



61.10(J)

1/53

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO. 361 OF 2010

~~The Amravati Peoples' Co-operative
Bank Ltd.~~

Cosmos Co-operative Bank Ltd.
Through its The Managing Director,
Cosmos Height, 269/270,
Shanwarpeth, Pune

... Appellant
Orig.Plaintiff.

-vs-

1. M/s Giltedege Management Services Ltd.
Through its Director/Chief Executive Officer/
Authorised signatory Ketan Kantilal Seth,
aged about 40 years, having its 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 its
Director/Chief Executive Officer/Authorised
signatory Mahendra Radheshyam Agrawal,
aged about 36 years, occupation business,
having its Registered office at 45-A Adoya
Sandhya Ghai Road, Calcutta 700 001 and
also having its 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,
Calcutta 700 027
5. M/s Home Trade Ltd. By its Director/
Chief Executive Officer/Authorised signatory,
Sanjay Hariram Agrawal, aged about
37 years, occupation business, having
its 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 Khandubhai Desai Road,
Vile Parle, (West), Mumbai
- 5(b) Subhodhchand Dayal Bhandari,
aged 37 years, Director of M/s Home
Trade Ltd., Mumbai, resident of B-703,
Govind Complex, Sector-14, Vasi,
Navi Mumbai
- 6) Sanjay Hariram Agrawal,
aged about 37 years, occupation business,
resident of Tower-4, 5th floor, Vasi Railway
Station Complex, International Infotech Park,
New Mumbai 400 703
7. Janata Sahakari Bank Ltd. Pune
having its branch at Fort, Mumbai
through its Branch Manager

... **Respondents**
Orig. Defendants.

.....
Shri Anand Parchure, Advocate for plaintiff/appellant.
Shri S.V.Purohit with Ms Gauri S. Purohit, Advocates for defendant/respondent
nos. 1 and 2.
Shri A.A.Choube, Advocate for defendant/respondent nos. 5(a) and 5(b).
Shri A.C.Dharmadhikari, Advocate for defendant/respondent no. 7.
.....

CORAM : A. S. CHANDURKAR AND PUSHPA V. GANEDIWALA, JJ.

Date on which the arguments were heard : 16th February, 2021
Date on which the judgment is pronounced : 7th April, 2021.

Judgment : (Per A.S.Chandurkar, J.)

This appeal under Section 96 of the Civil of Procedure Code, 1908 (for short, the Code) has been preferred by the unsuccessful plaintiff which claims to be a victim of the “Government Securities Scam” in Maharashtra. By the judgment dated 25.01.2010 in Special Civil Suit No.165/2002 the suit for return of Government Securities sold by the

plaintiff or in the alternate for recovery of value of the securities to the tune of Rs.12,75,86,403.67 has been dismissed.

2. The facts relevant for deciding the appeal as can be gathered from the pleadings of the parties are being referred to. The parties are being referred to as per their status before the trial Court. It is the case of the plaintiff that it is a bank duly registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 (for short, the Act of 1960). It carries on activities as a Non-scheduled Urban Co-operative Bank. As per Circulars issued by the Reserve Bank of India from time to time the plaintiff is required to invest 15% of its net demand and time liabilities in government and other approved securities. In accordance with these Circulars the plaintiff is engaged in making investments in government and other approved securities. This activity of purchasing securities was being undertaken by the plaintiff through the defendant no.1 which is a company registered with the Reserve Bank of India under the provisions of the Reserve Bank of India Act, 1934. The plaintiff's dealings with the defendant no.1 are from the year 1998 and the defendant no.2 is its Chief Executive Officer and Director. The plaintiff is concerned with two transactions of sale and purchase of Government Securities. As per the first transaction dated 15.01.2002 the plaintiff was to sell Government Security "GOI 10.70% Government Stock 2020"(hereinafter referred to as

Security No.1) to the defendant no.1. The total face value of the said security was Rs.4,00,00,000/- and the sale consideration was Rs.4,60,00,000/- with accrued interest of Rs.10,34,333.33 on the date of settlement which was 19.01.2002. The plaintiff was required to physically deliver the said security to the defendant no.1 within a period of fifteen days from the date of settlement. It was agreed that the defendant no.1 instead of paying sale consideration of Rs.4,70,34,333.33 would purchase Government Security “GOI 8.07% Government Stock 2017”(hereinafter referred to as Security No.2). The total valuation thereof was Rs.4,04,35,866.67. Security No.2 was to be physically delivered by the defendant no.1 to the plaintiff within a period of forty five days from the date of settlement. The defendant no.1 was to pay difference amount of Rs.65,98,466.66 to the plaintiff. According to the plaintiff pursuant to this agreement dated 15.01.2002 as per the trade practice Security No.1 was physically delivered along with blank signed transfer forms to the representative of the defendant no.1 on 29.01.2002. Pursuant thereto the defendant no.1 paid the amount of difference of Rs.65,98,466.66 to the plaintiff vide cheque dated 19.01.2002. According to the plaintiff it completed its part of the aforesaid transaction. However the defendant no.1 failed to deliver Security No.2 that was agreed to be delivered to the plaintiff.

3. The second transaction according to the plaintiff was dated 28.02.2002. In pursuance to the deal confirmation letter dated 28.02.2002 issued by the defendant no. 1, the plaintiff was to sell Government Securities having face value of Rs.5,50,00,000/- (hereinafter referred to as Security No.3) to the defendant no.1 for a consideration of Rs.6,40,32,347.48. These Government Securities were to be physically delivered to the defendant no.1 within 15 days from 28.02.2002. The defendant no.1 instead of paying the sale consideration agreed to purchase Government Securities having face value of Rs.5,50,00,000/- (hereinafter referred to as Security No.4) which were to be thereafter physically delivered by the defendant no.1 to the plaintiff within forty five days from 28.02.2002. The defendant no.1 was to pay the difference amount of Rs.60,76,097.48 to the plaintiff. The aforesaid transaction was duly confirmed on 07.03.2002. The plaintiff as per the trade practice delivered Security No.3 to the representative of the defendant no.1 along with blank signed transfer forms. As five transfer forms in respect of Maharashtra Krishna Valley Development Corporation Bonds (MKVDC Bonds) had not been properly filled in, the defendant no.1 called upon the plaintiff to send five transfer forms along with the letter dated 16.03.2002. According to the plaintiff the difference amount of Rs.60,76,097.48 was paid by the defendant no.1 through various demand drafts but the defendant no.1 failed to deliver Security No.4 to the plaintiff as agreed.

4. According to the plaintiff as the defendant no.1 failed to physically deliver Security nos.2 and 4, its officers made various telephonic calls to the defendant no.1 and it was assured that the securities would be delivered shortly. As regards transaction dated 28.02.2002 the defendant no.1 informed the plaintiff that a deal in that regard was made with the defendant no.3 and a fax message to that effect was sent to the plaintiff. As the defendant no.1 did not physically deliver the securities, the plaintiff issued two notices on 30.04.2002 calling upon the defendant no.1 to deliver Security No. 2 and the defendant nos. 1 and 3 to deliver Security No. 4 as agreed or in the alternative to pay the consideration thereon with interest. The defendant no.1 did not deliver Security Nos. 2 and 4 to the plaintiff. As the Government Securities were not available with the plaintiff in physical form, the Commissioner, Co-operation, State of Maharashtra, dissolved the governing body of the Board of Directors of the plaintiff on 10.05.2002 and appointed an Administrator. In the meanwhile, a report was lodged with Police Station City Kotwali, Amravati alleging misappropriation by the defendant no.1. Thereafter on 29.05.2002 and 03.06.2002 the defendant no.1 sought to reply to the plaintiff's notice dated 30.04.2002. It was stated that the defendant no.1 did not have a dealer's license of the Wholesale Debt Market to enable it to purchase and sell Government Securities. Hence the defendant no.1 had forwarded Security No.1 to the defendant no.5 for its

sale and thereafter for purchase of Security No.2 as agreed. The defendant no.5 however failed to deliver Security No.2. As regards the second transaction dated 28.02.2002 the defendant no.1 stated that no such transaction had been entered by it but it was the defendant no.3 who had entered into such transaction with the plaintiff.

5. It is then pleaded by the plaintiff that in the criminal complaint as filed offences under various provisions of Indian Penal Code came to be registered against the defendant nos. 1 to 6 and the defendant nos. 2, 4 and 6 came to be arrested. By amending the plaint it was alleged that the defendant nos. 1 to 6 were guilty of hatching criminal conspiracy and were abetted by the defendant no.7 which was against public interest and public policy. It is on the aforesaid premise that the plaintiff proceeded to file the present suit claiming the amounts due from the defendants jointly and severally under the transactions dated 15.01.2002 and 28.02.2002. The plaintiff sought a decree against the defendants by holding them liable to return back Government Securities or the value thereof. The suit was accordingly filed on 12.09.2002.

6. The defendant nos.1 and 2 filed their written statement at Exhibit 107. It was pleaded that as per the statutory provisions only a member of Wholesale Debt Market could deal in Government Securities and as the defendant no.1 was not a Wholesale Debt Market broker, it was

not possible for it to purchase securities on its own. The payment of difference amount of Rs.65,98,466.66 with regard to transaction no.1 was admitted by the defendant no.1. It was further pleaded that the defendant no.1 through the defendant no.5 had sought to obtain Government Securities forming part of Security No.2. However despite paying the entire consideration to the defendant no.5 it failed to keep its promise as per undertaking dated 25.01.2002 on account of which the defendant no.1 could not deliver Security No.2 to the plaintiff. The remedy of the plaintiff was against the defendant no.5 not against the defendant nos. 1 and 2. It was stated that the transaction dated 28.02.2002 was entered into by the plaintiff with the defendant no.3 and the defendant nos. 1 and 2 had no connection therewith. It was denied that the defendants were part of any conspiracy as alleged. It was thus prayed that the suit against the said defendants was liable to be dismissed.

The defendant nos. 3 and 4 filed their written statement at Exhibit 18. All allegations made against them were denied. According to the said defendants the transactions alleged were between the defendant nos.1 and 2 and the defendant nos. 3 and 4 were not concerned therewith. It was stated that there was no cause of action against the said defendants nor was any transaction entered into with them. Thus, the suit was liable to be dismissed.

The defendant no.5(a) filed his written statement at Exhibit 100. The allegations as made against the said defendant were denied. It was further stated that the said defendant had resigned from the defendant no.5-Company on 25.04.2002 and hence was not liable in any manner whatsoever. It was also pleaded that the defendant no.5(a) was joined as a defendant after expiry of period of limitation and hence the suit against him was not maintainable.

The defendant no. 5(b) filed his written statement at Exhibit 104 and took the stand that he was not a Director of the defendant no.5-Company but was only its employee. He denied any liability whatsoever.

The defendant no.7 filed its written statement at Exhibit 24. It was pleaded that the defendant no.2 had deposited MKVDC Bonds worth Rs.1,50,00,000/- with the defendant no.7 as security for the credit facility availed by the defendant no.2. The defendant no.7 had sanctioned cash credit limit to the tune of Rs.20,00,00,000/- to the defendant no.2 on 05.03.2001 and pursuant thereto the said Bonds had been furnished as security by the defendant no.2. The said defendant claimed banker's lien over the same as the Bonds had been pledged with it. It was stated that the said defendant would prove its status as pledgee under the provisions of the Indian Contract Act, 1872. It was thus pleaded that the defendant no.7 had absolute right to deal with the said Bonds and that the plaintiff was not entitled to the reliefs sought against the said defendant.

7. Before the trial Court the plaintiff examined two witnesses. The defendants did not examine any witness. On the basis of material on record the trial Court proceeded to hold that the plaintiff had failed to prove that it had entered into the transactions dated 15.01.2002 and 28.02.2002 with the defendant nos.1 and 2. The plaintiff had also failed to prove that the aforesaid transactions were vitiated by fraud, cheating, forgery or criminal breach of trust. It was further held that the plaintiff had failed to prove that the defendant no.7 had abetted the defendant nos.1 to 6 in misappropriating Security Nos. 1 and 3. The payment of the entire consideration by the defendant nos. 1 and 2 to the defendant no.5 for purchasing Security No.2 was held to be duly proved. The lien of the defendant no.7 over the MKVDC Bonds pursuant to the cash credit limit sanctioned in favour of the defendant no.2 was also held to be proved. The suit was held to be bad for non-joinder of parties. In the light of these findings, the learned Judge of the trial Court proceeded to dismiss the suit with costs. Being aggrieved the plaintiff has preferred the present appeal.

8. Shri Anand Parchure, learned counsel for the plaintiff after referring to the pleadings of the parties and their evidence submitted that the learned Judge of the trial Court committed an error in holding that the plaintiff had failed to prove the transactions dated 15.01.2002 and 28.02.2002. The evidence on record indicated that Security No.1 in its

physical form was handed over to the representative of the defendant no.1 and pursuant thereto the difference amount of Rs.65,98,466.66 was also paid to the plaintiff. Having delivered Security No.1 to the defendant no.1 and thereafter the defendant no.1 having paid the differential amount it was clear that the transaction dated 15.01.2002 was completed and thus duly proved by the plaintiff. Similarly, Security No.3 was also handed over to the representative of the defendant no.1 in its physical form after which the defendant no.1 paid the plaintiff the difference amount of Rs.60,76,097.48. There was substantial documentary evidence on record to indicate that the plaintiff had proved the transactions dated 15.01.2002 and 28.02.2002. The trial Court however without appreciating the evidence on record in its proper perspective erred in holding that these transactions were not duly proved by the plaintiff. The defendant no.1 and 2 had admitted entering into transaction dated 15.01.2002 but ignoring the same contrary finding was recorded. The defendants had in fact failed to lead any evidence whatsoever and they merely sought to shift the blame on other defendants. As it was clear that Security Nos. 1 and 3 had been duly handed over to the defendant no.1 both these transactions were duly proved. He therefore submitted that the plaintiff was entitled to receive back Security Nos. 1 and 3 or in the alternative the value thereof.

The learned counsel then referred to various grounds raised in the memorandum of appeal and submitted that reliance was sought to be placed by the learned Judge of the trial Court on material that was not placed on record by either of the parties. The plaintiff did not have any opportunity to counter such material that was taken into consideration by the trial Court on its own. He specifically referred to the adjudication of Issue No.11 in the impugned judgment and submitted that such course also vitiated the impugned judgment. Further the trial Court was not justified in dismissing the suit with costs. According to him, when the judgment was pronounced it was stated that it was merely dismissed and the dismissal with costs was subsequently added in the judgment. Placing reliance on the decision in *K.V.Rami Reddi Vs. Prema (2009) 17 SCC 308* it was submitted that when the learned Judge heard the arguments he was discharging judicial duties as 3rd Joint Civil Judge, Senior Division but when the judgment was delivered he was discharging judicial duties as 4th Joint Civil Judge, Senior Division. Further, no notice under Section 164 of the Act of 1960 was required to be issued to the defendant no.7 as the plaintiff was exercising its legal rights and seeking restoration of the MKVDC Bonds.

After referring to the notes of arguments that were placed on record before the trial Court it was submitted that on a proper consideration of the entire evidence on record it was clear that the suit as

filed was liable to be decreed and the judgment of the trial Court was liable to be set aside.

9. Shri S.V.Purohit, learned counsel appearing for the defendant nos. 1 and 2 supported the impugned judgment and submitted that as the defendant no.1 was not a member of Wholesale Debt Market, it was not possible for it to deal in Government Securities. The plaintiff was aware about this fact and the defendant nos. 1 and 2 as brokers were justified in seeking to complete the transactions through the defendant no.5. The remedy of the plaintiff was against the defendant no.5. The learned counsel referred to documentary material on record and submitted that the aspect of exchange of securities was never pleaded by the plaintiff and hence the trial Court was justified in recording a finding that the plaintiff had failed to prove the transactions dated 15.01.2002 and 28.02.2002. He also referred to written notes filed at Exhibit 443 before the trial Court to substantiate his contentions. He placed reliance on the decision in ***Nandkishor Lalbhai Mehta Vs. New Era Fabrics Pvt. Ltd. (2015) 9 SCC 755*** and submitted that in absence of material pleadings with regard to exchange of securities, no relief could be granted to the plaintiff.

Shri A.A.Choube, learned counsel for the defendant nos. 5(a) and 5(b) referred to the written statement filed by the said defendants and submitted that though the defendant no.5 had nine Directors only two

of them had been joined as defendants. None of the documents that were placed before the trial Court were signed by the defendant nos. 5 (a) and 5(b). He referred to the cross-examination of the plaintiff's witnesses to demonstrate that there was no material whatsoever on record against the said defendants and the trial Court was justified in dismissing the suit. Reference was made to the provisions of Section 85-B of the Indian Evidence Act, 1872 and it was submitted that no interference with the judgment of the trial Court was called for.

Shri A.C.Dharmadhikari, learned counsel appearing for the defendant no.7 submitted that MKVDC Bonds worth Rs.1,50,00,000/- had been furnished by the defendant no.2 by way of security for the cash credit facility advanced to that defendant. There being a concluded contract between the defendant no.2 and the defendant no.7 the said defendant had a banker's lien over the said Bonds. He referred to the specific pleadings in the written statement to substantiate his stand that after completing all the formalities the Bonds were furnished as security for the cash credit facility. He also referred to the cross-examination of both the witnesses examined by the plaintiff to urge that the defendant no.7 had not abetted the other defendants in any manner whatsoever. Moreover the aforesaid Bonds had been seized from the defendant no.7 during the course of investigation by the police authorities. He also referred to the evidence with regard to the transfer forms being signed by

the employees of the plaintiff to justify the legal right of the defendant no.7. The plaintiff itself having authorised the sale of the securities it was now estopped from making a grievance in that regard. He further submitted that no notice under Section 164 of the Act of 1960 was given to the defendant no.7 before filing the suit. Similarly the plaintiff had failed to point out any prejudice being caused by virtue of the fact that the learned Judge of the trial Court had referred to various Notifications and Circulars while deciding the suit. The learned Judge also had necessary jurisdiction to try and decide the suit. He placed reliance on the decision in *Central Bank of India Vs. Siri Guppa Sugars and Chemicals Ltd and ors. AIR 2007 SC 2804* and submitted that there was no reason to interfere with the judgment of the trial Court and the appeal was liable to be dismissed.

10. We have heard learned counsel for the parties at length and we have also perused the records of the case. In the light of the rival pleadings of the parties the following points arise for adjudication :-

- 1) Whether the plaintiff proves that it had entered into transaction dated 15.01.2002 with the defendant no.1 for sale of Security No.1 and in lieu thereof the defendant no.1 was to sell Security No.2 to it ?
- 2) Whether the plaintiff proves that it had entered into transaction dated 28.02.2002 with the defendant no.1/defendant no.3 for sale of

Security No.3 and in lieu thereof the defendant no.1/ defendant no.3 was to sell Security No.4 to it ?

3) Whether the transactions dated 15.01.2002 and 28.02.2002 were in the nature of sale and purchase of securities as urged by the plaintiff or they were transactions of exchange as held by the trial Court ?

4) Whether the plaintiff proves that it is entitled to return of Security Nos. 1 and 3 or the alternate relief of value of those Securities from the defendants ?

5) Whether the defendant no.7 has proved that it has bankers lien over MKVDC Bonds being security furnished by the defendant no.2 ?

6) Whether the suit is bad for non-joinder of necessary parties ?

7) Whether the suit is bad against the defendant no.7 for want of notice under Section 164 of the Act of 1960 ?

(8-i) Whether the trial Court was justified in relying upon various Circulars and Notifications without furnishing an opportunity to the parties to address it on the same ?

(8-ii) Whether the dismissal of the suit with costs was justified ?

(8-iii) Whether the Court of 4th Joint Civil Judge, Senior Division was competent to decide the suit ?

11. Before considering the rival pleadings of the parties and re-appreciating the evidence on record, it would be necessary to refer

to the following aspects :

(a) The entire case of the plaintiff is based on documentary evidence. Shortly prior to filing of the suit, Crime No.75/2002 came to be registered with regard to the transactions entered into by the plaintiff and the Investigating Officer seized voluminous documents during the course of investigation. The plaintiff has therefore examined the Investigating Officer for bringing on record that documentary evidence.

(b) The plaintiff examined two witnesses in support of its case. Though defendant nos. 1 to 4, 5(a), 5(b) and 7 filed their written statements none of the defendants examined either themselves or any witnesses.

(c) By amending the plaint and referring to the registration of offences under various provisions of the Indian Penal Code against the defendant nos. 1 to 6 it was pleaded that the transactions in question were tainted with fraud, cheating, forgery, criminal breach of trust, criminal misappropriation and criminal conspiracy being hatched by defendant nos. 1 to 6 and abetment by defendant no.7. Despite these pleadings, in the present civil proceedings the standard of proof required would be on the touchstone of preponderance of probabilities and not proof beyond reasonable doubt.

12. The plaintiff to substantiate its entitlement to the reliefs claimed in the plaint examined PW 1-D.M.Mawalkar at Exhibit 141. The said witness was working as Manager of the plaintiff since 1996 and from March 2002 he was working as its Managing Director. The other witness examined was Mohd. Qureshi at Exhibit 281, the Investigating Officer in Crime No.75/2002 that was registered pursuant to the complaint lodged by the Divisional Joint Registrar, Co-operative Societies in relation to the transactions that are the subject matter of the suit. The defendants did not examine any witness and sought to cross-examine the plaintiff's witnesses. The parties have relied upon documentary material in support of their respective stands.

As to Point No.1

13. According to the plaintiff as per various Circulars issued by the Reserve Bank of India from time to time the plaintiff was required to invest 15% of its net demand and time liabilities in Government and other approved Securities. Resolution dated 31.07.1998 was passed by the Board of Directors of the Bank-Exhibit 235 in that regard. Pursuant thereto the Bank entered into two transactions for sale and purchase of Government Securities. As per the first transaction dated 15.01.2002 Security No.1 in the form of "Government of India 10.70% Government Stock, 2020" valued at Rs.4,00,00,000/- Exhibits 145 to 152 was to be

sold and in lieu thereof the defendant nos. 1 and 2 were to procure Security No.2 and hand it over to the plaintiff. The date of settlement was taken as 19.01.2002 and the market value of Security No.1 on that date was settled at Rs.4,00,04,000/- along with accrued interest of Rs.35,866/-. In this regard confirmation was received from the defendant no.1 on 15.01.2002 at Exhibits 190 and 191. On 28.01.2002 the plaintiff handed over original eight certificates of the “Government of India 10.70% Government Stock, 2020” each valued at Rs.50,00,000/- to the representative of the defendant no.1-Shri Pushpak Khot - Exhibit 208. The delivery of Security No.1 is accepted by Shri Pushpak Khot in his statement at Exhibit 313. The defendant no.1 issued a cheque dated 19.01.2002 for an amount of Rs.65,98,466.66 in favour of the plaintiff. In the written statement filed by the defendant nos. 1 and 2 at Exhibit 107, it was admitted that the defendant no.1 was concerned only with the transaction pertaining to Security No.1. It was further admitted that the defendant no.1 had paid the difference amount of Rs.65,48,466.66 to the plaintiff. This fact is also clear from the statement of Smt. Jugna Lodaya dated 25.05.2002 at Exhibit 311 admitting such payment by the defendant no.1. Letter dated 14.11.2002 issued on behalf of Standard Chartered Bank-Exhibit 322 also records the fact that the said cheque was drawn from the account of defendant no.1. The letter dated 20.06.2002-Exhibit 297 issued by the Reserve Bank of India to PW 2 states that the Reserve

Bank of India had not authorised the defendant no.1 or the defendant no.3 as Primary or Satellite Dealer in Government Securities.

14. The plaintiff on 30.04.2002 issued a notice at Exhibit 192 to the defendant no.1 demanding delivery of Security No.2 or its value along with interest. In this context the defendant nos. 1 and 2 have relied upon the reply notice-Exhibit 216 sent by their legal advisors reiterating this stand. In the cross-examination of PW 2-Exhibit 281 it was suggested on behalf of the defendant nos. 1 and 2 that under the first transaction the plaintiff was to sell Security No.1 to the defendant no.1 and in exchange was to buy Security No.2. This was accepted to be correct by PW 2. The defendant nos. 1 and 2 had taken the stand that defendant no.1 was not a member of the Wholesale Debt Market and had hence sourced Security No.2 from the defendant no.5. PW 2 admitted that the defendant no.1 had paid the sale consideration of Security No.2 to the defendant no.5 and had also directed the defendant no.5 to supply Security No.2 to the plaintiff. He further admitted that during the course of investigation it was revealed that the defendant no.5 had not supplied Security No.2 to the plaintiff. The defendant no.5 had defaulted in honouring its commitment of delivering Security No.2. It is also seen that at Exhibit 389, the sole Arbitrator in arbitration proceedings initiated by defendant no.1 had passed award on 20.01.2003 directing the defendant no.5 to

deliver 12 securities as specified or pay an amount of Rs.16,89,04,938.96 to the defendant no.1. While defendant no.5 did not file its written statement the defendant no.5(a) denied the plaint allegations and stated that he had resigned as Director of the defendant no.5 company on 25.04.2002. Defendant no.5(b) also denied the liability to satisfy the suit claim.

15. In the light of the aforesaid documents and especially those at Exhibits 190, 191 and 208 coupled with the fact that the defendant no.1 had admitted that it had paid the plaintiff the differential amount of Rs.65,98,466.66 vide Cheque No.33686 dated 19.01.2002, it becomes clear that the plaintiff has proved that it had entered into transaction dated 15.01.2002 with the defendant no.1 for sale of Security No.1 to it and in lieu thereof it was to purchase Security No.2 from the defendant no.1. The defendant no.1 too admitted this transaction. Interestingly the trial Court while answering issue no.2 has recorded a finding that the defendant nos. 1 and 2 were only concerned with Security Nos. 1 and 2 as described in paragraph 4 A of the plaint. A finding is also recorded in paragraph 60 of the impugned judgment that delivery of Security No.1 was taken by the defendant no.1 and amount of Rs.65,98,466.67 was paid by the defendant no.1 from its account. Despite these findings, it was held that the plaintiff had failed to prove the first leg of transaction no.1

dated 15.01.2002. This conclusion is clearly contrary to the pleadings of the plaintiff, the defendant nos. 1 and 2 as well as the evidence on record.

The plaintiff's transaction with regard to Security No.1 having been entered into with defendant no.1 it alone was responsible to deliver Security No.2 to the plaintiff. The defendant no.1 may have further sought to purchase Security No.2 from the defendant no.5 but the plaintiff was not concerned with the same. That was a matter between the defendant no.1 and defendant No.5. The defendant no.1 having taken delivery of Security No.1 from the plaintiff and also having paid the difference amount of Rs.65,98,466.66 to the plaintiff it was legally bound to deliver Security No.2 to the plaintiff. The trial Court in paragraph 140 of its judgment has wrongly held that as the defendant no.1 had paid the difference amount to the plaintiff and the consideration of Security No.2 to the defendant no.5, it could not be held liable. It was for the defendant no.1 to pursue its own remedies against the defendant no.5 for non-delivery of Security No.2 to it as the plaintiff did not have any privity of contract in that regard with the defendant no.5. Thus it is held on the basis of the evidence on record that the plaintiff has proved that it had entered into transaction dated 15.01.2002 with the defendant no.1 for sale of Security No.1 to it and in lieu thereof the defendant no.1 was to sell Security No.2 to it. Point no.1 stands answered accordingly.

As to Point No.2 :

16. The second transaction according to the plaintiff is dated 28.02.2002. As per this transaction Government Securities valued at Rs.5,50,00,000/- were sold by the plaintiff to the defendant no.1 for a consideration of Rs.6,40,32,347.48. Instead of paying the aforesaid sale consideration the defendant no.1 was to deliver Government Securities having face value of Rs.5,50,00,000/- for a consideration of Rs.5,79,56,250/- and also pay the difference amount of Rs.60,76,097.48 to the plaintiff. The “Government of India 10.50% Bonds, 2014” having face value of Rs.4,00,00,000/- are at Exhibits 171 to 177 and the MKVDC-2005 Bonds having face value of Rs.1,50,00,000/- are at Exhibits 183 to 187. It is seen from the document at Exhibit 195 dated 28.02.2001, which date ought to be 28.02.2002 according to PW 1, that the plaintiff had received a fax message from the defendant no.1 to confirm the aforesaid deal. The plaintiff's Managing Director endorsed the said fax message to Mrs. Deshpande of the Bank for confirmation. On 28.02.2002 the plaintiff pursuant to telephonic talks and the quotation sent by the defendant no.1 had issued a letter to the defendant no.1-Exhibit 210 to purchase the securities referred to above valued at Rs.5,50,00,000/-. At Exhibits 242 to 245 and 248 are deal confirmation letters dated 04.03.2002 sent by the authorised signatory of the defendant no.3 stating therein that the defendant no.3 had bought Security No.3 having face value of

Rs.5,50,00,000/- and had sold Security No.4 having face value of Rs.5,50,00,000/-. PW 1 in his cross-examination admitted that these documents were received through electronic mode and were part of the charge-sheet at Exhibit 202. It was further stated therein that the net amount payable towards difference by defendant no.3 to the plaintiff was Rs.60,76,097.48. On 07.03.2002 the Government Securities in original along with certificates of MKVDC Bonds as well as transfer forms were handed over to the representative of the defendant no.1-Shri Pushpak Khot as is clear from Exhibit 209. PW 1 stated that the said securities were handed over to Shri Pushpak Khot in his presence and he had acknowledged its receipt. The delivery and acceptance of Security No.3 is also admitted by Shri Pushpak Khot in his statement dated 03.07.2002 which is at page 127 of the charge-sheet - Exhibit 202. The share transfer forms indicating the name of the plaintiff as transferor are on record at Exhibits 197 to 201 and its phoco-copies are at Exhibits 257 to 261. There is also a letter dated 16.03.2002 issued by the plaintiff to the defendant no.1 stating that five transfer forms for MKVDC Bonds were being sent as per telephonic talks and that letter is at Exhibit 194. The difference amount of Rs.60,76,097.48 was paid to the plaintiff through thirteen demand drafts dated 06.03.2002 and the same were encashed by the plaintiff which is clear from the letter dated 30.05.2002 - Exhibit 196 issued by the Indian Bank.

17. PW 2 Shri Mohammed Aslam Qureshi in his affidavit at Exhibit 281 has stated that the thirteen demand drafts had been drawn by Shri Mahendra Radheshyam Agrawal - defendant no.4, Director of the defendant no.3 Company from his account with the HDFC Bank. The letter issued by the HDFC Bank in that regard is at Exhibit 320. At Exhibit 256 is the clearing voucher of the plaintiff indicating receipt of that amount. On 30.04.2002 the plaintiff issued a notice to the defendant nos.3 and 1 – Exhibit-193 stating that Government Securities and MKVDC Bonds having face value of Rs.5,50,00,000/- had been sold to the said defendants and the original certificates were handed over on 07.03.2002. However, Security No.4 had not been handed over to the plaintiff. The plaintiff therefore sought return of those Government Securities handed over to the said defendants or Security No.4 or its equivalent value. The transaction dated 28.02.2002 however was not admitted by the defendant nos. 1 and 2 and according to them the plaintiff had entered into that transaction with the defendant no.3. The reply sent in May 2002 by the legal advisors of the defendant nos. 1 and 2 at Exhibit 215 indicates that said defendants had merely sent their quotation dated 02.02.2002 to the plaintiff. According to them the plaintiff had entered into this transaction with the defendant no.3.

18. PW 2 the officer who investigated Crime No.75/2002 admitted in his cross-examination that the transaction with regard to Security No.3 was entered into between the plaintiff and the defendant no.3 through the defendant no.1 as broker. He was referred to the deal confirmation fax dated 04.03.2002 at Exhibits 242 to 245. He admitted that the defendant no.3 had paid the difference amount of Rs.60,76,097.48 to the plaintiff while receiving Security No.3. He further stated that the defendant no.3 passed Security No.3 to defendant no.5 after which defendant no.5 sold the said securities to the various persons.

PW 2 was then referred the statement of Shri Ketan Maskariya - Exhibit 314 recorded by him. In the said statement it was stated by Shri Ketan Maskariya that Security No.3 had been purchased by defendant no.3 from the plaintiff and that the same were handed over to him by Shri Rajesh Lasunkar who was a peon employed with the defendant no.5. It was further stated by him that out of Security No.3 that was valued at Rs.5,50,00,000/-, securities worth Rs.2,00,00,000/- and MKVDC Bonds worth Rs.1,50,00,000/- were sold to the defendant no.1 while the remaining securities worth Rs.2,00,00,000/- were sold to M/s Shreyam Securities Finance Ltd and Vallient Capitals Services Pvt. Ltd. In the statement at Exhibit 314 it was admitted that Security No.3 was sold by defendant No.5 to the defendant no.1.

PW 2 was also referred the statement of Shri Jaikumar Mehta - Exhibit 316 who was an employee of defendant no.5. PW2 admitted that in his statement, Shri Jaikumar Mehta had stated that Security No.3 was purchased by the defendant no.3 from the plaintiff and then delivered by the defendant no.3 to the defendant no.5. It was further stated that Shri Rajesh Lasunkar who was a peon with the defendant no.5 had handed over Security No.3 to him.

PW 2 thereafter concluded by saying that Security No.3 was purchased by defendant no.3 and then given to defendant no.5. He also stated that thereafter Government Securities worth Rs.2,00,00,000/- and MKVDC Bonds worth Rs.1,50,00,000/- were sold by defendant no.5 to the defendant no.1.

The trial Court after referring to Exhibits 209, 242 to 245, 248, 193, 238, 239, 250, 295, 231, 320 and 214 has recorded the finding in paragraphs 90 to 100 and 127 that the transaction dated 28.02.2002 was entered into by the plaintiff with the defendant no.3. The deal was confirmed on 04.03.2002. Security no.3 was handed over to Shri Pushpak Khot, employee of defendant no.1 along with Rajesh Lasunkar, employee of defendant no.5 which was a sister concern of defendant no.3. Despite all these findings it has been held that the plaintiff had failed to prove the transaction dated 28.02.2002. The defendant no.3 has not challenged any of the adverse findings recorded against it by the trial Court.

19. In the light of the fact that Security No.3 having face value of Rs.5,50,00,000/- was handed over to Shri Pushpak Khot, an employee of defendant no.1 on 07.03.2002, pursuant to the fax message of the defendant no.1- Exhibit 195, five blank transfer forms sent to the defendant no.1 as per letter dated 16.03.2002 - Exhibit 194, difference amount of Rs.60,76,097.48 was paid to the plaintiff vide thirteen demand drafts by the defendant no.3 coupled with the letter dated 04.03.2002 - Exhibit 248 issued by defendant no.3 it becomes clear that Security No.3 was handed over to the defendant no.1. It thereafter passed it on to the defendant no.3 after which the plaintiff received the difference amount of Rs.60,76,097.48, from the defendant no.3. The manner in which Security No.3 travelled from defendant no.3 to defendant no.5 and from defendant no.5 to defendant no.1 as sought to be elicited in the cross-examination of PW 2 is not very material for answering Point No.2. The plaintiff has thus proved transaction dated 28.02.2002 and the handing over of Security No.3 to the defendant no.1 and its purchase by defendant no.3. Point no.2 stands answered accordingly.

As to Point No.3 :

20. The learned Judge of the trial Court has laboured much on the nature of transactions entered into by the plaintiff with the defendant no.1/defendant no.3. It has been held that though the transactions

between them were in the nature of sale and purchase of securities, the evidence led by the plaintiff was with regard to exchange of Security No.1 with Security No.2 and of Security No.3 with Security No.4. There were however no pleadings in respect of exchange of securities. It is on that premise that the trial Court proceeded to hold that the plaintiff had failed to prove the transactions dated 15.01.2002 and 28.02.2002.

In this regard it would be necessary to refer to the averments made by the plaintiff in the plaint while describing the nature of said two transactions. In paragraph 4 of the plaint, it has been pleaded that both the transactions were in respect of sale and purchase of Government Securities entered into between the plaintiff and the defendant no.1 on 15.01.2002 and 28.02.2002. As regards the first transaction it has been pleaded that the plaintiff entrusted to the defendant no.1 Government Security having face value of Rs.4,00,00,000/- for a consideration of Rs.4,60,00,000/- with accrued interest of Rs.10,34,333.33 on the date of settlement which was 19.01.2002. Security No.1 was to be physically delivered by the plaintiff to the defendant no.1 within fifteen days from the date of settlement and it was agreed that the defendant no.1 instead of paying the said sale consideration of Rs.4,70,34,333.33 in cash would purchase Government Securities having face value of Rs.4,00,00,000/- and market value as on the date of the settlement at Rs.4,04,00,000/- with accrued interest of Rs.35,866.67. The said securities were to be

physically delivered by the defendant no.1 to the plaintiff within forty-five days from the date of settlement. The defendant no.1 was to pay the difference amount of Rs.4,70,34,333.33 (-) Rs.4,04,35,866.67 which was Rs.65,98,466.66. According to the plaintiff though the defendant no.1 paid the difference amount by issuing a cheque on 19.01.2002, it did not deliver Security No.2 to the plaintiff. In other words, though the plaintiff sold and delivered Security No.1 to the defendant no.1, the defendant no.1 in reciprocation did not sell and deliver Security No.2 to the plaintiff.

Similarly with regard to the transaction dated 28.02.2002 it was pleaded that Government Securities having face value of Rs.5,50,00,000/- were entrusted by the plaintiff to the defendant no.1 for a consideration of Rs.6,40,32,347.48. The said Government Securities were to be physically delivered by the plaintiff to the defendant no.1 within fifteen days from the date of settlement which was 28.02.2002. It was pleaded that it was further agreed that the defendant no.1 instead of paying the sale consideration in cash would purchase Government Securities having face value of Rs.5,50,00,000/- for a total consideration of Rs.5,79,56,250/- and the same would be delivered by the defendant no.1 to the plaintiff within forty-five days from 28.02.2002. The defendant no.1 was to pay the difference amount of Rs.6,40,32,347.48 (-) 5,79,56,250/- which was Rs. 60,76,097.48. According to the plaintiff though it delivered Security No.3 to the defendant no.1, the defendant

no.1 paid the aforesaid difference amount to the plaintiff through various demand drafts but it did not deliver Government Security No.4 to the plaintiff as agreed.

21. In the light of these pleadings reference can be made to the provisions of Section 2(7) of the Sale of Goods Act, 1930. Section 2(7) defines the expression “goods” to mean every kind of movable property other than actionable claims and money and includes stock and shares. Section 2(2) defines “delivery” to mean voluntary transfer of possession from one person to another. The transactions being related to Government Securities, it was not necessary to resort to the provisions of the Transfer of Property Act, 1882 as done by the trial Court.

The pleadings in paragraph 4 of the plaint clearly indicate that the transactions as pleaded by the plaintiff were of sale and purchase of Government Securities. Pleadings in that regard are clear and admit of no doubt. It may be that the witnesses examined have used the expression “exchange” to describe the said transactions but such description would not have the effect of rendering such transactions to be in the nature of exchange instead of one of sale and purchase of Government Securities. The manner in which Government Security Nos.1 and 3 were agreed to be sold by the plaintiff to the defendant no.1 and the manner in which it was to purchase Government Security Nos.2 and 4 from the defendant no.1

has been pleaded. Receipt of part of the sale consideration has also been pleaded. According to the plaintiff the failure on the part of the defendant no.1 in delivering Government Security Nos. 2 and 4 respectively as part of the sale consideration amounted to breach on the part of the defendant no.1. In the light of these clear pleadings it is found that both the transactions dated 15.01.2002 and 28.02.2002 were transactions with regard to sale and purchase of Government Securities between the plaintiff and the defendant no.1. The trial Court was not justified in proceeding to consider these transactions to be one of exchange and thereafter recording a finding that though there was evidence on record to indicate exchange of Security No.1 with Security No.2 and Security No.3 with Security No.4, there were no pleadings with regard to exchange. In fact with regard to Security Nos. 1 and 2 the trial Court in paragraphs 48, 57, 60, 69 to 71 has recorded a finding that they were transactions of sale and purchase of the said Securities qua the plaintiff. On a plain reading of the entire plaint it is found that the trial Court misdirected itself while considering the transactions of sale and purchase of Government Securities to be transactions of exchange. The ratio of the decision in ***Nandakishor Labbhai Mehta*** (supra) does not assist the defendant nos. 1 and 2 in these facts.

22. In this context it is also to be noted that during pendency of suit the plaint was amended by adding paragraphs 8A to 8E. In these

amended paragraphs reference was made by the plaintiff to the investigation made by the police authorities in Crime No.75/2002 which was thereafter registered as Criminal Case No.847/2002 pursuant to the report lodged by the Divisional Joint Registrar on 15.05.2002 – Exhibit 295. Offences punishable under Sections 205, 406, 409, 420, 467, 470, 120 B read with Section 34 of the Indian Penal Code came to be registered against various accused including the defendant nos. 1 to 6 herein. Reference was also made to various orders passed in the criminal proceedings as well as the fact that the Board of Directors of the plaintiff-Bank came to be dissolved in proceedings initiated by the Authorities under the Act of 1960. In the light of the averments in these paragraphs, the trial Court framed Issue No.6-A as to whether the plaintiff had proved that both the transactions were vitiated by fraud, cheating, forgery, criminal breach of trust, criminal misappropriation and criminal conspiracy by the defendant nos. 1 to 6 as abetted by the defendant no.7. On a reading of plaint as a whole we find that the case as pleaded was basically one of breach of the agreement/contract entered into between the plaintiff and the defendant no.1 and its subsequent acts in collusion between the defendant nos. 3 to 6. It is a fact that criminal trial for which offences were registered against the accused including the defendant nos. 1 to 6 herein proceeded separately. In these facts it is found that it was not necessary to frame Issue No.6-A and that the trial Court ought to have

examined the claim of the plaintiff in the backdrop of the pleadings that there was breach of agreement/contract as entered into between the plaintiff and the defendant no.1 pursuant to the transactions dated 15.01.2002 and 28.02.2002. In any event it is found that the pleadings in the plaint insofar as they pertain to allegations with regard to fraud, criminal misappropriation, criminal breach of trust etc. fall short of the requirements of Order VI Rule 4 of the Code and hence Issue No. 6 A as framed was redundant. Point No.3 stands answered accordingly.

As to Point No.4 :

23. The plaintiff having proved that Security no.1 pursuant to transaction dated 15.01.2002 had been sold to the defendant no. 1 and the said defendant having failed to sell Security No.2 to the plaintiff, the plaintiff is entitled to the return of Security No.1. It is an admitted fact that the defendant no. 1 had paid differential amount of Rs.65,98,466.66 to the plaintiff. Notwithstanding the fact that the defendant no. 1 further alienated Security No.1 without the consent of the plaintiff, the defendant no. 1 would be liable to make good the value of Security No.1 by paying the same to the plaintiff. The alternate prayer made by the plaintiff in that regard is liable to be granted.

As regards Security No.3 pursuant to transaction dated 28.02.2002 the plaintiff has proved that said security was handed over to the defendant nos. 1 and 3. The defendant no.3 has paid the differential

amount of Rs.60,76,097.48 to the plaintiff. However Security No.4 as agreed to be sold to the plaintiff has not been accordingly delivered by the defendant nos. 1 and 3 to the plaintiff.

Since it has been proved that the defendant no.3 had paid the differential amount for the transaction dated 28.02.2002 to the plaintiff, it would be the liability of the defendant no.3 to make good the same to the extent of Rs.4,00,00,000/-. It has further come on record that the MKVDC Bonds worth Rs.1,50,00,000/- were lying with the defendant no.7 at the instance of the defendant no.2 who claims to have pledged the same with the defendant no.7. It is an admitted position on record that the the MKVDC Bonds valued at Rs.1,50,00,000/- which were part of Security No.3 were seized by the investigating agency in Crime No.75/2002 from the defendant no.7. The learned Magistrate on 14.03.2004 directed the investigating agency to hand over the said Bonds to the plaintiff in exercise of power under Section 457 of the Code of Criminal Procedure, 1973. This order was challenged by the defendant no.7 before the Sessions Court but the order passed by the learned Magistrate was maintained. In Criminal Writ Petition No.66/2006 this Court while maintaining the impugned orders directed creation of a separate account by the plaintiff in respect of the said Bonds. These orders are at Exhibits 178 to 180. It is thus clear that the plaintiff is entitled to the return of value of these MKVDC Bonds that were seized from the defendant no.7.

This aspect has been further dealt with while answering Point No.5.

24. Since it has been found that the plaintiff is entitled to receive the value of Security No.1 to the extent of Rs.4,00,00,000/- and in respect of Security No.3 to the extent of Rs.4,00,00,000/-, the plaintiff would also be entitled to receive that value along with interest in view of the provisions of Section 34(1) of the Code. It cannot be disputed that the transactions dated 15.01.2002 and 28.02.2002 are commercial transactions. In the plaint the plaintiff has claimed interest @ 24% per annum. There is however no evidence brought on record by the plaintiff to establish its entitlement to interest @ 24% per annum. Considering the fact that both these transactions were entered into in 2002, we deem it reasonable to award interest @12% per annum on the principal amount. The plaintiff would be entitled to receive interest on the principal sum of Rs.4,00,00,000/- for both the transactions from the date of filing of the suit which is 12.09.2002 till realisation.

25. As regards the personal liability of the Directors of the defendant nos. 1, 3 and 5 is concerned, we find that the plaintiff has not pleaded the basis on which these Directors can be held personally liable for the transactions entered into by the respective Companies with the plaintiff. The transactions dated 15.01.2002 and 28.02.2002 are contractual in nature. The defendant no.2 in the written statement at

Exhibit 107 has raised the defence that as Director of the defendant no.1 Company he cannot be made personally liable for the acts of the Company. The defendant no.4 in the written statement at Exhibit 18 has denied his personal liability under the alleged transactions. Similarly, defendant no.5(a) and 5(b) in their written statements at Exhibits 100 and 104 have denied any personal liability for the acts of the defendant no.5 Company of which it was alleged that they were Directors.

On first principles, a private limited Company is a separate legal entity that is entitled to sue and be sued as a 'juristic' person. Unless it is shown from the Articles of Association that a Director could be held personally responsible for the acts of the Company there would be no basis whatsoever to infer the same. Neither are there any pleadings in the plaint to that effect nor is there any documentary evidence brought on record by the plaintiff to indicate the basis on which the Directors could be held personally liable for the acts of the Company. The liability if any would be of the Company that has entered into the transactions in question. As observed in *Sangeeta Jewels Private Limited and others Vs. Ajay Kumar Jain ILR (2008) II Delhi 638* a Company is distinct from its Directors and shareholders. The Directors of a Company would be liable for misappropriation of the Company's funds and other misfeasance but not for ordinary contractual liability of the Company. The communications at Exhibits 190 and 191 have been signed by the

authorised signatory of the defendant no.1 and as held in *Panchanan Dhara and others Vs. Monmatha Nath Maity (dead) through LRs and another, 2006(5) Mh.L.J. 209* on the document being executed by the Company, it is the Company and not the persons signing the same that can sue or be sued on the contract. Point No.4 stands answered accordingly.

As to Point No.5 :

26. According to the plaintiff, Security No.3 included MKVDC Bonds worth Rs.1,50,00,000/-. As per transaction dated 28.02.2002 these bonds along with other Government Securities worth Rs.4,00,00,000/- were to be sold and in lieu thereof the plaintiff was to receive Security No.4. Pursuant to registration of Crime No.75/2002 the police authorities seized Security No.3 and it was revealed that the MKVDC Bonds were lying with the defendant no.7. By amending the plaint, it was pleaded in paragraph 8-A that the defendant no.1 had no legal right to retain the MKVDC Bonds and any transaction in that regard was not binding on the plaintiff. The defendant no.7 in its written statement took the stand that the defendant no.2 had availed cash credit facility to the tune of Rs.20,00,00,000/- from the defendant no.7 and the MKVDC Bonds that were part of Security No.3 were pledged with it as security for the cash credit facility. It was stated that the defendant no.7 had a banker's lien on the said Bonds and hence the plaintiff had no right to seek the said Bonds.

The learned Judge of the trial Court while considering Issue no.19 A was pleased to observe that in paragraph 8-A of the plaint the plaintiff had pleaded that the defendant nos. 1 to 6 had unauthorizedly and nominally pledged the said Bonds worth Rs.1,50,00,000/- with the defendant no.7 . The pledge was admitted by the plaintiff but was claimed to be nominal. It held that in view of these pleadings, it was for the plaintiff to prove that the said pledge was nominal and the burden was on the plaintiff to prove this fact. As the pledge was admitted, no further proof of its existence was required. Further by observing that since the transaction dated 28.02.2002 had not been proved and as the defendant no.7 had no means of knowing the transaction between the plaintiff and the other defendants, the defendant no.7 could not be blamed if it accepted the MKVDC Bonds as security for the cash credit facility. On that basis it was held that the defendant no.7 had lien over the MKVDC Bonds.

27. In our view this finding recorded by the learned Judge of the trial Court against Issue No.19 A is perverse. Paragraph 8-A of the plaint contains the following pleadings :

“Para 8-A : It is therefore submitted that the said Government Security Nos.1 and 3 were entrusted to the defendants 1 and 2 for reinvestment but the defendants 1 to 6, from out of said securities unauthorizedly nominally pledged the Maharashtra Krishna Valley Development Corporation Bonds, 2005 (MKVDC) worth Rs.1.50 Crores with the defendant no.7 by committing

criminal breach of trust and thereby dishonestly misappropriated the same and converted the same for their own use. The alleged pledge, if any, is not binding on the plaintiff and the same is fraudulent, collusive, unauthorised, illegal void ab initio and in fact it amounts to criminal breach of trust and criminal misappropriation.”

The defendant nos. 1 and 2 in paragraph 8 of their written statement have pleaded as under :

“These defendants are not aware that whether the MKVDC Bonds are lying with the defendant no.7 and therefore do not admit the same”

In paragraph 8-A, it has been reiterated that the defendant nos. 1 and 2 were concerned only with Security No.1 and that the plaintiff had a separate agreement with the defendant no.3 in respect of Security No.3. Thus the defendant no.2 who is alleged to have pledged the aforesaid MKVDC Bonds with the defendant no.7 by way of security for the cash credit facility availed by him did not raise any specific pleading in that regard in the joint written statement of the defendant nos. 1 and 2.

The defendant no.7 in its written statement in paragraph 8-E has pleaded as under :

“8-E :This defendant with reference to its allegations made by the plaintiff against this defendant has already made which stands very clear in the written statement filed on record and hence all the allegations made against the defendant and more particularly with reference to MKVDC Bonds 2005 to the tune of Rs.1.50 Crores is denied and this defendant at the appropriate

time shall prove its status as pledgee under the relevant provisions of the Contract Act. Rest of the contents are denied for want of knowledge.”

28. The aforesaid pleadings thus indicate that it is the specific assertion of the plaintiff that from Security No.3 the defendant nos. 1 to 6 had unauthorizedly and nominally pledged the said Bonds with the defendant no.7 by committing criminal breach of trust and had dishonestly misappropriated the same. The alleged pledge was not binding on the plaintiff. These pleadings can hardly be said to contain any admission on the part of the plaintiff to hold that the plaintiff was admitting the pledge but was claiming it to be nominal as observed in paragraph 186 of the impugned judgment. On the contrary the plaintiff pleaded that the alleged pledge was fraudulent and not binding on it. The defendant no.7 took upon itself the burden to prove its status as a pledgee under the relevant provisions of the Indian Contract Act, 1872. Thus when the plaintiff had challenged the very transaction of the Bonds being pledged with the defendant no.7 and the defendant no.7 having asserted that it was a pledgee as it had advanced an amount of Rs.20,00,00,000/- to the defendant no.2, the burden to prove a valid existing pledge was on the defendant no.7. It is material to note that the defendant no.7 did not choose to examine any witness on its behalf. As a result the document of pledge which the defendant no.7 claimed to have been executed by the defendant no.2 was not brought on record before the trial Court. The

defendant no.7 remained content with cross-examining PW 2 at Exhibit 281. The mere statement of the Investigating Officer that during the course of investigation, he found that the MKVDC Bonds were pledged with the defendant no.7 can hardly amount to the proof of existence of any pledge in the absence of the document of pledge itself. The statement of PW 2 who was an Investigating Officer in Crime No.75/2002 cannot be treated as any admission on the part of the plaintiff as to existence of a valid pledge in favour of the defendant no.7. It is found that ignoring the specific pleadings of the plaintiff as well as the defendant no.7 as reproduced hereinabove, the trial Court erred in holding that the defendant no.7 had a lien over the said Bonds.

29. At this stage it is necessary to refer to the orders passed in proceedings initiated by the plaintiff with regard to the MKVDC Bonds. During the course of investigation of Crime No. 75/2002 the investigating officer – Exhibit 281 had seized the MKVDC Bonds from the defendant no.7. The plaintiff had thereafter moved an application under Section 451/457 of the Code of Criminal Procedure, 1973 seeking delivery of the said Bonds on Supratnama. The trial Court by its order dated 13.04.2004 – Exhibit 178 allowed the said application on the condition that the said securities would not be transferred without prior permission of the Court. This order was confirmed by the Sessions Court in Criminal Revision

No.46/2004 on 14.08.2006 – Exhibit 179. The defendant no.7 challenged this order by preferring Criminal Writ Petition No.66/2007 before this Court. In the order dated 05.07.2007 – Exhibit 180 it has been noted that the MKVDC Bonds worth Rs.1,50,00,000/- have been placed in Account No. ISIN-6007 with the Maharashtra State Co-operative Bank Ltd. The interest accrued on said Bonds was being deposited in Current Account No. CA DFA-365 at the plaintiff bank. This amount was directed not to be withdrawn without any specific order in that regard. The aforesaid Criminal Writ Petition was disposed of on 17.09.2007 by directing a separate account to be maintained by the plaintiff bank in respect of the said Bonds.

By another order passed in Miscellaneous Criminal Case No. 335/2006 dated 21.09.2006 – Exhibit 182 the learned Magistrate directed the re-investment of the MKVDC Bonds in Government Securities through S.G.L. Account in Demat Form under the head “Held to maturity 2016”.

It is thus clear that during pendency of the suit the MKVDC Bonds worth Rs.1,50,00,000/- had matured on 31.03.2005 and were thereafter permitted to be re-invested by maintaining an SGL Account. The interest accrued is being deposited in a separate account maintained at the plaintiff bank. In the light of the findings recorded against Point No.4 the plaintiff would be entitled to receive the proceeds of the re-

invested Government Securities worth Rs.1,50,00,000/-.

30. According to the learned counsel for the defendant no.7 the material on record with regard to the MKVDC Bonds was sufficient to hold that the defendant no.7 had proved that the said Bonds were pledged with it and that it had banker's lien over the same. As stated above, in the light of the pleadings of the plaintiff and the defendant no.7, the burden to bring on record the document of pledge and prove that the Bonds had been validly pledged by the defendant no.2 was on the defendant no.7. It is a fact that the said Bonds had been seized during the course of investigation from the defendant no.7 by the investigating agency. However nothing prevented the defendant no.7 from adopting other permissible modes for bringing the Bonds on record and proving the pledge in its favour. Merely because the transaction with regard to Security No.3 was approved by the Officers of the plaintiff or that blank transfer forms duly signed were handed over to the employees of the defendant no.1/defendant no.3 or that the MKVDC Bonds were seized from the defendant no.7, the same would not be sufficient to hold that the defendant no.2 had validly pledged the said Bonds with the defendant no.7. There again cannot be any quarrel with the ratio of the decision in ***Central Bank of India*** (supra) relied upon by the learned counsel for the defendant no.7 as regards the rights of a pawnee and the provisions of

Sections 172 to 176 of the Indian Contract Act, 1872 are clear in that regard. However, in the facts of the present case when the document of pledge itself was not brought on record by the defendant no.7 for the reasons best known to it, it will have to be held that the defendant no.7 had failed to prove that it had banker's lien over the MKVDC Bonds on the ground that the same were pledged with it by the defendant no.2. The plaintiff would be entitled to the return of the value of the MKVDC Bonds and the defendant no.7 would be free to pursue its remedies against the defendant no.2 in that regard. Point No.5 stands answered accordingly.

As to Point No.6 :

31. The trial Court has held the suit as filed to be bad for non-joinder of necessary parties. According to the trial Court all subsequent transferees of the securities sold by the plaintiff to the defendant nos. 1 and 2 ought to have impleaded as defendants in the suit. For determining the presence of a party in a suit, reference may be made to the provisions of Order I Rule 3 of the Code. If the plaintiff claims any right to relief in respect of or arising out of a transaction against such persons either jointly or severally those persons have to be joined as defendants. In the present case the plaintiff claims that Security Nos. 1 and 3 were sold to the defendant nos. 1 and 2 and the plaintiff had agreed to purchase Security Nos. 2 and 4 from those defendants. According to the plaintiff the defendants instead of selling Security Nos. 2 and 4 to the plaintiff, they

proceeded to illegally transfer Security Nos. 1 and 3 to third parties. The plaintiff was seeking return of Security Nos. 1 and 3 from the defendants and in the alternative the relief of value of those securities with interest was claimed. Since according to the plaintiff it had entered into such agreement with the defendant nos. 1 and 2, it was not concerned with the further transactions undertaken by those defendants. It was not expected of the plaintiff to join each subsequent transferee of those securities especially when its privity contract was only with the defendant nos. 1 and 2. Since the plaintiff in the alternative had claimed monetary relief based on the value of the securities no relief was being sought against any subsequent transferees pursuant to transfers effected by the defendant nos. 1 and 2. The subsequent transferees were not necessary parties to the suit and hence the trial Court had committed an error in recording a finding that in absence of such subsequent transferees pursuant to the transfers effected by the defendant nos. 1 and 2 the suit was bad for non-joinder of necessary parties. Similarly, only on the ground that the Directors and officers of the plaintiff Bank were arrayed as accused in Criminal Case No.847/2002 and charge-sheeted for criminal conspiracy, fraud, etc. they were not necessary parties to the present suit. The suit has been filed by the Administrator appointed on the Bank. For the same reason presence of all Directors of the defendant nos. 1, 3 and 5 as well as all the Directors of the plaintiff's Bank was not necessary. That finding

recorded by the trial Court is set aside and it is held that in the light of the nature of reliefs sought by the plaintiff all necessary parties had been joined as defendants. Point No.6 stands answered accordingly.

As to Point No.7:

32. The defendant no.7 is a Co-operative Bank registered under the provisions of the Act of 1960. In its written statement it has raised a plea that the plaintiff did not issue any notice to it under Section 164 of the Act of 1960 and therefore the suit as filed against it was not maintainable. In the plaint it has been pleaded by the plaintiff that it had entered into transactions dated 15.01.2002 and 28.02.2002 with the defendant nos. 1 and 2. The said defendants were to sell Security Nos. 2 and 4 to the plaintiff after having purchased Security Nos. 1 and 3 from it. It has further pleaded that the said defendants failed to deliver Security Nos. 2 and 4 as agreed. It has further pleaded that during the course of investigation in Crime No.75/2002 it was noticed that the MKVDC Bonds worth Rs.1,50,00,000/- were lying with the defendant no.7. According to the plaintiff the said Bonds were standing in the name of the plaintiff and the same were never transferred to anybody else. In the light of these pleadings it was prayed that insofar as the transaction dated 28.02.2002 the defendant nos. 1 to 7 be directed to deliver Security No.4 having face value of Rs.5,50,00,000/- along with interest or in the alternative, return Security No.3 that had been handed over to them.

From the averments in the plaint it can be seen that the plaintiff was pursuing its legal right of re-claiming the MKVDC Bonds that were found to be with the defendant no.7. The plaintiff claims that the defendant nos. 1 and 2 without any authority in law had sought to transfer the same in favour of the defendant no.7. The plaintiff does not claim any privity of contract with the defendant no.7. Since the plaintiff was pursuing its own legal right, it cannot be said that the prayer as made qua the defendant no.7 in any manner is “in respect of any act touching the business of the society”. Since the plaintiff was pursuing its own legal right and was re-claiming the MKVDC Bonds standing in its name from the possessor thereof, no notice under Section 164 of the Act of 1960 was required to be issued to the defendant no.7. Reference in this regard can be made to the decision in *Gajanan Eknath Sonankar vs. Shegaon Shri Agrasen Co-operative Credit Society Ltd. and anr. 2015 (1) Mh L J 579*. The learned Judge of the trial Court committed an error in holding that for want of notice under Section 164 of the Act of 1960, the suit as filed against the defendant no. 7 was not tenable. That finding recorded by the trial Court is set aside. Point No.7 stands answered accordingly.

As to point No.8-i to 8-iii

33. According to the learned counsel for the plaintiff the trial Court in the impugned judgment relied upon various Circulars and Notifications while answering Issue No.11. It was submitted that no opportunity was

made available to the plaintiff to address the Court on the aforesaid Circulars and Notifications as a result of which prejudice was caused to the plaintiff. It is a fact that while answering Issue No.11 the trial Court referred to certain Notifications issued by the Ministry of Finance as well as the Securities and Exchange Board of India. It also referred to Circulars issued by the Reserve Bank of India. In paragraph 206 of the impugned judgment it was stated that none of the parties had filed copies of the said Notifications on record. The Court took upon itself to refer to said Circulars and Notifications that were taken on record at Exhibits 479 to 481. We find that the trial Court ought to have brought it to the notice of the parties that it intended to rely upon the said Circulars and Notifications while adjudicating the suit. If such notice would have been given to the parties they could have addressed the Court effectively. In absence of any such opportunity the trial Court was not justified in relying upon the same while holding against the plaintiff. Such pleas were also not raised by any of the defendants by challenging the aforesaid transactions as being contrary to the said Circulars and Notifications. It is thus held that the trial Court was not justified in placing reliance upon these Circulars and Notifications.

It was urged on behalf of the learned counsel for the plaintiff that when the judgment was pronounced by the Court on 25.01.2010 it was merely stated that the suit was dismissed. However when the

certified copy of the judgment was received, it was noticed that the suit was dismissed with costs. Reference was made to the *roznama* of the proceedings as maintained by the trial Court. We do not find any basis to hold that when the judgment was pronounced the suit was merely dismissed and the dismissal of the suit with costs only found place in the certified copy of the judgment. The *roznama* of the proceedings records that on 25.01.2010 the suit was dismissed with costs. The said contention of the plaintiff therefore cannot be accepted. However since we find the plaintiff entitled to reliefs as prayed for, the direction of dismissal of the suit with costs would not survive.

Yet another contention raised by the plaintiff was that when the suit was heard for considerable period by the learned Judge of the trial Court he was holding the charge of the Court of 3rd Joint Civil Judge, Senior Division, Amravati. However while deciding the suit the learned Judge was holding the charge of the Court of 4th Joint Civil Judge, Senior Division, Amravati. On this point also it was urged that the suit ought to have been heard and decided finally by the 3rd Joint Civil Judge, Senior Division, Amravati. We do not find any merit in this submission as the record indicates that the learned Judge who conducted the trial and heard the learned counsel thereafter has himself decided the suit. It may be that for certain period the learned Judge was discharging the duties as the 3rd Joint Civil Judge, Senior Division, Amravati. No prejudice whatsoever

has been pointed out in this regard and nothing much turns on this submission. The ratio of the decision in *K.V.Rami Reddi* (supra) does not apply to the facts of the present case. Point Nos.8-i to 8-iii stand answered accordingly.

34. In the light of the findings recorded against the points that have been framed for adjudication, we record our conclusions as under :

(a) The plaintiff has proved that it had entered into transaction dated 15.01.2002 with the defendant no.1 for sale of Security No.1 valued at Rs.4,00,00,000/-/ These securities were delivered to the defendant no.1 on 28.01.2002. The defendant no.1 paid the difference amount of Rs.65,98,466.66 to the plaintiff. The defendant no.1 however failed to deliver Security No.2 to the plaintiff as agreed.

(b) The plaintiff has proved that it had entered into transaction dated 28.02.2002 with the defendant nos. 1 and 3 for sale of Security No.3 valued at Rs.5,50,00,000/-. The said securities were delivered to the defendant no.1 on 07.03.2002. The defendant no.3 paid the difference amount of Rs.60,76,097.48 through thirteen demand drafts. The defendant nos. 1 and 3 however failed to deliver Security No.4 to the plaintiff as agreed.

(c) The transactions dated 15.01.2002 and 28.02.2002 were in the nature of sale and purchase of securities and not exchange of securities.

(d) The plaintiff has proved that it is entitled to the return of Security No.1 valued at Rs.4,00,00,000/- from the defendant no.1.

The plaintiff has proved that it is entitled to the return of Security No.3 to the extent of Rs.4,00,00,000/- from the defendant no. 3 and to the extent of Rs.1,50,00,000/- from the defendant no. 7. Since the plaintiff had parted with these securities, it is entitled to receive the value equivalent to said securities including those that were re-invested pursuant to orders passed in that regard.

(e) The defendant no.7 has failed to prove that it had banker's lien over the MKVDC Bonds worth Rs.1,50,00,000/- that were furnished by the defendant no.2 by way of security for the cash credit facility advanced to him. The defendant no.7 is free to pursue its remedies against the defendant no.2 if so advised in that regard.

(f) The suit is not bad for non-joinder of necessary parties.

(g) Notice under Section 164 of the Act of 1960 was not liable to be issued to the defendant no.7 and the suit is not bad against the said defendant on that count.

(h) The trial Court was not justified in relying upon various Circulars and Notifications without giving due notice to the parties that it intended to rely upon the same. The adjudication of the suit by the Court of learned 4th Joint Civil Judge, Senior Division, Amravati is legal and proper.

35. In the light of aforesaid discussion, the following order is passed :

(i) The judgment dated 25.01.2010 in S.C.S.No.165/2002 is quashed and set aside.

(ii) The plaintiff is entitled to receive the value of Security No.1 to the extent of Rs.4,00,00,000/- from the defendant no.1 along with interest @12% per annum from 12.09.2002 till realisation.

(iii) The plaintiff is entitled to receive the value of Security No.3 in the following manner :

(a) Amount of Rs.4,00,00,000/- along with interest @12% per annum from 12.09.2002 till realisation from the defendant no. 3.

(b) MKVDC Bonds worth Rs.1,50,00,000/- seized from the defendant no.7 which were subsequently re-invested. The plaintiff is entitled to receive the same in its present form. The plaintiff is also entitled to receive the amount of interest earned by the Bonds till their maturity as well as interest earned after their re-investment.

(iv) The suit stands dismissed against the other defendants.

(v) First Appeal No.361/2010 is allowed in aforesaid terms. The parties shall bear their own costs.

(vi) This judgment shall operate after period of eight weeks from today.

JUDGE

JUDGE

Andurkar..

In view of interim orders dated 01.12.2010 and 10.12.2010 the appellant had furnished security towards the costs awarded by the trial Court. The appellant is free to have the said security discharged.

JUDGE

JUDGE

Andurkar..