

IN THE SPECIAL COURT AT BOMBAY

Constituted under the Special Court [Trial of Offences Relating to Transactions in Securities] Act, 1992

MISCELLANEOUS PETITION NO.4 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 9th Floor, Nariman |
Bhavan, Nariman Point, Bombay – 400 021. |Petitioner

Versus

1. Suresh N. Shah (*Deleted*) |
Through Legal Heirs :- |
- 1.1 Jasumati Suresh Shah, Wife |
- 1.2 Dipti Suresh Shah, Married Daughter |
- 1.3 Krupa Suresh Shah, Married Daughter |
- 1.4 Binal Suresh Shah, Married Daughter |
All residing at 2, Lal Gabi Darshan, |
63, Swastik Society, N.S. Road No.4, |
Juhu Scheme, Vile Parle (West), |
Mumbai – 400 056. |
2. Dhanraj Mills Private Limited, |
A company incorporated under the |
provisions of the Companies Act, 1956 |
and having its office at Block 19, 1st Floor, |
Dhanraj Mills Compound, Sitaram Jadhav |
Marg, Lower Parel, Bombay – 400 013. |

3. T.B. Ruia (*Deleted*)]
Through 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,]
Mumbai – 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,]
4th Floor, Station Road, Santacruz (West),]
Mumbai – 400 054.]Respondents

Mr. J. Chandran, with Ms. Shilpa Bhate, for the Petitioner-Custodian.

Mr. Piyush Raheja, with Ms. Dhanashree Gaikawai, i/by Bilawala & Co., for Respondent No.1.1 to 1.4.

Mr. Amrut Joshi, with Ms. Radha Ved, i/by Kiran Jain & Co., for Respondent No.2.

Mr. Dipen Furia, with Mr. Romin Sangoi, i/by Shah & Furia Associates, for Respondent Nos.3A to 3E.

Mr. Rajiv Kumar, Sr. Advocate, with Mr. Gautam Mehta, Mr. Virendra Pereira, Mr. Anagh Pradhan and Mr. Anand Iyer, i/by Divya Shah and Associates, for Respondent No.4.

CORAM : A.K. MENON, J.
JUDGE, SPECIAL COURT

RESERVED ON : 24TH JUNE, 2022.

PRONOUNCED ON : 6TH JULY, 2022.

JUDGMENT :

1. This is the third petition in a group of three petitions filed by the Custodian to recover monies, said to be due to one Dhanraj Mills Private Limited – a notified party. In the array of parties, Respondent no.1 was a Share and Stock Broker, who is said to be a debtor of DMPL. He died on or about 30th April 2021 and as a result, his legal heirs have been impleaded as respondents 1.1 to 1.4 being his widow and three daughters. Dhanraj Mills Private Limited (**DMPL**) is respondent no.2. Respondent no.3 – one T.B. Ruia – was the Managing Director of DMPL, who also expired during the pendency of the petition. His legal heirs have been impleaded as respondents 3(A) to 3(E). Respondent no.4 is Suresh Jajoo – an individual, who is said to be liable to pay over the amounts claimed in this petition on an alternative basis, as hereinafter set out.

2. All parties are represented before me and have made oral submissions and have filed brief written submissions as well. The claim in the petition is a sum of Rs.58,94,120/- along with interest thereon @ 24% p.a., which the Custodian now claims from the estate of late Suresh Shah – the original

respondent no.1. In the alternative, a decree is sought against respondents 3(A) to 3(E) if the court finds that original respondent no.3 was liable to pay the amount. In the further alternative, it is contended that if court comes to the conclusion that respondent no.1 was not liable and respondent nos.3(A) to 3(E) and respondent no.4 are jointly and severally liable, a decree is sought against respondent nos.3(A) to 3(E) and respondent no.4.

3. Respondent no.4 –Suresh Jajoo, an individual, was a Share Broker, who is believed to have been involved in a transaction between DMPL and original respondent no.3–T.B. Ruia (*Ruia*) on the one hand and the 1st respondent–Suresh Shah (*Suresh Shah*) on the other. According to the Custodian, Suresh Shah was a debtor of DMPL and owes a sum of Rs.58,94,120/- to DMPL along with interest thereon @ 24% p.a. It is in this background that the petition has been filed.

4. It is the case of the Custodian that as a debtor of DMPL and since DMPL was notified under the Special Court [Trial of Offences Relating to Transactions in Securities] Act, 1992, (*Special Court Act*), the Custodian had filed Miscellaneous Application No.86 of 1993 against DMPL, calling upon DMPL to disclose on affidavit its assets and liabilities as on 5th August 1992 being the date of its notification. Pursuant to orders passed by this court, an affidavit dated 7th October 1993 came to be filed, wherein DMPL disclosed a sum of

Rs.58,94,120/- as outstanding and receivable by DMPL from the said Suresh Shah. On 30th July 1994, the Custodian called upon Suresh Shah to explain why he had not replied to a public notice issued by the Custodian on 10th September 1992 and required him to deposit a sum of Rs.58,94,120/- along with interest @ 24% p.a. from 5th August 1992 till payment or realization. In response to the said demand, Suresh Shah, vide his Advocate's letter dated 3rd September 1994, claimed that during the period from April 1991 to March 1992, several cheques were received for discounting and that after the amounts were credited to the account of Suresh Shah, the said amount was returned in cash and was paid over to respondent no.4-Suresh Jajoo (*Jajoo*), after deducting discounting commission @ 1%. The cash was then reportedly paid to Jajoo, who had apparently admitted the aforesaid facts in proceedings before the Income Tax Authorities.

5. The Custodian has contended that since Suresh Shah has admitted receipt of monies and has sought to claim that these were withdrawn from the bank account and paid in cash to Jajoo would be an admission of illegally and fraudulently diverting monies from DMPL by encashing the cheques and paying them over to Ruia, who was the Managing Director of DMPL at all material times. The transaction is said to be illegal and would not grant a discharge to Suresh Shah. Without prejudice to the aforesaid and in the alternative, if Suresh Shah were to be discharged and found not liable, Ruia should be ordered and

directed to pay to the Custodian the aforesaid sum of Rs.58,94,120/-. It is contended that original respondent no.3-T.B. Ruia was the Managing Director of the respondent no.2-DMPL, which owed large sums of monies to various notified parties. These monies were diverted by the notified parties in collusion with DMPL and the said Ruia from banks and financial institutions. It is also contended that if the version of Suresh Shah is to be believed, late T.B. Ruia was also beneficiary of the monies so diverted and therefore the Custodian is entitled to recover said amounts from T.B. Ruia or his estate.

6. Without prejudice, it is contended that if court finds that original respondent no.1-Suresh Shah was not liable, then, in such event, the heirs of respondent no.3 – late T.B. Ruia would be responsible to the extent of the estate that has passed into their hands. Moreover, respondent no.4-Jajoo was also a beneficiary of the funds, a decree is sought against respondent no.4. Thus, a decree is sought in a sum of Rs.58,94,120/- along with interest @ 24% p.a. from 5th August 1992, being the date of notification of DMPL, from the estate of the original respondent no.1-Suresh Shah. The petition also contained an interim prayer, which would not now survive since the matter is taken up for final disposal. It is in this factual background that this petition has been urged by the Custodian.

7. Based on the pleadings, 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 No.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 ?

Custodian's submissions

8. The Custodian has filed written submissions as well, reiterating that respondent no.1-Suresh Shah was called upon to furnish details of cheque number and cheque date along with the name of the bank, branch and full postal address of the bank from which the cheques were issued. Full details of the transactions were also sought and a confirmation was sought whether the amount had been received by loan. If so, terms and conditions of the loan were also sought. The Custodian has also sought confirmation whether the amount had been repaid, the mode of repayment and the bank particulars. If the amount had not been repaid, the reasons for non-payment despite notification issued by the Custodian was required to be explained. Mr. Chandran has in the course of submissions relied upon the details of these cheques which are six in number, first of which was dated 24th April 1991 and the last dated 27th January 1992. The cheques are for diverse sums of money, totaling to Rs.58,94,120/-. The Custodian has reiterated its contentions in the petition as far as correspondence between the parties and their Advocates are concerned, inviting my attention to the first pleading upto the plaint being made. Mr. Chandran has relied upon the statement of the 1st respondent-Suresh Shah in his affidavit-in-reply dated 3rd

March 1999 that respondent no.2 – DMPL had lent and advanced an aggregate sum of Rs.58,94,120/- @ 24% interest to Suresh Shah. DMPL has in its affidavit denied that the 4th respondent – Jajoo was an authorized signatory of DMPL or of the late Ruia. DMPL has denied that it entered into any cheque discounting arrangements with Suresh Shah either through Ruia or Manubhai or any one else. A similar situation has arisen in the case of other notified parties such as T.H. Vakil and V. Krishnakant and in respect of which MP 2 and MP 3 had been filed.

9. In the present case, as in the others, the 1st respondent–Suresh Shah contended that he had received cheques from DMPL and had withdrawn cash and paid over the cash to DMPL and Ruia through the said Jajoo. According to the Custodian, Suresh Shah was essentially liable to repay the amount. If Suresh Shah was not found to be liable, it would be the responsibility of Ruia and / or Jajoo. DMPL, late Ruia and the said Jajoo have all denied the transactions in question. Mr. Chandran has taken me through the various issues framed on 22nd April 2003. He submitted that the issues take into consideration the case against Jajoo, who was impleaded as a party only in the year 2000. He adopted the submissions made by the Custodian in MP 3 of 1996 and repeated as if the same were applicable entirely to the present facts. On the aspect of limitation, Mr. Chandran submitted that the issue had already been decided in the case of MP

285 of 1995 by judgment dated 2nd August 1996 in the case of *A.K. Menon Vs. Modern Chemicals (Supra)*. This was upheld and gratified by the Supreme Court in *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Anr.*¹. He has invited my attention to the observations of the Supreme Court in paragraphs 33, 35, 36, 38, 39, 41 and 45. As regards the issue of limitation, he submitted that the Limitation Act has no application in the present proceedings, because it is the court that is seeking to recover monies. He therefore submits that issue no.1 will be answered in the negative since the claim is not barred by the Law of Limitation.

10. Submitting on issue nos.2 and 9, Mr. Chandran submitted that Suresh Shah had clearly admitted having received monies prior to the filing of the petition through his Advocate's letter dated 3rd September 1994 (R-1/27). In the affidavit-in-reply, the admission continues and hence there is no doubt that Suresh Shah would be liable unless he is able to establish that the amounts were paid over in cash to Jajoo and/or Ruia. Mr. Chandran has therefore invited me to consider the averments in paragraphs 5(e), 5(l) and 9 of the affidavit of Suresh Shah, which clearly evidences receipt of the cheques. My attention is invited to the recording of evidence in chief of Suresh Shah on 24th April 2007, wherein he clearly states that first Suresh Jajoo would bring cheques of DMPL signed by T.B. Ruia to the witness, who used to deposit the cheques in his bank account.

¹ (2004) 11 SCC 456

The cross-examination reveals that Suresh Shah admits to have received six cheques from DMPL signed by T.B. Ruia. The cheques were drawn in his favour and the drawee bank was Bank of Hyderabad. From the aforesaid pleadings and evidence, it was undeniable that Suresh Shah had received a sum of Rs.58,94,120/-.

11. Mr. Chandran thereafter invited me to consider issues 5, 10, 12 and 15 together and submitted that Jajoo was never an agent for DMPL or Ruia, who was authorized to do the cheque discounting facility on behalf of DMPL. My attention is invited to the documents sought to be relied upon to establish that Jajoo was an agent for DMPL. The documents in question are R-1/4, R-1/5 and R-1/6.

12. Referring to the Power of Attorney dated 14th July 1990, which was marked R-1/4 but which was not admitted in evidence by the court, Mr. Chandran submitted that the power was granted thereunder in any case was only to sign transfer forms for transfer of shares to and from the name of DMPL in respect of securities wherein DMPL was either a transferor or transferee, which is a fact that has been set out in the pleadings of both DMPL and Ruia. In the circumstances, nothing turns on the said power of attorney.

13. Referring to the other documents referred to by the respondent no.1-Suresh Shah, to seek and establish that monies had been paid over after encashing the cheques in question, Mr. Chandran submitted that R-1/5, being the Share Transfer Form, does not in any way establish authority of respondent no.4-Jajoo to receive monies on behalf of DMPL and that the receipt executed and described in R-1/6 also does not show any authority of Jajoo to receive monies on behalf of DMPL. According to the Custodian, Suresh Shah had failed to establish that Jajoo was an agent of DMPL, who was authorized to receive monies and had received monies. Hence, Mr. Chandran submits that issues 5, 10, 12 and 15 be answered in the negative.

14. Inviting my attention then to issue no.3 on the aspect of pledge of shares and requiring the petitioner or respondents 2 and 3 to prove that they had advanced monies to Suresh Shah against pledge of shares, Mr. Chandran submitted that this is a defence that had never been taken up by Suresh Shah. Mr. Chandran submitted that if any party offers security and that security is given up when a claim is made for recovery of a debt, then there must be evidence of the circumstances under which the security was given up, if at all. However, in the instant case, Suresh Shah had never stated that any security was offered in respect of the monies received from DMPL. There is no evidence on record to prove that DMPL or Ruia had advanced monies to Suresh Shah against

pledge of shares. Mr. Chandran further submitted that Suresh Shah had failed to establish that he was engaged in the business of discounting cheques with Ruia and/or Jajoo and it is for Suresh Shah to prove that he had paid back the amounts received vide cheques. It is submitted that issue no.3 be answered in the negative. Mr. Chandran then submitted that the contents of R-1/6 is an undated writing on the letterhead of Suresh Shah, acknowledging receipt of cash amounts from Suresh Shah by Jajoo, and as canvassed in the affidavit of Suresh Shah dated 3rd March 1999 filed in MP/64/1994. On behalf of the Custodian it is submitted that although this document is taken on record and admitted in evidence, the contents thereof have not been proved and therefore, issue no.3 is liable to be answered in the negative.

15. Issue no.7 pertains to the alleged fraudulent diversion of monies from DMPL and payment thereof to DMPL by the 1st respondent – Suresh Shah and whether such transaction would give a valid discharge to Suresh Shah. Mr. Chandran submitted that there is no question of any discharge in the present case. Hence, nothing had been shown to prove that no proof has been led to establish the fact that Suresh Shah had paid back any monies to DMPL; however, at the same time, the cheques had been encashed.

16. On issue no.8, Mr. Chandran submitted that the Custodian is entitled to

recover the amount of Rs.58,94,102/- from Suresh Shah along with interest @ 24% p.a., as claimed in the petition, since there is no proof whatsoever that Suresh Shah had paid over the amount to either Ruia or DMPL. Likewise, issue no.9 requires Suresh Shah to prove that after encashing the cheques received, amounts had been paid over after deducting 1% discount in respect of commission. Mr. Chandran submitted that there is no evidence of whatsoever nature that any such amounts were deducted towards commission and cash paid back to DMPL. He therefore submitted that issue no.9 be answered in the negative.

17. Issue no.13 requires the 4th respondent – Jajoo to establish whether he had paid the amounts said to have been received by him to DMPL and / or Ruia in his capacity as Director of DMPL. Mr. Chandran submitted that Jajoo had neither pleaded nor led any evidence in the matter which would establish that he either received money from Suresh Shah or that any money was paid by him to DMPL and/or Ruia. The statement recorded before the income tax authorities (Exhibit R-1/30) only records that Jajoo paid some money to Ruia. The veracity of the statement has not been ascertained since Jajoo was not subjected to cross-examination on the issue. The bare statement made by Jajoo therefore has no evidentiary value and must be answered in the negative.

18. Issue no.14 requires Suresh Shah to prove that he was entitled to pay amounts of the cheques encashed by him in cash to DMPL in the face of a prohibition under Section 269-T of the Income Tax Act, 1961 to make repayments in cash. Mr. Chandran submitted that this issue no.14 must be answered in the negative, because, in the first instance, there was no evidence of the fact whether Suresh Shah had paid back any amounts in cash. Unless that is established, there is no question of considering whether the payments were prohibited under the Income Tax Act. Mr. Chandran has taken me through the provisions of Section 269-T of the Income Tax Act and how it applies to deposits. In my view, the aforesaid sections have no application to the facts at hand. To the extent it concerns the loan in respect of which issue arises for consideration, since it is the case of DMPL that the amount was advanced as a loan, the Custodian has canvassed that very case.

19. Issue no.16 requires Suresh Shah to prove that the cheques in question had been received from Jajoo on behalf of DMPL and Ruia for the purposes of cheque discounting. In this behalf, Mr. Chandran submits that Suresh Shah had admitted having received the cheques drawn by DMPL and claims that after depositing the same, amounts were paid back in cash. However, it is the case of the Custodian that not having been able to prove that Jajoo delivered the cheques, which statement had been controverted by Jajoo, this issue be answered in the negative.

20. Issue no.17 requires proof that the disputed transactions were fraudulent and the mode of diverting monies from DMPL to Ruia. According to Mr. Chandran, the issue does not arise for consideration in the facts of the present case since the only factual aspect which is admitted by Suresh Shah is the receipt of a sum of Rs.58,94,102/- by cheques. The contention that monies had been returned after carrying out a cheque discounting operation and deducting 1% commission has not been proved. In these circumstances, there is no occasion to consider whether the transaction was fraudulent.

21. In relation to issue no.18 which requires a finding on whether the petition discloses a cause of action against respondent no.4-Jajoo, Mr. Chandran submitted that the petition did reveal a cause of action by virtue of the averments of Suresh Shah that the amounts of the cheques received by him had been paid back through Jajoo and it is on the application of Suresh Shah that Jajoo was impleaded by the Custodian at the material time. However, as presently seen, there is no evidence of the fact of Jajoo's involvement and hence on the aspect of cause of action, Mr. Chandran submits that the petition does indeed disclose cause of action and justified the impleadment of Jajoo in the array of parties.

22. In relation to issue no.19, which requires the transactions as between the

parties were illegal and whether DMPL was entitled to seek monies as a result of those transactions, Mr. Chandran submitted that the defence of Suresh Shah was that the court could direct recovery of attached assets from any third party.

23. Issue no.20 is whether the petition is maintainable and not barred by principles of res judicata or constructive res judicata. Mr. Chandran submitted that by filing the present petition, the Custodian is not seeking recovery of monies which was subject matter of any earlier petition and hence there is no occasion to consider bar under the principles of res judicata or constructive res judicata. That issue does not even arise.

24. Issue no.21 is whether notwithstanding DMPL not having claimed Rs.58,94,120/- from Jajoo, whether the Custodian can still claim the amount from Jajoo. Mr. Chandran submitted that it is immaterial whether a notified party had claimed the amount from Jajoo since the assets of the notified party are statutorily attached and for the purposes of distribution under Section 11(2), the court could always recover money from a party that is liable to pay and in the present case, the issue does not have any relevance.

25. Issue no.22 is whether the petitioner is entitled to any reliefs and the Custodian has contended that the reliefs, as prayed, may be granted. In

summary, the case of the Custodian is that Suresh Shah having admitted receiving the amount of Rs.58,94,120/- from DMPL and having admitted to have deposited the cheques and encashed the same in his account, he is certainly liable to pay the amount back to DMPL. He further submits that Suresh Shah had failed to prove that Jajoo had received monies in cash as agent of DMPL. However, if this court holds that Suresh Shah had paid back the money through Jajoo and that Jajoo had no authority to receive monies on behalf of DMPL, in such a case, Suresh Shah would have to be directed to bring back the amount of Rs.58,94,120/- since he would have had made payment to Jajoo, who had no authority to receive the monies.

26. If Suresh Shah had given the monies to Jajoo in the mistaken belief that Jajoo was an agent of DMPL, it was the responsibility of Suresh Shah to recover it from Jajoo and not the Custodian. Only if the court finds that Suresh Shah had paid monies to Jajoo and that Suresh Shah had proved such payment and if he proves that Jajoo had paid over the amounts to Ruia, the heirs of original respondent no.3-T.B. Ruia would have to be directed to pay the monies with interest. Mr. Chandran therefore concluded on that note.

27. On behalf of respondents 1.1 to 1.4, Mr. Raheja led the arguments. According to him, the Custodian has not disclosed any document, which records

that Suresh Shah was a debtor of DMPL. Even except for a statement in an affidavit dated 7th October 1993 filed on behalf of DMPL in MA/86/1993, there is no document evidencing the so called loan. DMPL has proceeded on the basis of the pleadings in MP/64/1994, using that as a defence in the present proceedings. Mr. Raheja has taken me through the case of DMPL in MP/64/1994, which effectively dealt with DMPL's dealing with Manubhai Maneklal Shah (*Manubhai*). Monies were advanced by DMPL to Manubhai against pledge of shares. Later, that transaction of pledge was wound-up and the pledged shares were handed back to Manubhai in October, 1990. Thereafter, it appears that DMPL claimed arrangements, under which monies were advanced to T.H. Vakil, Loknath Shroff and A.B. Shah, which advances were secured by pledge of shares and a personal guarantee of Manubhai in an aggregate sum of Rs.8,79,61,432/- is said to have been advanced. However, no documents are produced in this respect. To the extent it concerns Suresh Shah, separate payments have been shown between 24th April 1991 and 31st January 1992. DMPL had received dividends in respect of pledged shares, which were in a suspense account and in respect of which credit was to be given to respondents 3 to 7 including respondent no.1-Suresh Shah. It is inter alia claimed that DMPL had received dividends in respect of pledged shares which were placed in a suspense account and in respect of which credit was to be given to respondents 3 to 7.

28. Mr. Raheja submitted that correspondence between DMPL and the income tax authorities reveal that in a letter dated 30th August 1994, DMPL had contended that funds that were advanced to Suresh Shah were shown as advances in the Balance Sheet of DMPL; however, DMPL had failed to produce Balance Sheet or any record to demonstrate that the funds have been provided by Suresh Shah as advances. Suresh Shah has, in an affidavit dated 3rd March 1999, denied that funds were received by him as a loan. On the other hand, Suresh Shah has canvassed the cheque discounting business having been carried out as between him and DMPL. In the written statement, Suresh Shah has also taken up the plea that Jajoo had accepted the cash and had paid it over to Ruia.

29. Meanwhile, Jajoo, after he was impleaded, has denied these statements, including the statement made before the income tax authorities, and seeking to explain its true meaning and legal effect. In my view, Jajoo had not denied existence of the statement or the fact that it was so made. Mr. Raheja submitted that the petitioner and DMPL had failed to establish that the loan had been advanced to Suresh Shah and hence there was no cause of action that had arisen. In any event the payments made to Suresh Shah were not from attached assets of DMPL. DMPL was notified on 5th August 1992 whereas the payments were made between April, 1991 and January 1992 and thus the Custodian was not seeking to recover monies from the attached assets. The subject matter of

attachment, if any, was the alleged debt owed by Suresh Shah to DMPL and for recovery of that amount from Suresh Shah, the Custodian would have to first establish that monies were advanced by way of a loan and that a debt was owed by Suresh Shah to DMPL, which could then be recovered. The pleadings do not adopt the contents of DMPL's case in MP 64 that the amounts were advanced as a loan against pledge of shares and repayable with 24% interest. No document is produced in support of the plea of a loan bearing interest and the pledge of shares. On the other hand, the communication from the Custodian to Suresh Shah seeks details of transactions towards which the amount had been received and if the amount had been received by way of a loan, full terms and conditions of such loan. The Custodian himself was unaware as to the amount forming subject matter of the petition.

30. My attention is invited by Mr. Raheja to the order dated 5th October 1996 passed by the Special Court, which observes that although the petition is filed by the Custodian, it is so filed on the instructions and / or an information provided by DMPL and as such, it is for DMPL to produce the necessary evidence in support and in view of this stand of DMPL, apart from other evidence that DMPL may want to lead. T.B. Ruia would have to step into the witness box to prove the claim, if it is to his knowledge. Neither DMPL nor Ruia having led evidence to establish the debt, despite affidavits having been affirmed, including

by one Narendra C. Dangarwala, Director of DMPL, no efforts were made by DMPL to produce any witness. In fact, at one stage, this court had put a question to counsel for DMPL whether Mr. Dangarwala was available, to which the answer was that DMPL was unaware whether Dangarwala was available. Thus, it is evident that no efforts were made to examine persons with personal knowledge of the transactions. Not only did DMPL fail to lead evidence, they also did not produce any documents in the form of balance sheets or other evidence to show that a loan had been advanced and it is difficult to believe that a company-DMPL had not created any record of a loan advanced to Suresh Shah, if at all it was true. It is contended that documentary evidence was indicated in the pleadings on behalf of DMPL (MP 64), when in a letter of 30th August 1994, DMPL asserted that funds advanced to Suresh Shah had been shown as advances in the balance sheet; yet, no balance sheet was produced. In MP 64, DMPL stated that dividends were received in respect of shares, which were received by them as security, enlisted in Exhibit-G to that petition and that the amount of dividend had been credited to the petitioner's (DMPL's) bank account and have since been held in a suspense account. No particulars of these amounts are forthcoming. No bank records have been produced either to demonstrate the fact that dividend had been so credited. The Custodian has also not produced any such evidence. DMPL also did not produce any board resolution to demonstrate that the company decided to advance monies to

Suresh Shah as a loan. The management of the DMPL would have sufficient records to show why these cheques were issued, however, none is forthcoming. In the absence of oral and documentary evidence duly corroborated, Mr. Raheja submitted that DMPL's case of a loan having been advanced to Suresh Shah is incorrect.

31. Mr. Raheja therefore submitted that original respondent no.1-Suresh Shah was not a debtor of DMPL. The said respondent had produced orders of Income Tax Authorities which had specifically accepted the case of Suresh Shah that he received income only in the form of commission from carrying out cheque discounting transactions. The tax authorities have also levied a penalty for failing to disclose income from the aforesaid business that 1st respondent carried out. My attention is invited to the order dated 23rd August 1996 passed by the Commissioner of Income Tax in relation to the Assessment Year 1992-93 of the 1st respondent-Suresh Shah. Mr. Raheja submitted that there are also other aspects which need to be considered, which established that there was no loan. These include the nature of payments made to Suresh Shah. As regards the DMPL's assertions that the amounts paid were secured by the pledge of shares and the absence of any demand by DMPL upon Suresh Shah for repayment of the amount, as far as the pledged shares were concerned, it was submitted that there is no evidence to demonstrate the pledge having been created. DMPL

produced no record to demonstrate the pledge or its claim in MP 64 that shares were transferred to the name of DMPL as pledgees. No record of dividend, having been allegedly received by DMPL, was introduced, nor was any bank statement produced in support of that plea. The pledged shares were later said to have been returned to Manubhai and that makes it clear that there was no loan transaction at all since it is extremely unlikely that an amount of Rs.8 crores as of 1991 was disbursed on personal assurance of Manubhai and yet the pledged shares were retained with Manubhai. This Mr. Raheja submits establishes the fact that there was no loan. In fact, there is no demand whatsoever made on Suresh Shah or Manubhai, who was purportedly the guarantor of the transaction. Mr. Raheja then submitted that in the absence of any loan being established, there is no question of any debt or its repayment.

32. The 3rd respondent – Ruia has, in an affidavit dated 11th July 2000, reiterated the fact that respondent no.4-Jajoo had been authorized as an attorney for the limited purpose of assisting the transactions in shares. DMPL had advanced diverse amounts to Jajoo, which had been repaid. DMPL had also purchased and sold shares through Manubhai and for transferring the securities to and from the name of DMPL, a power of attorney had been executed. The learned counsel has invited my attention to answers to questions 14, 39 and 40 in the cross-examination of Suresh Shah. Mr. Raheja submitted that there is

independent corroboration of repayment in the form of statement of Jajoo under Section 133A of the Income Tax Act. An express reference has been made to the statement in the affidavit of Suresh Shah dated 3rd March 1999. Moreover, a certified copy of the same has now been produced by the income tax authorities through an affidavit of Mr. Amol Kirtane dated 20th August 2008. Exhibit R-1/30, it is said, clearly establishes the fact that Jajoo had admitted the transaction, receipt of cash and payment of cash to respondent no.3-Ruia and/or respondent no.2-DMPL. Jajoo's answers to questions 16, 18 and 22 before the income tax authorities had been highlighted by Mr. Raheja, who submitted that Jajoo has verified the fact that the contents of the statement were true to the best of his knowledge and belief and that the statement was given without any coercion, threat, force or inducement. According to Mr. Raheja, not only has Jajoo accepted that repayment was made through him, but he also accepted correctness of the statement made by respondent no.1-Suresh Shah before the income tax authorities. He is therefore estopped from challenging the correctness of the statement in view of the express admission by Jajoo that he had received monies from Suresh Shah and paid it over. It is not now possible to relieve Jajoo of his liability since Jajoo had not provided any evidence of the true meaning of the statement made by him before the income tax authorities. It is contended that a statement made under Section 133A of the Income Tax Act is not bereft of evidentiary value. Reliance is placed on the decisions of *Dinesh Jain*

*Vs. Income Tax Officer*² and *Pebble Investment & Finance Ltd. Vs. Income Tax Officer*³. It is further contended that surrounding circumstances would establish that there was no loan which was required to be repaid, absence of documentation, release of the shares purportedly pledged by Manubhai, lack of any demand for repayment, are all cited as reasons for concluding that there was no loan and therefore no debt or liability.

33. Mr. Raheja then made specific reference to the Sarafi Receipts at Exhibits R-1/5 and R-1/6 and referred to the testimony of Suresh Shah recorded on 15th March 2007 and submitted that documents at Exhibits R-1/5, R-1/6 and R-1/30 had not been challenged or disputed by the Custodian. As far as the provisions of Section 269T of the Income Tax Act was concerned, it no doubt prohibits repayment of loans exceeding Rs.20,000/- by cash, it is contended that Section 269T was not in effect during the period 1991-92 and it was applied only to companies and banks and does not apply to individuals. It is also applicable only in the cases of a loan transaction, however, in the present case, no loan has been advanced and respondents 2 and 3 – DMPL and Ruia – had failed thus far to prove the same. In view of the aforesaid, it is contended by Mr. Raheja that as no case whatsoever is made out against his clients, the petition is liable to be dismissed.

² *Income Tax Appeal No.133/2014*

³ *2017 SCC OnLine Bom. 7600*

Submissions on behalf of Respondent No.2-DMPL

34. On behalf of respondent no.2-DMPL, Mr. Joshi submitted that the amount in question was advanced at the instance of Manubhai to respondent no.1-Suresh Shah at an interest rate of 24% p.a. and against pledge of shares, as set out in MP 64. He submits that the case of Suresh Shah is incorrect inasmuch as he has denied that Suresh Shah paid over the amount in cash to respondent no.4-Jajoo, who had allegedly paid over the amount to respondent no.3-Ruia. On behalf of Ruia as well, Mr. Joshi submitted that, as set out in the affidavit-in-reply dated 18th January 1996 in this petition, Ruia has denied that he had ever received cash from respondent no.4-Jajoo. Ruia had also taken the stand that respondent no.1-Suresh Shah has concocted the story to avoid liability. In a further affidavit of 11th July, 2000, Ruia denied the allegation of Suresh Shah that Jajoo was an agent of DMPL or Ruia himself. The power of attorney was specifically meant for the limited purpose of signing and executing transfer forms on behalf of DMPL as transferor or transferee and hence the case of the respondent no.1 has been denied. The power of attorney would not enable Jajoo to act beyond the grant.

35. Ruia had also denied the correctness of the statement made by Jajoo to have admitted cash, as set out in his statement under Section 133A of the Income Tax Act. He has also denied the allegation insofar as it concerns alleged

remittances under the Foreign Exchange Immunity Scheme. Dealing with the case that an amount advanced was a loan to Suresh Shah, Mr. Joshi submitted that Suresh Shah had clearly admitted in his affidavit-in-reply dated 3rd March 1999 to having received the amount in question and hence there is a clear admission on behalf of Suresh Shah. That amount is thus repayable. Dealing with the contention that it was indeed a loan, Mr. Joshi submits that the pleading of the DMPL is clear that a loan had been advanced against pledge of shares. Mr. Joshi further submitted that once Suresh Shah has agreed that the amounts were received by him, the onus shifts to Suresh Shah, who is now required to prove the purpose for which the amount was received. According to Mr. Joshi, Suresh Shah has failed to demonstrate his case that the amounts were received by Suresh Shah for cheque discounting, as he describes it, and in this behalf, he refers to the decision of *Anita Rani Vs. Ashok Kumar and Ors.*⁴, which sets out clearly that the party who admits receipt of certain amount of money on a particular date and pleads discharge by way of a full and final settlement at a latter date is the one on whom the onus lies. Suresh Shah had not discharged that burden and was therefore liable to remit the amounts to the credit of DMPL. Mr. Joshi relies strongly on this decision of the Supreme Court. According to Mr. Joshi, DMPL had discharged its burden of proving that the amount of Rs.58,94,120/- was advanced as a loan against the pledge of shares whereas Suresh Shah has failed to prove its case and therefore an adverse inference is

⁴ 2021 SCC OnLine 1265

required to be drawn against Suresh Shah. The 1st respondent–Suresh Shah has admitted having received the amount but has contended that he withdrew the amount in cash and handed it over to Jajoo, who, in turn, handed it over to Ruia. That leg of the defence of Suresh Shah has not been proved. There is absolutely no evidence that has been led on that aspect and the attempt to establish payment onward to DMPL and Ruia has not been made out. Mr. Joshi has controverted the approach of Suresh Shah in seeking to rely upon the statement said to have been made before the Income Tax authorities under Section 133A.

36. Mr. Joshi has also assailed the attempt of Suresh Shah to rely upon the power of attorney, transfer deed and receipt being Exhibits R-1/4, R-1/5 and R-1/6 by contending that the power of attorney has not been admitted in evidence and hence cannot be relied upon. The transfer deed and the receipts are not sufficient to demonstrate that Jajoo was an agent of DMPL or Ruia for the purpose of collection of cash, as alleged. According to Mr. Joshi, Suresh Shah has failed to establish and prove that Jajoo was an agent of either DMPL or Ruia and was involved in the handling of cash for the alleged cheque discounting facility. He submits that reliance on the statement made under Section 133A of the Income Tax Act cannot be treated as gospel truth and be held against Jajoo. It is submitted that the said statement has no basis in the pleadings and cannot be believed since DMPL could not cross-examine Jajoo before the income tax

authorities. This statement is to be believed since DMPL and/or Ruia should have had an opportunity to deal with the statements made by Jajoo; however, Jajoo has not offered himself for cross-examination and therefore it has effectively deprived DMPL from meeting the contentions of Suresh Shah.

37. In this behalf, reliance is placed on the decision in *Vidhyadhar Vs. Manikrao and Anr.*⁵, in which the Supreme Court held that, a party who does not appear in the witness box and states the case on oath but does not offer himself for cross-examination would lead to a presumption that a case set out by him is incorrect. Likewise, in *Iswar Bhai C. Patel Alias Bachu Bhai Patel Vs. Harihar Behera and Anr.*⁶, the Supreme Court has laid down that a party who abstains from entering the witness box must give rise to an adverse inference against it. In *Ishwar Bhai Patel (Supra)*, the Supreme Court held that, though the party abstains from entering the witness box, it must give rise to adverse inference against such a party and therefore Mr. Joshi submits that DMPL had discharged its burden of proving that the amount was advanced to Suresh Shah and that it was advanced as a loan against pledge of shares. He further submits that the onus has clearly shifted on Suresh Shah. He further submits that the burden of proof in respect of a particular fact lies on a person who wishes the court to believe in its existence and unless such proof is required to be provided by any law on any particular person.

⁵ (1999) 3 SCC 573

⁶ (1999) 3 SCC 457

38. Relying upon the decision in *Anil Rishi Vs. Gurbaksh Singh*⁷, Mr. Joshi submits that, while the initial burden of proof would lay on the plaintiff under Section 101 of the Evidence Act, pleading is not evidence and far less proof. The Supreme Court held in the facts of that case that the suit would fail if both the parties did not lead evidence. Ordinarily, while burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into it would be from the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side. Relying upon these observations, Mr. Joshi submitted that Jajoo has specifically denied that he received any amount in cash from Suresh Shah and in such circumstances, it was necessary for Suresh Shah to lead further evidence and prove such payment. Suresh Shah cannot merely hope that the court would infer that Jajoo received the cash and paid it over to Ruia. Thus, according to Mr. Joshi, Suresh Shah had not discharged the burden cast upon him.

39. Mr. Joshi has also invited my attention to Section 104 of the Indian Evidence Act, 1872 and submits that respondent no.1-Suresh Shah, upon whom the burden is cast, has not discharged his burden. He submits that Suresh Shah could have summoned the respondent no.4-Jajoo as a witness for the purpose of proving his assertions. Mr. Joshi further submitted that the amount in question

⁷ (2006) 5 SCC 558

was received by Suresh Shah in his bank account and nothing has been shown as to how the same was deployed. Suresh Shah having failed to prove that Jajoo was an agent of DMPL or Ruia, his case cannot be believed.

40. Mr. Joshi then dealt with the defence of Jajoo. It is submitted that Suresh Shah has failed to establish that Jajoo was an agent for the purposes of the cash transactions. Mr. Joshi submitted that mere execution of power of attorney, that too for a specific/limited purpose cannot operate as an agency generally to enable Jajoo to act on behalf of DMPL and/or Ruia to negotiate with Suresh Shah to collect cash and pass it over to DMPL or Ruia. In these circumstances, Jajoo would be rendered as agent for disclosed principal and would have no liability whatsoever.

41. On the aspect of limitation, Mr. Joshi submitted that the petition is not akin to a civil suit filed by DMPL and in view of the decision of the Special Court in *A.K. Menon, Custodian Vs. Modern Chemical Corporation*⁸, no period of limitation can apply to any act done by a court. This is duly supported by the view of the Supreme Court in *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Anr.*⁹ In this view of the matter, Mr. Joshi submitted that the petition is required to be allowed in terms of prayer clause (a).

⁸ (2002) 1 ALL MR 180

⁹ (2004) 11 SCC 456

42. Now to consider some of the decisions cited at the bar, in *Iswar Bhai C. Patel (Supra)*, the Supreme Court was concerned with a challenge to an order of the High Court in appeal modifying a decree and decreeing the suit against both the defendants and dealing with the provisions of the Evidence Act 1872 and in particular Sections 114 and 106, wherein the court observed that an adverse presumption must be drawn against a defendant who does not present himself for cross-examination and refuses to enter the witness-box in order to refute allegations made against him or to support his pleading in his written statement. Section 114 of the Evidence Act reads thus :-

“114. Court may presume existence of certain facts :-

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

43. *Iswar Bhai C. Patel (Supra)* also quotes from various other judgments of the Patna High Court, Allahabad High Court, Madhya Pradesh High Court and Calcutta High Court. In particular, reference has been made to the Allahabad High Court’s decision in *Arjun Singh Vs. Virendra Nath*¹⁰, in which the court observed that, the explanation of any admission or conduct on the part of a

¹⁰ AIR 1971 Allahabad 29

party must, if the party is alive and capable of giving evidence, come from him and the court would not imagine an explanation which a party himself has not chosen to give and if such a party abstains from entering the witness-box, it must give rise to an inference adverse against him. The Supreme Court applied this principle with approval and found that there can be an adverse inference to justify the facts of that case. On behalf of DMPL, I am invited to apply the same principle in the present case and draw an adverse inference.

44. In *Vidhyadhar (Supra)*, the Supreme Court was concerned with Section 54 of the Transfer of Property Act, 1882 and non-payment or inadequacy of sale consideration. In the course of considering the scope of the High Court's power in second appeal to interfere with concurrent findings of fact regarding execution of Sale Deed, the court came to the conclusion that where a party does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct, as has been held in a series of decisions of various High Courts. The Supreme Court made reference to the decisions in *Sardar Gurbakhsh Singh Vs. Gurdial Singh*¹¹, the Lahore High Court in *Kripa Singh Vs. Ajaipal Singh*¹², the Bombay High Court in *Martand Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh*¹³.

¹¹ AIR 1927 PC 230

¹² AIR 1930 Lah 1

¹³ AIR 1931 Bom. 97

45. In *Anil Rishi Vs. Gurbaksh Singh*¹⁴, the Supreme Court was considering reversal of burden of proof and when it was permissible and in particular Sections 101 to 110 of the Evidence Act. Relying on the text of Section 101, the Supreme Court observed that, the burden of proving the fact rests on a party who substantially asserts affirmative of the issue and not the party who denies it. The rule may not be universal in its application and there may be exceptions. It was further held that, the pleadings not being evidence and far less proof, issues are raised on the basis of the pleadings. Ordinarily, the burden of proof would rest on a party who asserts the affirmative of the issue. In *Anita Rani Vs. Ashok Kumar and Ors.*¹⁵, the Supreme Court was considering a challenge to the orders of the High Court reversing decrees passed by the First Appellate Court. The two second appeals came to be allowed reversing decrees passed by the First Appellate Court and after the Suits had been dismissed by the trial court. These were money suits and in this context, the Supreme Court, after considering the factual basis, observed that, in the first suit, case of the appellant–plaintiff was one of lending and non–payment. The defence set up by the respondents was one of payment but of a lesser amount in full and final settlement. The court observed that a party who admits receipt of certain amount of money on a particular date and pleads discharge by way of a full and final settlement at a latter date is the one on whom the onus lies. This onus was not discharged by

¹⁴ (2006) 5 SCC 558

¹⁵ 2021 SCC OnLine SC 1265

the respondents in that suit and hence the plaintiff was entitled to succeed in the first suit. The High Court in that case has overlooked that aspect.

46. In the instant case, the contention of the Custodian on behalf of DMPL is that the amount of Rs.58,94,120/- was paid over to respondent no.1-Suresh Shah. Suresh Shah has pleaded that he has discharged his obligations of paying that money back to DMPL and/or Ruia in cash as in the normal course of what Suresh Shah described as “bill discounting”. This repayment in cash having been denied, the burden of proof and denial will rest on Suresh Shah. In *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. and Anr.*¹⁶, the Supreme Court observed that the jurisdiction of the Special Court is of wide amplitude and the decision of the Special Court is subject to appeal is final. On the question of locus of the notified party, the court observed that the 1992 Act does not specify as to who can initiate a proceeding before the Special Court but the Special Court is entitled to direct the Custodian as regards application of any property which stands attached and it may do so at the instance of the notified party as well. It could also initiate a proceeding suo motu once attachment of a property is brought to its notice. In the present case, the Custodian has acted on the basis of the affidavit-of-disclosure filed by DMPL.

47. The court has acted thereon. It is for the court to attempt to recover the

¹⁶ (2004) 11 SCC 456

money which is to be used for distribution. *L.S. Synthetics Ltd. (Supra)* quotes with approval the decision in *A.K. Menon, Custodian Vs. Modern Chemical Corporation*¹⁷, in which case the Special Court held that, it is the court which initiated the proceedings and it is the court's duty and responsibility to recover the monies and then there can be no question of limitation affecting that power. In conclusion, the Supreme Court held that a notified party has a locus to bring the fact to the notice of the Special Court that a certain sum of money is owing from a third party whereupon a claim can be adjudicated by the court for recovery by the Custodian of assets of a notified party. It is this application that has been invoked in the present case and the Limitation Act, 1963 would have no application in relation to the said proceedings under the Special Court Act.

**Submissions on behalf of Respondent Nos.3(A) to 3(E)-Legal Heirs
of Original Respondent No.3-T.B. Ruia**

48. Submissions on behalf of respondents 3(A) to 3(E) were led by Mr. Furia, 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.

¹⁷ (2002) 1 All MR 180

Submissions on behalf of Respondent No.4-Suresh Jajoo

49. I will now deal with the submissions made on behalf of respondent no.4-Suresh Jajoo. Mr. Rajiv Kumar, the learned Senior Advocate appearing on behalf of Jajoo submitted that a claim against the 4th respondent-Jajoo is an alternative claim as between respondents 3(A) to 3(E) and Jajoo, jointly and severally. Mr. Kumar has taken me through the factual aspects, which are common in all these matters, in particular, basis of the present claim against the respondent no.1-Suresh Shah, how Suresh Shah has alleged that he has engaged in cash discounting, withdrawing cash from his bank accounts and returning the money received via cheques to DMPL and Ruia through Jajoo by inter alia alleging that Jajoo was an agent for DMPL and/or Ruia. However, it is the contention of the learned counsel that DMPL has failed to prove the transaction of loan secured by pledge of shares and Suresh Shah has failed to prove the alleged transaction of cheque discounting. My attention is invited to the pleadings of DMPL in MP 64 of 1994. Mr. Kumar has taken me through the substance of the averments in paragraphs 6 to 23 of that application inter alia contending that there is no evidence produced by DMPL or T.B. Ruia or the Custodian to prove any of the allegations that involve Jajoo. The transactions between DMPL and Suresh Shah and Manubhai have been adverted to shares of diverse companies alleged to have been pledged and they have been identified.

Manubhai is said to have bought and sold shares from time to time. Shares were transferred to the name of the petitioner-DMPL as pledgees with the intention of creating security and in or around October, 1990, DMPL as petitioner and respondent no.2 therein – Manubhai agreed that the advance will be gradually reduced and a proportionate number of shares would be released on security.

50. According to Mr. Kumar, there is no evidence produced by DMPL or T.B. Ruia or the Custodian to prove the said contentions. There is also no evidence produced by the 2nd or 3rd respondent as DMPL or Ruia or the Custodian in support of the contention that DMPL had handed over shares to Manubhai for safe keeping along with blank transfer forms. Mr. Kumar has taken me in detail through various averments in juxtaposition with the averments in the present petition. He submits that there is no evidence produced by DMPL or Ruia or the Custodian in support of a contention that a sum of Rs.8,77,61,432/- were held in various parties' names against pledge of shares mentioned in Exhibit-G to MP 64 and that DMPL was entitled to have the security enforced under a decree. According to Mr. Kumar, no evidence has been produced by DMPL or its Managing Director – at the material time T.B. Ruia – or the Custodian to support these contentions. There is nothing to indicate the value of the shares exceeded the amount advanced or that the amounts of advances, interest and costs were validly secured by pledge of shares. The main thrust of the arguments on behalf of respondent no.4-Jajoo is based on the averments in MP 64.

51. MP 64 laid great emphasis on seeking a decree that the amount of advances, interests and costs were secured by a pledge of shares listed in Exhibit-G and the decree, as sought, was to hold respondents 2 to 7 therein jointly and severally liable. However, there was no evidence to prove as to which of the shares were allegedly released by Manubhai in satisfaction of the debt and guarantee. There was no evidence about the bank accounts and suspense accounts mentioned in those pleadings. There was also no evidence of valuation of the shares and amounts of dividends said to have been received in the bank accounts by DMPL and it is further contended that all the aforesaid details were necessary to quantify the amount of the debt, which was to be due and payable to the petitioner-DMPL.

52. Mr. Kumar then invited me to consider a reply filed by Suresh Shah in MP 64. That reply is of 29th July 1995, admitted to be engaged in cheque discounting business, but he had discontinued it. The cheques in respect of the claim in the present petition were all said to have been received by him, encashed and then the cheque was handed over in cash after deducting commission to one Suresh Jajoo. The affidavit does not state that the cheques were delivered to him by Jajoo. During the pendency of MP 64, DMPL had denied the cheque discounting case sought to be set up by Suresh Shah and in June 1995, the Custodian had filed MP 4 for recovering the aforesaid sum of

Rs.58,94,120/-. Initially, the petition was only against respondents 1, 2 and 3 on the basis of information contained in the aforesaid affidavit of DMPL, to which I have made reference elsewhere. In December, 1995, Manubhai died and replies came to be filed on 18th January 1996 and 19th January 1996 by T.B. Ruia and DMPL, both of whom denied the transaction of cheque discounting or receiving cash through Suresh Jajoo or at all.

53. On 5th October 1996, Mr. Kumar reiterated that the Special Court recorded that T.B. Ruia would have to step into the witness-box; essentially, deciding the burden of proving the transactions was on respondents 2 and 3 – DMPL and Ruia. Later, the Special Court ruled that MP 64 stood abated as against Manubhai and this petition was later allowed to be withdrawn on a statement that DMPL was only seeking recovery of monies and had given up the pledge and guarantee by Manubhai. DMPL ought to have disclosed to the court the status and value of the pledged shares, but the company did no such disclosure. Although the pleadings in MP 4, making reference to the pledge, has given rise to issue no.3, the burden has not been discharged by DMPL or T.B. Ruia and there is no evidence whatsoever of the said pledge and no explanation is forthcoming as to the fate of the alleged pledge. In MP 64, DMPL pleaded debt secured by pledge of shares and a personal guarantee of Manubhai. MP 64 having abated and having been disposed upon filing of the present MP 4 of 1996, DMPL and the Custodian ought to have proved by evidence the factum of

release of security, valuation thereof and accounts pertaining to dividends received and the quantum of debt remaining, if any, after giving credit. This DMPL has failed to prove in evidence. The pledged shares have suddenly disappeared and it is evident that DMPL has given up its security and if such security is given up, the debt also would stand satisfied upto the extent of the value of the shares.

54. I am in agreement with Mr. Kumar that the court has not been provided with any assistance on this aspect and hence, an adverse inference must be drawn against DMPL. DMPL and Ruia have not made any claims against Jajoo. They have also denied the cheque discounting transactions. It is contended that the fate of the securities pledged, if any, is deliberately and intentionally suppressed from the court. Mr. Kumar submitted that the Custodian has no independent source of evidence. DMPL and Ruia have not stepped into the witness-box although it was their obligation to do so. On behalf of the Custodian, Suresh Shah was cross-examined on 20th June 2011, 27th, 28th and 29th September 2011 on the aspect of cheque discounting, suggesting that it was false. The allegations against Jajoo being agent of DMPL were false so also the contention of Suresh Shah that he paid cash to Jajoo. The Custodian has also filed his submissions in writing and it is evident from the said submissions that the Custodian's case is directed against Suresh Shah alone. The case against Jajoo is remote from alternative. Mr. Kumar further submitted that the burden of

proving the transaction solely rested on the shoulders of DMPL and / or Ruia. Despite the court having so observed, DMPL did not lead any evidence in the present petition nor did it lead any evidence in MP 2 of 1996, which had been decided earlier. T.B. Ruia was very much alive at the material time and he had died only on 12th February 2019. Despite a specific order dated 5th October 1996, the said Ruia decided not to step into the witness-box. The legal heirs also took no steps to lead evidence.

55. My attention is invited to the order passed by the court on 27th January 2017 recording the fact that DMPL did not wish to lead evidence. A conscious decision was thus taken. On 26th February 2021, this court has dismissed two review petitions by consent and two orders passed on earlier review petitions dated 11th December 2015 came to be set aside, paving the way for the trial of the two miscellaneous petitions viz. MP 3 and MP 4. On 5th March 2021, DMPL made a statement that it did not intend to lead evidence in MP 4 as well. Suresh Shah had made applications viz. SPMA/18/2017 to obtain a handwriting expert's opinion in respect of R-1/6 and SPMA/19/2017 for issuance of witness summons to procure the presence of Mr. S.S. Panwar of the Income Tax Department in an attempt to prove R-1/29 and R-1/30, which were statements made by Suresh Shah and Jajoo before the said S.S. Panwar. While the counsel for Suresh Shah made a statement that he does not intend to lead any evidence,

the court also recorded that DMPL and Ruia also did not intend to lead any evidence and accordingly, Suresh Shah sought to withdraw SPMA 18 and 19 of 2017. After hearing the parties, the court permitted withdrawal and evidence was closed. This order was final in all respects. However, DMPL later, on the second thought, filed MA 13 of 2021 seeking permission to lead evidence. Suresh Shah and Jajoo opposed the application; however the court permitted leading of evidence. DMPL later filed a Special Leave Petition against the order dated 7th May 2021 permitting the leading of evidence, which SLP came to be dismissed on 28th June 2021. Later, admissibility of documents has been considered by the court and an order passed. The learned counsel for the respondent 4-Jajoo submitted that the submissions on behalf of respondent no.4 are without prejudice.

56. In the alternative, it is submitted that the documents, which had been marked, have not been proved in accordance with law or contents thereof have not been proved and therefore it ought not to be read in evidence. Mr. Kumar submitted that the entire case of DMPL, as supported by T.B. Ruia when MP 64 was filed, was based on the alleged pledge, the pledge having been given up or not having been pressed into service. It is contended that no part of the claim would survive. Mr. Kumar then took me through the evidence led by Suresh Shah in MP 4. An affidavit came to be filed on 21st September 2005, followed by a compilation of documents. Suresh Shah also filed an affidavit in lieu of

examination-in-chief dated 30th September 2006 and further affidavit dated 16th October 2006. The oral evidence was permitted vide an order dated 24th November 2006 and a Commissioner was appointed. Evidence was led on various dates. On 5th March 2010, the court after hearing the counsel and perusing the order dated 24th November 2006, permitting evidence to be led, observed that objections raised by parties as to the admissibility of the documents should be decided later. The cross-examination of Suresh Shah was then proceeded with and completed on behalf of the Custodian, respondents 2, 3 and 4. Cross-examination of Suresh Shah concluded in October 2015. Mr. Kumar canvassed the point of cheque discounting and as described by Suresh Shah was illegal. In effect, it is a banking transaction, whereby bank discounts a cheque and usage of the term “cheque discounting” by Suresh Shah is completely misconceived. According to Mr. Kumar, Suresh Shah has made several contradictions, which resulted impeaching his own credibility. Suresh Shah has pleaded a case which is illegal and contrary to law apart from being opposed to public policy. Mr. Kumar submits that the version of Suresh Shah that he was engaged in cheque discounting “business” was unbelievable. These are what is known as in common parlance ‘hawala transactions’, which were prohibited being illegal and contrary to the public policy. Suresh Shah effectively seeks to convert the amount of the cheque into cash and such transaction should be shunned and the parties engaged in such transactions will

be held in *pari delicto*. Mr. Kumar further submitted that Suresh Shah had failed to prove that he received six cheques totaling to Rs.58,94,120/- from DMPL through Jajoo. Suresh Shah had failed to prove that he had received six cheques from Jajoo or that he was maintaining a account in HSBC Bank, Fort Branch as well as Vile Parle Branch apart from other bank accounts. Suresh Shah had also failed to prove that the six cheques were deposited in any bank account and / or that he made cash withdrawals from his bank accounts for being paid to DMPL / Jajoo. Suresh Shah had also failed to prove that the cash was handed over to any of the respondents 2, 3 or 4. In fact, he failed to prove cash withdrawals against any of the six cheques.

57. Mr. Kumar submitted that the bank statements, sought to be introduced in evidence, had not been proved. There is no proof of any cheque being deposited or cash being withdrawn. The deposition of Suresh Shah is evasive, contradictory and the bare statements are not believable. They are not corroborated by any documentary evidence. A large number of contradictory statements made by Suresh Shah, to which Mr. Kumar invited my attention. For instance, on some occasions, the witness Suresh Shah had contended that cash was handed over to Jajoo, some times in the office of Suresh Shah himself and some times in the office of Manubhai. However, in his evidence, Suresh Shah had deposed that he used to handover cash to Jajoo in Manubhai's office.

Contradictory evidence has been led and his oral testimony cannot be believed. Mr. Kumar therefore contended that Suresh Shah had failed to discharge the burden cast upon him. Mr. Kumar also contended that Suresh Shah had given false evidence. The fact that cheques were not handed over by Jajoo was established from the evidence of Suresh Shah to the effect that the cheque discounting and repayments in cash were conducted and orchestrated by Manubhai himself with Suresh Shah. The bare statements of Suresh Shah about withdrawing cash and paying it over are all without proof. Nothing has been placed on record to establish withdrawal of cash. In these circumstances, it is contended on behalf of the 4th respondent-Jajoo that Suresh Shah's contention about cash having been withdrawn to the extent of the amount of the cheques and having been paid over to Jajoo is false and misleading. It is further stated that an adverse inference must be drawn against Suresh Shah for making up a false case against Jajoo. The evidence of Suresh Shah suggesting that six cheques of DMPL were handed over cannot be believed. Suresh Shah could not even identify the signature of Mr. Ruia and on the cheques. The cheques have not been proved. The cheques have not been produced in evidence. There is no supporting bank statement or other evidence to prove that there were six cheques, which were handed over to Suresh Shah by Jajoo. According to Mr. Kumar, considering the proceedings in MP 64 and the parties thereto and that Suresh Shah and Manubhai were acting in concert and in consultation with

each other, the respondent no.1 – Suresh Shah had made false and incorrect statements with regard to his knowledge of pleadings and that of Manubhai in MP 64. Suresh Shah was ultimately confronted with his affidavit of 3rd March 1999, when he acknowledged the mentioning of Manubhai for the first time. In his affidavit in his own pleadings in MA 4, Suresh Shah deposed that all contents have been interpreted and explained to him in Gujarati. In effect, Suresh Shah in his oral deposition had admitted that he was unable to read, write and understand the English language. Contents of the documents have been read out to him and translated and explained to him in Gujarati. He is only able to sign in English. Pleadings, affidavits, documents etc. were in the English language. Even the oral deposition of Suresh Shah got translated into Gujarati and the court appointed interpreter was present throughout the process.

58. As regards agency and authority of respondent no.4-Jajoo, it is contended that Jajoo had failed to establish any such agency. In effect, the judgment of *Vivek Automobiles Vs. Indian INC*¹⁸ is sought to be relied upon and so also the provisions of Section 230 of the Indian Contract Act, 1872. This is a case of a “disclosed principal” and not an undisclosed principal. In the cases where the principal is disclosed, there is no occasion to hold the agent liable. The undated blank Share Transfer Form R-1/5 has also been assailed since the contents have not been proved and there is nothing in the said document which would suggest

¹⁸ 2009 Vol. 17 SCC 657

that Jajoo was an agent of DMPL or Ruia. The document has been objected to right at the outset. The signature of Jajoo has been denied and application made for appointing a handwriting expert has been withdrawn. The rubber-stamp of DMPL has also not been proved. All in all, the documents, admissibility of which has been questioned, could not be proved against Jajoo.

59. Interestingly, there is no statement on oath by Suresh Shah that R-1/5 bears a stamp of Manubhai. This form is not even signed by Manubhai. The document is entirely blank. It does not mention any number of shares or consideration, the kind of shares or distinctive numbers. The document is undated and the date of presentment of transfer form is 20th August 1991. Mr. Kumar has pointed out that Suresh Shah in his affidavits dated 21st September 2005 and 30th September 2006 had contended that transfer deeds were handed over to him by Jajoo in June, 1991. There was no mention of Manubhai signing on the transfer deed in the presence of Suresh Shah. Hence, it is obvious that Suresh Shah had given contradictory evidence.

60. Mr. Kumar submitted that, in reply to MP 64, respondent no.1 - Suresh Shah had suppressed the role of Manubhai and his involvement with Manubhai. It is contended that the agency attributed to respondent no.4-Jajoo has not been proved.

61. There is no evidence that Jajoo has retained any money received by cash for himself or that he was a beneficiary. Even the Custodian does not say that Jajoo is an agent of DMPL. Suresh Shah has not proved his case that Jajoo was engaged to collect cash and did collect cash, which was handed over by Suresh Shah. Now, respondent no.3-Ruia has contended that, at best, he would be agent for disclosed principal and hence not liable. In effect, there was no evidence whatsoever that Suresh Shah has adduced to prove payment of cash to and receipt of cash by Jajoo.

62. Suresh Shah has contended that the share transfer form was handed over to him in September 1991 and the stamp must be of September 1991; however, the document reveals that it is of August 1991. Suresh Shah then contended that he did not remember the date on which the document was signed and stamped by Jajoo. According to Mr. Kumar, this is a got up document. The transfer deed was not referred to when the affidavit-in-reply was filed in MP 64 or when the affidavit dated 3rd March 1999 was filed in present MP 4, in which Suresh Shah merely stated that Jajoo acted as authorized signatory or agent for DMPL and Ruia and would sign necessary documents including transfer deeds. This is unproven and hear-say and not to the knowledge of Suresh Shah. In the meantime, it is pointed out that Manubhai in his affidavit dated 11th August 1995 in MP 64 did not make any reference to Jajoo. All of this is sought to be

agitated since the source of the present miscellaneous petition is said to be MP 64.

63. In my view, the present petition must stand on its own feet. Whatever is to be established will have to be established by evidence in the present petition and not by relying upon what had transpired during the life of MP 64. That will be of historical significance and not necessarily binding on the decision in this matter. Mr. Kumar then submitted that merely because a document is marked in evidence, it does not mean that its contents of truth are approved. The document cannot be accepted per se. In relation to R-1/28, Mr. Kumar submitted that it was addressed to the Assistant Commissioner of Income Tax and stated that DMPL had delivered shares with blank transfer forms to Manubhai. The shares were said to be lying with Manubhai and that DMPL did not renew blank transfer deeds. The evidence of Suresh Shah is said to be false and mere marking of a document in evidence does not mean that the truth has been proved. According to Mr. Kumar, Suresh Shah had failed to prove the document and an unproved document cannot be read in evidence.

64. Referring to R-1/6, Mr. Kumar submitted that the case of Suresh Shah cannot be believed that the writing is an acknowledgment of some cash relating to the claim herein and in any event, Jajoo had denied having signed the document. The contents of the documents have not been proved by the witness.

65. Mr. Kumar recalled the instance when two miscellaneous applications were filed for appointment of handwriting expert and for summoning Mr. Panwar, both of which were withdrawn as aforesaid. R-1/6 is said to be a tampered document with notings in black ink, but as I have explained during the course of submissions, those page numbers were entered by the registry of the Special Court and nothing turns on this perceived objection of tampering. The document is certainly not tampered with, however it is true that it is undated and typewritten document on the purported letterhead of Suresh Shah. While document has been marked in evidence and Suresh Shah could have proved his letterhead, no details of the amounts said to have been paid in cash to Jajoo or as an agent for DMPL and Ruia have been provided. According to Mr. Kumar, R-1/6 is a suspicious, bogus, forged and fabricated document, without any evidentiary value, contents have not been proved and hence cannot be the basis of any liability being foisted on respondent no.4-Jajoo.

66. My attention is then invited to Exhibit R-1/30 and it is submitted that the contents of the statement dated 29th January 1993 of Jajoo had not been proved. The document has been certified pursuant to an order of this court. It is the contention of Mr. Kumar that an affidavit dated 3rd July 2008 has been filed by one Dr. Amol B. Kirtane, DCIT in relation to Show Cause Notice No.11 of 2008 in MA 87 of 2008 in MP 4 of 1996. This affidavit seeks to claim that R-1/30 is a

certified copy certified by the Income Tax Department and being a public record, it is admissible in evidence. This document has been marked as an exhibit by a separate order passed by the court and Suresh Shah has taken objection to the statement being marked since the contents thereof have not been proved. While Suresh Shah has contended that the document is produced from the record of Income Tax Department and certified pursuant to an order passed by the court, it is a record of a public authority and is a public document. This is contested by Mr. Kumar to the extent that income tax records are not public documents. In this behalf he has relied upon a case law in support of his contention.

67. I may recall here that during the marking of documents, extensive arguments were heard on admissibility of several documents. The main document wherein severe opposition was mounted by Jajoo is the copy of R-1/30. I have, after hearing parties and for the reasons set out, allowed the documents to be marked and read in evidence. Several objections have been taken to the introduction of this document inasmuch as Mr. Kumar submits that inspection of the original has not been provided, the original has not been produced and that itself is a gross violation of principles of natural justice. No inspection was given of the true copy. This I find unacceptable inasmuch as the true copy was always available in the registry of the Special Court. One had only to make request and make a search. Alternatively, one could have always

applied for taking inspection of the original in the custody of the income tax authorities, but no efforts whatsoever were made by any of the parties from 1996 till date. Mr. Kumar was at pains to submit that the statement under Section 133-A of the Income Tax Act is a private document and there is no vested right under the Income Tax Act for obtaining copies. He further submitted that there can be no presumption under Section 77 of the Indian Evidence Act in relation to proof of contents of such a document and no presumption of the genuineness of such a certified copy. Reference is made to Regulation 15 of the Special Court Regulations. It is incumbent upon Suresh Shah to offer inspection to Jajoo if he was relying on any document.

68. I do not find any merit in the submission inasmuch as it is always open for the court to pass appropriate directions in the manner of conduct of proceedings including production of documents. In the instant case I find that the court had directed the concerned officer to attend the office of the Special Court and certify the document as a true copy. This is so done obviously in order to facilitate ease of reference to the document for all parties concerned and without having to summon the income tax officer on every occasion. Thus, I find no substance in the objection of Mr. Kumar that inspection of the original had not been given since it was for the parties concerned, including Mr. Kumar's client, who could have sought inspection of the original in the income

tax records. No attempt was made to do so either directly or by approaching this court in a suitable application. Hence, this submission cannot be accepted.

69. Mr. Kumar persisted in his submission that Suresh Shah, who was required to prove Exhibit R-1/30, the maker of the document, ought to have proved it i.e. Mr. Panwar ought to have attended court and proved it. Suresh Shah had filed an application for summoning Mr. Panwar to establish this fact, however that application was subsequently withdrawn for reasons best known to the applicant. Mr. Kumar further submitted that Advocates for respondent no.1-Suresh Shah had issued a notice to produce dated 13th March 2007 addressed to the Advocates for respondent no.4-Jajoo inter alia referring to and seeking production of power of attorney (R-1/4) and the notice to admit documents. In response, Advocates for respondent no.4-Jajoo had denied all documents referred to in the notice other than the records and proceedings in respect of MP 64. It is contended that respondent no.1-Suresh Shah had no inherent right to inspect the documents; however, as I have already dealt with as above, this submission has no merit. Mr. Kumar further submitted that merely because a document is produced at the instance of the court and upon orders of the court, does not mean that the party relying on the document is not required to prove its contents or is absolved from proving the document in accordance with principles of evidence. R-1/30 it is contended is a handwritten document.

Respondent no.4-Jajoo not being the author has disputed the document and respondent no.1-Suresh Shah had not proved the contents, nor the handwriting. The author was not introduced or brought before the court and hence the document cannot be read in evidence. More importantly, it is contended that Suresh Shah was not personally present at the time of recording of the statement of Jajoo and has no personal knowledge of those documents referred to therein. Suresh Shah has also not proved his signatures on the document R-1/30. Reliance is placed on the provisions of Section 80 of the Indian Evidence Act to contend that the statement purportedly recorded under Section 133A of the Income Tax Act has no evidentiary value.

70. Reliance is placed on the decisions in *Paul Mathews & Sons Vs. Commissioner of Income Tax*¹⁹ and *Commissioner of Income Tax Vs. Khader Khan & Sons*²⁰ and *Commissioner of Income Tax Vs. Khader Khan & Sons*²¹, both of the Madras High Court and the Supreme Court, as aforesaid. Mr. Kumar also submitted that the statements under Section 133A of the Income Tax Act, although said to be under oath, the section does not provide any power to the officer to administer oath and take a sworn statement of respondent no.4-Jajoo since Section 133-A is only pertaining to the “power of survey”. No proceedings had been initiated against Jajoo. His statement was only recorded as part of the

¹⁹ 2003 SCC OnLine Kerala 677

²⁰ 2007 SCC OnLine Madras 1198

²¹ (2015) 14 SCC 491

investigation into the affairs of Suresh Shah. Even under Order XIII Rule 3 of the CPC, such a document is not admissible in evidence and in the event the court treats the statement of Jajoo as admissible, the contents cannot be relied upon since the contents have not been proved by the evidence of Suresh Shah and refusal of DMPL and T.B. Ruia to depose.

71. The evidence of Suresh Shah establishes that he has impeached his own credibility by giving false and contradictory evidence. Mr. Kumar contended that the decisions in *Pebble Investment & Finance Ltd. Vs. Income Tax Officer*²² and in the case of *Dinesh Jain Vs. Income Tax Officer*²³ do not apply in the instant case. Those judgments of the Bombay High Court are said to be per incuriam since they have not followed the ratio in *Khader Khan & Sons (Supra)*, which was approved and upheld by the Supreme Court. I am not able to accept this contention in the manner in which it is cast inasmuch as the decision of *Khader Khan & Sons* has been considered by the Bombay High Court in *Pebble Investment* and has been differentiated on facts. Mr. Kumar then contended that Manubhai was a necessary and proper party in MP 4 for a proper and just adjudication of the issues involved. Failure to join Manubhai is fatal to these proceedings since he was actively involved in the transactions and was apparently closely associated with respondent no.1 - Suresh Shah. It is contended that, from the pleadings in the present petition as well as in MP 64, it

²² 2017 SCC OnLine Bom. 7600

²³ (2014) SCC OnLine Bom 4736

is evident that Manubhai was the person responsible for the transactions in shares and also the alleged cheque discounting arrangements. Mr. Kumar has then led me through various depositions of Suresh Shah to the effect that he was not engaged in cash discounting business with Manubhai prior to 1991 and later contradicted himself to state that he was dealing with Manubhai since 1985. The contradictions, the bare statements and absence of evidence in this respect is sought to be highlighted by Mr. Kumar. Mr. Kumar then submitted that it is the Suresh Shah's case that transactions were carried out at the behest of and through Manubhai. My attention has been invited to the numerous instances where reference to cash / cheque discounting has been made in this behalf. Suresh Shah in his own evidence has alleged that all these transactions of payments and withdrawal of cash were managed and orchestrated by Manubhai and has nothing to do with respondent no.4-Jajoo.

72. Mr. Kumar then invited my attention to the pleadings of respondent no.4-Jajoo after being joined as party-respondent in MP 4. Jajoo had not deposed, did not file any affidavit-of-evidence nor did he lead any evidence. He had contended that he did not wish to file any evidence in MP 4 of 1996 and he relied on Section 230 of the Contract Act to evade any liability since he was at best an agent of a disclosed principal. Then relying on the said legal submissions, it is contended that no liability can be attached to him. It is further

submitted that Jajoo ought not to have been impleaded in the first place and at best he could have been only a witness in the transaction. Mr. Kumar also relied upon the provisions of Sections 172, 173 and 176 of the Contract Act in support of his submission that the shares handed over by way of pledge could have been invoked and if there is a default in payment of a debt, a suit could have been brought against the debtor by the creditor, who could have retained the pledge as just collateral. In the instant case, DMPL was always secured, if the loans were advanced against the pledge. There is no evidence to support the fact that the pledge was actually created and the DMPL Advocate's contention that the pledge was given up and MP 64 was withdrawn as they were interested only in recovery of money, does not fall into the factual matrix. It is further contended that the Custodian, DMPL and Ruia have failed to prove that Rs.58,94,120/- was advanced to Suresh Shah by DMPL, which was secured by pledge of shares and that the said sum was due along with interest.

73. It is therefore contended that issue nos.2 and 3 must be answered in the negative. Mr. Kumar submitted that Jajoo has denied having received any cash or having delivered any cash, as set out in his written statement, and nothing has been proved to the contrary. My attention is invited to various affidavits, pleadings and evidence, which would establish that Jajoo had no role to play. Under Section 34 of the Evidence Act, the requirement of proving books of accounts lies on the party who would fail if no evidence was led by either side.

Since none of the other parties, namely, the Custodian as petitioner or respondents 1 to 3 had produced any evidence regarding books of accounts and documents, there was effectively no evidence in that behalf.

74. As far as the issue of limitation is concerned, it was contended by the Custodian that the Limitation Act does not apply in view of the decision in *L.S. Synthetics Ltd. Vs. Fair Growth Financial Services Ltd. & Anr.*²⁴. However, Mr. Kumar sought to contend that the Supreme Court did not prevent the Special Court from deciding the question of limitation or the final hearing of this miscellaneous petition. There was no specific ouster of the Limitation Act and the judgment in *L.S. Synthetics (Supra)* was based on interpretation of Sections 3(3), 9A, 11 and 13 of the Limitation Act, which related inter alia to attachment of properties belonging to notified parties. The observations of the Supreme Court in paragraph 39 of the judgment have been highlighted. Mr. Kumar then submitted that the doctrine of delay and laches would apply and that there has been a gross and unreasonable delay in impleading respondent no.4-Jajoo and that cannot be ignored. MP 64 was filed on 5th October 1994 and Harshad Mehta was impleaded in January 1995. On the application of Harshad Mehta in June 1995, several other companies were impleaded as parties. In July 1995, Suresh Shah for the first time alleged that DMPL gave him cheques for discounting and that the cheques received were encashed and cash paid, after

²⁴ (2004) 11 SCC 456

deducting commission, through Suresh Jajoo. This, according to Mr. Kumar, establishes that there is unconscionable delay.

75. Later, in June 1995, MP 4 was filed and in October 1997, MP 64 was allowed to be withdrawn. It is only on 3rd March 1999 that Suresh Shah filed an affidavit alleging that Jajoo was involved in collecting and returning the cash to Ruia. Even then, it was not the case of Suresh Shah that Jajoo had retained the cash. In October 1999, in MP 4, a claim was made against Ruia and at that stage, it was no claim against Jajoo filed by the Custodian. It is only in February 2000 that Suresh Shah filed application to implead respondent no.4-Jajoo and accordingly that was allowed in October 2001. The impleadment of Jajoo is therefore occasioned six years after filing MP 4. This it is contended has resulted in the claim against Jajoo being barred by the law of limitation. Mr. Kumar then invited my attention to the cause of action pleaded and issue no.18. It was contended that no cause of action was disclosed against Jajoo. On reading of the pleadings, save and except a bald statement, nothing reveals involvement of Jajoo. At best, Jajoo could have been summoned as a witness by the Custodian or by Suresh Shah or even by DMPL or Mr. Ruia. This is not having been done, there is no cause of action that arises as disclosed in the pleadings.

76. Mr. Kumar has then relied upon the abatement of MP 64 upon the demise of Manubhai and withdrawal of MP 64. In support of these contentions,

Mr. Kumar has relied upon decisions in *State Bank of India, through General Manager Vs. National Housing Bank and Ors.*²⁵, *Amrit Lal Goverdhan Lalan (Dead), by his Legal Representatives Vs. State Bank of Travancore*²⁶ and *Bank of India Vs. Aiyars Advertising & Marketing Pvt. Ltd.*²⁷. The learned counsel for the respondent no.4-Jajoo also dealt on the aspect of illegality of the transactions contending that Suresh Shah had admitted that the transactions were not legal and especially in view of the provisions under Section 269T of the Income Tax Act, no payment exceeding Rs.20,000/- could have been made in cash. It is contended that Suresh Shah cannot be permitted to take advantage of such illegalities.

77. The next point urged by Mr. Kumar was based on the doctrine of *Pari Delicto*. Mr. Kumar contended that DMPL and Ruia have failed to prove that there is a loan that was secured by a pledge of shares and that the transactions involving the alleged cheque discounting and repaying the proceeds of such cheque discounted, in concurrence of the knowledge of DMPL and Ruia would effectively made them liable and guilty under the doctrine of *Pari Delicto*. It is further contended that merely because the Custodian as the petitioner, who seeks refund of these amounts, does not take away the fact that respondents 2 and 3, namely, DMPL and late Ruia, as well as Suresh Shah were all hand in

²⁵ (2013) 16 SCC 538

²⁶ AIR 1968 SC 1432

²⁷ 1993 SCC OnLine Bom 412

hand and were liable in Pari Delicto as joint tortfeasors. In these set of circumstances, it is contended that it was imperative for DMPL and Ruia to have led evidence and the blame could not be laid at Jajoo's door. On the aspect of the doctrine of Pari Delicto, reliance was placed on the judgment of *Mohammed Salimuddin Vs. Misri Lal*²⁸.

78. Mr. Kumar then contended that the revenue authorities under the Income Tax Act, 1961 were only concerned with revenue and imposing tax. Legality of the business had not been gone into and the statements made before the income tax authorities cannot be used as proof for transactions covered by the Special Court Act. Particular reference being made to the statements recorded under Section 133-A of the Income Tax Act since Jajoo was not an assessee and statement made had no evidentiary value in view of decision in *Khader Khan(Supra)*. Lastly, it is contended that no case whatsoever is made out against Jajoo. For all the aforesaid reasons, there is no occasion to pass a decree against Jajoo. Mr. Kumar thus concluded seeking dismissal of the petition as against Jajoo.

79. In addition to the judgments already referred to, at the outset, Mr. Kumar has also relied upon additional decisions on the aspect that income tax records do not qualify as public record and further judgments on the aspect of

²⁸ (1986) 2 SCC 378

limitation. Statements made under Section 133A of the Income Tax Act having no evidentiary value and the like. Further judgments were relied upon on the aspects of entries in Books of Accounts, which are required to be proved under Section 34 of the Evidence Act, the principle of in Pari Delicto and on the aspect that income tax department does not consider illegality of the transactions for the purposes of taxation, securing revenue and during the process, strict rules and regulations are not applicable. Further judgments on the principles of natural justice and security and the consequences of security being lost. It is also contended that admissions relied upon cannot be separated and must be read as a whole. The decisions of the Supreme Court in *Haji C.H. Mohammad Koya Vs. T.K.S.M.A. Muthukoya*²⁹, *Boramma Vs. Krishna Gowda and Ors.*³⁰ and *Sabir S/o. Jamaluddin Vs. Additional District Judge, Court No.4, Bulandshahar and Ors.*³¹ are relied upon. Mr. Kumar has also placed considerable stress on the decision in *Om Prakash Berlia and Anr. Vs. Unit Trust of India and Ors.*³²

80. I now propose to deal with the legal issues that have been urged before me on the aspect of liability of an agent, whose principal is disclosed. The law is fairly clear. Section 230 of the Contract Act deals with when an agent cannot personally enforce or be bound by the contracts on behalf of the principal. Section 230 is reproduced below for ease of reference.

²⁹ (1979) 2 SCC 8

³⁰ (2000) 9 SCC 214

³¹ 2003 SCC OnLine All 63

³² 1982 SCC OnLine Bom 148

“230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary—Such a contract shall be presumed to exist in the following cases:—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;*
- (2) where the agent does not disclose the name of his principal;*
- (3) where the principal, though disclosed, cannot be sued.”*

81. There is a presumption of contract to contrary and that presumption comes to play when an agent does not disclose the name of his principal or where the principal, though disclosed, cannot be sued. In the present case, that situation does not arise. It is Suresh Shah’s case that Jajoo was the agent of DMPL and/or Ruia. The principal in any case is disclosed and hence the presumption of a contract to the contrary cannot arise, as a result of which Jajoo will not be bound personally by the contracts entered into by DMPL.

82. The other issue that arises is whether transaction itself was legitimate and whether it can be construed as a contract at all since interpretation of a contract would require existence of an agreement or agreement enforceable by law. In the present case, the transaction described as “cheque discounting” was clearly not enforceable by law and, prima facie, could not be construed as a contract. By that reckoning, the question of agency would not arise in any event.

83. One other crucial aspect that needs to be considered is whether the statement made under Section 133A of the Income Tax Act has evidentiary value and in this respect, Jajoo has relied upon the decisions in *S. Khader Khan Son (Supra)* of Madras High Court and Supreme Court, but what it omits to consider is that in *Pebble Investment (Supra)*, this aspect has also been considered and the decision of the Supreme Court in *S. Khader Khan Son (Supra)* has been differentiated.

84. There is serious opposition from Mr. Kumar to R-1/30 being read in evidence at the time of marking R-1/30. Various grounds have been taken. Mr. Gautam Mehta had on behalf of respondent no. 4 relied upon a chronology of events in respect of R-1/30. Mr. Kumar today submits that on 3rd March, 1999 an affidavit in reply was filed by respondent no.1 and in paragraph 5(g) reference was made to a statement of respondent no.4 said to have been recorded under section 131 of the Income Tax Act. It is submitted that such

statement was not produced in these proceedings. Moreover, on 3rd August, 1999, an affidavit-of-documents came to be filed but it contains no reference to statement under Section 131 or 133A. On 23rd September, 2005 for the first time a photocopy of R-1/30 was annexed to a compilation of documents filed by respondent no. 1 which was tendered along with affidavit of evidence of 21st September, 2005.

85. Mr. Kumar submitted that Suresh Shah was aware that the statement was believed to have been recorded by one S.S. Panwar on behalf of the Income Tax Department. My attention is invited to the notes of evidence of that date. I find that on 29th August, 2007 MA/200/2007 was filed by respondent no. 1 seeking issuance of witness summons to the Income Tax department. It sought production of respondent no. 4's alleged statement under section 133A from the custody of the Deputy Director of Income Tax DDIT (Inv) at Scindia House, Ballard Pier. Production was also sought from the ACIT, Marine Lines office. The record indicates that on 29th September, 2007 pursuant to MA/200/2007 an order was passed directing Dr. Amol Kirtane, Asst. Commissioner of Income Tax ("ACIT") to certify the photocopy of the statement under section 133A as true copy. Mr. Mehta had then submitted that this was not on merits but merely on the basis of statement of officer who was then present in court.

86. Mr. Kumar invites me to hold that although proceedings under the Special Courts Act are not to be controlled by the provisions of the Civil Procedure Code, the provisions of the Evidence Act are attracted. Mr. Kumar has also relied upon the following decisions to emphasize that Article R-1/30 carries no evidentiary value. This aspect has already been considered by me in my order dated 29th April 2022 with consequences to follow.

87. Mr. Mehta also submitted that R-1/30 cannot be admitted as a public document since Income Tax records cannot be treated as public document and to that extent he relied upon decision of *Juhi Chawla (supra)* and the decision in *Anubhav Ajmani (supra)* of the Madhya Pradesh High Court. In *State Bank of India (supra)* Mr. Mehta relied upon observation of the Supreme Court held although the Special Court is not bound by procedure under the Civil Procedure Code it has power to regulate its own procedure but shall be guided by principles of natural justice and cannot violate basic principles of adjudication of claims and entitlements and that relief can only be decreed on the basis of legally admissible and proved evidence there by alluding to the contention that the Special Court is bound by the Evidence Act. The Special Courts Act vide section 9-A (5)(d) clearly provides that the Court shall have the same powers as are vested in Civil Court while trying a suit for summoning witness, requisitioning any public record or documents or copy of such record or

document from any office. Section 9-A(4) provides for observance of principles of natural justice.

88. Even if it is for academic purposes, I am unable to accept version of Mr. Kumar that a statement under Section 133A has no evidentiary value. That having been said, the question that also needs to be considered is whether the contents of the statement have been proved.

89. On the aspect of limitation, *L.S. Synthetics (Supra)* has laid down the law on this aspect and in doing so, quoted with approval the decision of the Special Court in *A.K. Menon, Custodian Vs. Modern Chemical Corporation (Supra)*, in which the Supreme Court observed that, an action of this nature initiated by the Custodian is at the instance of the court and it is the duty of the court to recover the amount and no period of limitation can be applied to any act to be done by the court and that is precisely what the present petition seeks to do, to recover the amount due from the notified party and make it available for distribution, if at all the amount is due. *L.S. Synthetics (Supra)* has concluded that a notified party have the locus to bring certain facts to the notice of the court about any amount that is due and owing to him on a third party, whereupon a proceeding can be initiated by the Custodian. The Supreme Court has held that the provisions of the Limitation Act, 1963 have no application in relation to the proceedings under the Special Court Act. I am therefore unable to accept the

contention on behalf of Suresh Shah that the claim is barred by the law of limitation and the issue framed on the aspect of limitation must be and is answered in the negative.

90. Reliance is placed on *Mohd. Salimuddin Vs. Misri Lal and Anr.*³³, dealing with Doctrine of Pari Delicto, wherein the Supreme Court has held that, the doctrine is not designed to reward the ‘wrongdoer’ or to penalize the ‘wronged’, by denying to the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. In the instant case, the doctrine appears to be correctly cited since all parties have pleaded a role in some form or the other to prevent the complete truth from emerging, as observed in *State Bank of India, through General Manager Vs. National Housing Bank and Ors.*³⁴ by the Supreme Court citing the Special Court’s judgment. The appellant led no oral evidence and merely tendered documents. One of the respondents attempted to lead evidence but had no personal knowledge and one of the respondents led no oral evidence and merely tendered documents. There is similar facts at hand wherein DMPL has not led evidence nor did its Managing Director – T.B. Ruia at all material times despite an order of the court indicating that he would be expected to be

³³ (1986) 2 SCC 378

³⁴ (2013) 16 SCC 538

stepped into the witness-box. Instead, DMPL led evidence of Suresh Shah despite availability of late Ruia at all material times. In defence, Suresh Shah led evidence, but, in my view, has not succeeded in establishing his case of payment. The Custodian was always depending upon DMPL for providing information and otherwise he was helpless. Respondent no.4-Jajoo also does not step into the box.

91. Along with Issue no.2, Issue no.3 becomes relevant since it requires the Custodian, on behalf of DMPL, to establish that monies had been advanced to Suresh Shah, which were duly secured by pledge of shares, as contended by DMPL in its affidavits. It is in this context that the affidavits and pleadings filed on behalf of DMPL become relevant. Although the factual matrix is very similar to that in MP 2 and MP 3, the extent of evidence that has been led in the present case by Suresh Shah marks a departure from the earlier two matters. However, the pleadings on the basis of which the parties are before the court are largely similar and in this behalf, one N.C. Dangarwala, Director of DMPL, at the material time, has filed his affidavit dated 19th January 1996, in which he has asserted the claim in the petition. After relying upon the pleadings in MP 64 of 1994, the deponent has contended that DMPL had advanced a sum of Rs.58,94,120/-to Suresh Shah, as set out in MP 64. Mr. Dangarwala has admitted that his deposition is based on records and information derived from

records of DMPL, indicating in no uncertain terms that he has no personal knowledge of the factual aspects.

92. Incidentally, a day prior to the affidavit of Mr. Dangarwala i.e. on 18th January 1996, an affidavit has been filed by T.B. Ruia—respondent no.3, who claims personal knowledge of the factual aspects. Strangely, the affidavit of Ruia affirms the contents of Dangarwala’s affidavit, which had not been affirmed when Ruia affirmed his affidavit. The said Dangarwala has in his affidavit made reference to the claim of DMPL against said Suresh Shah, as incorporated in MP 64 of 1994. He repeats and reiterates what he has stated in his affidavit filed in MP 64 and contends that the amount in question had indeed been paid over to Suresh Shah against pledge of shares and in consideration of return on interest @ 24% p.a. The aspect of loan is therefore reiterated on the basis of documents and records with DMPL. As an alternative plea, Dangarwala has stated that assuming that DMPL has received the amount in cash, it would be an illegal transaction and would not discharge Suresh Shah from liability that he would continue to be liable to pay the aforesaid sum of Rs.58,94,120/- along with interest thereon.

93. The affidavit of late Ruia on the other hand is based on personal knowledge. He has referred to the contents of MP 64 of 1994 and the affidavit of Dangarwala filed in the proceedings. He affirms the contents of DMPL’s case

in MP 64. He denies having received any amounts in cash from Suresh Shah through Jajoo either in his personal capacity or as Managing Director of DMPL. Ruia has denied having entered into any illegal transaction, as alleged. What is material is that late Ruia admits that, at the relevant time, he was a Managing Director of DMPL and was in control of day-to-day affairs. Late Ruia was aware of the facts and circumstances of the transaction between DMPL and Suresh Shah. Late Ruia's deposition was necessary because of personal knowledge Ruia possessed unlike that of Dangarwala, who has deposed on the basis of records of DMPL.

94. The question to be considered is what is the nature of the record of DMPL that has been relied upon and in this behalf, we find that Dangarwala has affirmed an affidavit-of-documents on 13th August 1999, which contains a schedule consisting of two parts. Part-I, as is customary, sets out the documents that he has in his power and possession. These include copies of papers and proceedings in MP 64 of 1994, copy of the Ledger Account, Cash Book for the year 1990-91, 1991-92 and original Ledger Account and Cash Book for the year 1992-93 and, lastly, copies of bank statements. No particulars have been provided of any of these items. Part-II is restricted to instructions to draft Petition No.64/94 and affidavits and written statements. These are the only documents that have been disclosed as being in the possession of DMPL and on the basis of which DMPL seeks to establish its case of a loan repayable with

interest @ 24% p.a. The documents disclosed do not assist DMPL or Ruia to establish that the amount advanced was a loan. In the light of the fact that Dangarwala deposed on the basis of record of DMPL, it was incumbent upon him to produce those records and disclose them in the affidavit-of-documents. True, it cannot be contemplated that CPC applies in full force, but the basic nature and purpose of an affidavit-of-documents is to all documents in the power and possession of the deponent/party. In the instant case, while late Ruia claimed personal knowledge of facts, he does not lead evidence. Instead, Ruia approves the deposition of Dangarwala, who relies on the records of DMPL. Considering the assertion that the amount advanced was a loan, the records of DMPL should have brought that out. The documents disclosed do not bear out the case of the Custodian that this was a loan.

95. From the conduct of late Ruia, I could infer that the relevant records are suppressed, because, despite a full opportunity granted to establish their case, DMPL/Ruia have consciously avoided availing of the opportunity of late Ruia deposing. Late Ruia's evidence would have been the best evidence considering his admission to being personally aware of the facts, but he chose not to depose. In view of the above, Issue nos.2 and 3 are answered in the negative, because, if the loan is not proved, there was no occasion to consider whether the loan was secured by a pledge of shares or at all.

96. Issue no.7 requires the petitioner to prove that Suresh Shah illegally and fraudulently diverted monies from DMPL and paid them over to DMPL and or Ruia. If that is established, then whether it still would not discharge the respondent of his liability to DMPL. The diversion of monies has not been established. The fact that monies were advanced to Suresh Shah has been admitted during the evidence; however, there is nothing to indicate that the amount was converted to cash and was paid over to either DMPL or Ruia through Mr. Jajoo or otherwise. The Custodian while canvassing this case has in no uncertain terms contended that there is no question of any discharge in the present case. According to Mr. Chandran, nothing has been shown by way of proof that Suresh Shah had paid back any monies to DMPL. The cheques however had been encashed. According to the Custodian, the liability to repay the amounts that were received continues; however such obligation to repay in my view would only arise if the amount advanced was by way of a loan in first place. In the instant case, it is evident that there is no loan that has been established. Absent a affirmative finding on issue no.2, the answer to issue no.7 must be and is answered in the negative.

97. Hence, I hold that the petitioner-Custodian / DMPL / Ruia have failed to prove that Suresh Shah illegally or fraudulently diverted monies from DMPL and paid them over to DMPL, which in any event would not grant Suresh Shah a

discharge. Evidence of Suresh Shah is grossly insufficient to establish that he withdrew the amounts in cash or paid over the amounts so withdrawn to Jajoo for payment onwards to DMPL or Ruia.

98. Having dealt with issue no.7, it is now time to consider Issue nos.17 to 22, excluding for the moment Issue no.20. As far as issue no.17 is concerned, the Custodian has not been able to establish that the transactions are fraudulent or of mode of diverting monies from DMPL to respondent no.3. The issue itself contemplates transactions which are disputed. In my view, it was necessary for the Custodian to establish that there was diversion of monies from DMPL to Ruia. The so called business of cheque discounting has been propounded by the 1st respondent. Ruia and DMPL have disputed that any business of cheque discounting was carried out. In fact, Suresh Jajoo has also disputed the so called arrangement of cheque discounting. It is only Suresh Shah who has canvassed this point in an effort to establish that the monies received by him had been paid back. However, he has failed to establish that with evidence. It was open to Shah to produce or summon the witnesses – the banks or the other persons, whose names have been referred to in the course of the trial who are believed to have handled the cheques issued by DMPL and handling the cash, which was withdrawn pursuant to encashment of those cheques. However, no attempt has been made to lead evidence of these persons in order to establish beyond doubt

that monies received via cheques to the extent of the suit claim were returned to DMPL and/or Ruia in cash. Absent any such affirmative finding, issue no.17 is answered in the negative.

99. As far as issue no.18 is concerned, the Custodian has contended that the petition does not reveal a cause of action by virtue of averments of Suresh Shah that amounts received by him had been paid back through Jajoo, but presently the evidence does not disclose the involvement of Jajoo in handling the cash and hence, Mr. Chandran states that the petition does not reveal any cause of action as against respondent no.4-Jajoo. The allegations against Jajoo in the course of the trial is multi-pronged. On the one hand it is contended that Jajoo was an agent of DMPL and/or Ruia and he was involved with Manubhai as well, it is contended that he was involved in handling the cheques, handing over the cheques to Suresh Shah as well as collecting the cash and paying over the cash to DMPL and/or Ruia. Reliance is placed on his statement recorded under Section 133A of the Income Tax Act, in which he admits to have received monies and having paid over the monies. Incidentally, there is no allegation that respondent no.4 has retained these funds.

100. None of the parties have alleged that respondent no.4 has retained these funds. Suresh Shah has merely contended that having paid over the amounts in

cash to Jajoo, Suresh Shah has no liability. However, both DMPL and Ruia, have supported the case of Jajoo and contended that Jajoo has not retained any cash. In fact, it is the case of the DMPL and Ruia that no monies whatsoever have been paid in cash. Once DMPL and Ruia speak in one voice in support of Jajoo and on the basis that no amount has been received in cash either by them or by Jajoo, in my view, there is no occasion for the Custodian to separately establish that Jajoo was recipient of cash and was entitled to pay back the amounts. Thus, in my view, the issue no.18 must be answered in the negative and is accordingly held in the negative.

101. Issue no.19 seeks to lay the burden on the Custodian and DMPL as to whether the Custodian or DMPL are entitled to seek monies under the transactions which are termed as illegal. The cheque discounting business has been clearly found to be not legal and therefore whether the Custodian could recover these amounts forming subject matter of any illegal transactions. In the present case, the evidence does not establish that Suresh Shah had engaged in such cheque discounting business. No evidence whatsoever has been placed on record to indicate when these proceeds of the cheques were individually paid over to DMPL and / or Ruia. Absent clear and cogent evidence on this aspect, there is no question of rendering a finding on these transactions. Only if there was evidence that cash had been dealt with and was paid over out of the funds

received by the cheque payments admitted by Suresh Shah would an occasion arise to consider whether these were illegal transactions. For the present, I am of the view that the evidence does not disclose anything to enable the court to hold that illegal transactions were carried out and that DMPL are entitled to seek return of monies under such transactions. Issue no.19 is therefore answered in the negative.

102. Since the business of cheque discounting has occupied center stage in the present adjudication, it would be appropriate in my view to consider issue nos.4, 9, 14 and 16 together. Issue no.4 required Suresh Shah to prove that he was engaged in the business of cheque discounting with DMPL and/or Ruia and in the interest of Suresh Shah. Large portions of his depositions are dedicated to the process of cheque discounting. I may observe here that the use of the term “cheque discounting” is not in that sense used in similar to banking parlance, but in a loose manner. What Suresh Shah has deposed to is the fact that DMPL would issue cheques in his favour. These cheques would be banked by him and encashed by him and an amount equal to the cheque value would then be withdrawn, 1% of that value would be retained by him as commission and the balance 99% would be paid over to DMPL and Ruia through Suresh Jajoo. The aspect of paying over the cash has not been made out. The evidence all suggests that the amounts paid over by DMPL were received by Suresh Shah in his

accounts. This fact is admitted by Suresh Shah, however it is his case that he has discharged his obligations under the so called cheque discounting business by paying over an amount equivalent to 99% of the value of the cheque to the company and/or its managing director. In my view, in the absence of any concrete evidence to establish that the value of the cheques were paid over in cash, there is no occasion for the court to hold in favour of Suresh Shah. Issue no.4 is therefore answered in the negative for want of evidence of any kind of cash payments to DMPL, Ruia directly and/or through Jajoo.

103. Reliance upon the statement R-1/30 alone is of no consequence inasmuch as by R-1/30, Jajoo has admitted receiving funds, engaging in the cheque discounting business and paying over the cash to DMPL. It is not the case of any of the parties here that Jajoo has retained any funds. According to him, he was obliged to DMPL and Ruia with whom he had business relations and in that context, he has not engaged in the activity of collecting cash from Shah and handing it over to DMPL / Ruia with the intention of receiving any consideration. Hence, it is the case of Suresh Shah that Jajoo has collected the monies and Suresh Shah is discharged upon payment of those monies.

104. Issue no.9 requires proof as to whether Shah received the cheques drawn by DMPL in his favour aggregating to Rs.2.28 crores for the purposes of

discounting or as an advance / loan repayable with interest @ 24% and in my view, there is no evidence to suggest that the amounts paid over to Suresh Shah was by way of an advance or a loan repayable with interest. There is also no evidence of any cheque discounting activity that Suresh Shah is alleged to have carried out at the instance of DMPL. Thus, read with the answer to issue no.2, in which I have held that the Custodian / DMPL had failed to establish that DMPL had advanced monies as a loan repayable with interest as aforesaid, there is no occasion to hold in favour of Suresh Shah. Issue no.9 is therefore answered in the negative.

105. Although issue no.14 seeks to consider whether Suresh Shah was entitled in law to contend that he had paid back the amounts in cash in the light of provisions of Section 269-T of the Income Tax Act, submission is to the effect that the said provision does not apply in cases of individuals and therefore, there is no bar in making payments in cash. To my mind, the issue does not arise in view of the fact that issue no.2 has been answered against the Custodian, DMPL and / or Ruia and also having held that there is no evidence to suggest that any of these amounts were repaid in cash. Absent evidence that amounts were paid back in cash, Issue no.14 does not arise.

106. Considering the aspect of cheque discounting further, we find that issue

no.16 required Suresh Shah to prove that cheques were received from Jajoo on behalf of DMPL and Ruia for the purposes of cheque discounting. I am of the view that there is no evidence whatsoever to suggest that Suresh Shah received any cheques from Jajoo and for the purposes of encashment of cheques and paying over the amounts in cash, as contemplated. Issue no.16 is therefore answered in the negative.

107. As far as issue no.20 is concerned, I have already held that the petition cannot be barred by principles of res judicata or constructive res judicata and that takes us to issue no.21, which seeks to impose upon DMPL the burden of establishing that it could claim the amount of Rs.58.94 crores receivable by it from Jajoo, despite not having claimed the amount till the petition was filed. In that respect, I refer to issue no.18 and the answer to issue no.18, which I have held to be in the negative. The petition, to my mind, does not disclose a cause of action against respondent no.4-Jajoo in the facts of the case and hence, there is no question of DMPL claiming any amounts from Jajoo. The Custodian has also opined that according to the Custodian, no cause of action has been disclosed against Jajoo. In these circumstances, issue no.21 must be answered in the negative and it is accordingly answered in the negative.

108. The next set of issues pertain to the creation of an agency as far as

respondent no.4-Jajoo is concerned. It is the case of the 1st respondent-Suresh Shah that Jajoo was an agent of DMPL and/or Ruia. In this respect, Issue nos.5, 6, 10, 11, 12, 13 and 15 are relevant since these issues are focused on an agency, if any, having been created in favour of Jajoo, whether Jajoo acknowledged receipt of cash from Suresh Shah, if any, as agent for DMPL or Ruia. The question that arises is whether Jajoo was an agent of DMPL and/or Ruia ? Whether Suresh Shah paid to and Jajoo received cash and issued an acknowledgment for cash received as contended by Suresh Shah as an agent and whether Jajoo had been appointed by DMPL and/or Ruia as authorized signatory or agent to collect cash amounts upon the cheques being discounted. Issue no.5 specifically requires proof that Jajoo was an agent of DMPL and/or Ruia as contended by Suresh Shah in his affidavit dated 3rd March 1999. Having considered all the factual aspects, the evidence led by Suresh Shah and his extensive cross-examination, I am of the view that there is no evidence to establish that Jajoo was an agent of DMPL or Ruia for the purposes and as described in the affidavit-in-reply of Suresh Shah. The only limited aspect that must be borne in mind is that Jajoo has not denied the fact that there was a power of attorney granted to him. Those powers of-course were limited to carrying out transactions in shares for buying, selling and transferring those shares. The powers conferred upon him by the power of attorney do not in my view entail that the Jajoo was an agent with wide powers including to deal with third parties, collected cash on behalf of DMPL and Ruia

and deal with the same. This not having been established, I answer Issue no.5 in the negative.

109. I now consider issue no.6, which requires Shah to prove that Jajoo issued a writing acknowledging receipt of cash amounts paid by Jajoo and as reflected on the affidavit dated 3rd March 1999 filed by Suresh Shah. In my view, the writing in question has not been admitted in evidence. There is no proof of its execution by Jajoo and absent such proof, it is not possible to hold in favour of Suresh Shah. Issue no.6 is answered in the negative.

110. I now proceed to consider issue nos.10, 12 and 15. Having answered issue no.6 in the negative, I find that issue no.10 also must be answered in the negative since it pertains to the aspect of agency and considering the evidence on record, I am of the view that Jajoo was not an agent for collection of cash but appears to be an agent for a limited period of time. Issue no.10 is therefore answered in the negative. As far as issue no.12 is concerned, no proof has been furnished to establish that Suresh Shah paid or repaid amounts due to Jajoo as an agent of DMPL. The evidence adduced does not indicate that Suresh Shah paid monies to Jajoo as an agent and representative of DMPL. Once that aspect is clear, there was no question of concluding in favour of Suresh Shah on issue no.12. Issue no.12 is therefore answered in the negative.

111. For reasons that I have already been spelt out above, issue no.15 must be answered in the negative since Suresh Shah has failed to establish that DMPL and/or Ruia had appointed Jajoo in order to collect cash amounts against the cheques being discounted. The power of attorney that has been referred to has not been marked to be read in evidence. The original has not been produced and only based on a copy, it was being contended that Jajoo had been appointed as an agent of DMPL and/or Ruia. In my view, nothing on record indicates that Jajoo was engaged to collect cash amounts. Jajoo's relationship with DMPL and Ruia has been brought out in the cross-examination of Suresh Shah and in my view, nothing on record suggests that the Jajoo was engaged for the purposes of collection of cash. The 4th respondent-Jajoo, it is observed, claims to be a stock broker in his own right. In my view, the concept of agency, as canvassed by Suresh Shah, has not been established save and except for limited powers under the power of attorney to deal with shares, to trade in shares etc.

112. That brings me to consider issue nos.7 and 14, which deal with the aspect of illegalities. Issue no.7 has already been dealt with in this judgment. As far as issue no.14 is concerned, I have already held that it does not arise for consideration.

113. In these circumstances, one has only to consider the issue no.8, read with issue no.22. To my mind, once I have concluded that the Custodian, DMPL and

Ruia have failed to establish that the amounts claimed herein was a loan. There is no occasion to grant any relief in this petition. Issue nos.8 and 22 are thus answered in the negative. The petitioner-Custodian, DMPL and Ruia have failed to make out a case of monies having been lent in advance to Suresh Shah, which was repayable with interest.

114. In these circumstances, the petition cannot succeed and I pass the following order :-

- (i) Miscellaneous Petition No.4 of 1996 is dismissed.
- (ii) No order as to costs.

[A.K. MENON, J.]