the 1st Respondent and the Applicant on a principal to principal basis and/or whether the transaction was between the 1st Respondent and ANZ Bank on a principal to principal basis.

6. The Court has observed that the test of whether the transaction was with some other Bank or with the Notified Party on a principal to principal basis, is whether the amounts paid by the Purchasing Bank (always by Bankers Cheques/Pay Orders in names of counter-party Bank) were credited into the Notified Parties account with the other Bank. If that was done, it could only be because the Notified Party was the principal. Another test would be whether the other Bank delivered to the purchasing Bank its own securities or delivered securities on behalf of Notified Parties. These two factors are clinching factors. The Court has, in order to save time, in all such matters called for Court Evidence of the abovementioned two factors. This it has done by calling upon all counter-party Banks, in all these matters, to file evidence on Affidavits setting out:

a) if the concerned transaction was their own

b) whether the amount paid by the purchasing Bank was

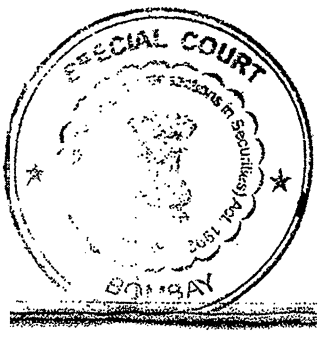


credited into their own accounts or into Notified Parties account and

c) whose securities were delivered.

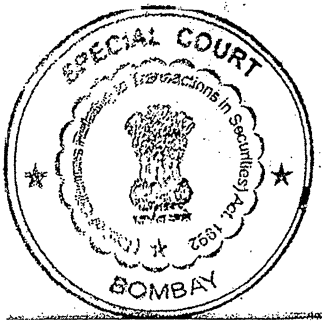
7. In this case the Court called upon ANZ Grindlays Bank to so state on affidavit. On 25th July 1995, ANZ Grindlays Bank filed their Affidavit Evidence. By this they set out that they have had no transaction with the 1st Respondent on a principal to principal basis. They set out that they have not entered into the contract dated 10th April 1992 in respect of 17% Taxable N.T.P.C. Bonds of the face value of Rs. 10 crores. They set out that the Account Payee Cheque issued by the 1st Respondent was credited into an Account of the Applicant in ANZ Grindlays Bank. They set out that the cheque was received by them along with a deposit slip for crediting the proceeds of the cheque into the Applicant's Current Account No. 01CBP 0486800 with their Sansad Marg Branch at New Delhi. They set out that the proceeds of the cheque have therefore been availed of by the Applicant. They set out that no securities belonging to ANZ Grindlays Bank have been delivered by them to the 1st Respondents under this transaction. It cannot be denied that 1st Respondent has received securities under this Contract. Now it is clear that those securities did not belong to ANZ Grindlays Bank. The only other party concerned with the transaction, is the Applicant.

8. Thus by this Affidavit Evidence the case of the Respondents that there was a transaction between ANZ



Grindlays Bank and themselves on a principal to principal basis is prima facie belied. Even though this is Affidavit Evidence, in all these matters Court has permitted parties to file Affidavits-in-Reply to the evidence. This so that if all parties agree then the matter can be disposed off on Affidavits and without recording evidence. No Affidavit-in-reply to the Affidavit of ANZ Grindlays Bank has been filed by Respondent No. 1 till date. This in spite of the fact that since then the matter has appeared on board on at least two occasions. Of course I agree that if a party wants to cross-examine, then no Affidavit-in-Reply need be filed. But then the Court must be informed on the very first occasion that they desire to cross-examine. The Court was not even informed that the affidavit evidence of ANZ Grindlays Bank was being disputed and/or that the 1st Respondent desired to cross-examine the witnesses of ANZ Grindlays Bank. This in spite of the fact that on 13th September 1995 this matter had reached and was to go on. At the request of Mr. Dhond it was kept back till today. Even on that date the Court was not informed that witnesses of ANZ Grindlays should be kept ready in Court.

9. Today after the matter reaches, for the first time, a contention is being taken that the 1st Respondent is entitled to cross-examine witnesses of ANZ Grindlays Bank. To this proposition there can be no dispute. Mr. Dhond fairly admits that the 1st Respondent had known that the Affidavit filed by ANZ Grindlays Bank was evidence on

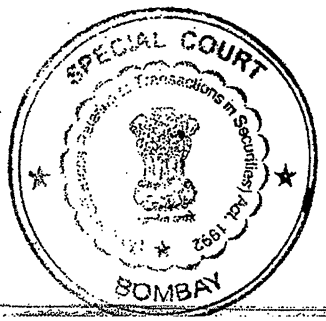


Affidavit. He however has no explanation why earlier it was not stated that the 1st Respondent desired to cross-examine. It is clear that the whole attempt has been to somehow or other delay the hearing of this Application. As this contention is being taken today it necessitates an adjournment. Court will now have to call the witnesses of ANZ Grindlays Bank as Court witnesses.

10. Mr. Dhond submits that before the witnesses of ANZ Grindlays Bank are examined the Applicant must first step into the witness box. He submits that it is the Applicant's case that they are the principal counter parties. He submits that the Applicant should first establish their case through their own witnesses. He submits that this is necessary as all the documents indicate that the Applicant has acted as a broker.

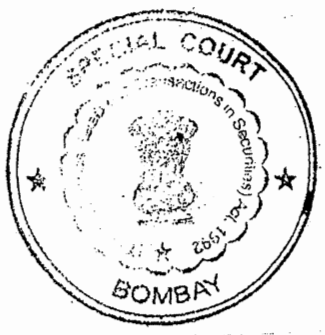
11. In support of this last submission he shows to the Court the Deal Slip which is annexed as Exhibit 'A' to the Application. He submits that this Deal Slip clearly shows that the Applicant acted as a broker. In my prima facie view, this Deal Slip shows that the Applicant was the principal counter party to this transaction. In my prima facie view the Deal Slip shows the contrary to what Mr. Dhond is submitting. Mr. Dhond then shows Exhibit 'B' to the Application namely the Contract Note. He submits that this Contract Note is in Form "A". He submits that as it is in Form "A" it is clear that the Applicant is a broker.

12. In this behalf it is necessary to mention what



this Court has been observing for the past three years. For the past three years the Court has been observing that in all cases the Contract Notes have been in Form "A". This irrespective of the fact whether the Notified Party acted as a principal or as a broker. In spite of all Contract Notes being in Form "A", in some matters purchasing Banks have honestly come to the Court and admitted that the Notified Party was the principal counter-party. There have been a large number of matters where Purchasing Banks have contended that the Notified Party was merely a broker. This Court has in an Order dt. 19th August 1995 in Chamber Summons No.34 of 1995 in Misc. Application No. 219 of 1993 negatived a contention that the Contract Notes would show that the Notified Party was a broker. The Court has held as follows:

> " However, this Court, during the past three years that it has functioned, has not yet come across any documents, in such transaction, wherein the Notified Parties are shown as principals. All documents have been on the footing that Notified Parties acted as Brokers. In spite of that this Court has found and many Banks have admitted, that the Notified Party was in fact the principal counter party. Therefore, merely because Documents show the Notified Party as a Broker does not by itself mean that Notified Party was not a principal."



The Court has also in a Ruling given on 14th June 1995 in Misc. Application 221 of 1993 held that the Contract Note by itself would not disclose whether the Notified person acted as a broker or a principal. Misc. Petition 221 of 1993 went through a protracted trial which is recently over. That case is pending Judgment. In that case also, based on the Contract Note it was contended that as the Contract Note was in Form "A", the Notified Party was a broker. It must be mentioned that the witness of the Respondent Bank, in Misc. Application 221 of 1993, ultimately admitted that merely by looking at the Contract Note it is not possible to say whether the person who issued the Contract Note was a broker or a principal.

13. It was pointed out to Mr. Dhond that the Court has already held as above. Mr. Dhond then took instructions from one Mr. Ranjan Srinath, Vice President of the PNB Mutual Fund. Mr. Dhond was instructed by the said Srinath to submit that merely by looking at the Contract Note Exhibit `B', without reference to any other document or record, it is possible to state that Harshad Mehta acted only as a broker. Mr. Srinath has been directed to put these instructions on Affidavit. Of course the evidence in Misc. Application 221 of 1993 is not binding in this case. However an Order of this Court would be binding. Thus at this stage, Court is prima-facie finding it difficult to accept the contention of Mr. Dhond. This in view of what this Court has been observing over the past three years and in view of fact that it has

already held to the contrary. However 1st Respondent are at liberty and entitled to establish the contrary.

14. In my prima-facie view, the mere existence of a Contract Note in Form "A" does not by itself show that the Applicant acted as a broker. Whether the Applicant acted as a broker or not depends on whether the amounts which the 1st Respondent paid went into Applicant's account and/or whether they went directly to ANZ Grindlays Bank. It also depends on who delivered the securities to the 1st Respondent.

15. Mr. Dhond submits that even if the evidence of ANZ Grindlays Bank is accepted it would only show that ANZ Grindlays Bank was not the counter party. He submits that this would not established that Harshad S. Mehta was the principal in this transaction. I am unable to accept this submission. This argument overlooks the specific case of the 1st Respondents. The specific case of the 1st Respondents is that their transaction was with ANZ Grindlays Bank. This argument overlooks the fact that ANZ Grindlays Bank evidence is to be the effect that amounts have been credited into the account of the Applicant and that the securities which have been received by the 1st Respondents were not securities of ANZ Grindlays Bank. Except for ANZ Grindlays bank, the 1st Respondent and the Applicant there is no other party connected with this transaction. It cannot be denied that the securities which are received are under this contract. If in

rindlays is not the

arily will follow tha

the principal counter party.

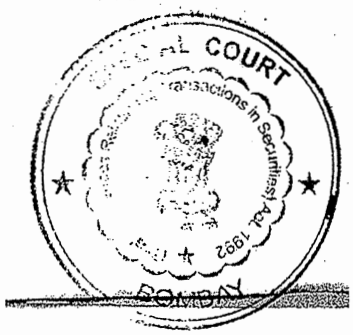
16. Mr. Dhond next submits that these are adversarial proceedings and that the knowledge which the Court has gained from other proceedings should not be imported into this Application. I am unable to accept this submission. The Legislature established one Court to try all these matters. The whole aim and purpose of this was that everything is before one Court. This so that the Court could learn and know how these transactions were performed and what the real state of affairs are. It is impossible that the Court not form prima-facie opinions based on what it has been observing. These however remain prima-facie opinions. Based on these opinions Court is not precluding parties from establishing the contrary. Till the contrary is shown to the Court, it cannot remain blind to facts coming before it.

17. Mr. Dhond submits that the Applicant must also prove that he owned these securities. Mr. Dhond submits that there are number of inconsistencies in the documents annexed by the Applicant in the Affidavit-in-Rejoinder. He submits that it will be necessary to cross-examine the Applicant on those aspects and on these documents.

18. In my view, it is not at all necessary to find out whether the Applicant owned these securities. The only question before the Court is whether there was a Ready Forward Transaction between the Applicant and the 1st Respondent on a principal to principal basis. Admittedly

the 1st Respondent got these securities under this Contract. Having got these securities under this Contract, it is not open to them to challenge the title of the party from whom they got the securities. If it is ultimately established that the Applicant was the principal counter party, then it would not be open to the 1st Respondents to challenge the title of the Applicant without first returning these securities. Also it is not necessary that Applicant should be owner of the securities. He could have got these securities under another Ready Forward Transaction or may have borrowed these securities. So far as this Application is concerned, title of Applicant is immaterial. If it gets established that Applicant was the principal counter-party, then how Applicant got the securities and gave them to the 1st Respondent is immaterial. If parties had restricted their transactions to securities owned by them there would have been no scam. The scam arose because, amongst other things, Notified Parties and Banks kept dealing with property of others and sometimes when they had no securities. Admittedly the 1st Respondent got the securities under this Contract. If the transaction has been between the Applicant and the 1st Respondent then, if Applicant was not the owner and dealt with someone else's property then there will be a claim against the Applicant for these securities. For that reason also the securities would have to be collected from the 1st Respondent. Further if Applicant had no title the 1st

no title. For that rea



return the securities. Thus the question of title Applicant and/or the question of cross-examining on inconsistencies in the documents in the Affidavit-in-Rejoinder on this aspect do not arise.

19. As stated above ANZ Grindlays Bank has filed evidence on Affidavit. In my view, unless this is contradicted, this evidence is conclusive of the matter. As stated above, the 1st Respondents are entitled to test this evidence by way of cross-examination. This is Court evidence. It must be led first. The parties can cross-examine. It is only after this, provided parties still desire to lead evidence, that the question of any party, including Applicants leading evidence arises. If by Court evidence all aspects are covered, then no necessity arises for protracted evidence of parties. I therefore reject submission of Mr. Dhond that Applicant must first step into the witness box.

20. I direct that on the next occasion the Application will cross-examine the witnesses of ANZ Grindlays Bank (if they so desire) and then the 1st Respondent will cross-examine witnesses of ANZ Grindlays Bank. Thereafter parties to decide whether they desire to lead any evidence.

21. It must be mentioned, only by way of prima facie observation, that the 1st Respondent claim that their contract was with ANZ Grindlays Bank. Admittedly, on 19th May 1992 there was no difficulty in performance of the reversal leg with ANZ Grindlays Bank. Under Bye-Law 235 of

the Bombay Stock Exchange, it was for the 1st Respondents to tender delivery on the reversal date. Significantly even though there was no difficulty in performing this contract with ANZ Grindlays Bank, there has been no reversal. The only difficulty, if any which might have existed on the reversal date, was the fact that, on 19th May 1992, the Applicant was in trouble because of the Scam having broken out.

22. ANZ Grindlays Bank is therefore directed to send to Court on 26th September 1995 one of the deponent of the Affidavit and if deponent is not personally conversant with facts of case to also send an Officer who is conversant with the facts of this case. All necessary documents in their possession, including duly certified statement of Account and delivery documents, must also be brought to Court by ANZ Grindlays Bank.

23. As this adjournment has been necessitated on account of the 1st Respondent's conduct, the 1st Respondent will pay costs of this adjournment fixed at Rs. 1,500/- each, to the Applicant and to the 2nd Respondent. Costs condition precedent.

24. Mr. Ranjan Srinath, Vice President, Finance of PNB Mutual Fund to state on Affidavit to be filed today that by merely looking at the Contract Note (a copy of which is annexed as Exhibit 'B' to this Application) and without referring to any other document or record, it is possible to state that Harshad S. Mehta acted only as a broker.

sd - XXX
(S. N. VARIAVA, J.)
Judge Special Court

Applie on 10/09/2012
Pages 14
Examined by Mr. MUJUMDAR
Compared with DESHMUKH
Ready on 12/09/2012
Delivered on 04/01/2013

SPECIAL COURT
BOMBAY

Certified to be a true copy

OFFICER ON SPECIAL DUTY
Officer of the Special Court
Bombay

(16)

Certified Copy Charges Rs. 6.00

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. APPLICATION NO. 400 OF 1994

Standard Chartered Bank. Applicants.

Vs.

1. Canbank Financial Services Ltd.,
2. Harshad S. Mehta,
3. Custodian,
4. C. B. I.,
5. Fairgrowth Finance Services Ltd. Respondents.

Mr. E. P. Bharucha i/b Gagrat & Co. for Applicants.
Mr. Pradeep Sancheti i/b Mulla & Mulla for 1st Respondents.
Mr. M. R. Jethmalani i/b Mahimtura & Co.for 2nd Respondent.
Mr. G. R. Joshi i/b P. M. Mithi & Co. for 3rd Respondent.
Mr. P. R. Namjoshi for 4th Respondents.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA.
28TH MARCH 1995.

ORAL ORDER:

1. Mr. Bharucha asks for time to take inspection of certain Bankers Receipts which are in custody of C. B. I. Mr. Namjoshi states that inspection will be granted. He however points out that the documents are in Bangalore. He states that the documents will have to be brought to Bombay. Mr. Namjoshi asks for 4 weeks time.

2. Mr. Jethmalani points out that on the averments of the Applicants in paras 10 to 15 of their Affidavit dated 14th December 1994, the Applicants have to deliver to the 2nd Respondent 13% NPC Bonds of face value of Rs. 3 crores.

3. Mr. Bharucha submits that this also arises from the initial transaction which forms the subject matter of the Application. Mr. Bharucha submits that the 1st Respondents

SPECIAL COURT (Trials in Securities) Ordinance 1992 & Act BOMBAY.

12(

admit that they have to deliver 13% NPC Bonds of face value of Rs. 5.5 crores to the Applicants. He submits that the Applicants have no objection to 1st Respondents handing over Bonds worth Rs. 3 crores to the 2nd Respondent.

4. Mr. Sancheti states that the 1st Respondent admit that they have to deliver to the Applicants 13% NPC Bonds of face value of Rs. 5.5 crores. He submits that that can only be if the Bankers Receipt is handed back to the 1st Respondents duly discharged and/or the Court grants to the 1st Respondents a dischargé. He submits that without the discharged Bankers Receipt and/or a discharge from Court, the 1st Respondents are not willing, at this stage, to bring in the Bonds.

5. Mr. Jethmalani points out that the C. B. I. has filed an Affidavit objecting to release of the 1st Respondents' Bankers Receipt. This because there is a pending prosecution. Mr. Jethmalani points out that the liability of the Applicants to deliver Bonds of the face value of Rs. 3 crores is independent of and not dependent upon the Bankers Receipt of the 1st Respondents. He submits that the attempt to link the two is merely a ruse to delay performance of their own obligation.

6. In my view, at this stage these questions do not arise in this Application. However it does prima facie appear to Court that Applicants have a liability to deliver 15% NPC Bonds of the face value of Rs. 3 crores to 2nd Respondent. It prima facie appears that these should have been

delivered as far back as 1992. Prima facie it does appear that this liability is independent of and not connected to the delivery by 1st Respondents under their Bankers Receipt.

7. Court is noticing that many parties including big Banks, are not performing their obligations. After Notification, all properties of Notified Parties stand attached. The Custodian has issued Public Notices calling upon all parties to inform him if any thing is owed to Notified Parties. Many parties have not replied. They have kept quiet. This probably in the hope that if things do not come to light, they might escape liability. Many of them may ultimately succeed, inasmuch as limitation is fast running out. If the Custodian does not learn of the claim, he cannot file an Application to recover. Parties, including Notified Parties, do not inform the Custodian. It is possible that there is an understanding between them. Presumably at some stage, after known assets are distributed, there will be adjustment between them and the Notified Party.

8. In my view, Court must take serious note of this tendency to not to disclose. In my view, if it comes to attention of Court that a party has not disclosed for the last over 2/3 years and that it is holding attached assets, then that party must be made to pay a high rate of interest and high costs.

9. As stated earlier, at this stage and in this Application, Court cannot call upon Applicants to bring in Bonds of face value of Rs. 3 crores. It is for Applicants to

decide what they want to do. Applicants have recently been a beneficiary of Court's view that high interest and high costs must be awarded under some circumstances. They therefore, more than anybody else are aware of Court's view in these matters. They more than anybody else know that if it is found that they have not disclosed and not honoured their independent obligation, they may end up paying high interest and costs.

10. As this has now come to the notice of the Court, I direct the Custodian to look in this aspect. If he finds that 2nd. Respondent's claim is correct and genuine, then he must take out an Application for recovery of these Bonds.

11. This Application is adjourned for four weeks.

-.oOo.-

Applied on 29.3.95
Pages (4)
Examined by R.M. Kubal
Compared with P.V. Sahoni
Ready on 4.4.95
Delivered on 5.4.95

SPECIAL COURT (Bombay Offences in Securities) Ordinance 1992 BOMBAY.

Certified to be a true copy
4-4-95
OFFICER ON SPECIAL DUTY
Office of the Special Court,
Bombay.