SUPREME COURT OF INDIA

Sudhir S. Mehta

Vs.

Custodian

C.A.No.5690-5697 of 2007

(S.B. Sinha and V.S. Sirpurkar JJ.)

16.05.2008

JUDGMENT

V.S. Sirpurkar, J.

1. These appeals are by way of a challenge to the order dated 02.11.2007 passed by the Special Court of Bombay constituted under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act (hereinafter referred to as `the Act'). By the impugned common order, Miscellaneous applications filed by Mr. Sudhir S. Mehta, Ms. Deepika A. Mehta, Mr. Ashwin B. Mehta, Gromore Research Assets Management Ltd., Ms. Jyoti S. Mehta and Mr. Hitesh S. Mehta, as also Ms. Pratima Mehta were disposed of by the learned single Judge. In that order, the Special Court directed the Custodian under the Act to refer two questions for the opinion of Disposal Committee. They were:

> " (i) What would be the appropriate time to be given to the bidders for submitting bids after publication of the notice inviting bids?
>
> (ii) Whether it will be admissible to break up the shares into appropriate groups and to give options to the bidders to bid either for whole lot or for a limited number of groups?
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> The Custodian was further directed to take legal and professional opinion in relation to the liability to pay Capital Gains Tax. The learned Judge further directed that if the notified parties wanted to make any submission on the above questions, the same may be submitted to the Custodian within the period of 4 days and such submissions would be transmitted by the Custodian to the Disposal Committee for its consideration, and after the opinion of the Disposal Committee is given, the Custodian shall take steps in accordance with the said opinion, as also in accordance with the legal and professional advice. The learned Judge further directed that the Custodian would be free to approach the Court and seek appropriate orders. With these directions, the learned Judge disposed of the report of the Custodian, as also the applications made by

the parties. All the applicants are the family members of late Sh. Harshad S. Mehta, while respondent no. 1 herein, is the Custodian appointed under Section 3(1) of the Act. The respondent no. 2 is the Disposal Committee in all the appeals, which are filed under Section 10 of the Act. Each of the individual appellant is in close relation late Sh. Harshad S. Mehta and have filed 6 appeals, while Gromore Research Assets Management Ltd. have filed 2 appeals. The questions are common and the learned counsel also apprised us treating all the questions involved, to be common. Hence, the appeals are being disposed of by this common Judgment."

2. All the common questions have arisen on account of the advertisements issued by the Custodian dated 28.10.2007 for the sale of the shares of Reliance Industries Ltd. As many as 24,26,376/- shares belonging to the individual appellants and 1, 75, 316 shares belonging to Fairgrowth Financial Services Ltd. and 5,300/- shares belonging to Mr. N.K. Aggarwal were covered by these advertisements. It was stated in the advertisements that these shares would be sold in bulk categories and the offers were to be submitted on or before 1.11.2007. Accordingly, the offers were received by the Custodian and the same were considered by the Disposal Committee, and the Custodian submitted his report for sale of the shares in favour of the Life Insurance Corporation of India (LIC of India), as the LIC of India had offered the highest price at the rate of Rs.2,701/- per share.

3. At this stage, the objections were raised by way of the Miscellaneous Applications before the Special Court at the instance of the appellants herein. The common grievances made in these objections cum applications were:-

"(i) that the time given in the advertisements for making offers was too short for the intended investors considering the huge number of shares and the prevailing market price of the shares.

(ii) that the shares could fetch more price if the Custodian had divided the shares into appropriate groups and given the option to the offerers to make offer for the whole lot or one or more groups.

(iii) that in fact, this was not an appropriate time to sell the shares considering the prevailing market conditions.

(iv) that if the shares were to be sold privately as was being done, the Capital gains tax would be required to be paid and, therefore, the shares should have been sold at the stock exchange."

4. The Special Court dealt with all the 4 objections. It firstly noted its order dated 17.08.2000, whereby, a scheme was framed for the sale of the attached shares and a Committee of experts known as Disposal Committee was constituted and the sale of shares was conducted under the supervision of that Committee. The learned Judge also took the stock of the arguments before him that before issuing advertisements inviting the offers, the Custodian had not consulted the said Disposal Committee regarding the appropriate time to

be given for submitting the offers. The learned Judge also took the notice of the earlier order dated 23.8.2001 passed by this Court regarding sale of shares, wherein, this Court had permitted even the private parties to submit their offers for the purchase of shares and, therefore, the learned Judge observed that the Custodian should have sought the opinion of the Disposal Committee.

5. Further, the learned Judge also observed that in the order passed by this Court, it was expressed that there was no provision for breaking up the bulk shares into groups and for selling each group separately, so as to invite the best price. The learned Judge, therefore, held that the opinion of the Disposal Committee was bound to be sought on the question as to "whether if the option is given to the buyers to bid for one or more groups instead of putting the bids for entire bulk, it would fetch more price?". The learned Judge, further observed that it was not for the notified parties to decide as to what would be the appropriate time, nor could the Court go by the opinion of the notified parties regarding the appropriate time for sale of the shares. The learned Judge, therefore, came to the conclusion that since, the Custodian had taken the opinion of the Disposal Committee on this aspect and since the Disposal Committee had opined that it was the opportune time for selling the shares, the objection raised regarding the opportune moment could not be accepted and that the opinion of the Disposal Committee on that behalf would be final. In short, the objection regarding the time of the sale was overruled. Lastly, as regards the tax liability, since the Custodian represented before the Court that the legal and professional advice regarding the tax liability would have to be obtained, the learned Judge permitted the Custodian to obtain such legal and professional advice. In this view, the learned Judge wanted to know from the LIC of India, whether they were willing to keep their offer open till the opinion of the Disposal Committee was obtained. It was noted that the representative of the LIC of India was not willing to keep their offer open. The learned Judge, therefore, decided not to accept the report of the Disposal Committee recommending the sale in favour of the LIC of India and issued the directions which we have already mentioned above.

6. It is, therefore, obvious that, firstly, there is no immediate possibility of the sale of the shares as was intended by the Custodian unless the directions given by the learned Judge are complied with. So also, since as many as 6 months have elapsed, the whole situation regarding the market has drastically changed and, therefore, the Disposal Committee would again be required to decide afresh as to whether the Reliance Shares should be sold and/or when they should be sold. It is also an admitted position that the legal opinions regarding the tax liability has also not been obtained by the Custodian and, therefore, the matters have not been crystallized and are still in a fluid state.

7. However, by these appeals, the basic objection is being raised to the effect that the Custodian or the Special Court have not examined nor given a finding with respect to the involvement of the appellants with late Sh. Harshad S. Mehta, nor has the Custodian examined the claim inter se between the entities within the so called group. In short, the appellants have challenged the very concept of the sale of shares. The further contention raised now is that the assets of the appellants were appreciating, therefore, it would not be advisable to effect the sale of the assets. The appellants suggested that in the past also, the

Custodian had sold the shares, the value of which were appreciating and, therefore, loss of Rs.6,500 Crores was caused to the appellants. The further objection raised in the appeal is that the Special Court is acting contrary to the directions issued by this Court, whereby, it was mandated that Special Court should arrive at a firm conclusion as regards the involvement of the individuals with late Sh. Harshad S. Mehta. The appellants dubbed the impugned order as a step towards the sale of assets of the appellants without any liabilities having been established against the appellants. It is also said that if the assets of the appellants are more than the liabilities, there would absolutely be no reason or warrant for the sale of appreciating assets of the appellants. The appellants have also raised the question mark against the so called illegal and exaggerated demands of revenue and according to them, there are adequate liquid balances, which can meet any eventuality of further liability. They further point out that though 21 months have elapsed after the order of this court in *Ashwin S. Mehta and Anr. Vs. Custodian & Ors.*[1], the Custodian had neither preferred their claim nor had examined the inter se liability between the so-called group of individuals (meaning his relatives who are the appellants). The appellants objected to the entire group being considered as one legal entity. Lastly, the aforementioned judgment of this Court in Ashwin Mehta's Case and some observations therein are heavily relied upon.

8. As against this, the Custodian has justified the sale of the assets as has been decided by the Special Court on various grounds. Our attention has been invited by the Custodian to the various provisions of the Act, as also the earlier orders passed by the Special Court and this Court including the last judgment in 2006 (cited supra). It is firmly suggested that there was no question of doing anything contrary to the judgments of this Court nor could it ever be said that the Custodian in any manner failed to do anything that was expected of him. Further, the Custodian had asserted that the appellants are trying to wake up the dead issues and non-issues without there being any occasion for the same.

9. Shri Jethmalani appearing for the appellants mainly stressed on the judgment of this court in Ashwin's case. Heavy reliance was placed on paragraphs 36, 41, 42, 46, 47, 50, 51, 52 and 77 and it was expressed that all these directions were never complied with by the Special Court nor were the individual liabilities were ever considered as was directed by this Court in that judgment.

10. Some basic facts were brought before us.

BASIC FACTS

11. After the huge scam broke out in respect of the shares and securities, which was almost of oceanic proportion, the Central Government came out with the aforementioned Act.

12. Section 3 of the Act provides for the appointment and functions of the Custodian. The Custodian, on being satisfied that any person is involved in any offence relating to the transactions of securities between the period 1.4.1991 and 6.6.1992, can notify the name of such person in the Official Gazette. Section 3(3) provides that any property movable or immovable or both belonging to any person notified under Section 3(2) stands attached

simultaneously with the issue of the notification, and such attached properties would be dealt with by the Custodian in such a manner as the Special Court may direct. Under Section 4(1), the Custodian is empowered to cancel any contract or agreement entered into between two aforementioned dates by the notified person. Section 4(2) provides for hearing as regards the correctness or otherwise of the notification under Section 3 notifying any person, on an application being made within 30 days of the issuance of notification. The Special Court is established under Section 5 and has exclusive jurisdiction conferred upon it under Section 7 for any prosecution pending in any court and such prosecution stands transferred to the Special Court under that provision. The Special Court is also conferred with the jurisdiction in respect to the civil matters, more particularly, specified in Section 9A. Section 11 is the crux of this Act, which reads as under:-

> "11. Discharge of liabilities:- (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Court may make such order as it may deem fit directing the custodian for the disposal of the property under attachment.
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> (2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under:
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> (a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-Section (2) of Section 3 to the Central Government or any State Government or any local authority;
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> (b) all amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund;
>
> (c) any other liability as may be specified by the Special Court from time to time."

13. Accordingly, on 8.6.1992, a notification was issued notifying the appellants and some other entities and obviously as per the mandatory need of the provision on and from that date any property movable or immovable or both, belonging to the notified persons/entities simultaneously and automatically stood attached. This property, which stood attached belonging to the notified persons and entities, included vast number of shares held by late Sh. Harshad S. Mehta, as also the other close relatives of late Sh. Harshad S. Mehta like the appellants, so also the other entities including the one which is before us today, i.e. the Fairgrowth Financial Services Ltd. The shares belonging to late Sh. Harshad Mehta, as also the appellants herein and the entities were of various companies. On 20.02.1995, in Misc. Application No. 107 of 1993 and other similar Misc. Applications, the Special Court formulated certain questions. On the interpretation of Section 11 of the Act, more particularly, in respect of the priorities created under that Section, the learned Judge presiding the Special Court directed the Custodian to move to the Supreme Court and hence, the appeal being Civil Appeal No. 5525 of 1995 came to be filed by the Custodian before this Court. In the same appeal all the notified persons were joined as the parties and they also

filed their say. Not only that, but the notified parties also filed Civil Applications before this Court which were clubbed together and all these Civil Applications were disposed of by an order dated 11.03.1996 passed by this Court. By the said order, this Court directed a scheme to be drafted in respect of the sale of shares from time to time. The Custodian was directed to forward the scheme to the Union of India for approval and on such approval being obtained, the said scheme was directed to be placed before this Court again. In compliance of the order dated 11.03.1996, the scheme for the sale of attached shares was proposed. Civil Appeal No. 5225 of 1995 was heard along with the other allied appeals like Civil Appeal No. 5326 of 1995, 5147, 5325, 6080 of 1995, 12574 of 1996 and T.C. (C) No. 5 of 1998 (the transferred writ petition) were disposed of by this Court by a judgment dated 13.05.1998 in *Harshad Shantilal Mehta Vs. Custodian and Others*[2]. The transfer case was in respect of constitutional validity of Section 11 of the Act by a writ petition filed before the Delhi High court which was got transferred by this Court itself. In its judgment disposing of all these appeals, this Court considered the 3 questions formulated by the Special Court:-

> "1. Whether the priority created by Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 is only in respect of amounts due prior to the date of notification and/or whether the priority would also apply to amounts due after the date of the notification.
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> 2. Whether the phrase `taxes' as used in Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 can only mean amounts due as and by way of taxes or whether it would also include penalties and interest, if any.
>
> 3. Whether penalty and/or interest can be levied on or charged to notified parties after the date of notification."

14. This Court then took notice of the whole Act including the Statement of Objects and Reasons with special reference to Section 11. It was observed in paragraph 12 and 13:-

> "12. Before the Special Court makes any order under Section 11(1), the Special Court must be satisfied that the property which is attached and is being disposed of, is the property belonging to the notified person. If any person other than the notified person has any share, or any right, title or interest in the attached property on the date of notification under Section 3, that right of a third party cannot be extinguished. There is no provision in the Special Court Act which extinguishes the right, title and interest of a third party in any property which is attached as a consequence of a notification under Section 3. The only right which the Custodian has, in respect of the rights of third parties in such properties, is conferred by Section 4 under which, if the Custodian is satisfied that any contract or agreement which was entered into by the notified party within the "statutory period" in relation to an attached property, is fraudulent or entered into for the purpose of defeating the provisions of the Special Court Act, he can cancel such contract or agreement. There is no other provision under the Special Court Act which affects the existing rights of a third party on the

date of attachment, in the property attached. The attached property also does not vest in the Custodian. In this regard, the position of a Custodian is different from that of an official liquidator of a company in winding up. Had the Act provided for the extinguishment of any subsisting rights of other persons in the attached property, the Act could well have been considered as arbitrary or unconstitutional (vide C.B. Gautam v. Union of India).

13. The directions, therefore, for disposal under Section 11

(1) can be given only after the Special Court has satisfied itself that the property under attachment is the property which belongs to the notified person. The directions for disposal can only be in respect of the right, title and interest of the notified person in the attached property. If, therefore, any application is filed before the Special Court by a third party claiming the property so attached and/or for releasing the right, title and interest of a third party in the property from attachment, the Special Court will have to decide the application before proceeding under Section 11."

15. In paragraph 15, this Court took the note of the words in Section 11 (2) "in order as under" and held that before the amounts can be paid to banks or financial institutions under Section 11(2)(b), the liabilities under Section 11(2)(a) are required to be discharged. This Court reframed the questions framed by the Special Court in paragraph 16, which are:-

"1. what is meant by revenues, taxes, cesses and rates due? Does the word "due" refer merely to the liability to pay such taxes etc., or does it refer to a liability which has crystallized into a legally ascertained sum immediately payable?

2. Do the taxes [in clause (a) of Section 11(2)] refer only to taxes relating to a specific period or to all taxes due from the notified person?

3. At what point of time should the taxes have become due?

4. Does the Special Court have any discretion relating to the extent of payments to be made under Section 11(2) (a) from out of the attached funds/property?

5. Whether taxes include penalty or interest?

6. Whether the Special Court has the power to absolve a notified person from payment of penalty or interest for a period subsequent to the date of his notification under Section 3. In the alternative, is a notified person liable to payment of penalty or interest arising from his inability to pay taxes after his notification?"

16. In paragraph 35, this Court observed that the Special Court can decide how much of the tax liability will be discharged out of the funds in the hands of the Custodian. It further observed, that the payment in full may or may not be made by the Special Court depending upon various circumstances. For this purpose, it can examine whether there is any fraud,

collusion or miscarriage of justice in assessment proceedings. It was observed that where the assessment is based on proper material and pertains to the "statutory period", the Special Court may not reduce the tax claimed and pay it out in full. In paragraph 40, the Court made reference to the order dated 11.3.1996, whereby, the Court had directed the Custodian to draft a scheme in respect of the shares held by the Custodian whereby such shares can be sold from time to time. The Court further noted that the Custodian was directed to forward the scheme for the approval of the Union of India and after the approval, the final scheme incorporating the modifications by the Union of India was filed in this Court. The Court specifically directed that the Special Court shall consider the scheme and the appropriate orders may be passed by the Special Court in respect of the scheme so submitted. The Court also upheld the constitutional validity of Section 11 read with Section 3(3) of the Act, and that is how, the earlier appeals were disposed of.

17. In pursuance of the order, to consider the scheme, the Special Court came out with an order dated 17.8.2000. The learned Judge then considered the whole scheme in extenso. Arguments were raised challenging the sale of the shares at that point of time. It was noted that the main objection of the notified parties was that the time for distribution of assets had not yet arrived and, therefore, the scheme of the sale of shares should neither be framed nor implemented. The learned Judge took the note of this scheme and the suggestions made therein on setting up a Disposal Committee. It was also noted that under the scheme, modality of sale of shares was provided for. Three questions were framed by the learned Judge, they being:-

> "A. Whether the time to frame the Scheme for sale of attached shares belonging to the notified parties has arrived?
>
> B. Challenge to the validity of scheme?
>
> C. Implementation of the scheme?"

18. It was specifically urged before the learned Judge that until the date of distribution is imminent, there would be no question of selling the attached shares, which though attached, remain the property of the notified parties. It was also contended that the sale and distribution were not separate events and, therefore, the sale of assets could not take place on a particular day and the distribution after 5 years. And, therefore, the sale of the attached assets being solely for the purpose of distribution can only take place at the time of distribution and after the question of nexus of the attached assets with the illegal security transactions is considered on merits. Even the judgment reported in *Harshad Shantilal Mehta Vs. Custodian and Others*[3] (cited supra) was relied upon, more particularly, paragraph 27 thereof, and lastly, it was contended that the order dated 20.2.1995 related only to Harshad Mehta group and Fairgrowth Financial Service Ltd. It was reiterated that in its order dated 11.3.1996 passed by this Court, which was the interim order in Civil Appeal No. 5326 of 1995, this Court had also stated that the time for distribution of assets in possession of the Custodian was drawing very near, and this was with reference to only to 2 notified parties, viz., Harshad Mehta group and Fairgrowth Financial Services Ltd. It was further contended

that the time for distribution of assets of Dhanraj Mills had still not arrived. A reference was given to the order dated 20.2.1995 of the Special Court by Hon. Variava, J. (as he then was), which according to the learned counsel, ultimately, shows that even according to the learned Judge, the distribution of assets was required to be made only in respect of Harshad Mehta group and Fairgrowth Financial Services Ltd. and, therefore, the scheme should not be applied to Dhanraj Mills. The learned Judge then observed:-

> "The above arguments were adopted by Mr. Jethmalani, the learned counsel for Respondent Nos. 3 to 27 (Harshad Mehta Group). The said arguments were also adopted by the counsel for other notified parties. However, Mr. Jethmalani added that in the Order of Variava, J. (as he then was) dated 20th February 1995, three questions of law were settled. In the said ruling the learned Judge has set out the time for distribution under Section 11 and, it was on that basis, that the Supreme Court proceeded to give its interim order for drafting the Scheme of sale of shares (see Order dated 11th March 1996 being the interim order in Civil Appeal No. 326 of 1995). The Supreme Court till then had not considered the question as to when the stage for distribution arises under Section 11. It was contended that the said issue was settled finally when the Supreme Court delivered the judgment on 13th May 1998 in the case of *Harshad Mehta Vs. Custodian*[4]. Therefore, at the time of delivering the interim order on 11th March, 1996, the question as to when the sale and distribution took place, remained unanswered. However, he contended that in view of the final judgment of the Supreme Court in the above case of Harshad Mehta, this Court should proceed on the basis of the final judgment of the Supreme Court. The learned counsel contended that in view of the judgment of the Supreme Court, the stage for sale and distribution of the assets under Section 11 of the act arise only after completion of examination of all civil claims under Section 9A of the Special Court Act and only after the assessment orders of the Revenue Department reached finality and only after they became binding i.e. when the assessee has exhausted all statutory remedies under the Act and since the process of examination of claims under Section 9A has not commenced, the Scheme is premature. It was contended that on a proper and legal assessment, the actual tax liability of Harshad Mehta Group would be marginal and a large portion of the amounts would have to be refunded by the revenue. He contended that in case of Harshad Mehta Group, the demands made by the Department are based on the best judgment assessments, which are highly exaggerated. He contended that the assessment orders are ex-parte in nature. He contended that Harshad Mehta Group is contesting the demands before the Appellate Authorities. That significant reliefs have been given by the tax department and, therefore, no sale should take place so that a reasonable opportunity is given to Harshad Mehta Group to bring down the demands to realistic levels....."
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> (Emphasis supplied).

19. When answering the issue, the learned Judge of the Special Court Hon. S.H. Kapadia, J. (as he then was), firstly, found as a preface that 3 Chartered Accountants Firms were appointed by the Special Court for preparing the submission of accounts of 9 notified parties

including Harshad Mehta Group and Dhanraj Mills. A complaint was made by the 3 firms of Chartered Accountants that they had not received the relevant documents from Harshad Mehta Group. The learned Judge deduced that no progress was made in the matter of accounting, as there was opposition for the sale of shares. The learned Judge referred to the large number of shares in possession of the Custodian as of date being 6.65 crores, out of which Harshad Mehta Group only controlled 2.88 crores of shares, apart from the benami and unregistered shares. The learned Judge then noticed that there were in all 6.65 crores of shares. The learned Judge then observed:

> "the position which has emerged is that the notified parties have not brought before the authorities/accountants appointed by the Court the relevant documents. It is for this reason that even the income-tax department has ultimately proceeded to assess some of the assessee-notified parties under best judgment assessment. During the said period none of the notified parties have come before the Court claiming that the assets are more than the liabilities. Their only contention is that the liabilities have not been crystallized. Their only contention is that till final adjudication is carried out by all the authorities under the Income-Tax Act by way of appeals, the assessment is not final and binding."

20. After noting these preface facts, the learned Judge examined the judgment of this Court and noted that the only condition prescribed by the judgment vide paragraph 13 was the satisfaction of the Special Court before it gives directions for disposal to the effect that the attached property belonged to the notified parties. The learned Judge, therefore, held that there was a dichotomy between the sale and distribution, which was accepted by this Court. The learned Judge then noted that the scheme was not for distribution and it was not under Section 11(2). The scheme instead was under Section 11(1) for sale and, therefore, the arguments regarding the sale being premature, as the distribution point had not arrived at, was liable to be rejected. The learned Judge then went on to hold, on the basis of this Court's judgment, that Section 11(2) could not be restrictive only to the tax liability during the statutory period and it covers all assessed taxes due for pre-statutory period and post-statutory period. Further, the learned Judge observed:

> "However, in answering the last contention of the notified parties that the liability should have been ascertained on the date of distribution, the Supreme Court observed that the date of distribution arrives when the Special Court completes the examination of claims under Section 9A and any tax liability for the statutory period is finally assessed and the assessment is final and binding, then such liability will be considered for payment under Section 11(2)(a) of the Act. As stated hereinabove, the pre-condition for sale of the property is that the attached property belongs to the notified parties whereas, the pre-condition of distribution is completion of examination of claims under Section 9A....."
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> There is no principle of law shown to this Court that sale cannot take place till completion of examination of all claims under Section 9A of the Act."

The learned Judge, therefore, recorded his conclusions as under:

"CONCLUSIONS ON POINT A

(a) That sale is different from distribution. The Scheme placed before this Court is for sale of shares. The Scheme is not for distribution of assets. Therefore, Section 11(1) of the Act applies to the Scheme and Section 11(2) which deals with distribution does not come into picture at this stage of the matter.

(b) That Sections 11(2)(a), (b) and (c) cover claims for pre- statutory period, statutory period and post-statutory period.

(c) On scaling down, in appropriate cases as held by the Supreme Court, the liability of the assessee of the balance tax would subsist and the taxing authorities would be entitled to realize the remaining liabilities including penalty and interest from the assessee under Section 11(2)(c). Therefore, there is no merit in the contention that the funds of some of the notified parties with the Custodian are far in excess of the tax demand and, therefore, they should not be brought within the Scheme for sale of shares.

(d) In view of the provisions of the Special Court Act, it is not necessary for this Court to postpone, in any event, the sale of shares till the claims against the notified parties are finally adjudicated upon. Looking to the income-tax demands, the decrees passed in various suits by this Court, it is clear that the liabilities of the notified parties exceed the attached assets and, therefore, one need not wait till all pending claims are finally adjudicated upon.

(e) The words `taxes due' in Section 11(2)(a) only refers to the liability, which is completed in accordance with the provisions of the income-tax Act. In other words, the expression `taxes due' would mean assessed tax, which are presently payable. The said expression does not contemplate taxes as finally payable."

21. By way of a second question, which pertained to the challenge of the validity of scheme, the learned Judge held the scheme to be valid and further considered the objections raised against the scheme and rejected the same. The objections were more particularly related to the modality to be adopted for sale of some shares. The learned Judge then decided the norms in respect of the bulk shares: (1) Norms for preparation of lots of bulk shares; (2) Norms for Sale of bulk shares; (3) Norms for lot preparation in respect of controlling block of shares; (4) Norms for sale of controlling block of shares; (5) Norms in respect of routine shares. The learned Judge also decided upon procedure to be followed by the Custodian for registration/dematization of shares before implementation of the above norms.

22. Ultimately, the learned Judge approved the scheme with the modifications. Undoubtedly, the following points are clear from the above judgment:

"(1) That the existence and the treatment of Sh. Harshad Mehta and his relatives and some concerns as Harshad Mehta Group was neither objected to nor contradicted and the learned Judge was addressed by all those entitites as the Harsahd Mehta Group.

(2) That a clear dichotomy was there in the matters of sale of shares and the distribution of assets.

(3) The scheme for the sale of shares which was ordered by the interim order of this Court and was finalized in the 1998 judgment, was approved with some modifications.

(4) That the total liabilities are more than the total assets of the notified parties."

23. There was an appeal filed against this judgment, which appeal was disposed of by this Court by its judgment dated 23.8.2001. The opening words of this judgment are very telling. They are:

"In these appeals, the only question relates to the Scheme devised by the Special Court for the sale of shares of the appellant-Apollo Tyres Ltd."

This Court noted that the Special Court had categorized the shares into 3 classes. They being: (1) Routine Shares (2) Bulk Shares (3) Controlling Block of Shares. The Court constituted a Disposal Committee and had issued directions in respect of those shares. The Court observed:

"The whole emphasis, and in our opinion rightly so, of the Special Court has been to ensure that maximum price is realized from the sale of the said shares. Keeping this in view, we do not find that the Special Court has erred in issuing the aforesaid directions. After hearing the counsel for the parties, we affirm the said directions with minor changes."

24. This Court then gave certain directions for the sale of bulk shares and modified the order dated 17.8.2000, holding that it would be more appropriate that the offer of the shares be not restricted only to the institutional buyers, and the non-institutional buyers including the management of the company may also be offered the shares of all the appellant-company. It observed that in that way, the best price would be realized. As regards the controlling block of shares, the Court directed that it would be open to the Special Court to decide whether to have the sale of the controlling block of shares either by inviting bids for purchase of controlling block as such or by selling the said shares according to the norms fixed for the sale of bulk shares or by the norms fixed in respect of routine shares. With these words, the order of the learned Special Judge was totally confirmed. It is only on the basis of this order, that ultimately, the advertisements came to be issued. However, there is one more development, which we must refer to.

25. On 26.4.1999, the Custodian had filed an application being Misc. Application No. 41 of 1999, seeking permission of the Special Court for sale of the residential premises commonly known as Madhuli of eight notified entities. A miscellaneous application being Misc. Application No. 4 of 2001 was filed by the Custodian praying for the sale of commercial premises. Some of the notified persons filed several miscellaneous applications for lifting of attachment on their residential premises on the ground that the same had been purchased much prior to 1.4.1999 and the same had no nexus with any illegal transactions in securities. All these applications were disposed of by the Special Judge by his judgment dated 17.10.2003, who held that if an undertaking is given by the adult members of the family of late Sh. Harshad S. Mehta (by then Sh. S. Harshad Mehta, as already expired), in the Special Court within a period of 4 weeks to vacate the flat occupied by them and hand over peaceful possession thereof to the Custodian within a period of 4 weeks from the date on which the Custodian sends them communication, the Custodian shall permit the members of family of late Sh. Harshad S. Mehta to occupy the flats during the time that the process of the sale of the flats goes on. This was challenged before this Court on the following grounds:

> "(i) Some of the entities having assets much more than actual liability, the impugned judgments are unsustainable. There was no occasion for the Custodian to club all the notified entities in one block so as to be termed as Harshand Mehta Group and/or to club their assets and liabilities jointly. Although in relation to a body corporate incorporated and registered under the Companies Act, the doctrine of lifting the corporate veil would be applicable, but the same cannot be applied in case of individuals.
>
> (ii) Having regard to the fact that only three entities out of eight were involved in the offences, the liability of Harsahd Mehta could not have been clubbed for the purpose of directing attachment and consequent sale of the properties which exclusively belong to them.
>
> (iii) The liabilities of Harshad Mehta, who was a sui generis, could have been recovered from the properties held and possessed by him or from the companies floated by him but not from the individual entities; at least two of whom being medical practitioners have their income from other sources.
>
> (iv) The books of accounts and other documents on the basis whereof the auditor's report had been made having not been allowed to be inspected by the appellants herein on the plea that they had the knowledge thereabout, the same could not have been taken into consideration for the purpose of passing of the impugned order or otherwise.
>
> (v) The appellants having preferred appeals against the income tax orders of assessment passed by the authority and the same having been set aside, no liability to pay income tax by the appellants as to now being existing, the residential properties could not have been sold.

(vi) Drawing our attention to a representative chart showing the discrepancies in the accounts of Mrs. Deepika A. Mehta as shows in (a) affidavit by the custodian; (b) books of accounts maintained by the appellants; and (c) auditor's report, it was submitted that the auditor's report could not have been relied upon.

(vii) A copy of the auditor's report having only been supplied during pendency of these appeals, the learned Special Judge committed a serious error in passing the impugned judgment relying on or on the basis thereof."

26. On behalf of the respondents, it was pointed out that all properties belonging to the notified persons, could be applied for discharge of the joint liabilities of the Harshad Mehta Group in terms of Section 11 of the Act in view of the ruling reported in 2004 11 SCC 456. It was secondly, contended that applications for denotification by the appellants were already withdrawn and, therefore, they could not raise the contention that they were not liable in terms of the provisions of the Act, and they could not also file fresh applications for denotification, as such applications would be barred by time. It was further contended that the tax liability have become final. It was also suggested that the appellants apart from the corporate entities, had received large loans, advances and credits from the Harsahd Mehta Group and that there had been intermingling of the assets to the tune of crores of rupees, and as such, they could not escape their liabilities into the Act and, therefore, liabilities exceed the assets. Some other grounds on merits were also raised. Lastly, it was contended that the sale of commercial property had only been seriously contested by the appellants and a contention was raised that if the commercial properties were sold, there would be no need to sell the residential properties. They pointed out that even before this Court, the sale of commercial properties was not questioned. This Court after analyzing the various provisions of the Act, referred to the ruling in 1998 5 SCC 1 (cited supra) in extenso. It also referred to the other ruling in *L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd.*[5]. The Court formulated 5 issues:

"(i) Whether the appellants being not involved in offences in transactions in securities could have been proceeded against in terms of the provisions of the Act.

(ii) Whether individual liabilities of the appellants ought to have been separately considered by the Special Court as not a part of Harshad Mehta Group.

(iii) Whether the tax liabilities could not have been held to be due as the order of assessments did not become final and binding.

(iv) Whether the commercial properties could have been sold in auction.

(v) Whether the residential properties should have been released from attachment."

27. In paragraph 30 of the judgment, this Court expressed that barring Harshad S. Mehta, Ashwin S. Mehta and Sudhir S. Mehta, the denotification applications were filed by

individual and corporate appellants, and by order dated 14.7.2000, those applications were permitted to be withdrawn with the permission to refile the same. In paragraph 31, the Court expressed that the said applications were pending for consideration before the Special Court and since those applications were to be decided by the Special Court particularly in respect of the limitation and jurisdiction etc., the Court will refrain itself from adverting to the said question. In paragraph 41, the Court observed that it was open to the appellants to show that even if they continue to be notified, the Custodian was not right in clubbing all the individual members of the family as a single entity styled as Harshad Mehta Group. The Court noted that a property belonging to the mother of Harshad Mehta was released from attachment. The Court then went on to consider the liabilities against the notified parties as also the valuation of immovable properties. The Court also disapproved the acceptance by the learned Judge, of the figures mentioned in the affidavit of the Custodian and stated that the learned Judge had relied upon the same without discussing the contentions and arguments raised on behalf of the appellants. The Court observed that it was necessary to give another opportunity of hearing. In para 51, the Court observed that if any notified party had no connection with late Sh. Harshad Mehta, they could not have been proceeded against for meeting the liabilities of late Sh. Harshad Mehta jointly or severally and a clear finding was required to be arrived at. The Court, further, observed:

> "It was, thus, necessary for the learned Special Court to arrive at a firm conclusion as regards the involvement of the individuals with Harshad Mehta, if any, and the extent of his liability as such."

28. In paragraph 55, the Court noted the judgment dated 17.8.2000 passed by the Special Court by Hon. Kapadia, J. (as he then was), as also the fact that the appeal against the same was dismissed by this Court. The question of sale of commercial properties was considered from paragraphs 67 to 73 and that of the sale of residential properties in subsequent 3 paragraphs i.e. paragraph no. 74 to 76. In paragraph 73, however, it was observed that the Court was not to interfere with that part of the order, whereby, the auction-sale as regards the commercial property had been directed by the learned Judge. Lastly, the Court recorded its conclusions with paragraph 77. Some of the relevant conclusions are to be found as below:

> "(i) The contention of the appellants that they being not involved in offences in transactions in securities could not have been proceeded in terms of the provisions of the Act cannot be accepted in view of the fact that they have been notified in terms thereof.
>
> (ii) The appellants being notified persons, all their personal properties stood automatically attached and any other income from such attached properties would also stand attached. The question as to whether the appellants could have been considered to be part of Harshad Mehta Group by the learned Special Court need not be determined by us as, at present advised, in view of the fact that appropriate applications in this behalf are pending consideration before the learned Special Court. The question as regards intermingling of accounts by the appellants herein with that of the Harshad Mehta Group and/or any other or further contentions raised by the

parties hereto before us shall receive due consideration of the learned Judge, Special Court afresh in the light of the observations made hereinbefore.

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(vi) We direct the Custodian to permit the appellants to have inspection of all the documents in his power or possession in the premises of the Special Court in the presence of an officer of the court. Such documents must be placed for inspection for one week continuosly upon giving due notice therefore to the appellants jointly. As the appellants have been represented in all the proceedings jointly, only one of them would be nominated by them to have the inspection thereof. The appellants shall be entitled to take the help of a chartered or cost accountant any may make notes therefrom for their use in the pending proceeding.

(vii) The appellants shall file their objections to the said report, if any, within ten days thereafter. The Custodian may also take assistance and/or further assistance from a chartered accountant of his choice. A reply and/or rejoinder thereto shall be filed within one week from the date of the receipt of the copy of the objection. The parties shall file their respective documents within one week thereafter. Such documents should be supported by affidavits. Both the parties shall be entitled to inspect such documents and file their responses thereto within one week thereafter. The parties shall file the written submissions filed before this Court together with all charts before the learned Special Judge, Special Court within eight weeks from date.

(viii) The learned Judge, Special Court shall allow the parties to make brief oral submissions with pointed reference to their written submissions. Such hearing in the peculiar facts and circumstances of this case should continue from day to day.

(ix) The learned Judge, Special Court while hearing the matter in terms of this order shall also consider as to whether the auction-sale should be confirmed or not. It will also be open to the learned Judge, Special Court to pass an interim order or orders, as it may think fit and proper, in the event any occasion arises therefor.

(x) We would, however, request the learned Special Judge, Special Court to complete the hearings of the matter, keeping in view the fact that auction sale in respect of the residential premises is being considered, as expeditiously as possible and not later than twelve weeks from the date of the receipt of the copy of this order. Save and except for sufficient or cogent reasons, the learned Judge shall not grant any adjournment to either of the parties.

(xi) The learned Judge, Special Court shall take up the matter relating to confirmation of the auction sale in respect of the commercial properties immediately and pass an appropriate order thereupon within four weeks from the date of receipt of copy of this order. If in the meanwhile the orders of assessment are passed by the Income Tax Authorities, the Custodian shall be at liberty to bring the same to the

notice of the learned Special Court which shall also be taken into consideration by the learned Judge, Special Court."

29. As has been stated by us in paragraph 9 of this judgment, the learned counsel for the appellants based his contentions more or less on the observations made in the aforementioned judgment and it is, therefore, that we have dealt with that judgment extensively.

30. The contentions raised by Sh. Jethmalani based on the aforementioned judgment are:

> "(1) that the Custodian and the Special Court have failed to comply with the directions given by this Court in the aforementioned judgment dated 3.1.2006 in Civil Appeal No. 667-81 of 2004 (hereinafter called Ashwin Mehta's Case) and more particularly, in paragraphs 41, 42, 46, 47, 51, 52 and 53, the whole arguments turns practical on this very issue.
>
> (2) that there was no reason for the Special Court to have ordered the sale of shares, and the Custodian as well as the Special Court have failed to justify the decision to put the shares on auction and distribute the liabilities.
>
> (3) that such decision is arbitrary and the sale of the shares shall lead to serious loss to the notified persons. The liabilities were only of late Sh. Harshad S. Mehta and not of the other notified parties and since the assets of the notified parties can meet their liabilities, the sale of the shares by auction was not justified. This is all the more true in view of the fact that the Custodian has not yet found the inter se liabilities of the notified parties, when their applications for denotification are not decided and pending before the Special Court.
>
> (4) it was also submitted by the learned counsel that because of the earlier sale of the shares, the parties were put to the loss of 6500 crores and that though the objections for denotifications were pending before the Special Court, the same have not yet been disposed of and, therefore, the decision to sell the shares belonging to the notified parties is wholly incorrect.
>
> (5) that the whole decision to put the shares for sale by auction is jurisdictionally, procedurally, as well as financially not correct."

31. It will be, therefore, our task to test these propositions on the anvil of the judgment in Ashwin Mehta's case, which is treated to be the backbone of the arguments of the appellants herein.

32. First of all, we must point out even at the cost of repetition that the decision to sell the shares was taken in the last part of the year 2007. The notice itself was issued in the month of October. That was of course, on the basis of advice by the Disposal Committee. On the

objections having been taken, the learned Judge had given certain directions, but before giving those directions, the learned Judge has practically wiped out the effect of the auction. It must be remembered that in that auction, the LIC of India had made an offer of Rs.2,701/- per share, which offer was accepted. However, the learned Judge found and in our view, rightly stated that something more was required to be done procedurally, as well as, by way of a policy. We have extensively quoted the directions given by the learned Judge, on the basis of the four formulated objections. In order to comply with the directions given by the learned Judge, it was necessary to put the auction proceedings on hold. However, the LIC of India was not prepared to keep its offer open and, therefore, the learned Judge had relieved the LIC of India of its obligations on the basis of its offer.

33. The learned Judge rightly felt that since the Custodian had not consulted the Disposal Committee regarding the appropriate time to be given for submitting the offers, the Custodian should do that first. The learned Judge, thereafter, held that that opinion of the Disposal Committee was bound to be sought for even on the question as to whether if the option is given to the buyers to bid for one or more groups instead of putting the bid for the entire bulk, it could fetch more price. As regards the opportune time, the learned Judge, however, held that the shares were being sold at the proper time. Lastly, as regards the tax liability also, the learned Judge had directed the Custodian to seek legal and professional advice, and for that purpose, practically wiped out the effect of the auction by directing the compliance of his directions. Thus, for all the practical purposes, one thing was certain that the shares were not to be sold unless all the directions were complied with. However, the appellants did not wait and rush to this Court even before the Disposal Committee had given its opinion on the various issues and even before the Custodian was able to get the legal and professional opinions regarding the tax liability.

34. It is obvious that the Disposal Committee would now have to again take a decision whether at this point of time, the shares should be sold or not. The Disposal Committee consists of the experts who would know best, whether the shares should at all be sold at this point of time. However, the appellants have come before this Court insisting that the shares should not be sold at all, which stand was conspicuously absent when the matters were argued firstly before the Special Court or even before the this Court, as we do not find any trace of the said contentions in the arguments before the Special Court. The old theory of not selling the shares at all unless individual liabilities were fixed one way or the other was wreaked up in this appeal and very surprisingly, though the order of the learned Special Judge was completely confirmed by this Court which also meant that the shares were bound to be sold. Completely giving a go-by to the judgment of this Court dated 23.8.2001, by which the judgment of the Special Court was confirmed, the appellants are now saying that the shares cannot be sold. This would be impermissible now.

35. While doing so, some factual incorrect statements have also been made before us, as they were made before this Court in Ashwin Mehta's Case, that the applications for denotifications were pending. In fact, the argument which was pressed in service in the Court was that since the denotification applications were pending, and had not been finally decided upon, the properties belonging to the notified persons should not be sold. We have before us,

the current status of such applications from which it is seen that each and every notified appellant herein had already withdrawn his/her denotification application, some of them in 1997 and rest of them in January, 2000. Thus even on the day, when the matters were being argued before this Court in Ashwin Mehta's Case, excepting those by Mrs. Rasila S. Mehta and Mrs. Rina S. Mehta (who are not covered here), no application for denotification was pending. True it is that permission was given to withdraw their applications with a liberty to file fresh petitions after the criminal trials, if any, are over but no application has been filed. Thus, the main stay of the arguments on the part of the appellants is knocked out on the basis of this fact, and it is not open to the appellants to say that since there are chances of their denotification, the shares belonging to them should not be sold.

36. When the provisions of the act are seen in the light of conclusions drawn and more particularly, the first conclusion in Ashwin Mehta's Case by this Court, the properties of the notified persons like the appellants would stand automatically attached and any other income from such attached properties would also stand attached. It is obvious that on the day when Ashwin Mehta's Judgment was delivered, there were no applications pending consideration before the Special Court nor are any such applications pending today also. Hence, an objection to the sale, on that ground, must be rejected. This answers contention no. 3.

37. The second aspect, which we would like to consider is the objection which is now raised to the nomenclature `Harshad Mehta Group'. We do not want to go to that aspect, because for the decision of this case, that is not a relevant aspect whether any appellant is referred to as a group or not. The very fact that such appellant is a notified person would be enough for the attachment of his/her property because of the Section 3(2) of the Act. In our opinion, there would be no necessity to consider the individual liability of any such appellant being a notified person. Unless any appellant is denotified, there would be no question of raising of these defences regarding individual liability. It is obvious, that the notification covers all the properties including the shares and securities of the notified persons and, therefore, comes into the hands of the Custodian. There would, therefore, be no question of raising the issues that the individual liability of such a notified person should be arrived at first. We say this, particularly, because the claim of the notified persons that their assets exceeds the liability, is also not correct. That is a clear cut finding given by Hon. Kapadia, J. in his judgment dated 17.8.2000, which is later on confirmed by this Court. The Custodian argues before us and not without any reasons that the tables prepared by the Custodian shows that the liability of the notified persons does exceed assets, we shall not go into that aspect at this juncture. However, the fact remains that there would be no question of any individual liability being arrived at before the shares are sold. The judgment of the learned Special Judge for selling the shares having been confirmed by this Court, whereby, the decision to sell the shares has been confirmed by the three Judge Bench of this Court concluding the issue. The same is binding. Therefore, it cannot be said at this juncture at least, that on that account, the sale of the shares should be postponed, till such time, as the question of individual liability viz. a viz. Harshad Mehta is decided upon.

38. We have already shown that there is a clear dichotomy arrived at by Hon. Kapadia, J. in his aforementioned judgment dated 17.8.2000, that there is no question of waiting for the

distribution and on that account, the sale cannot be stopped. The judgment having been confirmed by the three Judge Bench of this Court, that question will not be opened.

39. This takes us to the aforementioned paragraphs heavily relied upon by the learned counsel in the judgment of Ashwin Mehta's case (cited supra). In paragraph 41, it was stated that it was open to the appellants to show that even if they continued to be notified, the Custodian was not right in clubbing all the individual members of the family as a single entity styled as Harshad Mehta Group. We do not find that there was any attempt on the part of the appellants to disassociate themselves from Harshad Mehta Group. When we see the judgment dated 17.8.2000 passed by the Special Court, it is obvious that the learned counsel arguing that matter had argued it on behalf of the Harsahd Mehta Group. It is for this purpose that we have quoted in the argument before the learned Special Judge in extenso. We will only quote a sentence which forms a part of the argument: "it was contended that on a proper and legal assessment, the actual tax liability of Harshad Mehta Group would be marginal and a large portion of the amounts would have to be refunded by the revenue. He contended that in case of Harshad Mehta Group, the demands made by the Department are based on the best judgment assessments, which are highly exaggerated. He contended that the assessment orders are ex-parte in nature. He contended that Harshad Mehta Group is contesting the demands before the Appellate Authorities."

40. It was, therefore, obvious that at that juncture, when the question was as to whether the shares should be sold or not, the move was objected to by the appellants formulating themselves as Harshad Mehta Group. No such objection to form and treat the relatives as a group was raised before the Special Court in the year 2000 when the question of sale of shares fell for consideration for the first time. At any rate, unless it is shown as to what prejudice would be caused by treating them to be a group, this contention has no basis. We, therefore, do not think that the argument in this behalf has any basis.

41. In paragraph 46 and 47, this Court has criticized that the Special Court should have analysed the respective contentions of parties in greater details and in particular, in regard to the assets and liabilities of the separate entities, having regard to the contentions raised by them that they are not part of Harshad Mehta Group and their individual liabilities can be met from the assets held and possessed by them separately. We must immediately point out that these observations did not relate to the sale of shares. These observations obviously related to the sale of the immovable properties, regarding which the appeal was filed. The proceedings in that case emanated out of miscellaneous application no. 41 of 1999, seeking permission of the Special Court for sale of residential premises commonly known as Madhuli of eight notified entities, as also for the sale of the commercial premises and the only objection raised there was that the attachment should be lifted on the ground that the same properties had been purchased prior to 1.4.1991 and the same had no nexus with any illegal transactions in securities. It was also objected to on the ground that the asset base was greater than genuine liabilities, and hence, the residential premises should be released from attachment. We may, at this juncture, point out that this Court in the aforementioned judgment has specifically held with respect to commercial properties in paragraph 73 that the Court was not to interfere with the sale of the commercial properties and the Special Court was even allowed to pass

appropriate orders regarding the confirmation of the sale of such properties. It was only in respect of the residential property that this Court had directed the Special Court to deal with the matter afresh.

42. We must repeat at this juncture, that the judgment in Ashwin Mehta's Case did not concern the shares in the name of the appellants/ notified parties and the sale thereof which question was already decided finally by this Court while confirming the judgment dated 17.8.2000 passed by the Special Court. As regards the observations in paragraph 51 and 52 again these pertains to the subject of the Group. It is expressed that a question may further arise as to whether the learned Judge was correct in considering the individual liability of the notified parties as the liabilities of the Group. It is then expressed

> "if there were certain individuals, who had no connection with Sh. Harshad Mehta, they could not have been proceeded against for meeting the liabilities of Sh. Harshad Mehta jointly or severally and a clear finding was required to be arrived at. Only because there had been large intermingling and flow of funds from Sh. Harshad Mehta and inter se within the group, the same by itself may not justify the conclusion that all of their assets were required to be sold irrespective of their individual involvement and it was, therefore, necessary for the learned Special Court to arrive at a firm conclusion as regards the involvement of the individuals with Sh. Harshad Mehta, if any, and the extent of his liability as such." No such argument seems to have been advanced before the Special Judge at all in respect of the shares and the securities in respect of which this Court had finalized the issue.

43. Paragraph 52 refers so-called contradictory stand taken by the Custodian regarding the liabilities which were treated to be joint liabilities of the Harshad Mehta Group and further, inconsistency on the part of the Custodian to treat the liabilities of the notified entities also as their separate liabilities. Such question was not addressed in the Special Court. We have already shown that the observations would not apply to the sale of shares as the issue was concluded by this Court on 23.8.2001.

44. This Court had directed the Custodian in Ashwin Mehta's Case to permit the appellants to have inspection of all the documents in his power or possession in the premises of the Special Court in the presence of an officer of the court. In compliance thereof, the Custodian argues before us, that such inspection was to be allowed for one week continuously and all the documents in possession of the Custodian were laid open for a period of one week. The Custodian further points out that the directions in these paragraphs 41, 42, 46, 47, 51, 52 and 53 were dealt with by the Custodian in his affidavits dated 1.3.2006 and 22.3.2006 filed in miscellaneous petition no. 49 of 1999, and in these affidavits, the Custodian had taken into account the assets and liabilities position of each of the notified entities as on 31.12.2005 and those statements were also annexed to those affidavits. It is further pointed out that in each case, the liability was more than assets. The Custodian argues before us that late Sh. Harshad S. Mehta had siphoned off money from banks and financial institutions and distributed the same to his family members and various corporate entities by transferring the money to their accounts by purchasing shares in their names through 3 brokerage firms: (1) M/s Harshad S.

Mehta; (2) M/s Jyoti S. Mehta; (3) M/s Ashwin S. Mehta and all the transactions of purchase and sale of 25 notified entities were debited and credited in their mutual interest.

45. It is the further case of the Custodian that the notified parties had shown in their accounts, that these siphoned off monies were received by them as loan, borrowings and advances, and also shown that they were paying interest thereon to Sh. Harshad Mehta with the sole idea to show that they were running their own business with their own funds and that the monies borrowed by them. The Custodian has taken a stand before us that in the affidavit dated 1.3.2006, efforts have been made to show clearly as to how much money is transferred in cash to his relatives and corporate bodies and also how much siphoned off money was utilized for the purchase of shares in the name of various notified entities including the appellants. The affidavit dated 22.3.2006 is filed before us. It is the stand of the Custodian that he has already worked out the position of the assets and liabilities separately for individual members of the family and it is reflected in the affidavit dated 1.3.2006. The Custodian further submits that these accounts show that for the present, all the notified entities of the Harshad Mehta Group are in excess of their assets. It is thus, pointed out that all these materials were already available before the Special Court passed the orders. The Custodian further argues that these facts are known to the appellants, and there is an attempt to mislead the Special Court as well as this Court on the part of the appellants. It is then submitted that all the accounts, which are audited and reviewed by the Chartered Accountants have been prepared by the notified parties themselves and it is, therefore, that the liabilities shown therein, have been taken as admitted liabilities. In our opinion, this argument on the part of the Custodian must be accepted. It has already been shown in the earlier part of the judgment that all these contentions were only raised before the Special Court, particularly, when the objections were raised. We do find some traces of these objections in the petition, but it is obvious that these questions were never pressed into service before the Special Court, perhaps because the appellants knew the futility thereof. We, therefore, leave the matters at that, in view of the final order that we propose to pass.

46. This is apart from the fact that before us also, not even a distant reference was made to these affidavits dated 1.3.2006 and 22.3.2006. A bald statement was made that there was no compliance of this Court's order in Ashwin Mehta's Case. We are certain that if these arguments had been addressed before the Special Court, the Special Court would have taken note thereof. The Special Court chose to go-by the judgment of this Court confirming the earlier judgment regarding the sale of shares passed by the Special Court [Hon. Kapadia, J. (as he then was)] and in our opinion, that was a right approach since the controversy involved, related to the sale of shares and securities. At this juncture, we cannot ignore the fact that in 2005 itself, in pursuance of the judgment dated 17.8.2000 and the confirming judgment of this Court, the majority of the shares have already been sold. It is only in respect of the Reliance Shares that the present sale was contemplated. It is really surprising that when the major shares were sold way back in 2005, the appellants did not think it proper either to challenge the same or to raise this argument of the individual liabilities viz. a viz., the group liabilities or the second argument that unless the denotification applications were decided upon, there should be no sale of shares. We have already pointed out the hollowness of the argument regarding the denotification applications, which were claimed to be pending

before the Special Court, which claim is also baseless. Therefore, on both these counts, there would be no question of finding fault with the impugned order of the Special Court.

47. This takes us to another contention raised more particularly, in point number 2, 4 and 5. Apart from the fact that the contentions were never raised before the Special Court, it is pointed out that as in the earlier case of the sale of shares in 2005, the Disposal Committee which was formulated under the orders of the Special Court as also this Court, had found that it was opportune time for the sale of Reliance Shares. The Custodian argues that the instant sale of Reliance Shares was being carried out strictly in compliance with the procedure laid down by the Special Court and this Court in the earlier referred judgments. It is pointed out by the Custodian that between 12.12.2000 to 1.11.2007, 12.12 crores shares valued at Rs.1792.77 crores were sold. Out of these, the shares worth Rs.1463.96 crores belonged to the various entities of Harshad Mehta Group including the appellants. The learned counsel very surprisingly did not refer to these facts during his arguments, instead, it was suggested that there was a loss of 6500 crores of rupees because of the sale. Such figure apart from being imaginary, has no basis. We cannot ignore that the Special Court is dealing with the scam which shook the whole financial world of India. We again cannot ignore the fact that the decision to sell the shares in 2005 was taken by the Disposal Committee, which consisted of the experts of the financial world who were well-experienced in the sale of shares and securities and who had a thorough study of the share markets. No mala fides were ever alleged against the Disposal Committee. Under the circumstances, we find no reason to accept the argument that the earlier sale caused huge loss and, therefore, the shares should not be sold. In our opinion, the Special Court was right in confirming the advice and accepting the report filed before him on behalf of the Custodian justifying the sale of shares. However, all that exercise, we are afraid, would have to be repeated again, particularly, because more than six months have elapsed after that decision and the sale has yet not taken place. The Special Court has referred back the matter and has passed the directions for obtaining the legal and expert advice to deal with the taxes. We are told at the Bar that such exercise had already been completed. It would, therefore, be proper for the Disposal Committee to again decide as to whether the shares should be sold at all and when. That would depend upon the market conditions and so many other factors which are certain to be considered by the Disposal Committee. The Custodian has referred all the happenings during the pendency of this appeal and has relied on the report dated 27.11.2007. We need not go into the question, since, it would be for the Disposal Committee to decide upon the proper time and the manner in which the sale is to be executed, and it would be for the Special Court to further decide on the matter.

48. In view of what we have stated above, we are convinced that the appeals have no merits. However, one thing is certain that the sale, as well as the decision to make the sale at a particular time, stand frustrated because of the lapse of time. The whole procedure for sale of shares will have to be repeated now, meaning thereby, that the Disposal Committee would have to take a fresh decision in the light of the directions given by the Special Court, which are the correct directions. That shall be done at the opportune time. If the appellants so feel, they would be at liberty to put their objections subject to what has already been said in this

judgment. The appeals are dismissed with the above observations under the circumstances. The cost is quantified at Rs.2 lakhs.

[1]*2006 2 SCC 385*
[2]*1998 5 SCC 1*
[3]*1998 5 SCC 1*
[4]*1998 5 SCC 1*
[5]*2004 11 SCC 456*