

**IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO  
TRANSACTIONS IN SECURITIES) ACT, 1992  
MISCELLANEOUS PETITION NO. 3 OF 1996**

A. K. Menon Custodian appointed under the provisions of the Special Court (Trial of Offences relating to transactions in Securities ) Act, 1992 and having his office at 10<sup>th</sup> Floor, Nariman Bhavan, Nariman Point, Mumbai – 400 021

... Petitioner

vs.

- 1 M/s. V. Krishnakant  
701, P. J. Towers,  
Dalal Street,  
Bombay-400 023
- 2 Dhanraj Mills Private Ltd.  
A company incorporated under the Provisions of the companies Act, 1956 and having its office at Block 19, 1<sup>st</sup> Floor, Dhanraj Mills Compound, Sitaram Jadhav Marg, Lower Parel, Bombay-400 015
- 3 T. B. Ruia  
(since deceased) by Legal Heirs
- 3 (A) Asha Tejkumar Ruia
- (B) Vidhi Darsh Ruia
- (C) Gagan Darsh Ruia

- (D) Hriday Darsh Ruia  
All are residing at Samudra Gaurav  
Apartment, Khan Abdul Gafar Khan  
Road, Worli Sea Face, Worli,  
Bombay-400 025
- (E) Vibha Ashi Khandelwal  
Residing at 1903, Verona  
Hiranandani Garden, Next to  
Heritage Garden, Powai, Mumbai-  
400 076
- 4 Suresh Jajoo, Indian Inhabitant  
residing at 1, Dinar, 4<sup>th</sup> Floor, Station  
Road, Santacruz (West), Station Road,  
Santacruz (West),  
Mumbai-400 054
- ... Respondents

Mr. J. Chandran i/b. Ms. Shilpa Bhate & Associates for the Custodian.

Mr. Piyush Raheja a/w Ms. Dhanashree Gaikwari and Mr. Ayaz Bilawala i/b.  
M/s. Bilawala & Co. for Respondent no.1.

Mr. Amrut Joshi a/w. Ms. Radha Ved and Mr. Nipkesh Jain i/b. M/s. Kiran Jain  
& Co. for Respondent no. 2.

Mr. Karl Tamboly a/w. Mr. Dipen Furia a/w. Mr. Romin Sangoi i/b. M/s. Shah &  
Furia Associates for Respondent nos. 3(A) to 3(E).

Mr. Rajiv Kumar, Senior Counsel a/w. Mr. Gautam P. Mehta, Mr. Virendra  
Pereira, Mr. Anagh Pradhan and Mr. Anand Iyer i/b. Divya Shah & Associates  
for Respondent no. 4.

**CORAM : A.K. MENON, J.**

**Judge, Special Court**

**RESERVED ON : 11<sup>th</sup> FEBRUARY, 2022**

**PRONOUNCED ON : 6<sup>th</sup> JULY, 2022**

## JUDGMENT :

1. The Custodian has filed the present petition for a decree against respondent no. 1 in a sum of Rs. 2,28,58,274/- along with interest thereon @ 24% per annum from 5<sup>th</sup> August, 1992 or such earlier date as may be found appropriate in the event the aforesaid sum of monies were received by respondent no.1 on such earlier date. In the alternative to prayer clause (a) the Custodian seeks a similar decree against respondent nos. 3(A) to 3(E). In the further alternative the Custodian seeks an order against respondent no. 3 and/or respondent no. 4 jointly and severally to pay the aforesaid sum along with interest. Pending the disposal of the petition, the Custodian has sought a direction against respondent no. 1 to deposit the aforesaid sum of Rs. 2,28,58,274/- and interest thereon. No interim order that has been granted and hence no deposit that has been made.

2. For the sake of convenience, I will briefly describe the parties viz. the respondents. Respondent no.1-V. Krishnakant ("M/s. Krishnakant") is a partnership firm. He is said to be a debtor of respondent no. 2 – Dhanraj Mills Private Limited ( "DMPL" ). DMPL has been notified under the provisions of the Special Courts Act on 5<sup>th</sup> August, 1992. Upon notification all the assets of the DMPL stand automatically attached from 5<sup>th</sup> August, 1992. I may observe here that respondent nos. 3A to 3E are the legal heirs and representatives of original respondent no.3 one T.B. Ruia [hereinafter referred to as "Late Ruia"] who was the Managing Director of respondent no. 2 and

was also notified under the Act. Respondent no. 4 is an individual, a share broker known to Late Ruia (hereinafter referred to as "Jajoo").

3. The petition proceeds on the basis that the Custodian had filed Miscellaneous Application No. 86 of 1993 ( "M.A. 86" ) seeking a direction against DMPL to disclose on oath its assets and liabilities as on date of notification and pursuant to the order of this Court dated 7<sup>th</sup> October, 1993 DMPL disclosed that a sum of Rs. 2,28,58,274/- was outstanding and receivable by the DMPL from M/s. Krishnakant. Accordingly, the Custodian called upon the M/s. Krishnakant to disclose to the petitioner why he had failed and neglected to reply to the public notice issued by the Custodian on 10<sup>th</sup> September, 1992 and to confirm on oath the position of M/s. Krishnakant apropos the claim of Rs. 2,28,58,274/- and interest thereon. It was M/s. Krishnakant who was called upon to deposit the amount together with interest into the attached account of DMPL. M/s. Krishnakant responded on 3<sup>rd</sup> September, 1994 contending that several cheques had been received from DMPL during the period April,1991 to 31<sup>st</sup> March,1992 for the purposes of "discounting" and after collecting the proceeds of the cheques in M/s. Krishnakant's account the amounts were returned in cash to Jajoo after deducting an retaining "discounting commission of 1%". The Advocates for M/s. Krishnakant further claimed that Jajoo had during the course of his survey carried out in his premises by the Income Tax Authorities confirmed the fact that cash had been collected and after discounting was handed over

by him to late Ruia. Thus, it is the Custodian's contention that M/s. Krishnakant had admitted receipt of the amounts.

4. According to the Custodian the so-called discounting of cheques was effectively clandestine diversion of funds and therefore such transactions would not give a valid discharge to M/s. Krishnakant as regards the liability of M/s. Krishnakant to DMPL. Thus, it is contended by the Custodian that M/s. Krishnakant would continue to be liable. Upon further amendments being carried out the Custodian sought an alternative prayer as against late Ruia to contend that in the event the cash had been handed over to the said late Ruia by Jajoo as contended by M/s. Krishnakant, the said late Ruia was liable to pay over the said amount to the Custodian.

5. Without prejudice to the aforesaid reliefs the Custodian by way of further amendment has pleaded that in the event the Court concludes that M/s. Krishnakant had discharged his liability by making payment to the said late Ruia or his agent Jajoo then in such event mainly Ruia and/or Jajoo should be directed to jointly and severally pay the aforesaid amount of Rs. 2,28,58,274/- and interest thereon. The Custodian has contended that none of these respondents M/s Krishnakant, DMPL or late Ruia were entitled to retain these funds. The transactions that they claim to have executed were illegal and that M/s. Krishnakant and in the alternative DMPL and late Ruia were bound and liable to reimburse the petitioner the aforesaid sum. The petition annexes to it copies of the relevant correspondence to which I have referred above.

6. The following affidavit-in-replies / Written Statements were filed :

<b>Affidavits on behalf of Respondent no. 1 – M/s. Krishnakant</b>	
3 <sup>rd</sup> March, 1999	: Affidavit in reply of Respondent no. 1 – M/s. Krishnakant
3 <sup>rd</sup> August, 1999	: Affidavit of Ashish Krishnakant – Partner of M/s. V. Krishnakant
16 <sup>th</sup> October, 2006	: Affidavit of Evidence of Mr. Vidyut Shah (partner of respondent no. 1)
18 <sup>th</sup> February, 2022	: Written submission on behalf of respondent no. 1 – M/s Krishnakant
<b>Affidavits on behalf of Respondent no. 2 – DMPL</b>	
7 <sup>th</sup> October, 1993	: Affidavit-in-reply of Respondent No. 2 – DMPL
19 <sup>th</sup> January, 1996	: Affidavit-in-reply of Mr. Narendra Dangarwala (Director of Respondent No. 2 – DMPL)
13 <sup>th</sup> August, 1999	: Affidavit of Documents of Mr. Narendra Dangarwala
22 <sup>nd</sup> June, 2000	: Affidavit in reply of Mr. Narendra Dangarwala to Affidavit of Respondent No. 1
13 <sup>th</sup> January, 2003	: Affidavit of Documents of Mr. Brijesh Khandelwal – Respondent No. 2. –Director of Respondent no. 2
15 <sup>th</sup> March, 2021	Affidavits of Examination in Chief of Mr. Chittur Krishnan Sundaram of Respondent no. 2
29 <sup>th</sup> April, 2021	
7 <sup>th</sup> July, 2021	
28 <sup>th</sup> February, 2022	: Written Submissions on behalf of Respondent no. 2
<b>Affidavits on behalf of Respondent no. 3– Tejkumar B. Ruia</b>	
18 <sup>th</sup> January, 1996	: Affidavit in reply of Mr. Tejkumar B. Ruia
11 <sup>th</sup> July, 2000	: Affidavit of Mr. Tejkumar Ruia – Respondent no. 3.
<b>Affidavits on behalf of Respondent no. 4– Suresh Jajoo</b>	
23 <sup>rd</sup> October, 2002	: Written Statement of Mr. Suresh Jajoo – respondent no. 4
11 <sup>th</sup> October, 2005	: Affidavit of documents of Mr. Suresh Jajoo
10 <sup>th</sup> February, 2022	: Written Submission on behalf of respondent no. 4 –Suresh Jajoo along with undated Supplementary Written submissions.
<b>Affidavits on behalf of CBI</b>	
30 <sup>th</sup> September,2021	: Affidavit of CBI – Mr. Ajinkya Pattebahadur
29 <sup>th</sup> October, 2021	: Affidavit of CBI – Mr. Ajinkya Pattebahadur

7. Based on the aforesaid replies / written statements the following issues were framed :

*(1) Whether respondent no. 1 proves that the claim in this petition is barred by law of limitation ?*

*(2) Whether the petitioner and/or respondents Nos. 2 and 3 prove that respondent No. 2 and 3 had advanced to respondent no. 1 a loan of Rs.2,28,58,274/- as alleged in paragraph 9 of the affidavit dated 19.1.1996 on behalf of respondent no. 2.?*

*(3) Whether the petitioner and/or respondents Nos. 2 and 3 prove that respondents Nos. 2 and 3 advanced the said amount to respondent No. 1 against pledge of shares as alleged in paragraph 7 of the affidavit of respondent No. 2 dated 2.6.2000 ?*

*(4) Whether respondent No. 1 proves that respondent No. 1 was doing business of discounting cheques with respondent nos. 2 and/or 3 as alleged in paragraph 5(c) of the affidavit of Respondents Nos. 1 dated 3.3.1999 ?*

*(5) Whether respondent No. 1 proves that respondent No. 4 was the agent of respondents Nos. 2 and/or 3 as allowed in the affidavit in reply of respondent No. 1 dated 3.3.1999 ?*

*(6) Whether respondent No. 1 proves that respondent no. 4 issued a writing acknowledging receipt of the cash amounts paid by respondent No. 1 as alleged in paragraph 5(i) of the affidavit of respondent No. 1 dated 3.3.1999?*

*(7) Whether the petitioner proves that respondent No. 1 illegally or fraudulently diverted moneys from respondent No. 2 and paid them over to respondent No. 2 and/or 3 and if so, such illegal transaction would not give a valid discharge to respondent of his liability to respondent No. 2 as alleged in paragraph 6 of the petition ?*

(8) *Whether the petitioner is entitled to recover any amount from Respondent No. 1, and if so, what amount ?*

(9) *Whether respondent No. 1 received the cheques drawn by respondent No. 2 in favour of respondent No. 1 as set out in the annexure to Exhibit "B" to the petition aggregating in all to Rs.2,28,58,274/- for discounting or as an advance / loan repayable with interest at 24% p.a. ?*

(10) *Whether respondent No. 4 was an agent / representative of respondent No. 2. ?*

(11) *Whether respondent No. 1 after encashing the said cheques paid or repaid the amounts of the respective cheques to respondent No. 4 less discounting commission of 1% ?*

(12) *Whether respondent No. 1 paid or repaid the said amounts to respondent No. 4 as an agent / representative of respondent No. 2?*

(13) *Whether respondent No. 4 paid the said amounts alleged to have been received by him from respondent No. 1 to Respondent No. 2 and/or to respondent No. 3 as director of respondent No.2 or in any other capacity ?*

(14) *Whether the respondent No. 1 is entitled in law to contend that respondent No. 1 had paid / repaid the respective amounts of the said cheques to respondent no. 2 in cash in view of the prohibition contained in Section 269 of the Income Tax Act against repayment in cash ?*

(15) *Does Respondent No. 1 prove that respondent No.2 or respondent No. 3 had appointed respondent No. 4 as the authorised signatory or agent of respondents Nos. 2 and 3 and that respondent No. 4 had been engaged to collect cash amounts upon the cheques in question being discounted ?*



(16) *Does respondent No. 1 prove that the cheques in question were received from respondent No. 4 on behalf of respondents Nos. 2 and 3 for the purpose of cheque discounting ?*

(17) *Is it proved that the disputed transactions are fraudulent and a mode of diverting monies from respondent No. 2 to respondent No. 3 ?*

(18) *Does the petition disclose a cause of action against respondent No. 4 ?*

(19) *Whether in view of the petitioners contention in para 6 of the petition that the transactions were illegal, the petitioner / respondent No. 2 are entitled to seek the monies under such illegal transactions ?*

(20) *Whether the present petition is maintainable and is not barred by the principles of res-judicata or constructive res-judicata ?*

(21) *Notwithstanding the respondent No. 2 never having claimed a sum of Rs. 2,28,58,274/- as outstanding and receivable by respondent No. 2 from respondent No. 4 whether the petitioner can still claim the said amount from respondent No. 4 ?*

(22) *Whether the petitioner is entitled to any relief, and if so, what relief ?*

***Submission of Mr. Raheja on behalf of Respondent no. 1 – M/s. Krishnakant***

8. On behalf of M/s. Krishnakant Mr. Raheja led the arguments. According to Mr. Raheja the petition merely refers to a statement made in an affidavit dated 7<sup>th</sup> October, 1993 wherein DMPL claimed that the sum in question was due and payable by DMPL from M/s. Krishnakant. DMPL had in its affidavit dated 19<sup>th</sup> January, 1996 and 2<sup>nd</sup> June, 2000 relied upon papers

and proceedings in Miscellaneous Petition No. 64 of 1994 ( "M.P.64" ) which had then been filed by DMPL repeating the contents thereof and inter alia contending that DMPL's defence to the present petition were the pleadings filed in M.P.64.

9. Mr. Raheja then took me to the facts of M.P.64. According to the petitioner therein, DMPL had had dealings with one Manubhai Maneklal Shah (hereinafter referred to as "Manubhai") in relation to monies advanced by DMPL to Manubhai against pledge of shares. Manubhai is said to have provided shares to DMPL of a value in excess of the monies advanced and these shares were said to have been transferred to DMPL as pledgees. Later it is contended that there was an agreement in October, 1990 between DMPL and Manubhai by which the transaction would be squared off and the pledged shares were returned to Manubhai.

10. It was DMPL's case in M.P. 64 that in March, 1991 an agreement was arrived at whereby monies would be advanced to respondent nos. 3 to 7. These respondents were impleaded in M.P. 64. Respondent nos. 3 and 5 to 7 were T.H. Vakil who was respondent no. 1 in Miscellaneous Petition No.2 of 1996 before this Court and which has subsequently been rejected, respondent no. 5 was Suresh N. Shah who was respondent no. 1 in Miscellaneous Petition No 4 of 1996 a companion petition and respondent no. 6 and 7 were one Loknath Shroff and A B Shah. It was contended in M. P. 64 that the advances were secured by pledge of shares exceeding the value of the shares and

personal guarantee of Manubhai. It is further contended that the total sum of Rs. 8,79,61,432/- had been advanced to respondent nos. 3 to 7 and of which a sum of Rs. 6,31,64,932/- was subject matter of Miscellaneous Petition Nos. 2, 3 and 4 of 1994 filed by the Custodian.

11. We are presently concerned with Miscellaneous Petition No. 3 of 1996 ( "M.P.3" ) in which the amount advanced as stated above is claimed to be a sum of Rs. 2,28,58,274/-. According to M/s. Krishnakant the said amount was paid in 13 different installments. 13 cheques had been received from DMPL which M/s. Krishnakant encashed and paid it over to the said late Ruia through Jajoo. It is contended that in the meanwhile the company DMPL received dividends in respect of pledged shares which were placed in a suspense account(s) and in respect of which credit was to be given to respondent nos. 3 to 7. M. P. 64 also referred to correspondence as between DMPL with the Income Tax department.

12. Mr. Raheja contended that M/s. Krishnakant had filed an affidavit dated 3<sup>rd</sup> March, 1999 of one Vidyut Shah in which Vidyut Shah denied that amounts received were advanced as a loan. That the amounts received by the firm were effectively the result of cheque discounting business and had been paid over to DMPL and Ruia through Jajoo after deducting commission. Apparently M/s. Krishnakant was asked to carry on this business by the aforesaid Suresh Shah. It is contended that in the affidavit that DMPL had not demanded these monies because they had already been paid over to DMPL/

Ruia. The deponent had also made references to admissions made in inquiries before the Income Tax department wherein Jajoo had inter alia admitted having received cash from M/s. Krishnakant and having paid it over to Ruia. Jajoo was impleaded in the petition and in his written statement dated 23<sup>rd</sup> October, 2002 he had not denied that he had made such a statement to the Income Tax authorities. On the other hand, he had sought to contend that he would refer to the statement for its true meaning and legal effect.

13. According to Mr. Raheja the Custodian and DMPL had failed to establish that a loan was advanced to M/s. Krishnakant and hence according to Mr. Raheja payments made to M/s. Krishnakant was not from attached assets of DMPL since the payments were made prior to notification of DMPL. He invited my attention to the fact that payments were made between 3<sup>rd</sup> September, 1991 and 4<sup>th</sup> December, 1991. Thus, within a span of three months this amount of Rs. 2,28,58,274/- has been paid over and there is no question of having paid these amounts from attached accounts. Since it was the case of the Custodian that the amount payable by M/s. Krishnakant was by way of a loan Mr. Raheja contended that there was no evidence whatsoever that a loan had been advanced by DMPL to Krishnakant. Interestingly it was also contended that the Custodian had not adopted claims made by DMPL in M.P.64 and the absence of a pleading that the amounts were advanced by way of loan was clearly missing. No documents had been produced from the records of DMPL to demonstrate that DMPL had ever contended that the

transaction was a loan. He invited my attention to the contents of the letter dated 30<sup>th</sup> July, 1994 addressed by the Custodian to M/s. Krishnakant.

14. Mr. Raheja also invited my attention to an order dated 5<sup>th</sup> October, 1996 passed by the Special Court in which the court found that the petition was filed by the Custodian on the basis of information given by DMPL and it was for DMPL to produce evidence in support of the claim and considering the defence taken the court had opined that it will be necessary for respondent no. 3- T. B. Ruia to step into the witness box and Ruia must also prove the claim if it is to his knowledge. The evidence of Ruia was thus required. However, Ruia did not depose nor did any other witness depose to establish that there is a debt owing from M/s. Krishnakant to DMPL. On the other hand, DMPL led the evidence of one Chittur Sundaram ( "Sundaram" ) who claimed that he was an authorised signatory. Inviting my attention to the deposition of the said Sundaram, Mr. Raheja contended that the evidence fails to even remotely establish that there was a loan transaction between the parties.

15. Mr. Raheja invited my attention to witness Sundaram's admission that he was not aware whether the pledged shares were sold. On the other hand, the witness had deposed that DMPL had handed over the shares to Manubhai along with blank transfer forms. Mr. Raheja further contended that since pledged shares had apparently been returned to Manubhai there would not have been a loan transaction between the parties and that it is difficult to

believe that a sum of Rs. 8 crores would have been disbursed on the basis of personal guarantee of Manubhai and yet pledged shares would continue to be retained with him. This was clearly an indication that there was no pledge for loan at all.

16. Mr. Raheja further submitted that perusal of the record would indicate that no demand was ever made upon M/s. Krishnakant or Manubhai for repayment of the aforesaid sum of money. Mr. Raheja therefore contended that the facts of the present case are identical to the facts of Miscellaneous Petition No. 2 of 1996 ("M.P.2") which was filed by Custodian against T.H.Vakil. T.H.Vakil was also one of the respondents in M.P. 64. In that case as well payment of monies by DMPL to T.H.Vakil was confirmed and admitted by T.H.Vakil. In M.P. 2 judgment dated 9<sup>th</sup> June, 2020 this court had already found that the payment did not constitute a loan. The fact situation in the instant case was identical and hence the decision in M.P. 2 must prevail and the application is liable to be rejected. Merely because DMPL had led some evidence in the present case will not alter the factual aspects inasmuch as the loan has never been established.

17. Mr. Raheja further submitted that the documents produced by DMPL do not record any loan transaction nor do they establish pledge of shares. Deposition is merely hearsay and the witness has not been able to establish the contentions. It is further contended by Mr. Raheja that entire evidence of Sundaram is hearsay. The cash book produced have already been dealt with

in the case of M.P.2 and this court has already found that there is no evidence of any loan. In the present case as well, the evidence does not indicate of any loan having been advanced by DMPL. The Custodian and DMPL have thus failed to establish a loan or the existence of any debt. The question of recovering any amounts from M/s. Krishnakant does not arise. Mr. Raheja has made extensive reference to the deposition of Suresh N. Shah in Miscellaneous Petition No.4 of 1996 ("M.P.4") in support of his contentions. In the present case Vidyut K Shah had filed a detailed affidavit dated 16<sup>th</sup> October, 2006 on behalf of M/s. Krishnakant in which the deponent had disclosed that the entire transaction was carried out under the supervision of Suresh N Shah. Cash was withdrawn by employees of Suresh N Shah from the bank account for alleged repayment of the amounts to DMPL / Ruia. That the said Suresh N Shah thereafter handed over amounts withdrawn to Jajoo, but Jajoo had deliberately not come forward to lead evidence. My attention was invited to the relevant extract of examination in chief and cross examination of Suresh Shah in M.P.4 in support of the contention of Mr. Raheja that independent corroboration of repayment of the amount was available from the statement recorded by Jajoo under section 133 A of the Income Tax Act.

18. Mr.Raheja further submitted that Jajoo had accepted the fact that repayment had been made through him since he had also accepted the correctness of statement made by M/s. Krishnakant to the Income tax authorities. According to Mr. Raheja reliance placed by Jajoo on the decision

in *Paul Mathews & Sons vs. Commissioner of Income Tax*<sup>1</sup> and the *Commissioner of Income Tax vs. Khader Khan & Sons*.<sup>2</sup> were completely misconceived. According to Mr. Raheja although Jajoo had offered to explain the true meaning and legal effect of its statement under 133A no explanation whatsoever was coming. Hence the statement made by him must be taken as true.

19. In conclusion Mr. Raheja submitted that considering the surrounding circumstances no loan had been taken. The amounts advanced had been repaid. Moreover, the staggered manner in which the payments were made and thirdly the release of shares which were said to have been pledged by Manubhai with DMPL had also been released. Lastly there was no repayment of the amount ever sought and all of this read together would clearly indicate that there was no loan that had been advanced by DMPL to M/s. Krishnakant. Mr. Raheja therefore submitted that the petition has no merit and is liable to be dismissed.

***Submission of Mr. Joshi on behalf of Respondent no. 2 – DMPL***

20. Written submissions have also been filed on behalf of DMPL on whose behalf Mr. Joshi also made brief submissions on that basis. According to the learned counsel for DMPL, Jajoo had confirmed in his statement to the Income Tax Authorities having received cash from M/s. Krishnakant which he handed over to the said Ruia. Mr. Joshi relies upon the admission on

---

<sup>1</sup> 2003 SCC Online Kerala 677

<sup>2</sup> 2007 SCC Online Madras 1998



behalf of M/s. Krishnakant in the affidavit in reply dated 22<sup>nd</sup> June, 2000 of Narendra Dangarwala, Director of DMPL replying to affidavit of M/s. Krishnakant. That M/s. Krishnakant had received the amount in his bank account. The contention however is that the amount was withdrawn in cash. A sum equivalent to 1% of the amount of the cheques was retained by him and the balance 99% of the amount was handed over to Jajoo. He invited my attention to the contention on behalf of M/s. Krishnakant that a cheque discounting service was being offered by M/s. Krishnakant which had been availed of by the DMPL through its agent Jajoo. Vidyut Shah in his deposition has stated that the cash was then handed over by Jajoo to T.B Ruia, the then Managing Director of DMPL. DMPL has consistently taken up this stand including therein submissions made before me that DMPL has advanced amounts at the instance of Manubhai to M/s. Krishnakant at interest of 24% per annum and against pledge of shares as contended in M.P.64 DMPL has denied the case of M/s. Krishnakant that the amounts have been paid over in cash eventually for the benefit of T.B. Ruia.

21. Referring to the affidavit in reply dated 18<sup>th</sup> January, 1996 filed by Ruia it is contended that Ruia's denial of having received cash from Jajoo is correct. The contention of T.B. Ruia is that M/s. Krishnakant has concocted a story in order to avoid liability. In a further affidavit dated 11<sup>th</sup> July, 2005 filed by T. B. Ruia he has taken up the contention that the version of M/s. Krishnakant in his defence in the present application that Jajoo was an agent of DMPL is incorrect. I may observe here that the agency was sought to be

implied by virtue of a Power of attorney said to have been executed by DMPL in favour of Jajoo. However, that power of attorney has not been proved. On the flip-side T.B. Ruia has contended that the power of attorney granted by DMPL in favour of Jajoo was only limited to signing and executing transfer forms for and on behalf of DMPL either as a transferor or transferee during the course of DMPL's business of buying shares and securities. T. B. Ruia has also stated that no general agency was created as between DMPL and Jajoo. T. B. Ruia has taken up one more contention in his reply and that is his having not been given an opportunity to cross examine either M/s. Krishnakant or Jajoo before the Income Tax Authorities in order to enable him to controvert the statements made by them. T. B. Ruia's affidavit also goes on to question the version of Jajoo and the reliance placed by M/s. Krishnakant on Jajoo's contention / statement made before the Enforcement Directorate. Ruia has also denied that he was in any manner engaging in or taking advantage of the Foreign Exchange Immunity Scheme as contended by M/s. Krishnakant.

22. Perusal of the affidavit / written statement filed on behalf of Jajoo dated 23<sup>rd</sup> October, 2000 reveals that Jajoo has contended that the claim is firstly barred by limitation and that he cannot be made personally liable for the debts of Ruia on account of a clear disclosure that M/s. Krishnakant was acting as agent on behalf of disclosed principal viz. T B Ruia who was a party in the present proceedings and hence there is no question of making Jajoo liable. Jajoo has also contended that even assuming the transaction as pleaded by M/s. Krishnakant is true the same would be illegal and on the basis of such

illegal transactions there is no question of seeking to recover money through this court and if DMPL had entered into such illegal transactions the Custodian could hardly be expected to succeed.

23. According to Jajoo the defence that he has taken up is effectively confirmed by the conduct of DMPL and T.B. Ruia who did not at any stage make any attempt to recover monies from Jajoo. Clearly there was no amount that Jajoo owed to either Ruia or DMPL. More particularly it is seen that in the affidavit in reply dated 7<sup>th</sup> October, 1993 filed by DMPL in M.A. 86 there is no contention that any amount was receivable by DMPL from Jajoo. In any event Mr. Joshi submitted that Jajoo was not a beneficiary of any of the amounts and hence there is no question of holding him liable.

24. Mr. Joshi has then taken me through the 22 issues framed in the present petition and invited my attention to the evidence led on behalf of DMPL. He has taken me through the depositions of the DMPL's sole witness Sundaram in his affidavit marked as Exhibits R-2(1), R-2(2) and R-2(3). He has also taken me through the contents of the ledger at Exhibit R-2(4) as also some entries in the cash book which have been marked Exhibits R-2(6) to R-2(15). Relevant entries in the bank statement however have not been admitted in evidence for want of proof. According to Mr. Joshi the documentary evidence before the court today makes it clear that the amounts paid over by DMPL to M/s. Krishnakant was by way of a loan and M/s. Krishnakant had admitted receipt of the funds but has contended that the funds have been

received for the purposes of being converted to cash which M/s. Krishnakant did as a regular business and thereafter paid over the cash amount to T. B. Ruia through Jajoo. He submits that there is no evidence of that leg of the alleged transaction.

25. Reliance is placed by Mr. Joshi on the testimony of Sundaram, on the three affidavits that he has filed and it is contended that despite cross examination of the said witness the contention of DMPL that the amounts were advanced as a loan to M/s. Krishnakant have not been disturbed. He relies upon answers of witness Sundaram to questions 17 to 22 in his cross examination in support of his contentions and according to Mr. Joshi DMPL has discharged the burden of establishing that amounts were paid over to M/s. Krishnakant. That these payments were as a loan intended to be repaid and against pledge of shares. In view of this it is contended that M/s. Krishnakant had not led evidence and had admitted and was not interested in leading any evidence as recorded in the courts order dated 5<sup>th</sup> March, 2021. Mr. Joshi also contended that Krishnakant had failed to prove that the amount was paid over to Krishnakant for being converted to cash. Mr. Joshi relies on the following judgments in support of his case :

(a) *Anita Rani vs. Ashok Kumar and Ors.*<sup>3</sup>

(b) *Vidyadhar vs. Manikrao.*<sup>4</sup>

(c) *Ishwar Bhai Patel vs. Harihar Behera & Anr.*<sup>5</sup>

---

<sup>3</sup> 2021 SCC Online 1265

<sup>4</sup> (1999) 3 SCC 573

<sup>5</sup> (1999) 3 SCC 457

- (d) *Banganga Co-op Hsg. Society Ltd. vs. Vasanti Gajanan Nerurkar.*<sup>6</sup>
- (e) *Anil Rishi vs. Gurbaksh Singh.*<sup>7</sup>
- (f) *A.K.Menon, Custodian vs. Modern Chemical Corporation.*<sup>8</sup>
- (g) *L.S. Synthetics Ltd. vs. Fairgrowth Financial Services Ltd. & Anr.*<sup>9</sup>

26. Relying on the decision of the Supreme court in *Anita Rani (supra)* in which the court observed that the onus of proving that a party who received the amount had been discharged by way of payment to another would lie on the party contending so. Mr. Joshi submits that a suit where a defendant admits receipt of money but contends that the same was a gratuitous payment, it was for the defendant to establish his case. According to Mr. Joshi the Supreme Court's decision is clear inasmuch as a party which admits receipt of funds yet contends that it was for a particular purpose is bound to prove the said purpose. Applying that principle to the case at hand, Mr. Joshi submits that M/s. Krishnakant had failed to prove that he had "discounted" the cheques as contended. Hence according to Mr. Joshi, it is clear that the amount paid over to M/s. Krishnakant was a loan advanced and which was repayable. The same had not been repaid and hence the petitioner was entitled to a decree.

27. Referring to the evidence tendered by Sundaram, Mr. Joshi submitted that there is no merit in the contention of M/s. Krishnakant and Jajoo that

---

<sup>6</sup> 2015(5) Bom CR 813

<sup>7</sup> (2006) 5 SCC 558

<sup>8</sup> (2002) 1 All MR 180

<sup>9</sup> (2004) 11 SCC 456

Sundaram's deposition is only hearsay. According to Mr. Joshi, Sundaram had learnt of the fact that the amount paid over by DMPL to M/s. Krishnakant was by way of a loan and that his immediate superior T. B. Ruia had informed him of that fact. It is personal knowledge that he has deposed to and not what T B. Ruia had asked him to say. In fact, the said Ruia was not even alive at the relevant time to suggest that Sundaram was aware of the facts and he was not involved at the material time is of no avail. It is submitted M/s. Krishnakant's case though attractive is bereft of any merit. Sundaram was validly appointed employee of DMPL and his appointment has not been questioned. In fact, at one stage there was an attempt to question his authority by asking him whether he was given an appointment letter. Despite his answer in the affirmative he was not called upon to produce the appointment letter. Thus, it goes without saying that Sundaram was a validly appointed employee and had deposed in his capacity of being employed with DMPL at the material time. On the other hand, M/s. Krishnakant had failed to prove their case and an adverse inference is required to be drawn against M/s. Krishnakant which had admitted receipt of the amounts but had not discharged the burden of establishing that the amount was withdrawn and returned in cash to T. B. Ruia through Jajoo. M/s. Krishnakant has deliberately not lead evidence and therefore has avoided being cross examined.

28. Mr. Joshi relied upon the decision of the Supreme court in *Vidyadhar (supra)* in which case the court held that a presumption will arise in a case

where a party who does not appear and depose as a witness in support of his case and does not offer himself for cross examination would not have discharged the burden upon him. As in the case of *Ishwar Bhai Patel (supra)* the Supreme Court had held that when a party abstains from entering the witness box it must give rise to an adverse inference. Moreover M/s. Krishnakant is bound by admissions made in the evidence as held in *Banganga Co-op Hsg.Soc. Ltd (supra)* the party having failed to appear for cross examination admissions in the affidavit of evidence may be used by the rival party. Commenting on the burden of proof Mr. Joshi submitted that as held in *Anil Rishi (supra)* the burden of proof in the instant case would be upon M/s. Krishnakant who had admitted receipt of the fund but had failed to discharge the burden of proving that the monies had been paid over to T. B. Ruia through Jajoo. Mr. Joshi further submitted that in view of the case of Jajoo having denied receipt of any amount in cash from M/s. Krishnakant it was necessary that M/s. Krishnakant led evidence to establish his version that the monies have been withdrawn in cash and paid over to Jajoo for onward payment to DMPL and/or T. B. Ruia. He submits that M/s. Krishnakant having admitted receipt of the fund and having failed to discharge the burden that he had paid over the amount in cash was clearly liable. That the statement under Section 133A of the Income Tax Act does not absolve M/s. Krishnakant of liability or burden of establishing his case and at the most it could be used only for contradicting a witness as contemplated in Section

145 of the Evidence Act. Statement made before the Income Tax authorities was not evidence and was a statement which was retractable.

29. Adverting to the position taken up by Jajoo who had contended that there was no principal-agent relationship between him, DMPL or Ruia it was necessary that M/s. Krishnakant proved their assertion that Jajoo was an agent of DMPL and Ruia but M/s. Krishnakant had failed to prove the same. In his submission that seeks to indirectly support the version of Jajoo, Mr. Joshi submitted that merely because Jajoo had canvassed an argument on the basis of an assumption that the case of the petitioner and that of the M/s. Krishnakant attributing an agency on behalf of disclosed principal viz. attributing to M/s. Krishnakant of being an agent of T. B. Ruia and there is a disclosed principal. Jajoo cannot be made personally liable since Jajoo had not admitted that he was an agent of either DMPL or Ruia. Therefore, merely because a copy of a Power of Attorney has been relied upon it cannot be construed that Jajoo was an agent of DMPL. More so because the power of attorney was for a limited purpose of transacting in shares as set out earlier. In any event the power of attorney has not been admitted in evidence and hence there is no substance in the contention that Jajoo was an agent of DMPL under Ruia.

30. Lastly Mr. Joshi submitted that the petition filed by the Custodian is for recovery of monies belonging to a notified party and not to be treated as a Civil Suit. He relies upon the decision in the case *Modern Chemical*



*Corporation (supra)* which held that no period of limitation can apply to an act done by the court and that the present application is one whereby the Custodian is obliged to prosecute the petition by virtue of the act and establishment of the Special Court. It is Mr. Joshi's case that there is a statutory attachment that comes into force upon notification of a party. The court is duty bound to recover the amount for purpose of distribution and hence there can be no question of the present petition being time barred. He also relies upon the pronouncement of the Supreme Court in the case of *L S Synthetics (supra)* in support and contends that the petition cannot be held to be beyond time and for all the aforesaid reasons the petition is liable to be allowed by issuing appropriate directions against respondent no.1. In effect DMPL clearly seeks a decree against M/s.Krishnakant, to the exclusion of T. B. Ruia and/or Jajoo.

***Submission of Mr. Karl Tamboly on behalf of Respondent no.s 3(A) to 3(E) - Legal heirs of Respondent no. 3 - T. B. Ruia.***

31. Submissions on behalf of respondents 3(A) to 3(E) were led by Mr. Tamboly, learned counsel for the said respondents who are the legal heirs and representatives of the original respondent no.3-T.B. Ruia. These respondents supported the case of respondent no.2-DMPL contending that they were only legal heirs and they repeat and reiterate the contents of the pleadings. No further submissions were made except to adopt the submissions and judgments cited on behalf of DMPL.

*Submission of Mr. Rajiv Kumar on behalf of Respondent no. 4 – Suresh Jajoo*

32. On behalf of Suresh Jajoo the arguments were led by Mr. Rajiv Kumar who relied upon written submissions filed in the course of proceedings. Mr. Kumar contended that the claim in M.P 3 has its roots in M.P.64 which laid the foundation of the claims sought in the present application. That M/s. V. Krishnakant was party respondent to M. P. 64 along with some other brokers such as T.H Vakil and Suresh Shah. He submitted that the Custodian has proceeded on the basis of information provided by DMPL. Mr. Kumar invited my attention to the fact that there were two elements of the claim. Firstly, there was the transaction of loans advanced to Manubhai and later to M/s. Krishnakant against security of pledge of shares and the personal guarantee of Manubhai. The second leg of the claim is that M/s. Krishnakant was engaged in the cheque discounting business and would receive cheques, encash them and after collecting the cash would deduct commission of 1% on the amount of the cheque and pass on the cash to DMPL through Jajoo.

33. Mr. Kumar submitted that the Custodian having filed the present petition cannot separate the claim for recovery of money and seek to proceed for recovery of the monies advanced without dealing with the pledged securities. Mr. Kumar therefore submitted that the Custodian, DMPL and Ruia are required to prove the claim of the so-called secured loan and unless the loan is proved the petition is liable to be dismissed. It was also contended

that the issue of the pledge of shares cannot be separated from the money claim that is now being made. The Custodian, DMPL or Ruia had not made any efforts to prove pledge of shares against which the loan was advanced. He further contended that M/s. Krishnakant had failed to prove his case of so-called cheque discounting and apart from bare statements in the pleadings, the sheer absence of evidence would establish that nothing has been proved. The learned counsel for Jajoo contended that cheque discounting in banking parlance is quite different from what is now sought to be agitated before the Court.

34. Mr. Kumar dealt with the pleadings in M. P. 64 in relation to the alleged pledge of shares contending that there was no correlation at all between the alleged loans and the pledge. The value of the shares pledged was higher than the value of the advances. These transactions as between DMPL and Manubhai commenced sometime in July 1990 and continued up to October, 1990 and by September, 1990 shares had been transferred to DMPL's names as pledgees apparently with the intention of creating security for due payment of the amounts advanced. Apparently the petitioners therein namely DMPL and Manubhai had agreed that the advance could be gradually reduced and a corresponding number of shares would be released. However, there was no evidence whatsoever of the aforesaid contentions. It was also contended that DMPL having handed over shares of approximately value of 50 crores to Manubhai for safe keeping there is no evidence of the fact that

such shares were indeed handed over along with blank transfer forms in order to enable Manubhai to release an appropriate number of shares. Absent any evidence on this aspect Mr. Kumar contended that there is no merit in the case of the petitioner herein. A further pleading of DMPL in M.P.64 is to the effect that DMPL and Manubhai agreed that Manubhai would square up his account of advances with DMPL by end of March, 1991.

35. Inviting my attention to the various reliefs sought it was contended that there is no evidence to prove that any shares were released from the pledge, there is no quantification of the debt due, if any, at the time of release of the shares. In any event the case of the Custodian is that upon notification all assets of the notified party would stand attached. The pledged shares would not have been excluded from the attachment. Thus, absent any evidence to prove what shares were released by Manubhai in satisfaction of the guarantee and as to which bank accounts and suspense accounts were referred to in the pleadings, there was no evidence to support the plea of the petitioner. In this manner Mr. Kumar placed extensive reliance on the pleadings in M.P.64 including the reply filed by Vidyut Shah on behalf of M/s. Krishnakant. Mr. Kumar submitted that when M P 64 was allowed to be withdrawn on 8<sup>th</sup> October, 1997, the respondent no. 2 ought to have disclosed to the court as to what the status of the shares were at the time when the application was withdrawn. The petitioner was also duty bound to disclose the valuation of the shares in question. That transactions of pledge are covered by Section 172 to 176 of the Contract Act and would

have required DMPL to sell the shares invoking Section 176 and to recover the advances. This would have made it necessary for DMPL to disclose to court the status and conditions of the shares in question. DMPL did not disclose any of these particulars and there was no pleading whatsoever in M.P.3 for enforcing recovery of any funds allegedly advanced.

36. Mr. Kumar further submitted that Manubhai died on 19<sup>th</sup> December, 1995 M.P.3 was filed on 22<sup>nd</sup> June, 1995 during the life time of Manubhai yet Manubhai was not joined as party in M.P.3 despite having full knowledge of his claim in M.P. 64. Manubhai though necessary and proper party was omitted from the array of parties by the Custodian for reasons best known to the Custodian. In the absence of any value of the pledged shares being disclosed by any party alluding evidence any action being taken against T.B. Ruia or DMPL would result in frustrating the petitioners attempt. Furthermore, without evidence of valuation of the securities pledged the Custodian would find it impossible to ascertain and determine the amount of the alleged debt due as claimed in M.P. 3. According to Mr. Kumar there is no live claim that was capable being adjudicated

37. Mr. Kumar further contended that Manubhai had filed an affidavit on 11<sup>th</sup> August, 1995 in M.P. 64. It disputed the various contentions of the applicants. He denied pledge of shares. In fact, he denied any knowledge of dealings between DMPL and the respondent nos. 3 to 7 in M P 64. He went on to allege that DMPL and T. B. Ruia had received cash amounts from M/s.

Krishnakant and respondent nos. 3 to 5 T.H. Vakil, M/s. Krishnakant and S.N. Shah respectively. While DMPL filed a reply on the same date denying M/s. Krishnakant's case of cheque discounting. During the pendency of M.P. 64 the Custodian filed the present M P. 3 on 22<sup>nd</sup> June, 1995 and the filing of the petition was based on information obtained from an affidavit dated 7<sup>th</sup> October, 1993 filed by DMPL disclosing that a sum of Rs. 2,28,58,274/- was outstanding. Meanwhile on 19<sup>th</sup> December, 1995 Manubhai passed away.

38. In the present petition both DMPL and Ruia had filed replies. Both of whom denied transactions of cheque discounting. They denied receipt of cash including receiving cash through Jajoo. Mr. Kumar has invited my attention to the order dated 5<sup>th</sup> October, 1996 of the Special Court which observes that it is necessary that T. B Ruia steps into the box since the claim if at all is to his knowledge. According to Mr. Kumar the observations in the aforesaid order of 5<sup>th</sup> October, 1996 entail that the burden of proving the transaction lay on DMPL and T. B. Ruia. Meanwhile M.P.64 stood abated as against Manubhai and on 8<sup>th</sup> October, 1997 on the application of DMPL the court allowed DMPL to withdraw M.P.64 in view of the fact the DMPL wished to proceed only for recovery of monies. However, the aspect of the pledge was ignored. Mr. Kumar has contended and in my view correctly when M.P.64 was withdrawn the court should have been apprised of the fact of the status of the shares said to have been pledged, possession thereof and the valuation of the shares since it is case of the DMPL that advances made by them were secured

by a pledge of shares which were possibly in their possession secured by personal guarantee of Manubhai. DMPL did not make any such disclosure. There is also no pleading in M.P.3 in relation to enforcing the said pledge whereas the pleading in M.P.3 both DMPL and Ruia continued to refer to the pledge of shares. It is on that basis that issue no. 3 had been framed with regard to pledge and the burden clearly lay on DMPL and T. B. Ruia which had not been discharged. No proof was forthcoming on the aspect of pledge and no explanation has been offered as to the fate of the pledged shares, if any.

39. Mr. Kumar then contended that it was up to the company DMPL and Ruia to prove the transaction. The burden of proof was clearly upon DMPL and its Managing Director the said T.B. Ruia who did not step into the witness box despite an observation of the court in its order dated 5<sup>th</sup> October, 1996. By that order T. B. Ruia was put to notice about the fact that proof of the transaction would have to be forthcoming from him. T. B. Ruia ultimately died on 12<sup>th</sup> February, 2019 and he did not file any affidavit of evidence. Having decided not to depose in these proceedings Ruia has sought to examine witness Sundaram who has filed those three affidavits to which I have already referred. Mr. Kumar submits that the only attempt by the witness is to prove ledger of financial year 1991-92 and entries in the cash book being Exhibit R-2(6) to R-2(15) and a ledger which was caused to be produced from the custody of the Central Bureau of Investigation Exhibit R-4

for the period 1<sup>st</sup> April, 1992 to 31<sup>st</sup> March, 1993 which had 356 pages but all of which were blank. Effectively the documents that were sought to be proved do not at all support the case of the petitioner. It is also pointed out that the documents that were sought to be proved through witness Sundaram did not find place in the pleadings in M.P.64. Whereas witness Sundaram has deposed referring to M.P. 64.

40. My attention has been drawn to the fact that the deposition of the said witness in paragraph 6 to 14 do not have any supporting documents. Though the witness deposed that transactions of funds advanced to M/s. Krishnakant was at the instance of Manubhai against pledge of shares there was no evidence whatsoever of any pledge. There are inferences that deposition being made and when compared with the pleading in M.P.64 several contradictions arise.

41. My attention has been drawn to the provisions of section 172, 173 and 176 of the Contract Act in support of the contention that if DMPL had advanced monies to M/s. Krishnakant against pledge of shares, DMPL was secured as far as the alleged loan transaction is concerned. All that was required to be done is for DMPL to issue notice under section 176 for enforcing the pledge and for selling the shares and recovering the money. There is nothing on record to suggest that the company acted in accordance with law to enforce the pledge. Assuming that the pledge was in fact given up as contended while withdrawing M.P.64 that itself would render the



petition bad in law. In effect it is contended that the Custodian, DMPL and T. B. Ruia have failed to prove that an amount of Rs.2,28,58,274/- and interest was secured by pledge and that the said amount and interest was due and payable by M/s. Krishnakant to DMPL. Accordingly, it is contended that issue nos. 2 and 3 must be answered in the negative.

42. Mr. Kumar then submitted that as far as M/s. Krishnakant is concerned although affidavit of documents was served along with an affidavit of evidence M/s. Krishnakant did not depose to tender the documents. He has on the other hand relied upon the proceedings in M.P.64 He has not identified his signature in the affidavit and there is nothing on record to show that M/s. Krishnakant had intended to file an affidavit of evidence. Obviously the deponent did not make himself available for cross examination and on 26<sup>th</sup> February, 2021 a Review Petition filed was disposed by consent setting aside an order dated 11<sup>th</sup> December, 2015 and directing M.P.3 and companion petition M.P. 4 to proceed from the stage that they were on 11<sup>th</sup> December, 2015. This order was an order by consent of all concerned and hence cannot be assailed today.

43. It was open for M/s. Krishnakant to depose but it deliberately did not. On 5<sup>th</sup> March, 2021 respondent no. 1 conceded that he did not wish to lead any evidence. The statement on behalf of M/s. Krishnakant was accepted by the court. The result of the decision taken under legal advice not to depose, Mr. Kumar contended, that the affidavit purporting to be an affidavit in lieu

of examination-in-chief could not be considered as the deposition of the witness and the ratio of the decision in *Banganga Co-operative Housing Society (supra)* would not apply. The admissions in the affidavit cannot be taken into consideration. The affidavit cannot be referred to or relied upon in support of M/s. Krishnakant's case. Statements in the affidavit dated 16<sup>th</sup> October, 2006 it is submitted are to be disregarded and cannot be considered the evidence. Furthermore, the notice to admit documents issued by M/s. Krishnakant is also rendered redundant in view of the stand taken by the firm. Relying on the decision of *Banganga Co-op Hsg. Society Ltd. (supra)* and the observations in paragraph 20 it is contended that vide order of 5<sup>th</sup> March, 2021 this court has held that affidavit 16<sup>th</sup> October, 2006 was not filed pursuant to any order of the court. It was not tendered in court and M/s. Krishnakant had not been examined. Thus, it fails to comply with requirements of Order XVIII Rule 4 of the Code of Civil Procedure. In fact, the affidavit does not state whether it is an affidavit of evidence or an affidavit in lieu of examination-in-chief. It is only the Advocate's letter issued in 2017 which seeks to refer to it as affidavit in lieu of examination-in-chief. The deponent himself has not stated that he was aware that he was filing an affidavit by way of examination-in-chief and for all these reasons it is contended that the affidavit need not be considered as the witnesses deposition. Furthermore, an adverse inference is required to be drawn against the respondent since he has failed to make himself available for cross

examination. Contents of the affidavit is therefore nothing but hearsay and not a statement of facts based on personal knowledge.

44. Mr. Kumar on behalf of respondent no. 4–Jajoo relied on the following Judgments in support of his case :

- (a) *Vivek Automobiles vs. India Inc.*<sup>10</sup>
- (b) *Paul Mathews & Sons vs. Commissioner of Income Tax.*<sup>11</sup>
- (c) *Commissioner of Income Tax vs. Khader Khan & Sons.*<sup>12</sup>
- (d) *Commissioner of Income Tax vs. Khader Khan & Sons.*<sup>13</sup>
- (e) *Chandradhar Goswami vs. Guwahati Bank Ltd.*<sup>14</sup>
- (f) *Madras Cements Ltd. vs. TMP Kannamal Educational Trust.*<sup>15</sup>
- (g) *Arihant Enterprises vs. Anil Kumar and Ors.*<sup>16</sup>
- (h) *Kashi Nath (since deceased) through Lrs. vs. Jaganath.*<sup>17</sup>
- (i) *State Bank of India through General Manager vs. National Housing Bank & Others.*<sup>18</sup>
- (j) *Amrit Lal Goverdhan Lalan (dead) by his legal representatives vs. State Bank of Travancore.*<sup>19</sup>
- (k) *Bank of India vs. Aiyar Advertising & Marketing Pvt. Ltd. and Ors.*<sup>20</sup>
- (l) *Lallan Prasad vs. Rahmat Ali and Anr.*<sup>21</sup>

---

<sup>10</sup> 2009 Vol,17 SCC 657

<sup>11</sup> 2003 SCC Online Kerala 677

<sup>12</sup> 2007 SCC Online Madras 1198

<sup>13</sup> (2015) 14 SCC 491

<sup>14</sup> (1967) 1 SCR 898

<sup>15</sup> 2014 SCC Online Madras 11343

<sup>16</sup> 2020 SCC Online Karnataka 628

<sup>17</sup> (2003) 8 SCC 740

<sup>18</sup> (2013) 16 SCC 538

<sup>19</sup> (1968) 3 SCR 724

<sup>20</sup> 1993 SCC Online Bom 412

<sup>21</sup> (1967) 2 SCR 233

45. Relying upon the decision of the Supreme Court in *Vivek Automobiles (supra)* it is contended that by virtue of Section 230 of the Contract Act the respondent no. 4 – Jajoo cannot be held liable. There is no evidence whatsoever on record that Jajoo was engaged to collect cash at any stage. Affidavits filed on behalf of DMPL or T. B. Ruia in M.P.64 and or in M.P. 3 do not set up any case of cash being collected by Jajoo. In the absence of any evidence that Jajoo had collected cash there was no case against him. Furthermore M/s. Krishnakant had not produced the power of attorney in question and that has not been marked in evidence and the contention of Jajoo that he acted as agent on behalf of disclosed principals is a pure legal issue and cannot be treated as an admission of any agency by Jajoo. In short there is no evidence whatsoever in relation to Jajoo having received cash as part of the alleged cheque discounting transactions.

46. Dealing with the aspect of the survey conducted under section 133A of the Income Tax Act the learned counsel for Jajoo has contended that M/s. Krishnakant has not produced any documents in relation to Income Tax that have been tendered by the firm in these proceedings. It is merely referred to the statement under Section 133A during arguments and that the statement had not been marked in evidence. It is contended that the said statement under Section 133A has no evidentiary value and Mr. Kumar relied upon the decision in *Paul Mathews & Sons (supra)*, *Commissioner of Income Tax vs. S. Khader Khan and Sons (supra)*, *Commissioner of Income Tax Salem vs. Khader Khan & and Sons (supra)*.

47. Jajoo has denied having been received any cash in his written statement dated 23<sup>rd</sup> October, 2002 and has taken up certain legal contentions. Mr. Kumar submitted that there is no proof of having collected cash from M/s. Krishnakant or having handed over cash to DMPL or Ruia. There is no evidence that Jajoo had collected cash and retained it. He submits that in the affidavit filed by N C Dangarwala on behalf of DMPL in M. P. 64 affidavit filed by Manubhai dated 11<sup>th</sup> August, 1994 in M.P.64, affidavit dated 8<sup>th</sup> November, 1995 filed by N. C. Dangarwala in reply to affidavit of M/s. Krishnakant there is no denial of role of Jajoo. The affidavits filed in M.P.3 as well did not attribute any role to Jajoo. This includes affidavit of T. B. Ruia dated 18<sup>th</sup> January, 1996 and 11<sup>th</sup> July, 2000, N C Dangarwala dated 19<sup>th</sup> June, 1996 and 22<sup>nd</sup> June, 2000 role of Jajoo has been denied.

48. Mr. Kumar also submitted that by virtue of Section 34 of the Evidence Act responsibility of proving Jajoo collected cash is on M/s. Krishnakant. Responsibility of proving books of account lies on a party who would fail if no evidence was led. On either side keeping entries in books of account regularly in the course of business are relevant but mere production of cash is not sufficient in this behalf. Reliance is placed on *Chandradhar Goswami & Ors (supra)* and *Madras Cement Limited (supra)*.

49. On the aspect of limitation although the Custodian has relied upon *L .S. Synthetics (supra)* the doctrine of delay and laches would apply in this case as far as it relates to Jajoo who has set up defence on limitation as against him

inasmuch as Jajoo claims the suit is time barred. Alternatively, it is on the basis of the doctrine of delay and laches. There has been gross delay in impleading Jajoo and it has caused enormous prejudice to me and this court must reject the claim as against Jajoo. Demonstrating the delay Mr. Kumar pointed out that M.P. 64 was first filed on 5<sup>th</sup> October, 1994. On 9<sup>th</sup> January, 1995 Harshad S Mehta was joined as a party in relation to some ACC shares. On 5<sup>th</sup> June, 1995 several other companies joined as parties on the basis of application made by Harshad S. Mehta.

50. It is further contended that the Custodian was aware of the defence taken by M/s. Krishnakant inasmuch as when Custodian filed M.P. 3 in June 1995 he was aware of the letter dated 3<sup>rd</sup> September, 1994 addressed by the Advocates for M/s. Krishnakant recording the fact that monies have been returned in cash through Jajoo. Thereafter on 8<sup>th</sup> October, 1997 M.P.64 came to be withdrawn and M/s. Krishnakant filed his reply in M.P. 3 on 3<sup>rd</sup> March 1999 in which he admitted receipt of the cheques and stated that the amounts have been paid over in cash to Jajoo. It is the case of M/s. Krishnakant that cash has been returned to DMPL / Ruia through Jajoo and it was not the case of M/s. Krishnakant that Jajoo had retained the amount.

51. On 27<sup>th</sup> October 1999 Custodian filed Miscellaneous Application No. 615 of 1999 in M.P.3 in order to amend M.P.3 and make a claim against Ruia. Ruia was then impleaded as respondent no. 3. Even at that stage no claim was made against Jajoo who was not a party to the petition. It was obvious that

Jajoo was not to be impleaded on the mere allegation made by M/s. Krishnakant and in the absence of any evidence. It was only in February, 2000 M/s. Krishnakant filed an application to implead Jajoo stating that between 3<sup>rd</sup> September, 1991 and 4<sup>th</sup> December, 1991 Jajoo had handed over 13 cheques drawn by DMPL signed by Ruia and that Jajoo collected cash in relation to these cheques upon their encashment from M/s. Krishnakant . Thereafter DMPL and /or Ruia is said to have collected the cash from Jajoo. In these circumstances it was obvious that the cash was not retained by Jajoo.

52. It is only on 23<sup>rd</sup> October, 2001 that the court impleaded Jajoo as respondent no. 4 in M.P. 3. He was impleaded on a mere statement by M/s. Krishnakant alleging that cheques had been received from Ruia which were discounted and the cash was withdrawn in the process and handed over to Jajoo to be returned to DMPL. These are all the allegations as against Jajoo. Jajoo was thus impleaded not on the request of the Custodian but on an application made by M/s. Krishnakant six years after filing of M.P. 3. The alleged transactions covered by M.P.64 and M.P.3 were pertaining to the period September 1991 to December, 1991 whereas DMPL and Ruia were notified on 5<sup>th</sup> August, 1992. The effective delay in impleading Jajoo is about 9 years. This it is contended is baseless and the petition ought not to be entertained against respondents. Reliefs as against Jajoo are barred by the law of limitation, but in absence of cause of action against Jajoo it is contended that the pleadings as amended only contain a bald averment that M/s. Krishnakant had made payments in cash to Jajoo.

53. In these circumstances Jajoo could only have been summoned as witness by either the Custodian or the M/s. Krishnakant or DMPL or Ruia but no such steps were taken. M.P.3 having been filed in June 1995 and M.P. 64 having been pending on that date Manubhai was alive but was not impleaded in M.P.3. He later died in December, 1995. By order of this court M.P.64 stood abated against Manubhai and the consequence of such abatement and withdrawal of M.P.64 would bar any fresh petition being brought on the same cause of action. It is therefore contended that M.P.3 deserves to be rejected.

54. Reference is made to provisions of Order XXII Rule 9 of the CPC in this respect. The respondent no 4 has in the course of submissions counsel for respondent no. 4 in the course of submissions relied upon the decisions in *Kashi Nath (dead) by his Lrs (supra)*, *State Bank of India (supra)*, *Amrit Lal Goverdhan Lalan (dead) by Lrs (supra)*, *Aiyars Advertising & Marketing Pvt. Ltd. (supra)* and *Lallan Prasad (supra)*.

### ***Conclusions***

Having thus heard the learned counsel for the parties at length I will now deal with the law cited before me.

55. In *Vivek Automobiles Ltd. (supra)* the Supreme Court has reiterated provisions of section 230 of the Contract Act, 1872 to the effect that in the absence of contract to the contrary an agent cannot be sued where the principal had been disclosed. In the present context it translates to Jajoo



claiming that since his alleged principals DMPL and /or Ruia were already known and disclosed to M/s. Krishnakant there was no occasion to hold Jajoo liable for the transactions that have come on record. That brings me to the three decisions under the Income Tax Act which have been cited in support of Jajoo's case that the statement under Section 133A cannot be relied upon since it is not required to be on oath and it is not a deposition that can be held against him. In this respect decisions of the Kerala High Court in *Paul Mathews & Sons (supra)*, Madras High Court in *Khader Khan and Sons (supra)* and Supreme Court in *Khader Khan and Sons (supra)* have been canvassed before me in support of Jajoo's case. I have already dealt with this in some detail while considering admissibility of R-1(30) namely the statement under section 133 A and in view of the later decisions including that of the Bombay High Court in *M/s Pebble Investment & Finance Ltd. vs. Income Tax Officer 4(2)(1)*<sup>22</sup> the Division Bench of the Bombay High Court observed thus :

*We note that statement made under Section 133A of the Act is not bereft of any evidentiary value. The same may not be conclusive but in the absence of any contrary evidence or explanation as to why the statement made under Section 133A of the Act is not credible, it can be acted upon .*

In the absence of contrary evidence, the statement made by respondent no. 4 is not bereft of any evidentiary value whatsoever. The High Court also

---

<sup>22</sup> 2017 SCC Online Bom 7600

concluded that in the absence of contrary evidence or explanation as to why statement under section 133A is not credible it can be acted upon. It distinguishes the decision in *Khader Khan (supra)* as upheld by the Apex Court. On facts it was found that person who made the statement under section 133(A) of the Act had retracted it before the Assessment order was passed, besides in the absence of assessee offering any explanation as to why the statement cannot be relied upon.

56. I am of the view that the decisions in *Paul Mathews & Sons (supra)*, Madras High Court in *Khader Khan and Sons (supra)* and Supreme Court's decision in *Khader Khan and Sons (supra)* are of no assistance to the respondent no.4. In the decision of *Chandradhar Goswami (supra)* the Supreme Court had occasion to consider the effectiveness of certified copy of an account to prove an entry of monies advanced and after considering section 34 of the Evidence Act the Supreme Court opined that it is clear that no person can be charged with liability merely on the basis of entries in books of account. Even where such books are kept in the regular course of business the court observed that there had to be further evidence to prove payment of money which may be reflected in the books in order that a person is charged with liability. The only exception is where a person accepts the correctness of the books and does not challenge them. Applying the principle in the present case it was contended that the books of accounts relied upon by DMPL are of no consequence and in any event it cannot assist the Custodian in establishing

any claim against Jajoo. They have already observed that the accounts in question have several discrepancies, one of the ledger books was completely blank and in that behalf I find that the Custodian and DMPL can derive no assistance from the documents. There is no proof of the contents. As far as the claim against M/s. Krishnakant is concerned the admission of having received the funds and the absence of any evidence of having paid over the amounts in cash could be held against him unless there was no evidence of a loan and if it were a loan M/s. Krishnakant is able to dislodge that admission by concrete proof of having withdrawn cash equivalent to the cheque value and paid over amounts of the cheques after encashment or even before encashment. If M/s. Krishnakant is able to establish a discharge of liability by payment it would appear that only then can it succeed in thwarting the petitioners claim.

57. The decision of the Madras High Court in *Madras Cements Limited (supra)* also considers the effect of Section 34 and holds that production of accounts simplicitor computed is of no use and that there must be corroborative evidence to establish liability. Moreover, in that case ledger were produced but the person who wrote the accounts was not examined. The court held that a person who wrote the entries or a person who has knowledge of them would have to appear and depose before the court. Unless that was done the plaintiff would not be held to have proved his case. It was held that mere production of statements of accounts will not be sufficient to

charge defendants liability. Karnataka High Court has also taken a similar view in *Arihant Enterprises (supra)*. In addition, it observes that three elements are required to be considered by the court viz. Proof of execution of documents, proof of contents of a document and the evidentiary value of the document as a whole in relation to books of accounts and section 34 of the Evidence Act the decision in *Chandradhar Goswami (supra)* is reiterated.

58. In the case of *Kashi Nath(supra)* the Supreme Court inter alia considered a factual position where there was no evidence to support the plaintiffs case as reflected in the plaint. On the contrary evidence led by the plaintiff after the matter was remitted was completely at variance with assertions made in the plaint and therefore has to per se not be relied on at all. That was a case of second appeal and not entirely relevant for the present purposes. In *State Bank of India vs. National Housing Bank (supra)* my attention was invited to paragraph 30 of the judgment which held that under section 9-A(4) of the Special Courts Act this court is not bound by the procedure laid down by the Code but shall be guided by the principles of natural justice inter alia with power to regulate its own procedures. Supreme Court also observed that the plaintiff led no evidence, they merely tendered some documents and they did not bother to prove them inspite of caution by the Special Court. The Special Court had proceeded to reach its conclusions based on the Janakiraman Committee Report which the Supreme Court held in evidence. In the instant case the order of Variava, J dated 5<sup>th</sup>

October,1996 clearly sets out the fact that Ruia would have to step into the box and prove his case. However, that was obviously not done. DMPL led the evidence of Sundaram which is not sufficient in the facts and circumstances to establish the claim of the Custodian

59. The judgment in *Amritlal Goverdhan Lalan (supra)* the Supreme Court was considering inter alia the effect of a surety losing the security or part thereof and whether that would entitle the surety to be discharged. This really does not apply in the facts of the present case since the intention of relying upon these judgments relates to the plea that Manubhai had admitted to pledge of shares and the Custodian has not sought any relief against the pledged shares. It implies that the pledged shares would constitute attached property and the argument on behalf of Jajoo is that the shares also would be attached property. However, the Custodian has not made any claim in respect of the pledged shares. This is sought to be highlighted in the background of M.P.64 which did rely upon the pledge of shares as security and having filed M.P.3 without reference to the pledged shares and without impleading Manubhai, the Custodian had consciously avoided claiming the security and thus lost the security and therefore there was no occasion to enforce such pledge. According to Mr. Kumar this judgment would assist in holding that the surety stands discharged. Since the liability is sought to be foisted on M/s. Krishnakant and/or Ruia / Jajoo this judgment is of no assistance.

60. The Bombay High Court's decision in the case of *Bank of India (supra)* had occasion to deal with Section 139 and 141 of the Contract Act and Section 128 of the Contract Act considering the liability of the surety being co-extensive with that of the principal debtor, unless it is otherwise provided under contract. Under Section 137 mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. The court held that on a fair reading of Section 128 it was clear that when a guaranteed debt becomes due on default of the principal debtor there is an obligation of duty on the surety to pay he is liable thereunder. In paragraph 64 it dealt with the aspect of failure to enforce security and quoted from the Karnataka High Court decision in *The Karnataka Bank Ltd vs. Gajanan S Kulkarni*<sup>23</sup> The Karnataka High Court quoted from America Jurisprudence Vol 50, page 978, paragraph 114 the effect of failure to enforce a security inter alia observing that mere passive inactivity or passive negligence on the part of the creditor by failing to realise the debt from the collateral security is not sufficient in itself to discharge the surety for the reason that the surety can himself avoid consequences of such passivity by himself paying the debt and becoming subrogated to the right of the creditor and in the absence of the contract to the contrary, the creditor is not under any obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive. The inaction on part of the

---

<sup>23</sup> AIR 1977 Karnataka Pg.14

appellant- bank from which it derives title would not of itself, mitigate sureties liability.

61. These judgments are of little assistance in the facts of the present case only to the extent that DMPL was not obliged to share the pledged shares. In my view the pledged shares constituted security which could be enforced and did not belong to the notified party so as to result in automatic attachments. This is demonstrated below while analysing *Lallan Prasad (supra)*. Since we are really concerned not with discharge of surety but the consequence of an admission of receipt of funds and whether the recipient M/s. Krishnakant has established onward remittances culminating in the amount advanced by the DMPL reaching the bank accounts of Ruia. This judgment does not help fix liability.

62. *Lallan Prasad (supra)* dealt with the question of whether an appellant was entitled to recover balance of amount of the loan in view of his denial of pledge and failure to offer to redeliver the goods, observing that pawn or a pledge is a bailment of personal property as security for some debt or engagement. The ingredients of a pawn are that it is essential to the contract of pawn that property pledged should be actually or constructively delivered to the pawnee and a pawnee has only a special property in the pledge but the general property therein remains in the pawnor wholly reverts to him on discharge of the debt. A pawn therefore is a security, where, by contract a deposit of goods is made as security for a debt. The right to property vests in

the pledgee only so far as it is necessary to secure the debt and in that sense a pawn or a pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed. I find that this decision is of no assistance to the respondents in the facts of the present case which does not concern any pledge involving Jajoo. The pledge of shares involved the said Manubhai and Jajoo had no role to play in the pledging of shares. The role attributed to Jajoo is to receiving cheques and then cash handed out by M/s. Krishnakant and paying it over to Ruia. The decision in *Lallan Prasad (supra)* is of not assistance.

63. Reliance is placed on the decision of *Standard Chartered Bank vs. Andhra Bank Financial Services*<sup>24</sup> which judgment found that both the parties involved were in *pari delicto* in matter of fudging their accounts and indulging in transactions which had facilitated the securities scam inviting to me to draw parallel in the instant case.

64. Having considered the law cited and having perused the pleadings, the documents I shall now deal with the issues. Amongst all the decisions cited, I propose to refer only to those that are of immediate relevance. At the outset I believe that the issues though 22 in number can be grouped together in the following fashion based on the onus on the respective parties. Issue no. 1, 4, 5, 6, 10, 11, 12, 14, 15 and 16 all put the burden on M/s. Krishnakant. As far as the Custodian, DMPL and Ruia are concerned the burden of establishing

---

<sup>24</sup> (2006) 6 SCC 94



their case in respect of issue nos. 2, 3, 7, 8, 17, 18, 19, 21 and 22. The Custodian's interest are aligned with the claim of respondent no. 2 and 3. As far as issue no. 1 is concerned, considering the developments of law on the subject and especially in relation to the Special Courts Act, I am of the view that the petition cannot be said to be barred by limitation.

65. The decision of this court in *A.K.Menon, Custodian vs. Modern Chemical Corporation. (supra)* has in no uncertain terms clarified that once a claim is brought to the attention of the Custodian and the Custodian proposes to act he may approach the court and it is the court's duty to thereafter take up the matter and conduct the petition in a manner such that the court seeks recovery of the amounts that may be due to a notified party identified by the Custodian. Adopting that course of action, the court had held that when action is initiated by the court there is no question of the Limitation Act forming an impediment. This view has been upheld by the Supreme Court in the decision of *L S. Synthetics (supra)* inter alia holding that the Limitation Act has no application to the facts of the present case. The doctrine of delay and laches in my view has been dealt with and one of the parties which raised the issue of limitation is Jajoo who has been impleaded belatedly. In my view that makes no difference.

66. The contention of Jajoo is that a gross delay in impleading him has caused enormous prejudice to him and that the court must reject the claim on the ground of limitation does not appeal to me inasmuch as if it was to be

found that the monies which were said to be attached properties were recoverable from M/s. Krishnakant but had actually found its way to the hands of Jajoo as set out in the defence of M/s. Krishnakant, the claim made by the Custodian would not be barred by limitation for the aforesaid and in view of the Supreme Court's decision in *L.S.Synthetics (supra)*, I am firmly of the view that no part of the claim can be held to be barred by the law of limitation.

67. Having held that the petition and the claim thereunder is not barred by the law of limitation, I propose to deal with issue no. 20 which deals with maintainability and the question whether the petition is barred on principles of res-judicata or constructive res-judicata. The submission is essentially to be found in the written statement / affidavit of respondent no. 2 in which it is contended that the issues in this petition were squarely the issues before the court in M.P. 64 and therefore withdrawal of M. P. 64 would dis-entitle the Custodian from filing and maintaining the present petition. The submission and this contention must be rejected. In the first place M. P. 64 was filed by DMPL whereas M.P. 3 has been filed by the Custodian invoking his powers under the Special Courts Act. No doubt these powers are been exercised in respect of the assets of the notified party which was also a petitioner before the Special Court in M.P. 64. The scope of that petition was quite different as we have seen it laid claims against Manubhai as one of the key players in the transactions that have alleged to have taken place including by way of so-

called loan against pledge of shares repayable with interest @ 24% per annum and the “cheque discounting” business that has been disclosed and pleaded by M/s. Krishnakant with the involvement of Jajoo and under the blessings of the said Manubhai.

68. The Custodian’s attempt here is to seek recovery of monies which DMPL claimed were owing to it. It is based on that very statement in the affidavit dated 7<sup>th</sup> October, 1993 whereby DMPL claimed that the sum in question was owing to it from M/s. Krishnakant. No doubt DMPL has had in its affidavit of 19<sup>th</sup> January, 1996 relied upon the record and proceedings in M.P. 64 in support of their case, but the claims in M.P. 64 and the present petition are not identical. Since the provisions of the CPC do not apply to the proceedings under the Special Courts Act in the manner that the respondents wish that they would be. In my view the Custodian’s petition as held with the decision of the Special Court in *A.K.Menon, Custodian vs. Modern Chemical Corporation (supra)* the Special Court has filed M.P.3 to recover funds at the instance of the notified party once the Court is the initiator of the process of recovery there is no question of the principles of res-judicata coming into play. In my view the answer to issue no. 20 must be in the affirmative and it is accordingly answered in the affirmative. The petition is maintainable and not barred by res-judicata.

69. Having dealt with issue no. 1 and 20, I now propose to focus on issues nos. 2, 3, 7, 17, 18, 19, 20, 21 and 22 which are reproduced above for ease of

reference. Issue no. 2 required the Custodian and or DMPL / Ruia to prove that DMPL and Ruia had advanced a loan to M/s. Krishnakant. I may observe that there is a clear admission by M/s. Krishnakant of having received the cheques. It is now to be seen whether in the face of such admission the Custodian can succeed in getting a decree on behalf of the notified party DMPL proceeding on the basis of an admission in the pleadings. The issue is not whether a sum of money viz. Rs. 2.28 crores had been simply paid over but whether the amount was in the nature of a loan. A loan would indicate that it was repayable at some stage depending on the agreed terms and conditions whether it be the duration or the applicability of interest and a schedule of repayment on whether it could be paid back in installments or as a bullet payment. The amount of Rs.2.28 crores was not a lumpsum bullet payment but as the evidence has shown it is the cumulative value of 13 cheques issued by DMPL to M/s. Krishnakant. This would have required the Custodian and DMPL and/or Ruia to establish that each of these remittances was a loan. Alternatively, they would have to establish that there was an agreement to lend an advance a sum of Rs.2.28 crores and that promise to advance monies were performed by payment in 13 installments. If either of these two versions are established with the attached standing that these are repayable, there arises a possibility of holding in favour of the Custodian /DMPL. In the absence of evidence that these amounts were repayable the issue would have to be answered in the negative.

70. Issue no. 3 requires the Custodian /DMPL / Ruia ( collectively the Custodian ) to prove that DMPL and Ruia advanced the amounts to M/s. Krishnakant against pledge of shares as alleged in paragraph 7 of the affidavit filed on behalf of DMPL in June, 2000. The issue appears to have incorrectly recorded the date of the affidavit as "2<sup>nd</sup> June, 2000" which in fact is dated "22<sup>nd</sup> June, 2000". It becomes necessary to consider what the deponent of the affidavit of one Narendra Dangarwala claiming to be a director of DMPL had stated in Paragraph 7. Dangarwala makes reference to an affidavit filed on behalf of M/s. Krishnakant dated 3<sup>rd</sup> March, 1999 of one Vidyut K Shah. What is material is paragraph 4 of that affidavit. In paragraph 4 the deponent Vidyut Shah has pointed out that in M.P. 64 DMPL had alleged that they had lent as advance a sum of Rs.2.28 crores at the instance of Manubhai. It contended that this firm had never borrowed either from DMPL or Ruia any amount by way of loan and at all material times the firm had sufficient bank balances and hence there was no need for the firm to borrow any amounts. Later DMPL changed their version in an affidavit dated 8<sup>th</sup> November, 1995 in which Dangarwala dealing with Vidyut Shah's affidavit of 12<sup>th</sup> July 1995 stated that the payments made between 3<sup>rd</sup> September, 1991 and 4<sup>th</sup> December, 1991 were made to discharge liability of interest and thereafter the same represented interest and principal. Reference appears to be made to "business of discounting cheques of DMPL".

71. In paragraph 7 of his affidavit dated 22<sup>nd</sup> June, 2000 Dangarwala was dealing with this assertion of Vidyut K Shah. Let us therefore examine how the contentions of Vidyut Shah have been dealt with. In paragraph 7 Dangarwala reiterates that DMPL had lent an advance in an aggregate sum of Rs. 2.28 crores to M/s. Krishnakant from time to time at the instance of Manubhai and as set out in M.P. 64. He has denied that M/s. Krishnakant never borrowed funds from DMPL by way of loan or any of the reasons set out by Vidyut Shah. Dangarwala averred that he was not aware and does not admit that at all material times M/s. Krishnakant had sufficient bank balances. There is no denial of this assertion and one would have expected that Dangarwala took the matter forward to establish the fact that the amount paid over was indeed a loan.

72. The said Dangarwala has further denied that DMPL changed its version and he repeats and reiterates that monies were advanced to M/s. Krishnakant against pledge of shares. There is an admission that security was involved in respect of the loan. It is further contended that the amounts of the said loans were to be repaid with interest @ 24% per annum. While Dangarwala denied having made any false statements, in his affidavit in rejoinder dated 8<sup>th</sup> November, 1995, he repeats and reiterates that M/s. Krishnakant never paid over any amount in cash or otherwise aggregating to the aforesaid sum of Rs.2.28 crores after deducting commission as alleged. Not only in paragraph 7 but also in paragraph 8 the deponent reiterates

advancing Rs. 2.28 crores which had not been repaid in cash or otherwise. He denies that nothing is due and payable as contended by M/s. Krishnakant. He reiterates M/s. Krishnakant's liability to pay interest @ 24% per annum and does not admit and claims to be unaware of what had transpired between M/s. Krishnakant and Jajoo. He does not admit that Jajoo had admitted receipt of cash amounts from M/s Krishnakant in respect of cheques of DMPL and has put the respondent to strict proof thereof.

73. It is further contended that even if M/s. Krishnakant had paid any monies to Jajoo and if Jajoo had signed any receipt the same would not amount to receipt of money by DMPL and will not discharge M/s. Krishnakant from his liability to DMPL. The case of Dangarwala is crystal clear. The lender was DMPL and DMPL had not received back the amounts lent and advanced. DMPL had also not received interest @ 24% per annum. This assertion implies that there was an agreement to advance certain sums of money and those monies would carry interest @ 24% per annum till they were repaid. There is also the indication that the amount of money lent in advance was repayable subject to security being created by pledge of shares. This pledge is said to have been articulated in M.P. 64 but as we have seen M P 64 was withdrawn we will now have to consider the effect of withdrawal of M. P. 64 in the light of the fact that it alleged a pledge of shares at the instance of Manubhai.

74. Before dealing with the issue further having considered the plea that there is a loan repayable with interest as aforesaid that is initially set out in the affidavit dated 19<sup>th</sup> January, 1996 filed on behalf of DMPL as reiterated in the affidavit of Dangarwala dated 22<sup>nd</sup> June, 2000 one cannot help but refer to the affidavit of 19<sup>th</sup> June, 1996. In that affidavit filed on behalf of DMPL, Dangarwala as Director of the company affirms the affidavit on the basis of records and information derived from the records available with DMPL. It becomes clear that Dangarwala has been careful to state that it is out of the records of the company and information derived from those records “available with respondent no. 2 viz. DMPL” that he has signed the affidavit. He refers to M. P. 64 which was filed by DMPL. He proceeds to state that he would not have been deemed to have admitted any of the allegations and contentions which had not specifically been dealt by him. This is the first affidavit in reply to the petition filed on behalf of DMPL.

75. An affidavit dated 18<sup>th</sup> January, 1996, a day prior, has been affirmed by Tej Kumar Balkrishna Ruia – respondent no. 3. In that affidavit Ruia after having read the proceedings in M. P. 64 states that at the material time he was Director of DMPL and was in control of day to-day affairs of DMPL. He was aware of the facts and circumstances of the transactions between DMPL and M/s. Krishnakant as also what was stated in M.P. 64 and the affidavit of Dangarwala filed in reply which he affirms was substantially true and he confirms while denying all that is contrary to the contents of that affidavit. I must focus on the fact that Ruia’s reply of 18<sup>th</sup> January, 1996 is affirmed one



day prior to that of Dangarwala, yet he affirms the contents of Dangarwala's affidavit. Presumably Dangarwala's affidavit was already placed before Ruia prior to its affirmation as otherwise Ruia could not have deposed to the contents of an affidavit which was affirmed before the officer of the Special court on the following day. Not only that but Ruia has also filed a further affidavit on 11<sup>th</sup> July, 2000 contents of which I will deal with little later. But one fact is evident that Ruia was a key to unravel the mystery behind the payments of Rs.2.28 crores the alleged non-payment of principal and interest, viz. the pledge of shares and the dealings as between the parties including between DMPL, Ruia and Manubhai and the involvement of M/s. Krishnakant and Jajoo.

76. For the present I will restrict myself to the affidavit of Ruia dated 18<sup>th</sup> January, 1996. It in no uncertain terms deals with the letter written by M/s. Krishnakant to its Advocates' denying liability and stating that the monies were paid back in cash. It denies that Jajoo ever received cash after discounting cheques. Ruia deposes that he had not received any amount in cash or otherwise from M/s. Krishnakant through Jajoo or "otherwise howsoever". He states further in his personal capacity of the then director of DMPL that he had not entered into any illegal transaction as contended by M/s. Krishnakant and then it was "a story that has been trotted out by respondent no. 1-Krishnankant" with a view to avoid the liability to make payment to DMPL.

77. Having seen the contents of the affidavit of Ruia dated 18<sup>th</sup> January, 1996 I come back to the affidavit of Dangarwala which proceeds on the basis of information derived from “records”. While Ruia contends that he has personal knowledge, he has affirmed the contents of the affidavit of Dangarwala which was yet to be affirmed on 18<sup>th</sup> January, 1996. I am not for a moment influenced by the fact that the draft of the affidavit of 19<sup>th</sup> January, 1996 of Dangarwala could not have been placed before Ruia before it was signed. his affidavit is dated 18<sup>th</sup> January, 1996. It is evident that Ruia did not wish to depose to the details. He appears to have caused Dangarwala to affirm an affidavit based on records of the company while he himself has claimed to be in charge of the affairs on a day to-day basis and having personal knowledge of the transactions. Dangarwala’s affidavit therefore, as anticipated, proceeds on the usual path of reiteration of a claim, denial of the defence while at the same time taking shelter under the fact that the affidavit is being affirmed on the basis of records, information derived from the records of DMPL one thing becomes very evident that “records” were available with DMPL to establish the loan. The loan itself was said to have been advanced in installments. All of these would have been part of the record of DMPL and DMPL would have been expected to produce these records either from Dangarwala or as held by Variava, J. by introducing the same through evidence of Ruia. The order dated 5<sup>th</sup> October, 1996 passed by Variava, J. in this petition becomes relevant. The learned Judge held that it is Ruia who would be expected to step into the box. This was a considered

approach that the learned Judge took having obviously noticed the fact that Dangarwala's affidavit proceeds only on the basis of records whereas Ruia's is on the basis of personal knowledge. Not only in relation to the allegation that it was a loan repayable with interest @ 24% but also in relation to the pledge which involved Manubhai. The so-called cheque discounting need not detain us at this stage and therefore involvement of M/s. Krishnakant, his associates, Manubhai and Jajoo need not intervene in this analysis. In these circumstances the deposition of Ruia becomes crucial. Ruia was available to depose at all material times. He expired in 12<sup>th</sup> February, 2019 apart from filing the affidavit 11<sup>th</sup> July 2000 no further attempt was made to depose. These issues would have to be decided on the basis of material on record.

78. During the course of submissions, I had inquired of counsel for respondent no. 2 whether Dangarwala was available to depose to which there was no instructions from the client. The record indicates that on or about 13<sup>th</sup> January, 2003 one Brijesh Khandelwal director of DMPL affirmed an affidavit of documents. It states that DMPL has in its possession and power documents related to the question in the suit as said in the first schedule. Perusal of the First Schedule reveals three items

**Schedule**

**Part I**

1. *Copies of papers and proceedings in M.P. 64 of 1994.*
2. *Copy of ledger account/cash book for the year 1991-1992 and Original Ledger account and cash book for the year 1992-93*
3. *Copies of Bank statements*

79. In part II the instructions to draft the petition M.P. 64 and the affidavits and written statements finds mention. There is no mention of a Second schedule at all. According to DMPL all the documents in their power and possession are disclosed in Schedule I. It is not their case that they had in their possession documents which they do not now have for reasons and which were to be disclosed in Schedule II. We have to thus infer that what Dangarwala had in mind when he deposed on 19<sup>th</sup> June, 1996 was in relation to these very records and information derived from these records. No attempt has been made by DMPL to introduce any further document in evidence even during submission the affidavit of documents of Brijesh Khandelwal 13<sup>th</sup> January, 2003 has been reiterated. No other document has come to the fore. It is in this background that one has to consider the issues.

80. Having considered the conspectus of issue no. 2 when we come to issue no. 3 we find that the evidence required is in relation to the contention of DMPL and Ruia that monies were advanced against pledge of shares as set out in the affidavit of Dangarwala. There is no evidence on record whatsoever in relation to the pledge of shares since paragraph 7 reiterates that the monies were advanced against the pledge of shares. This aspect relates back to the averments in M.P. 64 and the alleged involvement of Manubhai. M.P. 64 was withdrawn with specific reasons that in view of the filing of M.P. 3 by the Custodian M.P. 64 would be rendered infructuous especially since the petitioner therein was restricting the claim to a money

claim and a decree in terms thereof effectively giving up the case of pledge, yet in his affidavit of 22<sup>nd</sup> June, 2000 Dangarwala reiterates the pledge and seeks to link the pledge with the loan repayable with interest as aforesaid. On the other hand, the affidavit of documents does not disclose any document of pledge or list of shares that were annexed as Exhibit G to M.P. 64. It appears therefore that DMPL did not have any other documents to disclose in relation to the loan or the pledge. Issue no. 2 and 3 will have to be answered based on these disclosures.

81. That takes us to issue no. 7 as to whether the Custodian proves that M/s. Krishnakant fraudulently or illegally diverted monies from DMPL and paid them over to DMPL or Ruia and if so whether such illegal transaction would not give a valid discharge of his liability. The issue arises as a result of the averment in paragraph 6 of the petition to my mind in considering this issue effectively it was DMPL and/or Ruia that would have to establish that there was illegal diversion of funds, but the case of DMPL is that the monies advanced were by way of a loan. That brings me to consider the averment in paragraph 6 which asserts that M/s. Krishnakant having admitted receipt of monies having claimed that monies were withdrawn in cash and paid over in cash to Jajoo, it amounts to an admission of M/s. Krishnakant who have illegally and fraudulently diverted monies from DMPL. Such an illegal transaction would not give a valid discharge of his liability to DMPL. This requires issue no. 2 to be answered in the affirmative inasmuch as till such

time the petitioner / DMPL / Ruia proves that the amount of Rs.2.28 crores has advanced as a loan there would be no question of a liability to DMPL. Thus issue no. 7 can be answered only upon issue no. 2 and 3 being decided.

82. If I conclude there was indeed a loan then the question of encashment of these cheques, withdrawal in cash and allegations of payment in cash to Jajoo would gain credence. Otherwise issue no. 7 would not at all arise. Withdrawal of monies in cash from a bank itself is not illegal nor can it be said to be fraudulent. The question was whether M/s. Krishnakant diverted monies from DMPL. The diversion of monies contemplated in paragraph 6 alludes to an illegal act, an act of fraud whereby M/s. Krishnakant induced DMPL to part with funds in the guise of a loan, but to what end ?. The contention of M/s. Krishnakant is that monies were paid back in cash. If a loan is not established it would indicate that certain monies were received by M/s. Krishnakant from DMPL which DMPL claims was a loan but which M/s. Krishnakant denies. In my view the question of diversion of monies does not appear in focus. Therefore, it is necessary to await the conclusion on issue no. 2 and 3 prior to addressing issue no. 7.

83. The next issue that can be clubbed with these is issue no. 17. Issue no. 17 questions whether there is proof that the disputed transactions are fraudulent and a manner of diverting monies from DMPL to Ruia. This flow stems from the allegation of M/s. Krishnakant that monies paid over by DMPL to M/s. Krishnakant were withdrawn in cash and the cash was paid over to

Ruia through the hands of Jajoo and hence that would bring into consideration issue no. 18 whether the petition discloses a cause of action against respondent no. 4? Issue nos. 17 and 18 in my view can be answered only upon answers to issue nos. 2 and 3 and followed by an answer to issue no. 7. The allegation of diversion of monies from DMPL to Ruia would actively involve the participation of Ruia who is alleged to be the recipient. Ruia not having deposed in the proceeding would have to be considered as relevant factor in deciding this issue. As far as issue no. 18 is concerned, whether or not petition discloses cause of action against Jajoo would also fall for consideration upon the earlier issues being decided.

84. The other issues that can be clubbed together are issue nos. 19, 21 and 22. As far as issue no. 19 is concerned whether in view of the petitioners contention in para 6 of the petition that the transactions were illegal and that the Custodian and DMPL were entitled to seek monies under such illegal transactions. This requires a factual finding as to whether there was any illegal transaction at all and this could have been answered only after the considering the evidence led by DMPL and/or Ruia. Such evidence alone would have helped the Custodian to establish that transactions referred to in paragraph 6 were illegal, whether such transactions took place would be the first step in arriving at such a finding. There should be evidence on record that M/s. Krishnakant in fact withdrew the money in cash and paid it over to Ruia. If that is established only then would there be an issue of the

Custodian or DMPL seeking monies from M/s. Krishnakant. The answer to issue no. 19 would have to await answers to the earlier issues. That brings us to consider the last two issues in this group viz. issue no. 21 and 22.

85. Issue no. 21 is crucial. It seeks to impose upon DMPL the burden of establishing that the sum of Rs. 2.28 crores are outstanding and receivable by it from Jajoo and whether the Custodian can claim the amount from Jajoo. Jajoo's involvement would have to depend upon answer to issue no. 18 and issue nos. 10, 12, 13, 15 and 16. All of these would also depend on whether the amount was paid over by DMPL to M/s. Krishnakant as and by way of a loan. In my view unless a loan is established there is no question of seeking repayment of the amount along with interest since it is not the case of the Custodian or DMPL or Ruia that irrespective of the loan being established or not monies paid over to M/s. Krishnakant for undisclosed reasons are now required to be recovered once again for reasons that are not disclosed except that to allege that there has been illegal diversion. These issues will all have to be answered based on the factual matrix which the evidence is expected to help establish.

86. The burden casts upon DMPL through the Custodian one has to consider the remaining issues viz. issue nos. 8 and 20. As far as issue no. 20 is concerned I have already answered the issue in the affirmative. Maintainability is not an issue needs to detain us any further. However, issue no. 8 is whether the Custodian is entitle to recover any amount from M/s.



Krishnakant and if so what amount ? The answer to this issue would undoubtedly depend upon the answers to issue nos. 2 and 3. Whether the monies were advanced as a loan, if it was a loan then it would possibly be repayable ? If it was not a loan the question was whether any amounts can be recovered based on the allegations that the withdrawal of monies and payment in cash were illegal and fraudulent and a result of diversion of funds from DMPL only to be paid back in cash to DMPL and/or Ruia. Intrinsically linked with issue no. 7 in respect of which I have already considered the pleadings and the attempt of the Custodian and DMPL to establish that monies were diverted and if so the diverted amounts could be recovered and the extent to which it could be recovered. Steps to recover these monies would involve fixing of liability on M/s. Krishnakant. Unless liability to repay is fixed whether on account of the transaction being a loan or otherwise there would be no occasion for this court to find that the petitioner is entitled to recover any monies from M/s. Krishnakant and if so quantify that amount.

87. Issue nos. 10 and 12 would constitute subsidiary issues and are of little consequence unless the Custodian / DMPL / Ruia establishes that the monies advanced by way of loan repayable as pleaded. Issue no. 4 and 12 would return upon M/s. Krishnakant establishing that these monies were paid over in cash to Jajoo who acted as an agent for DMPL. The issue is not whether Jajoo was an agent of Ruia but whether he was an agent or representative of DMPL the company. In that respect the agency sought to be established on

the basis of an affidavit in reply dated 3<sup>rd</sup> March, 1999 filed by Vidyut Shah on behalf of M/s. Krishnakant. That affidavit in paragraph 3 states that DMPL has been paid over the proceeds of the cheque after they were encashed and after deducting commission of 1% on the amounts received under the cheques by paying over the same to Jajoo who is described as agent of DMPL and Ruia. This is seen from paragraph 3 of that affidavit. In paragraph 5(a) the payment of these amounts through Jajoo has been reiterated. In paragraph 5(b) Vidyut Shah deposes that in the course of business he had come to know about share dealings of Manubhai who had voluminous share transactions on the exchange. That the cousin brother of Vidyut Shah viz. Suresh Shah who is incidentally respondent no. 1 in M.P. 4 was introduced to Jajoo by Manubhai and Jajoo did carry out business of cheque discounting on behalf of DMPL through Suresh Shah. Suresh Shah was related to Vidyut Shah, had introduced Vidyut Shah and M/s. Krishnakant into the business "on behalf of DMPL -respondent no. 2 through Suresh Jajoo". Vidyut Shah upon request agreed to also engage in cheque discounting and these cash amounts would be paid over after the cheques were encashed and retain 1% commission. The business of cheque discounting according to Vidyut Shah was done on behalf of DMPL through Jajoo. The recipient of the funds was at all times shown to be DMPL.

88. It is also the case of Vidyut Shah in paragraph 5(d) that after delivery of cheques, Jajoo would collect cash from Vidyut Shah and pay it over He had

undertaken the business of cheque discounting on behalf of DMPL through Jajoo. Vidyut Shah states that these 13 cheques had been encashed. After withdrawing the cash and retaining 1% commission the balance would be paid over to DMPL and Ruia through Jajoo. It is stated that DMPL and Ruia had received the cash amount from Jajoo since neither DMPL or Ruia had inquired with Vidyut Shah or demanded from him or from M/s. Krishnakant return of the amounts of the cheques. The cheques are also stated to have been received through Jajoo. The case of M/s. Krishnakant is not that Jajoo had returned the monies. His case is monies were paid over to Jajoo and in this respect reliance is placed on the statement at R-1(30). Jajoo is then believed to have paid over the cash to DMPL or Ruia. At all times the recipient of the funds is stated to DMPL or Ruia and on behalf of DMPL the only three persons have filed affidavits are Ruia, Dangarwala and Chettur Sundaram who was introduced as witness on behalf of DMPL. I will deal with the evidence of Sundaram at the material time, however all indications are that Vidyut Shah claims that M/s. Krishnakant does not owe any money to DMPL or Ruia and therefore to the Custodian or respondent nos. 3(A) to 3(E) since these monies were paid over in cash. The case of the Custodian however is that monies were loan advanced and must be repaid. Once again if the loan is established only then can this be demanded from M/s Krishnakant and a decree passed against M/s. Krishnakant.

89. The case against Jajoo seems to be an afterthought and a product of the pleadings filed on behalf of M/s. Krishnakant. DMPL and Ruia do not believe that Jajoo owes them any money. They have denied that amounts were paid to Jajoo and were paid over in turn by Jajoo to either DMPL or Ruia. In this background we need to consider whether issue no. 10 and/or 12 or 18 have been established

90. Having analysed the factual background, the affidavits filed and the arguments and submissions at the bar I am clearly of the view that DMPL and Ruia have failed to prove that they had advanced Rs.2.28 crores as a loan as contended in paragraph 9 of their affidavit on behalf of DMPL. The burden of establishing that the amount advanced was a loan was clearly upon the DMPL and Ruia. The order dated 5<sup>th</sup> October, 1996 was most relevant inasmuch as both the company and its Managing Director Late Ruia were made aware of the scope of the evidence required to be led. The aspect of a loan had to be specifically proved. The Custodian's case rests entirely on the disclosure made by DMPL and late Ruia to the effect that a sum of Rs.2.28 crores were recoverable from M/s. Krishnakant. Language of the letter dated 30<sup>th</sup> July, 1994 at Exhibit A clearly speaks of the fact that the Custodian was unsure whether the amount was received as a loan and calls upon the addressee to reveal information if the amount had been received as a loan. The burden was clearly therefore upon them to establish the fact that the advance was a loan and the terms on which it was advanced.

91. There is no evidence whatsoever that the amounts advanced were by way of loan. As I have already discussed above the amounts were paid in different installments. Cheques of odd figures are seen to have been issued. There should have been proper deposition in respect of why these amounts are paid over to M/s. Krishnakant in this particular fashion. If the loan was specific for a particular amount in respect of which a cheque was issued, it was incumbent upon DMPL and Ruia to establish why it was so advanced. DMPL and Ruia have also failed to produce any evidence on record which indicates that the company had in the regular course of business advanced these loans. No attempt has been made by DMPL and/or late Ruia to establish these facts. Ruia was bound to step into the box pursuant to the order of 5<sup>th</sup> October, 1996 and it is no purpose in now contending that the evidence of Sundaram would be sufficient to establish it. Sundaram's evidence does not inspire confidence. It is vague, assertions are not out of personal knowledge.

92. I have considered the contents of the three affidavits dated 15<sup>th</sup> March, 2021, 29<sup>th</sup> April, 2021 and 7<sup>th</sup> July, 2021 filed by the said witness Sundaram and further oral examination conducted on 3<sup>rd</sup> September, 2021. The initial approach of the witness was that he was an authorised signatory from the year 1992 but he did not establish he had association with DMPL prior to that date. The deposition of the events of 1991 therefore could not have been to the personal knowledge of Sundaram. Mr. Raheja had taken me through the relevant questions that were put to the witness Sundaram during his

cross examination. No documentary evidence whatsoever had been tendered by DMPL to Sundaram or through any other witness. In particular my attention has been drawn to witness Sundaram's answers to question nos. 33 and 34 and I am invited to hold that the deposition does not constitute evidence since witness Sundaram had no personal knowledge in relation to the alleged loan transaction. Mr. Raheja submitted that there is no corroborative evidence of any other witness to establish that there was a loan transaction as between DMPL and M/s. Krishnakant.

93. In the course of leading evidence, it was found that pleadings on behalf of DMPL were all filed by one N.C Dangarwala who was the director of DMPL, but DMPL did not present the said witness to establish their case at any stage. In the cross examination of Sundaram a specific question was put to the witness that in an answer to question 61 when Sundaram was asked whether N C Dangarwala was still available to which Sundaram admitted that he was unaware. When asked a further question whether DMPL attempted to ascertain whether N. C. Dangarwala was available, the answer was in the negative. It is contended that DMPL had deliberately introduced evidence of a person who has no personal knowledge whatsoever. That none of the documents produced by DMPL through witness Sundaram records any loan between the parties concerned. Lack of corroborative evidence is sought to be highlighted by Mr. Raheja except the bare word of Sundaram, there was no evidence to demonstrate that even a pledge was created, even assuming that the loan transaction as pleaded was genuine.

94. Although some of the documents have been marked Kumar points out that the contents of those documents have not been proved. For example, Exhibit R-2(4) purporting to be ledger of DMPL for the year 1991-92 is completely different from the photo copy of the document produced by the witness. The page in question being page 294 of the said ledger produced by the CBI does not reflect whether any amounts mentioned therein were paid to M/s. Krishnakant. The document has been produced by the CBI at the instance of DMPL. When the documents were shown to the witness he could not depose to the correctness thereof but proceeded to state that the documents were different than the documents then shown to him was different, the documents of which copies were taken. This is evidence cannot be believed. Furthermore, in cross examination in answer to question 30 witness Sundaram deposed that there is no document to show that a sum of Rs.2,28,58,274/- was advanced as loan by DMPL to M/s. Krishnakant. He was also not aware whether DMPL had made any written demand or repayment of the alleged loan.

95. The veracity of evidence of witness Sundaram is questionable. He deposed that he had joined as an intern in March 1990 and appointed as an employee in July 1991 . The witness has not produced any evidence of salary being received by him from DMPL and he has also admitted that he was not concerned with maintenance of accounts. Answers to question 33 and 34 in cross examination would establish that the deposition is hearsay. It is admitted

in answer to question 65 that his knowledge is based on meetings with directors. He was also not required to take any decisions in the matter of finance and was not involved in the business transactions involving DMPL and other brokers. He has further admitted that he was not aware whether M/s. Krishnakant was acting as agents for Manubhai and he did not personally deal with Manubhai. He also admitted that he had no knowledge about the pledge of shares. The Custodian has not demonstrated any source of evidence and DMPL not having produced any material on record and T B Ruia having died without leading evidence, it is contended that there is no substance in the claim.

96. In view of the findings that I have reached, I have no hesitation in holding that DMPL and Ruia have failed to prove that the company DMPL advanced a loan of Rs. 2.28 crores. Issue no. 2 is therefore answered in the negative.

97. Issue no. 3 also follows suits inasmuch as there is no evidence of DMPL or Ruia having advanced loan against pledge of shares as set out in the affidavit on behalf of DMPL. Issue nos. 2 and 3 having been answered in the negative we now proceed to consider issue no. 7. Since there is no evidence of the amount being a loan it was up to the Custodian to establish that M/s. Krishnakant illegally and fraudulently diverted monies from DMPL and paid it over to DMPL and/or Ruia. In my view there is absolutely no evidence to establish that M/s. Krishnakant was responsible for diversion of monies from



DMPL. The monies were advanced by DMPL and receipt of it is admitted by M/s. Krishnakant however the reasons for the said advance is not forthcoming from the DMPL or Ruia. All that they have maintained throughout is that the amount was a loan and that the loan was repayable. The version of M/s. Krishnakant is of course different. M/s. Krishnakant has contended that the monies have been repaid in cash. There is no evidence of such a transaction having been concluded and hence no occasion to hold that there has been illegal or fraudulent diversion of funds from respondent no. 2. For want of any evidence on this aspect issue no. 7 is also answered in the negative.

98. For the very same reasons issue no. 17 is answered in the negative and I hold that it has not been established that the disputed transactions were fraudulent or was meant for diverting monies from respondent nos. 2 and 3. Issue no. 19 also must be in the negative since the contention that transactions are illegal and that DMPL is entitled to seek monies under such illegal transactions have not been established. In effect there is no evidence of the cheque discounting being actually carried out. Only if there was proof of the cheque discounting activity having been carried out in the facts of the case would this issue arise. In the circumstances of the case and based on the material on record it is not possible to hold that these illegal transactions were carried out and that only then will the question of seeking monies under these transactions arise. Nothing has been shown which establishes the fact that the amounts of cheques upon encashment were paid over either to Jajoo and

through him to DMPL and/or Ruia and lack of evidence in this respect justifies answering issue no. 19 in the negative.

99. Issue no. 21 will follow suit inasmuch as the Custodian has not established that the amount of Rs. 2.28 crores are recoverable. All of these would have if could have been answered differently and in the affirmative if there was evidence of a loan that had been brought before the court but in the facts having decided issue nos. 2 in the negative there is no occasion to consider the amount as outstanding and repayable. Hence Issue no.21 is also answered in the negative. That brings us to consider the remaining issues some of which are on the basis of cheque discounting. These are issue no. 4, 9, 11, 14 and 16. To my mind Issue no. 4 is answered in the negative since M/s. Krishnakant has not proved that he was engaged in the business of cheque discounting with DMPL and/or Ruia as disclosed in his affidavit dated 3<sup>rd</sup> March, 1999. For the very same reasons and for want of evidence M/s. Krishnakant has not proved that cheques drawn in his favour was for the purposes of discounting. The company has not proved that the amount of Rs.2.28 crores was advanced as a loan which was repayable with interest as aforesaid. There is no evidence of such a loan having been advanced nor is there evidence of the amount of the cheques having been paid over in cash. Issue no. 9 is therefore answered in the negative.

100. In view of the above issue no.11 is also answered in the negative. As far as issue no. 14 is concerned this issue will not at all arise in view of what I

have held in respect of issue no. 7 and connected issues. Hence issue no. 14 does not call for any finding in the facts of the case. For the very same reasons that I have set out above, I am of the view that M/s. Krishnakant has failed to prove that cheques in question were received from Jajoo on behalf of DMPL or/Ruia. Issue no. 16 is also answered in the negative.

101. Now to deal with the last two sets of issues.

**Issue nos. 5, 6, 10, 12,13,15 and 18**

Issue no. 5, 6, 10, 12, 13 and 15 are all focused on an agency if any having been created in favour of Jajoo, whether he acknowledged receipt of cash from M/s Krishnakant if any as agent for DMPL or Ruia and whether. The question that arises whether Jajoo was an agent of DMPL and/or Ruia ? Whether Krishnakant paid to and Jajoo received cash and issued an acknowledgment for cash received as contended by M/s. Krishnakant as an agent and whether Jajoo had been appointed by DMPL and/or Ruia as authorised signatory or agent to collect cash amounts upon the cheques being discounted. Issue no.18 is whether the petition discloses a cause of action against respondent no.18. To my mind none of these allegations leading to these issues have been proved except that agency to the extent of the powers granted in the Power of attorney appear to have been admitted by Jajoo, since it is his contention that he was an agent, if at all for a disclosed principal. That aspect however will not affect the merits of the defence of Jajoo to the main claim as to liability to pay the amount of Rs.2.28 crores. As we have

seen from the evidence including Article R-1(30) there is no allegation that Jajoo has retained the funds. He has contended in his statement that the funds were paid over. However, neither DMPL nor Ruia have at any stage contended that the monies were retained by Jajoo. It is not even the Custodian's case today that Jajoo had retained these funds.

102. There are contradictions in the affidavit filed on behalf of M/s. Krishnakant. While there were no references to the cheques issued by DMPL in the affidavit dated 3<sup>rd</sup> March, 1999 whereas in his affidavit of July 1995 in M.P.64 he had contended that T.H.Vakil was doing business of cheque discounting. In paragraph 5 he stated that DMPL gave T H Vakil cheques for discounting. There is no reference to the cheques in Exhibit C in that application. In his affidavit of 3<sup>rd</sup> March, 1999 in the present application he states that 13 cheques of DMPL were received through Jajoo. Whereas in his affidavit of 16<sup>th</sup> October, 2006 in paragraph 15 to 25 he has contended that the cheques issued by DMPL were handed over to him by Suresh Shah. In his affidavit of 3<sup>rd</sup> March, 1999 in the present petition Vidyut Shah on behalf of M/s. Krishnakant has contended that Jajoo would collect cash amounts from M/s. Krishnakant after cheques were encashed, whereas in his affidavit of 16<sup>th</sup> October, 2006 he has stated that he would withdraw the cash and deliver it to Jajoo. In paragraph 15 to 25 of the affidavit of 16<sup>th</sup> October, 2006 he contends that cheques were handed over to Suresh Shah whose employees would withdraw cash and that cash would be handed over by the employees Dashrath Patel or V V Shah to M/s. Krishnakant. Further Suresh

Shah is said to have handed over cheques to him which were deposited in current account of Bank of India, Stock Exchange Branch and after deducting commission the balance was paid in cash to him by Suresh Shah in his office. These statements are said to be contradictory to the affidavit of 3<sup>rd</sup> March 1999. There is no evidence by way of bank statement or bank accounts. There is no evidence on the date and place where cheques were delivered, when the cheques were deposited and realised and when, if any cash withdrawals were made in respect of those cheques.

103. The affidavit dated 3<sup>rd</sup> March 1999 on behalf of M/s. Krishnakant contains a bare statement in paragraph 5(e) of the affidavit that Jajoo acted as the agent for DMPL and Ruia there is no evidence whatsoever to support this contention. It is pertinent to note that the Custodian does not state that Jajoo was an agent of DMPL. It is nobody's case that Jajoo had retained money received in cash for himself or that Jajoo was himself a beneficiary. For these reasons Issue nos. 5, 6, 10, 12, 13 and 15 are answered in the negative. Consequently issue no.18 is also answered in the negative.

**Issue nos. 7 and 14**

104. As far as issue no. 7 is concerned, I have already held that the Custodian has failed to prove that there has been illegal or fraudulent diversion of funds from DMPL. Reliance on the ratio of *Banganga Co-op Housing Society (supra)* is in my view of no consequence in the light of the fact that the loan itself has not been established. The principal case of the

notified party DMPL and as canvassed by the Custodian that there is a loan advanced that is now repayable has not been established. Once the character of a loan is not attached to the amounts advanced the obligation of repayment or payment of interest is not established. There is no occasion to hold any admissions against M/s. Krishnakant. Like in the case of M.P. 2 of 1996 M/s. Krishnakant in the instant case had failed to establish that monies were repaid in cash as contended. M/s. Krishnakant could have led evidence on that aspect but has failed to do so. As far as Jajoo is concerned, the limited admission that he was at best agent for disclosed principal implies that he was indeed an agent with limited powers under the Power of Attorney, nothing more. By virtue of the provisions of Section 230 of the Contract Act he cannot be held liable for transactions of a disclosed principal. The principal (DMPL/Ruia) have no quarrel with Jajoo. In any event having held that the petition discloses no cause of action against him save and except the statements being made on affidavit which have not been proved there is no occasion to hold Jajoo liable for payment of monies. It must be remembered that the contention varies from time to time. At some stages it is contended by M/s. Krishnakant that the cheques were brought in by Jajoo monies were handed over to Jajoo for being handed over to DMPL or Ruia and on another occasion it is contended that monies were paid over by Jajoo to Manubhai. These are all aspects that have not been established by leading evidence and continue to be mere allegations. Issue no.7 is thus answered in the negative. Issue no.14 is hypothetical and does not arise. On facts there is absolutely no

evidence to establish that there was diversion of funds as contended in the petition.

**Issue nos. 8 and 22**

105. That leaves us to conclude on the aspect of reliefs that can be granted in this petition and issue nos. 8 and 22 become relevant. Issue no 8 is whether the petitioner is entitled to recover any monies from M/s. Krishnakant and if so what amount and whether the petitioner is entitled to any relief at all. In my view the petitioner including DMPL and Ruia have failed to establish that they are entitled to any relief in this petition. Issue nos. 8 and 22 are therefore answered in the negative. In the result, the petition fails and I pass the following order :

- (i) Miscellaneous Petition No. 3 of 1996 is dismissed
- (ii) No orders as to costs.

**(A.K. MENON, J.)**