

SUPREME COURT OF INDIA

Standard Chartered Bank

Vs

Andhra Bank Financial Services Limited and Others

Civil Appeal No. 2275 of 2002; Civil Appeal No. 2276 of 2002

(Y. K. Sabharwal and B. N. Srikrishna, JJ)

05.05.2006

JUDGMENT

B. N. 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 negated 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:

2. 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 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.

3. 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.

4. 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.

5. On 8.6.1992 one Hiten P. Dalai (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.

6. 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 there for 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.

7. 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.

8. 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).

9. On 27.2.1993 NPCL contested the petition by denying the so called transaction alleged by CMF and stating that the matter was subjudice 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. On 10.1.1997, HPD took 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.

16. 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 there from to this Court.

17. 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.

18. since the judgment in Misc. Petition No. 81/95 merely follows the judgment in

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

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 affirmative 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?

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

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?

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?

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 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;

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

Answers

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

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

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

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

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

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

This issue is divisible in to three parts (i) CMF has proved that SCB has purchased cantripple 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 Issues

Answers

bonds of the face value of Rs. 50 crores and whether the Plaintiffs have applied for and got the said Cantripple 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?

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 ?

8. Whether the plaintiffs deliberately by their act and or omission or negligence put Defendant No. 1 or Hiten P. Dalai 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 ?

9. Whether Hiten P. Dalai 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?

10. Whether the Plaintiff is entitled to any reliefs and if so what As per final Order.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, 1, 993 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.

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

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

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

As per final Order.

Issues

1. Whether this Court has jurisdiction to entertain and try this Suit?
2. Whether the Plaintiffs are entitled to and/or are the owners of the said securities without having received the original Letter of Allotment?

Answers

In the affirmative.

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)

Issues

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)?
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?
5. What Order?

Answers

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.

In the negative.

As per final Order.

The issues framed in Misc. Petition No. 81/95 with the answers are as follows:

1. Whether the Petitioners are bona fide 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?

2. Whether Respondent No. 4 is entitled to object to registering transfer of 9% NPCL Bonds 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?

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 ?

5. What Orders on the Petition?

Findings

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

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

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

Does not arise.

As per final order.

21. 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.

22. 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% Arrangement' 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.

23. 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:

24. 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.

25. 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."

26. 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.

27. 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....

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 than (sic) CMF."

28. Thus, it is clear that the appeal has 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.

29. 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 subsection (2) of Section 111. The nature of proceedings under Section 111 are slightly different from a title suit, although, subsection (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 others* 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.

30. 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 *Manualal Khetan v. Kedar Nath Khetan and others* he contended that the provisions of Sec. 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 Sec.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."

31. 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.

32. 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:

33. 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.

34. 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.

35. 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 Judicata:

36. Mr. Jethmalani invited our attention to an earlier judgment of this Court in *Canara Bank and others v. Standard Chartered Bank* [1993] 3 SCR 103 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."

37. 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."

38. 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 others v. The State of U.P. and others*, *Guda Vijayalakshmi v. Guda Ramachandra Sekhara Sastry* and *Hope Plantations Ltd. v. Taluk Land Board, Peermade and another*.) 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-suited 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 Dalai as alleged in Para 5(d) of the Written Statement of Defendant No. 1?"

39. 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 there against 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.

40. 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.

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

B. Evidence on Record:

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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 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 PC. Purushothama Reddiar v. S. Perumal and R.V.E. Venkatachala 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.

48. 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 (P.W.I) in relation to the transaction of 26.2.1992.

49. 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.

50. 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 and others v. Badkulal and others*[AIR1953 SC 225], *Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others* S.P Chengalvaraya Naidit (dead) by L.R's. v. *Jagannath (dead) by L.R's. and others* and *Citi Bank N. A. v. Standard Chartered Bank and others* .

51. 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. Jethmalani 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. Bdas Kunwar v. Desraj Ranjit Singh and others*[1915 AIR(PC) 96, *Ramrati Kuer v. Dwarika Prasad Singh and others* and *Smt. Indira Kaur and others v. Shri Sheo Lai Kapoor* .

52. In *Hiralal's* case (supra), this court reiterated the observations of the Privy Council in *Murugesam Pillai v. Guana Sambandha Pandara Sannadhi* 1917 AIR(PC) 6 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 withhold 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 rell, upon a certain state of facts to withhold from the Court the best evidence which' 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 withholding 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 withhold from the court" the best evidence which is in their possession.

53. 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% arrangement 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 Sec. 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.

54. 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* 1962 AC 209, page 216]).

J