CASE NO.:
Appeal (civil) 7941 of 1995
Appeal (civil) 8340 of 1995

PETITIONER:
Citi Bank N.A.
Canara Bank & Ors.

RESPONDENT:
Standard Chartered Bank & Others
WITH Citi Bank N.A. & Ors.

DATE OF JUDGMENT: 08/10/2003

BENCH:
R.C. Lahoti & Ashok Bhan.

JUDGMENT:
J U D G M E N T

BHAN,J.

This judgment shall dispose of Civil Appeal No.7941 of 1995 arising in Suit No.22 of 1994 (filed by Standard Chartered Bank against Citi Bank & Others) decided on 10th July, 1995 and Civil Appeal No. 8340 of 1995 arising in Suit No. 20 of 1994 (filed by Citi Bank against Standard Chartered Bank & Others), decided on 7th July, 1995. Suits were tried by the Special Judge appointed under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992, hereinafter referred to as 'the Act'.

During 1991-92, Reserve Bank of India noticed that large scale irregularities and mal practices were committed in transactions in both the Government and other securities, by some brokers in collusion with the employees of various banks and financial institutions. The said irregularities and mal practices led to the diversion of funds from banks and financial institutions to the individual accounts of certain brokers. To deal with this situation and, in particular, to ensure speedy recovery of the huge amount involved and to punish the guilty and restore confidence in and maintain the basic integrity and credibility of the banks and financial institutions, this Act was enacted for establishment of Special Courts to be presided over by a sitting Judge of the High Court to be nominated by the Chief Justice of the High Court within the local limits of whose jurisdiction the Special Court is situated, with the concurrence of the Chief Justice of India. The Act provided for appointment of one or more Custodian for attaching the properties of the offenders with a view to prevent diversion of such property by the offenders. The Custodian, on being satisfied, on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 6th June, 1992 could notify the name of such person in the Official Gazette. Special Courts were given the jurisdiction to deal with cases of civil as well as criminal liability of the notified person.

The present appeals arise out of a set of transactions between three parties, namely, the Citi Bank, Standard Chartered Bank (for short 'SCB') and Canbank Mutual Fund (for short 'CMF') through its trustees.

Suit No. 22 of 1994 filed by SCB has been decreed against the Citi Bank and that is how the Citi Bank is in Appeal in Civil Appeal No. 7941 of 1995 and Suit No. 20 of 1994 filed by the Citi Bank has been decreed against the CMF and that is how CMF is in appeal in Civil Appeal No. 8340 of 1995.

The brief facts giving rise to these appeals are: Citi Bank is a corporation incorporated under the laws of United States of America, carrying on business of banking, inter alia, at Sakhar Bhavan, Nariman Point, Bombay. SCB is a bank incorporated by royal charter under the laws of England and Wales. CMF is represented through its trustees. CMF was made a party respondent along with its trustees in Suit No. 22 of 1994 filed by SCB initially; they were given up on the application of SCB on 10th July, 1995. CMF has been made a party in Civil appeal No. 7941 of 1995 (in Suit No. 22 of 1994), though as stated above it had been deleted from the array of parties in the suit at the instance of the plaintiff SCB.

On 27th May, 1991, CMF purchased certain securities (11.5% GOI 2009 Bonds) from the Bank of Karad. Citi Bank purchased from CMF 11.5% GOI 2009 bonds of the face value of Rs.44,93,20,414.17 p. for Rs.44.8505 crores on the same day. The total consideration was paid by the Citi Bank to CMF. CMF handed over to the Citi Bank their Subsidiary General Ledger (for short 'SGL') Transfer Form, duly executed on their behalf to enable the Citi Bank to get the said securities duly transferred to their name in the SGL maintained by the CMF with the Reserve Bank of India. CMF maintains with the Public Debt Office (for short 'PDO') of the Reserve Bank of India an account into which its purchase of the Government of India Securities were credited and whenever it desires to sell any Government securities, instead of physically handling the papers, it merely issues a SGL transfer form which can roughly be equated to a non-negotiable account payee cheque in favour of the transferee. A SGL has to be issued in favour of a named person and no blank SGL transfer form can be issued under the Regulations governing the use of SGL transfer form framed by PDO of the Reserve Bank of India.

Citi Bank on 27th May, 1991 presented the SGL transfer form to the Reserve Bank of India but the same was dishonoured for want of insufficient balance. An endorsement to that effect was made on the SGL form. It was presented once again on 6th June, 1991 when it was again dishonoured for want of balance.

On 18th & 19th September, 1991, Citi Bank agreed to sell to SCB 11.5% GOI 2009 Bonds of the face value of Rs. 42 crores and Rs. 8 crores respectively against receipt of the purchase price paid by the SCB to the Citi Bank. Since the bonds were not ready, the Citi Bank issued two Bankers Receipts (for short 'BRs') Nos. 0912621480 and 0912611410 for the said Bonds with the understanding that the Bonds will be delivered when ready in exchange for the duly discharged BRs and in the mean time the BRs will be held on account of the SCB. A seller issues a BR acknowledging its liability to deliver the purchased securities, when purchaser has made the payments. The exact term mentioned in the BR is as follows:

"The Securities/Debentures/Bonds of face value of Rs.42,00,000.00 will be delivered when ready in exchange for this receipt duly discharged and in the meantime the same will be held on account of Standard Chartered Bombay."

By a letter dated 19th September, 1991, the SCB requested the Citi Bank to deliver to the SCB, SGL forms issued by CMF in exchange for the two BRs issued by the Citi Bank. Accordingly, the Citi Bank delivered to the SCB, the (1) SGL form which had been issued by CMF in its favour of the face value of Rs. 44.8505 crores and (2) their own SGL form of the face value of Rs.5,41,95,000/- in exchange of the two BRs making it equivalent to Rs. 50 crores i.e. the amount advanced by SCB for purchase of the GOI

Bonds. SCB delivered to the Citi Bank, the two BRs duly discharged which had been earlier issued by the Citi Bank in favour of SCB. The letter dated 19th September, 1991 written by SCB to the Citi Bank is to the following effect:

"We hereby enclose two BRs (1) 42 crores (2) 8 crores issued by you of 11.5% GOI 2009 on 18.9.91 & 19.9.91 respectively. We now request you to give us SGLs of Canbank Mutual Fund in exchange of the same."

[emphasis added]

Allegedly on 8th of October, 1991 SCB addressed a letter to the CMF requesting CMF to issue a fresh SGL transfer form in its name in lieu of SGL transfer form received by the SCB from the Citi Bank. CMF in their written statement in Suit No. 22 of 1994 denied having received the said letter. The letter was attached by the SCB with its plaint in Suit No. 22 of 1994 and this fact was mentioned in the plaint as well. Another important fact which needs to be noticed is that on 25th November, 1991 SCB received the interest due as on 19th November, 1991 of the said bonds vide cheque No.944073 dated 25th November, 1991 in the sum of Rs.2,56,33,787.50 p. drawn on Andhra Bank. The interest was neither received from the Citi Bank nor from the CMF. The same was received from a third party whose name was not disclosed in the plaint by the SCB. Citi Bank's SGL form of the value of Rs. 5,00,95,000/- was duly encashed by the SCB and there is no dispute about it.

On 17th June, 1991 SCB addressed their advocate's letter to the Citi Bank calling upon the Citi Bank to forthwith handover to SCB the consideration of Rs. 44.8505 crores paid to the Citi Bank with further interest in respect of the said bonds as they had not received delivery of the said bonds from CMF in spite of the lapse of over nine months from the date of giving of the SGL of CMF. Advocate for the Citi Bank sent a reply to the advocate's notice of SCB refuting the claim of the SCB. According to the Citi Bank, the liability of the Citi Bank to deliver the securities (11.5% of GOI 2009 Bonds) under the contract of sale between the Citi Bank and SCB stood discharged and the Citi Bank ceased to be liable to carry out any further obligation in respect of the said transactions.

On 8th October, 1992 SCB filed a suit against the Citi Bank in the Federal Court at New York claiming consideration paid by the SCB to the Citi Bank. SCB also filed a suit bearing No. 3837 of 1992 in the High Court of Judicature at Bombay on its original side against the Citi Bank for recovery of the aforesaid amount due towards the Bonds. Citi Bank made an application to the Federal Court at New York seeking dismissal of the suit on the ground of forum non-convenience. By an order dated 22nd April, 1994 the Federal Court dismissed the said suit, inter alia, granting liberty to the SCB to revive the suit in the event the suit filed by the SCB in the Bombay High Court was not disposed of within a reasonable period of time. Before the service of summons in Suit No. 3837 of 1992, Citi Bank filed a suit in the nature of third party proceedings being Suit No. 20 of 1994 before the Special Court at Bombay constituted under the Act, inter alia, against the SCB, CMF and its trustees in which the Citi Bank pleaded that in the event of a decree being passed against the Citi Bank and in favour of the SCB in Suit No. 3837 of 1992 filed by the SCB against the Citi Bank, Citi Bank was entitled to a decree against CMF for delivery of the original securities, or, in the alternative for the refund of the consideration paid and for other reliefs.

Plaint in Suit No. 3837 of 1992 was returned by the High Court for being presented to the Special Court because one of the parties notified under the Act was involved. The suit was transferred to the Special Court and renumbered as Suit No. 22 of 1994. Citi Bank after service of the summons in Suit No. 22 of 1994 filed its written statement.

Primarily the case of SCB against the Citi Bank was for return of money on the ground that for consideration which was paid on 18th and 19th

September, 1991, it had not received the transacted securities. That Citi Bank expressly/impliedly warranted that CMF would transfer the Bonds and on its failure to do so, the Citi Bank was obliged to deliver the Bonds. That the action of Citi Bank was fraudulent and amounted to deceit. That 'useless' and 'worthless' SGLs were given by Citi Bank which even could not be transferred in its name. In the written statement filed by SCB in Citi Bank's suit an additional plea (which is absent in its own suit filed two years earlier) was taken to the effect that the SGL sought by SCB was an SGL of CMF in favour of SCB and not the one drawn in favour of Citi Bank. Citi Bank in its defence in suit no. 22 of 1994 pleaded and contended that as SCB had on its own volition asked for and took the SGL of CMF which was in its possession and returned the two BRs duly discharged and therefore the Citi Bank was no longer under any obligation to either pay any sum or to deliver any securities much less to refund the money. That SCB returned two BRs duly discharged in exchange of the SGL of CMF at its express desire. The obligation to deliver bonds under BRs was substituted by delivery of the SGL of CMF. Citi Bank similarly claimed complete discharge in its own suit. Citi Bank in its suit claimed for a decree against CMF in case a decree was passed against the Citi Bank in the Suit filed by SCB. The defence taken by the CMF in the two suits was more or less common. In substance it was that all these transactions were part of Hiten Dalal's transactions with SCB and that CMF as well as Citi Bank were merely used as a conduit to pay monies from the Bank of Karad which was basically a Hiten Dalal's account to SCB and from SCB to the Bank of Karad and that all these transactions were in pursuance of an arrangement which Hiten Dalal had with SCB under which SCB used to "Park" funds with Hiten Dalal for guaranteed return of 15 percent, although this parking of funds was shown simulated transaction in securities.

On these broad pleadings the following separate issues were framed in Suit No.20 of 1994 between Citi Bank and SCB (Set A) and between Citi Bank and CMF(Set B):

ISSUES IN SUIT NO. 20 OF 1994

A. ISSUES BETWEEN THE PLAINTIFF (CITIBANK N.A.) AND DEFENDANT NO. 2 (STANDARD CHARTERED BANK).

1. Whether the liability of the Plaintiffs towards Defendant No. 2 stood discharged and the Plaintiffs ceased to be liable as alleged in paragraphs 8 and 9 of the plaint?
2. Whether the liability of the Plaintiffs towards Defendant 2 could have been discharged only if Defendant No. 2 had obtained delivery of the securities as alleged in paragraph 8 of the Written statement?
3. Whether the remedy of Defendant No. 2 is only against Defendant Nos. 3 to 3G as alleged in paragraph 9 if the plaint?

B. ISSUES BETWEEN THE PLAINTIFF (CITIBANK N.A.) AND DEFENDANTS 3 TO 3G (CANARA BANK & OTHERS)

1. Whether the alleged claim of the Plaintiff is contingent upon the Plaintiff being held liable for the alleged claim of Defendant No. 2 in Suit No. 22 of 1994 as alleged in paras 12 and 14 of the Written Statement of Defendant Nos. 3A to 3G?
2. Whether the two transactions dated 27th May 1991 are interconnected with the Plaintiffs alleged transaction dated 18th September 1991 with Defendant Nos. 2?
3. Whether the alleged transaction dated 18th September 1991 with the Plaintiffs are part of and/or connected with the alleged 15% informal arrangement that Defendant No. 2 had with Defendant No. 1 and whether the alleged transactions are illegal and opposed to public policy as alleged para 8G of the Written Statement of Defendant Nos. 3A to 3G?
4. Whether the Plaintiff and the Defendant Nos. 3A to 3G are not liable to Defendant No. 2 for the reasons alleged in para 8D of the Written Statement of Defendant Nos. 3A to 3G?
5. Whether the Defendants are not liable for the claim in the suit in view of the alleged facts and circumstances mentioned in paragraph Nos. 8F and 10 of the Written Statement of Defendant Nos. 3A to 3G?

6. Whether the two security transactions dated 27th May, 1991 were a ruse by which Defendant No. 1 transferred funds to himself using Defendant No. 3 as a conduit?
7. Whether claim against Defendant Nos. 3A to 3G personally is barred by limitation?
8. Whether Defendant Nos. 3A to 3G are personally liable for the claim in the Suit?
9. Whether the Plaintiffs claim against Defendant Nos. 3 to 3G is not maintainable in view of the facts and circumstances set out in paragraphs 5(a) to 5(h) of the Written Statement of Defendant Nos. 3A to 3G?

In Suit No. 22 of 1994 issues were framed between the plaintiff SCB and Citi Bank, defendant No.2. No issues were framed between SCB and the CMF. The same were as follows:

ISSUES IN SUIT NO. 22 OF 1994

1. Whether the Plaintiffs have no cause of action against Defendant No. 1 as alleged in Paragraph 1 of the Plaint.
2. Whether for the reasons mentioned in paragraph 3 of their written statement Defendant No. 1 stands discharged of all their obligations.
3. Whether Defendant No. 1 gave any express or implied warranty of the nature alleged in para 13 of the plaint.
4. Whether there is any failure of consideration as alleged in para 14(3) of the plaint.
5. Whether Defendant No. 1 is guilty of any fraud or deceit as alleged in para 14(g) of the Plaint.
6. Whether any amount is payable by the 1st Defendant to the Plaintiffs as alleged in para 15 of the plaint.
7. To what reliefs are the Plaintiff entitled to?
8. And generally.

Copies of documents in Suit No. 20 were tendered in the Court. No oral evidence was led by any of the parties in Suit No.20. Suit No. 20 of 1994 was listed for hearing. Citi Bank and CMF submitted before the Special Court that issues between Citi Bank and SCB should not be decided in Suit No. 20 of 1994 (Citi Bank suit) but in Suit No. 22 of 1994 as issues between Citi Bank and CMF were dependent on the result of Suit No. 22 of 1994 filed by SCB against Citi Bank. It was contended that the suit filed by the Citi Bank was a contingent suit depending on the result of the suit filed by SCB against the Citi Bank. This objection was overruled by the Special Court.

All the three issues (Set A) in Suit No. 20 of 1994 between the Citi Bank and the SCB were decided in favour of the SCB and against the Citi Bank on 5th/6th July, 1995. It was held that the liability of the Citi Bank was not discharged towards the SCB and that the remedy of SCB was not against the CMF or its trustees. It was further held that the liability of the Citi Bank towards SCB could be discharged only if the SCB had obtained delivery of the securities as alleged by the SCB in paragraph 8 of its written statement.

On 7th of July, 1995 issues between Citi Bank and CMF (Set B) in Suit No. 20 of 1994 were answered in favour of the Citi Bank and the suit decreed against CMF. Issue No.1 was decided in the negative. Issues No.2 to 6 were also answered in the negative because of the absence of any evidence. Issues Nos. 7 & 8 were not pressed. Issue No. 9 was decided in the negative i.e. against the CMF and in favour of the Citi Bank. Citi Bank's claim against CMF was held to be justified. CMF was ordered to deliver Bonds equivalent to the amount mentioned in the SGL to the Citi Bank along with interest at 11.5% accrued thereon. Under the Bonds the interest was payable after every six months. Since it was not paid, in order to compensate the Citi Bank for denial of the use of the interest amount accrued, coupon interest of 20% on the interest accrued was ordered to be paid. The trustees of CMF i.e. defendant Nos. 3 to 3G were discharged from their personal liability. The decree was made contingent depending upon the

result in Suit No.22 of 1994 filed by SCB against Citi Bank.

Issues in Suit No. 22 of 1994 were answered in the following terms. Issues Nos. 1 & 2 were answered in the negative i.e. in favour of the SCB and against the Citi Bank. It was held that SCB had a cause of action against the Citi Bank and the Citi Bank was not discharged of its obligations towards the SCB. Issues Nos. 3 & 5 were not pressed. Issue No. 4 was answered in the negative. Issue Nos. 6, 7 and 8 were answered as per order. SCB's suit was decreed for Rs.54,07,24,676.93 p. with interest at 20 % per annum on Rs.44,79,44,864/- from the date of the suit till payment for the reasons set out in the judgment dated 7th July, 1995 in the issues between Citi Bank and the SCB in Suit No. 20 of 1994.

On 10th of July, 1995 SCB filed an application for dropping defendants Nos. 2 to 9 (CMF and its trustees) in Suit No.22 of 1994. This was opposed by the CMF. Court permitted the CMF and its trustees to be dropped from the array of the parties. Another fact which needs to be noticed is that CMF filed Civil Appeal Nos.8248-89 of 1995 against the orders passed by the Special Court dropping it as a party in Suit No. 22 of 1994 and the decree passed therein. Both of these appeals were dismissed by this Court on 18th September, 1995.

Learned Special Judge did not accept the Citi Bank's plea that there was a satisfaction accepted and recorded to the original contract between Citi Bank and the SCB in terms of Section 63 of the Indian Contract Act. Submission that the original contract to deliver the 11.5% GOI 2009 Bonds was substituted by the SCB vide their request letter dated 19th September, 1991 and instead to give "SGLs of Canbank Mutual Fund in exchange of the same" was not accepted on the ground that novation of the contract could not be there as CMF was not a party and consented to the transfer of their SGL form in favour of SCB which was in the hands of Citi Bank. Submission made by the counsel appearing for the SCB to the effect that Section 41 of the Contract Act would be more appropriately applicable was accepted as the third party (CMF) failed to perform or the Citi Bank failed to get the promise made by it to be performed by the CMF. That the SCB by returning the two BRs did not dispense with or remit the performance of the promise made by the Citi Bank. Learned Special Judge gave detailed reasons for turning down the request of the CMF for issue of chamber summons as the learned Special Court was of the opinion that there was an effort on the part of the CMF to get the suit adjourned.

Before we go to the submissions made before us by the learned senior counsel for the parties, reference may be made to the entire documentary evidence present on the record which was referred to and read out extensively during the course of the hearing. Exhibit 'B' is the form of transfer for operation on SGL account dated 27th May, 1991 by Canara Bank as trustee of Canbank Mutual Fund and to assign and transfer their interest and share in SGL by way of 11.5% GOI 2009 Bonds for the sum of Rs.44,58,05,000/- in favour of Citi Bank. On presentation of the SGLs by the Citi Bank to the Reserve Bank of India the same were dishonoured and returned with an endorsement "insufficient balance" on the face of the form. The two Banker's receipts dated 18th & 19th September, 1991 in the sum of Rs.42 crores and Rs. 8 crores being the cost of securities/debentures/bonds of 11.5% GOI 2009 Bonds issued by the Citi Bank and handed over to the SCB is jointly marked as Exhibit 'A'. On the reverse of these two receipts there is a stamp of SCB and signatures of an officer of the bank. Then there is a letter dated 19th September, 1991 written by the SCB to the Citi Bank requesting the Citi Bank to give the SCB SGL's of Canbank Mutual Fund in exchange of the two BRs. On receipt of this letter, Citi Bank handed over the original SGL forms of 11.5% GOI 2009 Bonds received by it from the CMF dated 27th May, 1991 face value of which was Rs.44,58,05,000/- and its own SGL in the sum of Rs.5,41,95,000/- making a total of Rs.50 crores in return for the two BRs of equivalent amount bearing Nos. 0912611410 & 0912621480 in the sum of Rs. 42 crores and Rs.8 crores. Then there is Advocate's letter of SCB dated 17th June, 1992 addressed to the Manager,

Citi Bank asking for securities of the face value of Rs.44,58,05,000/- instead of SGL of Canbank Mutual Fund of the same amount in the form of 11.5% GOI 2009 Bonds or in the alternative to make payment of the said amount in respect of the valuable consideration already received by the Citi Bank. Exhibit 'D' is the letter addressed by the Advocates of the Citi Bank refuting the statement of facts made by in the advocate's notice of the SCB dated 17.6.1992. It was stated that SCB knew that SGLs are not transferable but in spite of that SCB desired to have SGLs issued by CMF in favour of the Citi Bank. Accordingly, SGLs were delivered in exchange of the two BRs. That SCB for reasons best known to it and of its own volition chose to take from Citi Bank the SGL of CMF which was in its possession in exchange for the two BRs. The obligation of Citi Bank to physically deliver the securities ceased/ or was discharged. The question of handing over the securities or valuable consideration for the securities, under the circumstances therefore, did not arise at all.

Admitted position which emerges from the facts narrated above is that on 18th September, 1991 and 19th September, 1991 Citi Bank had agreed to sell to SCB 11.5% GOI 2009 Bonds of the face value of Rs. 42 crores and

Rs. 8 crores. Citi Bank had issued two Banker's receipts promising to deliver the 11.5% GOI 2009 Bonds when ready with the stipulation that on delivery of the Bonds SCB would return the two BRs duly discharged. A letter dated 19th September, 1991 was written by the SCB requesting the Citi Bank to give SGL of CMF in exchange of the two BRs (1) Rs.42 crores and (2) Rs.8 crores issued by the Citi Bank stipulating to give 11.5% GOI 2009 Bonds of that value. The two BRs issued by the Citi Bank were returned to it by the SCB and SCB accepted the SGL of CMF for the sum of Rs. 44,58,05,000/- and another SGL of the Citi Bank for the sum of Rs. 5,41,95,000/-. The latter was duly encashed by the SCB and there is no dispute regarding the same.

On the basis of these facts Shri Andhyarujina, learned senior counsel appearing for Citi Bank in Civil Appeal No. 7941 of 1995 contended that SCB on its own asked for and voluntarily accepted the two SGLs from Citi Bank as satisfaction which it deemed fit in exchange for Citi Bank's obligation to deliver the 11.5% GOI 2009 Bonds of the face value of Rs.50 crores under the two BRs. That SCB voluntarily and unconditionally accepted the SGL of CMF knowing full well that under such SGL it could not obtain Bonds from PDO. That SCB accepted the SGL of CMF knowing full well that it had been dishonoured by the Reserve Bank of India and it is not transferable. That these admitted and established facts clearly bring the case of Citi Bank under Section 63 of the Indian Contract Act. That SCB asked for and accepted the SGL of CMF as satisfaction which it deemed fit for the obligation of the Citi Bank to deliver GOI bonds of the face value of Rs.44,58,05,000/- and therefore the Citi Bank stood discharged from its obligation to deliver the Bonds under Section 63 of the Indian Contract Act. That the contention of the SCB that SGLs were 'useless or worthless' was not tenable as it accepted the dishonoured SGLs of CMF without any protest and also received interest from an undisclosed third party thus treating itself a beneficial owner of SGL which clearly points that SGL was not 'useless or worthless' as is being sought to be made out now. The letter of 8th October, 1991 written to CMF asking to give SGL in favour of SCB also shows that SCB knew that the securities could not be delivered on the strength of SGL form taken by it from Citi Bank. Plea put forth that Citi Bank had given 'useless or worthless' SGL by playing a fraud is an after thought after the unscrambling of the infamous securities scam. Another fact emphasised was that SCB kept quiet for almost 9 months for which no satisfactory explanation has been given. That an adverse inference be drawn against SCB as it had failed to disclose the material facts in the suit and also failed to explain the delay of 9 months in approaching the Citi Bank. It is his contention that the Special Judge fell in error in accepting the contention of SCB that the present case would be governed by Section 41 of the Indian Contract Act. According to him Section 63 of Indian Contact Act would be

more appropriately applicable. That the Citi Bank as per decree was required to pay the value of the securities along with interest whereas it has been given in return the bonds of the face value of Rs.44.8505 crores the value of which at that time in the market was at a discount and in this process the Citi Bank incurred a loss of Rs.12,94,66,022.41 p.

As against this Shri R.F.Nariman, the learned Senior advocate appearing for the SCB in Civil Appeal No. 7941 of 1995 contended that an implied warranty must be read in the transaction asking for and accepting the SGL of CMF. Principles of contractual interpretation mandate that construction placed on the terms be reasonable and consistent with the natural and probable course of human conduct. That the courts will not adopt an interpretation out of context in commercial dealings between the parties and in a manner unknown to trade and commerce. That admittedly SCB had paid Rs.50 crores to Citi Bank for 11.5% GOI 2009 Bonds. SCB having established that it did not receive securities worth Rs.50 crores despite having paid the consideration, the onus to prove novatio and/or discharge by substitution and/or satisfaction was on the Citi Bank which it had failed to discharge.

That in the absence of oral evidence, SCB's letter dated 19th September, 1991 to Citi Bank falls for consideration. This letter does not state that SCB required 'the dishonoured SGL of CMF in favour of Citi Bank'. Admittedly, such an SGL could not have been used by SCB for delivery of securities. There is no reason why SCB did or could have asked for the said SGL. What SCB wanted was the SGL of CMF in favour of SCB. That SCB's letter dated 19th September, 1991 should be interpreted in the above context and the following points emerge from a plain reading of the letter and establish that SCB required a SGL of CMF in favour of SCB and not the one in favour of Citi Bank. That the BRs were enclosed with the letter and therefore SCB gave them first and only thereafter received the SGLs. The BRs were for Rs.50 crores and not for Rs.44.58 crores; latter was the value of the SGL of CMF. By return of the BRs of Rs.50 crores, SCB cannot be understood to have asked for a dishonoured third party's SGL of Rs.44.58 crores. That the word "SGLs" in plural shows that SCB did not want the single dishonoured SGL of CMF. That the words "issued by you" in the letter referring to Citi Bank's BR are not followed by the words "in our favour". Similarly, SCB's request for SGLs of CMF is not followed by the words "in our favour". The words "in our favour" are obviously intended in both situations and ought to be read into the letter. That the letter does not show SCB had knowledge of CMF's SGL in favour of Citi Bank. That the words "in exchange" only shows that SCB was substituting one "step in aid" for another "step in aid" of delivery of securities. That the Citi Bank's obligation to deliver bonds is nowhere discharged. Only the BRs are substituted with SGLs. Both are merely promises to deliver bonds. That the words "SGLs of CMF" only imply that SCB was willing to look to CMF for performance. This could have been achieved only if SGLs of CMF were issued in favour of SCB and bonds consequently transferred to SCB. Since the offer of SCB to get performance by CMF was not satisfied, the letter does not vitiate Citi Bank's contractual obligation to deliver securities to SCB. That Citi Bank clearly understood the letter as above i.e. its obligation to deliver bonds continued and did not cease. That for this reason Citi Bank gave its own SGL of Rs.5,45 crores which gave securities to SCB.

It was next contended that acceptance of the SGLs transfer form was only a conditional discharge of performance and not as an absolute discharge. Relying upon a few reported decisions it was contended that where a cheque, pronote or banker's receipt is received or accepted "in satisfaction", there is a presumption that such acceptance was only as a 'conditional discharge' of performance and not as an 'absolute discharge'. The conditional discharge having failed, the SCB could fall back on the original consideration. That Section 63 of the Indian Contract Act was not applicable. That mere signatures or endorsement on the BRs, without

receipt of bonds which the BRs promised, can never discharge the Citi Bank of its main obligation of delivering the bonds. That receipt of the interest by SCB from a third party was of no consequence. That this point was not raised by the Citi Bank or the CMF in its submissions made before the Special Court. This point has also not been taken as a ground in the Citi Bank's appeal. That merely because SCB received some money/interest from the third party does not lead to an inference that the SCB had discharged Citi Bank of its obligation to deliver the securities. He further argued that in order to do complete justice between the parties the SCB could be asked to make good the loss if any suffered by the Citi Bank. The CMF should not be unduly benefited.

Dr. A.M.Singhvi, learned senior advocate, appearing for the SCB in Civil Appeal No. 8340 of 1995 additionally contended that in case both the decrees in Suit No. 22 and 20 of 1994 were reversed, CMF would be unduly enriched and SCB would lose Rs.45 crores apart from the interest accrued thereon. Such a result would be contrary to all notions of justice. Under the circumstances irrespective of any view this Court may form, in order to do complete justice between the parties, in exercise of its power under Article 142 of the Constitution of India the Court should maintain the decree in favour of SCB and if need be the SCB can be made to reimburse the Citi Bank to the extent of Rs.12,94,66,022.41p. That this Court in exercise of its power under Article 142, keeping in view the practicality and reality of the situation, should see to it that nobody is allowed to have its own pound of flesh unjustly against the other.

Learned counsel for the parties have been heard at length.

As per stipulation in the BRs the Citi Bank had agreed to deliver 11.5% Government of India 2009 Bonds when ready "in exchange for this receipt duly discharged and in the meantime the same will be held on account of Standard Chartered Bombay." On the same day, i.e., on 19th September, 1991 SCB wrote a letter returning the two BRs with a request "to give us SGLs of Canbank Mutual Fund in exchange of the same". Stipulation in the BRs was to deliver 11.5% GOI 2009 Bonds in exchange of BRs duly discharged; SCB in exchange of the BRs asked for and received SGLs of CMF. Case of Citi Bank is that BRs are duly discharged with the result that Citi Bank was relieved of its obligation to deliver the Bonds under the BRs. That the SCB substituted the satisfaction referred to in the BRs (11.5% GOI 2009 Bonds) by asking for and taking the SGL of CMF. As against this the case of SCB is that BRs were never discharged. They were returned to the Citi Bank in exchange of SGL of CMF. The Citi Bank was not discharged of its obligation under the BRs to deliver the 11.5% GOI 2009 Bonds. The first question which needs to be determined is whether the BRs were duly discharged by the SCB. The fact that the two BRs were duly discharged was accepted by the SCB before the Special Judge. The judgment in suit 20 of 1994 records this fact as follows:

"46. Mr. Tulzapurkar submitted that it is an admitted position that in pursuance of this letter the two Banker Receipts issued by the plaintiffs were returned to the plaintiffs duly discharged by defendant No.2 and defendant No.2 accepted the SGL of Canbank Mutual Fund and another SGL of the plaintiffs. The fact is also not being denied.

50. Mr. Cooper reiterates that the facts as set out are admitted."

[Note: Mr. Tulzapurkar was the counsel for the Citi Bank whereas Mr. Cooper was the counsel for the SCB in the Special Court.]

This finding has not been challenged. Further the return of two BRs with the stamp of the SCB on its reverse duly signed by the officer of the SCB also amounts to discharge of the BRs. This was the mode of discharge of BRs. The discharged BRs being in possession of the Citi Bank would raise a presumption in law under Section 114 illustration (i) of the Evidence Act, 1872 that the BRs stood duly discharged. Section 114 provides that 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. Illustration (i) provides that Court may presume 'that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged'. The two BRs were in the custody of the Citi Bank. The possession of two BRs with the Citi Bank would raise a rebuttable presumption of discharge of the two BRs. Onus to rebut the presumption was upon the SCB. SCB has failed to rebut the presumption by leading any evidence that the obligation under the two BRs did not stand discharged. Finding recorded by the Special Court that there was nothing on the record to show that there was an absolute discharge granted by the Citi Bank to the SCB cannot be accepted because the two BRs were returned with the stamp of SCB duly signed by an officer of the SCB authenticating that it had been discharged.

What is the effect of production of documents by promissor from its custody was considered in Chaudhri Mohammad Mehdi Hasan Khan Vs. Sri Mandir Das, [L.R. 39 Indian Appeals 184]. In the said case, a suit was filed on the basis of mortgage deed for the recovery of Rs. 62,000/- by way of sale of the mortgage premises. At the time of institution of the suit the plaintiff produced only a copy of the document, alleging that the original had been lost. The defendant in his written statement admitted the execution of the document but alleged that the debt has been discharged. In support of this allegation he produced the original document containing the endorsement of payment by the plaintiff. The Privy Council overruling the decision of the Judicial Commissioner held that in view of the presumption under Section 114 of the Evidence Act the onus was upon the plaintiff to show that the debt was still subsisting which the plaintiff had failed to discharge by producing any evidence. It was held that production of the document by the defendant from his custody raised a rebuttal presumption of the discharge of the debt.

In our view, the law has been correctly stated in the aforesaid case and applying the same ratio, we hold that production of two BRs by the Citi Bank raised a rebuttable presumption that Citi Bank had discharged its obligation under the two BRs which the SCB failed to dislodge by pleading/leading any evidence to show the circumstances under which the two BRs were returned. In the absence of any explanation by the SCB either in its plaint in Suit No. 22 of 1994 or the written statement filed by it in Suit No. 20 of 1994 whatsoever as to why it had asked for and took dishonoured SGL of CMF in exchange of two BRs raises a presumption under Section 114, illustration (i) that Citi Bank was discharged of its obligation under the BRs i.e. to deliver the Bonds.

SCB, in its plaint in Suit No. 22 of 1994 or in the written statement filed by it in Suit No. 20 of 1994, failed to gave any explanation whatsoever as to why it had asked for and taken dishonoured SGL of CMF which could not have given it any security. It did not plead or give evidence as to why it accepted "useless or worthless SGLs", as stated by it in its plaint, when it knew that it would not be even transferable. SCB has not disclosed any particular or even the name of the person from whom or the circumstances under which it obtained interest for half year in the sum of Rs. 2,56,33,787.50 on 25th November, 1991 on the bonds of the value of Rs.44,58,05,000/-. It is not SCB's case that the interest was either received from the Citi Bank or the CMF or from Government of India or from a person actually holding the Government of India bonds who may have paid the interest to SCB after receiving it from the Government of India. Shri

Andhyarujina is right in submitting that on the facts and in the circumstances an adverse inference should be drawn against the SCB to the effect that if these facts were disclosed it would have been proved that SCB had taken the SGL of CMF for its own benefit or at the behest of the third person from whom it had received the interest. That third person treated the SCB as the beneficial owner of Bonds and therefore entitled to interest on it.

Illustration (g) of Section 114 of the Indian Evidence Act provides that Court may presume 'that evidence which could be and is not produced would, if produced, be unfavourable to the person who holds it'. Privy Council in T.S. Murugesan Pillai Vs. M.D. Gnana Sambandha Pandara Sannadhi & Ors., [AIR 1917 PC 6], held:

"A practice has grown up in Indian procedure of those in possession of importance documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of ,the suit; but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition...."

This passage was cited with approval of this Court in Biltu Ram Vs. Jainandan Prasad, Civil Appeal No. 941 of 1965, decided on 15.4.1968, and again in Gopal Krishnaji Ketkar Vs. Mohammed Haji Latif & Ors., [AIR 1968 SC 1413] in which it was held:

"...Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

An adverse inference has to be drawn against the SCB. Had the facts referred to in the previous paragraph been disclosed, it would have proved that SCB had taken the SGL of CMF for its own benefits or at the behest of the third person from whom it had received the interest. Failure on the part of the SCB to show from whom it had received the interest would raise a presumption that the SCB had failed to disclose/produce a material piece of evidence which would have thrown much light on the issue in controversy.

Contention raised by Shri Nariman that there was only one contract between SCB and Citi Bank and that was to deliver the 11.5% GOI 2009 bonds for which it had paid valuable consideration or that the BRs issued by the Citi Bank were not independent of the main contract to supply 11.5% GOI 2009 bonds cannot be accepted. SCB had taken the SGLs of Canbank with the clear intention that it wanted to exchange the BRs of Citi Bank with SGLs of Canbank. SCB was to get 11.5% GOI 2009 Bonds in exchange of two BRs but SCB instead substituted that satisfaction by asking for and taking unconditionally the SGL of CMF. The obligation to deliver the bonds under BRs, in our opinion, was substituted by delivery of SGL of CMF.

The BRs are dated 18th and 19th September, 1991, respectively, and on 19th September, 1991 the SCB wrote a letter returning the two BRs and asking of SGLs of Canbank Mutual Fund from the Citi Bank. Proximity of these two dates, clearly indicates that the intention of the SCB was to buy the SGLs of Canbank Mutual Fund otherwise they would not have written the letter on 19th September, 1991 itself. Proximity of these two dates and the manner in which whole transaction was completed indicates that it was done with a purpose or a design. It has not been explained as to how did SCB know that the Citi Bank had in its possession the SGL of CMF. SCB must have known, being a big banking business company, that the SGL issued by the CMF in favour of the Citi Bank was non-transferable. It could not provide any security to them. It had also been dishonoured. Still SCB asked for and accepted the dishonoured SGL of CMF. If the SGL given to them by the Citi Bank was 'useless' and 'worthless' then why did SCB gladly accept the same without any protest. If it was their case that the SGL of CMF given to them was 'useless' or 'worthless' it should have refused to accept it; far from doing so, the SCB not only accepted it but also acted upon it. It received interest from the third party. It has not been explained as to why third party paid interest of the SCB. Basically, it was for the SCB to explain and answer all these questions which it has failed to do.

SCB in its letter dated 8th October, 1991 wrote to CMF that SCB had bought from Citi Bank 11.5% GOI 2009 Bonds in the sum of Rs. 50 crores, for which, the Citi Bank gave its two BRs. Significantly, it was stated in the letter - "We understand that the same stock has been sold by you to Citi Bank. Therefore, we returned their BRs in exchange of your SGL for Rs. 44,58,05,000. We now request you to issue a fresh SGL in our favour for the same amount to enable us to lodge it urgently." This clearly indicates that SCB has taken the SGL of Canbank with the clear understanding that it wanted to exchange the BRs of Citi Bank with SGLs of Canbank. The argument now raised that SCB only wanted 11.5% GOI 2009 Bonds is belied by this letter. It is specifically stated in this letter that it had known that Canbank had given its SGL in favour of Citi Bank which the SCB wanted to secure. In order to secure it, it had returned the BRs in exchange of SGL of Canbank in the sum of Rs. 44,58,05,000. It asked the CMF to issue fresh SGL in their favour of the same amount to enable it to lodge it urgently. This letter clearly indicates that the SCB wanted the SGL of CMF and it had exchanged it with the two BRs knowingly, consciously and voluntarily. The submission now made that SCB at all point of time was insisting on the delivery of 11.5% GOI 2009 Bonds cannot be accepted. Though this letter has not been formally proved as the same has been denied by the CMF but since this was pleaded by the plaintiff-SCB and the document was attached with the plaint, SCB cannot disown this document. It is bound by its own case set up in the Court.

In the face of letter dated 19th September, 1991 written by the SCB to the Citi Bank asking for the SGLs of Canbank Mutual Fund in exchange of BRs and the subsequent letter dated 8th October, 1991 written by the SCB to the CMF to issue fresh SGLs in their favour of the same amount clearly indicates that the SCB substituted its satisfaction in place of 11.5% GOI 2009 Bonds for and taking unconditionally SGL of CMF.

In their letter dated 17th June, 1992 the SCB did not say that a trick or fraud had been played on them by delivering useless and worthless dishonoured SGL as has been pleaded by it in its plaint or argued before us. Contrary to that it was stated in the letter:

"Our clients returned the aforesaid two Bank Receipts and in exchange for the same you gave to our clients (a) your SGL for Rs. 5,41,95,000/- and (b) a SGL of Canbank Mutual Fund for Rs. 44,58,05,000/- drawn in your favour. We understand that when the aforesaid SGL for Rs.44,58,05,000/- had been presented by

you earlier on 27th May 1991 the same was dishonoured by the Reserve Bank of India. Our clients accepted documents at (a) and (b) above..."

[emphasis supplied]

The words "our clients accepted documents A and B" clearly indicate that the SGLs were accepted in the exchange of two BRs without any protest thereby relieving the Citi Bank of its liability to give the 11.5% GOI 2009 Bonds. Another point which needs to be highlighted from this letter is that the Citi Bank feigned its ignorance of having written the letter dated 19th September, 1991 asking for the SGL of CMF in exchange for two BRs. It has not been denied that such a letter was written but it was stated:

"...We note that you have failed to produce a copy of this letter, but even assuming that it exists we fail to see how this carries the matter further as the debt owed to our clients is not affected."

Nothing hinges on it but this just shows as to how their mind was working.

Citi Bank has pleaded and contended that as SCB had of its own, asked for and taken unconditionally the SGL of CMF and returned the two BRs of Citi Bank duly discharged. It was under no obligation to either pay any sum or any security much less the refund the money. The obligation was substituted by the SCB for delivery of SGL of CMF. The SCB substituted the obligation to deliver the bonds under two BRs by delivery of SGL thereby accepted the satisfaction in terms of Section 63 of the Indian Contract Act.

In the light of these facts, let us now consider the effect of Section 41, 62 and 63 of the Indian Contract Act, 1872. The same are reproduced hereunder for ready reference:

"41. Effect of accepting performance from third person.- When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

"62. Effect of novation, rescission, and alteration of contract.- If the parties to a contract agree to substitute a new contact for it, or to rescind or alter it, the original contract need not be performed."

"63. Promise may dispense with or remit performance of promise.- Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

In para 63 of the judgment, the Special Court has recorded a finding to the effect:

"In this case the third party i.e. Canbank Mutual Fund had not consented to the SGL transfer form being transferred. Therefore, there is no discharge under alleged contract

and there is no Novatio."

Novatio, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally. Special Court was right in observing that Section 62 would not be applicable as there was no novatio of the contract. Further it is neither Citi Bank's nor CMF's case nor even SCB's case that there was a tripartite arrangement between the parties by which CMF was to accept the liability. Such a case of novatio does not arise for consideration. Shri Andhyarujna, the learned senior counsel for Citi Bank has also not seriously pressed for the Citi Bank's case being considered by reference to Section 61 abovesaid.

Citi Bank pleaded in paras 8 & 9 of its plaint (in Suit No.22 of 1994) that it was discharged of its obligation to deliver the bonds on the delivery of SGLs of CMF to SCB at its own request and therefore ceased to be liable to SCB in respect of the agreement to deliver 11.5% GOI 2009 bonds. Learned Special Court in para 62 held that there was no unconditional discharge pleaded by the Citi Bank and for this reliance was placed on the contents of para 9 of the plaint. In para 9 Citi Bank has stated that SGLs of CMF were taken by the SCB voluntarily and unconditionally at their own request and returned the BRs issued by the Citi Bank, duly discharged, and, therefore, the remedy of the SCB, if any, is against the CMF or its trustees and not against the Citi Bank. That the Citi Bank was filing the suit to safeguard its interest so that in the event a decree is passed against the Citi Bank in the suit filed by the SCB then the Citi Bank will be entitled to claim relief against the CMF. It is true that Citi Bank in para 9 has not pleaded complete discharge from its obligation but the Special Court failed to consider the averments made in para 8 of the plaint which categorically raises the plea that liability of the Citi Bank to deliver the bonds stood discharged and Citi Bank ceased to be liable to SCB. It is stated in this paragraph that the SGLs of CMF were handed over to SCB at their own request on return of the two BRs, duly discharged, which completely discharges the Citi Bank and the Citi Bank ceased to be liable to the SCB to deliver 11.5% GOI 2009 bonds. The averment is to the following effect:

"In the premises, the liability of the plaintiffs to deliver the said securities stood discharged and the plaintiffs ceased to be liable to the defendant No.2 in respect of the agreement mentioned in para 7 above."

It is true that Citi Bank in its plaint did not specifically mention Section 63 of the Indian Contract Act but overall reading of the plaint makes it clear that Citi Bank was relying upon the terms of Section 63 in pleading that it stood discharged of its obligation to deliver the bonds under the two BRs on the delivery of SGL of CMF.

Under Section 63, unlike Section 62, a promissee can act unilaterally and may

i) dispense with wholly or in part, or
ii) remit wholly or in part,

the performance of the promise made to him, or

iii) may extend the time for such performance, or
iv) may accept instead of it any satisfaction which he thinks fit.

It is Citi Bank's case that SCB of its own asked for and voluntarily accepted two SGLs from Citi Bank as satisfaction which it deemed fit in exchange for the Citi Bank's obligation to deliver GOI bonds of the face value of Rs.50 crores under the two BRs. Such a plea would fall under Section 63. Special Court concluded that provisions of Section 41 of the Contract Act would be applicable to the facts of the case because the CMF had failed to deliver the GOI's bonds to the SCB and, therefore, the SCB could claim it from the Citi Bank. In our opinion, the Special Court fell in

error in applying Section 41 of the Indian Contract Act to the facts of the case. Section 41 of the Indian Contract Act only provides that the promisee cannot have double satisfaction of its claim i.e. from the promisor as well as third party. It does not give a cause of action to the promisee, but, to the promisor, to contend that the promisee who has accepted satisfaction from the third party cannot insist of the satisfaction of its claim from the promisor as well. No case under Section 41 of the Contract Act has been pleaded by the Citi Bank. It no where pleaded that CMF had delivered the bonds to SCB and, therefore, SCB cannot enforce its demand for delivery of bonds against the Citi Bank. Privy Council in Har Chandi Lal and Others vs. Sheoraj Singh and others [AIR 1916 PC 68] held that Section 41 of the Contract Act applies only where a contract has in fact been performed by some person other than the person bound thereby. What is required by Section 41 is actual performance of the original promise and not a substituted promise. In Chegamull Suganmull Sowcar vs. V.Govindaswami Chetty & Others, [AIR 1928 Mad. 972], it was held that actual performance has to be there for importing the applicability of Section 41. It was held:

"...Much more than a bare promise is necessary under the Section. What is contemplated is actual performance of the original promise. According to the section, performance "by a stranger, accepted by the promisee, produces the result of discharging the promisor, although the latter has neither authorised nor ratified the act of the third party..."

The learned Special Court fell in error in holding that Section 41 of the Contract Act would be more appropriately applicable. Section 41 for the reasons set out above would not be applicable to the facts of the present case. It also fell in error in holding that Citi Bank did not plead complete discharge from performing its obligation in terms of Section 63. In our opinion, Citi Bank has specifically pleaded that it stood discharged from the performance of the original obligation on the delivery of SGLs to the SCB, which were asked for and accepted by SCB for reasons best known to it. SCB instead of the original satisfaction accepted another satisfaction, deemed fit by it, in terms of Section 63 of the Indian Contract Act.

Contention of Shri Nariman, learned senior counsel appearing for the SCB is that there has been only one contract between the Citi Bank and the SCB and that is to give 11.5% GOI 2009 Bonds for which the SCB had paid valuable consideration to the Citi Bank. That BRs are not independent of the contract. As the bonds were not ready with the Citi Bank it gave instead the BRs with the understanding that bonds would be handed over as and when available. SGL of CMF were taken by the SCB as a step-in-aid for the delivery of bonds. The acceptance of SGL of CMF should not be taken as satisfaction in substitution to deliver the bonds as had been agreed upon originally. It was contended that implied warranty must be read in the transaction asking for and accepting of SGL of CMF. That principles of contractual interpretation mandate that interpretations adopted be reasonable and arise out of natural and probable course of human conduct. The courts will not adopt an interpretation out of context with the commercial dealings between parties and in a manner unknown to trade and commerce. SCB has established that it did not receive the bonds in spite of having paid full consideration, heavy burden should be put on the Citi Bank to show that it has discharged its original obligation by substituting it with supply of SGL of CMF to the SCB. That it would be contrary to the normal, natural and probable course of banking business to deduce that SCB would be satisfied with neither the bonds nor the monies thereof, but with SGLs which admittedly had no value or significance. According to him the interpretation put on the letter dated 19th September, 1991 be interpreted in a commercial sense so that it serves the commercial purpose. To substantiate this, he placed reliance upon paragraphs 777, 782, 921, 951, 952, 953 and 955 of Halsbury's Laws of England, 4th Edition, Vol. 9, wherein it has been observed that the courts can interpret the mercantile contracts in a way that it

makes good commercial sense or to give efficacy to a contract to emancipate one side from all the chances of failure, and to make each party to perform its parts of the promise. He has relied upon certain observations made in Hillas & Co. Ltd. vs. Arcos Ltd. [1932 All ER 494], Investors Compensation Scheme Ltd. vs. West Bromwich Building Society [1998 (1) All ER 98], Stocznia Gdanska SA vs. Latvian Shipping Co. & Others [1998 (1) All ER 883], Antaios Cia Naviera SA vs. Salen Rederierna AB [1984 (3) All ER 229] and Union of India vs. D.M.Revri & Co. [1977 (1) SCR 483 at 487]. We do not find any merit in this submission.

SCB soon after the payment of Rs. 50 crores and receiving the BRs from the Citi Bank acknowledging its liability to deliver the bonds writes a letter dated 19th September, 1991 asking for and accepting the SGL of CMF. Admittedly, SGL of CMF was not honoured by the PDO twice and an endorsement to that effect had been made on the SGL. As to why a creditor like SCB had asked for and accepted the instrument which was on the face of it unrealizable from the debtor which is even described by it as 'useless and worthless'? It owed a duty of explanation to the Court as to why did it ask for or accepted the delivery of such an instrument. SCB has conspicuously and completely failed to give any explanation either in its plaint or even in evidence. It is difficult to import an implied condition or warranty, as was sought to urged at the hearing, in the absence of such an explanation by the SCB. Contention that the words "in our favour" be read as introduced by necessary implication in the SCB's request for SGL of CMF and the expression - "We now request you to give us SGLs of Canbank Mutual Fund in exchange of the same" be read as "We now request you to give us SGLs of Canbank Mutual Fund in our favour in exchange of the same" to give it a commercial sense cannot be accepted. Such a re-writing of SCB letter of request of 19th September, 1991 and imposing a qualification in the acceptance of the Canbank SGL by SCB is not permissible. The clear intention of SCB was to ask for and take the SGL of Canbank which was in possession of the Citi Bank. The said SGL was in favour of Citi Bank. SCB as a business house was clearly aware of the terms of an SGL of CMF from Citi Bank when it asked Citi Bank for it and accepted and retained it. For getting the SGL of CMF in its own favour it need not have routed its request through the Citi Bank. It could have straight away approached the Canbank for either buying the 11.5% GOI 2009 Bonds in its favour or for getting the SGL of CMF drawn in its favour. A term can only be implied by way of sense to give efficacy to the transaction which is intended by the parties. Implied terms in law are founded on the presumed intention of the parties. In this case, the intention of the SCB was clear and unambiguous. SCB for its own reasons wanted to take the SGL of CMF in possession of the Citi Bank. The subsequent receipt of interest on the face value of the price of bonds mentioned in the SGL is clear pointer to the fact that the SCB had taken the SGL of CMF from Citi Bank for its own purpose or at the behest of an undisclosed third party who paid interest to SCB. In the absence of any explanation as to how the SCB knew that Citi Bank was in possession of SGL of CMF; as to why it had asked for an instrument which on the face of it was unrealizable by it from the debtor; why did it accept and act upon the same, and, further treating itself as a beneficial owner and receiving interest on it, the implied condition or warranty such as it sought to be urged on behalf of SCB cannot be imported in the transaction. The plea of implied warranty is one made in desperation and is clearly an after thought.

The plea of implied warranty is also negated by the fact that SCB had pleaded in its plaint in Suit No. 22 of 1994 that Citi Bank has "expressly and impliedly warranted to SCB that Canbank would on the SCB's request transfer the stock" Issue No. 3, namely, "Whether Defendant No. 1 gave any express or implied warranty of the nature alleged in para 13 of the plaint." was framed on this plea. The onus of proving this issue was on the SCB. Far from adducing any evidence the SCB simply instructed its counsel to not to press the issue. Thus the plea of implied warranty was expressly given up before the Special Court. It is not open to SCB to take up the plea of express or implied warranty now before us in the appeal.

Since on facts we have found that the SGL of CMF were taken by the SCB voluntarily knowing and understanding the consequences flowing from it and the fact that plea of express or implied warranty was given up before the Special Court, we are unable to accept the contention of Shri Nariman that there was an implied condition/warranty by the Citi Bank to give the Bonds on the SGL being dishonoured.

It was next contended by Shri Nariman that the acceptance of SGL of Canbank by SCB was a conditional discharge. Actual delivery of 11.5% GOI 2009 Bonds could only discharge the liability of the Citi Bank and not the mere delivery of SGL. On failure to get the 11.5% GOI 2009 Bonds or return of the amount paid the SCB could fall back and sue on the original consideration. For this he placed reliance on Brijbhusan Pande & Ors. Vs. Ramjanam Kuer, AIR 1932 Patna 324, Parman Nand & Anr. Vs. Saliq Ram & Ors., AIR 1926 Lahore 328, Ramdayal Vs. Maji Devdiji, AIR 1956 Raj. 12, Lingam Narayan Das Vs. Punia Das, AIR 1959 Orissa 176, Subramniam Chettiar Vs. Muthiah Chettiar (died) & Ors., AIR 1984 Madras 215. In Parman Nand & Anr. Case (supra) it was held that it was a question of fact to be decided in each particular case as to whether the parties intended the subsequent Hundi to be an absolute or conditional payment of the original debt. On the facts of the case the learned Judges came to the conclusion that Hundis were given as a conditional payment of the original debt and therefore the plaintiffs could revert to the original consideration and based a claim thereon. In Brijbhusan Pande & Ors and Lingam Narayan Das cases (supra) the name of the payee was not mentioned in the promissory note. It was held that in the absence of the name of the payee in the promissory note the document was not a promissory note and therefore no decree could be passed on the basis of such an instrument. Where a plaintiff sues on a defective headnote, then, on the failure of the headnote the plaintiff was entitled to sue on the loan itself. In Lingam Narayan Das case (supra) it was held that where a creditor takes a bill, note or cheque in payment he may either accept it in complete satisfaction of the debt, or may accept as a conditional payment only. The presumption in the absence of a clear indication to the contrary is, that the payment by means of bill, note or cheque is a conditional payment only. The defendant upon whom the burden lay of establishing such an intention did not choose to lead any evidence on the point and in the absence of any material on the record It was not possible to come to the conclusion that there was such an intention. In Subramniam Chettiar case (supra) the facts were that defendant executed two pronotes A and B and subsequently executed third pronote C for a sum which was total of A and B and endorsing on A and B that in view of C the sums due under A and B have been discharged. Pronote C was insufficiently stamped. It was held that instrument C was invalid and inadmissible in evidence and therefore the promisee could rely on the original cause of action and claim the recovery of the amount. None of these cases would be applicable to the facts of the present case.

It is well settled that where an instrument, a cheque or negotiable instrument, is given by the debtor and accepted by the creditor , the question whether the instrument was taken as an absolute payment or a conditional payment is one of the fact depending on the intention of the parties. When the creditor takes an instrument by way of absolute satisfaction of the debt then the creditor cannot fall back on the original transaction and is restricted to the terms of that instrument only. In the present case the SCB asked for and accepted an SGL of Canbank payable to the Citi Bank in absolute satisfaction of the Citi Bank’s original obligation to give to SCB bonds of the face value of Rs. 44.58 crores. SCB asked for the SGL of Canbank which was in possession of the Citi Bank and accepted the same voluntarily and unconditionally indicating to the fact that SGL was taken as satisfaction deemed fit within the meaning of Section 63 of the Contact Act. There was no intention of the parties that taking of the SGL was conditional, i.e., that if SCB did not get the bonds from CMF, the SCB would hold Citi Bank liable for the bonds. Under the circumstances, the authorities cited by the SCB of conditional acceptance of the pronote are not applicable.

Shri Nariman also contended that asking for and acceptance of SGL from the Citi Bank is not proof of acceptance of the condition that SCB had given up its claim for the original consideration. For this he placed reliance on Firm Basdeo Ram Sarup vs. Firm Dilsukharai Sewak Ram [AIR 1922 Allahabad 461], Shyamnagar Tin Factory Private Ltd. vs. Snow White Food Product Co. Ltd. [AIR 1965 Cal. 541] and Union of India vs. Narayan Lall [AIR 1953 Patna 152]. In Firm Basdeo Ram Sarup's case and in Shyamnagar Tin Factory Private Ltd.'s case the debtor sent the money on the terms that it is to be taken in satisfaction of a larger claim towards the total amount due and would not be entitled to the balance of the amount. Creditor accepted the cheque and thereafter filed the suit for the balance amount. It was held that sending of a cheque for a smaller amount along with a letter to the effect that it was in full and final settlement of the debt did not amount to a discharge of the entire debt, nor does it amount to payment or tender of the amount on any condition that acceptance of the amount is in full and complete discharge of the entire debt. Acceptance of the cheque was not conclusive in law. The entire matter was a question of fact which the court has to determine keeping in view the true character of the transaction. It would be seen that in these two cases the debtor had sent the cheque unilaterally and it was not the creditor who had either remitted or accepted the lesser amount in satisfaction of the entire amount. Section 63 of the Indian Contract Act, as was rightly held, did not have any applicability in such cases. Similarly in Union of India's case (supra) the railways in order to meet the claim of the plaintiff by damages for non-delivery of railway consignment sent a cheque for lesser amount with an express stipulation in the letter accompanying the cheque that in case the plaintiff was not prepared to accept the amount he should return the cheque, but, the plaintiff encashed the cheque and brought the suit against the railways for the balance amount. Plea of the railways that acceptance of the lesser amount was evidence of accord and satisfaction was not accepted and, in our view, rightly so. The principle applied was the same as in the earlier two cases, referred to above. In the present case, as stated in the foregoing paragraphs, the SCB had substituted its original satisfaction by asking for and taking the SCB of CMF as deemed fit for its own reason which have not been disclosed to the Court. The cases cited by Mr. Nariman referred to in this paragraph under the circumstances would have no applicability.

SCB's next submission is that even if the court comes to the conclusion that as a matter of fact Citi Bank is discharged under Section 63 of the Contract Act, the decree should not be reversed and should only be modified by this Court in exercise of its special jurisdiction under Article 142 to do complete justice between the parties. In case both the decrees in Suit No.20 of 1994 and 22 of 1994 are reversed, CMF would be unjustly enriched and SCB would lose Rs. 45 crores with interest and such a result would be contrary to all notions of justice. It was contended that irrespective of any view this Court may take on documents, the Court has the power to do complete justice between the parties under Article 142 of the Constitution of India by maintaining the decree in favour of SCB. That even if the court comes to the conclusion that decree in favour of SCB is liable to be set aside, it need not direct setting aside of the decree but may instead do substantial and complete justice between the parties by giving appropriate directions. We do not find any substance in this submission. Suit No. 22 of 1994 and Suit No. 20 of 1994 were back to back suits and the enforcement of decree in Suit No.20 of 1994 was contingent upon a decree being passed in Suit No.22 of 1994. Acceptance of the submission of the SCB would be that this court would be passing a decree against CMF indirectly. Result would be that the amount received by Citi Bank from CMF would be allowed to be retained by SCB, despite the fact that SCB's suit did not succeed. SCB's contention is based on the presumption that SCB had received neither securities nor money and on the other hand CMF has received the money and has unjustly enriched itself. CMF in both the suits has not only denied the allegations to this effect but has in fact pleaded a specific case to the contrary. Once the court comes to the conclusion that

Citi Bank has discharged its obligation under Section 63 of the Indian Contract Act then there is no warrant or justification on the part of the Court to pass any order or decree or maintain a decree in favour of SCB. Suit No. 20 of 1994 is a contingent suit and, therefore, the said suit is not even liable to be tried much less decreed, if it is found that Citi Bank has discharged its obligation and is not liable to SCB. The submission of SCB that since a decree has been passed in the contingent suit, to the extent of decretal amount paid in the contingent decree, SCB's suit should be decreed cannot be accepted. Firstly it is to be decided in SCB's own suit (22 of 1994) whether it is entitled to a decree or not. If that suit is dismissed then the question of passing any decree in Suit No.20 of 1994 which is a contingent suit would not arise. Acceptance of the submission of the SCB would mean that though SCB's suit does not deserve to succeed but still it be maintained by passing a decree in the contingent suit which cannot be done. It would be travesty of justice rather than doing justice. The submission is, therefore, rejected.

For the reasons stated above Civil Appeal No. 7941 of 1995 filed by the Citi Bank is accepted. Judgment and decree passed by the Special Court in Suit No. 22 of 1994 is set aside and the suit is ordered to be dismissed with costs throughout.

As a consequence to the aforesaid, Citi Bank becomes entitled to restitution of the total amount paid by it to Standard Chartered Bank (principal and interest) along with interest @ 12% p.a. from the date of receipt of payment by SCB provided it is paid on or before 30th November, 2003 and in default to pay the interest @ 15% p.a. from the date of receipt of payment till it is repaid by the Standard Chartered Bank. The Citi Bank would also be entitled to receive back the amount of costs it had paid to Standard Chartered Bank under the decree of the Special Court but the same would not carry any interest. Though the appellant had prayed that the interest be granted at the same rate at which it was granted by the Special Court (i.e.20% p.a.) but we have reduced the same keeping in view that interest rates have come down substantially in the recent years.

Costs in this appeal are assessed at Rs. 40 lakhs. Citi Bank would also be entitled to the costs before the Special Court of the equivalent amount which were awarded against it by the Special Court while decreeing the suit against it.

Civil Appeal No. 8340 of 1995

This appeal has been filed by the CMF against the decree passed against it in Suit No. 20 of 1994. In Civil Appeal No. 7941 of 1995 we have recorded a finding that Suit No. 20 of 1994 filed by the Citi Bank was a back to back suit to save itself in case a decree was passed against it in the suit filed by the Standard Chartered Bank in Suit No. 22 of 1994. In other words, it was a contingent suit based on the result in Suit No. 22 of 1994. Mr. Kapadia, learned senior counsel appearing for the CMF had addressed arguments at length supporting the submissions made on behalf of Citi Bank against the Standard Chartered Bank. He did not say much against the decree passed in favour of the Citi Bank. We need not deal with the contentions raised by Mr. Kapadia as we have accepted the Civil Appeal No. 7941 of 1995 and set aside the decree passed against the Citi Bank in Suit No. 22 of 1994. The consequence of the acceptance of the said appeal would be that this appeal has to be accepted which arises from a contingent suit. Accordingly, the appeal filed by the CMF is accepted and the decree passed against it in Suit No. 20 of 1994 is set aside and the suit is ordered to be dismissed with costs throughout.

As a consequence to the aforesaid CMF becomes entitle to restitution of the total amount paid by it to the Citi Bank (principal and interest) along with interest @ 12% p.a. from the date of payment provided it is paid on or before 5th December, 2003 and in default to pay the interest @ 15% p.a. from the date of payment till it is repaid by the Citi Bank. Though the appellant had prayed for interest @ 20% p.a.(which had been awarded by the

Special Court) but we have reduced the same keeping in view that interest rates have come down substantially in the recent years. In Civil Appeal No. 7941 of 1995 also we have granted interest @ 12% p.a. only.

The CMF would be entitled to receive the amount of costs it had paid under the decree of the Special Court but without interest. Costs in this appeal are assessed at Rs. 20 lakhs. CMF would be entitled to the costs before the Special Court of the equivalent amount which were awarded against it by the Special Court while decreeing the suit against it.

Both the appeals stand allowed in the aforesaid terms.

JUDIS