

(2003) 03 BOM CK 0059

In the Bombay High Court

Case No : Notice of Motion No. 592 of 2002 in Suit No. 654 of 2002

Jry Investments Private Limited

APPELLANT

Vs

Deccan Leafine Services Ltd. and Others

RESPONDENT

Date of Decision : 11-03-2003

Acts Referred:

Companies Act, 1956 — Section 108
Contract Act, 1872 — Section 148, 172
Depositories Act, 1996 — Section 10, 12
Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 — Regulation 58, 58(2)

Citation : (2004) 121 CompCas 12 : (2004) 56 SCL 339

Hon'ble Judges : S.A. Bobde, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, Chirag Balsara and Birendra Saraf, instructed by Negandhi Shah and Himayatulla, for the Appellant; Kusum Joshi, instructed by M and M Legal Venture for defendants Nos. 2, 6 and 7, S.H. Doctor and Chetan Kapadia and Kharade, instructed by DSK Legal for defendant No. 14, Shekhar Shetye and Kapadia, instructed by Pandya Gandhi and Co. for defendant No. 18, S.P. Bharati, for defendant No. 27, Alpana Ghone, instructed by Kanga and Co. for defendant No. 34 and Rajendra Barot, instructed by Chamber of Zia Mody for defendant No. 35, for the Respondent

Judgement

S.A. Bobde, J.—This notice of motion is taken out by the plaintiffs for appointment of the court receiver in respect of 5,27,650 shares of ETC Networks lying in the demat account of defendants Nos. 1, 14, 17 and 18 including the power to sell and dispose of the said shares.

2. Today the plaintiffs seek relief only in respect of one lakh shares held by defendants Nos. 18, 14 and 35 each.

3. The plaintiff has filed this suit, inter alia, for a declaration that the 6,50,000 shares of ETC Network Ltd. lying to the credit to the demat account of defendants Nos. 1 to 21 and 35 maintained with defendants Nos. 22 to 33 and

34, belong to the plaintiff. The plaintiffs also seek an order and direction to the defendants to transfer the said 6,50,000 shares of ETC Network lying to the credit of the demat account of defendants Nos. 1 to 21 and 35, particularly set out in exhibit F to the plaint to the plaintiffs demat account maintained with defendant No. 22, i.e., the Stock Holding Corporation of India. In the alternative, the plaintiff has prayed for an order and decree in the sum of Rs. 1,95,00,000 as per particulars of claim.

4. The plaintiff is an investment company. Defendant No. 1 is a company which carries on the business of providing finance. The plaintiff claims that defendants Nos. 2 to 21 are companies and individuals who have participated in fraudulently receiving equity shares of ETC Network Ltd., which belong to the plaintiff. The plaintiffs aver that they parted with 6,50,000 shares in favour of defendant No. 1 in order to secure repayment of a loan of Rs. 1,12,50,000 proposed to be taken from defendant No. 1. Eventually, defendant No. 1-company did not give the loan. However, it transferred the shares to other defendants. Today, according to the plaintiffs, defendant No. 18 has 1,00,000 shares, defendant No. 14 has 1,00,000 shares and defendant No. 35 has 1,00,000 shares which it has purchased from defendant No. 14. The basic transaction between the plaintiff and defendant No. 1 is as follows :

5. The plaintiff entered into an agreement dated May 25, 2001, to borrow a sum of Rs. 1,12,50,000 against shares in a dematerialised form to be duly transferred in the name of Deccan Leafine Services Ltd., i.e., defendant No. 1. Clause 1 of the agreement reads as follows :

"1. The lender hereby agrees to lend Rs. 1,12,50,000 (rupees one crore, twelve lakhs and fifty thousand) only (hereinafter called "the said loan") to the borrower against shares in dematerialised form, more fully described in the schedule attached hereto, duly transferred in the name of the lender. The security margin shall be one time at 50 per cent. and this margin shall not be changed anytime during the currency of the loan irrespective of the change in market price of the shares secured under this loan agreement."

Clause 5 of the agreement reads as follows :

"5. The borrower hereby agrees to give the lender the absolute and irrevocable authority, to set off the value of the security at the price of Rs. 15 per share in the event of non-payment of quarterly interest as accrued and remaining unpaid till date. In the event of such a set off, the borrower hereby expressly waives the right to receive any notice whatsoever from the lender."

Clause 7, which gives power to defendant No. 1 in respect of the security in the dematerialised shares, reads as follows :

"7. The borrower hereby appoints and nominates the lender as its/his power of attorney to transfer all its/his rights and authority in/upon the security hereunder given as also to sell, exchange, surrender, receive, consolidate the said security

or part thereof. The borrower further undertakes not to cause or do any act to stop or prevent the lender in exercise of the powers hereby granted, till the borrower discharges the entire liability under the said loan."

Clause 10, which confers further power on defendant No. 1, reads as follows :

"10. The lender shall be entitled to trade sell, assign or transfer its rights and obligations under this agreement to any person (s) of the lender's choice, either in whole or in part and in such manner and on such terms as the lender may decide. The borrower further agrees that, he shall not object to such a trading/lending, selling, assigning, refinancing, transferring the rights/obligation of the stock, during the continuance of this agreement."

Clause 15 which confers voting rights in respect of the shares on defendant No. 1 during the subsistence of the agreement, reads as follows :

"15. The borrower agrees that during the continuance of this agreement, the voting right in respect of the security hereunder given shall exclusively vest on the lender."

It is an undisputed fact that the plaintiffs did not write a request letter to defendant No. 1 for loan and therefore defendant No. 1 has not given a loan to the plaintiffs. The shares have been transferred by the plaintiffs to defendant No. 1 as follows :

1,50,000 shares on May 29, 2001; 2,50,000 shares on June 16, 2001;

11,00,000 shares on June 18, 2001.

Totalling to 15,00,000 shares. Of the 15,00,000 shares deposited with defendant No. 1, the plaintiffs have taken back about 8,50,000 shares on or about August 24, 2001.

6. Defendant No. 1 has transferred to defendant No. 18, 1,00,000 shares on May 29, 2001, in an off-market transaction, i.e., directly and not through the stock exchange. Defendant No. 14 purchased 1,00,000 shares on June 27, 2001, from the Bombay Stock Exchange and 4,00,000 shares on July 10, 2001. Defendant No. 14 sold 1,00,000 shares on March 20, 2002. Defendant No. 35 purchased 50,000 shares from the Bombay Stock Exchange on March 19, 2002, and another 50,000 shares on March 20, 2002, from the Bombay Stock Exchange. The plaintiffs seek an injunction and/or appointment of the receiver on total of 3,00,000 shares, i.e., 1,00,000 shares in the hands of defendants Nos. 18, 14 and 35 each. This is the number of shares presently held by these defendants.

7. The main contention of Mr. Tulzapurkar, learned counsel for the plaintiffs is that under the loan agreement dated May 25, 2001, the plaintiffs transferred 15 lakh shares to defendant No. 1 with the intention of creating security. The plaintiffs did not intend and in fact did not, transfer title in the shares to defendant No. 1. Therefore, the said defendant did not have any authority to transfer the shares in favour of the other defendants. The shares were

transferred merely as a security and in order to create a pledge for the money that was to be borrowed by the plaintiffs as a loan from the defendants. Since defendant No. 1 did not give the loan, the consideration for the security failed. Since no title in the shares vested in defendant No. 1 and therefore defendant No. 1 could not have transferred the shares. The plaintiffs, therefore, continue to be the owner of the shares and are entitled to an injunction and appointment of the receiver in respect of the said shares.

8. It is, therefore, necessary to consider the nature of the transaction between the parties. The plaintiffs' case is that under the loan agreement dated May 28, 2001, the intention of transferring the shares to the defendants was for the purpose of securing the loan which was to be taken from defendant No. 1. Since no loan was taken the transfer of the shares in favour of the defendants is void and therefore the plaintiffs remain the owner of the shares.

9. In the first place, it is obvious that the manner in which the shares were transferred and the terms under which they were transferred to defendant No. 1 the shares do not appear to have been pledged. The transaction is as follows:

10. On May 28, 2001, defendant No. 1 wrote a letter to the plaintiffs in response to the plaintiffs' application for a loan of Rs. 1,12,50,000 against 15 lakh shares of ETC Networks in the demat form. The letter, at exhibit A to the plaint, stated that the loan would be disbursed to the plaintiffs after confirmation of the transfer of demat shares into the demat account. It was specifically stipulated that under Clause 10 of the agreement which was being signed by the plaintiffs, defendant No. 1 would acquire an absolute and unconditional right to transfer and trade on the scrips transferred to them as security without attributing any reason whatsoever. That clause is reproduced again for the sake of convenience.

"10. The lender shall be entitled to trade, sell, assign or transfer its rights and obligations under this agreement to any person(s) of the lender's choice, either in whole or in part and in such manner and on such terms as the lender may decide. The borrower further agrees that, he shall not object to such a trading/ lending, selling, assigning, refinancing, transferring the rights/obligations of the stock, during the continuance of this agreement."

11. It must be noted that there is no dispute that the agreement continues, i.e., subsists. In fact, defendant No. 1 has stated that it is willing to finance the amount, if so desired by the plaintiffs. Even otherwise, the loan agreement refers to the handing over of the shares by the plaintiffs to defendant No. 1 as "transferred" and not as "pledged". From Clause 10 and other terms of the loan agreement, I am prima facie of the view that the intention was to transfer the shares in favour of defendant No. 1 in consideration of the amount that was to be advanced by defendant No. 1 at the request of the plaintiffs. In any case that is what has been done. Merely because the consideration failed, it cannot be said that the transfer of shares in favour of defendant No. 1 was not a transfer. Moreover, in the present case, it is an admitted fact that it is the plaintiffs who

did not ask for the disbursal of the loan by writing a letter as contemplated by Clause 24 of the agreement, which reads as follows :

"24. The loan amount will be disbursed only after the complete transfer of all the shares stated under this agreement has taken place and on the receipt of the request letter from the borrower. The lender reserves the right to disburse the loan amount in the phased manner."

12. As observed earlier, defendant No. 1 has stated that it is willing to give the loan asked for by the plaintiffs, vide paragraph 7 of the affidavit in reply of defendant No. 1.

13. Ordinarily where shares are handed over by a borrower to the lender for securing repayment of the loan they are regarded as pledged. But here the plaintiffs appear to have consciously used the term "transfer" and have even agreed to defendant No. 1 having the power to trade, sell, assign and transfer the "rights/obligations of the stock during the continuance of the agreement", vide Clause 10. Though learned counsel for the plaintiffs did so contend, it is not possible to hold that rights/obligations of the stock only means the rights and obligations and not the stock itself. The two are inseparable. It is difficult to conceive of the power to transfer the right in a thing but not the thing itself. It does not appear that the transfer of shares in the present case can be taken to be a pledge in law. Therefore, there can be no question of applicability of Section 176 of the Contract Act which requires the pledgee to give a notice to the pledger of his intention to transfer the pledged goods. This aspect is being considered because at one stage it was argued by learned counsel for the plaintiffs that the transfer by defendant No. 1 of shares in favour of the other defendants is void in the absence of the notice by defendant No. 1 of their intention to sell the shares. Reliance is placed on a decision of the Division Bench of this court in *Official Assignee, Bombay v. Madholal Sindhu*, AIR 1947 Bom 217, in which this court held that Section 176 of the Contract Act is mandatory; its provisions are not like other provisions of the Contract Act, subject to the "contract to the contrary". Therefore, where the pledger fails to redeem, the pledgee cannot sell the goods without notice to the pledger unless it is proved to have been waived by the pledger. In the view I am taking, it is not necessary to consider whether the view taken by the judgment holds the field since the judgment has been reversed by the Federal Court in *Madholal Sindhu v. Official Assignee of Bombay* [1949] 51 BLR 906. The same view as of this court has been taken by other High Courts.

14. Mr. Doctor, learned counsel for defendant No. 14, strongly contended that no case whatsoever of a pledge of shares has been made out ; primarily because of the nature of the shares in the demat form, particularly since the procedure prescribed for pledging shares by the Depositories Act, 1996, has not been followed. The submission deserves acceptance.

15. It must be remembered that the shares in question are demoted shares, i.e.,

shares in the dematerialised form. In other words, the shares are not in the physical form of share certificates bearing a certificate number but are shares which are stored with or deposited as shares of the company in the dematerialised form without individual identity. They are in a fungible form. It is, therefore, clear that such shares cannot be pledged in accordance with the provisions of the Indian Contract Act, 1872, which requires delivery of the goods pledged. Section 172 of the Contract Act reads as follows :

"172. "Pledge", "pawnor" and "pawnee" defined.--The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called "pawnee"."

Section 148 defines bailment as follows :

"148. "Bailment", "bailor" and "bailee" defined.--A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee". It is, therefore, obvious from the said provisions that for a valid pledge, there must be a delivery of goods, i.e., a physical possession of the goods. It might be possible to hold that such shares are goods as defined by Article 366(12) of the Constitution of India, i.e., "all materials, commodities and articles" and by Section 2(7) of the Sale of Goods Act which defines the word to include "stocks and shares".

16. It would, however, be impossible to hold that such goods in a dematerialised form are capable of delivery that is by handing over de facto possession. Since such goods are invisible and intangible it would-be impossible and in any case difficult to fix the fact of time and place of delivery. Even if it is possible according to some protocol, it does not seem to have been recognised by the law yet. Dematerialised shares cannot be delivered physically nor can physical possession of such dematerialised shares be handed over.

17. In fact, it appears that the provisions have been enacted in the Depositories Act, 1996, for the purpose of recording accurately the transfers and pledges of shares including those in a dematerialised form.

18. The transaction in such shares are directly governed by the Depositories Act, 1996, which contemplates the existence of a depository, i.e., a company which acts as the depository of such shares. The shares are held by the depository in the name of the beneficial owner of the shares. The depository is entitled to act as a registered owner for the purpose of effecting transfer of ownership of security on behalf of a beneficial owner vide Section 10 of the Depositories Act, 1996, which reads as under :

"10. Rights of depositories and beneficial owner.--(1) Notwithstanding anything contained in any other law for the time being in force, a depository shall be

deemed to be the registered owner for the purposes of effecting transfer of ownership of security on behalf of a beneficial owner.

(2) Save as otherwise provided in Sub-section (1), the depository as a registered owner shall not have any voting rights or any other rights in respect of securities held by it.

(3) The beneficial owner shall be entitled to all the rights and benefits and be subjected to all the liabilities in respect of his securities held by a depository."

19. It is important to note that Section 10 begins with a non-obstante clause and therefore ownership and transfer of shares governed by the Act must be in accordance with the provisions of the Depositories Act, Section 12 of the Depositories Act provides for pledge or hypothecation of the security and reads as follows :

"12. Pledge or hypothecation of securities held in a depository,--(1) Subject to such regulations and bye-laws, as may be made in this behalf, a beneficial owner may with the previous approval of the depository create a pledge or hypothecation in respect of a security owned by him through a depository.

(2) Every beneficial owner shall give intimation of such pledge or hypothecation to the depository and such depository shall thereupon make entries in its records accordingly.

(3) Any entry in the records of a depository under Sub-section (2) shall be evidence of a pledge or hypothecation."

20. Section 20 deals with the offences and renders any one who acts in contravention of the Act or any regulations or bye-laws punishable with imprisonment. The Securities and Exchange Board of India has in exercise of the powers u/s 25 of the Depositories Act made the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996. The regulations require the depository to maintain, inter alia, records of all approvals, notices, entries and cancellation of pledge or hypothecation, as the case may be, vide regulation 38(1)(e). Regulation 58 reads thus :

"58. Manner of creating pledge or hypothecation.--(1) If a beneficial owner intends to create a pledge on a security owned by him, he shall make an application to the depository through the participant who has his account in respect of such securities.

(2) The participant after satisfaction that the securities are available for pledge shall make a note in its records of the notice of pledge and forward the application to the depository.

(3) The depository after confirmation from the pledgee that the securities are available for pledge with the pledgor shall within fifteen days of the receipt of the application create and record the pledge and send an intimation of the same to the participants of the pledgor and the pledgee.

(4) On receipt of the intimation under sub-regulation (3) the participants of both the pledgor and the pledgee shall inform the pledgor and the pledgee respectively of the entry of creation of the pledge.

(5) If the depository does not create the pledge, it shall send along with the reasons an intimation to the participants of the pledgor and the pledgee.

(6) The entry of pledge made under sub-regulation (3) may be cancelled by the depository, if the pledgor or the pledgee makes an application to the depository through its participant:

Provided that no entry of pledge shall be cancelled by the depository without prior concurrence of the pledgee.

(7) The depository on the cancellation of the entry of pledge shall inform the participant of the pledgor.

(8) Subject to the provisions of the pledged document, the pledgee may invoke the pledge and on such invocation, the depository shall register the pledgee as beneficial owner of such securities and amend its records accordingly.

(9) After amending its records under sub-regulation (8) the depository shall immediately inform the participants of the pledgor and pledgee of the change who in turn shall make the necessary changes in their records and inform the pledgor and pledgee respectively.

(10) (a) If a beneficial owner intends to create a hypothecation on a security owned by him, he may do so in accordance with the provisions of sub-regulations (1) to (9).

(b) The provisions of sub-regulations (1) to (9) shall mutates mutandis apply in such cases of hypothecation :

Provided that the depository before registering the hypothecate as a beneficial owner shall obtain the prior concurrence of the hypothecator.

(11) No transfer of security in respect of which a notice or entry of pledge or hypothecation is in force shall be effected by a participant without the concurrence of the pledgee or the hypothecate, as the case may be,"

21. It is, therefore, clear that the Act and the regulations contain a whole and self-contained procedure for the creation of pledges. In any case, since it is not possible to physically deliver demoted shares and therefore pledge them in accordance with the Indian Contract Act, 1872, it must be held that a pledge of such shares can only be validly created in accordance with the provisions of the Depositories Act, 1996,

22. In the present case, it is an admitted fact by the plaintiffs that the plaintiffs did not make any application to the depository for the creation of a pledge as contemplated by regulation 58. In any case, there is no dispute about the fact that after the plaintiffs transferred the shares in favour of defendant No. 1 under

the loan agreement, the shares were held with the depository, i.e., National Securities Depository Ltd. and defendant No. 1 was shown as the beneficial owner of the shares with the depository participant, i.e., defendant No. 22. It is the depository participant who holds the account of various beneficial owners for the purpose of transfer of share transactions of the clients with the depository.

23. It is, therefore, evident that the plaintiffs conveyed their property in the shares to defendant No. 1 and defendant No. 1 has been shown as a beneficial owner in the depository participant account. If the plaintiffs intended to transfer the shares in favour of defendant No. 1 on account of the pledge they could have done so in the manner provided by regulation 58, i.e., by making an application to the depository through defendant No. 2 depository participant, whereupon the depository participant would have made a note that the securities are available in the pledge in accordance with Section 58(2). The important thing is that the security would have been accepted by the depository as a pledger and the record would have shown the plaintiffs as the pledger, and defendant No. 1 as pledgee. This has an important bearing on the question whether the plaintiffs intended to convey title in the shares in favour of defendant No. 1, or merely intended to create a pledge, In view of the fact that the plaintiffs did not follow the procedure provided by regulations for creating pledge, I am of the view, prima facie, that the plaintiffs had not intended to create a pledge but intended to transfer and that in any case has been the effect. In any case, in fact they did not create a pledge, but transferred the shares.

24. The question whether there was a transfer or not, in favour of defendant No. 1 has a bearing in the present case on the purchase by the other defendants from defendant No. 1. The question is whether the other defendants who purchased shares from defendant No. 1 can be said to be bona fide purchasers for value without notice. There is no dispute about the fact that the shares in question were transferred by the plaintiffs to the demat account of defendant No. 1. His client's ID was 14700654 as apparent from the debit column of the transaction statement at exhibit D3 to the plaint which shows the transfer of shares in question except two lakh shares the transfer of which is reflected at exhibit D4. The said transaction shows certain entries as being "to pledge". Significantly the transfer of the shares in question does not show a transfer to the pledge account as in the case of other transactions in the said statement. Ex facie the shares in question had not been pledged but transferred.

25. Defendant No. 18 appears to have purchased shares directly from defendant No. 1 and defendant No. 14 and defendant No. 35 appear to have purchased the shares from the Bombay Stock Exchange.

26. Prima facie, therefore, defendant No. 1 got a title, in any case an ostensible title in the shares from the plaintiffs. The next question is whether defendant No. 18 who purchased one lakh shares of ETC Networks from defendant No. 1 and defendants Nos. 14 and 35 who purchased one lakh shares each held by them from the Bombay Stock Exchange can be said to be bona fide purchasers for

value without notice.

27. Mr. Tulzapurkar, learned counsel for the plaintiffs submitted that the sale of the shares by defendant No. 1 was not a sale by the owner of the shares. It is not possible to accept the contention of Mr. Tulzapurkar, learned counsel for the plaintiffs that the plaintiffs not having conveyed any title in the shares to defendant No. 1, the purchasers from defendant No. 1 acquired no better title to the goods than the seller as provided by Section 27 of the Sale of Goods Act, 1930. As observed earlier, the plaintiffs did not create a pledge and indeed transferred title in the shares to defendant No. 1. Therefore, it cannot be said that the sale by defendant No. 1 of the shares is sale by a person who is not an owner thereof.

28. Assuming for the sake of argument that the plaintiffs did not convey title in the shares to defendant No. 1, it does not ipso facto lead to the conclusion that defendants Nos. 18, 14 and 35 who purchased shares from defendant No. 1 could not get any title in the shares. There are certain exceptions to the rules that no person can pass a better title to another than he himself possesses. The law acknowledges cases when a person having no title to the property may acquire and pass good title to a bona fide purchaser for a value without any knowledge or by virtue of any defect in the title of the person conveying the same. The Calcutta High Court has set out these classes of cases in *Sumitra Debi Jalan Vs. Satya Narayan Prahladka and Others*, wherein the Calcutta High Court observed in paragraph 47 as follows (page 362):

"47. In this case it has been clearly established on evidence that title to shares such as the shares in suit passes from hand to hand freely by delivery with blank transfer deeds duly signed by the registered holders. There is evidence also that the purchasers could not have found out if there were any defect in title to these shares at the time of purchase and thus in my opinion these shares are negotiable according to the law merchant, custom and/or practice of the Calcutta Stock Exchange. No doubt under the Sale of Goods Act "shares" are goods but that do not preclude them from being negotiable according to custom, practice or the law merchant."

The Calcutta High Court has further observed in paragraphs 48 and 49 as follows (page 362) :

"48. There may arise cases also when the true owner may be estopped from asserting his title against a bona fide purchaser for value without notice of any defect in title although from whom such bona fide purchaser acquires such title has no title to pass : Section 27 of the Sale of Goods Act.

49. The principle of bona fide purchaser for value without notice acquiring a good title although the person conveying the same had no title had further been extended and recognised on the ground of mercantile convenience."

29. In the present case, it is clear that the other defendants had no reason to

suspect that there was any defect in title of defendant No. 1 particularly since the shares stood in the name of defendant No. 1 as beneficial owner upon transfer by the plaintiffs. These circumstances of the shares standing in the name of defendant No. 1 as beneficial owner of the shares in the records of the depository participant was clearly attributed to the act of plaintiff in transferring the shares instead of creating a pledge in accordance with the Depositories Act. The other defendants obviously had no notice of any defect in title of defendant No. 1, assuming there was, and they must therefore be taken to be bona fide purchasers without notice. Therefore, it would be appropriate in the interest of justice to hold, assuming that defendant No. 1 did not get title to the shares that the true owner, i.e., the plaintiffs must be taken to be estopped from asserting its title against bona fide purchasers for value without notice of any defect in the title. This situation is certainly brought about by the conduct of the plaintiffs who had transferred the shares and not created a pledge. It must be noted that the plaintiffs have pleaded that they have been defrauded by defendant No. 1 in that defendant No. 1 has obtained the shares and has not advanced the loan to the plaintiffs. Since the plaintiffs admit that they did not write any letter demanding a loan as contemplated by Clause 24 of the loan agreement, it is difficult to see any case of fraud on the part of defendant No. 1. As observed earlier, defendant No. 1 claims to be ready and willing to disburse the loan and in any case the correspondence between the plaintiffs and the defendants does not contain a whisper that defendant No. 1 has committed a fraud. Even in the case of fraud, the Supreme Court has made the following observations in regard to the status of innocent purchasers in *Central National Bank Ltd. Vs. United Industrial Bank Ltd.*, . In paragraph 10, the Supreme Court observed as under (page 184) :

"If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is defeasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in favour of an innocent transferee for value without notice. This proposition is well recognised in English law and seems to us to be well founded on principle. In *Cahn v. Pockett's Bristol Channel Steam Packet Co.* [1899] 1 QB 643 (CA) (A) Collins LJ, made the following oft quoted observation :

"However fraudulent a person in actual custody may have been, in obtaining the possession, provided it does not amount to larceny by trick and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can, by his disposition, give a good title to the purchaser.""

30. Their Lordships have observed that the position would be different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person such as a case where A obtains possession of goods from the owner by falsely

representing himself to be B. Such is clearly not a case here.

31. In an early case, this court in *Fazal D. Allana Vs. Mangaldas M. Pakvasa*, , this court observed as follows :

"Where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a bona fide purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser."

32. I am of view that the present purchasers from defendant No. 1 are on a better footing in this case since defendant No. 1 himself did not acquire title through any fraud but acquired title to the shares under the loan agreement. It is far from dear at this stage that defendant No. 1 had any intention of defrauding the plaintiffs particularly when in the very first letter the defendants had made it clear that it would be necessary for the plaintiffs to transfer the shares to defendant No. 1 and the plaintiffs did so. There does not seem to have been any dispute between the two since defendant No. 1 at the request of the plaintiffs also returned about 8,50,000 shares to the plaintiffs and in the affidavit before this court states that defendant No. 1 is willing to disburse the loan which has not been demanded by the plaintiffs himself admittedly.

33. This takes us to the last question urged by Mr. Doctor, learned counsel appearing for defendant No. 14. According to Mr. Doctor, the plaintiffs suit is itself not tenable in that it seeks a decree in respect of 6,50,000 shares of ETC Networks Ltd. lying to the credit of the demat accounts of defendants Nos. 1 to 21 and 35 maintained with defendants Nos. 22 to 33 and 34. This argument is based on Order XX, Rule 10 of the Code of Civil Procedure. It is submitted by learned counsel that there cannot be any decree and much less a prayer clause for interim relief in respect of particular shares held in demat accounts in view of the fact that the shares are held in a fungible form in accordance with Section 9 of the Depositories Act, 1996. The submission in brief is that when securities are held in a fungible form they lose their individual identity as particular shares and becomes completely replaceable with one another like money or even claim of money. Having regard to the fact that the plaintiffs have also made an alternative prayer for a decree in the sum of Rs. 1,95,00,000 in respect of the shares, it is not necessary to go into this aspect of the issue at this stage.

34. Thus, in view of the finding aforesaid, I find no merit, in the notice of motion, which is hereby dismissed. In the circumstances of the case, there shall be no order as to costs.

35. At this stage, Mr. Balsara, learned counsel for the plaintiffs seeks a continuation of the ad interim injunction passed by this court for a period of two weeks. Learned counsel for the defendants opposes this application. However,

having regard to the fact that the ad interim injunction has continued for almost a year. I consider it appropriate in the interest of justice to extend the ad interim injunction by a further period of two weeks from today.

34. All authorities concerned to act on an ordinary copy of this order duly authenticated as true copy by the associate of this court.