1) Findings that transactions used to take place with M/s Harshad S Mehta on a principal to principal basis despite using contract A
2) SBI and it's subsidiary usurped 3.71 crore Units of M/s Harshad S Mehta and upon being exposed dishonestly sought to give money credit in lieu thereof of Rs 51.49 crores. SBI Cap was found guilty of wrongful conversion of Units
3) The Units were purchased by M/s Hardhad S Mehta but it's custody was lying with SBI and instead of disclosing and handing them over to Custodian SBI and SBI Caps sought to misappropriate them

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

MISC. APPLICATION NO. 185 OF 1993

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

Vs.

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

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

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

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

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

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

24th October 1996.

ORAL ORDER :

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

crore Units belong to the 3rd Respondent.

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

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

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

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

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

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

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

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

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

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

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

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

11. The facts are as follows :

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

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

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

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

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

" As you are aware, our Securities transactions were conducted through the State Bank of India, Bombay Main Branch, Securities Division and they used to receive, retain custody and effect deliveries of all Bank Receipts/Physical scrips on our behalf.

2. In connection with the usual annual inter-party settlement of units transactions due in May 1992, we took an inventory of the BRs and Physical Certificates in Units standing in the name of SBICAP that were held in the custody of SBI, Bombay Main Branch on 21-5-92. As per the inventory so made, the above Branch delivered to us Bank Receipts, Physical Certificates, etc. in Units relating to SBICAP. All the BRs standing in the name of SBICAP so received from SBI, Bombay Main Branch, were presented by us to the respective issuers in the course of the units settlement

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

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

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

Photocopies of the three BRs are enclosed for your information.

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

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

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

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

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

(Photocopies of these BRs are also enclosed)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

his and were being utilised for performance of his transactions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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