CASE NO.:
Appeal (civil) 2275 of 2002

PETITIONER:
Standard Chartered Bank

RESPONDENT:
Andhra Bank Financial Services Ltd. & Ors.

DATE OF JUDGMENT: 05/05/2006

BENCH:
Y.K. Sabharwal, B. N. Srikrishna & P.P. Naolekar

JUDGMENT:
J U D G M E N T
with Civil Appeal No. 2276 of 2002

SRIKRISHNA, J.

These two appeals under Section 10 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as "the Act") are against the judgments of the Special Court constituted under Section 5 of the Act, by which judgments the Special Court dismissed Special Court Suit No. 11/96 and allowed Misc. Petition No. 81/95, which had been transferred to it. As a result of the said two judgments of the Special Court, the claim made by the appellant-Standard Chartered Bank (hereinafter referred to as "SCB") was negatived in dismissed Suit No. 11/96, and the application made by Canara Bank as principal trustee of Canbank Mutual Fund (hereinafter referred to as "CMF") for a direction to Nuclear Power Corporation of India Ltd. (hereinafter referred to as "NPCL") to register CMF as the owner of certain bonds and to pay the interest payable thereon was allowed.

FACTS:
Sometime in December 1991, NPCL issued bonds of two series - 9% tax free bonds and 17% taxable bonds. These bonds were permitted by the Controller of Capital Issues to be sold to banks and financial institutions for private placement. On 24.2.1992 Andhra Bank Financial Services Ltd. (hereinafter referred to as "ABFSL") made an offer to NPCL for placing Rs. 100 crores \026 Rs. 50 crores in 9% tax free bonds and Rs. 50 crores in 17% taxable bonds. On 26.2.1992 NPCL wrote to ABFSL confirming the allotment of the 9% tax free bonds and the 17% taxable bonds, as requested. On 26.2.1992, NPCL issued a letter of allotment (hereinafter referred to as the "LOA") confirming the allotment of 9% tax free bonds of the nominal value of Rs. 50 crores (hereinafter referred to as the "suit bonds"). NPCL also said that intimation would be given in due course as to when the allotment letter duly discharged may be exchanged for bond certificates, and that the interest payable on the suit bonds would accrue from the date of allotment, payable on half yearly basis. On the same day ABFSL sold the suit bonds to SCB and in connection with the said sale issued its Cost Memo No. 057 dated 26.2.1992 indicating the particulars of the suit bonds and the cost at which they were being sold i.e. @ 85.05 at the total cost of Rs. 42,52,50,000/-. Against the receipt of the said Cost Memo No. 057 from ABFSL, SCB issued a Pay Order No. 246408 dated 26.2.1992 for the sum of Rs. 42,52,50,000/-. ABFSL, in turn, issued a Banker’s Receipt (hereinafter referred to as "BR") No. 23728 acknowledging receipt of the sum of Rs. 42,52,50,000/- from SCB towards the cost of the suit bonds and undertook to deliver the suit bonds of the value of Rs. 50 crores, when ready, in exchange for the said BR duly discharged, and assured that, in the meantime, the suit bonds would be held on account of SCB. On 26/27.2.1992, ABFSL addressed a letter to SCB requiring SCB to hand over its BR No. 23728 in lieu of the original LOA in respect of the suit bonds as

well as the 17% NPCL taxable bonds, which were said to have been enclosed with the said letter.

According to SCB, in April/May 1992, when the securities scam broke out, the officers of SCB made an investigation of its records and found that SCB did not have in its possession the original LOA, but only a photocopy.

On 20.5.1992, SCB wrote to NPCL alleging that though in ABFSL's letter dated 26.2.1992, it was stated that the original LOA was forwarded, SCB had found that only a photocopy of the LOA had been enclosed. A copy of ABFSL's concerned letter was also enclosed. SCB further stated that the original LOA purportedly sent by ABFSL was not available, that a note may be made in NPCL's records that the original LOA was missing and, therefore, due caution should be exercised by NPCL. SCB also requested for issue of a duplicate allotment letter on the undertaking to return the original, if received by it, and keeping NPCL indemnified against claims, if any, arising out of issue of the duplicate. On 29.5.1992, SCB requested ABFSL to confirm to NPCL the fact of having sold the suit bonds to SCB. On the same date, ABFSL addressed a letter to NPCL (with a copy endorsed to SCB), confirming having sold the suit bonds to SCB on 26.2.1992. They also confirmed that they had no objection to NPCL issuing a duplicate LOA to SCB.

On 8.6.1992 one Hiten P. Dalal (hereinafter referred to as "HPD"), who was acting as a broker in a large number of securities transactions of banks and financial institutions, was declared a 'notified person' under the provisions of Section 3 of the Act. On 20.6.1992 SCB filed a First Information Report ("FIR") against HPD and its own employees alleging that, as a result of a conspiracy between HPD and its own employees, several securities and monies had been misappropriated by HPD.

On 14.7.1992 CMF filled up a Transfer Deed dated 13.7.1992 and lodged it along with the original LOA with NPCL seeking transfer and registration of the suit bonds in its name. On 3.8.1992, NPCL wrote to SCB that the matter with regard to issuance of duplicate LOA of the suit bonds was being considered in consultation with its solicitors. On 17.8.1992, CMF wrote to NPCL claiming that the suit bonds had been bought on 27.2.1992 from ABFSL through a broker, HPD, and that the consideration therefor had been paid by certain adjustments between itself and ABFSL. CMF claimed that it was the legitimate holder of the suit bonds as it had received them against valid consideration. On 8.9.1992, NPCL informed CMF that they had received a request for issue of a duplicate LOA pertaining to the suit bonds from SCB, which was also claiming purchase of the suit bonds from ABFSL. On 8.9.1992 by another letter, NPCL informed SCB that CMF had lodged the original LOA for registration claiming to have purchased the suit bonds from ABFSL on 27.2.1992. On 30.9.1992 NPCL asked ABFSL to confirm if it had sold the suit bonds to SCB as NPCL had received the LOA and the transfer deed in relation to the suit bonds duly endorsed by ABFSL in favour of CMF. On 30.9.1992 NPCL informed CMF that as early as on 20.5.1992 it had received a letter from SCB conveying that the suit bonds had been transferred in SCB's favour by ABFSL and enclosing a letter of ABFSL to evidence the transaction. They also referred to another letter of 29.5.1992 by ABFSL confirming that ABFSL had sold the suit bonds to SCB on 26.2.1992 and that it had no objection to issuing/transferring the LOA/bonds to SCB. On 9.10.1992 SCB wrote to NPCL stating that as the suit bonds had been issued to ABFSL, who had confirmed selling the same to SCB, the LOA from CMF may be disregarded. By another letter of 15.10.1992 from ABFSL to NPCL, ABFSL once again confirmed the selling of the suit bonds to SCB and stated that as per market practice the suit bonds had been sold with blank transfer deeds to SCB. On 6.11.1992 NPCL informed SCB that, since there was a dispute over the ownership of the suit bonds between SCB and CMF, the matter should be resolved between SCB and CMF, only after which necessary action would be taken by it.

On 27.11.1992 SCB filed Suit No. 3808/92 on the Original Side of the Bombay High Court against ABFSL, CMF and NPCL for a declaration that it was entitled to the suit bonds and for an order directing NPCL to register the suit bonds in the name of SCB and to hand over the same to SCB. A further declaration was sought that CMF had no right, title and interest in the suit bonds; in the alternative, SCB sought refund from ABFSL. The said suit came to be transferred to the Special Court on 25.9.1996 and was re-numbered as Special Court Suit No. 11 of 1996.

On 27.11.1992 CMF filed a petition before the Company Law Board (hereinafter referred to as "CLB") under Section 111 of the Companies Act, 1956 seeking registration of the suit bonds in its name. The original respondents to the petition were NPCL, ABFSL and HPD. SCB was subsequently joined as a party respondent. In this petition, CMF alleged that it had purchased the suit bonds from ABFSL on 27.2.1992 through HPD, who, according to CMF, had acted as a broker/authorised agent of ABFSL in the transaction and that the payment of the price of the suit bonds to ABFSL was made by netting of the amounts of three other transactions between CMF and ABFSL made on the same day (i.e. 27.2.1992).

On 27.2.1993 NPCL contested the petition by denying the so called transaction alleged by CMF and stating that the matter was sub judice since a suit was already filed in the Bombay High Court with regard to the alleged suit bonds. ABFSL also filed a reply to the petition denying that it had sold the suit bonds to CMF and affirming their sale to SCB on 26.2.1992. SCB in its reply to the petition pointed out that it had purchased the suit bonds from ABFSL after paying consideration and that ABFSL had also confirmed that there had been no sale or delivery of the suit bonds to CMF. SCB alleged that HPD had wrongly and fraudulently diverted the suit bonds to CMF. On 16.3.1993 the CLB made an order directing all the parties to disclose the role of HPD in the transaction.

On 6.3.1995 the petition by CMF before the CLB was transferred to the Special Court and re-numbered as Misc. Petition No. 81/95. HPD had filed no affidavit in reply to the petition when the matter was before the CLB.

On 14.6.1996, after the transfer of the petition to the Special Court, HPD filed an affidavit in reply in Misc. Petition No. 81/95 stipulating that the contents thereof and the documents referred to could not and ought not to be referred to and relied upon or used against HPD in any proceedings as he could not be compelled to be a witness against himself in any court of law, whether civil or criminal. According to HPD’s version, SCB had ’lent’ the suit bonds and the 17% NPCL bonds to him on 27.2.1992; that he had agreed to return the same with interest; that on 9.5.1992 he had purchased the suit bonds from SCB and adjusted the price payable by him to SCB against a sale by him of Cantriple Units and further that, he had sold and delivered the suit bonds to CMF on 27.2.1992.

On 25.6.1996, SCB replied to HPD’s affidavit and denied that it had any transaction with HPD in respect of the suit bonds on 27.2.1992 and denied that the suit bonds were sold by SCB to HPD on 9.5.1992, or that it had purchased Cantriple Units from HPD. SCB also pointed out several inconsistencies and contradictions in the stand taken by HPD in his affidavit.

On 27.11.1996, the Special Court dismissed Misc. Petition No. 81/95 by holding that CMF had admitted through its counsel that it was not in a position to show that it had paid any consideration for the suit bonds to ABFSL, and, as no consideration was paid by CMF either to ABFSL or to SCB, CMF could claim no title to the suit bonds, even assuming that HPD had acted as a mercantile agent and appeared to have obtained possession of the LOA through/from SCB. In view of this, the Special Court concluded that CMF could claim no right, title and interest in the suit bonds. However, in view of the fact that SCB had already filed Suit No. 11/96, it was held that SCB’s title to the suit bonds could be decided in that suit.

On 23.12.1996, CMF preferred an appeal to this Court but failed to obtain any interim relief except a direction from this Court that the Officer on Special Duty, who was in possession of the suit bonds, would not part with the suit bonds without notice to CMF and that the decision in Suit No. 11/96 would be subject to the decision in the appeal.

On 10.1.1997, HPD took out Chamber Summons 1/97 in Suit No. 11/96 for being joined as a party. The said Chamber Summons was opposed by SCB and by an order dated 20.3.1997, the Chamber Summons was dismissed by the Special Court taking the view that HPD was at liberty to adopt appropriate substantive proceedings regarding his alleged claim of having purchased the suit bonds from SCB on 9.5.1992.

On 30.9.1997, SCB applied for withdrawal of the Suit against CMF. This application was allowed. However, the Special Court took the view that CMF was a necessary party to the Suit in spite of its earlier order holding that CMF could claim no right, title or interest in the suit bonds and by an order made on 30.9.1997/ 1.10.1997 the Suit was dismissed on the ground of non-joinder of CMF which was a necessary party. SCB appealed therefrom to this Court.

Thus, both SCB and CMF, came in appeal to this Court against the orders made by the Special Court in Misc. Petition No. 81/95 as also of dismissal of Suit No. 11/96. By the judgment and order dated 21.4.1998 made in Civil Appeal No. 7 of 1997 etc., this Court allowed both the appeals filed by SCB and CMF and remitted the matter to the Special Court for being tried de novo. Accordingly, both, the Suit and the Misc. Petition came to be tried again by the Special Court. By the judgment dated 17.1.2002, Special Court Suit No. 11/96 was dismissed and Misc. Petition No. 81/95 was allowed. Being aggrieved, SCB is in appeal against both the judgments. Since the impugned judgments arise out of interconnected facts, it would be convenient to dispose of both the appeals by a common judgment.

Since the judgment in Misc. Petition No. 81/95 merely follows the judgment in Special Court Suit No. 11/96, it would be sufficient to deal with the judgment in Special Court Suit No. 11/96, calling it the 'impugned judgment' hereinafter.

Issues:

The Special Court raised the following issues in the impugned judgment and answered them as under:

Issues

Answers

1. Does the Plaint not disclose any cause of action against the Defendant No.2 ?

In the affirmative i.e. in favour of CMF and against SCB

2.Whether the plaintiffs were entitled to and continue to be entitled to the suit bonds as alleged in para 8 of the Plaint ?

In the negative i.e. in favour of CMF and against SCB

2A. Whether the Plaintiffs prove the circumstances in which Original BR was taken away from them as alleged in para (8) of the Plaint ?

In the negative i.e. against SCB and in favour of CMF.

3. Whether the alleged transaction dated 26/2/92 was a transaction of Hiten P. Dalal as alleged in para 1(d) and 8 of the Written Statement ?

In the affirmative i.e. in favour of CMF and against SCB

4. Whether the alleged transaction dated 26/2/1992 was under an arrangement with the Plaintiffs as alleged in paras 1(d) ,7, 8 and 9 of the Written Statement ?

In the affirmative i.e. in favour of CMF and against SCB.

5. Whether the Plaintiffs are estopped from making any claim as alleged in para 1 read with para 22 and 29 of the Written Statement?

In the affirmative i.e. in favour of CMF and against SCB.

6. Whether on 9th May 1992 the Plaintiffs purchased Cantriple Units of the face value of Rs.45.50 crores for Rs.266.18 crores (approx.) and against which the Plaintiffs sold and adjusted various securities including the suit bonds of the face value of Rs. 50 crores and whether the Plaintiffs have applied for and got the said Cantriple units of face value of Rs.45.50 crores transferred in their name in January, 1993 disclosing a sale consideration of about Rs.266.18 crores as stated in para 14 and 15 of the Written Statement ?

This issue is divisible in to three parts (i) CMF has proved that SCB has purchased cantriple units of the face value of Rs. 45.50 crores on 9/5/1992. To that extent, issue is answered in the affirmative

(ii) However, CMF has not proved that the said purchase was against sale of the suit bonds on 9/5/1992.

To that extent the sub-issue is answered in the negative,
(iii) CMF has proved that in January, 1993 SCB applied for and have got the said cantriple units of the face value of Rs. 45.50 crores transferred in their name. Therefore, to that extent, the sub-issue is answered in the affirmative.

7. Whether the Defendant No.2 purchased the bonds and received delivery thereof along with Transfer Deed as alleged in para 22 and 29 of the Written Statement ?

In the affirmative i.e. in favour of CMF and against SCB.

8. Whether the plaintiffs deliberately by their act and or omission or negligence put Defendant No.1 or Hitel P. Dalal in a position to deal with the LOA and the Transfer Deed as they liked as alleged in para 21 and 29 of the Written Statement ?

In the affirmative i.e. in favour of CMF and against SCB.

9.Whether Hiten P. Dalal was authorised to deal with and/or deemed to be authorised to deal with the Bonds as alleged in paras 22 and 29 of the Written Statement ?

In the affirmative i.e. in favour of CMF and against SCB.

10. Whether the Plaintiff is entitled to any reliefs and if so what

As per final Order.

ISSUES BETWEEN PLAINTIFF (SCB) AND DEFENDANT NO. 3 (NPCL)

ISSUES

ANSWERS

1. Whether this Court has jurisdiction to entertain and try this Suit ?

In the affirmative.

2. Whether the Plaintiffs are entitled to and/or are the owners of the said securities without having received the original Letter of Allotment ?

3. Whether these Defendants are entitled to a lien on the said Bonds for securing the repayment of the deposit placed by them with the 1st Defnednats (sic) ?

Answer for Issue No. 2 and 3.
Issues between SCB & NPCL were framed on 2/7/1997 i.e. after Judgment and Order of Variava, J. (as he then was) dismissing Misc. Petition No. 81 of 1995 on 27/11/1996 (which judgment has been subsequently overruled by the Apex Court). As stated above, at one point of time, there were disputes between plaintiff and NPCL which disputes do not survive in view of the subsequent stand taken by SCB before this Court. Therefore issues nos. 2 and 3 do not arise for determination.

4. Whether the Plaintiffs prove that these Defendants are bound to register any Bonds in the name of the Plaintiffs or to issue the said Bonds and relevant interest warrants to the Plaintiffs ?

In the negative.

5. What Order ?

As per final Order.

The issues framed in Misc. Petition No. 81/95 with the answers are as follows:
ISSUES
FINDINGS
1. Whether the Petitioners are bonafide purchasers of value without notice of 9% NPCL Bonds from Respondent No. 3 for consideration paid to Respondent No. 3 as set out in the affidavit of S. Ramaraj dated July 12, 1993 ?

In the affirmative as answered in the Judgment in suit No. 11 of 1996 i.e. in favour of the Petitioners and against SCB.

2. Whether Respondent No. 4 are entitled to object to registering transfer of 9% NPCL Bonds in favour of the Petitioners ?

In the negative i.e. against SCB and in favour of the Petitioners.

3. Whether the Petitioners are entitled to have the suit LOA (for 9% NPCL Bonds f.v. 50 Crs.) transferred to their name ?

In the affirmative i.e. in favour of the Petitioners and against SCB.

4. Whether there was collusion between Respondents Nos. 2, 3 and/or 4 as alleged by the Petitioners in the affidavit of M. Nayak dated April 10, 1993 ?

Does not arise.

5. What Orders on the Petition?

As per final order.

The core issue in both proceedings pertains to 9% NPCL Tax Free bonds and whether SCB or CMF is the owner of such bonds and entitled to be registered as such.

The Special Court held that SCB had proved that it had purchased the suit bonds from ABFSL against payment of Rs. 42,52,50,000, but it dismissed SCB's suit and allowed CMF's petition for the following reasons:

(1) that under the existing '15% Arrangment' between SCB and HPD, SCB had purchased the suit bonds on behalf of HPD;
(2) that HPD was accordingly entitled to deal with the bonds, and
(3) that HPD had delivered and sold the bonds to CMF; and thus, CMF is actually the owner.

Whether these findings are justified on facts and in law has been argued before us by learned senior counsel appearing for the parties with great perseverance, ingenuity and erudition.

I. Nature of the Suit and the Proceedings in the Misc. Petition:

The Special Court has taken the view that the suit filed by SCB is basically a title suit. Originally in the suit, a money decree in the alternative had been prayed for against ABFSL, but the monetary relief was subsequently given up. Following upon this, the Special Court held that even if CMF failed to prove the payment of consideration, SCB could not succeed in its suit as it was a title suit. In the same vein, the Special Court held that the Suit had to fail because it was a title suit and HPD was entitled to deal with the suit bonds in his own title. And since the title suit failed,

SCB could not prevent NPCL from transferring the bonds in favour of CMF. Finally, the Special Court concluded on this issue, that non-payment of consideration by CMF, as submitted by SCB, could only be questioned by HPD and not by SCB. The Special Court also held that as the Suit was a title suit, SCB was required to prove its title and could not succeed on the basis of the faults in the evidence of the defendant-CMF.

Mr. Jethmalani, learned counsel for the appellant, contended that the Special Court erred in taking the view that Suit No. 11/96 was a title suit in which SCB failed to have its title established. He submitted that on proper analysis, the suit of SCB was in the nature of a declaratory suit falling within the ambit of Section 34 of the Specific Relief Act, 1963, which corresponds to Section 42 of the Specific Relief Act, 1877 (hereinafter referred to as the "old Act"). He placed particular emphasis on illustration (c) appended to Section 42 of the old Act and contended that a declaratory suit under Section 42 of the old Act, or Section 34 of the present Specific Relief Act, need not be one for declaring the title of the plaintiff, but may be one for declaring any other legal character of the plaintiff. It is difficult to accept this contention of Mr. Jethmalani. As rightly pointed out by Mr. Kapadia, learned counsel for CMF, SCB appears to have all along claimed that its suit was a title suit. In the first place, the prayer clauses in Special Court Suit No. 11/96 read as under:

"a) For a declaration that the plaintiffs are fully entitled to 9% NPCL Tax free 'F' series Bonds (fifth Issue) of the Third Defendants more particularly described in Exhibit 'G' hereto and that the Third Defendant are bound and liable to register and (sic) said Bonds in the Plaintiffs' name and to issue and deliver the said Bonds to the Plaintiffs along with interest warrants in respect thereto.

b) For a declaration that the second defendants have no right, title and interest whatsoever, in relation to the said Bonds, more particularly described in Exhibit 'G' hereto and that the Second defendants are not bonafide purchasers of the said Bonds for value."

The substantive prayers are for a declaration that the plaintiffs "are fully entitled" to the suit bonds and certain reliefs which are founded upon this declaration. A suit for such a declaration would certainly be a title suit so far as the suit bonds are concerned.

Further, even Grounds A28 and A30 of the present Civil Appeal No. 2275/02 by SCB read:

"A28) The learned Judge erred in failing to appreciate that SCB having proved its title on 26th February, 1992 its said title would prevail against the whole world until a superior title of any party was established.

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A30) The learned Judge erred in failing to appreciate that thereby SCB had established its prior title to the Suit Bonds and had a better title thereto then (sic) CMF."

Thus, it is clear that the appeal has been brought on the footing that SCB had fully proved its title to the suit bonds and that the Special Court had erroneously held against SCB. Looked at from any point of view, we are not satisfied that the Suit was a mere declaratory suit, it must be regarded as a title suit.

We shall now turn to the nature of the proceedings in Misc. Petition No. 81/95. This petition was presented under Section 111 of the Companies Act, 1956. Section 111(1) provides for the power of refusal by a company to register the transfer of debentures to a transferee. The transferor or the transferee has a right of appeal to the Tribunal (then, the CLB) under sub-section (2) of Section 111. The nature of proceedings under Section 111 are

slightly different from a title suit, although, sub-section (7) of Section 111 gives to the Tribunal the jurisdiction to decide any question relating to the title of any person who is a party to the application, to have his name entered in or omitted from the register and also the general jurisdiction to decide any question which it is necessary or expedient to decide in connection with such an application. It has been held in M/s Ammonia Supplies Corporation (P) Ltd. v. M/s Modern Plastic Containers Pvt. Ltd. and Ors. that the jurisdiction exercised by the Company Court under Section 155 of the Companies Act, 1956 (corresponding to Section 111 of the present Act, before its amendment by Act 31 of 1988) was somewhat summary in nature and that if a seriously disputed question of title arose, the Company Court should relegate the parties to a suit, which was the more appropriate remedy for investigation and adjudication of such seriously disputed question of title.

Mr. Kapadia, learned counsel for CMF, contended that as far as the petition of CMF was concerned, it merely invoked the summary remedy under Section 111 of the Companies Act. The only prayer made by CMF before the CLB was that it had purchased the suit bonds from ABFSL and, therefore, it was entitled to be registered as the owner of the suit bonds in the register of NPCL. Relying on Mannalal Khetan v. Kedar Nath Khetan and Ors. he contended that the provisions of Section 108 of the Companies Act, 1956 were mandatory and unless they were fulfilled, a registration of the transfer of the bonds could not be done. Further, he relied on the exemption granted from certain provisions of Section 108(1) in respect of bonds issued by a Government company. He placed reliance on Notification G.S.R. 1294 (E) dated 17.12.1986 issued by the Central Government in exercise of its powers under Section 620(1)(a) of the Companies Act, 1956. The said Notification reads as under:

"In exercise of the powers conferred by clause (a) of sub-section (1) of section 620 of the Companies Act, 1956 (1 of 1956), the Central Government hereby directs that the provisions of sub-section (1) of section 108 of the said Act, in so far as it requires a proper instrument of transfer to be duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee, shall not apply with respect to bonds issued by a Government company, provided that an intimation by the transferee specifying his name, address and occupation, if any, has been delivered to the company along with the certificate relating to the bond, and if no such certificate is in existence, along with the letter of allotment of the bond, a copy of this notification having been laid in draft before both the Houses of Parliament as required by sub-section (2) of section 620 of the said Act."

It is the contention of Mr. Kapadia that the provisions of Section 108(1) of the Companies Act, 1956 are conditionally excluded by reason of this Notification as the suit bonds were issued by NPCL, which is admittedly a Government company. Thus, according to him, the suit bonds would be transferable by endorsement and delivery as long as the transferee gave intimation as contemplated under the Notification. According to him, the terms of Section 108(1) as amended by the aforesaid Notification had been fulfilled, and, therefore, there was an obligation on the part of NPCL to register CMF as the registered holder of the suit bonds. Emphasising that the intention of the legislature is to enable transferability of bonds issued by Government companies with greater facility and lesser formality, he referred to provisions of the Companies Act, 1956 and the Transfer of Property Act, 1882 (hereinafter referred to as the "TP Act"). Section 2(12) of the Companies Act, 1956 defines 'debenture' as including debenture stock bonds and any other securities of a company, whether constituting a charge on the assets of the company or not. Chapter VIII of the TP Act deals with transfers of actionable claims. Section 137 of the TP Act, however, provides that the provisions in Chapter VIII (Sections 130 to 136) would not apply to stocks, shares or debentures. The argument is that the mode of transfer of actionable claims specified in the TP Act (Sections 130 to 136) has been

specifically done away with. Even the mode of transfer under Section 108 of the Companies Act has been considerably relaxed insofar as bonds issued by Government companies are concerned. So far as the nature of the proceedings in the Misc. Petition are concerned, it is the submission of Mr. Kapadia that the only issue to be considered is whether CMF is a transferee of the bonds, and whether CMF has complied with Section 108 read with the Notification G.S.R. 1294(E) dated 17.12.1986 so as to be eligible for registration as the holder of the bonds.

Even if the petition filed under Section 111 of the Companies Act, 1956 was only for this limited relief of registering the petitioner-CMF as the holder of the suit bonds, we cannot accept the contention of Mr. Kapadia for two reasons. In the first place, whatever might have been the limited jurisdiction of the CLB under Section 111 of the Companies Act, 1956, while entertaining the petition, the fact that the said petition was transferred to the Special Court by an order of this Court needs to be reckoned with. The order of this Court is specific and requires the trial of Special Court Suit No. 11/96 along with Misc. Petition No. 81/95. The limitation of the jurisdiction of the CLB, if any, does not apply to the Special Court, which is clothed with all the jurisdiction of a civil court. Secondly, merely by filing a petition under Section 111 of the Companies Act, 1956 and by placing reliance on Section 108 of the Companies Act, 1956 the petitioner-CMF cannot succeed. It would have to go further and prove that it is validly a transferee of the suit bonds, if that question is put in issue. Thus, in our view, each of the two contesting parties, i.e. SCB and CMF, would have to prove their rights and show how they are entitled to the suit bonds before any relief could be granted either in the Suit or in the Misc. Petition.

II. Nature and Effect of 15% Arrangement:

The Special Court has laid great emphasis on what it has called the '15% arrangement' and concluded that because of this 15% arrangement HPD became owner of the suit bonds, which he rightfully transferred to CMF for consideration. The learned counsel for the appellant has severely criticised this conclusion as totally contrary to the evidence on record.

Under the instructions of the Reserve Bank of India (hereinafter referred to as "RBI"), banks and financial institutions were required to maintain a certain liquidity ratio of debt to equity. They could have ready forward transactions in securities only with other banks and only in respect of government and other approved securities. The statutory liquidity ratio was maintained by sale and purchase of securities, issued by Government companies and public sector institutions.

An unhealthy practice had developed among all the banks and financial institutions affected by the securities scandal, under which some securities were repeatedly shown as bought and sold in order to advance finances to certain brokers. HPD was one of them. The so called '15% arrangement' was an informal arrangement with HPD under which SCB bought securities from other counter-parties, as directed by HPD, and also sold them to such parties at such rates as designated by HPD. A desired sale price was arrived at so as to ensure that SCB obtained a return of 15% of the transaction. The evidence on record consisting of the Janakiraman Committee Report (the report of a High Powered Committee appointed by RBI to investigate into the irregularities in the funds management in commercial banks and financial institutions, in particular in relation to the dealings in Government securities) has examined this arrangement and reported upon it in Paragraphs 8.1 to 8.7 of its Fourth Interim Report (March 1993), particularly with regard to the way in which the arrangement operated in SCB. The Joint Parliamentary Committee Report (hereinafter referred to as the "JPC Report") (Exhibit-26) vide Paragraphs 8.49-8.51 has also explained this arrangement. There is also the evidence tendered on record in the form of replies to interrogatories in which SCB has explained the details of the scheme and how the 15% arrangement worked. The agreement between HPD and SCB was that, if SCB followed the instructions of HPD in

the matter of which securities are to be bought or sold, from or to which parties, at what rates and when; SCB was assured of a net return of 15% of the outlay in the purchase of the securities concerned. If the return was less than 15%, HPD would bear the difference; if the return happened to be higher than 15%, HPD would be paid the difference. The evidence on record clearly bears out that this is how the 15% arrangement worked between SCB and HPD.

A. Public Policy and Res Judiciata:

Mr. Jethmalani invited our attention to an earlier judgment of this Court in Canara Bank and Ors. v. Standard Chartered Bank where the nature of the 15% arrangement was carefully considered by this Court. Incidentally, the said judgment was delivered in a dispute between the same parties and after analysing the nature of the 15% arrangement, this Court categorically rejected the argument that it was opposed to public policy. This Court upheld the judgment of the Special Court rejecting the contention that the 15% arrangement was contrary to public policy. While rejecting the contention that the 15% arrangement was opposed to public policy, the Special Court had made the following findings:

"The object and consideration of the suit contracts are purchase/sale of the securities and payment of price. Such securities contracts are normally entered into by banks. These may be for SLR purposes or in the normal course of business of the bank. It is the business of the bank to try and make profit. Thus even if these were part of the 15% arrangement, provided there was such an arrangement, would not make them against public policy if it was a genuine security transaction. None of the circulars relied upon by Mr. Salve prohibit such transactions. In my opinion none of the circulars have any bearing on the point under consideration. The suit transactions or transactions under the alleged 15% arrangement are not against the subject matter of these circulars. They are also not even against any policy laid down therein. I thus see no illegality."

These were expressly approved by this Court in the judgment. It appears to us that much of the controversy about the nature of the 15% arrangement could have been avoided if the judgment in the Canara Bank case (supra) had been kept in mind. We notice from the impugned judgment that the decision of this Court in Canara Bank (supra) was specifically brought to the notice of the Special Court, but it appears to have been brushed aside on the grounds, first, that the doctrine of res judicata would not apply as Section 13 of the Act had an overriding effect; second, the exact scope of the 15% arrangement was not determined by evidence in the previous suit; and third, that an arrangement by which banks and public financial institutions are enabled to earn a return higher than what is stipulated by the government/RBI, would cause inflation and the government would not be able to control its deficit, hence it was opposed to public policy. The Special Court said: "In the economic sense, they are not legitimate. On this point also, therefore, there is no merit in the arguments advanced on behalf of SCB."

We are afraid that the Special Court was wrong on all the counts. On the question of res judicata, the Special Court failed to notice that the doctrine of res judicata is not merely a matter of procedure but a doctrine evolved by the courts in larger public interest. What is enacted in Section 11 of the Civil Procedure Code ("CPC") is not the fountain-head of the doctrine, but merely the statutory recognition of the doctrine, which rests on public policy. (See in this connection Daryao and Ors. v. The State of U.P. and Ors. , Guda Vijayalakshmi v. Guda Ramachandra Sekhara Sastry and Hope Plantations Ltd. v. Taluk Land Board, Peermade and Anr.) In the previous suit to which both SCB and Canara Bank were parties, the same issue with regard to '15% arrangement' with HPD was urged by CMF as a non-suiting factor, but was negatived both by the Special

Court and by this Court. Issue No. 10 in the previous suit was the relevant issue dealing with 15% arrangement, which was as follows:
"Whether the suit transactions entered into by the Plaintiffs with the Canbank Mutual Fund were in fact entered into by the plaintiffs on behalf of Hiten Dalal as alleged in Para 5(d) of the Written Statement of Defendant No. 1?"

This was an issue raised by CMF which was defendant no. 1 in that suit (Special Court Suit No. 13/94). The burden of proving this issue was on the defendant and the Special Court answered the issue in the negative and observed that the counsel for defendant no. 1 had admitted that there was no evidence to support this issue. Consequently, the Special Court held that the issue was answered in the negative i.e. against defendant no. 1. Since the Special Court findings were finally upheld by this Court in the judgment reported in Canara Bank (supra) and a review petition thereagainst was also dismissed, we are of the view that it is not open for this Court to again raise the issue and take a view contrary to what had already been decided in the previous suit, particularly in view of the fact that there has been no new revelatory evidence on this issue.

We are not in agreement with the view taken by the Special Court that Section 13 of the Act overrides the doctrine of res judicata. Section 13 of the Act provides: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any Court, tribunal or other authority". This was certainly not intended to abrogate all the established principles of law, unless they were directly in conflict with the express provisions of the Act itself. There is nothing in the Act which is inconsistent with the doctrine of res judicata, per se, as seems to have been assumed by the Special Court.

We are also unable to appreciate the thinking of the Special Court that there was something morally or economically reprehensible in the arrangement which was brought about between HPD and SCB as a result of which SCB was able to earn higher return.

B. Evidence on Record:

The evidence as to the nature of the 15% arrangement was SCB's replies to interrogatories in previous suits, tendered by CMF as Exhibits 5, 6, 8 and 9 as evidence in the present suit, the Janakiraman Committee Report and the JPC Report, which recognise and explain the 15% arrangement. There is nothing in all the said evidence to suggest that by entering into such a contractual transaction with HPD, HPD became the owner of the bonds. The evidence, on the other hand, clearly brings out that at all times the securities transactions would be between SCB and the counter-party-banks, the legal relationship always being between the said two parties. In our view, therefore, the Special Court grossly erred in drawing a conclusion based on no evidence and attributing to the said arrangement a legal character, which was not proved on record. It also erred in ignoring the finding on the issue given in the previous Special Court Suit No. 13/94 as upheld by the judgment of this Court in Canara Bank (supra). The Special Court has also observed that under the 15% arrangement SCB was "maintaining broker's position". While this may be appropriate jargon in a stock exchange, what exactly is the legal implication, if any, of such an expression is unclear. We find no evidence on record to suggest that merely because of the 15% arrangement the legal ownership of the securities was transferred to HPD in any manner, since all the transactions appear to be between SCB and counter-party-banks. This would be evident from the fact that if the counter-party-banks failed to deliver the securities or failed to pay for the securities delivered, the legal action could only be between SCB and the counter-party-banks with which the transaction took place and not by or against HPD.

We are unable to accept the conclusions drawn by the Special Court with regard to some of the documents produced by CMF as defendant, about which no evidence by way of explanation was led by either party.

In the absence of proper explanation, it was not open to the Special Court to make inferences or assumptions with regard to terms used in the documents, for example, SCB's securities ledger in relation to the suit bonds (Exhibit-11), which pertains to the sale and purchase of the suit bonds with different counter-parties. This document as such does not contain the description 'portfolio', but the said appellation has been given to it by the Special Court on its own. The Special Court has observed thereupon: "Therefore, all such transactions were entered into by the bank on behalf of HPD. Therefore, they were transactions of HPD. This is amply illustrated by Exhibit-11. A portfolio represents stock held by SCB on behalf of HPD. HPD was entitled to enter into buy transactions and sale transactions in respect of securities coming under that portfolio. The portfolio was built up by SCB by purchasing securities at the instance of HPD. This is also called as building up of position. The suit contract comes under Exhibit-11. By the suit contract, the LoA came within the portfolio of HPD. He was allowed to deal with the LoA under the portfolio." We are afraid that this inference is not readily available ex facie from the document; nor was there any other evidence given by any witness explaining the document, suggesting it.

Further, the word 'loan' used in the Security Ledger (Exhibit-11) was seized upon by the Special Court to draw an unwarranted inference. The Special Court has held that this term shows "lending of scrip to HPD" and has then gone on to hold as follows: "this word has to be read while construing the entries in Exhibit-11 beginning from 27.2.1992. The word "loan" must be read with the column "Book Value" and the column "Profit and Loss" and "Balance". That, last column "Balance" represents HPD's outstanding to SCB." There is no warrant, whatsoever, for such an explanation to this document as no witness has said so. Further, the word 'loan' also appears to have been used in the BR issued by AB to SCB in respect of the suit bonds (BR no. 23728 dated 27.2.1992). There was no justification for giving an interpretation to the word 'loan' used in any of the documents without any explanation by a witness.

The Special Court also makes a finding that the word 'Direct' used in SCB's ledger showing transaction details of SCB from April 1991 to May 1992 (Exhibit-7) suggests that such transactions were all under the 15% arrangement. This again appears to be an inference which has been drawn by the Special Court without any supporting evidence thereto. In the replies to the interrogatories as well as the evidence of the witnesses no one has asserted that all transactions described as 'direct' were necessarily covered by the 15% arrangement. Although, the reply to Question no. 43 of the interrogatories, in Suit No. 14/94, did suggest to the contrary, the said reply not having been tendered in evidence and taken on record, does not form part of the evidence before the Special Court. The Special Court is, therefore, not justified in drawing this conclusion for which there was no acceptable evidence.

Mr. Jethmalani contended that the chargesheet (Exhibit-4), FIR (Exhibit-3), SCB's answers to interrogatories (Exhibits 5, 6, 8 and 9), details of SCB's securities transactions during April 1991 \026 May 1992 (Exhibit-7), security ledger of SCB in relation to the suit bonds (Exhibit-11), SCB's deal slips dated 9/5/92 (Exhibit-10), SCB's vouchers (Exhibit-12), and the Janakiraman Committee Report (Exhibit-18) were all produced by CMF; and relying on the judgments of this Court in P.C. Purushothama Reddiar v. S. Perumal and R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr. he urged that the contents of these documents would be binding on CMF. The Special Court has relied on these documents to arrive at a conclusion which does not arise from them.

While it may be true that the Special Court has been given a certain amount of latitude in the matter of procedure, it surely cannot fly away from

established legal principles while deciding the cases before it. As to what inference arises from a document, is always a matter of evidence unless the document is self-explanatory. We do not think that any of the documents placed on record during the trial were self-explanatory; nor were they explained by any competent witness on either side. In the absence of any such explanation, it was not open to the Special Court to come up with its own explanations and decide the fate of the Suit on the basis of its inference based on such assumed explanations. In fact, these inferences run contrary to the oral evidence given by Kalyana Raman (PW-1) in relation to the transaction of 26.2.1992.

The Special Court has also adversely commented on the conduct of SCB in not leading evidence to prove what the 15% arrangement was. We fail to see how a party could be called upon to lead evidence with regard to an issue which was no part of its case. The 15% arrangement was brought on record at the instance of CMF and the burden, if any, of proving its details lay on CMF. Although, a number of documents were produced on record as called for by CMF, there was no obligation on SCB to explain any of them.

Learned counsel for CMF also contended that SCB failed to produce relevant documents that would have established what the 15% arrangement was. For this failure, he contended that an adverse inference should be drawn against SCB. For this proposition, he relies on the judgments of this court in Hiralal & Ors. v. Badkulal & Ors. , Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors. , S. P. Chengalvaraya Naidu (dead) by L.R's. v. Jagannath (dead) by L.R's. & Ors. and CitiBank N. A. v. Standard Chartered Bank & Ors. .

This argument is met by learned counsel for SCB. An adverse inference is a presumption which the court is entitled to draw under Section 114 of the Indian Evidence Act, 1872 read with illustration (g) thereto. Mr. Jethmanlani contended that the weight of the authorities would show that unless there are some special circumstances making it obligatory for a party to produce evidence, no adverse inference can be drawn unless a party has been called upon to or ordered to produce evidence and fails to do so. Mr. Jethmalani relies on Mt. Bilas Kunwar v. Desraj Ranjit Singh and Ors. , Ramrati Kuer v. Dwarika Prasad Singh and Ors. and Smt. Indira Kaur and Ors. v. Shri Sheo Lal Kapoor .

In Hiralal's case (supra), this court reiterated the observations of the Privy Council in Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi where the Privy Council laid down the general rule of procedure that instead of relying on the abstract doctrine of onus of proof a party to the suit "desiring to rely upon a certain state of facts" ought not to withold from the court the written evidence in his possession. In Gopal Krishnaji Ketkar's case (supra) the observation in Murugesam Pillai (supra) was reiterated and it was observed: "Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof." S. P. Chengalvaraya Naidu (supra), was a situation of a fraudulent litigant basing his case on falsehood and witholding vital documents. Citibank (supra) merely relies on the observations made in Murugesam Pillai (supra) and Gopal Krishnaji Ketkar (supra), both of which say that it is not a sound practice for those "desiring to rely upon a certain state of facts to withold from the court" the best evidence which is in their possession.

On the other hand, the three authorities on which Mr. Jethmalani relied independently take the view that unless a party is called upon to produce evidence or ordered to do so by the court and fails to do so, no adverse inference can be drawn against such party. Mr. Jethmalani distinguished the two apparently contradictory lines of authorities by

pointing out that in the authorities relied on by Mr. Kapadia the facts showed that there was a special obligation upon the party concerned to produce the relevant documents even without being called upon or ordered to do so and that the party had failed to produce them. Further he pointed out that the observations of the Privy Council originating from Murugesam Pillai (supra) which have been reiterated in the subsequent cases including Citibank (supra) would apply only if the party is "desiring to rely upon a certain state of facts". He rightly contends that the 15% arrrangement was neither any part of SCB's case, nor was SCB desiring to rely on the said state of facts. In the circumstances there was no obligation upon SCB to produce any documents to prove the case put forward by CMF; there was no situation in which adverse inference could be drawn against SCB. Finally, Mr. Jethmalani also urged that irrespective of what the parties did, the Special Court could have, if it was so minded, invoked its power under Section 165 of the Indian Evidence Act, 1872 and directed production of all documents it considered relevant instead of relying on adverse inference which was doubtful in the circumstances. This is particularly so with regard to the argument of CMF that the computer spread sheets had not been produced, as paragraph 7 of the written statement of CMF indicates that CMF was aware of the existence of such sheets and yet failed to call upon SCB to produce it or seek an order for production thereof from the Special Court.

The whole thrust of the impugned judgment is that the transactions between SCB and the counter-party-banks, which were covered by the 15% arrangement were sham transactions, making HPD the owner of the suit bonds. Where a transaction results in rights and obligations, it can never be treated as a sham transaction. (See in this connection Chow Yoong Hong v. Choong Fah Rubber Manufactory .) It was nobody's case that in any of the transactions under the 15% arrangement, HPD could have been sued for enforcement of any right arising therefrom between SCB and ABFSL.

C. Estoppel:

Issue No. 5 framed by the Special Court was whether SCB was estopped from making any claim to the suit bonds by denying the authority of HPD to deal in the suit bonds, as SCB had actually, ostensibly or negligently permitted HPD to deal with the suit bonds. Although, the Special Court answered the issue in the affirmative i.e. in favour of CMF and against SCB, there does not seem to be any specific discussion on this issue nor any reason supporting the said finding. It is however true that the Special Court took the view that the direct fallout of the 15% arrangement was that HPD became the owner of the suit bonds and had the right to deal with the suit bonds as he pleased; and since this was done to the knowledge of and by acquiescence of SCB, SCB was estopped from denying that HPD had acquired any such right to deal with the suit bonds or to transfer them to any other person.

The Special Court has taken the view that the transactions reflected in the Security Ledger (Exhibit-11), indicated funding of the broker by SCB and that it was something like a 'running account' of HPD in the books of SCB, which had opened with an entry of 26.2.1992 and was settled on 9.5.1992. It then observed: "Under Exhibit-11, the suit scrip of 9% NPCL bonds was made available to HPD for raising finances either by sale, pledge or Ready Forward. It was bought for HPD as he had assured a fixed return to SCB. The (sic) HPD was entitled to trade. He was entitled to take position in the market on the suit bonds bought for him as he has assured a fixed return. He was entitled to take a position on suit bonds. He took that position through SCB. Therefore, SCB had taken his position under Exhibit-11. Under the above arrangement, SCB could claim return of the security or equivalent money value only from HPD as the transactions in Exhibit-11 are under 15% Arrangement. Therefore, SCB cannot claim any relief against CMF. They can only claim relief against HPD. SCB is estopped from claiming any relief against CMF. SCB, therefore, has no right to object to the transfer of bonds by NPCL in favour of CMF."

Learned counsel for SCB however criticised the impugned judgment

of the Special Court on the ground that this finding, though not made specifically, but diffusedly over the impugned judgment arises from a misapprehension as to the exact nature of the doctrine of estoppel. Learned counsel contended that estoppel would require a representation by SCB, by acting upon which CMF should have altered its position to its prejudice. Since the burden of proving the issue was on CMF, CMF had to show what the representation was, to whom it was made, how CMF had altered its position as a result of such representation and what prejudice it had suffered. It was contended that no evidence was led by CMF on any of these aspects and, therefore, the Special Court had no material whatsoever before it to make any finding on the issue of estoppel other than pure conjecture and speculation based upon its understanding of the 15% arrangement. Further, learned counsel contended that if HPD had obtained the suit bonds by theft or by committing any other offence, then there would be no question of estoppel of SCB from denying the title of HPD or of any one else who claimed to have obtained title to the suit bonds from HPD. In Mercantile Bank of India Ltd. v. Central Bank of India Ltd. , it was observed:
"\005though estoppel has been described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority."

"\005that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."
"There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority."

It was thus held that a plea of estoppel could not be availed of if there was no duty owed by the person sought to be estopped, nor any representation made by such person. In New Marine Coal Co. (Bengal) Pvt. Ltd. v. The Union of India, this Court had occasion to examine the doctrine of estoppel and cited with approval the following observations in Halsbury's Law of England : "before any one can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one", that, it was required that "the negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it, but must be the proximate or real cause of that result ." The judgment of the Privy Council (supra) was approvingly cited by this Court, which also observed, "\005before invoking a plea of estoppel on the ground of negligence, some duty must be shown to exist between the parties and negligence must be proved in relation to such duty."
Mr. Jethmalani, therefore, is justified in his submission that there was no such duty owed by SCB to CMF. At any rate, none was shown to have existed. Hence, there is no substance in the plea of estoppel raised by CMF.

D. The Benami Transactions (Prohibition) Act, 1988:

One of the arguments canvassed before us by Mr. Jethmalani was on the effect of Section 4(2) of the Benami Transactions (Prohibition) Act, 1988 on the defence of CMF in the Suit. The argument was that CMF has contended, though not in precise terms, that the suit bonds did not belong to SCB at any point of time because the 15% arrangement was only a funding transaction under which the real owner was HPD, though the suit bonds were ostensibly held by SCB. Mr. Jethmalani contends that this contention of CMF is specifically barred by Section 4(2) of the Benami Transactions (Prohibition) Act, 1988. The learned counsel for CMF, however, relies on Section 3(3) of the Act, which reads thus:

"Notwithstanding anything contained in the Code and any other law for the time being in force, on and from that date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification."

The force of the words "belonging to any person notified" used in sub-section (3) of Section 3 of the Act are wide enough to result in attachment of the property which belongs to the notified person irrespective of in whose name the property stands. The provisions of Section 13 of the Act give an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Even assuming that the argument of Mr. Jethmalani based on Section 4(2) of The Benami Transactions (Prohibition) Act, 1988 is a plausible one, we are of the view that the combined effect of Sections 3(3) and 13 of the Act would give an overriding effect to the provisions of the Act. It is rightly urged by Mr. Kapadia, learned counsel for CMF, that, if that were not so, then the whole purpose of the Act would be defeated since the objective of the Act was to reach out and attach the property in whichever hands it was, irrespective of in whose names the property stood, as long it was property belonging to a notified person. Thus, the contention based on Section 4(2) of the Benami Transactions (Prohibition) Act, 1988 has been rightly rejected by the Special Court.

Much was said by the learned counsel for CMF about the manner in which SCB has hedged its replies. The learned counsel criticised the attempt of SCB to hide the true facts and contended that SCB kept on changing its stand from time to time. He highlighted that the stand taken by SCB in the Suit, the stand taken by it in the reply to the Petition and the stand taken by it before this Court was wholly inconsistent and, therefore, urged that the claims of SCB should fail. We think that this is a classic case of the pot calling the kettle black. When we look at the defence taken by CMF, the same criticism can be validly levied against it. CMF started by saying that it had bought the suit bonds from ABFSL. When it found that the evidence was against it, it shifted its stand and said it had bought them from HPD with HPD acting on behalf of ABFSL or SCB as the broker, or on his own behalf. We do not think that on the question of bona fides and consistency, there is anything to choose between SCB and CMF. Since both parties are tarred by the same brush, the issue will have to be resolved purely on the basis of what the legal evidence demonstrates.

III. Did SCB get any title to the suit bonds:

It is the case of SCB that it had the title to the suit bonds as it obtained the suit bonds under a contractual agreement by paying consideration for the suit bonds. This transaction is based on documentary evidence on record. The Cost Memo (Exhibit-B) dated 26.2.1992 issued by ABFSL evidences that the suit bonds were offered to SCB at the consideration indicated in the document. The Cost Memo indicates the details of the transactions such as the description of the bonds, the number of bonds sold, the rate at which they were sold and the total consideration payable. This is accompanied by a BR. Against this, there is a pay order dated 26.2.1992 issued by SCB in

favour of ABFSL in the sum of Rs.42,52,50,000/- evidencing that such consideration had been paid. The BR No. 23728 dated 26.2.1992 evidences that upon receipt of the agreed consideration, being the cost of the suit bonds sold to SCB, the BR was issued to undertake that bonds of the face value of Rs. 50 crores would be delivered when ready, in exchange for the BR duly discharged and that in the meantime the suit bonds would be held on account of SCB. The letter dated 26.2.1992 from ABFSL to SCB shows that the LOA of the suit bonds was forwarded to SCB inter alia with a request for discharging the corresponding BR No. 23728 on receipt of the LOA. The register of SCB shows that with reference to BR No. 23728, the bonds had been received, although, the word 'photocopies' appears to have been inserted therein. It is the case of SCB that one of its employees, Mulgaonkar, had acted fraudulently by inserting this word and causing misappropriation of the suit bonds. We find that this part of the case was not part of the pleadings of SCB either in its plaint or in the written statement filed in reply to CMF's petition. There was also no reference to it at any time when evidence was led by the parties. The first time this part of the case appears is in the copy of the chargesheet filed by CBI against certain employees of SCB and HPD for several criminal offences. Mr. Jethmalani contended that since this chargesheet was produced on record at the instance of CMF, the averments in the chargesheet must be taken to have been proved before the court. Even assuming Mr. Jethmalani is right in characterising the charge sheet as a public document within the meaning of Section 35 of the Indian Evidence Act, 1872, we cannot accept all that is stated in the charge sheet as having been proved. All that we can say is that it is proved that the police had laid a chargesheet in which such allegations have been made against the accused. We need not delve further into it since the criminal proceedings against HPD and others are still pending and it will be up to the appropriate court to decide the correctness or otherwise of the charges in the chargesheet. All that can be said at this stage is that there were serious allegations that the original LOA went out of the possession of SCB by some nefarious means.

Learned counsel for CMF contended that even as on 26.2.1992 SCB had no title to the suit bonds since the suit bonds were under the 15% arrangement and that under the 15% arrangement the transaction was one merely of funding; in other words, that there was no real buyer or seller and it was mere paper work intended as a cover for lending money to HPD. We are unable to accept this argument for more than one reason. The documents which we have referred to above clearly evidence a transaction of sale and purchase of the suit bonds by SCB upon payment of consideration. Secondly, ABFSL, who was the other party to the transaction, has come forward and accepted the transaction unhesitatingly. There is no reason why all this evidence should be discarded by choosing the chimera of the 15% arrangement theory. We, therefore, hold that SCB validly acquired title to the suit bonds as a result of the transaction entered into between itself and ABFSL on 26.2.1992. And that the suit bonds were in fact handed over to SCB although, it is not evident as to how the suit bonds went out of the possession of SCB. Therefore, the contention of CMF that SCB never acquired title to the suit bonds cannot be accepted. Even the Special Court finds that the contract of 26.2.1992 with regard to the suit bonds had been proved by the evidence on record. However, the Special Court goes on to say that merely proving the suit contract was not sufficient because it had to be further proved that the suit bonds had been acquired by SCB, as, in its view, the mystique of the 15% arrangement made HPD the real owner of the bonds.

Mr. Jethmalani rightly urged that the title of any person acquiring property would depend upon the antecedent title of the person from whom the property is acquired. In the instant case, the suit bonds were validly acquired by ABFSL from the original issuer, namely, NPCL and as a result of the transaction dated 26.2.1992, SCB in its turn acquired them by payment of consideration, from ABFSL. He relied on the judgments in Vasudev Ramchandra Shelat v. Pranlal Jayanand Thaker and Ors. and L.I.C. of India v. Escorts Ltd. and Ors. in support of this

proposition. The title of SCB arises from antecedent ownership of ABFSL, and it is proved that the suit bonds transaction was in accordance with law.

Mr. Kapadia, learned counsel for CMF, contended that the evidence on record showed that SCB had acquired no title at all to the suit bonds even on the initial date of transaction i.e. 26/27.2.1992. He contended that the property in the suit bonds had never passed to SCB as there was no evidence of endorsement or delivery of the suit bonds. He extensively referred to the pleadings in the plaint in Suit No. 11/96 and highlighted the fact that what was pleaded in the plaint was non-delivery of the suit bonds. The only prayer made was for a decree against NPCL, which was holding the bonds as a bailee for CMF, since CMF had forwarded the original LOA to NPCL and sought registration of its name as holder of the suit bonds. He further highlighted the fact that a decree had been sought against only NPCL, as a bailee, though CMF was in constructive possession being holder of the receipt for lodging with NPCL. He also pointed out that the plaint sought the relief of refund of money from ABFSL as an alternative relief. It is his contention that, at the most, the frame of the Suit could have been as a suit for specific performance, but since it was framed as a suit on title, it must fail. Further, he urged that even the alternative prayer of money claimed against ABFSL was given up during the trial and, therefore, the Suit must necessarily fail in its entirety.

He also pointed out that both the 17% NPCL bonds and the 9% NPCL bonds (suit bonds) were bought in the same manner, on the same day, as part of the same transaction, and a suit is filed for 17% NPCL bonds also being Suit No. 3809/92 only against ABFSL and only for a money decree. In his submission, it is somewhat surprising that with respect to the two claims - in respect of 9% NPCL bonds and 17% NPCL bonds - which were transacted on the same date under the same circumstances, while the Special Court Suit No. 11/96 pertaining to the suit bonds seeks a declaration of title, the suit in respect of the 17% NPCL bonds being Special Court Suit No. 3809/92 is for a money claim for refund of the consideration paid. He also referred to the details of the evidence and pointed out that while SCB came to the court alleging that it had never received the original LOA, which was its consistent stand in its pleadings in the Suit and also in the Petition, after the CBI submitted the charge sheet, SCB came out with the story of conspiracy of Mulgaonkar with HPD. Even this contention was not argued in the trial court at all, nor was any evidence led that SCB had made any reasonable enquiry to find out how the original LOA went into the hands of HPD. There is also no pleading or evidence to show endorsement and delivery of the concerned bonds. Relying on the decisions of this Court in Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and Ors. , Thiru John v. Subramhanyam v. The Returning Officer & Ors. and Bharat Singh and Ors. v. Mst. Bhagirathi, Mr. Kapadia contended that there were admissions galore by SCB both in the pleadings and thereafter in the evidence, and as such they could not be permitted to change their stand. He pointed out that on 2.7.1997 the money decree claim against ABFSL was specifically given up and on the next day the officer of ABFSL, Kalyana Raman (PW-1), gave evidence for the plaintiff-SCB and the stand that the original LOA was not received by SCB was conveniently given up by SCB.

He also contended that the documents on which reliance is placed by SCB were not proved. The evidence of the plaintiff's witness, Kalyana Raman, employee of ABFSL, shows that only two persons, namely, himself and another officer of ABFSL, R.V. Shenoy, had dealt with such transactions. But neither officer claimed any personal knowledge of the suit bonds transaction. Further, that Kalyana Raman gave evidence that the dealers were mainly dealing with one Shiv Kumar, another officer of SCB, who might be in the know of the suit bonds transaction. Although, SCB took out a Chamber Summons for examining the said Shiv Kumar as he was posted at Singapore at the material point, the Chamber Summons was not pursued and Shiv Kumar was not examined. Thus, according to Mr. Kapadia, there is no evidence worth reliance placed on record to show how the deal was struck and the contract of the purchase of the bonds was

brought about, as the documents placed on record were hardly worth credence. That during the cross examination of Kalyana Raman, SCB was specifically called upon to produce on record the document showing HPD's involvement in the transaction and the learned counsel for SCB stated that there were no such documents in existence at all. Mr. Kapadia, therefore, submitted that no evidence could be considered contrary to the pleadings of SCB, for which he strongly relied on Siddik Mohamed Shah v. Mt. Saran & Ors. , Bhagatsingh & Ors. v. Jaswant Singh and Shri Venkataramana Devaru & Ors. v. State of Mysore. For all these reasons, Mr. Kapadia submitted that SCB had failed to prove that it had acquired title to the suit bonds even on 26/27.2.1992.

Learned counsel for SCB, however, laid emphasis on the principle that SCB's title arises from the antecedent right of ownership of its transferor, namely, ABFSL, about whose title there is no dispute at all. The suit bonds are nothing but debentures within the meaning of Section 2(12) of the Companies Act, 1956. A debenture is an actionable claim. However, Section 137 of the Transfer of Property Act exempts debentures inter alia from the provisions of Sections 130 to 136 of the TP Act. Thus, with respect to debentures, there is no prescribed mode of transfer of property under the TP Act. According to Mr. Jethmalani, an act between the transferor and transferee is sufficient to convey all rights of ownership, except the right to have the bonds registered, for which the requirements of the Companies Act, 1956 have to be followed. In his submission, the Suit and the Misc. Petition were nothing but rival claims made for being placed on the register of NPCL, and the party which had legitimately acquired the ownership rights by reason of transfer from the antecedent owner of the suit bonds, would be entitled to be placed on the register of NPCL as the registered holder of the bonds. His reliance on the judgment of Controller of Estate Duty v. Godavari Bai in support of the proposition is justified. Section 9 of the TP Act recognises even an oral transfer made in every case in which a writing is not expressly required by law. Mr. Jethmalani submitted that the transfer in the instant case would be valid even without execution of any kind of instrument in writing and without actual delivery of the suit bonds. He is justified in relying on the Cost Memo, which is part of the evidence, as being sufficient to evidence the contract of transfer of the bonds, since it is signed by the transferor, names the transferee, indicates the details of the suit bonds, the amount of consideration, the mode of its payment and delivery of the BR as evidence of the holding of the bonds by ABFSL on behalf of SCB. Mr. Jethmalani is right in his submission that this transfer has been accepted even by the Special Court. Mr. Jethmalani went to the extent of contending that even formal delivery of the original LOA was not an essential requisite to complete the transaction so as to effectuate the transfer of property in the suit bonds to SCB and whether the BR was duly discharged would hardly be a material fact, since the BR does recognise SCB's right and declares that the bonds were being held on behalf of SCB. We are, therefore, satisfied that there was transfer of the property in the suit bonds to SCB and the evidence on record is sufficient to arrive at such a conclusion. It was wholly unnecessary for SCB to go further and prove how the BR was discharged and how the LOA went out of its possession, which were the facts emphasised on behalf of CMF. Nor was it necessary for SCB to lead evidence as to how HPD had intercepted the original LOA, when and in what manner.

Turning to the argument that SCB could not be permitted to make an argument inconsistent with the pleadings on record, we need to see an order dated 2.7.1997 made by the Special Court. On that day the learned counsel for SCB made a statement that he was not pressing for relief of monetary claim in terms of prayer (b) of its plaint. While settling the issues between SCB and CMF and SCB and NPCL, the learned counsel for SCB made a statement that he would not be pressing the contention that the original LOA had not been received by SCB. In view thereof, the Special Court did not permit the issue proposed to be raised by CMF on the said point. CMF proposed another issue as to whether SCB was not aware of the circumstances in which the original LOA was taken away from it. This issue was held by the Special Court to be irrelevant for the purposes of the Suit on

the ground that, as the plaintiff was not pressing the contention that they have not received the original LOA; it was not necessary.

Mr. Jethmalani rightly contended, that when these admissions were placed on record formally, there was no objection by CMF to these admissions being taken on record, nor was there any challenge by CMF to the ruling given by the Special Court, overruling the framing of the aforesaid two issues. In the circumstances, he submits that it is not open to CMF to raise an objection at this stage. Apart therefrom, Mr. Jethmalani also relied on Order XII Rule 1 of the Civil Procedure Code to contend that it is open to a party at any time to give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. This was precisely what happened during the trial on 2.7.1997. Merely because such a situation arises, the rest of the case does not get affected and has to be tried in accordance with law. In Bhagwati Prasad v. Chandramaul, while dealing with the argument that it would not be open to a party to sustain a claim on a ground which is entirely new or not pleaded, this Court rejected the contention and held that it was a general doctrine which could not be applied irrespective of the facts of the case on hand and observed thus (vide paragraph 10):

"But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

We respectfully concur with the said observations and reject the contention of Mr. Kapadia that SCB could not be permitted to rely on its changed stand.

There is one minor issue with regard to the date of the letter written by ABFSL, namely, whether it was 26.2.1992 or 27.2.1992. The evidence of Kalyana Raman makes it clear that mentioning the date of the letter as 26.2.1992 was a mistake and that the actual date of the letter was 27.2.1992.

IV. Did SCB lose title to the suit bonds at any time before the suit was filed?

A large portion of the impugned judgment is devoted to an analysis of the Securities Ledger (Exhibit-11) and raising inferences thereupon. There is no doubt that Exhibit-11 is a securities ledger maintained by SCB in respect

of the suit bonds. Ex facie, the Securities Ledger shows the date on which the transaction took place, the counterparty to the transaction, whether the transaction was a sale or purchase, face value of the transaction, rate of the transaction, book value, interest paid/received, profit/loss of the transaction and the balance. The document as such does not give rise to an inference that in any of the transactions HPD had become the owner of the suit bonds. The Special Court, on account of a misreading of the evidence pertaining to the 15% arrangement, drew a conclusion from this Exhibit-11 that HPD became the owner of the suit bonds right from 26.2.1992 and thereafter all the transactions were those of HPD, the losses or gains being credited to the account of HPD. We have already seen the evidence on record as to the 15% arrangement. No part of that evidence can legitimately give rise to the inference that in respect of securities transacted under the said arrangement, any person other than SCB or the counterparty become the owner of these securities. We have already seen that the suit bonds were purchased by SCB legitimately on 26.2.1992 by payment of consideration to ABFSL, which fact is even accepted by the Special Court. However, on analysis of certain documents on record, the Special Court has come to the conclusion that on 9.5.1992 the suit bonds were sold by SCB to HPD. The transaction dated 9.5.1992 thus becomes crucial and has to be scrutinised to see if this inference is correct.

The Special Court laid great emphasis on Exhibit-7 (details of SCB's securities transactions during April 1991 \026 May 1992), which purportedly shows that on 9.5.1992 the suit bonds were sold to Andhra Bank (hereinafter referred to as "AB"). There is also SCB's deal slip no. 10729 showing that there was a sale of the suit bonds of the face value of Rs. 50 crores @ Rs. 91.00 to AB. According to SCB, entries in the deal slips from nos. 10727 to 10735 were sham entries made in order to account for a large amount of money which HPD admitted to be owed to SCB and paid up by transferring Cantriple Units worth about Rs. 205 crores. SCB's explanation is that it had to show in its books, the receipt of this Rs. 205 crores and, therefore, a number of sham entries were recorded in deal slip Nos. 10727 to 10735 and were also indicated in Exhibit-7, AB being shown throughout as the counterparty and all such transactions being shown as 'direct'. The learned counsel for SCB contended that these were sham entries in order to take into the books of SCB the large amount of Rs. 205 crores.

According to the FIR which is exhibited by CMF on record, by about 30.4.1992, the officers of SCB discovered that there had been a series of transactions in securities conducted through HPD, as a result of which, securities to the tune of about Rs. 300 crores remained unaccounted for, as neither securities nor BRs pertaining to them had been received by SCB. One Ravi Iyer, Director, Local Currency Group of SCB made some preliminary inquiry and confronted HPD about this fact. HPD admitted on 10.5.1992 to Ravi Iyer that in respect of payments made by SCB for purchase of securities, there was a very substantial shortfall of securities, as the securities or BRs pertaining to them had not been handed over to SCB by HPD. HPD promised that he would hand over BRs/securities for the shortfall already identified and on 11.5.1992 he delivered a letter promising to deliver further securities to fill the gap that had been noticed. SCB had relied on the chargesheet and recital in the chargesheet as an admission on the part of CMF, since the charge sheet was produced as CMF's evidence. Further, there is evidence of M.Q. Askari (PW-3), an officer of AB in terms denying that there was any sale or purchase transaction between SCB and AB during the period 1.5.1992 to 10.5.1992. In fact, Askari produced the purchase register of AB in which there was no entry showing purchase of the suit bonds by AB from SCB on 9.5.1992. Mr. Jethmalani contended rightly that the evidence of Askari had remained totally unchallenged, particularly with reference to the absence of any purchase of the suit bonds by AB. Mr. Jethmalani criticised the impugned judgment of the Special Court as having singularly failed to consider any part of this crucial evidence of the officer of AB. We think that this criticism is justified. While the Special Court's inferences are based upon its understanding of what the 15% arrangement was and its analysis of Exhibit-11, it totally fails to give any reason as to why the evidence of a witness from AB about there being no such transaction on 9.5.1992, backed by the purchase register of AB, should be

rejected. In our view, in the face of the positive evidence of AB that no such transactions were there, there was no justification for not accepting the stand of SCB that entry dated 9.5.1992 pertaining to the suit bonds was a sham entry intended to introduce the money into the books of SCB to cover a wide gap.

The Janakiraman Committee Report is also clinching on this issue of the so called sale of the suit bonds on 9.5.1992 to ABFSL. Both sides have relied on the Janakiraman Committee Report, which is admitted in evidence as Exhibit-18. In the Fourth Interim Report dated March 1993, in Paragraph 3.1(h) there is a discussion of this entry in the Report. The Janakiraman Report says:

"(h) On 9.5.1992, Stanchart as per deal slip purchased units of Cantriple of face value of Rs. 45.5 crores @ Rs. 58.50 per unit from Andhra Bank for an aggregate cost of Rs. 266.18 crores. There is no record of this transaction in the books of Andhra Bank nor are there any cost memos available and no securities were received from Andhra Bank. On the same day, Stanchart as per deal slips sold PSU bonds aggregating Rs. 266.12 crores to Andhra Bank. (Refer paragraph 3.4 below). There is no record of these transactions in the books of Andhra Bank and no securities were delivered. A pay order No. 257131 for the difference of Rs. 0.06 crore was prepared but not delivered to Andhra Bank. These transactions appear to have been put through merely to cover up a gap in respect of various earlier purchase deals for which neither securities nor BRs. were available. The details of these earlier transactions are explained in paragraphs 3.3 and 3.4 below."

Admittedly, the Janakiraman Committee was a committee of experts appointed by the RBI to investigate the securities scam. There is also no dispute that the Janakiraman Committee had full authority backed by the RBI order and did investigate by meticulously going into the account books of all the banks concerned, including AB. This report also supports the stand of SCB that the entries pertaining to the sale of the suit bonds on 9.5.1992 were sham entries and that there was really no transaction of sale of the suit bonds to AB on the said date. In the face of this evidence, it was not open to the Special Court to reject the story of bogus entries by merely indulging in speculative analysis of the entries in Exhibits 7 and 11 against the background of what it understood to be the 15% arrangement. One more fact, which the Special Court considered as proving the genuineness of the entries pertaining to 9.5.1992, is about the purchase of Cantriple Units deposed to in the evidence of Waseem Akhtar Saifi (Exhibit-14) in the previous Suit No. 17/94. Mr. Jethmalani criticised this finding as wholly erroneous. In the first place, according to him, Saifi was examined in the previous proceedings in Suit No. 17/94 only for the purpose of showing that a letter dated 11.5.1992 written by HPD to SCB was not under coercion as alleged in that suit. What was placed on record in the present suit by CMF was only the cross-examination from pages 45-53 after SCB had waived formal proof and accepted that Saifi did make such a statement. Mr. Jethmalani submitted that not only was the said evidence irrelevant, but also had been misread by the Special Court to arrive at an erroneous conclusion. Such evidence could be admissible only to show what fact was sought to be proved in the previous Suit No. 17/94 and secondly, such evidence is wholly hearsay with regard to the transaction of Cantriple Units on 9.5.1992. He also criticised the finding of the Special Court as self-contradictory on this issue.

The Special Court has laid emphasis on the failure of SCB to explain by cogent evidence how HPD got possession of the original LOA and transfer deed. In our view, this is an irrelevant issue, although according to the charge sheet, HPD had obtained possession of the original LOA and the signed transfer deed by misappropriation in conspiracy with some officers of SCB. Mr. Jethmalani also relied on the affidavit filed by HPD before the CLB in which he had stated that he had borrowed the suit bonds from SCB.

In our view, that affidavit has no meaning as the deponent refused to submit himself to cross-examination and the evidence given in the affidavit was not tested by cross-examination. We need not delve further into the issue as we have already stated that the issue is immaterial.

It is the stand of CMF that SCB lost its title to the suit bonds as a result of sale of the suit bonds on 9.5.1992 as consideration for its purchase of Cantriple Units worth Rs. 205 crores. While answering issue no. 6, the Special Court has clearly held that purchase of the Cantriple Units on 9.5.1992 had been proved but CMF had not been able to prove that the said purchase was against sale of the suit bonds on 9.5.1992. In the face of this finding, the argument of CMF that SCB lost title because it had sold the suit bonds in lieu of which it purchased Cantriple Units, has been rejected by the Special Court itself.

For these reasons, we are clearly of the view that whatever might have been the conjectures on the part of the Special Court, whatever might have been the suspicion generated on account of sham entries made by one or the other party, when it came to the crux of the issue, the Special Court has correctly answered it and negatived the case of CMF that SCB lost title of the suit bonds because the suit bonds were sold in consideration of purchase of Cantriple Units.

V. Did CMF get title to the Suit Bonds ?

Finally, the question that needs to be considered is whether CMF as defendant acquired title to the suit bonds.

It is urged on behalf of CMF on this issue that CMF is in possession of the suit bonds, and by reason of Section 110 of the Indian Evidence Act, 1872, the presumption is that the possessor of the property is the owner unless SCB dislodges this presumption by showing a superior title. It is contended that only a person with a better title than the party in possession could succeed. Mr. Kapadia relied on the rule as to burden of proof as to ownership under Section 110 of the Indian Evidence Act, 1872 and contended that as far as the rule enunciated in Section 110 is concerned, it makes no exception with respect to incorporeal property like debts or bonds. In his submission, while a debt may be a chose in action, the evidence of the debt may be by way of tangible property, namely, the paper evidencing it and, therefore, that paper would itself be a chattel to which the rule of burden of proof in Section 110 would apply, even on the assumption that the suit bonds were choses in action. He relied on passages in Halsbury's Laws of England and the discussion thereunder to show that debentures of companies were also choses in action. Relying on the same authority, he also urged that the strictness of the common law rule against the assignment of choses or things in action had been relaxed by various statutes. He, therefore, contended that as far as transfer of the suit bonds was concerned, it was governed by the practice in the market, read with the provisions of Section 108 of the Companies Act, 1956 in the light of the Notification issued by the Central Government under Section 620 of the Companies Act, 1956, governing the transfer of the suit bonds. In the submission of Mr. Kapadia, debentures strictly fall within the description of 'chattel personal', and by the applicable statute, namely, the Companies Act, 1956 they have been made capable of being dealt with as chattel. He relied on another passage in Halsbury's Law of England in support thereto. Relying on Jagdish Narain v. Nawab Said Ahmed Khan he further contended that since the Suit is one on title, the plaintiffs could succeed only on the strength of their own title; the defendants were not obliged to plead any possible defects in the title and they were entitled to avail themselves of any defect that such title showed subsequently. To similar effect were cited the decisions of this Court in Moran Mar Basselios Catholicos and Anr. v. Most Rev. Mar Poulose Athanasius and Ors. , Brahma Nand Puri v. Mathra Puri and Anr. and L.J. Leach and Co. Ltd. and Anr. v. Messrs. Jardine Skinner and Co. Strong reliance was also placed on the observations of this Court in Chuharmal Takarmal Mohnani v. Commissioner of Income Tax in relation to Section 110 of the Indian Evidence Act, 1872.

Rebutting these arguments, Mr. Jethmalani contends that Section 110 is contained in Chapter VII of the Indian Evidence Act, 1872, which deals

with the burden of proof. As a matter of fact, Section 110 merely enunciates the burden of proof as to ownership. He rightly submits that any rule of burden of proof is irrelevant when the parties have actually led evidence and that evidence has to be considered. Reliance is placed by him on Sita Ram Bhau Patil v. Ramchandra Nago Patil and Anr. for the proposition that when the entire evidence is before the court, the burden of proof becomes immaterial. Even assuming that the rule of burden of proof in Section 110 is relevant, Mr. Jethmalani contended that Section 110 would be applicable only to a 'thing', which is capable of being possessed. He rightly submits that a chose in action is not a 'thing', as, by definition, it is not in the possession of someone, but that possession has to be acquired by some action which is why it is called a chose in action. He rightly distinguished the judgment of this Court in Chuharmal Takarmal (supra) as wholly inapplicable to a situation of a chose in action. In the said judgment, the possession was with respect to certain wrist watches, which were obviously not choses in action. According to him, Section 137 of the TP Act makes Section 132 inapplicable to debentures but the principles of common law and equity must surely govern even such transactions of transfer of debentures.

Mr. Jethmalani further contended that although the suit bonds were excluded from the definition of 'goods' under Section 27 of the Sale of Goods Act, 1930 and Section 27 does not apply to the situation, the general rule of transfer of property, that a transferee acquired no better title than the transferor, holds good and applies even in the case of the suit bonds. Thus, according to Mr. Jethmalani, in a situation like this, where there is a defect in the title of the antecedent transferor, the transferee got no title. In his submission, the general principle of the legal maxim nemo dat quod non habet must govern all transactions. Relying on the judgment of the Chancery Division in France v. Clark, he contended that this rule is not derogated from under Section 108 of the Companies Act, 1956. The provisions of the Companies Act, 1956 for registration in the name of a transferee merely give complete effect, provided there is already a prior valid transferor. A mere registration cannot effectuate a document which was, as between the alleged transferor or transferee, inoperative and of no effect. Relying on the judgment of the Chancery Division (supra) he contended that even when a blank transfer form is signed, there is no notice that the transferor is the owner and if the circumstances are such that the transferee is put on enquiry as to the bona fides of the transfer or the circumstances are such that the transferee must be deemed to have been put on such enquiry, then the transferee would not be a purchaser for value without notice of defect in the title of the transferor. He contended that even assuming CMF came into possession of the original LOA of the suit bonds together with blank transfer deeds, there would be clear notice that the transfer deeds were signed by someone other than the original owner of the suit bonds; if CMF had made the slightest enquiry, it would have learnt that the original owner (SCB), was not intending to transfer them to CMF. Thus, in his submission, CMF cannot be said to be a purchaser for value without notice. At all points of time, it had notice that whoever was delivering the original LOA with the blank transfer deed was not a person with full title to the suit bonds. Referring to the defence of CMF, he contended that CMF initially took the stand that the suit bonds had been acquired by it from ABFSL through HPD, subsequently changed its stand and alleged that HPD must have acted as a broker either for ABFSL or for SCB or on his own behalf. According to Mr. Jethmalani, this is a situation where CMF is unable to say as to who was the person with the antecedent title who could have transferred the title to CMF for bona fide purchase for value without notice. He criticised the impugned judgment of the Special Court for brushing aside the principle in France v. Clark (supra) on the ground that HPD was the owner of the suit bonds. He pointed out that the principle in France v. Clark (supra) has been reiterated and applied in India also and has been followed in V.S. Venkata Subbiah Chetty v. A. Subha Naidu and Ors. and Govt. of the United States of Travancore and Cochin v. Bank of Cochin Ltd. . In his submission, a transferee of an actionable claim gets no better title than that of the transferor and he would take it subject to all the liabilities and equities to which the transferor was subject. On the basis of the pleadings of CMF, it

acquired the right to the suit bonds from HPD. HPD could not confer a better title than he himself had to the suit bonds. It is the case of SCB that HPD had got the bonds by theft, misappropriation or some other offence and, hence, it could not pass any title to CMF. He, therefore, contended that even if the case of CMF is to be accepted, CMF got no title to the suit bonds.

The only exception would be the case of a bona fide purchaser for value without notice. He seriously questioned both the bona fides and lack of notice, on the part of CMF. He contended that the so called acquisition of the suit bonds by CMF was neither bona fide nor was CMF a purchaser for value, as no consideration had been paid by CMF and, in any event, CMF had or ought to have had notice of the lack of title on the part of its antecedent title holder.

Impugning the bona fides of the transaction by which CMF claimed to have acquired the suit bonds, Mr. Jethmalani points out that although CMF took up the initial stand that the suit bonds had been purchased from ABFSL, it later shifted its stand. In its petition before the CLB, CMF claimed that it had purchased the suit bonds from ABFSL by paying it consideration. In its written statement in the Suit, CMF took up the stand that it had purchased the suit bonds from HPD, who was acting on behalf of ABFSL or SCB. In its supplementary written statement, it contended that it bought the bonds from HPD acting for himself or ABFSL or SCB. Learned counsel contended that such a plea coming from a financial institution, which had entered into a transaction worth about Rs. 45 crores was utterly absurd and unbelievable. At no point of time did CMF state on record as to what was the representation made by HPD when he allegedly sold the suit bonds to CMF on 27.2.1992. It was not as if ABFSL was an unknown party, for the record shows that there were at least 23 transactions between CMF and ABFSL in November 1991 and 4 transactions even on 27.2.1992. Even after HPD filed his affidavit alleging that the suit bonds had been 'lent' by SCB, CMF did not care to deny the contents of HPD's affidavit. As a banker, CMF knew that no transaction in securities could take place without a cost memo, or some other kind of documentation. This was a case where CMF has been unable to produce any credible documentation to support its plea that the suit bonds were purchased from/through HPD on 27.2.1992. A document relied upon as evidencing the alleged transaction is the letter dated 27.2.1992 issued by HPD to CMF in which he had asked for a bankers' cheque in the sum of Rs. 46,01,23,287.67 in favour of AB. The deal slip pertaining to this transaction bearing date 27.2.1992 showing that the suit bonds of the value of Rs. 50 crores had been bought from ABFSL through HPD, was an internal document of CMF suggesting purchase of the suit bonds from ABFSL through HPD as broker. Thus, the evidence led by CMF was that it had bought the suit bonds from ABFSL with HPD as the broker. At no point of time did it seek or obtain a cost memo for this transaction. R.V. Shenoy (PW-2), ABFSL's employee, denies that any such transaction had taken place by which the suit bonds were sold by ABFSL to CMF with HPD as a broker or otherwise, and there is no cross-examination on this aspect. Interestingly, even the Special Court does not hold that there was any transaction on 27.2.1992 in which CMF had bought the suit bonds from ABFSL. The Special Court glossed over the matter by stating that the 15% arrangement made HPD the owner of the suit bonds and, therefore, it was a transaction between HPD and CMF.

No evidence was led by CMF as to which employee of CMF had transacted the deal in which the suit bonds were purchased from ABFSL ostensibly, through HPD as the broker, on 27.2.1992. Affidavit of one Satish was filed as a witness of CMF who claimed knowledge about the transaction, but the said Satish was not examined. The only witness of CMF, Nandita Rao, frankly admitted that she had no personal knowledge of the suit transaction whatsoever. No other documents were produced by CMF to show that such a transaction was entered into between itself and ABFSL with HPD as the broker, as a result of which it came into possession of the suit bonds as an owner. It is impossible to believe the story of CMF that, a financial institution could have entered into a deal of such magnitude without a scrap of document. That is the reason why even the Special Court does not hold that there is any evidence on record from which a conclusion can be drawn in favour of CMF acting bona fide. The evidence on record

does not appear to support the story of CMF that it had entered into a contract under which it purchased the suit bonds from ABFSL on 27.2.1992 with HPD as the broker.

Mr. Kapadia, learned counsel for CMF, relied on the judgment of a learned Single Judge of the Bombay High Court in Fazal D. Allana v. Mangaldas M. Pakvasa in support of his contention that, it is common practice in the share market that shares are transferred by mere delivery with a transfer deed signed in blank and that in such a situation there was no question of CMF being put to notice that there was anything irregular in the LOA of the suit bonds delivered to CMF by a transfer deed signed in blank by ABFSL. He, therefore, contends that this was a bona fide transfer consistent with the market practice. As a result of the Bombay High Court judgment, the authority of France v. Clark (supra) was shaken, is the submission of the learned counsel. Relying on the judgment of this Court in Vasudev Ramchandra Shelat v. Pranlal Jayanand Thaker and Ors. it is pointed out that a transfer of property in securities, which is recognised by the TP Act, may be antecedent to the actual vesting of all or the full rights of ownership of shares and exercise of the rights of a shareholder in accordance with the provisions of company law. The antecedent transfer of title in the security results in the equitable right of the transferee to be registered by the company. Learned counsel contended that as a result of delivery of the original LOA accompanied by the blank transfer deed, CMF acquired ownership rights including the equitable right as against NPCL to have its name registered as the owner. Strongly refuting the argument of Mr. Jethmalani, Mr. Kapadia contended that since delivery of securities accompanied by a blank transfer deed was a common practice in the trade, there was no occasion for alarm bells ringing merely because the original LOA accompanied by blank transfer deed was delivered to CMF. In our view, notwithstanding the market practice of delivery of securities accompanied by a signed blank transfer deed, the property in the securities can only be transferred if there is bona fide purchase of the same for value. The crucial question in the present case is: did CMF purchase the suit bonds for value from the antecedent title holder?

This brings us to the last limb of the argument of Mr. Jethmalani that CMF can never be said to be a purchaser for value, as there is no evidence to show that any consideration was paid by CMF for acquisition of the suit bonds.

When the matter was first tried by Variava, J. as the Special Court, the learned counsel appearing for CMF categorically admitted that there was no evidence by which it could be established that CMF had paid consideration for acquisition of the bonds. It is true that this judgment was subsequently set aside by this Court and the matter was remanded for trial along with the Misc. Petition. But this is a significant fact which the Special Court could not have overlooked in appreciation of the evidence.

The stand taken by CMF is that on 27.2.1992 it purchased the suit bonds and the 17% NPCL bonds for a total sum of Rs. 46,01,23,287.67, of which, Rs. 46 crores was the purchase price and Rs. 1,23,287.67 was the accrued interest on the bonds for one day i.e. from 26.2.1992 to 27.2.1992. CMF claimed that the consideration for acquisition of the suit bonds and 17% NPCL bonds was paid by two sales of 13% NLC bonds and 13% MTNL bonds. In other words, according to CMF, there were two purchases and two sales on 27.2.1992. CMF alleged that on 20.11.1991 there were 19 sales and four purchases. The four purchases included the 13% NLC bonds and 13% MTNL bonds, which formed part of the consideration for purchase of the suit bonds on 27.2.1992. The evidence in support of its alleged purchase of 13% NLC bonds and 13% MTNL bonds is again somewhat convoluted. The Special Court held that out of the so called 19 sales alleged on 20.11.1991, 10 had been proved by the evidence led by CMF and jumped to the conclusion that thereby all 19 must be taken to have been proved. The Special Court observes: "The important point which the Court has to bear in mind is whether the Court should reject all the 10 sales which stands proved because the remaining 9 sales could not be proved. The answer is in the negative. The evidence in the form of 7 BRs; the evidence in the form of Andhra Bank Purchase Register, the evidence in the form of Andhra Bank Sale Register, and the evidence in the form of Exhibit-H as well as the

evidence of PW-2 cannot be thrown overboard as bogus. These 10 transactions, as proved, shows that CMF is right in saying that they had sales on 20.11.1991 with HPD who had received the securities from CMF. In the circumstances, I hold that payment of consideration for four purchases dated 20.11.1991 stands proved." This finding, in our view, is wholly untenable. There is no warrant for the conclusion that if some transactions are proved, all transactions on the same day are to be held to be proved.

Having erroneously held thus, the Special Court finds that after adjusting the transactions, there was a netted amount of Rs. 3,87,46,575.35 which was payable by HPD to CMF, which was paid to CMF as evidenced by HPD's letter dated 26.2.1992 giving instructions to AB to pay the amount to CMF and debit the aforesaid amount to his account.

Mr. Jethmalani justifiably criticised these findings of the Special Court. In the first place, the transactions of 20.11.1991 and the transactions of 27.2.1992 appear to between CMF and HPD. Assuming they are proved, as held by the Special Court, and the netted amount of Rs. 3,87,46,575.35 was paid by HPD to CMF, it does not prove that the consideration of the suit bonds was paid to ABFSL/SCB, who alone could have been the antecedent owner of the suit bonds. It is the erroneous inference of the Special Court that HPD had become the owner of the suit bonds that has misdirected it into assuming that CMF had paid considerations for purchase of the suit bonds. There is merit in this contention. One of the documents relied upon in support of the story of sales made on 20.11.1991 is a letter from HPD dated 20.11.1991 addressed to the Manager, AB advising him to issue a bankers' cheque in favour of CMF for Rs. 2,75,18,571.04. CMF's witness, Nandita Rao (DW-1), was specifically asked in cross-examination as to how much of the amount was payable by CMF to ABFSL as a result of the transactions dated 20.11.1991. She answered that it was an amount of Rs. 21,77,01,565.98 and claimed that it was the difference between the amount paid and received. She also stated that, in addition to the aforestated amount, an amount of Rs. 4,75,55,205.51 also became payable as sundry creditors. She also stated that she had arrived at the figure after taking into account all the purchases and sales of 20.11.1991 and also from the RBI Cash Book. Thus, according to the evidence led by CMF, CMF had to pay to ABFSL on 20.11.1991 a large sum as a result of their deals which took place on 20.11.1991. Surprisingly, instead of CMF paying ABFSL the aforesaid amount, on the same day, two sums of Rs. 2,75,18,571.04 and Rs. 4,56,70,000.00 as evidenced by letter dated 20.11.1991 written by HPD to AB, came to be paid to CMF by HPD. It is evident that some of the existing documents with regard to various deals have been put together by CMF to patch up the story of consideration put forward by it.

Another strange document which shakes the credibility of the story of consideration set up by CMF is the letter dated 26.2.1992 from HPD to AB instructing AB to issue a bankers' cheque in favour of CMF for a sum of Rs. 3,87,46,575.35 and debit his account. The actual number of the cheque is also shown on the document as 143941 dated 27.2.1992. There is also a statement of the RBI account of HPD with AB showing the debit of the aforesaid amount to the books of HPD in AB. The Special Court relies on this letter as evidencing the netting of the transactions between CMF and HPD on 27.2.1992. Mr. Jethmalani legitimately criticised the story of consideration put forward by CMF by urging that, if the aforesaid amount of Rs. 3,87,46,575.35 was the amount after netting, which had been arrived at on 27.2.1992, it was impossible to believe that HPD had the prescience on 26.2.1992 to know the exact amount that would be arrived at after netting of transactions including the purchase of the suit bonds on 27.2.1992. Although, SCB raised this point in the arguments and pointed out that this letter belies the stand of CMF, the Special Court brushed it aside by saying that it did not find any merit in the argument and observing: "merely because letter is dated 26.2.1992 one cannot assume that HPD knew about the transactions one day prior to 27.2.1992. The remark indicating pay order number and the date of 27.2.1992 shows that the instructions were specifically given on 27.2.1992." Moreover, if we accept the finding of the Special Court that the transaction of the suit bonds between HPD and CMF on 27.2.1992 did take place, then there is no explanation for the suit bonds being sold to and purchased from other parties during the period 27.2.1992

to 9.5.1992 as shown in Exhibit-11.

The pleadings of CMF on the issue of consideration appear to be most confusing and shifty. The exercise carried out by the Special Court of analysing several transactions and discharge of BRs, shows transactions of payments back and forth between CMF and HPD. The ledger folio produced by CMF in support of its stand is also hardly reliable. The ledger entry pertaining to the purchase of 13% NLC bonds discloses a very curious state of affairs. The entry pertaining to 20.11.1991 is hand written after the entry of 30.11.1991. When the witness of CMF, Nandita Rao (DW-1), was cross-examined as to how the entry of 20.11.1991 could have been written in the ledger folio after the entry of 30.11.1991, she had hardly any explanation for that except professing ignorance. The said witness was also asked as to whether she came across any document from ABFSL in support of the transactions of 20.11.1991 on the basis of which she had prepared the vouchers and ledger entries. She admitted that she had not seen any document from ABFSL on the basis of which such entries were made. Under cross-examination, the said witness also stated that she did not remember whether any documents were received from ABFSL in support of the four general vouchers dated 27.2.1992 and she further admitted that, irrespective of whether a cheque was received or not, it was a routine practice to write "RBI cheque received from ABFSL" in the transactions with ABFSL. Considering the evidence as a whole, it appears that the initial stand taken by the learned counsel of CMF in the first round of the litigation, that there was no credible evidence on which payment of consideration by CMF could be proved, was fully justified. The attempt of CMF on picking up and putting forward some of the documents, out of the several transactions entered into by them to patch up the story of consideration, in our opinion, has miserably failed. There was no cause for being charitable to CMF by saying that they could prove only a part of the consideration, ergo, rest of the transactions must be deemed to have been proved. We are of the view that every one of the arguments put forward by SCB to impugn the story of CMF that it had paid consideration is justified and the Special Court was wrong in rejecting the arguments of SCB on this count. We, therefore, hold that CMF has utterly failed to prove its story that it had paid consideration for purchase of the suit bonds on 27.2.1992.

Conclusion:

Finally, it appears that there is not much to choose between the two contending banks, namely, SCB and CMF. Both the banks have been tarred by the same brush by the Janakiraman Committee Report about fudging their accounts. However, it appears to us that the issue of the ownership of the suit bonds could not have been decided on any basis other than what the legal evidence showed. The situation is somewhat like a game of musical chairs; the one who is sitting on the chair when the music stops, wins. Similarly, the situation before us. Once we eliminate the conjectural findings, we find that all the material evidence on record shows that SCB had purchased the suit bonds from NPCL by paying good money. The original LOA for purchase of the suit bonds along with the transfer deed was handed over to SCB. As to how it went out of its possession, it appears to be the subject matter of the FIR filed by SCB. SCB alleges that, it was pilfered or misappropriated by some officer in conspiracy with HPD, but that is a matter which will be tried by an appropriate criminal court.

Turning to the other side of the story, CMF claims acquisition of the suit bonds on 27.2.1992 by paying consideration for them. It is not shown as to who was the counter-party from whom the purchase was made, as CMF's stand on its counter-party keeps changing from beginning to end. The documents produced on record do not bear out the stand of CMF. In spite of exercise of our imagination, we are not able to support the conclusion that CMF had paid consideration for acquisition of the suit bonds from HPD; or that HPD became the owner of the suit bonds merely because of the existence of the 15% arrangement, the details of which were thoroughly analysed by the Janakiraman Committee Report and the Joint Parliamentary Committee Report. That such an agreement was not against public policy was clearly held by the previous judgment of this Court in Civil Appeal No. 4456/95 .

In these circumstances, we are not satisfied that the evidence on

record proves that HPD became the owner of the suit bonds or that CMF legitimately acquired the suit bonds from HPD or any other person by paying bona fide purchase value for them. Consequently, we must hold that CMF acquired no right, whatsoever, to the suit bonds. The suit bonds always remained the property of SCB irrespective of how they found their way into the hands of CMF.

In the result, we allow both the appeals and set aside the impugned judgments of the Special Court in Special Court Suit No. 11/96, and Special Court Misc. Petition No. 81/95 and hold that SCB as the owner of the suit bonds is entitled to be registered as such in the register of NPCL. Consequently, the Suit is decreed in terms of the prayers in Civil Suit No. 3808/92 and Misc. Petition No. 81/95 is dismissed.

Considering that both parties are in pari delicto in the matter of fudging their accounts and indulging in transactions which have facilitated the securities' scam, we do not think it fit that SCB should be awarded costs, although it has succeeded in the appeals.

The appeals are accordingly allowed with no order as to costs.