

(2007) 09 DEL CK 0063
In the Delhi High Court
Case No : C.S. (OS) 737 of 2002

CAN BANK Mutual Fund

APPELLANT

Vs

Nuclear Power Corporation of India

RESPONDENT

Date of Decision : 10-09-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 37 Rule 2
Trusts Act, 1882 — Section 47

Citation : (2008) 1 BC 330 : (2007) 98 DRJ 464 : (2007) ILR Delhi 6 Supp

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Jay Salva and Meenakshi Ogra, for the Appellant; Ashok Nijhawan and Arvind Upadhyay, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The plaintiff is a trust constituted under the Indian Trusts Act, 1882 (hereinafter referred to as the "Trusts Act") with the primary object of conducting the business of mutual fund by promoting the savings of small and individual investors through various schemes.

2. It is stated that the plaintiffs were registered holders of 55,000 13 per cent secured bonds of Rs. 1000/- each, fully paid up, of the defendant company which were acquired by the plaintiff in December 1992. The said bonds were redeemable on 22.08.1997 and are stated to have been held under two schemes of the plaintiff being CANPREMIUM and CANSTAR. The details of the bonds are as under:

S. Certificate Distinctive No. Quantity Value No. No. 1 TND 0112 D5211001 To D5221000 10000 1,00,00,000/- 2 TND 0200 D4961001 To D4971000 10000 1,00,00,000/- 3 TND 0204 D4996001 To D5001000 5000 50,00,000/- 4 TND 0205 D5001001 To D5006000 5000 50,00,000/- 5 TND 0206 D5006001 To D5011000 5000 50,00,000/- 6 TND 0115 D5241001 To D5246000 5000 50,00,000/- 7 TND 0118 D5256001 To D5261000 5000 50,00,000/- 8 TND 0116 D5246001 To D5251000 5000 50,00,000/- 9 TND 0117 D5251001 To D5256000

5000 50,00,000/-

3. It is stated that the defendant paid interest to the plaintiff @ 13 per cent per annum on the 23rd of February and the 23rd of August each year as stipulated in the bonds.

4. The plaintiff claims that it had appointed one IIT Corporate Services Ltd (for short IIT Ltd.) as their custodian in respect of the two schemes. It is averred that IIT Ltd received a notice issued by the defendant company confirming that the plaintiff is the holder of the said bonds due for redemption on 22.08.1997 and requesting IIT Ltd to surrender the said bonds for the payment of the maturity value of the bonds on the due dates. The duly filed prescribed redemption form, the duly discharged nine original bond certificates and photocopies of the power of attorney are stated to have been sent to the defendant vide letters dated 06.08.1997 and 13.08.1997.

5. It is stated that vide two letters dated 27.08.1997, IIT Ltd informed the defendant that it had not received the redemption warrant in respect of the bonds due on 22.08.1997. The plaintiff avers that the defendant failed and neglected to pay the amount due and IIT Ltd sent a reminder dated 10.09.1997 informing the defendant company that no payment had been received and that the plaintiff would be claiming interest @ 18 per cent per annum from the due date of payment till the actual payment was made. Further reminders are stated to have been sent on 13.09.1997 and on 17.09.1997.

6. It is averred that the defendant sent a letter dated 06.10.1997 stating that the defendant company was withholding the redemption proceeds of the bonds as the matter regarding repayment of dues of the defendant by Can bank Financial services (For Short Can Fin) was under consideration by the Union of India and the defendant was withholding payment pending the final decision of the Union of India. The plaintiff is thereafter stated to have written a letter dated 06.11.1997 stating that the withholding of the redemption proceeds and clubbing the same with the non payment issue by CanFin was arbitrary and mala fide and as the amounts held were of small investors, the non payment of the redemption proceeds was detrimental to public interest.

7. The plaintiff is thus stated to have filed a writ petition being Writ Petition No. 5545/1997 in this Court praying inter alias for a writ of mandamus or other appropriate writ to be issued to the defendant to pay the amount of Rs 5.5. crores to the plaintiffs @ 18 per cent per annum from the due dated 22.07.1997 till the date of payment. In reply to the same it was contended that the writ petition was not maintainable in view inter alia, of the fact that disputed questions of fact were involved and the decision to retain the bonds was taken so as to adjust its proceeds against the total outstanding dues payable by CanFin to the defendant. An affidavit was filed by the plaintiff refuting the contentions of the defendant which was followed by a further affidavit by the defendant taking the plea that the matter in issue in the petition was pending before the

committee of secretaries for the settlement of outstanding disputes between the plaintiff and CanFin on one hand and the defendant along with other public sector undertakings on the other. It is stated that thereafter another affidavit was filed by the plaintiff denying any proceedings before the committee of secretaries included the disputes in the petition.

8. Another affidavit is stated to have been filed by the defendant dated 22.05.2000 stating that the subject matter of the writ petition had been settled as a sum of Rs. 5.5 crores had been paid to be plaintiff. The plaintiff however, claims that by a letter dated 13.04.1999, the defendant was informed that the said amount was being adjusted towards interest overdue and that a balance of Rs. 1,14,79,177/- was due and payable towards the redemption amount together with interest from 13.04.1999 till the date of payment. The defendant however claimed by a letter dated 29.04.1999 that no interest was payable as the payment of Rs. 5.5 crores was made as per terms of settlement and no interest was to be paid beyond the due date of redemption. The plaintiff claims to have made a further demand for the balance by a letter dated 28.05.1999 and also filed an affidavit in the writ petition dated 10.07.2000 that the plaintiff did not participate in any meeting of the committee of secretaries and that the meeting was with regard to disputes between the defendant and Can Fin with no reference to the plaintiff.

9. The writ petition is stated to have been disposed of vide an order dated 09.01.2001 where the conclusion reached was that the extraordinary writ jurisdiction could not be exercised in view of the contradictory statements made by the parties.

10. The plaintiff thus filed the present suit under Rule 2 of Order xxxvII of the Code of Civil Procedure, 1908 (hereinafter referred to as the said code) for the recovery of the balance of Rs. 41,81,000/- towards the principal amount along with interest @ 18 per cent per annum from 31.03.1999 to the date of filing of the suit and future interest on the amount of Rs. 41,81,000/-. The defendant was granted leave to defend vide an order dated 18.11.2003.

11. In its written statement, the defendant has taken the stand that the suit is liable to dismissed being barred by the principles of res judicata and by limitation. The subject matter of the suit is stated to have been settled. It is averred that the plaintiff has filed the present suit for the recovery only of the interest amount which is not permissible.

12. The defendant claims that the suit has not been signed, verified and instituted by a duly authorized person and is Therefore liable to be dismissed.

13. It is averred that the plaintiff herein is a trust created by the Canara Bank and CanFin is a wholly owned subsidiary of Can Bank. Both Can Bank and Can Fin have common business interests. Can Bank is thus stated to be equally responsible for the activities of CanFin.

14. It is stated that the defendant from its Vth series of bonds issued in March 1992 made deposits with CanFin. The defendant claims that CanFin, created liabilities in terms of payment of interest against the defendant, without any subscription money being received, and the inter corporate deposits made as a condition for the subscription of bonds on its maturity were not paid by CanFin. It is averred that CanFin did not pay the deposit amount on maturity to the defendant and also stopped paying interest. The dispute was thus taken to the committee of secretaries for settlement. As the defendant was to recover a large amount against Can Fin, it decided to retain the bonds transferred by CanFin to Can Bank. The matter was settled and the settlement is stated to include the subject matter of the present suit. An amount of Rs. 5.5 crore is stated to have been paid to the plaintiff in full and final settlement on 31.03.1999. it is thus the case of the defendant that all disputes, controversies and claims of the parties have been settled and in pursuance to the settlement, the parties have performed their obligations and Can Bank is unnecessarily re-agitating the matters on purely technical grounds. The parties had specifically agreed that their disputes and claims of principal and interest had been settled.

15. The defendant has also raised the plea of non-joinder of necessary parties including Can Bank and Can Fin. 16. On the pleadings of the parties, the following issues were framed on 02.09.2005:

1. Whether the plaint is signed and verified and suit instituted by a duly authorized person on behalf of the plaintiff?
2. Whether the suit is barred by principle of res judicata?
3. Whether the suit is barred by limitation?
4. Whether the payment of Rs.5.5 crore made by the defendant on 31.03.1999 was towards full and final settlement of dues/claims of the plaintiff?
5. Whether the plaintiff is entitled to appropriate the amount of Rs 5.5 crore paid on 31.03.1999, firstly towards the interest and principal amount in view of the fact that the redemption amount which was due on 22.08.1997, was in fact paid on 31.03.1999?
6. Whether the alleged settlement arrived at in the meeting of Committee of Secretaries on 03.03.1999 is binding upon the plaintiff in view of the averments made in the Para 21 of the plaint?
7. To what amount, if any, the plaintiff is entitled towards principal and interest and at what rate?
8. Relief.

17. In support of its case, the plaintiff filed the affidavit of evidence of Sh. Prabhat Kumar (PW 1) while on behalf of the defendant, affidavits were filed of Sh. S.S. Dhillon (DW 1) and Sh. K Raveendran (DW 2).

18. I have heard learned Counsel for the parties and the findings on the issues are set out hereinafter. Issue 1: Whether the plaint is signed and verified and suit instituted by a duly authorized person on behalf of the plaintiff?

19. The present suit has been filed through Can Bank in the capacity of the principal trustee of the bank. Can Bank is stated to have issued a power of attorney in favor of Can Bank Investment Management Services Ltd. whose employee has signed and verified the plaint. The writ petition, on the other hand is stated to have been filed by all the trustees of the plaintiff.

20. Learned Counsel for the defendant averred that Mr. Prabhat Kumar, (PW1) who has signed and verified the plaint has failed to prove his power of attorney on record and did not produce the original power of attorney. Further, no details of the power of attorney or the asset management company have been mentioned in the plaint.

21. Learned Counsel submitted that a trust can file a litigation within the meaning of Section 47 of the Trusts Act. The said provision is as under:

47. Trustee cannot delegate - A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

Explanation - The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

22. In support of his submissions, learned Counsel for the defendant placed reliance on the judgment of the Apex Court in J.P. Srivastava and Sons Pvt. Ltd and Ors. v. Gwalior Sugars Co Ltd. and Ors. JT 2004 (9) SC 507 wherein it was observed after consideration of various judgments that although as a rule, trustees must execute the duties of their office jointly, the general principle is subject to certain exceptions where one trustee may act for all. These are (1) when a trust deed allows the trusts to be executed by one or more by majority of trustees; (2) where there is express sanction or approval of the act by the co-trustees; (3) where the delegation of power is necessary; (4) where the beneficiaries competent to contract consent to the delegation; (5) where the delegation to a co-trustee is in the regular course of the business; (6) where the co-trustee merely gives effect to a decision taken by the trustees jointly.

23. Learned Counsel contended that the only justification in the present case could have been that the trust deed was filed on record with a resolution signed by all the trustees authorizing Can Bank to file the present case and further authorizing Can Bank to issue a power of attorney to third party. This was however not done. It is thus contended that the present suit has not been filed by a duly competent person within the meaning of the Trusts Act.

24. Learned Counsel for the plaintiff, on the other hand contended that Sh. Prabhat Kumar is the constituted attorney of the plaintiff and has been authorized vide a power of attorney (Ex. PW 1/22] to sign, verify and institute the suit.

25. A reference was made to the provisions of Order XXXI of the said code, Rule 2 of which states that where there are several trustees, executors or administrators, they shall be made parties to a suit against one or more of them. It was thus contended that institution of a suit by all trustees is not required.

26. Learned Counsel for the plaintiff referred to the decision of the Apex Court in United Bank of India Vs. Naresh Kumar and others, to contend that where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality and procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. The courts have sufficient power under the said code to ensure that injustice is not done to any party who has a just case, as far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. In Bal Niketan Nursery School Vs. Kesari Prasad, , the Apex Court, dealing inter alia, with the provisions of Rule 10 of Order I of the said code observed that it is well settled that if the court is satisfied that a bona fide mistake has occurred in the filing of the suit in the name of the wrong person, then the court should set right matters in exercise of its powers under Order I Rule 10 and promote the cause of justice. The courts have also held that even if the suit has been instituted in the name of a person who has no competence to file the suit, the courts should set the matter right by ordering the addition or substitution of the proper plaintiff for ensuring the due dispensation of justice.

27. It may be noticed that after the judgment in the present suit was reserved, the plaintiff filed an application being is 9385/2007 under Order 1 Rule 10 of the said code for the impleadment of the other trustees of the plaintiff trust as co-plaintiffs in the present suit. The application was allowed leaving the question of requirement of mandatory impleadment of trustees and the effect of subsequent impleadment in curing the defect, if any, to be dealt with in the judgment.

28. Learned Counsel for the plaintiff contended that under Regulation No. 20 read with regulation 18 of the SEBI Mutual Funds (Regulations), it is mandatory for every mutual fund to appoint an asset management company to supervise and manage the assets of the trust and in the present case, the plaintiff trust has appointed Can Bank Investment Services Private Ltd as its asset management company. Mr. Prabhat Kumar is an officer of the said asset management company.

29. Insofar as the impleadment of co-trustees in the present suit are concerned, it was submitted that as per the SEBI (Mutual Fund) Regulations, 1996 not less than 2/3rd trustees are mandatorily required to be independent persons and the trustees appointed at the time of institution of the suit could no longer represent

the Trust.

30. Learned Counsel for the defendant, submitted that the inherent defect cannot be cured as the amendment would relate back to the date of filing of the suit and the trustee were not the trustees of the plaintiff as on the date of filing of the suit. Also the power of attorney is in favor of the asset management company and not in favor of Can Bank.

31. The legal position insofar as execution of trust is concerned is that generally trustees are to act jointly in executing the functions. The principle is not absolute as observed in J.P. Srivastava's Case (supra) and the exceptions to the rule include, where the trust deed so provides, where there is an express sanction of the trustees, where delegation is necessary or in the regular course of business. In the case of delegation of powers by a trustee, again the position is that where the trust deed provides or where the delegation is necessary or in the regular course of business, the powers may be delegated.

32. The judgment in United Bank case (supra) is to the effect that mere technicalities should not be permitted to defeat public interest. The court has the power under Rule 10 of Order I of the said code to set right matters where it is satisfied that a bona fide mistake has been committed in filing the suit and can even exercise power where the suit has been instituted in the name of a wrong person by ordering the addition or substitution of the proper plaintiff [Bal Niketan Nursery case (supra)].

33. The present suit was instituted in the name of the plaintiff through its principal trustee, Can Bank. The plaint has been signed by an employee of Can Bank Investment Services who has been authorized by Can Bank by a power of attorney (Ex. PW 1/22) to institute suits, company petitions arbitration proceedings etc and related acts. The plaintiff has further filed powers of attorney by the co- plaintiffs being Sh. Raj Kumar Aggarwal, Sh. Ashok Pradhan and Sh. K. Krishna Roy also authorizing inter alia, Sh. Prabhat Kumar to institute suits etc.

34. The suit was filed by the plaintiff through its principal trustee. There is no document authorizing the principal trustee alone to institute the action. In view of the judgment in Bal Niketan case (supra), the court has the power to set matters right even where a suit has been filed in a wrong name. In the present case, the suit was filed in the name of the plaintiff through its principal trustee. The other trustees were however not impleaded initially. However, this is really in the nature of a technical defect and is not of a nature that cannot be cured. The plaintiff has sought to cure the defect by impleading the persons who are currently co- trustees of the plaintiff. I am thus of the view that the defect can be cured. The issue is thus answered in favor of the plaintiff.

Issue 2: Whether the suit is barred by principles of res judicata?

35. Learned Counsel for the plaintiff submitted that the plaintiff had earlier filed a

writ petition (W.P No. 5545/1997) against inter alia, the defendant herein for issuance of a writ directing the defendant to pay the amount of Rs. 5.5 crores with interest thereon to the plaintiff and interest thereon. On 31.01.1999, during the pendency of the writ petition, a sum of Rs. 5.5 crores was paid to the plaintiff. The writ court in an order dated 09.01.2001 was of the view that the question as to whether the amount has been paid under a settlement or whether the Chairman or Deputy General Manager of Canara Bank were authorized to enter into a settlement or not and whether the bonds in question were the subject matter of settlement or not are a disputed questions of fact. While exercising extraordinary writ jurisdiction the court would not embark into an enquiry into the realm of facts as to whether the bonds were covered under settlement or not. It was thus contended by the plaintiff that as the writ petition was disposed of with the aforesaid observations, the suit cannot be held to be barred under the principles of res judicata.

36. Learned Counsel for the defendant, on the other hand contended that it is not disputed that the amount of Rs 5.5. crores has been taken by the plaintiff which finds mention in the overall settlement of Rs 500 crores. Learned Counsel disputed the contention of the plaintiff that the bonds in question were not before the committee of secretaries.

37. Learned Counsel referred to the cross examination of PW 1 wherein the said witness has taken the stand that he is not sure whether the amount of Rs. 5.5 crores was one of the claims settled through the full and final settlement on 31.03.1999. It has been denied that the amount of Rs. 5.5 crores was accepted in full and final settlement and that no further amount is due.

38. The list of participants at the meeting dated 03.03.1999 of the committee of secretaries to resolve the dispute between the defendant and Can Bank/ Can Fin shows that there was representation on behalf of Can Bank and CanFin and not on behalf the plaintiff.

39. A perusal of the settlement agreement i.e. Ex. DW 1/1 show that the same was entered into between CanFin and the defendant. The recital refers to the long standing dispute between CanFin, Can Bank and the defendant relating to investments made by the defendant and withholding of some bonds by the defendant and further states that the parties to the dispute namely CanFin, Can Bank and the defendant felt that they should mutually come to a settlement. The terms of the agreement set out the schedule for payment by CanFin and provide for the set off of amounts due by the defendant to Can Fin. The agreement bears the signatures of the representatives of CanFin and the defendant. Nowhere in the agreement is the name of the plaintiff mentioned. The annexure to the agreement of the amounts payable to CanFin by the defendant which mentions the bonds and the proceeds due does not mention the series IV bonds which are the subject matter of the present suit. It is thus apparent that the plaintiff was not a party to the settlement agreement i.e. Ex DW 1/1. It is however not disputed that an amount of Rs. 5.5. crores was paid by the defendant to the

plaintiff.

40. The only proceedings with regard to the bonds of series IV which are in question in the present suit was the writ petition filed by the plaintiff against the defendant which was disposed on 09.01.2001 (Ex. PW 1/21) on account of the fact that the question whether the amount of Rs. 5.5 crores was paid under the settlement or not, was disputed. The court observed that it cannot inquire into the realm of facts as to whether the bonds were covered under the settlement or not although observations were made by the court that the amount of Rs. 5.5 crores finds mention in the overall settlement amount of Rs. 500 crores and the court expressed disagreement with the submissions of the petitioner (plaintiff herein).

41. The present suit is for the recovery of the amount of Rs. 41,80,000/- towards the principal amount. The plaintiff was not a party to the settlement agreement i. e. Ex DW1/1 and insofar as the writ petition is concerned, though the court made certain observations no final finding was given by the court on the question of whether the bonds were covered in the settlement or whether the chairman of Can Bank was authorized to enter into any agreement with the defendant. In fact it has been stated that the court in exercise of its extraordinary writ jurisdiction in view of the conflicting statement of the parties would not embark into an enquiry in the realm of facts.

42. Thus, it cannot be said that the question of whether the bonds in question were covered under the settlement has been settled and is barred by res judicata. The issue is thus decided in favor of the plaintiff.

Issue 3: Whether the suit is barred by Limitation?

44. Insofar as the issue of limitation is concerned, the plea of the defendant is that no date has been mentioned on the plaint in the present suit as to when the same has been signed or verified as the suit appears to have been filed after 30.03.2002 and is thus time barred.

45. Learned Counsel for the plaintiff, on the other hand contended that the bonds in question had matured on 22.08.1997 . The payment of Rs.5.5 crores was made on 31.03.1999 and the present suit was filed on 30.03.2002 and thus the suit is filed within the period of limitation.

46. The plaintiff had filed a writ petition on account of non payment of amount due in respect of bonds which had matured on 22.08.1997. During the pendency of the petition, on 31.03.1999, an amount of Rs. 5.5 crores was paid to the plaintiff which is stated to have been adjusted first towards interest and thereafter towards the principal amount. Thereafter letters were sent and affidavits filed in the writ petition with respect to the additional amount claimed. The writ court disposed of the petition on 09.01.2001 on account of the contradictory statements made by the parties as to whether the bonds in question were covered in the settlement. The dispute as to whether the bonds in

question formed part of the settlement and consequently whether the plaintiff is entitled to any additional amount arose after the payment was made on 31.03.1999. The present action was thus brought on 30.03.2002. Thus, it cannot be said that the suit is beyond the period of limitation.

Issue 4: Whether the payment of Rs.5.5 crore made by the defendant on 31.03.1999 was towards full and final settlement of dues/claims of the plaintiff?

Issue 5: Whether the plaintiff is entitled to appropriate the amount of Rs 5.5 crore paid on 31.03.1999, firstly towards the interest and principal amount in view of the fact that the redemption amount which was due on 22.08.1997, was in fact paid on 31.03.1999?

Issue 6: Whether the alleged settlement arrived at in the meeting of Committee of Secretaries on 03.03.1999 is binding upon the plaintiff in view of the averments made in the Para 21 of the plaint?

47. Learned Counsel for the plaintiff submitted that Can Bank is a nationalized bank of which CanFin is a wholly owned subsidiary. CanFin was unable to meet its commitment of repayment in respect of certain deposits made by the defendant on account of a fall in the stock market. The defendant thus withheld the amount of Rs.510 crores invested by Can Bank towards bonds as well as the amount of Rs. 5.5 crores due to the plaintiff. The dispute between the defendant, Can Bank and Can Fin was resolved by the committee of secretaries by an agreement [Ex. DW1/1] Learned Counsel for the plaintiff pointed out that the annexure to the agreement shows that the bonds in question in the present suit did not find mention in the said agreement. It was pointed out that under the agreement [Ex. DW1/1] it was agreed that CanFin would make payment of the outstanding dues of the defendant after making adjustment. The amount of Rs. 510 crores payable to Can Bank was to be paid partly by cheques and partly by bonds repayable in seven years.

48. It was also submitted that series III bonds which became due on 25.09.1999 as well as investment made under the Gratuity and Provident Fund Scheme of Can Bank were not covered and would not be covered under the Settlement. In this behalf, learned Counsel referred to Ex DW 1/4 which is a letter on behalf of the defendant to the plaintiff with regard to the "resolution of dispute between Cab Bank/ Can Fin and NPC in which it is stated that subsequent to the settlement all dues of Can Bank relating to redemption of bonds of the third series (9 per cent) falling due on 25.09.1999 and payment of interest on bonds which have not been taken into account in the settlement would be cleared by NPC as and when they are due."

49. Reliance was also placed on Ex. DW 1/8 written by Can Bank wherein it has been stated that the funds in question belong to the provident and gratuity fund of the employees of the bank cannot be clubbed with the dispute between Can Bank, Can Fin and the defendant.

50. Learned Counsel referred to Ex. DW 1/10 which is a receipt issued by the plaintiff in respect of the amount of Rs 5.5 crores paid by the defendant on 31.03.1999 to contend that the same does not state that the payment is in full and final settlement of the claim of the plaintiff.

51. It was submitted that the issues discussed before the board of secretaries pertained only to the disputes between the defendant, CanFin and Can Bank and the dues of the plaintiff were not even discussed and there was no representation on behalf of the plaintiff.

52. Learned Counsel for the plaintiff contended that the well settled common law principle followed by Indian Courts is that the creditor is entitled to adjust the amount first towards the payment of interest and thereafter towards the principal amount.

53. In this behalf learned Counsel for the plaintiff referred to Chitty on Contracts (24th edn, Vol. 1, pp.623-24) where it has been stated that where several debts are due from the debtor to the creditor, the debtor may, while making the payment appropriate the money to a particular debt or debts. In cases where the debtor has not exercised his right the right to appropriate devolves upon the creditor. Where there is no appropriation by either the debtor or the creditor, the law will unless a contrary intention appears apply the payment to the discharge of the interest before applying it to the earliest items of principal. Reference was also made to Halsbury's Laws of India (Vol 11 p. 404) wherein it has been stated that where both principal and interest are due, the usual presumption is that the amount received is to be applied to the interest first. Similar observations have been made in Chase v. Box 1197 ER 22, Bishwnath Bhattacharjee v. Sameshwar Sarma Baruah AIR 1918 Cal 609 , AIR 1922 233 (Privy Council) , Jia Ram v. Sulakhan Mal AIR 1941 Lah 266 . In Industrial Credit and Development Syndicate Now called M/s. Industrial Credit and Development Syndicate Now Called I.C.D.S. Ltd. Vs. Smt. Smithaben H. Patel and Others, , the Apex Court referred to the judgments in Chase and Jia Ram cases (supra) and held that the general rule of appropriation of payments towards the decretal amount is that for such an amount, in the absence of directions contained in the decree, the adjustment is to be made firstly towards interest and costs and thereafter towards the payment of the principal amount.

54. Learned Counsel for the plaintiff submitted that fund money cannot be appropriated or clubbed with the amount that may have been deposited with the bank or its subsidiary corporation. In this behalf reference was made to the judgment of the Apex Court in Canara Bank and Others Vs. National Thermal Power Corpn. and Another, in which it was held that the trustees of the Trust constituted by Canara Bank as settler for the benefit of numerous unit holders cannot be termed and styled as a government company or a public sector undertaking. It was found that a perusal of the bond in question in that matter showed that no dispute could be raised for the payment of the amount on demand to its holder or order. The claim of the respondent could be enforced

separately against the subsidiary of Can Bank and the same cannot be made a ground to resist the claim of the appellants.

55. Learned Counsel also placed reliance on the decision of the company Law board in Canara Bank v. National Thermal Corporation and Ors. (1996) 4 Comp LJ 214 wherein it was observed that where a public sector undertaking is acting as a trustee of a trust, the real litigant is not the public sector undertaking but the trust.

56. The case of the defendant on this aspect is that that Ex. DW 1/10 shows that the representative of the plaintiff was present on 31.03.1999 and collected the cheque on that day in view of the settlement arrived at on that date. The plaintiff never accepted the amount on the condition that the same is towards interest. It was contended that Ex. DW 1 to DW 1/9 show that there were detailed meetings before the committee of secretaries and a full and final settlement was arrived at. The issue of non payment of interest was raised only after 31.03.1999.

57. Learned Counsel for the defendant submitted that the plaintiff has not filed any statement of account and has also not led any evidence as to why the amount of Rs 5.5. crores was appropriated by it against which rate of interest.

58. Learned Counsel for the defendant referred to the minutes of meeting dated 24.03.1999 where it was assured by CanFin that it would honour its commitments. It was contended that the Can Bank was present and Can Bank represented the plaintiff being its principal trustee. Learned Counsel also referred to Ex. DW 1/8 to contend that the same refers to payment in respect of Canara Bank Employees Gratuity Fund and Canara Bank Staff Provident Fund and can Bank did not impress upon payment of interest to the plaintiff.

59. As noted above, a perusal of the agreement [Ex. DW1/1] shows that the parties to the agreement were Can Fin, Can Bank and the defendant. The plaintiff was not a party to the agreement. In fact the bonds mentioned in Annexure I to the said agreement are of series I, IV-I, IV-I and V. The bonds in question in the present suit, Ex. PW1/1- Ex. PW1/9 are bonds of series IV which have not been mentioned in the settlement agreement. The plaintiff was not a party to the settlement agreement. There is also nothing to indicate that the representative of Can Bank was also representing the plaintiff. The settlement agreement does not refer to any dispute between the plaintiff and the defendant and the only disputes to which it relates are the disputes between CanFin, Can Bank and the defendant.

60. The agreement no doubt is final and binding between the parties but that would be only in respect of the disputes referred to in the agreement. There is no dispute that an amount of Rs. 5.5 crore was paid on 31.03.1999 in respect of which a voucher being Ex. DW 1/10 was issued. There is however nothing to indicate that the same was accepted in full and final settlement of the dispute as regards Ex. PW1/1to PW 1/9 i.e. the bonds in question in the present suit. The voucher (Ex. DW 1/10) merely acknowledges the receipt of R. 5.5 crores by the

plaintiff but nothing is stated about the same being in full and final settlement of the disputes. After the payment of this amount, the plaintiff sent a letter dated 13.04.1999 stating that the amount paid was being adjusted firstly towards interest and on such adjustment, the balance amount of Rs. 1,14,79,177 was still due and payable towards the balance principal amount. Insofar as the amount of Rs. 5.5 crores in respect of the bonds being Ex. PW 1/1- Ex PW 1/9, the same had become due on 22.08.1997. It is not disputed that no amount was paid to the plaintiff in respect of the said bonds till 31.03.1999. The amount was being detained on account of the disputes between the defendant, CanFin and Can Bank to which the plaintiff was not a party. It cannot be disputed that the plaintiff would be entitled to interest on account of such non payment.

61. Insofar as the appropriation of amounts paid by a debtor to the creditor, the principle is that where nothing has been specified in the agreement and where the debtor or creditor have not exercised their right to appropriation, the amount paid would be first adjusted towards the interest and thereafter towards the principal amount. This is apparent from Chitty on Contracts, Halsbury's Laws of India as also the pronouncements *inter alia*, in Chase, Jia Ram and Industrial Credit and Development Syndicate cases (*supra*). Thus the plaintiff had the right to appropriate the amounts paid firstly towards the interest and thereafter towards the principal amount.

62. In the meeting to resolve the dispute between Can Bank/ CanFin and the defendant dated 03.03.1999 (Ex. DW 1/7) there was representation on behalf of the defendant, Can Bank and CanFin besides the DAE. The said minutes record the discussions between the parties as regards a settlement and records the terms of settlement mutually agreed between the parties. One of the terms is that the defendant would pay withheld interest only up to the maturity period of the bonds. There is nothing in the minutes of meeting dated 24.03.1999 to indicate that the representatives of Can Bank were present in the capacity of the principal trustee of the plaintiff. The settlement is between Can Fin and the defendant. Insofar as the contention of the defendant that the Can Bank did not impress upon the payment of interest to the plaintiff is concerned, the letter dated 13.04.1999 (EX. PW 1/18) shows that additional amount was claimed in respect of the bonds in question in the present suit.

63. It cannot be disputed that a trust is a separate entity and a public sector undertaking acting as a trustee is acting in the capacity of the trustee and not in its own capacity (Canara Bank (1996) case *supra*). The claims of the defendant in respect of which the settlement agreement was entered into were against Can Fin, a subsidiary of Can Bank and not against the plaintiff which is a trust and thus a separate entity. There is nothing to show that the representatives of Can Bank were representing the plaintiff either in the meeting dated 03.03.1999 (Exhibit DW-1/7) or while signing the agreement dated 31.03.1999. The annexure to the settlement agreement which specifically lists the bonds in respect of which payments are to be made does not refer to the bonds in the

present suit. Even if it was agreed that no interest was to be paid after the date of maturity, the same was with respect to the disputes between the defendant, Can Bank and Can Fin. The same cannot be said to be applicable to the plaintiff. Thus the plaintiff would be entitled to interest as no amounts were paid till 31.03.1999 although the amount had become due on 22.08.1997. The issues are thus decided accordingly.

Issue No 7: To what amount, if any, the plaintiff is entitled towards principal and interest and at what rate?

64. The plaintiff has restricted its claim to Rs.41.81 lakhs towards the principal amount as it was directed by the Special Court Mumbai to hand over bonds of the value of Rs.3.5 crores to Standard Chartered Bank.

65. Insofar as the rate of interest is concerned, it may be noticed that the bonds in question carried interest of 13 per cent per annum. I am thus of the view that the plaintiff is entitled to interest @ 13 per cent per annum simple interest on the amount of Rs 41,81,000/-from 31.03.1999 till the date of realization.

Issue 8: Relief

67. In view of the aforesaid, a decree is passed in favor of the plaintiff and against the defendant for a sum of Rs.41,81,000/- along with simple interest @ 13 per annum from 31.03.1999 till the date of realization. The plaintiff shall also be entitled to proportionate costs.

68. Decree sheet be drawn up accordingly.