Presented on 12/09/2002.
Registered on 12/09/2002.
Decided on : 25/01/2010.
Duration : 7Y. 4M. 13D.

IN THE COURT OF 4th JOINT CIVIL JUDGE (SR.DN.), AMRAVTI.

(Presided over by **A.M. Khan**)

Special Civil Suit No. 165/2002. **Exh. No. 482**

The Amravati Peoples' Co-operative Bank Ltd., a Bank Registered under the Maharashtra Co-operative Societies Act, having its registered office at Jalaram Market, Jawar Road, Amravati, Tq. & Distt. Amravati through it's Administrator. ..... ***PLAINTIFF.***

- V E R S U S -

1. M/s. Giltedge Management Services Ltd, through it's Director /Chief Executive Officer /Authorised Signotary Ketan Kantilal Seth, aged about 40 years, Occu. Business having it's Registered Office at 103, Liberty Apartment, 80-A , Sarojini Road, Vile Parle (West) Mumbai-400 056.

2. Ketan Kantilal Seth, aged about 40 years, Occupation business, resident of 193, Lalit Kutir Co-op. Housing Society, Gulmohar Cross Road No.9, JVPD Scheme, Andheri (West) Mumbai-400 049.

3. M/s. Century Dealers Pvt.Ltd, by it's Director /Chief Executive Officer /Authorised Signatory Mahendra Radheshyam Agrawal, aged about 36 years, occupation business, having it's Registered Office at 45-A Adoya Sandhya Ghai Road, Calcutta-700 001

and also having it's office at 302 Rewa Chambers, Near Marine Lines, Mumbai- 400 020.

4. Mahendra Radheshyam Agrawal, aged about 36 years, occupation business, resident of 2-J, Judge's Court Road, Alipur, Calcatta- 700 027.

5. M/s. Home Trade Ltd, by it's Director /Chief Executive Officer /Authorised Signatory, Sanjay Hariram Agrawal, aged about 37 years, occupation business, having it's Regd. Office at Tower- 4, 5th Floor, Vasi Railway Station Complex, International Infotech Park, New Mumbai- 400 703.

5 (a). Nandkishore Shankarlal Trivedi, aged 45 years, Director of M/s Home Trade Ltd. Mumbai, resident of Pushpam Apartment, 6 Khandoba Desai Road, Vile Parle (West) Mumbai.

5 (b). Subhodh Chand Dayal Bhandari, aged 37 years, Director of M/s. Home Trade Ltd. Mumbai, resident of B- 703 Govind Complex, Sector- 14, Vasi, New Mumbai.

6. Sanjay Hariram Agrawal, aged about 37 years, occupation business, resident of Tower- 4, 5th floor Vasi Railway Station Complex, International Infotech Part, New Mumbai- 400 703.

7. Janata Sahakari Bank Ltd., Pune having it's branch at Fort, Mumbai, through its Branch Manager.

..... ***DEFENDANTS***.

SUIT FOR RECOVERY OF RS. 12,75,86,403.67 ps.

APPERANCE :-

Shri A.M. Jain, Advocate for Plaintiff.
Shri L.H. Purohit, Advocate for Defendant Nos. 1 & 2.
Shri V.L. Navlani, Advocate for Defendant Nos. 3.
Shri A.J. Kadu, Advocate for Defendant No. 4.
Suit is proceeded Ex-parte against Defendant Nos. 5 & 6.
Shri A.B. Maloo, Advocate for Defendant No. 5 (a)
Shri G.A. Thakre Advocate for Defendant No. 5 (b)
Shri S.L. Deshmukh, Advocate for Defendant No. 7.

J U D G M E N T
(Delivered on 25/01/2010)

This is a suit for return / deliver of Government securities or alternatively for recovery of value of securities Rs. 12,75,86,403.67 ps. Plaintiff bank has pleaded as under.

2. It is the contention of plaintiff bank that it was established in year 1937. It is a non-scheduled Urban Co-operative bank and is regulated by Maharashtra Co-operative Societies Act 1960 (hereinafter referred as MCS Act for brevity), Banking Regulated Act and guide line issued from time to time by Reserve Bank of India and Co-operative Department State of Maharashtra. Plaintiff bank has to show Nett Demand and Time Liability (NDTL) in its yearly balance-sheet. Amount payable to current bank account holders, saving bank account holders and defendant holders is known as, " Net Demand Liability" while amount payable to fixed deposit holders is known as " Time Liability" As per the circular issued by Reserve Bank of India from time to time. (hereinafter referred as RBI) Plaintiff bank is required to invest 15% of NDTL in Government and other approved securities. Interest is payable on these securities on half yearly

basis at the rate mentioned on the securities. Interest due as on the date of sale or purchase of the security is called "Accrued Interest". Date of transaction of sale and purchase is known as "Settlement Date".

3. Plaintiff bank has further pleaded that defendant No. 1 is a company registered with RBI under the provisions of RBI Act 1934 and defendant No. 2 is the Chief Executive Officer and Director of defendant No. 1 company. Since 1998, plaintiff bank is purchasing and selling Government securities from and through defendant No. 1 company and has got faith and confidence in defendant Nos. 1 and 2.

4. According to the plaintiff bank the subject matter of the suit relates to two transactions of sale and purchase of Government securities entered into between plaintiff and defendant No. 1 company on 15/01/2002 and 28/02/2002, which are reproduced as under.

(A) The first transaction between plaintiff and defendant No. 1 company was entered into on 15/01/2002 and was confirmed by defendant No. 1 company vide its bill No. 1/1/2425 and bill No. 01/01/2431 both dated 15/01/2002. As per the above transactions plaintiff bank entrusted to defendant No. 1 Government security viz. GOI 10.70% Government Stock "2020" under 8 book debt certificate Nos. NG-1 to NG-8 having face value of Rs. 50,00.000/- each i.e. Rs. 50,00,000/- X 8 = Rs. 4,00,00,000/- for selling the same for consideration of Rs. 4.60 crores with accrued interest of Rs. 10,34,333.33 ps., as on date of settlement 09/01/2002 i.e.,

worth consideration of Rs. 4,60,00,000/- + 10,34,333.33 ps., + Rs. 4,70,34,333.33 ps., and the said securities (which is hereinafter referred as security No. 1). This security No. 1 was to be physically delivered by the plaintiff bank to the defendant No. 1 within 15days from the date of settlement. It was further agreed that instead of paying of the sale consideration of Rs. 4,70,34,333.33 ps., in cash to the plaintiff, defendant No. 1 will purchase Government securities GOI 8.07% Government Stock 2017 having face value of Rs. 4 crores of which the market value as on the date of settlement was settled at Rs. 4,04,00,000/- with accrued interest of Rs. 35,866.67 ps., having total value of Rs. 4,04,00,000/- + Rs. 35,866.67 ps. = Rs. 4,04,35,866.67 ps. (which is hereinafter referred to as Govt. security No. 2) were to be physically delivered by the defendant No. 1 company to the plaintiff bank within 45 days from the date of settlement. Defendant No. 1 was to pay difference amount of Rs. 4,17,34,333.33 ps. - Rs. 4,04,35,866.87 ps. = Rs. 65,98,466.66 ps.

5. Plaintiff bank further pleads that plaintiff bank physically delivered and handed over Government security No. 1 along with blank signed transfer form to Shri Pushpak Khot, who is representative and employee of defendant No. 1 company on 29/01/2002. Defendant No. 1 company paid the above stated difference amount of Rs. 65,98,466.66 ps., by issuing cheque No. 33686 dated 19/01/2002 drawn on ANZ Grindlatys Bank, Mumbai and thereby sale transaction dated 15/01/2002 was acted upon by the defendant No. 1 company, but it did not deliver the said Govet. Security No. 2.

Plaintiff has pleaded second transaction as under.

(B) In pursuance to letter dated 28/02/2002 issued to plaintiff by defendant Nos. 1 and 2. Plaintiff bank entrusted to defendant No. 1 following Government securities having face value of Rs. 5.5 crores

"10.00% GOI 2014	2.00 crores @	116.00
10.50% GOI 2014	2.00 crores @	120.00
12.90% MKVDC 2005	1.50 crores @	100.10."

	5.50 crores	

The above said securities (hereinafter referred to as Govt. security No. 3) were entrusted by the plaintiff to the defendant No. 1 for selling the same for consideration of Rs. 6,40,32,347.48 ps., of the said Govt. security No. 3 was to be physically delivered by the plaintiff bank to the defendant No. 1 within 15 days from 28/02/2002. It was further agreed that defendant No. 1 instead of paying the said sale consideration of Rs. 6,40,32,347.48 ps., in cash to the plaintiff bank will purchase Govt. securities under the 6 scripts GOI 7.50 Government Stock 2010 having face value of Rs. 5.5 crores @ 103 for total consideration of Rs. 5,79,56,250/- (herein after referred to as Govt. security No. 4). Said security No. 4 were to be physically delivered by the defendant No. 1 company to the plaintiff bank within 45 days from 28/02/2002. The defendant No. 1 company was to pay difference amount of Rs. 6,40,32,347.48 ps. - Rs. 5,79,56,250/- = Rs. 60,76,097.48 ps.

6. In confirmation of the above said transaction datd

28/02/2002, plaintiff bank issued letter dated 28/02/2002 by fax as well as by courier services to defendant No. 1 company and as per trade practice physically delivered Government security No. 3 along with blank signed transfer forms to Shri Pushpak Khot, who is employee of defendant No. 1 company on 07/03/2002. Out of these forms, 5 forms were not filled-in properly. Defendant No. 1 company called upon the plaintiff to sign 5 transfer forms duly printed which were sent on 16/03/2002. Employee of defendant No. 1 company handed over 13 demand drafts of total consideration of Rs. 60,76,097.48 ps. Thus, transaction dated 28/02/2002 was acted upon by defendant No. 1 company did not deliver the Government security No. 4. Last date for delivery of security No. 4 by defendant No. 1 was 14/04/2002.

7. According to the plaintiff bank as per the transaction No. 1 dated 15/01/2002, defendant was under the contractual and legal obligation to purchase and deliver security No. 2 on or before 05/03/2002 vide in respect of transaction dated 28/02/202. Defendant No. 1 was under contractual and obligation to purchase and deliver Government security No. 4 before 14/04/2002, defendant No. 1 failed to do so. Defendant No. 1 company telephonically intimated that as regarding transaction dated 28/02/2002, it has made deal with defendant No. 3 M/s, Century Dealers Pvt. Ltd., inspite of the assurances defendant No. 1 company did not deliver said security. Plaintiff issued 2 separate notices both dated 30/04/2002 to defendant No. 1 and was called upon to deliver Government security Nos. 2 and 4 as agreed or in the alternatively to return the Government security Nos. 1 and 2

delivered by the plaintiff bank or to pay the consideration thereof along with interest thereof. Despite notice, defendant No. 1 neither gave any proper reply to both the notices, nor sent Government security Nos. 2 and 4.

8. Plaintiff bank has further pleaded that as the Government securities were not in possession of the plaintiff bank in physical form, Commissioner of Corporation State of Maharashtra, in pursuance of the report of R.B.I., and report of Co-operative department dissolved the governing body of board of directors as per order dated 10/05/2002 and an Administrator was appointed. Report was also lodged with police station City Kotwali by the Divisional Joint Registrar on 14/04/2002 and it was found that defendant No. 1 has criminally mis-appropriated the said Government security No. 1 and 3 and consideration thereof has been criminally mis-appropriated and thereby committed an offence of breach of trust.

9. Plaintiff bank further contended that defendant No. 1 company through its Advocate Adhia and Adhia, Mumbai has sent reply dated 29/05/2002 and 03/06/2002 to the notice dated 30/04/2002 issued by the plaintiff bank. In the said reply in respect of transaction dated 15/01/2002, defendant No. 1 contended that it is a non-banking finance company and is not having dealers license of wholesale debt market to sale and purchase Government securities. As such, defendant No. 1 has forwarded security No. 1 to defendant No. 5 for its sale and for purchase Government security No. 2 from out of the consideration thereof and that

defendant No. 5 company has forwarded the same and defendant No. 1 is taking action against defendant No. 5. As far as, transaction dated 28/02/2002 is concerned, it was replied that defendant No. 1 has not entered into any transaction in respect of security No. 3, but it is defendant No. 3, who has entered into the said transaction. Defendant No. 1 has denied the transaction, though it was defendant No. 1, who entered into the contract with the plaintiff bank and paid the difference amount as mentioned above, and it was defendant No. 1 to whom physically deliver of security Nos. 1 and 3 was made. Though the security were delivered to defendant No. 1 and it sold the security Nos. 1 and 3, but did not purchase Government security Nos. 3 and 4 and mis-appropriated the sale consideration acting in collusion with defendant Nos. 3 to 6.

10. Plaintiff bank has further contended that police investigated the matter and it was found that defendant Nos. 3 and 5 are the companies registered with RBI and defendant Nos. 4 and 6 are its Directors-cum-Chief Executive Officers. Defendant Nos. 1, 3 and 5 are sister concerns and defendant Nos. 2, 4, 6, 5A and 5B are business associates and are acting in collusion and they have mis-appropriated the Government securities. These defendants dishonestly induced to deliver Government security Nos. 1 and 2 and the fraud the plaintiff bank and public at large. Police registered offence under Section 120-B, 405, 406, 409, 420, 467, 470 r/w Section 34 of Indian Penal Code against defendant Nos. 1 to 6 and defendant Nos. 2, 4, and 6 were arrested. During the investigation, police found that defendant Nos. 5A and 5B are the

directors of defendant No. 5 company and are also responsible. All the defendants have sold security Nos. 1 and 3 to different persons and different places. From out of Government security No. 3, the security worth Rs. 1.5 crores MKVDC bonds are lying with defendant No. 7bank which were handed over to it by defendant Nos. 1 and 2. These securities are still in the name of plaintiff bank. Defendant No. 7 is also party to the said fraud and conspiracy and has unlawfully kept security worth Rs. 1.5 crores. Plaintiff has amended the plaint and pleaded that during the investigation by the police and inquiry by Commission of Co-operative Society and during the course of hearing in similar matters by Hon'ble High Court in the cases reported in 2003(4) Mah.L.J ., 1070, and 2004 (3) BCR, 555, it was observed that defendant Nos. 1 to 6 by adopting the same modus operandi defrauded and cheated many other co-operative banks in the State of Maharashtra by hatching conspiracy. Defendant Nos. 1 and 2 defrauded the plaintiff bank and took custody of Government security Nos. 1 and 3 under the dealing dated 15/01/2002 and 28/02/2002 by falsely representing to the plaintiff bank in lieu and by exchange of security Nos. 1 and 2. Defendant Nos. 1 and 2 still possess Government security Nos. 2 and 4 for the plaintiff. Government security Nos. 1 and 3 were entrusted to defendant Nos. 1 and 2 for reinvestment. But defendant Nos. 1 to 6 pledged 1.5 crores MKVDC bonds with defendant No. 7 by committing criminal breach of trust. Said pledged is not binding with the plaintiff bank. Defendants showed inter-se transfer of the securities and split and passed over the securities one by one and converted the proceeds thereof for their

own use. The securities passed by them are stolen property within the meaning of Section 410 of IPC. Police have freezed all the securities under Section 91 of Cr.P.C . The holders of the securities claiming from defendant Nos. 1 to 6 have dishonestly received and retained the stolen property and they are recipient of stolen property which is an offence under Section 411 of IPC. Defendant No. 7 forged the valuable securities which are the subject matter of offence in criminal case No. 847/2002 pending before Chief Judicial Magistrate, Amravati. The present suit is off-shoot of what is notoriously known as Government securities scam of Maharashtra which has shaken various Co-operative banks in Maharashtra. In criminal Revision No. 46/2004, District Judge has held that property i.e. Rs. 1.5 crores MKVDC bonds are stolen property. Said order was challenged before Hon'ble High Court in writ petition No. 66/2007, which was dismissed.

11. It is further contended by plaintiff bank that with the permission of Hon'ble High Court and District Judge, Chief Judicial Magistrate opened D-Mat Account in HDFC bank bearing account CSG No. 020003 and directed the police to transfer the freezed securities in that account. Said order was challenged by 4 different revisions which are pending. However, police has only done the work of postman and not implemented the order of Chief Judicial Magistrate. As such, the securities have not been collected. Transaction dated 15/01/2002 and 28/02/2002 are tainted with fraud , cheating, forgery and criminal breach of trust and criminal mis-appropriation and are thus, illegal transactions, void ab-initio and

not binding on plaintiff bank. Plaintiff bank continues to be the sole, absolute and exclusive owner of Government security Nos. 1 and 3 and it is the plaintiff bank, who is entitled to retain and keep the said amount. Plaintiff has submitted that this Court be pleased to direct RBI and Security and Exchange Board of India (SEBI) to transfer security Nos. 1 and 2 and accrued interest thereon, now existing in electronic form freezed by the police authority from the account of defendant No. 1 to 6 or any person claiming through them to the D-Mat SGL account No. SG 0201123 of the plaintiff bank opened with Maharashtra State Co-operative Bank, Mumbai.

12. Plaintiff bank has further contended that due to the publicity of securities scam a panic was created amongst the depositors and creditors, who all of sudden and over night started withdrawing the amount. Plaintiff bank has suffered business losses due to it and has claimed Rs. One crore towards damages. Plaintiff has claimed as under.

i) Rs. 4,04,35,866.67 ps. Amount payable under the transaction dated 15/01/2002 in respect of Govt. security Nos. 1 and 2.

ii) Rs. 61,15,232.00 ps. Interest @ 24% p.a., on the above sum from 19/01/2002 till 05/09/2002.

iii) Rs. 26,96,986.00 ps. Interest which the plaintiff would have received from RBI on the Government

		security No. 2 if the said would have been delivered to plaintiff bank.
iv)	Rs. 5,79,56,250.00 ps.	Amount payable under the transaction dated 28/02/2002 in respect of Govt. security Nos. 3 and 4.
v)	Rs. 72,40,562.00 ps.	Interest on the above sum @ 24% p.a. From 28/02/2002 till 05/09/2002.
vi)	Rs. 31,41,507.00 ps.	Interest which the plaintiff bank would have received from RBI on the Govt. security No. 4 if the same would have been delivered to plaintiff bank.
	Rs. 11,75,86,403.67 ps.	Total.
	Rs. 1,00,00,000.00 ps.	Claim of damages as mentioned in para 9.
	==========	
	Rs. 12,75,86,403.67 ps.	Grand Total.

13. Plaintiff has prayed for

(1) plaintiff has claimed as regarding transaction dated 15/01/2002, delivery of security No. 2 and alternatively return of security No. 1 along with interest @ 24% p.a.

(2) In pursuance of transaction dated 28/02/2002, plaintiff has claimed delivery of security No. 4 and the alternatively return of security No. 3 along with interest @ 24% p.a.

(3) A money decree of Rs. 12,75,86,403.67 ps., along with interest @ 24% p.a., from 05/09/2002 till its realization from all the

defendants jointly and severally.

(4) Money decree of Rs. 1,00,00,000/- towards damages along with interest from the date of suit till its realization.

(5) Cost of the suit.

(6) Transfer of security Nos. 1 and 3 and accrued benefits now existing in different forms freezed by the police authority from the account of defendant Nos. 1 to 6 or any person claiming through them to the D-Mat SGL Account No. SG 020123 of the plaintiff bank.

14. Despite service of summons to defendant Nos. 5 and 6, they failed to appear, hence, suit is proceeded ex-parte against defendant Nos. 5 and 6.

15. Defendant Nos. 1 and 2 have filed their written statement at Exh. 107. Defendant Nos. 1 and 2 have admitted that defendant Nos. 1 company is dealing in Government securities with the plaintiff bank since 1998 and there was no default at any point of time. They have admitted to enter into transaction as mentioned in para 4-A of the plaint. However, denied transaction stated in para 4-B of the plaint. They have submitted that these defendants have paid the difference amount of Rs. 65,98,466.66 ps., to the plaintiff. For the purchase and delivery of GOI-2017, defendant No. 1 had instructed defendant No. 5 Home Trade Ltd. To purchase securities on behalf of plaintiff and also paid the entire consideration to these securities to Home Trade Ltd. Home Trade Ltd., confirmed to deliver these securities directly to the plaintiff. As per rule it is

only the member of a Whole Sale Debt Market, registered with SEBI, which could deal in Government securities transactions. Defendant No. 1 is not a member of wholesale debt market. As such, these securities were sourced from Home Trade Ltd., which was registered wholesale debt market member and a reputed company. The remedy available to the plaintiff is against defendant No. 5. As regarding transaction stated in para 4-B in plaint, defendant Nos. 1 and 2 contended that they have no concerned with the said transaction and even the difference amount was paid by defendant No. 3 directly and plaintiff has remedy from defendant No. 3. Defendant Nos. 1 and 2 have also admitted that police have investigated the matter and they would be defending the proceeding in the criminal Court. These defendants have also denied any collusion with defendant Nos. 3 to 6.

16. Defendant Nos. 1 and 2 have further submitted that they are not aware whether MKVDC bonds are lying with defendant No. 7. These defendants denied that they are acting in collusion with defendant Nos. 3 to 6 including defendant No. 5-A and 5-B and defrauded and cheated plaintiff bank and other Co-operative banks in Maharashtra. They have denied that security No. 1 and 3 were entrusted to these defendants for reinvestment and that they committed criminal breach of trust and mis-appropriation. They have also denied that by playing fraud they transferred the securities inter-se. All the other allegations were denied by these defendants. These defendants have also contented that though plaintiff has received 1.5 crores MKVDC bonds on supratnama they

are claiming for these securities. These defendants also denied the prayer of plaintiff for directing SEBI and RBI to transfer all the securities freezed by the police, from the account of defendant Nos. 1 to 6 or all the persons claiming through them to the D-Mat SGL Account No. SG 02123 of the plaintiff bank.

17. Defendant Nos. 1 and 2 have further denied all the contentions and prayer of plaintiff bank. In their additional statement, they have raised the ground of non-joinder and mis-joinder of necessary parties. They have contended that the company is the separate entity which can be and should be sued in its own name. Defendant No. 2 cannot be sued for the acts of the company merely because he is director of defendant No. 1 company. Defendant No. 2 has been mis-joined in the suit and suit is liable to be dismissed against defendant No. 2. These defendants have also raised the ground that suit is bad for non-joinder of necessary parties i.e., the persons, who were owning the securities sold by the plaintiff till they were freezed by the police. They have contended that since the last owner of the securities has acquired titled of the securities, they are necessary parties, as right to the securities are to be decided in the suit.

18. These defendants also raised the ground that inquiry was conducted under Section 88 of Maharashtra Co-Operative Societies Act, wherein issue No. 5 was specifically regarding sale and purchase of the Government securities dated 15/02/2002 and 28/02/2002. The subject matter of the inquiry more particularly

issue No. 5 is directly and substantially same in this suit also. Said inquiry is completed and findings are given nd directors of the plaintiff bank are held liable to make good the loss caused to the plaintiff bank by paying Rs. 11,21,80,388.33 ps., along with interest. Plaintiff bank has obtained recovery certificate and has also filed execution proceedings before the Civil Court, Amravati. Once the issue is decided by competent Court and the same issue, being res-judicata, cannot be decided again and the instant suit deserves to be dismissed. These defendants have also raised the ground that the suit is bad for non-joinder of the directors.

19. Defendant Nos. 1 and 2 have further denied the prayer clause No. 4 on the ground that the plaintiff is seeking transfer of freezed securities from RBI and SEBI without joining them and present owners of the securities and as such, the suit is bad for non-joinder of necessary parties. Plaintiff claims that these transactions are void ab-initio and it is the owner of said securities and is praying for transfer of freezed securities directly from RBI and SEBI, if the bank seeking such decree, then bank is also liable to refund the difference amount received by it of Rs. 65,98,466.66 ps.. in respect of security No. 1 to the defendant No. 1, since this amount was paid by defendant Nos. 1 and 2.

20. Defendant Nos. 1 and 2 have further contented that they have paid the consideration of security No. 2 to the Home Trade Ltd., for purchasing the same and delivered it to the plaintiff. Defendant No. 5 has failed to deliver the securities to the plaintiff,

but also other clients of defendant No. 1, therefore, defendant No. 1 has referred its dispute with Home Trade Ltd., to the sole arbitrator Shailendra Shah of the Pune Stock Exchange vide case No. 273/2002, wherein Award was passed on 17/01/2003 whereby said Home Trade Ltd., was directed to deliver 12 securities deal on 30/01/2003 to defendant No. 1 and on its failure to pay Rs. 16,89,04,938.93 ps., along with interest @ 9% p.a. These defendants have filed execution proceedings before Hon'ble District Judge, Mumbai vide application No. 239/2005 and the same is pending. If this Court passes a decree infavour of the plaintiff and against these defendants, then the decreetal amount to be recovered from defendant No. 5 by virtue of said arbitration award. These defendants have prayed for dismissal of suit.

21. Defendant Nos. 3 and 4 have filed their written statement at Exh. 18 and have denied that there is any cause of action against them in the plaint itself. The contents of the plaint does not show any direct or indirect dealing with defendant Nos. 3 and 4. The suit is deserves to be dismissed on this ground. These defendants have further pleaded that since the plaint shows transaction between plaintiff and defendant Nos. 1 and 2, they do not make any comment, but these defendants have denied that security No. 4 was to be delivered by it on behalf of defendant No. 1. Defendant Nos. 3 and 4 have denied receiving of any security. It has only admitted that defendant No. 4 was arrested. These defendant have denied fraud, collusion or conspiracy and denied all the claims of the plaintiff. They have prayed for dismissal of suit

against them.

22. Defendant Nos. 5-A and 5-B have filed their written statements at Exh. 100 and Exh. 104 respectively and have pleaded that the suit is barred by limitation as against them and it be dismissed. They have further pleaded that they have been joined in the suit only because they were directors of defendant No. 5 company and they cannot be made liable for the acts of the company. Directors cannot be personally made liable for the acts of the company. The suit suffers from mis-joinder of necessary parties and cause of action and on this ground also it needs to be dismissed. They have further contended that they resigned from defendant No. 5 company w.e.f. 25/04/2002 and 26/04/2002 respectively. They have denied that defendant No. 5 is sister concern of any other defendants and also denied collusion, conspiracy, mis-appropriation etc. They have prayed for dismissal of suit.

23. Defendant No. 7 bank has filed its written statement at Exh. 24. Defendant No. 7 bank has pleaded that defendant No. 2 had availed cash credit limit to the tune of Rs. 20 crores from it. Defendant No. 2 deposited MKVDC bonds worth Rs. 1.5 crores as security for said cash credit. At the time of availing the cash credit, defendant No. 2 submitted MKVDC bonds worth Rs. 1.5 crores along with transfer forms duly signed by the concerned officer of the plaintiff. Relying on this security transfer forms, defendant No. 7 bank advanced cash credit facility to the defendant No. 2 for Rs. 20 crores. It has further contended that the transaction dated

28/02/2002 was acted upon and was concluded contract. It has denied that it was involving in any fraud, collusion, mis-appropriation or breach of trust. It has admitted that MKVDC bonds worth Rs. 1.5 crores were seized by the police authority in criminal case No. 487/2002 and said bonds are handed over to the plaintiff bank on supratnama vide order dated 14/03/2004 passed by Chief Judicial Magistrate, Amravati. It has also admitted that Criminal Revision No. 47/2004 filed by them was dismissed by Sessions Judge Amravati vide its order dated 14/08/2006. It has further contended that writ was filed against the order of District Court, which was disposed of by the Hon'ble High Court as per order dated 17/09/2007.

24. In its special pleadings, it has pleaded that defendant No. 7 bank is scheduled co-operative bank and it does business activities of advancing loan and advances to the prospected borrowers and also to accept deposit from the public. While advancing the loans, bank secures its loans and advances by availing movable and immovable properties, Government securities, shares etc. Defendant No. 2 availed cash credit facility of Rs. 20,00,000/- with the said bank, which was sanctioned on 05/03/2001. Securities and PSU bonds were obtained as security to the loan. MKVDC bonds worth Rs. 1.5 crores was also furnished by defendant No. 2 as security to the loan. It was accompanied with transfer forms duly signed by the plaintiff bank. Defendant No. 7 bank has Banker's lien over the said MKVDC bonds deposited by defendant No. 2 towards security of the cash credit facility. MKVDC

bonds are pledged to defendant No. 7. It has further contended that defendant No. 7 has absolute right over the MKVDC bonds worth Rs. 1.5 crores. It has prayed for dismissal of suit.

25. On rival pleadings of the parties following issues were framed and I record my findings against them for the reason given below.

ISSUES .	***FINDINGS.***
1) Whether plaintiff bank proves that as per transaction dated 15/01/2002 entered between plaintiff and defendant No 1, plaintiff bank entrusted Government securities (referred as security No. 1) total worth Rs. 4 crores with defendant No. 1 for selling the same with accrued interest for consideration of Rs. 4,70,34,333.33 ps. ?.	Negative.
2) Whether plaintiff bank further proves that it was further agreed that instead of paying said amount Rs. 4,70,34,333.33 ps., defendants will purchase Government securities "GOI" 8.07% , Government Stock, "2017" with accrued interest worth Rs. 4,04,35,866.67 ps. (referred as Government security No. 2) and delivered the said securities to the plaintiff bank within 45 days from the date of settlement ?.	Negative.

3) Whether plaintiff bank further proves that as per transaction dated 28/02/2002 entered between plaintiff and defendant Nos. 1 & 2, plaintiff bank entrusted Government securities (referred as security No. 3) total worth Rs. 5.5 crores as described in para No. 4-b of the plaint for selling the same for consideration of Rs. 6,40,32,347.48 ps. ?. ..... Negative.

4) Whether plaintiff bank further proves that, it was further agreed that instead of paying amount of Rs. 6,40,32,347.48 ps., the defendant No. 1 would purchase Government securities under the script, "GOI 7.50% " "Government Stock, 2010" having face value of Rs. 5.50 crores @ 103 for total consideration of Rs. 5,79,56,250.00 ps. (referred as Government security No. 4) and delivered the same to the plaintiff bank within 45 days from 28/02/2002 ? .....Negative.

5) Whether plaintiff bank further proves that defendant No. 1 failed to deliver Government securities referred at Nos. 2and 4 in the plaint to the plaintiff within specified time ?. ..... Negative.

6) Whether plaintiff bank further proves that

defendant Nos. 1 and 2 in collusion with defendant Nos. 3 to 6 including defendant Nos. 5-a and 5-b mis-appropriated sale consideration of Government securities Nos. 1 and 3 and did not purchase Government securities Nos. 2 and 4 ?. ..... Negative.

6-A) Whether plaintiff proves that alleged transaction dated 15/01/2002 and 28/02/2002 being vitiated by fraud, cheating, forgery, criminal breach of trust, criminal mis-appropriation, criminal conspiracy by defendant Nos. 1 to 6, abated by defendant No. 7 and being against public interest and public policy are void ab-initio and not binding on the plaintiff ?. .....Negative.

7) Whether plaintiff bank further proves that out of Government security No. 3, security worth Rs. 1.5 crores of Maharashtra Krishna Valley Development Corporation are lying with defendant No. 7, which are in the name of plaintiff bank ?. ..... Redundant.

7-A) Whether plaintiff bank proves that defendant No. 7 has abated defendant Nos. 1 to 6 in mis-appropriating Government securities Nos. 1 and 3 ?. .....Negative.

8) Whether plaintiff bank further proves that it is entitled to receive Government securities Nos. 1 and 3 or Government securities Nos. 2 and 4 in physical form or its price along with interest thereon ?. .....Negative.

8-A) Whether Government securities Nos. 1 and 3 and accrued benefits now existing in electronic form is liable to be transferred in D-Mat SGL Account No. SG 020123 of the plaintiff bank ?....Negative.

9) Whether plaintiff bank is entitled to interest, as claimed ?. .....Redundant.

10) Whether plaintiff bank is entitled for damages of Rs. One crore along with interest thereon from the date of suit till its realization ?. .....Negative.

11) Whether plaintiff bank is entitled to decree, as claimed ?. .....Negative.

12) Whether defendant Nos. 1 and 2 prove that they are only concerned with Government securities Nos. 1 and 2, as described in para No. 4-A of the plaint ?. .... Affirmative.

13) Whether defendant Nos. 1 and 2 further prove that they paid entire consideration to defendant No. 5 for purchase of Government security No. 2 and directed it to deliver the said security to the plaintiff bank directly ?. .....Affirmative.

14) Whether suit is barred by res-judicata ?. ..... Negative.

15) Whether defendant Nos. 1 and 2 prove that Government securities worth Rs. 1.5 crores are delivered to the plaintiff bank ?. .....Redundant.

16) Whether defendant Nos. 1 and 2 further prove that as per arbitration Award dated 17/01/2003, defendant No. 5 is liable to make good loss, if any, caused to the plaintiff bank ?. .....Negative.

17) Whether suit is barred by limitation as against defendant Nos. 5-a and 5-b ?. .....Negative.

18) Whether defendant No. 5-b proves that he is not liable for the defendant No. 5 company ?.....Redundant.

19) Whether defendant No. 7 proves that it has lien over Government securities MKVDC Bonds of face value of Rs. 1.50 crores against cash credit

limit sanctioned in favour of defendant No. 2 ?....Affirmative.

19-A) Whether plaintiff bank proves that the pledge of Maharashtra Krushna Valley Development Corporation Bond of 2005 worth Rs. 1.50 crores by defendant Nos. 1 and 2 in favour of defendant No. 7 is not binding on the plaintiff bank ?. ..... Negative.

20) Whether defendant No. 5-a and 5-b prove that suit is beyond jurisdiction of this Court ?. .....Negative.

20-A) Whether suit is bad for non-joinder of necessary parties ?. .....Affirmative.

20-B) Whether the suit is barred as per the provisions of Section 22 (E) of the Securities Contracts (Regulation) Act 1956 ?. .....Negative.

20-C) Whether suit is barred or this Court lacks jurisdiction to try the present in view of the provisions of Section 15 (K) and or Section 20(A) of Securities and Exchange Board of India Act 1992 ?. .....Negative.

21) What relief cost and order ?. As per final order.

R E A S O N S.

26. ***ADMITTED FACTS*** . Following facts are admitted by the parties.

(1) ***Security No. 1*** = Government security GOI @ 10.70% 2020 (8 in numbers) NG-1 to NG-8, each having face value of Rs. 50,00,000/-, total Rs. 4 crores.

(2) ***Security No. 2*** = Government Security GOI @ 8.07% 2017 having face value of Rs. 4 crores.

(3) ***Security No. 3*** = Government securities. :-

10% GOI 2014	=	2 crores	@ 116.00
10.5% GOI 2014	=	2 croes	@ 120.00
12.90% MKVDC Bonds 2005	=	1.5 crores	@ 100.10

Total value of Rs. 5.5 crores.

(4) ***Security No. 4*** = Government Security GOI @ 7.50% 2010 having value of Rs. 5.5 crores.

(5) Defendant No. 1 paid difference amount of Rs. 65,98,466.66 ps., to the plaintiff bank by cheque No. 33686 dated 19/01/2002 drawn on ANZ Grindlays Bank, Mumbai.

27. In order to prove its case, plaintiff has examined two witnesses i.e., PW.1 Dattatray Mawalkar, who is managing director of plaintiff bank and PW.2 Mohd. Aslam Qureshi, who is the Police Inspector and investigated the concerned crime No. 75/2002 of City

Kotwali Police Station. None of the defendants examined any witness. Plaintiff has filed notes of arguments at Exh. 395, 396, 397, 398, 460 reply notes at Exh. 432, synopsis at Exh. 405, citations at Exh. 407, reply notes at Exh. 437 and summary at Exh. 435. Defendant No. 1 and 2 have filed notes of arguments at Exh. 412, 423, 424, 442, summary at Exh. 443. Defendant No. 5-a has filed his notes of argument at Exh. 418. Defendant No. 7 has filed its notes of arguments at Exh. 429.

28. Plaintiff bank as well as defendants have cited host of citations in their above referred notes of arguments. This Court has referred to all the citations cited by all the parties and have cited relevant citations in the reasoning. The other citations which are not taken into consideration defer with the facts of the case.

29. ***AS TO ISSUE NO. 1, 2, 3, 4 and 12***:- Plaintiff bank alleged the non compliance of the contract by the defendants particularly defendant Nos. 1 and 2 on various grounds and also alleged fraud on the part of defendants. In order to find out these facts, this Court has to first look into the transaction as pleaded by the plaintiff bank.

30. Plaintiff is seeking enforcement of transactions dated 15/01/2002 and 28/02/2002. The first transaction is pleaded in para 4-a of the plaint. Para 4-a is reproduced in the verbatim in the facts stated above. According to this transaction dated 15/01/2002, plaintiff bank entrusted defendant No. 1, Government Security No.1

for selling the same for consideration of Rs. 4.60 crores with accrued interest of Rs. 10,54,333.33 ps. Delivery of this security No. 1 was to be made by the plaintiff within 15 days of the date of settlement. It was further agreed that defendant No. 1 instead of paying the sale consideration of Rs. 4,70,34,333.33 ps., in cash to the plaintiff, will purchase Government Security No. 2 having face value of Rs. 4 crores and market value on the date of settlement of Rs. 4.04 crores with accrued interest of Rs. 35,866.67 ps., total Rs. 4,04,35,866.67 ps., and physically deliver security No. 2 to the plaintiff bank within 45 days from the date of settlement. Defendant No. 1 was to pay difference amount of Rs. 65,98,466.66 ps.

31. Careful reading of this transaction would show that there are two transactions stated therein i.e., one is of sale of security No. 1 by defendant No. 1 and the another is of purchasing and delivering of security No. 2 by defendant No. 1 company to the plaintiff bank.

32. Plaintiff has admitted that defendant No. 1 company paid difference amount of Rs. 65,98,466.66 ps., by cheque dated 19/01/2002. Careful reading of this transaction further shows that the rates of sale and purchase were also fixed between the parties and accordingly difference amount of Rs. 65,98,466.66 ps., was calculated.

33. According to the defendant Nos. 1 and 2, first transaction as pleaded in para 4-A of the plaint was of sale and

purchase of security Nos. 1 and 2. According to it, defendant No. 1 is a broker through whom security Nos. 1 and 2 were to be sold and purchased. Security No. 1 was sold to defendant No. 1 on 15/01/2002 by the plaintiff and defendant No. 1 paid difference amount of Rs. 65,98,466.66 ps. to the plaintiff and paid consideration of security No. 2 to defendant No. 5 and directed defendant No. 5 to deliver security No. 2 to the plaintiff bank. Defendant No. 1 has pleaded in his written statement that since he has not Wholesale Debt Market member, he instructed Home Trade to purchase security No. 2 and to supply it to the plaintiff bank. It is not dispute that defendant No. 1 is not a member of Wholesale Debt Market. As such he could not buy securities from the W.D.M. Defendant No. 5 failed to deliver security No. 2 to the plaintiff bank. Since, defendant No. 1 is a broker the remedy available to the plaintiff bank is against the defendant No. 5 only.

34. Defendant No. 5 is proceeded ex-parte. Defendant No. 7 has denied the transaction for want of knowledge. Defendant No. 5-a and 5-b does not say anything about this transaction.

35. In order to find out whether plaintiff has proved the said transaction, the evidence and documents are to be looked into. Plaintiff has examined two witnesses. PW.1 is the managing director of the plaintiff bank, who has filed his affidavit in lieu of oral evidence at Exh. 141, who is working with plaintiff bank since 1976. Since March 2002, he is working as managing director. From 1996 to 2002, he was also Manager of the plaintiff bank. He states to have dealt with the suit transaction and is conversant with the facts

of the case.

36. In para 8 of his affidavit, PW.1 has deposed that as per transaction dated 15/01/2002, plaintiff bank was to entrust Government Security No. 1 to defendant Nos. 1 and 2 and in lieu thereof defendant No. 1 company was to procure security No. 2, date of settlement was to be taken as 19/01/2002. Defendant No. 1 was to deliver security No. 2 within 45 days in lieu of security No. 1.

37. PW.1 has further deposed that formar managing director Shri S.N. Joshi delivered and handed over the said security No. 1 along with blank signed transfer form to Shri Pushpak Khot on 29/01/2002, who was employee of defendant No. 1 company. Pushpak Khot acknowledged the receipt which is at Exh. 208, which shows that security No. 1 was handed over to defendant No. 1 company. It has further come in the evidence of P.W. 1 that defendant No. 1 paid difference amount of the first transaction Rs. 65,98,466.66 ps., by cheque dated 19/01/2002 drawn on ANZ Grind Lay's Bank, Mumbai. Payment of difference amount is not at all disputed by any party. It has also come on the record in the evidence of PW.1 that plaintiff bank issued two notices dated 30/04/2002 calling upon the defendant No. 1 to return security Nos. 1 and 3 or to deliver security Nos. 2 and 4 to which defendant No. 1 replied through his counsel Adhia and Adhia by notices dated 29/05/2002 Exh. 215 and 03/06/2002 Exh. 216. In the said notice, defendant No. 1 contended that it is not a member of wholesale

debt market. As such, it forwarded security No. 1 to defendant No. 5 for its exchange with security No. 2, but defendant No. 5 has not forwarded securities and defendant No. 1 company is taking action against defendant No. 5. P.W. 1 has also deposed that defendant No. 1 has received security Nos. 1 and 3 and in lieu thereof defendant No. 1 was to deliver security Nos. 2 and 4, but defendant No. 1 un-authorizedly, clandestinely, fraudulently passed over security Nos. 1 and 3 to defendant Nos. 3 to 7 with an intention to cheat the plaintiff bank.

38. In his cross-examination, P.W. 1 has admitted that he does not have any knowledge about the transaction dated 15/01/2002 and 28/02/2002. When defendant No. 1 put a question to P.W. 1 that whether securities were given to defendant No. 1 for selling them in the market and purchasing the same, P.W. 1 answered that securities were given for exchange, and it was look out of defendant No. 1 whether to exchange it or to sell and buy new securities in its place. P.W. 1 has further stated that he does not know whether defendant No. 5 is a member of whole sale debt market. Issuance of notices Exh. 192 and Exh. 193 are admitted by P.W. 1, but he denies knowing the contents thereof. P.W. 1 has also admitted that he does not know to which transaction amount of Rs. 65 lacs and odd amount was received by the plaintiff bank. He has also admitted that security scam took place during the tenure of Shri S.N. Joshi and he cannot tell whether officers of the bank, board of directors had discussed with Shri Joshi regarding investment of securities and even he did not have any discussion

with Shri Joshi regarding securities. He has also admitted that he was the bank manager at the time when transaction took place and bank manager has nothing to do with securities transactions. He has also admitted that till today he has not dealt with the transaction of securities, sale and purchase and as such, he does not know details regarding transactions. P.W. 1 has also admitted in his cross examination that he does not know whether head office maintains any account in respect of transaction of Government securities and plaintiff bank has not maintained any account in respect of purchase and sale of securities. He has also admitted that plaintiff bank maintained account of securities purchased, sold or transferred it and that plaintiff bank has not filed account of Government securities as well as profit and loss account and balance sheet in the Court. PW. 1 also admitted that plaintiff bank did not direct defendant No. 1 for sale or purchase of any security.

39. Throughout the cross-examination by defendant Nos. 1 and 2, 5-a and defendant No. 7, P.W. 1 has deposed that the suit transactions were of exchange. In the cross-examination by defendant No. 5-a, P.W. 1 has deposed that plaintiff bank entered into transaction of exchange of Government security Nos. 1 and 3 with defendant Nos. 1 and 2. When a specific question was put by defendant No. 7 as to what does he mean by exchange. P.W. 1 gave answer that he gave one security and demanded another security in its place. Time and again P.W. 1 volunteered that the transaction was of exchange.

40. Plaintiff bank has also examined P.W. 2 Mohd. Usman

Qureshi, who is Sub-Inspector and investigating officer of crime No. 75/2002 of City Kotwali police station, Amravati. P.W. 2 has filed his evidence by way of affidavit in lieu of oral evidence at Exh. 281. According to him, he has investigated crime No. 75/2002, which is registered by him for offences punishable under Section 406, 409, 420, 468 r/w Section 34 and 120(B) of Indian Penal Code. He has also filed charge-sheet before the Court of Chief Judicial Magistrate Amravati, which was registered as Criminal Case No. 847/2002. According to this witness, this civil suit is arising out of crime No. 75/2002. He has deposed on the basis of record of this case which was inspected by him. As regarding transaction dated 15/01/2002, P.W. 2 has deposed that plaintiff bank entrusted security No. 1 to defendant Nos. 1 and 2 for its exchange with security No. 2. P.W. 2 has further deposed that defendant Nos. 2 to 6 hatched conspiracy and mis-appropriated security Nos. 1 and 3 entrusted by plaintiff bank to defendant Nos. 1 and 2 for its exchange by security Nos. 2 and 4. He has also deposed that in the statement recorded by him of Jugna Ladaya, she has stated that the difference amount of Rs. 65,98,466.66 ps., was on account of exchange of security Nos. 1 and 2.

41. In his cross-examination, P.W. 2 has admitted that Investigating Officer Shri Deshmukh has seized copy of agreement between defendant No. 1 and defendant No. 5 dated 25/01/2002 and 22/01/2002, which are filed on record at page Nos. 186 and 188 of charge-sheet Exh. 202 and that vide letter dated 04/07/2002 issued by Giltedge Management of Shri Deshmukh filed on page

365 Giltedge Management had sent original deal confirmation letter of Home Trade Ltd., for GOI 2017, which are on page 366 and 367 of charge-sheet Exh. 202. He has further admitted that it is correct to say that defendant No. 1 directed defendant No. 5 to supply directly Government security No. GOI 2017 to the plaintiff bank. He has also admitted I.O. Shri Deshmukh seized certified copy of statement of account of Giltdge management issued by Janta Sahakari Bank (Exh.380), which is filed at page No. 786 of charge-sheet Exh. 202. When a question was asked to P.W. 2 whether he has seen or seized any document or collected by him where word "exchange" has been mentioned, P.W. 1 gave answer that he did not, but in the complaint itself it is mentioned that securities were to be exchanged. He has also admitted that both the transactions are of sale and purchase and that defendant No. 1 directed defendant No. 5 to directly supply Government security No. 2 2017 to plaintiff bank. He has also admitted that defendant No. 1 paid sale consideration of security No. 2 2017 to defendant No. 5. He has also admitted that copies of documents executed between defendant No. 1 and defendant No. 5 were supplied to the plaintiff bank. He has also admitted that defendant No. 5 did not supply security No. 2 to the plaintiff bank or defendant No. 1.

42. In his re-cross-examination by defendant Nos. 1 and 2, PW.2 has admitted that as per statement of Jugna Ladhaya, an amount of Rs. 4,02,62,766/- was paid by defendant No. 1 company to Home Trade through Tirupati Urban Co-op. Bank by cheque No. 948619 drawn on Janta Co-Op. Bank for purchase of security No. 2

and he received copy of letter dated 23/01/2002 issued by Giltedge Management to Home Trade from Jugna. He has also admitted that I.O. Shri Deshmukh seized letter issued by Home Trade to Giltedge Management dated 06/12/2001, whereby defendant No. 1 company was requested by Home Trade to remit the amount of Rs. 9.5 crores to Tirupati Urban Co-op. Bank on behalf of Home Trade. He has further admitted seizure of documents under Exh. 246 from the plaintiff bank, which consists of deal confirmation between defendant No. 1 and defendant No. 5 in respect of security No. 2, contract note between Giltedge and Home Trade and letter issued between Giltedge and Home Trade and plaintiff bank filed at page No. 186 to 188 of Charge-sheet Exh. 202.

43. In order to prove the first transaction, plaintiff has relied upon certain documents i.e., deal confirmation letters Exh. 190 and Exh. 191, notice dated 30/04/2002 issued by the plaintiff Exh. 192 to defendant No.1, cheque dated 19/01/2002 drawn on ANZ Grindlay's bank issued by defendant No. 1. Notice issued by counsel for defendant No. 1 Adhia and Adhia dated 03/06/2002 Exh. 216, delivery letter Exh. 208.

44. This being fact finding Court, in order to determine the rights and liabilities of the contracting parties, it has to find out what the contract is and between whom. This Court has to further find out as to in what manner the contracts were executed so as to decide the rights and liabilities of the third parties affected by the suit transaction.

45. On perusal of transaction No. 1 as pleaded in para 4-a of the plaint, it can be seen that it has two transactions incorporated in it. The first leg is of sale of security No. 1 of the plaintiff by defendant No. 1 company and second leg is of purchase of security No. 2 by defendant No. 1 for the plaintiff. On perusal of evidence on record, it can be seen that both the witnesses have deposed that security No. 1 was to be given to defendant No. 1 and in lieu thereof defendant No. 1 was to deliver security No. 2. The evidence further shows that P.W. 1 and P.W. 2 have deposed that the transaction was of exchange rather than sale and purchase of securities. Throughout the cross-examination, PW.1 and PW.2 have been emphasizing on the word "exchange".

46. In order to find out as to what the transaction is, it is also necessary to verify the documents on record. Following are the documents filed on record by the plaintiff.

(A) ***Exh. 190 and Exh. 191 Deal Confirmation*** :- The deal confirmations are the documents from which the terms and conditions of the contract can be gathered. Deal confirmation filed on record at Exh. 190 and Exh. 191 are in respect of the first transaction. The very fact that there are two deal confirmations in respect of the first transaction makes it clear that the first transaction consist of two legs, first one is of the sale of security No.1 by the plaintiff bank and second one is of purchase of the security No. 2 by the plaintiff bank. Securities to be purchased and

sold are also different securities.

47. Perusal of Exh. 190 shows that Government security GOI 2020 of face value of Rs. 4 crores was to be sold @ Rs. 4,60,00,000/- along with accrued interest of Rs. 10,34,333.33 ps., total Rs. 4,70,34,333.33 ps., by plaintiff bank through defendant No. 1. This document was received by plaintiff bank from defendant No. 1 company by fax. The xerox copy filed on the record of the suit does not bear the endorsement of plaintiff bank in token of its acceptance, but document filed along with charge-sheet in record of criminal case No. 847/2002 bears endorsement of plaintiff bank showing acceptance.

48. Exh. 191 is a deal confirmation in respect of second leg of the first transaction for purchase of government security No. 2 GOI 2017 by plaintiff bank through defendant No. 1. The face value of security was Rs. 4 crores, which was to be purchased for Rs. 4.04,00,000/- along with accrued interest Rs. 35,866.67 ps., total Rs. 4,04,35,866.7 ps. This deal is also confirmed by the plaintiff bank by putting signature of the managing director, which is filed along with original charge-sheet Exh. 202. On perusal of deal confirmation Exh. 190 and Exh. 191, no doubt remains that the transaction No. 1 was in respect of sale of security No. 1 and purchase of security No. 2 by the plaintiff bank through defendant No. 1 company.

49. (B) ***Exh. 208 Letter dated 29/01/2002 from plaintiff***

bank to defendant No. 1. :- Plaintiff bank is also relying on letter Exh. 208 dated 29/01/2002 whereby security No. 1 was delivered to the employee of defendant No. 1 company Shri Pushpak Khot. Perusal of this document also shows that the subject of this letter is regarding delivery of GOI 2020 i.e., security No. 1 to the defendant No. 1 for sale of it and not for exchange.

50. ***© Exh. 192 Letter / notice dated 30/04/2002 issued by plaintiff bank to defendant No. 1***. :- This is the office copy of the letter issued by plaintiff bank to defendant No. 1. In this letter plaintiff bank has specifically stated that the security No. 1 was sold and defendant No. 1 was to purchase security No. 2 for the plaintiff bank. Plaintiff bank has also stated that it has received difference amount of Rs. 65,98,466.67 ps. This letter bear the signature of Managing Director of plaintiff bank i.e. P.W. 1.

51. ***(D) Exh. 216 Reply of defendant No. 1 to the notice of plaintiff bank.*** :- Defendant No. 1 company has replied to the notice issued by plaintiff bank dated 30/04/2002 filed at Exh. 192 by its reply dated 03/06/2002, which is at Exh. 216, wherein defendant No. 1 has admitted that they sold security No. 1 purchased from the plaintiff bank and have paid the difference amount of Rs. 65,98,466.66 ps., to the plaintiff bank and as per direction of the directors of the plaintiff bank defendant No. 1 has instructed the defendant No. 5 Home Trade to physically purchase the security on behalf of plaintiff bank and deliver it to the plaintiff bank.

52. ***(E) Exh. 337 Letter issued by P.W. 2 to RBI dated 23/05/2002***. :- This is a letter issued by PW. 2 to the General Manager, RBI seeking information in this letter PW. 2 has specifically stated that security No. 1 i.e. GOI 2020 was handed over by plaintiff bank for selling the same and he wanted to know to whom these securities were sold by defendant No. 1.

53. ***(F) Exh. 311 and Exh. 315 Statement of Jugna Lodhaya and Bina Sanghvi***. :- PW. 2 has recorded statements under Section 161 of Cr.P.C. of Jugna Ladhaya and Bina Sanghvi, who are employees of defendant No. 1 company. They have stated that defendant No. 1 took security No. 1 from plaintiff bank and sold it in the market and paid difference amount of Rs. 65,98,466.67 ps. They have further stated that defendant No. 1 also purchased GOI 2017 for plaintiff bank from Home Trade Ltd., and make payment in advance to Home Trade on 12/12/2001 and directed Home Trade to deliver the securities to plaintiff bank.

54. ***(G) Exh. 238 and Exh. 239 Letters issued by plaintiff bank to RBI dated 27/04/2002 and 07/05/2002***. :- These are the office copies of letters written by plaintiff bank to the RBI signed by Managing Director. This document also shows that first transaction was of sale of security No. 1 by the plaintiff bank and purchase of security No. 2 by the plaintiff bank through defendant Nos. 1 and 2.

55. ***(H) Exh. 246 and Exh. 247 Seizure panchanamas*** :- PW. 1 has admitted in his cross-examination that seizure memo Exh. 246 and Exh. 247, police seized documents from his custody.

PW.1 further admitted in his cross-examination that letter dated 25/01/2002 filed at page No. 186, 187 and 188 of charge-sheet Exh. 202 were seized from plaintiff bank through him. Letter dated 25/01/2002 is from defendant No. 1 to defendant No. 5 informing that it paid price of security No. 2 to it and directed defendant No. 5 to deliver security No. 2 to the plaintiff bank. This letter is at page No. 186 of charge-sheet Exh. 202. Similarly at page No. 187 there is contract note between defendant No. 1 and Home Trade whereby defendant No. 1 purchased security No. 2 2017 worth Rs. 4 crores from defendant No. 5. The contract note is at page No. 187 of charge-sheet Exh. 202. There is also letter dated 25/01/2002 issued by defendant No. 1 company to the Home Trade directing it to deliver security No. 2 to the plaintiff bank within 45 days. PW.1 has admitted that these letters and contract note were seized from the custody of bank through him. Seizure panchanama Exh. 246 also shows that these documents were seized by the police from the custody of plaintiff bank through PW. 1 Shri Dattatray Mavalkar, who is the Managing Director of the plaintiff bank. All these documents seized by police bears endorsement of receipt by the plaintiff bank.

56. Plaintiff has submitted that documents which are not proved cannot be looked into, and as such these documents cannot be considered. It is pertinent to note that proving of documents and proving of contents of documents are different from each other. As per Section 64 of the Evidence Act, a document is to be proved by placing the original before the Court i.e., primary evidence.

Secondly Section 67 of the Evidence Act provides that the contents of the document is to be proved by examining the executor thereof. The above documents at page No. 186 to 188 of charge-sheet are important documents connected with the suit transaction. Plaintiff is in custody of these documents. Since the charge-sheet is filed on record by the plaintiff, it can be said that these documents are filed by the plaintiff. Moreover, plaintiff is aware of these documents as these documents were seized from its custody. Despite this plaintiff failed to prove or to explain these documents. Plain reading of the documents at page 186 to 188 of charge-sheet Exh. 202 shows that defendant No. 1 purchased security No. 2 from defendant No. 5 and directed defendant No. 5 to deliver security No. 2 to the plaintiff bank. Letter dated 25/01/2002 filed at page No. 188 of charge-sheet Exh. 202, which was seized from the plaintiff bank shows that plaintiff bank was informed about the said transaction between defendant No. 1 and defendant No. 5.

57. All the documents on which plaintiff is relying to prove its transaction shows that the transaction was of sale and purchase, but plaintiff has not lead any evidence in respect of transaction of sale and purchase. The evidence on record of PW. 1 and 2 is in respect of exchange of security No. 1 with security No. 2, which is not at all the transaction between the parties. The documents on record and admissions of the witnesses in their cross-examination clearly goes to show that the transaction was of sale and purchase. Apart from this, there are various other documents on record which show that transaction No. 1 was of sale and purchase and not of

exchange.

58. In the notes of argument plaintiff has submitted that both the transactions were of exchange i.e., security No. 1 was entrusted to defendant No. 1 and defendant No. 1 was to deliver security No. 2 in exchange thereof. Similarly security No. 3 was entrusted to defendant No. 1 and defendant No. 1 was to deliver security No. 4 in exchange thereof.

59. The burden of proving the suit transaction is always on the plaintiff bank. Onus may shift on the defendants if plaintiff proved initial burden of proving the transaction. There is no pleading in respect of exchange in the entire plaint. Pleadings are in respect of sale of security Nos. 1 and 3 and purchase of security Nos. 2 and 4 by the plaintiff bank through defendant No. 1 company. Accordingly there was no issue in respect of transaction of exchange of securities. Moreover, none of the above stated documents show that the transaction was of exchange of securities. Secondly, plaintiff has neither pleaded that security No. 1 was sold to defendant No. 1.

60. The transaction No. 1 as pleaded shows that it was of sale of security No. 1 and purchase of security No. 2 by the plaintiff bank through defendant No. 1. However, what transpired between the parties is altogether different. Perusal of Deal confirmation Exh. 190 shows that it was defendant No. 1, who purchased security No. 1. The difference amount of Rs. 65,98,466.67 ps., is also paid by

defendant No. 1 from its own account. Delivery of security No. 1 is also taken by defendant No. 1.

61. Similarly other documents seized from plaintiff bank vide seizure memo Exh. 246 i.e., letters at page 186 and 188 and contract note dated 22/01/2002 at page 187 shows that security No. 2 was purchased by defendant No. 1 from defendant No. 5 and defendant No. 5 was directed to deliver security No. 2 to the plaintiff bank. These documents are filed on record by the plaintiff bank. These documents are also seized from the custody of plaintiff bank. Despite the fact that plaintiff bank was having knowledge of the above transaction, it did not feel it necessary to plead and prove the exact transaction as transpired between the parties.

62. The Indian Contract Act provides for rights and liabilities of the parties, agents etc. Sale of Good Act provides for rights and liabilities of buyer and seller etc. Transfer of Property Act defines exchange. The transaction of sale and exchange are altogether different and it has different consequences. Similarly a transaction enter through agent or broker also have different consenquences rights and liabilities. Under such circumstances, it is necessary to examine the definitions of Sale, Agency and Exchange as defined in Section 4 of Sale of Good Act, Section 182 of The Indian Contract Act and Section 118 of The Transfer of Property Act respectively. They are reproduced hereunder.

63. ***4. Sale and agreement to sell*** :-

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

64. ***182. "Agent and "principal" defined.*** :-

"an agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the principal."

65. ***118. "Exchange" defined*** . :-

When two person mutually transfer ownership of one thing for the ownership of another, neither thing or both things being money, only, the transaction is called an "exchange". A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

66. Sale is completed on delivery of goods and receipt of price thereof. Once the goods are delivered and price is paid, the only remedy with the seller is to sue for price as provided under Section 55 of The Sale of Good Act. In the present case, plaintiff has received the price since it has received difference amount and directed defendant No. 1 to purchase security No. 2 from the remaining consideration. After payment of difference amount, the remaining amount in the custody of defendant No. 1 is for the purchase of security No.2 for the plaintiff bank, as custodian thereof. As such, the first leg of the transaction is completed.

67. For the transaction of exchange, both the parties need to be owner of the properties to be exchanged. On the date of transaction i.e. 15/01/2002, defendant No. 1 was not owner of security No. 2. Moreover, the transaction as pleaded does not show that it was of exchange.

68. There is no pleading of exchange of security No. 1 and security No. 2. Not a single document is there on record to show that the transaction was of exchange. Though P.W. 1 and 2 have deposed that the transactions were of exchange, they have admitted in cross examination that the transactions were of sale and purchase.

69. It is also pertinent to note that price of security No. 1 i.e. difference amount Rs. 65, 98, 466.67 ps., is paid by defendant No. 1 company from its own account. Security No. 1 was also delivered

to defendant No. 1 company. Defendant No. 1 has pleaded that security No. 1 was purchased by it. This shows that security No. 1 was sold by plaintiff bank to defendant No. 1, as principle. As per the circulars issued by RBI dated 15/09/1992 filed at Exh. 333, and circular dated 04/09/1992 filed at Exh. 336, if the transactions are entered through brokers, the role of broker should be restricted to that of bringing the two parties to the deal together. But in the present case, defendant No.1 has itself purchased security No. 1 as principal. Though plaintiff bank is aware of this fact it did not find it necessary to plead this fact, or it is deliberately suppressing this fact.

70. As regarding second leg of transaction of purchase of security No. 2 by the plaintiff bank through defendant No. 1 is concerned, perusal of Exh. 191 shows that as per this deal confirmation plaintiff bank entered into deal of purchase of security No. 2 through defendant No. 1. This document also shows that security No. 2 2017 was to be delivered within 45 days from the date of settlement i.e. 19/01/2002. The price of this security Rs. 4,04,00,000/- with accrued interest of Rs. 35,866.67 ps., total Rs. 4,04,35,866.67 ps., is already paid by plaintiff which is retained by the defendant No. 1 from the first leg of transaction i.e., sale of security No. 1. This shows that the second leg of the first transaction was of purchase of security No. 2 by the plaintiff bank through defendant No. 1. Despite the fact that the second leg of transaction No. 1 was of purchase of security No. 2 by the plaintiff bank through defendant No. 1, plaintiff bank did not lead evidence as such.

71. The transaction as pleaded by the plaintiff is of purchase of security No. 2 through defendant No. 1. Defendant No. 1 is also admitting the transaction as pleaded by the plaintiff that this transaction No. 1 was of sale and purchase of security Nos. 1 and 2 by the plaintiff bank through defendant No. 1. The documents discussed above, particularly Exh. 237, 238, 192 and 193 also shows that the second leg of transaction was of purchase of security No. 2 through the defendant Nos. 1 and 2 in their capacity as broker. Despite the above facts, the evidence lead by plaintiff is of exchange.

72. Thus, there is no evidence on record in respect of the transaction pleaded by the plaintiff bank. Neither there is evidence on record of the transaction as transpired between plaintiff and defendant Nos. 1 and 2. The evidence lead by plaintiff is of exchange of security No. 1 with security No. 2 and security No. 3 with security No. 4, however, there is no pleading in respect of exchange of securities. Plaintiff has itself relied upon the case of , ***Bondar Singh Vs- Nihal Singh, reported in (2003) 4 S.C.C., 161,*** wherein Hon'ble Supreme Court has held that, " no evidence can be looked in without pleadings". The ratio laid down by Hon'ble Supreme Court applies to the plaintiff also. I, therefore, hold that plaintiff bank failed to prove transaction dated 15/01/2002 as pleaded by it.

73. The second transaction dated 28/02/2002 is pleaded in para 4-b of the plaint, which has been reproduced above in

verbatim. According to plaintiff, defendant Nos. 1 and 2 issued letter dated 28/02/2002 and in pursuance thereof plaintiff bank entrusted to the defendant No. 1 security No. 3 for selling the same for consideration of Rs. 6,40,32,347.48 ps. Said security No. 3 was to be physically delivered by the plaintiff bank to the defendant No. 1 within 15 days from 28/02/2002. It was further agreed that defendant No. 1 instead of paying the said sale consideration in cash to the plaintiff bank will purchase Government security No. 4 for the consideration of Rs. 5,79,56,250/- and physically deliver the same to the plaintiff bank within 45 days from 28/02/2002.

74. Plaintiff has further contended that in confirmation of the above transaction entered into on 28/02/2002, plaintiff bank sent a letter bearing No. 2472/01/02 dated 28/02/2002 by fax (Exh.199) as well as by courier service to defendant No. 1 company and thereafter as per the trade practice delivered and handed over security No. 3 along with blank transfer forms to Shri Pushpak Khot, who is representative and employee of defendant No. 1 company on 07/03/2002. 5 transfer forms in respect of MKVDC securities were not properly filled in. Defendant No. 1 company called upon the plaintiff to send 5 transfer forms duly filled in which were sent by plaintiff bank along with letter dated 16/03/2002 (Exh. 194).

75. Plaintiff bank has further contended that defendant No. 1 company paid difference amount of Rs. 60,76,097.48 ps., which was paid by the defendant No. 1 company vide 13 drafts dated 06/03/2002 delivered by Shri Pushpak Khot and that defendant No.

1 company paid the said amount by way of 13 drafts which were physically handed over through their employee and representative Shri Pushpak Khot and the transaction dated 28/02/2002 was acted upon, but defendant No. 1 company did not deliver security No. 4.

76. Plaintiff has further submitted that as per the transaction dated 15/01/2002 and 28/02/2002, defendant No. 1 was under contractual and legal obligation to purchase and deliver security Nos. 2 and 4 before 05/03/2002 and 14/04/2002 respectively.

77. Defendant No. 1 has pleaded that defendant No. 1 is not concerned in any manner with transaction mention in para No. 4-B of the plaint dated 28/02/2002. Defendant No. 1 further contends Plaintiff had entered into said transaction with defendant No. 3 directly and therefore, the plaintiff has seek to remedy, if any, against the defendant No. 3 only. Defendant Nos. 1 and 2 have further submitted that they are not aware whether MKVDC bonds are lying with defendant No. 7.

78. Defendant Nos. 3 and 4 have denied the transaction altogether. Defendant Nos. 5-a and 5-b do not say anything about the transaction. Defendant Nos. 5 and 6 are ex-parte.

79. Defendant No.7 has pleaded that certain transaction transpired between plaintiff on one part and defendant Nos. 1 and 2 on the other part. Certain correspondence entered between plaintiff and defendant Nos. 1 and 2 were filed by the defendant No. 2 with it

at the time of availing of cash credit facility. Defendant No. 2 deposited MKVDC bonds worth Rs. 1.5 crores towards security for the cash credit facility of Rs. 20 crores and pledged the said MKVDC bonds with defendant No. 7 bank and also handed over original bonds along with transfer forms duly signed by the concerned officer of the plaintiff bank. It has further contended that the transaction between plaintiff and defendant Nos. 1 and 2 is a concluded contract and was acted upon and defendant No. 2 became owner of said MKVDC bonds and pledged it with defendant No. 7 bank.

80. In order to prove the second transaction dated 28/02/2002, plaintiff bank has relied upon the testimonies of PW.1 and PW.2. PW. 1 is the Managing Director of the plaintiff bank, he claims to have knowledge of the transaction being dealt by him. He also claims to have read the plaint and written statement. PW.1 has deposed that the transaction dated 28/02/2002, was to entrust security No. 3 to defendant Nos. 1 and 2 and in lieu thereof defendant Nos. 1 and 2 were to procure security No. 4. He also deposed that difference amount of Rs. 60,76,097/- is paid by defendant Nos. 1 and 2 through 13 demand drafts dated 06/03/2002. According to this witness on 28/02/2001, defendant No. 1 has sent a fax (Exh. 195). In his further cross-examination, this witness clarified that though the fax is dated 28/02/2001, it was received on 28/02/2002 and the date mentioned on the letter is not correct. He has further stated that then Managing Director ShriJoshi directed Sau. Deshpande to confirm the deal by putting

and endorsement to that effect and in pursuance thereof letter dated 28/02/2002 (Exh.210) was sent confirming the deal under the signature of Shri Utikar. He has further deposed that Managing Director Shri Joshi physically delivered security No. 3 along with blank signed transfer forms to Shri Pushpak Khot, who is employee of defendant No. 1 company on 07/03/2002, who acknowledged the receipt (Exh. 209). He has also stated that the difference amount paid by 13 demand drafts bearing No. 424777 to 424789. He further deposed that on 16/03/2002 defendant No. 1 company telephonically informed that 5 blank transfer forms of MKVDC bonds were not correctly filled up and requested for sent 5 signed blank forms and accordingly on 16/03/2002, plaintiff bank again sent 5 blank signed forms by issuing a letter dated 16/03/2002 (Exh. 194). He also states that since the delivery of security Nos. 2 & 4 was not received by plaintiff bank, it issued two separate notices, both dated 30/04/2002 (Exh. 192 & Exh. 193) to which defendant No. 1 replied through it Advocate Adhia and Adhia on 29/05/2002 and 03/06/2002 (Exh. 215 & Exh. 216). He further states that defendant No. 1 informed that the transaction dated 28/02/2002 was entered into by plaintiff with defendant No. 3. He further states that security Nos. 1 and 3 were delivered to defendant Nos. 1 and 2 and in lieu thereof defendant Nos. 1 and 2 were to deliver security Nos. 2 and 4 in exchange thereof.

81. Plaintiff bank has examined PW.1 as its witness to prove suit transactions. In his cross-examination, this witness i.e. PW.1 has given some glaring admissions. He has admitted that

he does not have any knowledge about transaction dated 15/01/2002 and 28/02/2002. He has also admitted that defendant No. 1 is a broker. He has denied knowing as to how the transactions of sale and purchase of Government securities are to be dealt with. He also denies knowing circulars and directions of Reserve Bank of India, which are mandatory to be followed while dealing in Government securities. He has also admitted that plaintiff bank does not have deal confirmation note in respect of second transaction dated 28/02/2002. He also denies knowing contents of plaint,. Most importantly this witness admits receiving deal confirmation letters at Exh. 242 to 245 and 248 between defendant No. 3 Century Dealers Pvt. Ltd., and plaintiff bank and that plaintiff never entered into any transaction dated 28/02/2002 with defendant No. 1. This witness denies knowing the contents of his own letters Exh. 192 and Exh. 193 and further denies receiving difference amount of Rs. 60,76,097.48 ps., by the plaintiff bank which he has himself deposed in his affidavit in lieu of examination-in-chief Exh. 140. When a specific question was asked to him whether defendant No. 1 had not sent Exh. 195 to the plaintiff bank, PW.1 answered that he does not know.

82. In his cross-examination by defendant No. 5-a, PW.1 admitted that security Nos. 1 and 3 were never given to defendant Nos. 5-a or 5-b and these securities were given to defendant Nos. 1 and 2 for exchange. In his cross-examination by defendant No. 7, he has admitted that plaintiff bank did not maintain the account in respect of sale and purchase of Government securities.

83. Plaintiff bank has also examined PW.2 for proving the transactions as well as for proving the fraud, collusion, mis-appropriation, breach of trust etc. PW.2 is the Investigating Officer of Crime No. 75/2002 of City Kotwali police station, Amravati. He filed charge-sheet (Exh. 202) which was registered as Regular Criminal Case No. 847/2002 and is pending in the Court of Chief Judicial Magistrate, Amravati. He has filed his affidavit at Exh. 281. He claims to be aware of the facts of the case as he has investigated the crime, read plaint and written statement and gone through the record of this case. According to him, as per transaction dated 28/02/2002 between plaintiff bank and defendant Nos. 1 and 2, security No. 3 owned by the plaintiff bank were entrusted to defendant Nos. 1 and 2 for exchange with security No. 4. He further says that the defendant Nos. 1, 3 and 5 companies and their directors and office bearers defendant Nos. 2, 4, 5-a, 5-b and 6 mis-appropriated security Nos. 1 and 3 entrusted by plaintiff bank for its exchange by security Nos. 2 and 4. He has further stated in his examination in chief that on 04/03/2002, letter was issued on the later pad of Century Dealers Pvt.Ltd., that security No. 3 was received from Pushpak Khot and Rajesh Lasunkar. In his further examination in chief, he has deposed that document at page No. 773 of charge-sheet Exh. 202 is original cheque issued by Century Dealers Pvt. Ltd., to H.D.F.C., for the purpose of drawing demand draft in favour of Amravati Peoples Co-op. Bank and H.D.F.C. Bank issued letter to that effect which is at Exh. 320.

84. In his cross-examination, PW.2 has time and again volunteered that the transaction was exchange and not of sale. Whenever any question was asked this witness used to add that the transaction was of exchange. When a specific question was asked whether he has seized or collected any document where word "exchange" has been mentioned, he replied in negative, but added that in the complaint it is mentioned as "exchange". When his attention was drawn to Exh. 238 and Exh. 239, he has stated that he did not read them. He further admits that as per the FIR the second transaction of security Nos. 3 and 4 was entered between plaintiff and defendant No. 3 through the broker defendant No. 1. he further admits that on 04/03/2002, defendant No. 3 faxed deal confirmation to the plaintiff bank which were seized by P.I. Shri Deshmukh filed on record at Exh. 242 to 245. He also admits that defendant No. 3 Century Dealers paid difference amount of Rs. 60,76,000/- to the plaintiff bank in respect of security No. 3. He further admits that he has not seized any document to show that second transaction of security No. 3 was executed between plaintiff bank and defendant No. 3 through defendant No. 1. He further admits that Century Dealers passed Government Security No. 3 to defendant No. 5 and defendant No. 5 sold these securities to many persons. He also admits that defendant Nos. 3 and 5 i.e. Century Dealers and Home Trade are sister concerns. He also admits that security No. 3 was purchased by defendant No. 3.

85. In his cross-examination by defendant No. 5-a, PW.2 tried to wash-out the admissions given by him in the cross

examination of defendant Nos. 1 and 2, however, an opportunity was given to the defendant No. 1 to re-cross examine PW.2. In his re-cross-examination, PW.2 again re-affirmed the admissions given by him in the cross-examination by defendant Nos. 1 and 2. He also admit to have seized many documents from plaintiff bank during the course of investigation, which shows that the transaction to be of sale and purchase of security No. 3.

86. In his cross-examination by defendant No. 7, PW.2 has admitted that he seized deal confirmation letter between Century dealers Pvt.Ltd, Giltedge Management and Plaintiff bank. He has also admitted that as per letter seized vide Exh. 246 there was sale of security No. 3 by plaintiff bank to Century Dealers Pvt.Ltd.

87. Following are the documents, perusal of which are necessary to decide these issues and particularly the second transaction dated 28/02/2002.

(A) ***Exh. 195 and Exh. 210 alleged Deal Confirmation dated 28/02/2002***. :- Plaintiff has pleaded and PW.1 and 2 have deposed that as per transaction dated 28/02/2002, defendant No. 1 company sent a fax dated 28/02/2001 received by it on 28/02/2002, which is the deal confirmation of the second transaction. Accordingly plaintiff bank confirmed the deal by issuing letter Exh. 210 under the signature of Shri Utikar. On perusal of Exh. 195 it can be seen that it is a quotation which indicates the inductive rates of the security Nos. 3 and 4. The date of letter is 28/02/2001, it

merely gives description of the security, by yearly interest rates. Date of maturity and the offer and bid rates. It is pertinent to note that plaintiff has filed deal confirmation Exh. 190 and Exh. 191 in respect of first transaction which was also entered between plaintiff and defendant No. 1. Comparison of deal confirmation Exh. 190 and Exh. 191 with Exh. 195 shows that the former contains confirmation of the transaction /deal, description of the security, put date , call date, deal date, date of settlement, mode of settlement, delivery period, rates, face value, accrued interest on the date of settlement and the total consideration. None of these details can be found on Exh. 195.

88. Moreover, as per the plaintiff itself, on receiving the said fax, then Managing Director Shri Joshi made endorsement and directed Sau. Deshpande to confirm the deal. This shows that till then the deal was not confirmed. According to plaintiff, deal was confirmed by issuing letter dated 28/02/2002 Exh. 210, which was issued by Shri Utikar. Unless the plaintiff bank proves that the confirmation of deal has been communicated to defendant No. 1 it cannot be said that the deal is confirmed. Plaintiff alleges that the letter was sent by fax as well as by courier. There is no postal acknowledgment, receipt of courier regarding delivery or confirmation of delivery of fax to the defendant No. 1. As such, it cannot be said that the confirmation of the deal was communicated by the plaintiff bank to defendant No. 1.

89. Counsel for plaintiff has argued that plaintiff has lead evidence that the confirmation was sent by fax and courier and

defendant has not entered the witness box to rebut this evidence. He has also submitted that receipt of letter Exh. 210 is within the special knowledge of defendant No. 1 and unless it denies it will be deemed to have been proved in view of the provision of Section 106 of the Evidence Act. It is pertinent to note that it was incumbent upon the plaintiff to first discharge the initial burden of proving the fact that it sent the deal confirmation by fax and or by courier by filing fax confirmation receipt and or receipt of courier services regarding delivery and then only the onus would shift on the defendants and the question of defendant to explain would arise. As per the provisions of Section 101 and 102 of the Evidence Act the initial burden is always on the person alleging the fact. As such, in absence of the proof of sending of letter Exh. 210, it cannot be said that deal is confirmed. Moreover, there is no explanation by the plaintiff that when the Managing Director Shri Joshi was present in the bank why Mr. S.T. Utikar signed the alleged letter Exh. 210. Plaintiff has not examined Shri Utikar, who has personal knowledge about this fact. Nor Shri Utikar had authority to issue deal confirmation, as it is admitted by PW.1 that Shri Utikar was never Managing Director. This letter is also doubted by the Enquiry Officer, Assistant Registrar, Co-op. Department in the award passed in the enquiry under Section 88 of Maharashtra Co-op. Societies Act Exh. 250. Under no circumstances, Exh. 195 can be said to be deal confirmation, neither the confirmation is communicated to the defendant No. 1.

90. ***(B) Exh. 209 Letter issued by plaintiff bank to***

defendant No. 1 dated 07/03/2002 . :- According to the plaintiff, plaintiff bank, employee of defendant No. 1 company Pushpak Khot acknowledged the receipt of security No. 3 on 07/03/2002 and signed the said document (Exh. 209). Plaintiff alleges that since delivery of security No. 3 was taken by defendant No. 1, deal Exh. 195 is confirmed. It is pertinent to note that this letter was drafted by the plaintiff bank and Pushpak Khot, who is a peon of the defendant No. 1 company has acknowledged the receipt. However, in the affidavit of PW.2 at page 26, he has deposed as under.

> "Similarly in respect of security No. 3, letter was issued on 04/03/2002 on the letter-pad of Century dealers Pvt.Ltd. which is a sister concern of defendant No. 1 and 5 to the plaintiff bank, wherein it was inter-alia mentioned that the said Government Security No. 3 was received by Pushpak Khot and Rajesh Lasunkar from the plaintiff bank."

PW. 2 has recorded statement of Pushpak Khot at Exh. 313. In the said statement Pushpak Khot has stated that, "on the say of Jugna Lodhaya, employee of Giltedge Management, he accompanied Rajesh Lasunkar, peon of Home Trade to Amravati Peoples Bank, Amravati to bring Government securities worth Rs. 5.5 crores. Accordingly he along with Rajesh Lasunkar went to Baheti Hospital, Amravati and met Managing Director Shri S.N.Joshi. Rajesh Lasunkar gave 13 cheques to Shri S.N. Joshi. Employee of the

bank Prashant Labade brought Government securities worth Rs. 5.5 crores and instead of giving it to Rajesh Lasunkar gave it to him and took the delivery of Government securities worth Rs. 5.5 crores and gave it to Rajesh Lasunkar of the Home Trade company".

91. Similarly, statement of Jaikumar Mehta at Exh. 316 and Ketan Maskaria at Exh. 314, who are employees of Home Trade have also stated that Pushpak Khot and Rajesh Lasunkar received the Government security No. 3 from plaintiff bank and handed it over to defendant No. 5. Defendant Nos. 3 and 5 are sister concerns. Though, the security No. 3 are received by the employee of defendant No. 1 company i.e. Pushpak Khot, it was handed over by him to Rajesh lasunkar, who is employee of defendant No. 5, which is sister concerns of defendant N. 3. This shows that Pushpak Khot and Rajesh Lasunkar took the securities and transfer forms for defendant No. 3.

92. ***(C) Exh. 242 to Exh. 245 and Exh. 248 Deal Confirmation*** :- In his cross examination, PW.1 has admitted that police seized documents from his custody vide seizure memos Exh. 246 and Exh. 247. He has further admitted that on 15/06/2002, police seized fax dated 04/03/2002 sent by defendant No. 3 in respect of security Nos. 2 and 4 and they are filed at page No. 338 to 341 of charge-sheet Exh. 202. He has also admitted that this fax was received by plaintiff bank and they were seized by the police from the plaintiff bank through him, they are at Exh. 242 to Exh. 245. PW. 1 has also admitted that police seized original letter

dated 04/03/2002 Exh. 248. Exh. 243 to Exh. 245 are the deal confirmations of sale of security No. 3 by the plaintiff bank to defendant No. 3. These documents also bears stamp and signature of plaintiff bank showing its acceptance. Exh.242 and Exh. 248 are letters issued by Century Dealers Pvt. Ltd., to the plaintiff bank, which was admittedly received by it. This shows that security No. 3 was sold by plaintiff bank to defendant No. 3 Century Dealers and plaintiff bank purchased security No. 4 from the Century Dealers i.e., defendant No. 3. PW.1 has admitted that receipt of this letter by the plaintiff bank through fax. PW. 2 has also admitted in his cross-examination that original letters were seized from plaintiff bank from the custody of PW.1 vide seizure memos Exh. 246 and Exh. 247. This deal confirmation shows that second transaction as alleged in para 4-b of the plaint was between plaintiff bank and defendant No. 3 and it took place on 04/03/2002.

93. ***(D) Exh. 193 Letter issued by plaintiff dated 30/04/2002*** :- This is a letter sent by plaintiff bank to defendant No. 1 as well as defendant No. 3. On perusal of this letter, it can be seen that the reference mentioned is quotation dated 28/02/2002 from defendant No. 1 and five deal confirmation letters dated 04/03/2002 from defendant No. 3. This itself goes to show that the quotation was received from defendant No. 1, but the deals were confirmed with defendant No. 3 Century Dealers. Plaintiff has further specifically stated that they sold security No. 3 and handed over on 07/03/2002 and as against this, security No. 4 was to be purchased through defendant Nos. 1 and 3. Plaintiff bank also

accept receipt of difference amount. This shows that the deal was confirmed on 04/03/2002 with defendant No. 3 and not on 28/02/2002 with defendant No. 1 as pleaded. This fact is also admitted by PW.1 in his cross-examination that no transaction took place on 28/02/2002.

94. ***(E) Letters dated 27/04/2002 and 07/05/2002 issued by plaintiff bank to Deputy General Manager RBI Exh. 238 and Exh. 239.*** ;- These are the letters issued by plaintiff bank under the signature of PW.1 as Managing Director to RBI. In letter Exh. 238, plaintiff has specifically stated that it has not paid any brokerage to the brokers while dealing through brokers. They have also furnished the details of transaction which are in respect of security Nos. 1, 2, 3, and 4 and have also admitted receiving of difference-amount in both the suit transactions. Plaintiff bank further stated that they are pressing the brokers M/s Giltedge Management and Century Dealers Pvt. Ltd., for delivery of securities. They have also stated that they are dealing through brokers M/s Giltedge Management, M/s Niche Financial Ltd., and M/s Century Dealers Pvt. Ltd.

95. Perusal of Exh. 239 also shows that plaintiff bank has informed the RBI that they have received difference-amount in both the transaction through brokers in which securities were delivered on 29/01/2002 and 07/03/2002. The date of delivery of securities, names of the brokers and the statement of plaintiff that it is dealing in securities through brokers including defendant Nos. 1 and 3

clearly goes to show that the transactions were of sale and purchase of security Nos. 1, 2, 3 and 4 through defendant Nos. 1 and 3.

96. ***(F) Award of Joint Registrar under Section 88 of Maharashtra Co-op. Societies Act Exh. 250***. :- Joint Registrar, Co-op., has directed enquiry under Section 83. Enquiry was conducted and Enquiry Officer delivered an Award under Section 88 of Maharashtra Co-op. Societies Act certified copy of which filed at Exh. 250. In this award also, the second transaction of 5.5 Crores is shown to be with Century Dealers i.e., defendant No. 3. The date of transaction also shown to be 04/03/2002. Enquiry Officer has also doubted the alleged deal confirmation (Exh. 195) dated 28/02/002.

97. ***(G) Exh. 295 Police complaint filed by Divisional Joint Registrar.*** :- The report lodged by Divisional Joint Registrar (Audit) Co-operative Society also shows that second transaction was with Century Dealers Pvt. Ltd. (defendant No. 3).

98. ***(H) Exh. 231 Inspection report of RBI in respect of Inspection of plaintiff bank dated 09/09/2002***. :- RBI has conducted inspection of the plaintiff bank and submitted the report which is filed at Exh. 231. In this report also, the second dealing is shown to be with defendant No. 3 and the date of delivery is shown as 04/03/2002.

99. ***(I) Exh. 320 Letter issued by HDFC to PW.2*** :- This letter shows that it was defendant No. 3, who paid the difference amount of the second transaction Rs. 60,76,097.48 ps., to the plaintiff bank.

100. ***(J) Exh. 214 Order of Commissioner Co-op. Society dated 10/05/2002***. :- This letter also shows that the first transaction to be with defendant No. 1 and the second transaction to be with defendant No. 3.

101. Similarly there are statements of witnesses recorded under Section 161 of Cr.P.C., by PW.2 during the course of investigation in Crime No. 75/2002. These statements are not direct evidence, but the testimony of the person, who recorded these statements has some value being second hand version. It is a hearsay evidence. This evidence can also be considered, if the credibility of the person deposing it is not shaken. The bar under Section 162 of Cr.P.C., is not attracted in the Civil Case, as ruled in the case of ***Harman & another -Vs- N.C. Shrinivasan, AIR 1990, Madras, 14,*** and case of ***Torising -Vs- State of U.P., 1962, Supreme Court, 399.***

102. PW.2 has recorded statements of Babarao Bihade at Exh. 346 and 347 and Statement of Jaikumar Mehta and Ketan Maskariya at Exh. 316 and Exh. 314 respectively. All these persons have stated that it was defendant No. 3, who purchased security No. 3 from the plaintiff bank.

103. PW.2 has also prepared cover pages at Exh. 363, 364, and 365, which are in respect of security No. 3 which shows that Century Dealers purchased security No. 3 from plaintiff bank.

104. The admissions of PW.1 that, " It is true that plaintiff bank never entered into any transaction dated 28/02/2002 with defendant No. 1", and, " plaintiff bank does not have deal confirmation note in respect of second transaction dated 28/02/2002 and, " It is true that on 15/06/2002, police seized fax dated 04/03/2002 sent by defendant No. 3 to the plaintiff bank in respect of security Nos. 3 and 4 dated 28/02/2002, which are received by the plaintiff bank and which were seized by the police from the plaintiff bank Exh. 242 to Exh. 245", and admission of seizure of Exh. 242 to 245 and 248 by PW.1 itself negates the claim of plaintiff that the second transaction was of exchange of security Nos. 3 and 4 with defendant Nos. 1 and 2 dated 28/02/2002. Plaintiff has itself relied on the case of ***S.P.Chengal Varaya Naidu -Vs- Jagannath, reported in AIR 1994, S.C., 853,*** wherein it has been held that Courts of Law are ment for imparting justice between the parties. Once who comes to the Court must come with clean hands- --- a litigant who approaches the Court is bound to produce all the documents executed by him, which are relevant to the litigation. If he with holds the vital documents in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite side. The ratio laid down by Hon'ble Supreme Court is applicable to the plaintiff bank.

Plaintiff bank, having suppressed the above documents amounts to playing fraud.

105. Plaintiff has examined PW.1 Shri Mavalkar, who is a responsible officer of the plaintiff bank, holding the post of Managing Director. He is employee with the plaintiff bank since 1976. In his affidavit he is stated on oath that he has knowledge of present suit, as he is conversant with the facts of the case and has dealt with the suit transaction. He also claims to have read the plaint and written statement. Despite this, this witness denied knowing any of the circular of the RBI, which are binding on the plaintiff bank. All the more, in the very first sentence of the cross-examination he denies having knowledge of transaction dated 15/01/2002 and 28/02/2002 on which the whole suit of the plaintiff is based on. Not only this, but he went on to deny the facts in his cross-examination which he has deposed in his affidavit on oath and filed it before this Court. He further denies knowing the contents of letters issued and signed by him as Managing Director to the plaintiff bank to statutory bodies like RBI and SEBI. This shows that either this witness has no knowledge of the transaction, or he is deliberately suppressing the real facts, as he himself is accused in Regular Criminal Case No. 847/2002, which is in respect of suit transactions. In his cross examination he went on deny all the questions, except few, which he admitted on confronting his signature on the documents or if it was seized from his custody. Plaintiff bank wants that the Court should believe the testimony of such person and decree the suit.

106. Plaintiff has also examined PW.2, Mohd. Aslam Mohd. Usman Qureshi, who is Police Inspector and Investigating Officer in Crime No. 75/2002 of City Kotwali police station, Amravati. He is an independent witness and a Government Officer holding Class-I post in the Police Department. What is expected of him is to depose truth before the Court. However, the evidence on record shows that he made two contrary statements in his cross-examination by defendant Nos. 1 and 2 and by defendant No. 5-a. In his cross-examination by defendant Nos. 1 and 2, this witness admitted certain facts. However, in his cross-examination by defendant Nos. 5-a, he admitted certain facts which were contrary to his admissions given in the cross-examination by defendant Nos. 1 and 2 in order to wash-out the admissions given by him in his cross-examination by defendant Nos. 1 and 2. Plain reading of these admissions show that either of the statement is false. Defendant Nos. 1 and 2 was permitted by this Court vide its order Exh. 356 to further cross-examine PW.2. In his further cross-examination by defendant Nos. 1 and 2, his attention was drawn to the relevant documents and statements to prove that admissions given by him in his cross-examination by defendant Nos. 1 and 2. Moreover, he admits to have filed the charge-sheet against the accused persons, who were involved in the securities scam concerning the plaintiff bank after thorough investigation. Defendant No. 5-a is also accused in the said case No. 847/2002. Despite this, in order to support defendant No. 5-a he goes to the extend of deposing that defendant No. 5-a is not connected with the

suit transaction and that defendant No. 5-a is not involved in the conspiracy between defendant Nos. 1 to 6. This witness also deposed that he is aware of the contents of the facts stated in his affidavit Exh. 281 and signed it after reading it. However, in his cross examination, he is admitted that certain portions were not known to him and it was pleaded by the counsel of the plaintiff bank. Plaintiff bank wants to rely on the testimony of this witness. I have discussed the conduct of PW.2 in deatiled while deciding issue No. 11 and the same needs to be read while deciding these issues also.

107. Both the witnesses examined by plaintiff are not trust-worthy. PW.1 is also accused in the crime involving these securities, which are subject matter of the suit. As such, there is every reason for this witness to conceal material facts and to depose facts, which is in his personal interest. Court cannot rely on the testimonies of these witnesses. Defendant No. 7 bank has relied upon the case of ***Chandramohan Tiwari -Vs- State of Madhya Pradesh, reported in AIR 1992, S.C., 891***, wherein it has been held that Court should be honest guard and evidence of interested witnesses must be subject to close scrutiny.

108. Plaintiff has also submitted in its notes of arguments that Court should apply the principle of Quasi Contract and decree the suit. In the present suit, contract, as pleaded by the plaintiff, is an express contract dated 15/01/2002 and 28/02/2002 . In the deal confirmation details of transaction is specifically provided for like

name of the parties, value of the security, rates, date of settlement, date of delivery etc. Parties have also acted upon the contract. Securities have been delivered and consideration paid every minute details is specifically expressed. Moreover, this is a commercial transaction /contract. Plaintiff has even failed to prove what fraud defendants have played. Nothing remains to be implied in the contract. Under such circumstances, the principles of Quasi Contract cannot be applied.

109. It is further contended by the plaintiff bank that none of the defendants have entered the witness box and lead evidence in rebuttal of the plaintiff's evidence, as such, the evidence of the plaintiff bank stands un-rebutted and needs to be admitted. Plaintiff bank has also relied upon the case of ***Vidyadhar -Vs- Manikrao, reported in AIR 1999, S.C., 1441 and case of Chandrakant -Vs- Dayanand, reported in AIR 2006, Bombay, 16.*** Plaintiff has failed to prove the suit transaction, fraud etc. Unless the plaintiff proves its case, the onus will not shift on defendants to lead evidence in rebuttal. Moreover, defendants can also rebut the evidence of plaintiff firstly by cross-examined the witness of the plaintiff and extracting the admissions truth and shaking the testimony of the witness, secondly from the documents filed by the plaintiff bank as well as by the defendants. Thirdly by the public documents. In the present case defendants have extracted material admissions from the plaintiff's witness and plaintiff has failed to prove the suit transaction. Plaintiff's own witnesses have admitted the defence set-up by the defendants.

Under such circumstances, non entering of witness box by the defendants will not be fatal for the defendants. The ratio laid down in the above citations would not be applicable in the present case.

110. In the first leg of transaction as pleaded by the plaintiff, plaintiff was to entrust security No. 1 to defendant Nos. 1 and 2 for selling the same. However, evidence on record shows that plaintiff sold security No. 1 to defendant No. 1. Despite having knowledge that it sold security No. 1 to the defendant Nos. 1 and 2, plaintiff did not feel it necessary to plead as such. It went on to lead evidence of exchange, which is not the case of plaintiff as pleaded, nor the transaction which took place. Plaintiff bank has thus failed to prove the first leg of the transaction No. 1 dated 15/01/2002.

111. As far as second leg of first transaction dated 15/01/2002 is concerned, plaintiff has pleaded that security No. 2 was to be purchased through defendant Nos. 1 and 2. Defendant Nos. 1 and 2 admitted the contentions of the plaintiff and have submitted that it paid consideration of security No. 2 to defendant No. 5 and directed it to deliver the securities to the plaintiff bank and also paid difference amount to the plaintiff bank. Receipt of difference amount is admitted by the plaintiff bank. However, plaintiff has lead evidence that defendant No. 1 was to deliver security No. 2 in lieu of security No. 1 in exchange. Plaintiff has not pleaded the transaction to be of exchange. Plaintiff's own documents show that defendant No. 1 was a broker to whom it sold security No. 1 and through whom security No. 2 was to be

purchased. PW.1 has also admitted that defendant Nos. 1 and 2 were brokers. Thus, plaintiff bank has miserably failed to prove the second leg of the first transaction No. 1 dated 15/01/2002, as pleaded by it.

112. As regarding second transaction dated 28/02/2002 is concerned, plaintiff has pleaded that security No. 3 was to be entrusted to defendant Nos. 1 and 2 for selling the same and instead of paying the consideration defendant Nos. 1 and 2 were to purchase security No.4 and deliver the same to the plaintiff. Plaintiff lead evidence that security No. 3 was to be entrusted to defendant Nos. 1 and 2 and in lieu thereof defendant Nos. 1 and 2 were to deliver security No. 4 in exchange. Plaintiff bank has failed to prove that the transaction was with defendant Nos. 1 and 2 and that it was a transaction of sale and purchase through the broker. As such, plaintiff failed to prove both the legs of second transactions dated 28/02/2002.

113. For all the reasons discussed above, I hold that plaintiff has failed to prove transaction dated 15/01/2002 and 28/02/2002. I further hold that defendant Nos. 1 and 2 have prove that they are only concern with Government security Nos. 1 and 2 and I answer issue Nos. 1 to 4 in negative and issue No. 12 in affirmative.

114. ***AS TO ISSUE NOS. 5 and 13 .*** :- Since the findings of issue Nos. 1 to 4 are recorded in negative, these issues do not survive. However, the first transaction as pleaded in para 4-a of

the plaint is admitted by defendant Nos. 1 and 2. Defendant Nos. 1 and 2 have further admitted taking of delivery of security No. 1. Defendant Nos. 1 and 2 have further pleaded in written statement that it purchased security No. 1 and paid difference amount to plaintiff bank and also paid consideration of security No. 2 to defendant No. 5 for purchasing securities on behalf of plaintiff bank and it was for defendant No. 5 to deliver the security No.2 to the plaintiff bank.

115. It is the contention of plaintiff bank that defendant Nos. 1 and 2 un-authorizedly clandestinely, fraudulently, secretly and illegally passed on security Nos. 1 and 3 to other defendants and third parties. If the transaction No. 1 as pleaded is perused, it shows that security No. 1 was entrusted to defendant Nos. 1 and 2 to be sold and defendant Nos. 1 and 2 were to purchase and deliver security No. 2 to the plaintiff bank. As proved, security No. 1 is sold by plaintiff bank to defendant No. 1 as principal, though defendant No. 1 was to act as broker. Defendant Nos. 1 and 2 were further authorized to purchase security No. 2 from the market. As such, if defendant Nos. 1 and 2 purchased security No. 2 from defendant No. 5 and directs it to supply the said securities to plaintiff bank, there is no illegality or breach or violation of the terms of contract as plaintiff bank has itself authorized defendant Nos. 1 and 2 to purchase security No. 2 for itself. In the said transaction defendant No. 1 acted as broker and purchased security No. 2 from defendant No. 5, which is proved in the issue Nos. 1 and 2. The admissions of PW.1 in his cross-examination that contract note dated 22/01/2002

and two letters dated 25/01/2002 seized vide seizure memo Exh. 246 and Exh. 247 shows that plaintiff bank was aware of the transaction entered by defendant Nos. 1 and 2 with defendant No. 5. PW.2 has also admitted in his cross-examination that defendant No. 1 paid sale consideration of Government Security No. 2 to defendant No. 5 and directed it to supply the said security to the plaintiff bank. PW.2 has also admitted that copies of the documents executed between defendant No. 1 and defendant No. 5 were supplied to the plaintiff bank. This also goes to show that plaintiff bank was aware of the transaction between defendant No. 5 and defendant No. 3. Most importantly document Exh. 216, which is reply of defendant No. 1 to the notice issued by plaintiff dated 30/04/2002 clearly indicates that it was aware that defendant No. 1 has purchased securities from defendant No. 5. It is thus clear that plaintiff bank was aware of the transaction of purchase of security No. 2 by defendant Nos. 1 and 2 from defendant No. 5 for the plaintiff bank.

116. As per the provisions of Section 211 of the Contract Act, agent is bound to conduct the business of his principal according to the directions given by the principal and in absence of such directions according to the customs prevailing in doing the business. Only if he acts otherwise and if loss is sustained to the principal, he is liable to make it good to the principal. In the present case, security No. 2 was purchased by defendant No. 1 as per directions of plaintiff bank. As such, it cannot be said that defendant No. 1 acted contrary to the direction of the plaintiff bank.

Under such circumstances, defendant No. 1 cannot be held personally liable for the loss caused to the plaintiff bank.

117. ***Section 226 of The Contract Act is reproduced under***.

> ***226. Enforcement and consequence of agent's contract***
>
> "Contract entered through an agent, and obligation arising from acts done by the agent may be enforced in the same manner and will have same legal consequences, as if contract has been entered into and the acts done by the principal in person".

In view of the provisions of Section 226 of The Contract Act, the act of the agent is the act of the principal. This provision enables the plaintiff bank to claim delivery of security No. 2 directly from defendant No. 5 in case of default. Admittedly, deliver of security No. 2 is not received. As such, plaintiff has to claim delivery of security No. 2 directly from defendant No. 5. But this is not the case pleaded by the plaintiff. It suppressed material facts which defendant brought on record during the cross-examination. Plaintiff has not even lead evidence as per its pleading and has lead evidence on exchange and has thus failed to prove issue Nos. 1 to 4 and the suit transaction. Under such circumstances, defendant Nos. 1 and 2 are not liable to deliver security No. 2.

118. As per my findings on issue Nos. 1 to 4, plaintiff bank

has failed to prove the transaction itself. I have also held that the second transaction dated 28/02/2002 in respect of security Nos. 3 and 4 was entered between plaintiff bank and defendant No.3. As such, there is no question of delivery of security No. 4 by defendant Nos. 1 and 2. For all the reasons above, I answer issue No. 5 in negative and issue No. 13 in affirmative.

119. ***AS TO ISSUE NO. 16***. :- Defendant Nos. 1 and 2, in reference to transaction No. 1 dated 15/01/2002, have pleaded that since defendant No. 5 failed to deliver security No. 2 to the plaintiff bank it obtained an arbitration Award dated 17/01/2003 against defendant No. 5 and if the suit is decreed against them, defendant No. 5 be made liable to make good the loss. Defendant Nos. 1 and 2 have placed on record certified copy of Award at Exh. 389 and complete arbitration proceeding while list of documents Exh. 411.

120. It is pertinent to note that defendant Nos. 1 and 2 have not lead any evidence to show that the said Award is in respect of security No. 2 of the suit transaction. On going through the proceeding, it can be seen that the claim of the defendant No. 1 in the said arbitration proceedings are in respect of 12 securities, total worth Rs. 18,21,01,987.04 ps. Security at serial No. 1 is GOI 2017 8.07% valued at Rs. 4 crores. Merely because Government security GOI 2017 is mentioned in the Award, it cannot be presumed that the Award is in respect of the said securities which defendant No.1 claims to have purchased for the plaintiff bank.

Moreover, the Award is in the name of defendant No. 1 company. There is no evidence on record to connect this Award with the suit transaction. Defendant Nos. 1 and 2 have not entered the witness box to prove that this Award is in respect of the suit transaction dated 15/01/2002 for purchase of security No. 2. Under such circumstances, I hold that defendant Nos. 1 and 2 have failed to prove defendant No. 5 is liable to make good the loss and I answer issue No. 16 in negative.

121. ***AS TO ISSUE NOS. 6, 6-A AND 8-A.*** :- Plaintiff has pleaded that defendant Nos. 1, 3 and 5 companies and their Directors i.e. defendant Nos. 2, 4, 5-a, 5-b and 6 collusively committed fraud on the plaintiff bank and the fraud was abated by defendant No. 7 bank. It is the contention of the plaintiff bank that the defendants deceived the plaintiff bank and committed breach of trust and mis-appropriated the securities by converting them for their own use and thus cheated the plaintiff bank.

122. Defendant Nos. 1, 2, 4 and 7 have denied any fraud and have submitted that it is the case of simple breach of contract. The remedy with the plaintiff was to claim the delivery of the security No. 2 from defendant No. 5 and security No. 4 from defendant No. 3.

123. In order to ascertain whether any fraud as alleged by the plaintiff is committed or not, the Court has to see as to what was the transaction between the plaintiff bank and defendants. This Court

while deciding the issue Nos. 1 to 4 has elaborately explained and discussed the transactions dated 15/01/2002 and 28/02/2002, evidence and documents on record and the same be considered for deciding these issues also.

124. The transaction dated 15/01/2002 was of entrustment of security No. 1 by the plaintiff bank to the defendant No. 1 for selling the same and instead of paying the consideration thereof defendant No. 1 was to purchase and deliver security No. 2 to the plaintiff bank. The plain reading of this transaction shows that it contains two legs. First or ready leg is for sale of security No. 1 by the defendant No. 1 for the plaintiff. As discussed in issue Nos. 1 to 4, I have already held that security No. 1 was sold by plaintiff and purchased by defendant No. 1 and consideration was also paid by defendant No. 1 to the plaintiff by way of difference amount and remaining amount was paid to the defendant No. 5 towards the consideration of security No. 2. Thus, the first or ready leg of the transaction dated 15/01/2002 was duly performed and nothing remained to be performed in this leg. As per the provisions of Section 4 of the Sale of Goods Act, the transaction of sale is complete on delivery of goods and payment of the price thereof. Once the transaction of the sale is completed, the title to the goods is conveyed to the purchaser and the purchaser is free to deal with the goods as he wishes. In the transaction dated 15/01/2002, first leg of sale is completed and valid title of security No. 1 is acquired by defendant No. 1. In the case of ***B.O.I. Finance Ltd. -Vs- The custodian, reported in AIR 1997, S.C., 1952,*** similar facts wherein

question wherein Hon'ble Supreme Court held as under :-

" In the ready leg there is purchase or sale of security at a stated price which is executed on payment of consideration for the spot delivery of security together with transfer forms. The full and absolute ownership of the title in securities vests in the purchaser, the entire property in the security passing immediately upon such delivery and payment. The seller is divested of all the rights, title and interest in the said securities."

Hon'ble Supreme Court has further held that property in chattels and land can pass under a contract which is illegal.

Once the title to the security No. 1 is acquired by defendant No. 1, it has right to deal with this security as it likes and plaintiff cannot questioned the further transaction made by defendant No. 1 in respect of this security No. 1.

125. The second or forward leg of the first transaction dated 15/01/2002 was of purchase of security No. 2 at a future date. As discussed in the reasonings while deciding issue Nos. 1 to 4, defendant No. 1 has been able to prove that it paid sale consideration of security No. 2 to the defendant No. 5. There is no iota of doubt that defendant Nos. 1 and 2 were not the brokers as is proved by the documents of the plaintiff itself , which are discussed while deciding issue Nos. 1 to 4and admission of PW.1. As such the remedy for the plaintiff was against defendant No. 5 only as principal in view of the provision of Section 230 of The Contract Act by claiming the delivery of security No. 2 or price thereof.

Unfortunately neither plaintiff has pleaded such case, nor it has proved the transaction.

126. As far as transaction dated 28/02/2002 is concerned, this transaction is also two fold. I have also discussed the transaction in detailed, while deciding issue Nos. 1 to 4, which has to be taken into consideration while deciding these issues. The first or ready leg of this transaction was of entrustment of security No. 3 to the defendant Nos. 1 and 2 for selling the same and instead of paying the consideration thereof, defendant Nos. 1 and 2 were to purchase security No. 4 and deliver it to the plaintiff bank. It is pertinent to note that I have already held that plaintiff has failed to prove the second transaction dated 28/02/2002 to be with defendant Nos. 1 and 2. Defendant Nos. 1 and 2 have proved that the transaction dated 28/02/2002 was not between plaintiff bank and defendant Nos. 1 and 2, but was between plaintiff bank and defendant No. 3 company. Since, this issue is framed this Court has to decide the same.

127. The transaction dated 28/02/2002 also contains two legs. First leg of selling security No. 3 by defendant No. 3 for and on behalf of plaintiff bank. Defendant Nos. 1 and 2 have further proved on record that defendant No. 3 paid difference amount of Rs. 60 lacs and odd amount to the plaintiff bank and retained the remaining amount towards the consideration of security No. 4. The evidence on record, which is discussed by this Court while deciding issue No. 4 further makes it clear that though security No.

3 was handed over to Pushpak Khot, it was received by defendant No. 3 through its peon Rajesh Lasunkar. This fact is also proved through the statement of Pushpak Khot, Jaikumar Mehta and Ketan Maskaria filed at Exh. 313, 316 and 314 respectively, as well as admissions of PW. 2 given in his cross-examination. This shows that defendant No. 3 took the delivery of security No. 3 and paid difference amount to the plaintiff bank. The remaining amount of consideration of security No. 3 was retained by it was for purchasing security No. 4. Under such circumstances, the amount retained by defendant No. 3 was for and on behalf of plaintiff bank. Thus, the first leg of transaction of sale of security No. 3 was duly performed and sale of security No. 3 was complete. Once the sale is complete, the title vests with the purchaser and he is free to deal with the security as he likes.

128. As far as second leg of transaction dated 28/02/2002 is concerned, defendant No. 3 was to purchase security No. 4 and deliver it to the plaintiff bank. Despite having knowledge of this transaction, plaintiff bank choose to plead that this transaction is also with defendant Nos. 1 and 2, which it failed to prove and it was found that the said transaction was entered between plaintiff and defendant No. 3. Plaintiff lead evidence of exchange of securities and failed to prove this transaction as pleaded by it.

129. Thus, once the sale of security Nos. 1 and 3 is completed, the purchaser thereof have every right to deal with these securities as they like and there would be no fraud, breach of

trust etc., if the securities Nos. 1 and 3 are sold, passed on or dealt with in any manner as the owner thereof likes.

130. As per my findings on issue Nos. 1 to 4 have already held that plaintiff has failed to prove both the suit transactions dated 15/01/2002 and 28/02/2002 and on this count only the suit is bound to be dismissed.

131. In order to find out whether any fraud has been played by the defendants, Court has to consider what is evidence on record, which constitute the fraud and what effect it has on the suit transactions. Plaintiff has pleaded that the transactions are ab-initio void as vitiated by fraud. It has also pleaded criminal conspiracy, criminal breach of trust, criminal breach by public servant, cheating, forgery to have been committed by the defendants and after investigation, police arrested the defendants and charge-sheeted them for offences under Section 120-B, 405, 406, 409, 470 r/w Section 34 of I.P.C. It has also pleaded that said case is registered as Regular Criminal Case No. 847/2002 is pending in the Court of Chief Judicial Magistrate, Amravati. It is also the contention of plaintiff that these defendants passed on these securities and sold them by splitting them.

132. In order to prove the fraud as alleged, plaintiff needs to prove each of the offence alleged by it by leading evidence thereon. On perusal of examination-in-chief of PW.1 it can be seen that he has deposed that defendant Nos. 1 and 2 in collusion with other

defendants dishonestly induced the plaintiff bank to physically delivered security Nos. 1 and 3 for the purpose of procure security Nos. 2 and 4 in exchange thereof with no intention to get the same exchanged and mis-appropriated the same by committing breach of trust and forgery. PW.1 has also deposed that defendant Nos. 1 to 6 have hatched the conspiracy in league with defendant No. 7 to dupe and cheat various CO-operative Banks through out India and simulteniously of the plaintiff bank, which is notoriously known as Government Securities scam of Maharashtra. PW.1 has further alleged that securities were passed on by the defendant Nos. 1 and 2 between the defendants interse and sold them to different persons in order to cause wrongful gain for them and wrongful loss to the plaintiff bank.

133. PW.2, who is the police inspector and investigating officer of Criminal Case No. 847/2002 has deposed by Exh. 281 that defendant Nos. 1 to 6 by acting in collusion conspired by fraudulently mis-appropriating security Nos. 1 and 3, which was entrusted to defendant Nos. 1 and 2 for its exchange with security Nos. 3 and 4 and committed breach of trust, mis-appropriation and cheating. PW.2 has stated that he came to this conclusion on the basis of information collected by him during the investigation, which was on the basis of ;

(A) Records of the plaintiff bank, RBI, Grindlays Bank, Janta Bank,

(B) Statements recorded during the investigation.,

(C) Documents seized under the seizure memo and documents collected during the investigation and

(D) Documents containing in file Nos. 1 to 13 prepared from out of documents collected during the investigation of the said bank.

134. Perusal of evidence of both the above witnesses reveals that none of the witnesses have lead any evidence as to

(1) What was the conspiracy and between whom and when was it hatched.,

(2) Of what property and how breach of trust was committed and by whom.,

(3) What was the nature of transaction and whether the transaction was or part thereof was completed and what are the consequences thereof.,

(4) What was the fraudulent and dishonest inducement and how the plaintiff bank was deceived and did something which it would not have done, if no such inducement was made.

(5) What was the mis-appropriation and how it was done.,

(6) What was the forgery and what are the documents by the defendants and particularly by which defendant.

(7) What was the documents which was falsely made by the defendants.

135. There is absolutely no specific evidence on the above points in the evidence of PW.1 and 2. The allegations are wild and general. Both the witnesses have just made allegations that defendants are acting in collusion and passed on the securities interse between them in order to cause wrongful loss to plaintiff bank and wrongful gain for themselves without even giving the

details of transaction as pleaded by it. It is also pertinent to note that PW.1 is himself an accused in the said criminal case No. 847/2002. As such, this Court cannot completely rely on the testimony of PW.1 as his personal interest is involved in the suit transactions. PW.1 has avoided giving material answers to the questions put by defendants in his cross-examination. He has also admitted that he does not know anything about the transactions. PW.2 has absolutely no knowledge about the transactions as entered between plaintiff and the defendants as he was nowhere in the picture at the time when transaction was entered between the parties.

136. In order to constitute fraud in the contracts, it has to be proved that the consent of the parties to the contract was obtained by fraud. Subsequent conduct has no bearing on the contract in the case of contracts as is made clear by the provisions of Section 19 of The Contract Act. Moreover, PW.1 has stated that he has come to the conclusion that defendants committed fraud on the basis of documents collected, statement recorded, files prepared by him and information collected. It is pertinent to note that PW.2 has himself admitted in his re-examination by the plaintiff that he has no knowledge of the documents. Statement recorded by him of Jugna Lodhaya Exh. 311, 312, Pushpak Khot at Exh. 313, Ketan Maskaria Exh. 314, Bina Sanghvee Exh. 315 and Jaikumar Mehta Exh. 316 only shows that defendant Nos.3 company and defendant No. 5 company are associated companies. Above statements further shows that security No. 3 was handed over by defendant No.3 to defendant No. 5. It also shows that defendant No. 2 was

director of defendant No. 5 company for some time. However, document Exh. 323 shows that defendant No. 2 resigned from the post of Additional Directorship of defendant No. 5 w.e.f. 15/05/2001 i.e., before the suit transactions. Thus, evidence of PW.1 and 2 cannot be relied upon, nor they proved alleged fraud.

131. Order 6 rule 4 CPC provides that in all the cases were party pleading relies on mis-representation, fraud, breach of trust, willful default, undue influence etc., particulars with dates and items shall be stated in the pleading. Plaintiff has not specifically pleaded what was the mis-representation, deception, cheating, its mode and date of such acts.

137. It is the contention of plaintiff bank that none of the defendants have rebutted the evidence lead by the plaintiff bank. As such, plaintiff bank discharged its initial burden of proving fraud and the onus now shifts on the defendants to rebut the evidence and lead evidence of the facts specifically within their knowledge as provided under Section 106 of the Evidence Act. It is pertinent to note that as stated above, the initial burden as provided under Section 101 and 102 of the Evidence Act is always on the plaintiff bank. In the cases of fraud, mis-representation, breach of trust etc., the burden of proving them is heavily casted on the party alleging it. In the present case none of the witnesses have deposed as to what was the deception, mis-representation and when it was made.

138. Plaintiff has also relied upon the case of ***Thangachi Nachial -Vs- Ahemad Hussen Malumiar, reported in AIR 1957***

Madras, 194 and has submitted that fraud is always secret in its origin. As such, it was necessary for the defendants to rebut the evidence. As discussed above, plaintiff has failed to prove both the transactions dated 15/01/2002 and 28/02/202. Moreover, second transaction is proved to be with defendant No. 3 and plaintiff has failed to prove transaction as pleaded. Secondly, plaintiff has failed to discharge its initial burden of proving mis-representation, deception, details of forgery, the documents forged etc. Unless the initial burden is discharged by the plaintiff to prove these facts, the onus will not shift on the defendants to rebut the evidence lead by plaintiff. Section 102 of the Evidence Act specifically provides that burden of proving a particular fact lies on the person, who would fail if not evidence is given on either side. Since the fraud, mis-representation, breach of trust are alleged by plaintiff, burden will always be on it to prove these facts.

134. Plaintiff has also contended that defendant No. 1, 3, 5-a, 5-b and 6 are involved in similar transaction with other co-op. Bank and has relied upon the case of ***Vinayachandra Tusidas Madhalani and others -Vs- State of Maharashtra, reported in 2002 (Supp.2) Bombay C.R. 198,*** and in the case of ***Nagpur District Central Co-operative Bank -Vs State of Maharashtra, reported in 2005 (Supp) Bombay C.R. (Criminal), 760.*** However, it is pertinent to note that the above cases are in respect of interim orders and none of the case the guilt of the accused have been proved. Merely because accused / defendants were investigated arrested or that charge-sheet was filed against them, this Court cannot hold them to be criminals. Unless the guilt of accused is

proved, they are presumed to be innocent.

139. Frauds in criminal case and frauds in contract are always on different footings. Frauds in civil case are to be determined on the basis of provisions provided in the Contract Act. Plaintiff claims that since the transactions are vitiated by fraud, they are void ab-initio. Fraud as defined in Section 17 of the Contract Act is reproduced as under.

> ***Section 17 Fraud*** :- "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent with intent to deceived another party there to or his agent or to induce him in to the contract :-
>
> (1) The suggestion of fact that which is not proved by one who does not believe it to be true.
>
> (2) The active concealment of fact by one having knowledge or believe of the fact.
>
> (3) A promise made without any intention of performing it.
>
> (4) Any such act or omission has the loss specifically declares to be fraudulent.
>
> (5) Any other act fitted to deceive.

Explanation :- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, his silence is, in itself, equallent to speech.

140. As discussed above, there is no evidence on record as to what deception or inducement was made by the defendants. Neither it has proved what facts were suggested by the defendants which were not true and it believed to be true. Plaintiff bank has submitted that defendants have no intention to perform the transactions. I have already discussed above, that first leg of transaction is duly performed by defendant No. 1 by paying difference amount to plaintiff bank and consideration of security No. 2 to defendant No. 5. As regarding transaction No. 2 dated 28/02/2002, plaintiff itself failed to prove this transaction to be with defendant No. 1 as pleaded by it. Moreover, sale consideration of security No. 3 i.e., difference amount is received by plaintiff bank and consideration of security No. 4 is paid to defendant No. 3 for the purchase of security No. 4.

141. Section 18 of the Contract Act defines mis-representation, which is reproduced here under.

> ***18. Mis-representation defined*** .:- "Mis-representation" means and includes :-
>
> (1) Positive assertion in a manner not warranted by the information of the person making it, of that which is not to though he believes it to be true.
>
> (2) Any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him, by misleading another to his

prejudice or to the prejudice of any one claiming under it.

(3) Causing, however innocent, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

142. Plaintiff has not lead any evidence to show as to what was the positive assertion made by the defendants which was not true.

143. Plaintiff has claimed the transaction to be void ab-initio. The contracts are void only under two circumstances i.e., when it is an act which is forbidden by law or performance of which is impossible. It is not the case of plaintiff that the suit transactions are forbidden by law or are impossible. All other contracts, even if they are vitiated by fraud, are only voidable at the option of the plaintiff. Section 19 of the Contract Act is reproduced as under.

19. Voidability of agreements without free consent.

When consent to an agreement is caused by coercion fraud, or mis-representation, the agreement is a contract voidable at the option of the party, whose consent was so caused.

A party to a contract _, whose consent was caused by fraud or mis-representation, may, if he thinks fit, insists that contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception :- If such consent was caused by mis-representation or by silence, fraudulent within the meaning of Section 17, the contract, never-the-less, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinarily diligence.

Explanation :- A fraud, mis-representation which does not caused the consent to a contract of the party of whom such fraud was practiced, or to whom such mis-representation was made, does not render a contract voidable.

144. Plain reading of above Section it makes it clear that for rendering the contract voidable, the fraud must be played at the time of obtaining the consent of the party i.e., when the contract was entered into and not thereafter. Secondly, even if a fraud is played and consent is obtained by fraud, it is the option of the person whose consent was so caused, either to seek the declaration to the contract to be void or to seek performance of it. In the present suit plaintiff has not obtained for declaring the transaction to be void and has claimed performance of the transaction. Perusal of the prayer clause of the plaint makes it clear that the plaintiff is seeking performance of contract. In both the transactions, plaintiff is seeking delivery of security Nos. 2 and 4 and in the alternative, it is seeking return of security Nos. 1 and 3 or as the third alternative, it is claimed price of both the securities. Plaintiff has also amended and added prayer clause (vi) which is in respect of directing RBI and SEBI to transfer security Nos. 1 and 3, now existing in electronic form from the accounts of defendants or

any person claiming through them to the plaintiff's account. Since the security Nos. 1 and 3 are not existing in the physical form and are converted in electronic form, this prayer No. (vi) will have to be read with the first alternative prayer of return of security Nos. 1 and 3, which were in physical forms.

145. Plaintiff has not sought declaration of the contract to be void and thus opted for performance of the contract as is clear from the pleadings, particularly the prayer clause. As such, even if there is a fraud played on the plaintiff it will have no effect on the suit transactions.

146. Secondly, Exception in Section 19 makes it clear that even if there is a fraud on mis-representation, the contract is not voidable if the party whose consent was caused had means of discovering the truth with ordinary diligence. PW.1 who is the Managing Director of the plaintiff bank has himself mentioned in the letter written by him to RBI dated 27/04/2002 filed at Exh. 238 that plaintiff bank had, at the time of sale and purchase of securities, called for quotation and verified prevailing rates of securities from the market quoting, and by making enquiries with others and after full satisfaction, the transaction is put through. Plaintiff has itself pleaded that it is dealing with defendant Nos. 1 and 2 since 1998 and there is no default till the present transaction. PW.1 has also admitted issuing letters Exh. 238 and Exh. 239 to the RBI. In the letter Exh. 239 , plaintiff bank has stated that it made inquiries with market quoting and also received quotation from other brokers. This shows that plaintiff had other means of discovery of truth with

ordinary diligence. As such, in view of the exception carved out in Section 19 of the Contract Act, plaintiff cannot claim the suit transactions to be void.

147. It is also pertinent to note that while alleging fraud by the defendants, plaintiff bank conveniently suppressed the material fact that all the directors and some of the employees including PW.1 are also accused of the alleged fraud and have been charge-sheeted. All the then Director of Board of the plaintiff bank, it's Managing Director i.e. PW.1 Shri Dattatray Mavalkar are also accused in Reg. Criminal Case No. 847/2002 pending before Chief Judicial Magistrate, Amravati for offences under Section 406, 409, 420, 468, 120-B r/w Section 34 of I.P.C., charge-sheet of which is filed on record Exh. 202. The I.O., has filed details of crime along with charge-sheet which runs into 13 pages, which discloses that bank has entered into the said contract in contravention of bye law No. clause 36 (8, 9 and 14) and clause 39 (2) of the plaintiff bank. It further reveals that the suit transaction was entered into in violation of directives of RBI which mandates dealing of Government securities to be through Subsidiary General Ledger Account (SGL). Suit transaction was also found to be with un-registered brokers, which is in contravention of the RBI directives. The Board of Director was the Governing body of the plaintiff bank at the time of suit transactions. As such, the act of the Board of Director was the act of the bank. A party who is himself / itself a party to the fraud cannot inforce the contract by alleging fraud on the other party. It is also pertinent to note that though this fact was well within the

knowledge of plaintiff bank it suppressed this material fact and only pleaded that the defendants are accused in the said crime. Plaintiff should have approached the Court with clean hands and should have pleaded all the material facts. This amounts to paying fraud on the Court in view of the ratio laid down in the case of ***S.P.Chengalveraya Naidu -Vs- Jagannath, reported in AIR 1994, S.C., 853***.

148. Plaintiff has also claimed that Government security Nos. 1 and 3 and accrued benefits now existing in electronic form is liable to be transferred in D-Mat Account of the plaintiff bank in view of the alleged fraud committed by the defendants. It is pertinent to note that by the present suit, plaintiff bank is claiming performance of the contract dated 15/01/2002 and 28/02/2002 and claiming delivery of security Nos. 2 and 4. Plaintiff has not sought declaration of contract to be void and has opted for enforcement of the contract. As such, in view of Section 19 of the Indian Contract Act, plaintiff cannot now claim that the suit transactions are vitiated by fraud and it is entitled to be placed in the original position.

149. Secondly, the first legs of both the transactions dated 15/01/2002 and 28/02/2002 i.e., sale of security Nos. 1 and 3 has been completed and the title of the securities have been conveyed to the buyers thereof. PW.2 has admitted in his cross-examination that defendant No. 3 Century Dealers passed the Government security No. 3 to defendant No. 5 Home Trade and Home Trade sold these securities to many persons. Evidence on record of PW.1

and PW.2 further shows that both the security Nos. 1 and 3 were sold by defendant Nos. 1 and 3 to different persons. I have already discussed above that the title to these security Nos. 1 and 3 have passed to the respective buyers, as the first leg of both the transactions is completed, since plaintiff has delivered these securities and received price thereof. As such, plaintiff cannot claim these security Nos. 1 and 3.

150. Even if for the sake of argument it is consider that the sale of security Nos. 1 and 3 were vitiated by fraud, it cannot be said that title to the securities have not passed to the subsequent buyers. Section 29 of the Sale of Goods Act provides that when seller of goods had obtained possession thereof under a contract viodable under Section 19 or Section 19 A of The Indian Contract Act 1872, but the contract has not been rescinded at the time of the sale, the buyer acquired a good title to the goods, provided he buys them in good faith and without notice of the seller defect of title. In the present case PW.2 has admitted that subsequent purchaser entered into the transaction of security Nos. 1 and 3 before registration of the offence through RBI without having knowledge of the fraud, as such they were not made accused in the criminal case. There is no evidence on record to show mala-fide or dishonest intention on the part of subsequent purchasers of security Nos. 1 and 3. Neither plaintiff has joined subsequent purchaser as party to the suit to prove their bona-fieds. Thus, the title of security Nos. 1 and 3 is validly transferred to the subsequent purchaser and plaintiff cannot claim security Nos. 1 and 3 and accrued benefits, now

existing in electronic form.

151. Moreover, proviso to Section 27 of the Sale of Goods Act provides that where a mercantile agent is,. With the consent of owner in possession of a goods or for a documents of title to the goods, any sale made by him when acting in the ordinary course of business of a merchantile agent, shall be as valid as if he were expressly authorized by the owner of goods to make the same ; provided that the buyer acts good faith and has not at the time of the contract of sale noticed that seller has no authority to sell. In the suit transactions as pleaded plaintiff authorized the brokers to sell the securities and entrusted them with the security Nos. 1 and 3. As discussed above, the subsequent purchasers had no knowledge of the transactions between plaintiff and defendants. As such, the subsequent purchaser would acquired a good title of security Nos. 1 and 3.

152. Plaintiff bank has relied upon the case of ***A.V. Papayya Sastry -Vs- Government of A.P., reported in 2007, S.C., 1546***, case of ***Baburao Dagdu Paralkar -Vs- State of Maharashtra, reported in AIR 2005, S.C., 3330 (1).*** In the present suit, plaintiff has failed to prove the exact nature of fraud played by the defendants. The facts of this case being different the ratio laid down is not applicable. It also suppressed that directors of the plaintiff bank are also accused in the alleged fraud and have been charge- sheeted in criminal Case No. 847/2002. As such, the ratio laid down in the case of ***S.P. Chengal Varaya Naidu -Vs-***

Jagannath, reported in AIR 1994, S.C., 853 is applicable to itself.

153. For all the reasons stated above, I hold that plaintiff has failed to prove that defendant Nos. 1 and 2 in collusion with defendant Nos. 2 to 6 including defendant Nos. 5-a and 5-b mis-appropriated sale consideration of Government security Nos. 1 and 3 and did not purchase security Nos. 2 and 4. I further hold that plaintiff further failed to prove that transactions dated 15/01/2002 and 28/02/2002 are vitiated by fraud, cheating, forgery, criminal breach of trust, criminal mis-appropriation and criminal conspiracy by defendant Nos. 1 to 6, abated by defendant No. 7 and being against public interest and public policy are void ab-initio and not binding on plaintiff bank. I further hold that security Nos. 1 and 3 and accrued benefits now existence in electronic form are not liable to be transferred it D-Mat SGL account of the plaintiff bank and I answer issue Nos. 6, 6-A and 8-A in negative.

154. ***AS TO ISSUE NO. 20-A***. :- Defendant Nos. 1 and 2 have raised objection that suit is bad for want of necessary party and have also contended that suit suffers from mis-joinder of party.

155. According to the defendant Nos. 1 and 2 the suit transaction is between plaintiff bank and defendant No. 1 company. Defendant No. 1 company is a registered company and a legal entity and can sue and be sued in its name. Directors of the companies cannot be held personally liable for the act of the company. Despite this, plaintiff has joined defendant No.2 in his

personal capacity. As such, suit suffers from mis-joinder of parties. Defendant Nos. 1 and 2 have relied upon the case of ***Pudukottah Textiles -Vs- B.R. Adityan, reported in AIR 1976, Madras, 341***.

156. There is no doubt that in the case simple breach of contract directors cannot be held personally liable for the act of the company. The company being a legal entity can sue or be sued in its name. In the present case, plaintiff is alleging fraud and collusion by the directors of the company in their personal capacity. As such, it cannot be said that the suit suffers from mis-joinder of parties. The ratio laid down in the above case of Pudukottah Textiles -Vs- B.R. Adityan will not be applicable in the present case since the question of fraud was not before it and it was a simple case of breach of contract.

157. It is also the contention of defendant Nos. 1 and 2 that the suit suffers from non-joinder of necessary parties on two counts. Firstly the directors of the plaintiff bank have not been joined as plaintiffs or as defendants and secondly non-joining of the subsequent purchasers of security Nos. 1 and 3, which were sold in the market and particularly the last purchaser of the securities. It is the contention of defendant Nos. 1 and 2 that by-law No. 36 of the plaintiff bank provides that every suit to be filed and defended by the board of directors. As such, every member of the board of director is a necessary party. Moreover, since every director is accused of criminal conspiracy against the plaintiff bank and have been charge-sheeted in criminal case No. 847/2002, they are

necessary parties, either as plaintiffs or as defendants.

158. It is true that at the time of entering of contract the plaintiff bank was acting through its board of directors. However, vide order below Exh. 214 passed by Commissioner of Co-operative dated 10/05/2002, the board of directors were superseded and removed under the provision of Section 110-A (iii) of Maharashtra Co-op. Societies Act, and an Administrator was appointed. On the day of filing of suit the affairs of the plaintiff bank was conducted by the Administrator and board of director were not having any power being denuded of their powers. As such, joining of directors as plaintiffs was not necessary. Moreover, as the bank is making allegations of fraud, joining of directors as plaintiff would have been detrimental to the interest of the plaintiff bank. On this count also the directors and the officers of the plaintiff bank could not be joined as plaintiffs.

159. Directors and Officers of the plaintiff bank are also accused of criminal conspiracy, mis-appropriation, breach of trust etc., along with defendants and have been charge-sheeted. Charge-sheet Exh. 202 in criminal case No. 847/2002 filed on record shows that accused No. 1 is president, accused No. 2 is vice-president, accused Nos. 3 to 15 are the directors and accused Nos. 16 to 18 are the employees of the plaintiff bank. Since these directors and officials of the plaintiff bank or also accused of the same offence of playing fraud on the plaintiff bank, they are also necessary parties to the present suit.

160. Plaintiff bank has filed application Exh. 37 for joining defendant Nos. 5-a and 5-b, where in it has been pleaded by the plaintiff bank that in the investigation police have found that defendant No. 5-a and 5-b are directors of defendant No. 5 company and they are necessary parties. Applying the same principle, plaintiff should have joined other persons as defendants to the suit, who are accused in criminal case No. 847/2002 pending before C.J.M., Amravati.

161. If the plaintiff alleging fraud to have been played upon it, all the persons who are alleged to have committed the fraud are necessary parties. The then directors and employees of the plaintiff bank are also alleged to have conspired with defendant Nos. 1 to 6 and have been charge-sheeted in criminal case No. 847/2002. As such all the directors and employees i.e. accused Nos. 1 to 18 in criminal case No. 847/2002 are necessary parties to the suit.

162. Defendant Nos. 1 and 2 have also submitted that the last holder of securities, from whom the securities were freezed are also necessary parties in view of the prayer clause No. (i), (ii) and (vi). It is the contention of the defendant Nos. 1 and 2 that since plaintiff is claiming return of security Nos. 1 and 3 which is admittedly not in possession of either of the defendants and are sold to different companies, the last holder of securities who have become the owner thereof by paying valuable consideration are

necessary parties. It is further submitted that if the prayer of plaintiff is allowed, it would adversely affect the rights of the purchasers. It has further submitted that it is the cardinal principle of justice that whenever any person is adversely affected by the orders of the Court, then he must be given an opportunity of hearing by applying the principles of , "audi aterum partem".

163. Plaintiff has contended that the securities sold by defendants are stolen property within the meaning of Section 410 of IPC and all the subsequent purchasers are receivers of stolen property within the meaning of Section 411 of the IPC. Plaintiff has contended that as per order of CJM below Exh. 265 in criminal case No. 847/2002 dated 18/04/2006, copy of which is filed at Exh. 237 in this suit, securities sold by defendants were freezed. It has further contented that as per order of CJM in Misc.cri.Appln. No. 572/2002 MKVDC bonds worth Rs. 1.5 crores were given in possession of plaintiff bank. Said order of CJM was challenged by defendant No. 7 bank in cri. Rev. No. 46/2004 before the District Judge, Amravati. The said revision was dismissed vide order dated 14/07/2006, copy of which is filed at Exh. 179. While dismissing the revision Hon'ble District Judge has held that these securities are stolen property within the meaning of Section 410 IPC. Plaintiff has further submitted that Hon'ble High Court in Writ Petition No. 66/2007 have confirmed the orders of Lower Court, as such, the orders have attained finality and plaintiff is entitled to these securities.

164. The above submission of the plaintiff cannot be accepted. All the orders passed by the CJM, District Court and Hon'ble High Court stated above are in respect of interim custody of the securities and they do not decide the title of these securities. Plaintiff has relied upon the case of ***Nagpur District Central Co-op. Bank -Vs- State of Maharashtra, reported in 2004 (1) Bom.C.R.(Cri), 776*** wherein, the defendants companies in this suit were involved in the similar transaction with Wardha District Central Co-op. Bank. The said case, Hon'ble High Court has held as under.

> "The seizing of account by itself would only prevent the applicant bank from making further investments out of the amount and to the extent secure the amount. Once the amount is secured, their exist provision in the Court, both at the interim at final stage of the trial to seek the return of any amount genuinely due to any person. That claim is decided judiciary and the order so passed can be subjected to further scrutiny by higher Court".

The above observation of the Hon'ble High Court is applicable to the present case. The above observation further makes it clear that the custody of the Court pending trial or the custody of parties under the provision of Section 451 or 457 of Cr.P.C., are interim custody and the trial Court has to decide as to who is entitled for the custody of the said property at the conclusion of the trial as provided under Section 452 Cr.P.C. The trial Court while deciding the custody of the properties will have to take into consideration as to

who is entitled to the property. Any judicial pronouncement by the Civil Court in respect of the title of these properties are binding on the Criminal Courts. Under no stretch of imagination it can be said that the order passed by CJM Amravati in respect of freezing of the security Nos. 1 and 3 under Section 91 of Cr.P.C., order of CJM granting interim custody of MKVDC bonds worth Rs. 1.5 crores to the plaintiff bank, orders passed by Hon'ble District Judge in Revision and order passed by Hon'ble High Court in W.P.No. 66/2007 can be said to have decided the title / ownership of the plaintiff over security Nos. 1 and 3.

165. As per my findings on issue Nos. 1 to 4 and 6, 6-A I have already held that plaintiff has failed to prove the suit transaction, and that since plaintiff seeks to enforce the contract, the allegations of fraud cannot be looked into in view of the provision of 19 of The Contract Act. I have also held that plaintiff has failed to prove he fraud on the part of defendants. While deciding these issues, I have discussed that since first leg of both the transactions was complete, the title / ownership of security Nos. 1 and 3 are validly transfered to the respective owners and plaintiff can only sue for delivery of security Nos. 2 and 4 or price thereof. While deciding issue Nos 6, 6-A and 8-A, I have discussed the provisions of Section 27 and Section 29 of the Sale of Goods Act the same has to be read for deciding this issue. Provisions of Section 27 and 29 of the Sale of Goods Act provides that title of property validly transfers if done by an agent or under a voidable contract before the contract is rescinded. If the plaintiff wants to

claims that security Nos. 1 and 3, all the subsequent purchasers of these securities are necessary parties.

166. It is also the contention of plaintiff that the securities are stolen property within the meaning of Section 410 of IPC and subsequent purchasers have purchased the properties dishonestly knowing it to be a stolen property and therefore, they are not necessary parties. The above contention of the plaintiff bank holds no ground. The evidence on record shows that all the subsequent purchasers were not having slightest of hint of any crime to have been committed in respect of these securities. In view of the provisions of Section 29 of the Sale of Goods Act as discussed above, the title to the security is validly passed to the subsequent purchaser. It is also pertinent to note that one of the subsequent purchaser i.e., defendant No. 7 has been joined as a party to the suit by the plaintiff. Similarly other purchasers of the security are also necessary parties.

167. It is pertinent to note that plaintiff has examined only two witnesses. PW.1 is the Managing Director of the plaintiff bank. He is having absolutely no personal knowledge of what happened to these securities after sale of security Nos. 1 and 3. Neither there was any means to PW.1 to know as to whom these securities were sold and whether they were bona-fied or mala-fied purchasers, whether the purchasers were having knowledge of any fraud being committed or whether they had any dishonest intention to purchase the stolen properties. Knowledge of these facts should be with the

person who investigated the crime i.e. PW. 2 Shri Qureshi and P.I. Shri Deshmukh. P.I. Shri Deshmukh has not been examined. As such, the only person whose testimony can be considered is PW.2 Shri Qureshi.

168. On perusal of the evidence of PW.2 it can be seen that some material admissions have been given by him, which shows that all the subsequent purchasers including defendant No. 7 bank were bona-fide purchasers for consideration without having any knowledge of alleged fraud. PW.2 has admitted that defendant No. 3 company is sister concern of defendant No. 5 company and defendant No. 3 passed security No. 3 to defendant No. 5. He has further admitted that security No. 3 were purchased by defendant No. 3 and given to defendant No. 5, who sold MKVDC bonds worth Rs. 2 crores to defendant No. 1. He further admits that these securities were further sold to various companies. He has also admitted that he has not made the companies, who purchased the Government Securities as accused in the criminal case as the defendants sold these securities through RBI and before registration of offence. He also admits that officers of defendant No. 7 bank were also not made accused in the criminal case.

169. It is also pertinent to note that in the application filed by the plaintiff bank to seize the securities under Section 91 of Cr.P.C., filed on record at Exh. 237, plaintiff bank has given a schedule of securities showing the chain of transaction of sale of securities up to the last purchaser from whom securities were seized. In the said

schedule it was shown that security No. 1 (NG- 1 and NG- 2) worth Rs. 1 crore were freezed from last owner United India Insurance Company Ltd. Security No. 1 (NG- 3 and 4) were lastly owned by NALCO Employees Pension Fund. Security No. 1 NG- 5 to NG- 8 were seized from United India Insurance Company and United India Insurance Company Employees Provident Fund. Security No. 3 NG- 59 and NG- 60 worth Rs. 1 crore were freezed under Section 91 from Hindalco Employees Provident Fund. Security No. 3 NG- 55 and NG- 56 were lastly freezed from L & T Officers and Supervisory Staff Provident Fund, L & T Gratuity Fund, L & T Provident Fund, EWAC Officers and Supervisors Gratuity Funds, Tengil Gratuity Fund and Audco Staff and workman Provident Fund. Security No. 3 NG- 61 and NG- 62 worth Rs. 1 crore were lastly freezed from Vicro System Provident Fund Trust. Security No. 3 NG- 51 worth Rs. 1 crore was lastly freezed from Janta Sahakari Bank Ltd., Gondia and Tata Technogists, ISP Employees Provident Fund, Turner Morison Officers Fund and Shri Satya Sai Institute Employees Provident Fund.

170. All the subsequent purchasers of the securities including defendant No. 7 were not made accused in the criminal case No. 847/2002, neither there is any charge under Section 411 of IPC. From the above evidence on record it is thus clear that the subsequent purchasers of security Nos. 1 and 3 are bona- fide purchasers of securities without any dishonest intention to purchase the stolen properties.

171. It is also pertinent to note that even if it is consider for the sake of argument that the subsequent purchasers have received stolen property with dishonest intention, under such circumstances also the subsequent purchasers of the securities are necessary parties, so as to grant them an opportunity to show there bona-fides. Holding subsequent purchases of securities receivers of stolen properties with dishonest intention without giving them an opportunity of hearing would cause grave prejudice and would seriously affect the right of these purchasers of securities. Moreover, it would also deprive their of the valuable consideration paid by them for purchasing these securities. It is also pertinent to note that if each subsequent purchaser is required to file a separate suit to claim the securities, it would lead to multiplicity of the litigation. Under such circumstances, joining of all the subsequent purchasers and particularly the last owners of the securities are not only necessary but essential for deciding the issues and relief claimed in the present suit. For all the reasons above I hold that all the subsequent purchasers of security Nos. 1 and 3 are also the necessary parties and suit is bad for non-joinder of necessary parties and I answer this issue in affirmative.

172. ***AS TO ISSUE NOS. 7, 15.*** :- Initially plaintiff bank had pleaded that MKVDC bonds worth Rs. 1.5 crores out of security No. 1 were lying with defendant No. 7 bank. However, subsequently these securities were freezed and seized by the police. As per order dated 13/04/2004 of CJM, Amravati in Misc.Cri. Appl. No. 572/2002, copy of which is filed at Exh. 178,

interim custody of MKVDC bonds worth Rs. 1.5 crores was given to the plaintiff bank. As such, issue No. 7 was framed.

173. Despite having received the custody of the said MKVDC bonds, plaintiff did not make necessary amendments in the plaint. Under these circumstances, defendant Nos. 1 and 2 pleaded in its written statement that these securities are delivered to plaintiff bank. As such, issue No. 15 was framed.

174. Thereafter, the plaint was amended as per order Exh. 122 dated 05/09/2008, wherein plaintiff brought on record that the said MKVDC bonds were handed over to it by the order of CJM, Amravati. In view of these pleadings issue Nos. 7 and 15 do not survive. As such I answer these issues as redundant.

175. ***AS TO ISSUE NOS. 7-A, 19, 19-A.*** ;- These issues are in respect of MKVDC bonds worth Rs. 1.5 crores, which is part and parcle of second transaction dated 28/02/2002 and particularly security No. 3. MKVDC bonds were seized by the Inquiry Officer P.I. Shri Qureshi during the course of investigation from defendant No. 7 bank. PW.2 Shri Qureshi had admitted seizure of these bonds from the custody of defendant No. 7 bank along with original transfer forms and resolution passed by plaintiff bank. The original MKVDC bonds are at Exh. 183 to 187, and xerox copies of blank signed transfer forms are at Exh. 197 to 201 and Exh. 257 to 261 (the xerox copies were exhibited twice). PW.2 has further admitted that original transfer forms were handed over to plaintiff bank. The

MKVDC bonds filed on record at Exh. 183 to Exh. 187, at present have no value as they have been converted into electronic form and on their maturity, they have been en-cashed and reinvested in Government security GOI 2016 as per the orders below Exh. 181 passed by CJM, Amravati. As per the orders of Hon'ble High Court in W.P. No. 66/2007 a separate account is to be maintained for these bonds, wherein interest is also directed to be credited. Under such circumstances, the MKVDC bonds worth Rs. 1.5 crores are now converted into security GOI 2016.

176. Plaintiff has contented that defendant No. 7 Janta Sahakari Co-op.Bank Ltd., Mumbai has abated defendant Nos. 1 to 6 in fraud committed by them by showing false loan transaction and pledged of MKVDC bonds, which are part of security No. 3.

177. Plaintiff has contended that as per the case of Nagpur District Central Co-Op. Bank -Vs- State of Maharashtra reported in 2003 (4) Mh.L.J., 106 it can be seen that defendant No. 7 has abated defendant Nos. 1 to 6. I have gone through the said case. In the said case Hon'ble High Court has not fixed the liabilities nor held on merits that defendants or defendant No. 7 bank has committed any crime. Merely because there are multiple transactions in the account of an account holders maintained with the defendant No. 7 bank, it does not amounts to involvement of bank in any crime. The observations made by Hon'ble Court were on the basis of submissions of the parties wherein inter-locatory order was in question. On the basis of the above cited judgment it

cannot be held that defendant No. 7 has abated defendant Nos. 1 to 6.

178. It is also the contention of plaintiff bank that MKVDC bonds are standing in the name of plaintiff bank then how it can be pledged by Ketan Seth, who was not the owner thereof. It has further contented that plaintiff bank had not authorized any person to pledge MKVDC bonds. It has been further contended that according to defendant Nos. 1 and 2 security No. 3 were passed on by Pushpak Khot to Rajesh Lasunkar, employee of Century Dealers (defendant No. 3), who passed into defendant No. 5 Home Trade, how defendant No. 7 contends that Ketan Seth (defendant No. 2), who is the owner of Giltedge pledged MKVDC bonds. If defendant No. 1 has not taken the delivery of security No. 3, how defendant No. 2 pledged the MKVDC bonds with defendant No. 7.

179. As per my findings on issue Nos. 1 to 4, I have held that plaintiff has failed to prove the suit transactions. MKVDC bonds worth Rs. 1.5 crores are part and parcel of security No. 3 concerning transaction dated 28/02/2002. Plaintiff has alleged said transaction to be with defendant No. 1, which it failed to prove and it was found that said transaction was with defendant No. 3. Further plaintiff failed to prove transactions itself as pleaded by it. On all the above counts these issues do not survive. Since these issues arise from the pleading of the parties the Court is bound to answer these issues. The first leg of second transaction dated 28/02/2002, which is in respect of sale of security No. 3 was complete. This

transaction is elaborately discussed while deciding issue Nos. 1 to 4 and the same has to be considered while deciding these issues. Plain reading of this transaction as pleaded in para 4-B of the plaint shows that plaintiff authorized the broker to sell these securities. If the sale of these securities is authorized by the plaintiff bank itself, plaintiff is now estopped from claiming that it did not authorize sale of security No. 3. On the sale of security No. 3 ownership of these security validly transferred and the owner thereof is free to deal with it as he likes. In the case of BOI Finance -Vs- The custodian, reported ion AIR 1997, S.C.,1952. Similar question was involved and para 40 of the Judgment it has been held that, " the full and ownership of the title in securities vests in the purchaser, the entire property in the security passing immediately upon such delivery and payment."

180. It is also necessary to see as to what is the evidence on record to prove the abatement by the defendant No. 7 as alleged by plaintiff bank. PW.1 is the Managing Director, he has absolutely no knowledge as to what transpired between defendant No. 2 and defendant No. 7 bank. The testimony of PW.1 in respect of it is nothing but a tell tale story and cannot be believed. It is only PW.2, who investigated the crime No. 75/2002, who knows something about the transaction. No other witness has been examined. As such, whatever has been deposed by this witness is the oral evidence on record. Plaintiff has not filed any documentary evidence to show that the loan transaction and pledged between defendant No. 2 and defendant No. 7 are false transactions.

181. PW.2 has deposed in his affidavit Exh. 281 that it was found in the investigation and also by the Court while deciding various applications, revisions that defendant Nos. 1 and 2 in collusion with defendant Nos. 3 to 7 fraudulently and dishonestly induced to deliver security Nos. 1 and 3 and committed mis-appropriation, breach of trust etc. He has also deposed that defendant No. 7 acting in collusion, nominally and unauthorized pledged MKVDC bonds with defendant No. 7 and defendant No. 7 is acting in league with defendant Nos. 1 to 6.

182. In his cross- examination, PW.2 has given some material admissions, which are as follows.

(1) Second transaction dated 28/02/2002 was between plaintiff bank and defendant No. 3 Century Dealers.

(2) Century Dealers passed Government security No.3 including MKVDC bonds to defendant No. 5, who is sister concern of defendant No. 3.

(3) Admitted that Ketan Maskaria in his statement Exh. 314 stated that Century Dealers had purchased Government security worth Rs. 5.5 crores including MKVDC bonds from Amravati Peoples Co- op. Bank.

(4) Admitted that Ketan Maskaria further stated that Home Trade sold MKVDC bonds to Giltedge Management (defendant No. 1)

_____(5) Admitted that MKVDC bonds and Government securities worth Rs. 2 crores were sold by defendant No. 5 to

defendant No. 1.

_____(6) Admitted that he did not made companies who purchased the Government securities an accused in criminal case as defendants sold these securities through RBI to these companies before registration of offence.

_____(7) States that as transaction of sale of securities to other companies was through RBI, they relied on the transaction as genuine, as such, they were not made accused.

(8) Admits that during course of investigation I found that MKVDC bonds of security No. 3 were pledged with Janta Sahakari Co-op. Bank i.e., defendant No. 7 and he seized said bonds along with transfer forms along with authority letter of Managing Director of plaintiff bank Shri S.N. Joshi and Dattatray Mavalkar to deal with security No. 3.

(9) Admits seizure memo Exh. 318.

_____On perusal of the evidence on record it can be seen that there is no evidence showing as to how defendant No. 7 bank abated defendant Nos.1 to 6. As per my findings on issue Nos. 6, 6-A, 8-A, I have already held that plaintiff has failed to prove fraud, mis-appropriation, criminal breach of trust. As such, the abating of the fraud by defendant No. 7 does not arise. Moreover, the above admissions given by the PW.2 further shows that MKVDC bonds are pleaded by defendant No. 2, which were purchased by defendant No. 1 company from defendant No. 5 Home Trade, who got its custody from Century Dealers (defendant No. 3) to whom plaintiff bank has entrusted for selling the same. The complete link of chain of transaction of MKVDC bonds is admitted by the plaintiff's

witness i.e. PW.2.

183. Moreover, defendant No. 7 is not a natural person but a reputed Co-operative bank. Granting loans against securities is the regular business of banks and every bank tries to secure the loans advanced by it by way of mortgage, pledge, charge etc. Merely because defendant No. 2 pleaded bonds with defendant No. 7, it cannot be said that defendant No. 7 abated the crime. Defendant No. 7 bank while taking these securities in pledge also confirmed whether plaintiff bank had authorized the sale of these MKVDC bonds as is clear from the fact that the resolution passed by the plaintiff bank authorizing sale of MKVDC bonds was seized from the custody of defendant no. 7 by PW. 2 vide seizure memo Exh. 318. Bona-fide of the defendant No. 7 bank can also be gathered from the fact that they have obtained an Award against the defendant No. 2 in respect of the said loan transaction, copy of which is filed at Exh. 430.

184. Plaintiff bank has further contented that MKVDC bonds are still in its name as owner thereof. As such it is still owner of these bonds. This argument has no base. Plaintiff has itself pleaded that security Nos. 1 and 3 were entrusted for selling to defendant Nos. 1 and 2, and blank signed transfer forms were also handed over. This shows that in the regular course of transaction the transfer of securities, securities are sold by delivering the securities along with blank signed transfer forms. Plaintiff has also pleaded that this is the regular mode of transaction. Interest on

these securities are paid biannually and the person holding the securities and the relevant time of payment of interest may present it with RBI to get the said securities registered in his name in order to claim the interest. In the period intervening the payment of interest, there may be multiple transaction of sale of security on the basis of blank signed transfer forms and the ownership validly passes to the purchasers. According to the plaintiff's pleading in the suit transaction also same mode of transaction was adopted, thus, the contention of the plaintiff that it is still the owner of MKVDC bonds cannot be accepted. Moreover, as stated above, said MKVDC bonds got matured in the year 2005 and plaintiff bank, who has interim custody of this security has reinvested this amount in Government security GOI 2016.

185. Plaintiff has contended that defendants cannot show that security No. 3 passed by defendant No. 3 to defendant No. 5, who sold it to defendant No. 1 and so on without there being any pleadings in respect of this transaction. This ground also has no substance. Plaintiff has alleged transaction dated 28/02/2002 to be between plaintiff and defendant No. 1. Defendant Nos. 1 and 2 have pleaded in their written statement Exh. 107 that this transaction was between plaintiff bank and defendant No. 3 and not between plaintiff and defendant No. 1. In order to prove the said facts defendants have every right to put such questions to the witnesses of plaintiff bank. Section 11 of The Evidence Act makes it clear as to when facts not otherwise relevant becomes relevant. Section 11 is reproduced hereunder.

11. When facts not otherwise relevant become relevant.

Facts not otherwise relevant are relevant :

(1) If they are inconsistent with any facts in issue or relevant fact;

(2) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though, not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

Thus, Sub Section (2) of Section 11 makes it clear that in order to prove that transaction dated 28/02/2002 was not between plaintiff and defendant Nos. 1 and 2 and was between plaintiff and defendant No. 3, defendants can lead evidence and / or cross-examine the witness of plaintiff to show that the transaction No. 2 was with defendant No. 3. Though the further transactions are not relevant for the facts in issue, they become relevant in order to

show that since the transaction was between plaintiff and defendant No. 3, security No. 3 were further sold by it to different persons.

186. It is also the contention of plaintiff that defendant No. 7 has not proved the pledge as such, these issues are to be decided in favour of plaintiff. Plaintiff has further submitted that defendant No. 7 did not enter witness box, neither proved the pledge and the oral evidence on record is inadmissible in view of Section 91 of The Evidence Act in absence of the documents on pledge. It is pertinent to note that in para 8-A of the plaint, plaintiff has pleaded that defendant Nos. 1 to 6 unauthorizedly and nominally pledged MKVDC bonds worth Rs. 1.5 crores with defendant No. 7 bank. From the above pleadings, it is clear that plaintiff is admitting the pledge, but claiming it to be nominal. In view of this pleading, it is for the plaintiff to prove that the said pledge was nominal and burden lies on the plaintiff to prove this fact. Once the pledge is admitted, no further proof of its existence is required. As per the provisions of Section 57 of The Evidence Act, facts admitted need not be proved. PW.2 has also admitted that defendant No. 2 has pledged MKVDC bonds with defendant No. 7 bank and since the transaction was bona-fide he did not make officials of plaintiff bank accused in the criminal case. Plaintiff has failed to prove that the pledge was nominal. As such, the above contention of the plaintiff also has no substance.

187. Plaintiff has also contended that defendant No. 7 bank has itself submitted that plaintiff bank had sold security No. 1 and 3

to defendant Nos. 1 and 2. As such, the transaction dated 28/02/2002 is proved. The above submission of the plaintiff holds no ground. Plaintiff's evidence on record and documents filed by it shows that transaction dated 28/02/2002 to be between plaintiff bank and defendant No. 3. Defendant No. 7 bank absolutely has no knowledge of suit transaction as it was not in picture at the time of entering into the suit transaction dated 28/02/2002. Neither defendant No. 7 is a party to the said transaction. Defendant No. 7 bank has no means of knowing the transaction as entered between plaintiff and other defendants. Under such circumstances, if the defendant No. 7 states that second transaction is between plaintiff and defendant Nos. 1 and 2, it will have no bearing on the case and needs to be ignored.

188. Defendant No. 7 bank has submitted that as per the provision of Section 171 and 176 of The Indian Contract Act, defendant No. 7 bank has .precedential right over the MKVDC bonds and accrued benefits as they are pledged with it. In support of this contention he has relied upon the case of ***Central Bank of India -Vs- Siriguppa Sugars and Chemicals Ltd., reported in AIR 2007, S.C., 2804*** and ***Standard Chartered Bank -Vs- Custodian, reported in AIR 2000, S.C., 1488***. the ratio laid down in both the cases above, are applicable in the present case.

189. Plaintiff has failed to prove the suit transactions dated 15/01/2002 and 28/02/2002. It further failed to prove that transaction dated 28/02/2002 was with defendant Nos. 1 and 2.

Transaction dated 28/02/2002 as pleaded by the plaintiff itself shows that it authorized sale of security Nos. 1 and 3. PW.2 has admitted that MKVDC bonds were pledged by defendant No. 2 with defendant No. 7, which were seized by him from defendant No. 7 bank along with blank transfer forms and resolutions of plaintiff bank showing authorization to sale this security No. 3.

190. For all the reasons above, I hold that plaintiff bank failed to prove that defendant No. 7 abated defendant Nos. 1 and 2 in mis-appropriating Government security Nos. 1 and 3. I further hold that plaintiff bank failed to prove the pledge of MKVDC bonds worth Rs. 1.5 crores by defendant No. 1 in favour of defendant No. 7 bank is not binding on the plaintiff bank. I also hold that defendant No. 7 has lien over MKVDC bonds and I answer issue No. 7-A and 19-A in negative and issue No. 19 in affirmative.

191. ***AS TO ISSUE NOS. 17, 18 & 20.*** :- These issues arise in view of adding of defendant Nos. 5-a and 5-b. Nandkishor Shankarlal Trivedi and Subodh Chand Dayal Bhandari , who are directors of the defendant No. 5 company were added subsequent to the filing of suit by application Exh. 37, which was allowed by order dated 29/07/2004. Names of defendant Nos. 5-a and 5-b were incorporated in the plaint on 19/08/2004. According to the plaintiff it was found in the investigation by the police that defendant Nos. 5-a and 5-b were directors of the defendant No. 5 company and they are also jointly and severally responsible for the suit claim. Plaintiff has also alleged collusion, conspiracy, fraud, mis-

appropriation, breach of trust against these defendants. It is also the contention of plaintiff that in the case of ***Vinayachandra Tulsidas Madhalani -Vs- State of Maharashtra & others, reported in 2002 (Supp.2), Bom. C.R., 198***, Hon'ble High Court has made certain observation in respect of these defendants of which relevant portion is claimed to have been reproduced at page 77 and 78 of notes of arguments Exh. 398.

192. Defendant Nos. 5-a and 5-b have raised ground of limitation and has submitted that suit is barred by limitation. It is their submission that amendment and addition of parties does not relates back to the filing of suit. They have further contended that only because they were directors of defendant No. 5 company, they cannot be made liable in their personal capacity.

193. Perusal of plaint and particularly para 11, which is in respect of cause of action shows that cause of action to the suit arose on 15/01/2002 and 28/02/2002. These defendants were joined subsequent to the filing of suit vide application filed by the plaintiff Exh. 37, which was allowed by order dated 29/07/2004. Name of these defendants were incorporated on 19/08/2004. Article 13, 68 provides for limitation of 3 years. As such, the limitation would come to an end 15/01/2005. These defendants having been joined on 19/08/2004, the suit is within limitation as against them.

194. Defendant Nos. 5-a and 5-b have taken the ground of

lack of jurisdiction of this Court. However, they have not specifically pleaded as to how or under which law this Court lacks territorial or inherent jurisdiction. Neither these defendants have lead any evidence to prove this issue of jurisdiction.

195. I have already held that plaintiff has failed to prove suit transactions and that fraud to have been played by the defendants. Under such circumstances, issue No. 18 does not survive. If the suit transaction would have been proved by the plaintiff then only the defendant No. 5-a and defendant No. 5-b would have been required to prove this issue No. 18. Defendant No. 5-b need not and cannot prove negative assertion and the burden of proving the fraud would always beyond the plaintiff. As such, I hold that this issue has become redundant.

196. For all the reasons above, I hold that suit is within limitation and within the jurisdiction of this Court and I accordingly answer issue Nos. 17 and 20 in negative, and issue No. 18 as redundant.

197. ***AS TO ISSUE NO. 11*** :-

(A) Object of the Securities Contract (Regulation) Act and Securities and Exchange Board of India Act is to prevent undesirable transaction in security by regulating the business of dealing therein to protect the interest of the investors in securities and to promote and regulate security market. In order to achieve the above object these Acts provides for as to how and by whom

and in what manner transactions of sale and purchase in securities are to be executed. SC(R) Act further provides for mechanism for settlement of claims in case of any dispute in the transaction / contract involving securities. Under such circumstances, the provisions of these Acts needs to be understood in the context of the present suit.

198. Section 16 of the SC(R) Act provides for the power of Central Government to issue notification providing for the manner in which the contract of sale and purchase of security is to be entered into. Sub Section (2) of Section 13 of the above Act provides that contracts in contravention of the notification to be ***illegal.***

199. Section 13 of the SC(R) Act provides for Central Government to issue notification making contracts entered into otherwise than between the members of the Stock Exchange to be illegal. Section 14 provides of the above Act provides that any contract entered in notified area under Section 13 which is in contravention of bye-law specified in that behalf under clause (a) of Sub Section 3 of Section 9 shall be void in respect of ;-

(a) In respect of right of the member of Stock Exchange,

(b) In respect of right of any other person, who has knowing participated in the transaction. In the transaction entailing such contravention.

200. Ministry of Finance i.e. Central Government issued notification bearing No. S.O.183 (E) under Section 29 A of the

SC(R) Act thereby deligating its power to issue notifications under Section 16 of the SC(R) Act to RBI in relation to the contracts in Government security, money market securities, ready forward contracts etc. Said notification is reproduce as under ;-

MINISTRY OF FINANCE

(Department of Economic Affairs)

NOTIFICATION

New Delhi, the 1st March 2000

S.O. 183(E)-- In exercise of powers conferred by Section 29A of the SC(R) Act, 1956 (42 of 1956), the Central Government hereby amends the notification of the Government of India. Ministry of Finance (Department of Economic Affairs), number S.O. 573 (E), dated the 30th July 1992, as follows namely; --

"Provided the powers exercisable by the Central Government under the said section 16 of the said Act, in relation to any contracts in Government securities, money market securities, gold related securities and in securities derived from these securities and in relation to ready forward contracts in bonds, debentures, debenture stock, secutirised debt and other debt securities shall also be exercisable by the RBI constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of the 1934):

Provided further that such contracts entered into on the recognized stock exchanges shall be entered into in accordance with ;-

(a) the rules or regulations or the bye-laws made under the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or

the directions issued by the Securities and Exchange Board of India under the said Acts;

(b) the rules made or guidelines or directions issued under the Reserve Bank of India Act, 1934(2 of 1934) or the Banking Regulation Act, 1949 (10 of 1949) or the Foreign Exchange Regulation Act, 1973 (46 of 1973) by the Reserve Bank of India;

© the provisions contained in the notification issued by the Reserve Bank of India under the Securities Contracts (Regulation) Act, 1956 (42 of 1956)".

Copy of the above notification is filed at Exh. 479.

201. SEBI under the powers deligated to it by the Central Governnment in view of the above notification issued further notification bearing No. 183 (E) under Section 16 dated 01/03/2000, which is reproduce as under ;-

Notification under Section 16(1) by SEBI :-

" SEBI in exercise of the powers conferred under section 16(1) read with the Government of India notification No. S.O. 573(E) dated 30th July 1992 and S.O. 183 (E) dated 1st March 2000 issued notification No. 183 (E) dated 1st March 2000 declaring that no person shall enter into any contracts for sale or purchase of securities otherwise that spot delivery contracts for cash or hand delivery or special delivery or contracts in derivatives as is permissible in the said Act or the Secrurities and Exchange Board of India Act, 1992 and the rules and regulations made under such Acts and the rules, regulations and bye-laws of the recognized stock exchange. It was further specified that the contracts for purchase or sale of Government securities, money market

securities, gold related securities, ready forward contracts, debt securities to be entered into the recognized stock exchange shall be entered in accordance with the rules or the regulations or the bye-laws made under the SC(R) Act or the SEBI Act or the directions issued by SEBI and the rules made under the RBI Act. Banking Regulation Act and the FER Act by RBI."

The above notification is filed at Exh. 480.

202. The above notification provides that the contracts in Government securities or ready forward contracts are to be entered into through recognized Stock Exchange in accordance with the rules and regulations, or bye-laws of stock exchange made under SC(R) Act or SEBI Act or the directions issued by RBI and the rules made under RBI Act, Banking Regulations Act and FER Act by RBI

203. RBI issued circular bearing No. IDMC No. PDRS.3346/10.02.01/99-2000.

"In terms of Notification No. S.O. 2561 dated 27th June 1969 issued by Government of India under Section 16 of the Securities Contracts (Regulation) Act, 1956 all forward contracts in securities had been banned excepting ready forward transactions specifically exempted by the Government. Government of India has now rescinded the 1969 notification and delegated powers to RBI under Section 16 of the SC(R) Act for regulating contracts in Government securities, money market securities, gold related securities and derivatives based on these securities. The copies of notifications issued by Government of India, RBI, and Securities and Exchange

Board of India in this connection are enclosed for your information.

204. In terms of the second proviso to the notification of the RBI referred to above, ready forward contracts as described in the proviso (including Reverse Ready Forward contracts), may be entered into in accordance with the terms and conditions and among the participants as specified here under ;-

(a) ready forward contracts are undertaken only in Treasury Bills and dated securities of all maturities issued by the Government of India and State Governments.

(b) ready forward contracts in the securities specified at (a) above may be entered into by a banking company, a co-operative bank or any person maintaining a Subsidiary General Ledger Account and a Current Account with RBI Mumbai, only among themselves. The list of non-bank entities currently having SGL and Current Account with RBI, Mumbai office is enclosed in Annexure-I

© such ready forward contracts shall be settled through the Subsidiary General Ledger Accounts of the participants with RBI at Mumbai, only and

(d) no sale transaction should be put through without actually holding the securities in the portfolio.

Copy of this circular is filed at Exh. 481.

205. RBI also issued circular No. 252 dated 30/12/2000, which is filed along with charge-sheet Exh. 202 and recovered from the custody of plaintiff bank, it is at Exh. 478. It is reproduced as under;-

Plan .PCB Cir/22/09.29.00/2000-2001. 30 Dec. 2000.

"Please refer to out circular UBDNo. Plan.PCB.32/09.29.00/94-95 dated 24 November, 1994 and UBD.No.Plan PCB.Cir.19/09.29.00/97-98 dated 10 November 1997 in terms of which bank are permitted to undertake transactions in securities among themselves or with non-bank clients through members of the National Stock Exchange and OTC Exchange of India respectively. It has since been decided to permit banks to undertake transactions in securities among themselves or with non-bank clients through the members of Stock Exchange , Mumbai (BSC) in addition to the National Stock Exchange and OTC Exchange of India. In case any transactions in securities are not undertaken on NSE, OTC Exchange of India or the Stock Exchange, Mumbai (BSE) the same should be undertaken by banks directly without the use of brokers.

Bank should ensure that all instructions contained in the above circulars as regards engagement of brokers for investment transactions are strictly adhered to while undertaking transactions in securities among themselves or with non-bank clients through the members of Stock Exchange, Mumbai. It may be noted that any violation or circumvention of the instructions will invite penal action against banks which could include raising of reserve rquirements, withdrawal of refinance from the Reserve Bank of India and denial of access to money market as also such other penalty under the provisions of the Banking Regulation Act, 1949 (AACS), as the

Reserve Bank may deem fit."

206. Notification at Exhs. 479, 480 and circular issued by RBI Exh. 481 cited above, are statutory notifications and circulars having force of law being issued under Section 16 of SC(R) Act and SEBI Act. None of the parties have filed copies of these notifications on record. These notifications and circulars are necessary in order to decide the suit transactions since they are concerned with transactions in Government Securities and ready forward contracts in Government securities. Under such circumstances, this Court obtained copies of the above cited notifications and circulars through internet from the official website of RBI and SEBI. Section 78 of the Evidence Act provides that Acts, orders or notifications of Central Government, State Government or any Department of Central or State Government may be proved by the certified copies or by documents purporting to be printed by order of such Government. Since these notifications and circulars are obtained from the official website of SEBI and RBI by the Court, they can be read in evidence. No Court will allow any illegality to be committed or pass a decree which is based on in contravention of any law only because the parties to the suit have not placed the correct and present position of law or the statutory notifications and circulars before the Court. In the case of ***Lily Thomas -Vs- Union of India, reported in AIR 2000, S.C., 1650***. Hon'ble Supreme Court has held as under ;

" It cannot be denied that Justice is a virtue which transcends all barriers and the rules or procedure or technicalities of law cannot

stand in the way of Administration of Justice. Law has to bend before justice."

Under such circumstances, this Court has placed notifications and circulars filed at Exhs. 479, 480, and 481 on record.

207. On perusal of the above notifications and circulars, it can be seen that plaintiff bank has committed following illegalities while entering into suit contracts / transactions dated 15/01/2002 and 28/02/2002.

(1) Plaintiff bank did not enter into the suit contracts through recognized Stock Exchange and thereby contravene the mandatory directions issued by SEBI by notification filed at Exh. 480 under Section 16 SC(R) Act. Section 16 (2) of SC(R) Act provides that contracts in contravention of notification shall be illegal.

(2) Plaintiff bank did not enter into the suit contracts dated 15/01/2002 and 28/02/2002 through SGL Accounts, as provided by the circular filed at Exh. 481 above, which is issued under Section 16 of SC(R) Act. Thus, in view of Section 16 (2) of SC(R) Act, suit transaction is illegal.

(3) Plaintiff bank entered into both the suit transactions through brokers, though the transaction was not traded through recognized Stock Exchange, which is in contravention of circular issued by RBI filed at Exh. 478. As per the above notification at Exh. 479 the directions issued by RBI vide this circular Exh. 478 are mandatory as issued under Section 16 of SC(R) Act and is thus, illegal as provided under Section 16 (2) of the said Act.

(4) RBI issued circular dated 15/09/1992, copy of which is

filed on record at Exh. 333, which provides that the role of the broker should be restricted to that of bringing the two parties to the deal together. In the suit transaction pleadings of the plaintiff bank reveals that it delivered the securities to the broker and made payment of the securities to be purchased to the brokers which is in contravention of the said circular. Thus, plaintiff bank committed illegality.

(5) Plaintiff bank did not enter into the suit transaction through the SGL Account maintained by RBI and has thus, contravened circular dated 7th March 2000 Exh. 481 and circular dated 19/04/2001 Exh. 227 filed on record issued by RBI.

208. In the case of ***B.O.I. Finance Ltd. -Vs- The Custodian, reported in AIR 1997, S.C., 1952.*** The Hon'ble Supreme Court had on occasion to decide a case involving ready forward contract. The case of SEC -Vs- Drysdale securities of the US Court of appeal was referred wherein reverse process contract was in question. The reverse process contract is a contract where broker enters into sale and repurchase agreement these agreements are structured as sale of securities by the broker subject to an agreement to repurchase them from the other party at a fixed price at a later date. The broker also entered into reverse sale and purchase agreement whereby he purchased Government securities subject to an agreement to resale to the other party at a fixed price at a later date. The suit transactions dated 15/01/2002 and 28/02/2002 are similar transactions.

209. In the above cited case of BOI Finance Ltd. -Vs- The Custodian, Hon'ble Supreme Court has also held that circular issued by RBI under Section 13(1) of Banking Regulations Act are binding. Moreover, the above notifications and circulars being issued under the provisions of Section 16 of SC(R) Act are statutory notifications and circulars. The suit transactions being in contravention of notification and circulars issued under Section 16 are illegal.

Though plaintiff bank has itself pleaded that directions of **Reserve Bank of India** are binding on it, it entered into suit transactions in contravention of circulars filed at Exhs. 481 and 227.

210. In the above referred case of ***Bank of India -Vs- The Custodian,*** Hon'ble Supreme Court has held that illegal contracts cannot be enforced in law or equity. Thus,the suit transactions dated 15/01/2002 and 28/02/2002 are illegal within the meaning of Section 23 of the Contract Act.

211. Under the provisions of Banking Regulations Act and SEBI Act RBI and SEBI issued directions to the Urban Co- op. Bank and other banks in order to prevent the banks falling prey to the fraudulent transactions in order to secure the public funds entrusted with the bank. These directions are made in the public interest. Any contravention of such directions would be opposed to the public policy, rendering the contract illegal under Section 23 of The Contract Act.

212. It is contention of plaintiff bank that if suit is not decreed, loss will caused to the public money, which they have deposited with the plaintiff bank. It is pertinent to note that Joint Registrar Co-operative directed enquiry under Section 88 of M.C.S. Act. In the said enquiry, Award dated 05/02/2003 came to be passed, copy of which is filed at Exh. 250 on record. As per this Award the Enquiry Officer held the directors liable for the loss caused to the plaintiff bank and directed the director of the plaintiff bank to compensate, the plaintiff bank by paying Rs. 11,56,40,462.70 ps. Each director was made liable to pay Rs. 85,66,881/- . The Award under Section 88 is having force of a decree and can be executed through Civil Court. Plaintiff bank has filed execution proceedings against the said directors to recover the compensation amount. Certified copies of the execution proceedings are filed on record vide list of documents Exh. 447. All the 10 executions filed by the plaintiff bank against its directors were dismissed for want of steps by the plaintiff bank, which they did not take since filing of the execution applications in year 2003. List of immovable property filed in R.D.No. 198/03 certified copy of which is filed at Exh. 474 shows that director Vasantrao Pandurangji Saurkar owns 7 immovable properties. Similarly in R.D.No. 199/03 list of property of director Bhojraj Gupta shows that he owns 2 immovable properties at prime location of Amravati. Despite the fact that the directors own immovable properties, plaintiff bank did not take any steps to execute the order under Section 88 of M.C.S. Act Exh. 250 and allowed all the execution proceedings to be dismissed for wants of steps.

213. The order of Enquiry Officer was appealed before State Government and thereafter Hon'ble High Court in W.P. No. 3097/2004 and was confirmed. Though the order is confirmed in appeals, the conduct of the plaintiff bank shows that it does not have will to recover the public money from the persons held liable.

214. Suit contract being illegal and opposed to the public policy cannot be enforced and plaintiff is not entitled to decree as claimed. Suit needs to be dismissed on this count.

215. ***(B)*** Defendant No. 7 bank has filed notes of arguments at Exh. 419. In their notes of arguments defendant No. 7 bank has submitted that it is a Urban Co-operative Bank and the provisions of Maharashtra Co-operative Societies Act 1960 are applicable. It further submitted that issuance of notice under Section 164 of M.C.S. Act prior to filing of suit is mandatory and the plaintiff bank has not issued any notice as required and claimed that the present suit is barred.

216. Plaintiff bank does not claims to have issued the notice under Section 164 of M.C.S. Act. It is the contention of plaintiff bank that as per order 8 rule 2 of CPC, all the grounds needs to be pleaded in their written statement to show that the suit is not maintainable. Defendant No. 7 having not raised this ground in written statement, they cannot now raised these grounds.

217. Plain reading of Section 164 of M.C.S. Act makes it

clear that the jurisdiction of the Court is barred in absence of the notice contemplated under it at and Court cannot entertain the suit itself. If at all the suit is filed inadvertently, the plaint needs to be rejected as per the provision of order 7 rule 11 CPC, as soon as it is brought to the notice of the Court.

218. Defendant No. 7 has relied upon the case of ***SIC Corporation Ltd. -Vs- B.J.V.& Associates, reported in 2008 (5), MH.L.J., 803,*** and case of ***Mohan Mekin Ltd. -Vs- Pravara Ltd., reported in 1987, Mh.L.J., 503,*** wherein it has been held that notice under Section 164 of M.C.S. Act is mandatory and suit filed without such notice is not maintainable.

219. It is pertinent to note that as per the provisions of order 7 rule 11(d) CPC plaint is to be rejected if it is shown that the contents of plaint shows that the suit is barred by any law. This shows that without raising the ground in written statement plaint can be rejected if objection is raised or by the Court suo-moto. Section 164 bars entertaining of suit itself if no notice is given. Plaintiff has nowhere pleaded that it issued notice to defendant No. 7 under Section 164 of M.C.S. Act. In the present suit though the defendant No. 7 did not raise the objection initially, it is raised as a later stage. Merely because the objection is raised at the later stage, Court cannot ignore the provision of Section 164 of M.C.S. Act, which bars the jurisdiction of the Court to entertain the suit itself.

220. For all the reasons above, I hold that the suit is barred against defendant No. 7 bank for want of notice under Section 164 of M.C.S. Act and needs to be dismissed as against defendant No. 7 bank.

221. ***(C)*** Plaintiff has alleged fraud, mis-appropriation, criminal breach of trust, conspiracy and collusion against defendant No. 5-a also. However, the evidence on record shows that plaintiff and defendant are acting in collusion to obtain decree in the present suit.

222. Plaintiff bank has pleaded collusion, fraud, mis-appropriation, breach of trust against defendant Nos. 5-a and 5-b and has also cited cases of ***Nagpur District Central Co-Op. Bank -Vs0- State of Maharashtra, 2004 (1) Bom.C.R.(Cri.), 776, Nagpur District Central Co-Op. Bank -Vs- State of Maharashtra, 2005 (Supp.) Bom. C. R. (Cri.), 760 and Vinaychandra -Vs- State of Maharashtra, reported in 2002 (Supp.2) Bom. C. R., 198*** in order to show that Hon'ble High Court has also held that these defendants along with defendant Nos. 1 to 6 were involved in number of fraudulent transactions with number of Co-Op. Societies in Maharashtra and Gujrat. It is also alleged that these defendants are also involved in the conspiracy in question in this suit. The above allegations also find place in affidavit of PW.1, who is Managing Director of plaintiff bank and PW.2, who is the police Inspector, who investigated the offence in relation to the present suit i.e. criminal case No. 847/2002. PW.2 is an independent

witness. He has also deposed that defendant Nos. 5-a and 5-b are involved in the conspiracy.

223. In his cross-examination by defendant No. 5-a, PW.1 admits that plaintiff bank joined defendant Nos. 5-a and 5-b after 4 years of filing of suit, though these defendants were joined within 2 years of filing of suit and suit was well within limitation from the date of cause of action. Not only this, the cross-examination further reveals that PW.1 also gave material admissions in respect of joining of defendant Nos. 5-a and 5-b only as they were charge-sheeted in the criminal case in order to avoid technical objections. He also gave admission that these defendants have no direct concern with plaintiff bank and that he cannot tell whether false suit is filed against defendant No. 5-a. Though PW.1 and PW. 2 have alleged the fraud against defendant Nos. 5-a and 5-b they have given admissions in the cross-examination by defendant No. 5-a which tents to supporting his case. Perusal of the cross-examination of PW.1 by defendant No. 5-a, which are reproduced above shows that he is supporting defendant No. 5-a by giving admissions on oath contrary to his own affidavit, pleadings and contrary to the record, which he claims to have verified.

224. Similarly PW.2 has also given material admissions in the cross examination by defendant No. 5-a, they are as follows:

(1) No documents seized or collected on record to show that defendant No. 5-a is connected to defendant No. 5 Home Trade.

(2) Defendant No. 5-a was employee of defendant No. 5.

(3) Defendant No. 5-a was not concerned with suit transactions.

(4) Defendant No. 5-a signed on agreement dated 22/01/2002 on the say of director of defendant No. 5 Sanjay Agrawal.

(5) Defendant No. 5-a is not concerned with suit transaction except the signature on agreement dated 22/01/2002.

The above admissions of PW.1 and 2 clearly goes to show that they are contrary to their own affidavits filed on record at Exh. 141 and Exh.281.

225. It is also pertinent to note that defendant No. 5-a has also tried to support the plaintiff bank to prove its case by giving suggestions to PW.1 and PW.2 of which he was not concerned with. These suggestions were answered by the PW.1 and PW. 2 in affirmative and an attempt was made to fill up the lacuna and to prove the plaintiff's case. They are reproduced as under.

Suggestion to PW.1. :

(1) It is true that plaintiff bank entered into transaction of exchange of Government security Nos. 1 and 2 with defendant Nos. 1 and 2.

(2) Security No. 1 and 3 are today also owned by plaintiff bank.

(3) The status and possession of Government security Nos. 1 and 3 with any other person is of stolen property.

(4) It is true that no amount as recovered from the directors and plaintiff bank did not seize any property of directors as they do not have any property.

(5) It is true that difference amount of security Nos. 1 and 2 was paid by defendant Nos. 1 and 2.

226. The above suggestion given by defendant No. 5-a are the suggestions to which defendant No. 5 has no concern. On the contrary they are against the interest of defendant No. 5, as decree is claimed against all the defendants jointly and severally. Neither it is any-body's case that difference amount was paid by defendant No. 5-a or 5-b. The cross-examination shows that plaintiff and defendant No. 5 are collusively trying to support each other's case.

227. Not only this, but defendant No. 5-a in collusion with plaintiff even tried to wash out the admissions given by PW.2 during his cross-examination by defendant Nos.1 and 2. In the cross-examination by defendant No. 5-a, PW. 2 denied all the admissions given by them during his cross-examination by defendant Nos. 1 and 2. Being aggrieved by the cross examination by defendant No. 5-a, defendant Nos. 1 and 2 filed application Exh. 356 for further cross-examination of PW. 2. After considering the circumstances on record, this Court allowed the application and granted permission to defendant Nos. 1 and 2 to further cross-examine PW.2. During the further cross-examination the truth was brought forward from the witnesses mouth. Each instance of cross-examination by defendant Nos. 1 and 2, cross-examination by

defendant No. 5-a and further cross-examination by defendant Nos. 1 and 2 are reproduced as under.

During the cross-examination of PW. 2 by defendant Nos. 1 and 2, he admits following statements.

" It is correct to say that I.O. Shri Deshmukh had seized copy of agreement between defendant No. 1 and defendant No. 5 dated 25/01/2002 and 22/01/2002, which are filed on record at page No. 186 to 188 of charge-sheet Exh. 202. It is correct to say that vide letter dated 04/07/2002 issued by Giltedge Management to I.O. Shri Deshmukh filed at page No. 365 Giltedge Management had sent original deal confirmation letter of Home Trade Ltd, for GOI 2017 which are on page No. 366 and 367 of charge-sheet Exh. 202."

228. In his cross-examination by defendant No. 5-a, PW.2 admits as under.

"It is correct to say that I could not find any document to show that there was communication between defendant No. 1 and defendant No. 5 in respect of security No.2."

Similarly, in the cross-examination by defendant No. 1 and 2, PW.2 admits :

" It is correct to say that defendant No. 1 paid sale consideration of Government security No. 2017 @ 8.07% to defendant No. 5. It is correct to say that defendant No. 1 directed defendant No. 5 to supply directly Government security No. GOI 2017 to plaintiff bank."

229. In his cross-examination by defendant No. 5-b, PW.2 admits as under.

"It is correct to say that during the course of investigation I could not find a single document to show that defendant No. 1 paid sale consideration to the defendant No. 5 in respect of security No. 2. It is correct to say that I could not find any document to show that defendant No. 1 directed defendant No. 5 to deliver security No. 2017 to the plaintiff bank."

In the cross-examination by defendant Nos. 1 and 2, PW.2 admits :

"It is correct to say that MKVDC bonds and Government securities worth Rs.2 crores were sold by defendant No. 5 to defendant No. 1."

However, in the cross-examination by defendant No. 5-a, PW.2 admits :

"It is correct to say that defendant No. 5 never sold MKVDC bonds and other securities to defendant No. 1."

230. PW.2 also admitted in the cross-examination by defendant Nos. 1 and 2 ;

"It is correct to say that vellient sold security purchased by it to Provident Corporated Advisory Services. Sold these securities to Wipro Provident Fund Trust, Banglore. It is correct to that security purchased by Shreyam securities Pvt.Ltd., were sold to Birla Sunlife Securities Ltd., and Trust Pvt. Ltd., Mumbai. It is correct to say that Birla Sunlife sold it to Janta Sahakari Bank, Branch Gondia. It is correct to say that Trust Capitals further sold it security to L. & T. officers and supervisory staff Provident Fund, Mumbai and Birla Sunlife Security, Mumbai. It is correct to say that other securities were also sold to different persons." (This admission is portion marked "C")

However, in his cross-examination by defendant No. 5-b admits ;

"Portion mark "C" of cross-examination is shown to me. It is not correct to say that I am not seized any document in respect of contention stated in portion mark "C". It is correct to say that all the securities passed through defendant No.1 up to the last holder."

231. The above instances show that whatever admissions were given by PW.1 in the cross-examination by defendant Nos. 1 and 2 was tried to be washed away in the cross-examination by defendant No. 5-a. However, by allowing the application Exh. 356 , this Court granted permission to defendant No. 1 to further cross-examine PW.2. In his further cross-examination by defendant Nos. 1 and 2, PW.2 admits as under.

'It is correct to say that before filing my affidavit Exh. 281 I had examined the record of this case including record of criminal case No. 847/2002 arising out of crime No. 75/2002. It is correct to say that I gave answers in cross-examination as per the charge-sheet Exh. 202. My attention is drawn to portion mark "D" of my cross-examination by defendant No. 5-a. I made the statement as mentioned in portion mark "D" after going through the record."

PW. 2 further admits as under.

"It is correct to say that on 05/06/2002 P.I. Shri Deshmukh recorded the statement of Jugna Lodhaya. Statement now shown to me, which is filed on record at page No. 84 of Exh. 202 is the same.

Question *: In the statement of Jugna Lodhaya, she has stated that on the say of Home Trade, Giltedge Management paid Rs. 9.5 crores to Tirupati Urban Co-Op. Bank vide cheque No. 948619 of*

Janta Co- Op. Bank ?

Answer : It is correct to say that in the statement of Jugna Lodhaya it is stated so. It is correct to say that in her statement it is also stated that this payment of Rs. 9.5 crores includes the payment of Rs. 4,02,62,766.67 ps., of GOI 2017 @ 8.07% purchased on behalf of Amravati Peoples Co- op. Bank. It is correct to say that at the time of giving the statement Jugna Lodhaya handed over copy of letter dated 23/01/2002 issued by Giltedge Management to Home Trade. It is correct to say that on 03/06/2002 Shri Deshmukh went to the office of Home Trade and seized some documents. The said seizure panchanama is at page No. 756 of Exh. 202. It is correct to say that Shri Deshmukh seized letter issued by Home Trade to Giltedge Management dated 06/12/2001. Letter now shown to me and in the said letter it is mentioned that Giltedge Management was requested to remit 9.5 crores to Tirupati Urban Co- op. Bank on behalf of Home Trade Ltd. It is correct to say that Shri Deshmukh also seized general vouchers of Home Trade Ltd., which shows payment of Rs. 9.5 crores by Giltedge Management to Tirupati Urban Co- op. Bank on behalf of Home Trade Ltd. Voucher is filed page 768 of charge- sheet Exh. 202. It is correct to say that Shri Deshmukh also seized copy of cheque and receipt of commission which are filed on record at page No. 769 and 770 of charge- sheet Exh. 202. It is correct to say that Shri Deshmukh seized some documents from the custody of Janta Co- op. Bank, Fort branch, Bombay. It is correct to say that Shri Deshmukh seized original cheque issued by Giltdge Management to Tirupati Urban Co- op. Bank bearing No. 948619, which is at page No. 785. It is correct to

say that Shri Deshmukh also seized certified copy of statement of account of Giltedge Manage showing payment of Rs. 9.5 crores to Tirupati Urban Co-op. Bank by Giltedge Management, which is filed at page No. 786 of charge-sheet Exh. 202. My attention is drawn to portion mark "E" of my cross-examination by defendant No. 5-a. Said statement was made after going through the record. It is correct to say that Shri Deshmukh seized documents from plaintiff bank on 31/05/2002. Seizure memo Exh. 246 is the same. It is correct to say that vide this seizure Shri Deshmukh had seized deal confirmation letter between defendant No. 1 and defendant No. 5 in respect of Government security GOI 2017 @ 8.07%. Letter is now shown to me. It is correct to say that defendant No. 1 has requested defendant No. 5 to deliver security to Amravati Peoples Co-op. Bank on its behalf. Said letter is filed at page No. 186 of Exh. 202. it is correct to say that contract note between Giltedge Management and Home Trade is filed at page No. 187 of Exh. 202. My attention is drawn to letter filed at page No. 188 of Exh. 202 issued by Home Trade Ltd., wherein it has been mentioned that, " we hereby confirmed the below mentioned transaction and below mentioned securities would be delivered to Amravati Peoples Co-op. Bank within 45 days. It is correct to say that this letter was in respect of GOI 2017 @ 8.07%. (Shri A.M. Jain has objected to the questions in respect of documents to which attention of witnesses is drawn by counsel for defendant Nos. 1 and 2, Shri jain has submitted that said witness is not author of documents. As such, no such question can be put to him. He has further submitted that Court is not blind and it can read the document. Counsel for

defendant Nos. 1 and 2 Shri Purohit has submitted that the drawing of attention to the contents is necessary in view of the answers given by this witness during the course of cross-examination by defendant No. 5-a particularly portion mark "D" and "E". The plain reading of cross-examination of this witness by defendant No. 5-a, which is at portion mark "D" and "E" would make it clear that drawing of the attention of this witness to the contents of this letter were necessary as this witness has specifically deposed that he has gone through the record of this case as well as record of the criminal case before filing his affidavit. Objection is rejected)
It is correct to say that original deal confirmation letter sent by Giltedge Management along with letter dated 04/07/2002 is filed at page 366 and 367 of charge-sheet Exh. 202. It is correct to say that I have collected documents contained in file No. 8 filed within charge-sheet Exh. 202. Index on file No. 8 is prepared by me. It is correct to say that slip prepared by me shows original letter of Giltedge Management to Home Trade and original letter of Home Trade to Giltedge Management in respect of confirmation of GOI 8.07% . Constable has prepared said slip as per my direction. The original document as mentioned in the slip might be shifted in some other file. Index of file No. 1 is prepared by me, it is at Exh. 362 pages 1, 2, 3

232. My attention is drawn to portion mark "F" of my cross examination by defendant No. 5-a. Portion mark "F" is correct. My attention is also drawn to portion mark "G" of my cross-examination that defendant No. 5-a, the contents thereof are correct.

Statements which are at portion mark "F" and "G" were made by me after going through record of suit and criminal case No. 847/2002. It is correct to say that index of file No. 11, 12 and Index file filed along with charge-sheet Exh. 202 are prepared by me. They are at Exh. 363 to Exh. 365. It is correct to say that on 18/10/2002, I have seized documents from Vellient Capital Market Pvt. Ltd. and prepared seizure panchanama now shown to me, it bears my signature. it is at Exh. 363. It is correct to say that I have seized documents in respect of securities sold by Home Trade to Vellent Capital Market which are filed on record at page No. 521 to 531 of charge-sheet Exh. 202. It is correct to say that on 10/10/2002, I seized documents from the custody of Larsen and Tubro Ltd., and prepared seizure panchanama now shown to me, which bears my signature. Exh. 366. It is correct to say that vide this seizure panchanama I seized documents on record at page No. 575 to 583 of Exh. 202. On 16/08/2002, I seized documents from Shreyam securities and prepared seizure panchanama which bears my signature, it is at Exh. 368. It is correct to say vide this seizure memo I have seized documents filed at page Nio. 628 to 642 of charge-sheet Exh. 202.

Question : Despite the documents which were not (the word,"not" to be correctly read as "now") shown to you , you have made false statement in portion mark "D", "E", "F" and "G" in order to support the plaintiff and to misguide this Court ?

Answer: It is not correct to say that I had made false statement as stated above."

233. Plain reading of further cross-examination by defendant Nos. 1 and 2 of PW.2 reproduced above , makes it clear that either admissions given by PW.2 in the cross-examination by defendant Nos. 1 and 2 or admission given by him in his cross-examination by defendant No. 5-a are true. Both the statements cannot be true at the same time, which are self contradictory.

234. The evidence on record further shows that even the affidavit filed by PW.2 Shri Qureshi contains facts, not personally known to him. In his affidavit Exh. 281 in para 44 he has quoted the observation of Hon'ble High Court in the case reported in 2003 (4) Mh.L.J., 1070. However, in his cross-examination by defendant Nos. 1 and 2 he has given material admissions that he cannot tell who were the parties in the said case and he does not know anything about the case cited in the above ruling. He further admits that the citation mentioned in his affidavit was added as per the say of counsel Shri A.M. Jain. This shows that though PW. 2 is an independent witness, he is deposing as per the say of plaintiff bank and /or it's counsel.

235. The above evidence on record goes to show that plaintiff is supporting defendant No. 5-a by giving admissions which tents to discharge him of the plaintiff's claim and against this defendant No. 5-a is helping the plaintiff in proving its case by giving suggestions to the plaintiff's witness to prove plaintiff's case and to wash out the admissions given by PW.1 and PW. 2. The conduct of PW.2 shows that he is supporting the plaintiff in order to obtain a

decree. Thus, the above evidence leaves no room for doubt that plaintiff and defendant No. 5-a are acting in collusion and they are being helped by PW. 2.

236. ***AS TO ISSUE NO. 14***. :- Plaintiff bank was audited by the Divisional Joint Registrar Audit on the basis of audit report Divisional Joint Registrar directed enquiry under Section 88 of The Maharashtra Co-op. Societies Act. The subject matter of the enquiry was in respect of illegalities committed by the plaintiff bank while dealing in Government securities. The security in question in the said enquiry are the securities in the present suit as described as security No. 1 and security No. 3. Accordingly issue No. 5 in the said enquiry was framed as under.

"Illegality committed in the sale and purchase of securities."

The transaction of sale of security involved in the said enquiry and suit transaction dated 15/01/2002 and 28/02/2002 are the same. It was held by the Enquiry Officer that the board of directors of the plaintiff bank committed illegality while dealing in Government Security No. 1 and 3, which was done in contravention of the circular of RBI No. BR/6/16.26.00/2000-2001, dated 09/08/2001. Following illegalities were held to have been committed.

(1) Dealing in securities were not done through Subsidiary General Ledger Account.

(2) Dealings were done through un-registered brokers.

(3) Transaction was not completed on the same day and 45 days time was granted for delivery of securities.

(4) Securities were delivered to broker and transaction in

money was done through them.

237. The above acts of the plaintiff bank were in contravention of the RBI circulars issued under the Banking Regulation Act. The Enquiry Officer vide its Award dated 05/02/2003 filed on record at Exh. 250, held liable the Members of the Board of Directors for the loss caused to the plaintiff bank and directed them to compensate the plaintiff bank by paying Rs. 85,66,882.56 ps., each.

238. Appeal was preferred by the directors against the said Award before the State of Maharashtra, which came to be dismissed by order dated 20/04/2004. The directors of the plaintiff bank filed writ petition Nos. 3097/2004 and 2995 to 3002/2004 before Hon'ble High Court against the order of State Government. Copy of the said order is filed along with list of documents Exh. 140. Hon'ble High Court vide its order dated 05/03/2007 dismissed the writ petition. While dismissing the writ petition Hon'ble High Court permitted the petitioners to make representation, within two weeks, to the plaintiff bank and also to the Assistant Registrar of the Co-operative for consideration as to whether credit to the respective petitioners in respect of amount claimed to have been recovered should be given or not. The competent authority was granted further 4 weeks time after making of the representation to decide the issue. Plaintiff has also filed writ (Exh. 477) in Civil Application No. 2617/2007, which shows that Hon'ble High Court was further pleased to extend the time by 4 months vide its order dated

21/04/2007. The extended period also come to an end on 21/08/2007. There is no documents on record to show that representation was made by the directors to the competent authority and what orders came to be passed despite laps of more than 2 years and 4 months.

239. Defendant Nos. 1 and 2 have contended that the present suit is filed by the plaintiff bank for recovery of the security Nos. 1 and 3 or price thereof. In the said enquiry award came to be passed under Section 88 to compensate the bank by recovering the loss of plaintiff bank by way of compensation. As such, bank has already obtained the decree in respect of the loss of the securities in the present suit. Bank has also filed execution proceedings by obtaining recovery certificates from the Registrar Co-operatives under Section 101 of Maharashtra Co-operative Societies Act. Certified copies of execution proceedings are filed on record along with list Exh. 447. These defendants have further contended that the Award under Section 88 has a force of decree and can be executed through Civil Courts and accordingly plaintiff bank has filed their execution proceedings, as such the present suit is barred by res-judicata as per the provision of Section 11 of the Code of Civil Procedure.

240. Plaintiff has opposed the contention of the defendant Nos. 1 and 2 on the ground that

(1) Defendant Nos. 1 to 6 are not parties to the said enquiry under Section 88 of M.C.S. Act.

(2) Issues involved in the said enquiry and the present suit are all together different.

(3) Enquiry under Section 88 of M.C.S. is not a suit within the meaning of Section 11 of CPC.

(4) Defendant Nos. 1 and 2 have not filed copy of complaint, charge- sheet and documents of the enquiry.

241. The contentions of defendant Nos. 1 and 2 are not acceptable. The object of enquiry was to ascertain whether due to the act of the Board of Directors plaintiff bank suffered loss and to what extent. Once the loss was ascertained, directors were made liable to compensate the bank for the said loss. The present suit is for delivery or recovery of the securities and alternatively for price thereof. In this suit, the issue involved is of the contract of sale and purchase of security, its execution and recovery. This shows that issue involved in the enquiry under Section 88 of the Maharashtra Co- op. Societies Act and the present suit are altogether different.

242. Moreover, parties in the enquiry and in the present suit also differs. None of the defendants were parties to the said enquiry. Defendants have submitted that the principle of res-judicata also applies in the cases where parties litigate under the different names and has relied upon the case of ***Junior Telecom Officers Forum -Vs- Union of India, reported in AIR 1993, S.C., 787. and Maharashtra Vikrikar Karmachari Sanghatana -Vs- State of Maharashtra, reported in AIR 2000, S.C., 622.*** In the

above cited case though the parties were different the issue involved was the same. Once the issue is decided, it also applies to other parties, who are concerned in the said issue, which is made clear by explanation VI of Section 11 CPC.

243. Similarly, the enquiry is not a suit within the meaning of Section 11 of CPC. It is the submission of defendant Nos. 1 and 2 that res-judicata applies to the proceedings before other authorities and has relied upon the case of ***Abdul Rehman -Vs- Prasony Bai, reported in AIR 2003, S.C., 718***. In the above cited case the principle of constructive res-judicata was held to be applicable. Plaintiff could not have agitated the suit claim in the enquiry held under Section 88 of MCS Act as the Enquiry Officer was not having jurisdiction to decide the issues involved in the present suit. Under such circumstances, the ratio laid down by Hon'ble Supreme Court cannot be applied in the present suit since the present suit differs on facts.

244. Merely because the directors are made liable to compensate the plaintiff bank it cannot be said that the plaintiff bank has lost its right to claim the securities or recover the price thereof. In fact the right is always there to the plaintiff and if at all the amount of compensation is recovered from the Directors, they will acquire right to recover the amount paid by them towards the compensation from the person from whom the plaintiff bank is entitled to recover by way of subrogation. Similarly, if the bank makes any recovery in the present suit, the liability of the directors

to pay compensation will reduce to the extent of the amount recovered. In its Judgment dated 05/03/2007 in W.P. No. 3097/2004 and 2995 to 3002/2004, copy of which is filed along with list of documents Exh. 140, Hon'ble High Court has also observed that if the amount is recovered by the bank, credit to the directors is to be given in relation to such amount.

245. The facts of the case shows that the bar under the provision of Section 11 of CPC i.e., res-judicata is not attracted to the present suit and the suit is tenable. Hence, I answer this issue in negative.

246. ***AS TO ISSUE NOS. 20-B AND 20-C***. :- Plaintiff has claimed a decree for delivery of security Nos. 2 and 4 or alternatively return of security Nos. 1 and 3 or price thereof from all the defendants jointly and severally. Defendant Nos. 1 and 2 have contended that since they are not members of Wholesale Debt Market, they purchased securities from defendant No. 5 and directed it to deliver security No. 2 to the plaintiff bank. Defendant Nos. 1 and 2 have further pleaded that since Home Trade failed to deliver security No. 2 to the plaintiff bank and other clients of defendant No. 1, it referred it dispute with Home Trade Ltd., before sole arbitrator Shri Shailendra Shah of Pune Stock Exchange vide case No. 273/2002. It has been further contended that Award came to be passed on 17/01/2003 in favour of defendant No. 1 directing defendant No. 5 to deliver the securities till 30/01/2003 to defendant No. 1 or to pay price thereof Rs. 16,89,04,938.69 ps.,

with interest. Since defendant No. 5 failed to satisfy the Award, execution proceeding No. 329/2005 came to be filed. Defendant Nos. 1 and 2 submits that if decree is passed against them, it be recovered from defendant No. 5 by virtue of Award, copy of which filed on record at Exh. 389.

247. Plaintiff bank initially contended that none of the parties are member of any Stock Exchange, as such there is no question of application of Securities Contract (Regulation) Act and or bye-laws framed under Section 9 of the Securities Contract (Regulation) Act by any Stock Exchange. Subsequently, by filing additional notes of arguments Exh. 460. Plaintiff bank has admitted that defendant No. 5 was a member of Pune Stock Exchange. It is the also the contention of plaintiff bank that Pune Stock Exchange has expelled said Home Trade with effect from 13th August 2002 for contravention of bye-laws and regulations and have filed media release issued by Bombay Stock Exchange filed along with list of documents Exh. 467. However, this document has not been proved. Plaintiff has also filed certified copy of order dated 29/04/2002 issued by SEBI debarring M/s Home Trade Ltd., from dealing in securities as broker with effect from 29/04/2002.

248. The above documents goes to show that defendant No. 5 Home Trade was registered as broker with SEBI and member of Pune Stock Exchange at the time of suit transaction and thereafter till 29/04/2002.

249. Securities Contract (Regulation) Act was inacted to regulate the transactions in securities. I have discussed the provisions of SC(R) Act in detailed while deciding issue No. 11 (A) and the same needs to be considered while deciding these issues. The notifications and circular filed at Exh. 479 to 481 shows that all the transactions in Government securities are to be executed as per the bye-laws of the recognized Stock Exchange.

250. The above referred notifications and bye-laws under Section 9 goes to show that all the contracts in securities are mandatory to be entered into on the recognized stock exchange in accordance with rules and regulations or bye-laws made under the SC(R) Act, SEBI Act or the directions issued by SEBI Act, Banking Regulation Act and directions issued by RBI and SEBI.

251. In the present suit plaintiff has claimed decree against all the defendants jointly and severally. Plaintiff bank is not a member of Pune Stock Exchange, whereas defendant No. 5 is the member of the said Exchange. Clause 7.4 of the bye-laws of Pune Stock Exchange provide that any dispute between a member and non-member is to be settled in the clearing house of the Stock Exchange. In the case of ***Asha Katariya -Vs- Ashok Kumar Bafna, reported in 2007 (5) Bom.C.R., 125*** Division Bench of Hon'ble High Court has held that dispute can be settled as per the bye-laws between member and non-member. As per bye-law No. 7.4 of the Pune Stock Exchange even disputes against expelled members can be enforced. This being the position , the dispute

between plaintiff and defendant No. 5 in respect of transaction dated 15/01/2002 needs to be settled in the clearing house of the Pune Stock Exchange.

252. The question before the Court is whether by referring the matter to the clearing house all the questions involved in the suit can be decided. It is pertinent to note that plaintiff has pleaded collusion between all the defendants in order to commit fraud, breach of trust and mis-appropriation. The claim of the plaintiff is against all the defendants jointly and severally. Under such circumstances, the suit cannot be severed. Moreover, the clearing house of Pune Stock Exchange will not have jurisdiction to decide the issue involving fraud, collusion, breach of trust, mis-appropriation etc. Further claims against defendant Nos. 3, 4, 5-a, 5-b and 7 cannot be agitated before the clearing house. It will also split the case in to two leading to multiplicity of proceedings which is not permitted. For all the reasons discussed above, I hold that the remedy provided under Section 9 of SC(R) Act and bye-law framed by Pune Stock Exchange is not adequate to decide all the questions involved in the present suit and to grant all the reliefs claimed in the suit. As such, the jurisdiction of the Civil Court is not barred.

253. As far as, SEBI Act is concerned, Section 12 of the said Act requires registration of persons as broker, sub-broker, Share agent, banker, under writer and inter-mediatory in order to deal in securities. Section 15 A to H provides for penalty is for

contravention of the rules and regulations committed by the registered broker, sub-brokers, agent etc. Section 15 I provides for appointment of adjudication officer for imposing of the penalties. Section 15 Y bars jurisdiction of Civil Court in respect of any matter which adjudication officer is empowered to determine.

254. Similarly, Section 20 A of the SEBI Act bars jurisdiction of Civil Court to entertain any suit to which Board is empowered to pass an order. In the present case, neither order of adjudicating officer, nor the Board is in question. As such, the bar under Section 15 A and 20 A of the SEBI Act is not attracted. For all the reasons

above, I answer issue No. 20-B and 20-C in negative.

255. ***AS TO ISSUE NO. 8, 9 and 10.*** :- Plaintiff bank has failed to prove suit transactions dated 15/01/2002 and 28/02/2002. Suit is also bad for non-joinder of necessary parties. Suit against defendant No. 7 is bad for notice under Section 164 M.C.S. Act. Similarly, suit contract being illegal, it cannot be enforced, as such, on this count also suit is liable to dismiss. I have also held that suit is filed in collusion with defendant No. 5-a. On this ground also suit is liable to be dismissed. As per my findings on all the issues, I hold that plaintiff bank is entitled to receive security Nos. 1 and 3 or security Nos. 2 and 4 or its price thereof. Since, plaintiff is not entitled for the price of securities there is no question of granting interest thereon. Neither plaintiff is entitled for damages as claimed and I answer these issue Nos. 8, 9 and 10 in negative.

256. ***AS TO ISSUE NO. 21***. :- As per my findings on the above issues, I hold that plaintiff bank is not entitled for any relief and I proceed to pass the following order.

O R D E R.

(i) Suit is dismissed with cost.

(ii) Decree be drawn up accordingly.

(**A. M. Khan**)
Dated : 25/01/2010. 4th Joint Civil Judge (Sr.Dn.)
Amravati.