

The Custodian Vs. Union of India and Others

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Court : Mumbai

Decided On : Aug-17-2000

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Judge : S.H. Kapadia, J.

Acts : Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 - Sections - 4(1), 9-A, 10, 11(1) and 11(2); [Income Tax Act, 1961](#); [Insolvency Act, 1909](#) - Sections 49, 68, 69, 70 and 71; [Constitution of India](#) - Article 226; [Finance Act, 1975](#); [Companies Act, 1956](#) - Sections 77

Appeal No. : Misc. Petition No. 64 of 1998

Appellant : The Custodian

Respondent : Union of India and Others

Advocate for Def. : A.S. Bobde, ;S.G. Mandrekar and ;B.M. Chatterjee, Advs. i/b ;R.N. Bandopadhyay, ;Mahesh Jethmalani and ;Ajay Kandhar, Advs. i/b ;S.D. Chaugule & Co., ;M.S. Rane and ;M.P.S. Rao, Advs. i/b ;Purnana

Advocate for Pet/Ap. : G.R. Joshi, ;S.Rustomjee and ;J. Chandran, Advs. i/b; P.M. Mithi & Co.

Judgement :

ORDER

S.H. Kapadia, J.

1. This petition has been filed by the Custodian for consideration of the Scheme for Sale of shares of the notified parties under Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to, for the sake of brevity, 'the said Act').

2. Before coming to the Scheme, the following facts are required to be mentioned :

FACTS

Prior to the coming into force of the said Act on 18th August 1992, large scale irregularities and malpractices were noticed in the course of investigations by RBI with regard to transactions in Government and other securities indulged in by some brokers in collusion with the employees of various banks and financial institutions. The said irregularities and malpractices led to diversion of funds from banks and financial institutions to individual accounts of certain brokers. To deal with the above situation and in order to ensure speedy recovery of huge amounts involved, the Special Courts (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992 was promulgated on 6th June 1992. The Ordinance, inter alia, provided for appointment of Custodian for attaching the properties of the notified parties to prevent diversion of such properties by the offenders. The securities, which were attached included shares of various companies. On 20th February 1995 in Misc. Application No. 107 of 1993 & Others, the Special Court formulated certain questions on the interpretation of section 11 of the said Act in respect of the priorities created by section 11 of the said Act, particularly, regarding the amounts due prior to the date of notification. The learned Judge (as he then was) directed the Custodian to move the Supreme Court. This was done vide Civil Appeal No. 5225 of 1995 filed by the Custodian before the Supreme Court. In the said Appeal the notified parties also filed their say. The notified parties also, in turn, filed Civil Applications. They were all clubbed together and disposed off on 11th March 1996. By the said order, the Apex 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 Union of India for approval and

on such approval being obtained, the Said Scheme was directed to be placed before the Supreme Court. In compliance of the order of the Supreme Court dated 11th March 1996, a Scheme for sale of attached shares was proposed. Vide order dated 13th May 1998 in Civil Appeal No. 5326 of 1995, the Supreme Court directed the said Scheme with further modifications, if any, to be considered by the Special Court. Accordingly the matter has come before this Court basically to consider the Scheme for sale of the attached shares. The said draft Scheme has been updated. At this stage it may be mentioned that Civil Appeal No. 5326 of 1995 has been finally disposed off by the Supreme Court on 13th May 1998. Apart from answering the questions framed by this Court on section 11 of the said Act, the Apex Court also decided the validity of the Act. The Act has been upheld.

4. SCOPE OF THE PETITION :

For the sake of convenience it may be mentioned that in this petition we are mainly concerned with two broad aspects viz., validity of the Scheme and implementation thereof. The arguments by various parties before me broadly deal with challenge to the sale of shares at this point of time. In short, the main objection of the notified parties is that the time for distribution of assets has not yet arrived and, therefore, the Scheme for sale of shares should not be framed nor implemented.

5. SCHEME FOR SALE OF ATTACHED SHARES BELONGING TO NOTIFIED PARTIES :

The Scheme is mainly in two parts. It provides for constitution of a Disposal Committee and secondly, it deals with Modality of sale. The constitution of the Committee has been suggested because as of date the Custodian possesses 6.65 crores shares. They are unregistered shares, benami shares and registered shares. Further shares are likely to come in. Out of the above three categories of shares, the unregistered shares in physical possession of the Custodian are 1.87 crores. Similarly, the benami shares are 80.74 lakhs. The registered shares in the name of the notified parties, which are in possession of the Custodian, are 3.95 crores. Looking, to the magnitude of the work, the Scheme suggests setting up of a Disposal Committee. Under the Scheme, looking to the magnitude of the work

involved and particularly, in view of the limited resources and manpower available with the Custodian, the Committee is required to be set up consisting of the Custodian, Director General-Investigation, Department of Revenue, Managing Director of UTI Securities, Mumbai, Managing Director of ICICI Brokerage Services Limited and O.S.D. in the Branch Office of the Custodian at Mumbai. Under the Scheme, Modality of sale was been provided for. It is proposed to engage two institutional brokers viz. UTI Securities as well as ICICI Brokerage Services Limited to undertake sale of shares. In view of the demat facilities, equity shares of a large number of companies can now be traded in demat form, which has many advantages. Therefore, the Scheme contemplates conversion of shares to demat. Under the Scheme, this work of debating shall be handed over by the Committee to the broking houses, which would undertake the job themselves or through their subsidiary under the supervision of the O.S.D., who will act as a Secretary of the Disposal Committee. Under the Scheme, the proceeds of the sale, after deduction of usual brokerage and other charges, shall be made available by the institutional brokers mentioned above, to the Custodian's representative for depositing the amounts in the respective attached accounts of the notified parties. The amounts so received be invested by the Custodian in short term deposits in Nationalised Banks to avoid loss of interest. Under the Scheme, after the registered and benami shares are processed and cleared for sale by the Disposal Committee, both the broking houses will sell the shares in a phased manner at an appropriate time to obtain the best value for the shares. The Scheme further provides that offers received from Public Sector Banks, UT1, Mutual Funds and Public Financial Institutions shall be given the first priority without affecting maximisation of the sale proceeds. Under the Scheme, the discretion is vested in the broking houses regarding the timing of the sale of shares so that adverse impact on the capital market in general is avoided. The Scheme also lays down the method required to be followed by the Committee to scrutinize and process the scrips to establish salability of the scrips. The Scheme provides further that the Disposal Committee will, with the assistance of institutional brokers, undertake the work of packaging and sorting of lots of shares to be sold. These are the basic provisions of the Scheme. As stated hereinabove, the framing of the Scheme is different from implementation of the Scheme.

However, the work is enormous. The implementation of the Scheme will have to be done in a phased manner.

6. The following points arise for determination :

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 ?

7. ARGUMENTS ON POINT (A(REFERRED TO ABOVE :---

The notified parties have objected to the framing of the Scheme essentially on the ground that till the date of distribution arises, the sale of shares cannot be effected. Therefore, I have proceeded to consider this legal submission advanced on behalf of the notified parties first in point of time. Mr. S.D. Parekh, the learned Senior Counsel appearing on behalf of Dhanraj Mills Private Limited and T.B. Ruia (Respondent Nos. 32 and 33 respectively) has contended that the date of distribution of the assets of Dhanraj Mills has not yet arrived and is not likely to arrive in near future. It was submitted that until the date of distribution is imminent, there is no question of selling the attached assets, which though attached, remain the property of the notified parties. It was submitted that on true and correct interpretation of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act and in particular section 11 thereof, sale of attached assets is inextricably linked to the distribution of assets in the order of priority envisaged under section 11(2). It is contended that sale and distribution are not separate events. Therefore, the sale of assets cannot take place on a particular day and distribution after five years. Such an eventuality has not been mentioned in the Act. It was further contended that keeping in mind the object of the Act, the nature of the property attached, the ownership of the attached property, the position and role of the Custodian vis-a-vis the attached property, it is clear that 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

illegal security transactions is considered on merits. It was further contended that on a proper reading of the judgment of the Supreme Court in the case of Harshad Mehta v. Custodian, reported in : [1998]231ITR871(SC) , sale of attached assets cannot be ordered when time for distribution is nowhere in sight. It was contended that the distribution was dependent upon the determination of liability of the notified parties under section 9A of the Act and, therefore, consideration of liability of a notified party was, in turn, dependent upon ascertaining the rights of a third party in an attached property and also dependent on the question as to whether the attached property had any nexus with the security transaction. It was therefore, submitted that sale of attached assets dehors distribution will be unreasonable, unfair, arbitrary and prejudicial to the notified parties. It was contended that the date of distribution would arise only when this Court completes examination of claims under section 9A of the Special Court Act as held by the Supreme Court in para 27 of its judgment in Harshad Mehta's case (supra). It was contended that as far as Dhanraj Mills was concerned, the Special Court was yet to examine the case made against Dhanraj Mills under section 9A. Reliance is placed in this connection on the pending Misc. Petition No. 51 of 1998 filed by the Custodian as also Suit Nos. 7, 8, and 10 of 1994 filed by Canfina. It was urged that Misc. Petition No. 51 of 1998 has been filed by the Custodian on behalf of Abhay Narottam. It is for recovery, of Rs. 75.75 crores plus interest. In the said petition, a decree is sought against Dhanraj Mills and others. Similarly, the above suits bearing Nos. 7, 8 and 10 of 1994 are filed by Canfina on the basis of certain security transactions. Hence, the argument was that till all such claims are finally adjudicated upon, sale of assets cannot take place because the date of distribution arrives only when the Special Court completes examination of all cases under section 9A of the Act. It was contended that even under the [Insolvency Act, 1909](#) the date of distribution arises only upon the Court adjudicating a person as insolvent. In other words, the Court should be satisfied that the person is unable to pay his dues whereupon the person will be adjudicated as insolvent and it is only thereafter, that the Court will proceed to distribute the assets amongst the creditors. Therefore, until the claims against Dhanraj Mills are finally adjudicated upon by the Special Court, assets cannot be distributed under section 11 and, therefore, sale of assets cannot be effected till the date of distribution arises. It

was urged that even under section 49 of the Insolvency Act all the debts listed in sub-section (1) are to be paid in priority to all other debts. It was urged that after payment of debts, if any assets remained, the same were to be used for the purposes of paying all other debts proved in insolvency rateably. It was contended that under the Insolvency Act, however, there was no provision for scaling down the amounts payable in respect of the debts mentioned in section 49(1). However, as held by the Supreme Court in paras 35 and 36 of the judgment in Harshad Mehta's case (supra), the Special Court was empowered to scale down the amounts payable under section 11(2)(a) under certain circumstances so that some amounts is left for the purposes of paying the banks and financial institutions under section 11(2)(b). It was contended that before the decision of scaling down is taken, the claims of banks and financial institution will have to be adjudicated upon and crystallised and, therefore, it was contended that in view of this powers of the Special Court to scale down the amounts payable under section 11(2)(a), it was obvious that no distribution can take place until the claims of banks and financial institutions are decided. It was further contended that in view of paras 24 and 27 of the said judgment of the Supreme Court in Harshad Mehta's case (supra), only those income-tax assessment which has become final and binding on the assessee are liable to be paid under section 11(2)(a). It was submitted that under the Act, only those assessments can be said to have become final and binding on the assessee against which no appeal is pending. It is submitted that the distribution under the Act is the final distribution. That the Act does not contemplate interim distribution. Hence, it was argued that the Act contemplates distribution of the assets of a notified party towards satisfaction of the claims, which have attained finality and, therefore, if any appeal is pending against an assessment under the Income-tax Act, the assessment is not final and binding on the assessee in the context of the Special Court Act particularly, in view of the fact that such assessment would be set aside in the appeal. It was contended that executability of an assessment order should not be confused with the assessment order becoming final and binding- It was submitted that an order that is executable, is not necessarily final and binding. It was contended that in the above judgment of the Supreme Court in Harshad Mehta's case (supra), the purpose of the Special Court Act has been considered. It was contended that in the said

judgment, the Supreme Court has held that the words 'taxes due' under section 11(2)(a) referred to ascertained liability and, therefore, the words 'taxes due' referred to taxes finally assessed. It was contended that taxes which were not legally assessed or assessments which have not become final and binding on the assessee were not covered under section 11(2)(a). It was contended further that vide paras 25 and 26 of the said judgment it has been held that it is only the tax liability arising out of income relating to transactions in securities during the statutory period 1st April 1991 to 6th June 1992 which alone was entitled to priority under section 11(2)(a). It was contended that the tax liability of Dhanraj Mills during the aforesaid period is only Rs. 22 lakhs whereas Rs. 35 crores were lying with the Custodian to the credit of Dhanraj Mills, which was more than sufficient to meet the tax liability under section 11(2)(a). It was further contended that the issue as to whether the attached assets had any nexus with illegal transactions in securities of the banks during the statutory period is to be decided prior to distribution of assets. As held by the Supreme Court in the above judgment (see paras 14 and 15), it was contended that none of the attached assets of Dhanraj Mills have any nexus with illegal transactions in securities belonging to banks and financial institutions during the above statutory period i.e. 1st April 1991 to 6th June 1992 (hereinafter referred to as 'the statutory period'). On facts it was contended that Dhanraj Mills had filed several applications in this Court to raise attachment on their assets. However, this Court by its judgment dated 14th October 1999 in Misc. Petition No. 44 of 1999 was pleased to reject the applications filed by Dhanraj Mills on the ground that there was a nexus between Dhanraj Mills and the illegal transactions in securities. However, the Special Court did not decide the issue as to whether the attached assets have any nexus with the illegal security transactions. In this connection, reliance was placed in para 59 of the said judgment in which the Special Court has held that the issue regarding nexus raised by Dhanraj Mills would be considered at the stage of distribution. Therefore, it was contended that the issue of nexus is yet to be decided by the Special Court and until then, the assets cannot be sold. It was contended that the entire Act was restricted to the statutory period. Therefore, the Act does not give power, jurisdiction or authority to the Special Court for the period other than the statutory period. It was contended that section 11(2)(c) is only a residual clause

and such a clause can never be interpreted to cover liabilities owed to the tax authorities or to the banks or to financial institutions or to private parties during the non-statutory period. Therefore, neither the tax liabilities nor the bank liabilities nor the third party liabilities such as brokers for the period other than the statutory period stood covered by section 11(2)(c). This is qualified by further restriction that only such liabilities that arise from statutory transactions during the statutory period alone would fall under section 11(2)(c). It was contended that on reading the entire judgment, it is clear that only those liabilities mentioned in para 8 of the said judgment would fall under section 11(2)(c) and not the liabilities for the -non-statutory period or liabilities during the statutory period but not arising from security transactions. Accordingly, it was submitted that only the following liabilities would fall under section 11(2)(c) viz. balance of tax liability scaled down under section 11(2)(a); interest and penalty on the tax liability under section 11(2)(a); interest on the principal amount owed by the notified parties to banks and financial institutions under section 11(2)(b) and other liabilities owed to private parties such as, brokers which arises out of transactions in securities during the statutory period. Mr. Parekh further added that vide order dated 20th February 1995 in Misc. Application No. 431 of 1994 filed by Dhanraj Mills and T.B. Ruia, a recital is given in which the learned Judge Variava, J., (as he then was) stated that the time for distribution of assets under section 11 was approaching for two notified parties viz. Harshad Mehta Group and Fairgrowth Financial Services Limited. He also invited my attention to the order passed by the Supreme Court dated 11th March 1996 being the interim order in Civil Appeal No. 5326 of 1996 in which the Supreme Court has also stated that time for distribution of the assets in possession of the Custodian was drawing very near and this was with reference to only two notified parties viz. Harshad Mehta Group and Fairgrowth Financial Services Limited, which clearly show that the Supreme Court was fully aware that time for distribution had approached only for two notified parties viz. Harshad Mehta Group and Fairgrowth Financial Services Limited. Therefore, the time for distribution of assets of Dhanraj Mills has still not arrived. This was on the footing of the above arguments. It was contended that the order of Variava, J., dated 20th February 1995 clearly shows that, even according to the learned Judge, distribution of the assets is required to be made only in respect of Harshad Mehta Group and

Fairgrowth Financial Services Limited and, therefore, the Scheme should not be applied to Dhanraj Mills. 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. 5326 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 v. Custodian reported in : [1998]231ITR871(SC) . 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 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 assessment, 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. It was further contended that under the interim order passed by the Supreme Court on 26th August 1996 and also under the order of this Court dated 22nd March 2000, an amount of Rs. 234 crores has been deposited with the department. It is contended that the said amount exceeds the tax liabilities of the department. It was contended that in most cases the accounts are now complete. It was further contended that under section 11 of the Act as construed by the Supreme Court, the expression 'taxes due' does not refer merely to liability created by the charging section, but they refer to ascertained liability. He contended that taxes, which are not legally assessed or assessments which have not become final and binding, are not covered by section 11(2)(a) and the words 'taxes due' would mean taxes finally assessed. Therefore, this Court should not consider any Scheme of sale as there is no need to distribute any further amounts under section 11 of the Act. It has contended that the sale of shares and distribution are interlinked. It was contended that the Act does not contemplate sale of assets for any other purposes than distribution that is to meet the demands of the creditors and in the entire Scheme of the Act. no sale of assets is contemplated other than to meet the claims of the creditors. He further contended that any sale of assets would entail a tax liability on the respondents. The sale of shares would immediately create a tax liability of 20% at least in capital gains. He contended that monies realised would be deposited in bank deposits earning a taxable income as against a current tax free income earned through dividend on equity shares and, therefore, this Court should not release any amounts to the revenue towards capital gain taxes or the tax liability resulting from income from fixed deposits. Therefore, the notified parties will be burdened with tax liability which is presently nonexistent. The arguments of Mr. Jethmalani are also adopted by the learned Counsel appearing for various notified parties. Mr. Joshi submitted that section 11(2)(a) of the Act refers to Priority Liability. He contended that section 11(1) begins with a non-obstante clause. He contended that section 11(1) empowers the Custodian to sell the attached assets. He contended that section 11(1) refers to sale whereas section 11(2) of the Act refers to distribution. Mr. Joshi accordingly, contends that under section 11, there is a clear cut dichotomy between sale and distribution and one should not be mixed with the other. He further contended that under section 11(2)(a), the liability of the

notified parties on account of taxes, rates, cesses, etc. need to be discharged by the Custodian. He contended that this Court has no jurisdiction to go into the merits of the assessment orders. That this Court cannot order discharge of liabilities of the notified parties. That this Court, however, can scale down the quantum of tax under section 11(2)(a) and to the extent it is scaled down, the amounts shall fall under section 11(2)(c). He contended that the liabilities of the notified parties are required to be paid or discharged in the order contemplated by section 11(2)(a) to 11(2)(c). He contended that the Scheme framed by the Custodian is only for sale, which is a step before distribution under section 11(1) of the Act. In other words, the Scheme falls under section 11(1) and not under section 11(2). He further contended that none of the notified parties in the last eight years have come before the Court saying that the assets are more than the liabilities. He contended that priority is given to tax arrears by section 11(2)(a) in respect of the priority period, which corresponds to the statutory period under the Act viz. 1st April 1991 to 6th June 1992. He contended that the object of the Special Court Act is speedy recovery of the dues of the creditors including the Income-tax department. He contended that even under section 49 of the [Insolvency Act, 1909](#), the Official Assignee cannot be asked to wait and not to sell the assets till crystallisation of all debts of debtors. He contended that even under section 49 of the Insolvency Act, the Official Assignee can sell the assets and pay off the tax dues without being asked to wait till crystallisation of all other debts of the insolvent to banks, financial institutions, etc. He contended that there is no dispute that distribution can only take place on realisation of assets. In fact under the Insolvency Act, dividends can be declared even if certain debts are not cleared. Reliance is placed on sections 69, 70 and 71 of the Insolvency Act. Accordingly, it was contended that the sale was not depended on distribution. Mr. Joshi further contended that the submission advanced on behalf of Dhanraj Mills viz. that assets, which do not have any nexus with the illegal transactions in securities has been specifically rejected by the Special Court in Misc. Application No. 1 of 1999; judgment of Rane, J., in Misc. Petition No. 44 of 1999 as also the order of the Special Court in Misc. Petition No. 16 of 1998. He contended that in Misc. Petition No. 16 of 1998, Dhanraj Mills had specifically asked for release of assets on the ground that their assets do not have any nexus with the illegal

security transactions. It was contended that in Misc Petition No. 16 of 1998, Dhanraj Mills-have applied for release of shares of Killick Nixon Private Limited. They had applied to this Court for a restraining order against the Custodian preventing him from selling the shares of Killick Nixon. In the said application, Dhanraj Mills had sought a declaration that the said shares are free from attachment as they had no nexus with illegal transactions in securities. However, by order dated 14th October 1999, the application of Dhanraj Mills came to be rejected. Hence, it is not open for the Dhanraj Mills to raise the same contention once again. He contended that if section 11(2)(a) is confined only to the priority period as contended on behalf of Dhanraj Mills and if section 11(2)(a) did not cover the post priority period or pre-priority period in respect of income-tax dues, then even the Income-tax Department will not be able to recover their dues for the post priority period/pre-priority period. He contended that if the arguments of Dhanraj Mills were accepted, the Income-tax department cannot proceed against any property because all the properties of the notified parties have been attached under the Act statutorily. He contended that except T.B. Ruia, not a single notified party has declared his earning from the future income. He contended that future income, as laid down in the judgment of the Supreme Court in the case of T.B. Ruia v. Custodian, reported in : AIR 1997 SC442 , refers to an income generated by a notified party by dint of his own labour which would then fall outside section 3(3) and it is in respect of such income that the attachment under section 3(3) will not operate. However, such future income, cannot be equated with post statutory period income. Mr. Joshi further contended that under the above circumstances, sections 11(2)(a), (b) and (c) would cover all assets particularly in view of the fact that all the assets of the notified parties stood statutorily attached under section 3(3). He contended that if the contentions of the notified parties are accepted that in respect of claims for pre-statutory period/post -statutory period can never be enforced as nothing could be sold and that be the case then one fails to understand as to where the decree holder would go for enforcement of his claim for pre-statutory period and post- statutory period. He contended that since all the assets of the notified parties stood attached, the decree holder can only come to the special Court because no other Court can attach the properties of the notified parties. If the argument of the notified parties on the above interpretation is

accepted then no claim could be enforced as there would be no machinery to enforce such claim of pre-statutory and post-statutory period. He contended that in the above judgment of the Supreme Court, the Supreme Court has laid down the scope of section 11(2)(a). It has not laid down the scope of sections 11(2)(b) and (c). He contended that the Supreme Court realised that in certain cases looking to the Income-tax demands raised on the notified parties, a situation may develop where the entire realised amounts would be required to be appropriated towards the taxes due which would mean that nothing could be left for distribution to banks and financial institutions under section 11(2)(b) and, therefore, the procedure for scaling down the quantum of tax under section 11(2)(a) has been provided for and, to the extent that the amount is scaled down under section 11(2)(a), the balance would fall under section 11(2)(c). Therefore, the Supreme Court has laid down only section 11(2)(a) in the above context. According to the learned Counsel. vide para 26 of the judgement, the Supreme Court has clearly indicated that every kind of tax liability for any other period (meaning pre-statutory and post-statutory period) is not covered by section 11(2)(a). However, such tax liability (meaning pre-statutory and post-statutory period) may be discharged under the directions of the Special Court under section 11(2)(c) or taxing authority may recover the same from any subsequently acquired property of a notified person (vide *Ruia v. Custodian*) (supra) or in any other manner from the notified parties in accordance with law. However, the priority given under section 11(2)(a) is only to the tax liability for the statutory period i.e. 1st April 1991 to 6th June 1992. Therefore, it was contended that sections 11(2)(a) and (b) cover all liabilities. The said sections covered inter alia, all tax liabilities for the pre-statutory period, the post-statutory period and also for the statutory period. He further contended that even under section 11(2)(c) the legislature has used the expression 'any other liability' and, therefore, even under section 11(2)(c) the Court can decide the priority for example, if the Court is required to consider the question as to whether the penalty under income-tax dues should be given, priority under section 11(2)(c) or whether the claim of Abhay Narottam against Dhanraj Mills should be given priority, then such question can certainly be decided by the Special Court and the Court can always give priority in appropriate cases. Therefore, all claims will fall under sections 11(2)(a) and (c) and even within 11(2)(c) the Court can decide the

question of priority. Mr. Joshi further contended that there is no merit in the contentions advanced on behalf of the notified parties that income-tax dues were required to be separately worked out on the basis of income from security transactions. He contended that it was not possible to spell out the income from security transactions. He further contended that there is no basis to support the contention that only the income-tax dues relating to security transactions should be spelt out separately. He contended that there is no such provisions under section 11(2)(a) of the Act. He contended that wide para 24 of the judgment of the Supreme Court in Harshad Mehta's case (supra) the words 'taxes due' have been stated to mean ascertained liability quantified in accordance with law. According to the Supreme Court, taxes due would mean taxes as assessed which were presently payable by the notified parties. He contended that the Supreme Court has used the words presently 'payable by the notified parties' and not finally payable. Hence, there is no merit in the contentions of the notified parties that till the entire matter is decided by CIT (Appeals) or by the Tribunal or by the Supreme Court, the sale shall not take place. Therefore, he contended that final and binding assessment would mean taxes as assessed and taxes which would be presently payable. Hence, he contended that there is no merit in any of the above contentions raised on behalf of the notified parties on Point A.

8. FINDINGS ON POINT A.

(i) PREFACE

Before coming to the legal contentions, a short preface needs to be mentioned. The Act came into force on 18th August 1992. Before that date, the Ordinance was promulgated on 6th June 1992. On 3rd February 1994, three firms of Chartered Accountants were appointed by the Special Court. The order was passed in Misc. Petition No. 270 of 1992. They were appointed to prepare the statements of accounts of nine notified parties including Harshad Mehta Group and Dhanraj Mills. This Court has now received letters from three firms of Chartered Accountants stating that till today they have not received the relevant documents from Harshad Mehta Group. At this stage, it may be mentioned that initially the books of accounts were directed to be prepared by the above three

firms of Chartered Accountants. Subsequently, the task was undertaken by the Harshad Mehta Group, who undertook to furnish the accounts by the end of 1999. For the last eight years no progress has been made. The Chartered Accountants have recorded that even supporting documents have not been given to them till today. The reason is obvious. The notified parties are objecting to the sale of shares. The number of shares, in possession of the Custodian as of date, are approximately 6.65 crores. Further updating is yet to be done. The number of registered shares of Harshad Mehta Group alone are 2.88 crores. Apart from registered shares, the Custodian is also in possession of benami and unregistered shares. The total of all the three comes to 6.65 crores. On the other hand the tax liability of Harshad Mehta for the priority period alone is Rs. 1624 crores. The tax demand against Dhanraj Mills for entire period is Rs. 224 crores. Steps are yet to be taken to register the shares/demat the shares. In other words, the notified parties are interested in delaying the sale of shares on one ground or the other. Mr. Jethmalani has urged on behalf of Harshad Mehta Group that they have done their best to complete the accounts. He has also relied upon the correspondence. On going through the correspondence, I find that in most of the cases the notified parties have relied upon netting transactions. Even in the income-tax record produced before me of Dhanraj Mills show that the assessee had relied Upon the netting transactions. However, in a netting transaction purchase is netted out against the sales and vis-a-vis. Where the documents of purchase were produced, there are no sales. This aspect is stated because after eight years of the implementation of the Act, 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 crystallised. 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. Of course, one cannot loose sight of the fact that the shares, if ordered to be sold, should fetch the best possible price. So that the liabilities of the notified parties

could be discharged in the best possible manner. It is for this reason that the Scheme for sale of the shares has been formulated and placed before the Court. I may mention that the observations in the preface are only to show that on one hand, the notified parties claim that their liabilities under the Income-tax Act have not crystallised and on the other hand, they have not even produced the relevant documents/statements of assets and liabilities before the Court appointed Chartered Accountants for completion of accounts in the last eight years. This is particularly in the context of Harshad Mehta Group. The observations made by me in this preface should not be read as binding in the pending proceedings before various authorities under the Income-tax Act including AO/CIT (Appeals)/Tribunal. Lastly, this Court is also required to take into account the ground realities, which have emerged, in its working during the last eight years while deciding this application.

(ii) SUMMARY OF THE ARGUMENTS ON BEHALF OF THE NOTIFIED PARTIES.

With the above preface, I now proceed to examine the arguments advanced on Point A.

The main argument advanced on behalf of the notified parties is that the attached assets should not be sold till the date of distribution. That the date of distribution has not arrived. That sale of assets under the Act as interpreted by the judgment of the Supreme Court in Harshad Mehta's case (*supra*) is directly linked with date of distribution. That till the completion of examination of all claims under section 9-A of the Act, the date of distribution cannot be said to have arrived. That there are no final and binding assessment orders passed by the Income-tax authorities till today as the matters are pending in appeals before the Appellate Authorities and, therefore, till the assessee exhaust all the remedies under the Act, the assessments are not final and binding. Hence, to that extent also the date of distribution has not arrived. That even today, for example, the Custodian's claim against Dhanraj Mills in Petition No. 51 of 198 for Rs. 75.75 crores plus interest is pending. So also, petitions filed by Cafina are pending. It is contended that Dhanraj Mills had also challenged the validity of Kar Vivad Samadhan Scheme,

which is also pending under Article 226 of the Constitution. In short, the submission is that till all the above claims are finally adjudicated upon by this Court or by the High Court in its writ jurisdiction or by the various Appellate Authorities under the Income-tax Act, the date of distribution cannot be said to have arrived particularly, when according to the notified parties, the department has made best judgment assessment. According to the notified parties, the claim of the Income-tax department are highly exaggerated. In some cases, the CIT (Appeals) have set aside the assessment orders and have remanded the matter back to the AO and, therefore, it is urged that the liabilities are not crystallised. Therefore, the scheme for sale of shares should not be sanctioned. It was further urged that the mere fact that an amount is ascertained by an assessment order would not mean that the date of distribution has arrived. It was contended that on the passing of the assessment order, the same may be executable, but the said order should not be final and binding. That there is a difference between executability and finality. It was further contended on behalf of notified parties that under the Act the power of the Custodian is restricted to the statutory period viz. 1st April 1991 to 6th June 1992. Therefore, the tax demand could only be restricted to the said period and, if, the tax demand is restricted to the said period then, in the case of Dhanraj Mills and some of the other notified parties, the assets lying with the Custodian would be much more than the Income-tax liability. For example, it was contended that in the case of Dhanraj Mills, assets worth Rs. 35 crores are lying with the Custodian whereas, at the highest the tax demand was Rs. 7 crores. Therefore, the Scheme should not be applied uniformly to all the notified parties. It was further contended that under section 11(2)(a) of the Special Court Act only the tax liability arising out of illegal transactions in securities during the statutory period is required to be taken into account. It was contended that under the Income-tax Act, it was possible to work out tax liability arising out of such security transactions pertaining to the statutory period and only to that extent section 11(2) would apply. However, it was contended that tax, liability for pre-statutory period and post-statutory period would not fall under section 11(2). On the basis of the judgment of the Supreme Court in Harshad Mehta's case (supra), it was contended that only the following liabilities would fall under section 11(2)(c) viz. balance of tax liability scaled down by this Court under section 11(2)(a); interest and penalty on the tax liability under

section 11(2)(a); interest on the principal amount owed by the notified parties to banks and financial institutions under section 11(2)(b) and lastly, other liabilities owed to private parties such as brokers, which arises out of transaction in securities during the statutory period. In substance, the argument is this that the power of the Custodian to sell the attached assets is restricted. It was further contended that in the case of Dhanraj Mills during the period 1st April 1992 to 6th June 1992 there was no security transaction. That the demand of the tax department for the said period was in respect of a non-security transaction. Such demands cannot fall under section 11(2)(a). In other words, if there is a tax demand for a period other than the statutory period or if there is a demand in respect of the statutory period, but if such demand is not related to or having nexus to the security transaction then such liabilities will not fall under section 11(2)(c). Therefore, the power to distribute exclude the demands for the periods other than statutory period or demands for the statutory period but not related to the security transactions. According to the notified parties, the said nexus is yet to be decided. Therefore, the assets cannot be sold. Reliance was placed on para 27 of the judgment of the Supreme Court in the case of Harshad Mehta (supra) in which it has been observed that the date of distribution arise when the Special Court completes the examination of claims under section 9-A and if on that day any tax liability for the statutory period is legally assessed and the assessment is final and binding, then that liability will be considered for payment under section 11(2)(a). On the basis of the said observation, the learned Counsel for the notified parties contended that only on completion of examination of claims under section 9-A, the date of distribution can arise. That date has not arrived. Therefore, the assets cannot be sold. Similarly, it was contended that if a claim is not adjustable by the Special Court then to that extent section 11(2)(c) will not be attracted. In other words, if there was no nexus between any illegal security transaction and the property attached, such property cannot be distributed under section 11(2)(a), (b) and (c). It was contended that in the present matter, the Custodian should be directed to make a separate application for sale of shares belonging to Dhanraj Mills and, if such an application is made, then it would be possible for Dhanraj Mills to show that there was no nexus and that the property should be released. However, if the Scheme is made uniformly applicable to all notified parties, then

the above question cannot be decided and without such determination, the attached assets should not be sold. At this stage, it may be mentioned that several attempts were made by Dhanraj Mills for release of asset. They adopted various proceedings. They all failed.

(iii) FINDINGS ON THE ABOVE ARGUMENTS.

I do not find any merit in the above arguments of the notified parties. Section 11 consists of two parts. Section 11(1) deals with sale. Section 11(2) deals with distribution. This distinction is required to be kept in mind. Even under the Insolvency Law, this clear cut distinction between section 68 on one hand and sections 69, 70 and 71 on the other hand show that the above two concepts are different. Even under the Insolvency Law, distribution has nexus with proved claims. Under the Insolvency Law, the Official Assignee starts with the work of distribution only after the assets are realised and sold. One reason being the distribution work involves certain expenses towards advertisement in the newspapers inviting claims from the creditors, individual notices to the creditors, etc. The said expenses can only come out of the monies with the Official Assignee. The said monies come from realisation of the assets. Therefore, even under the Insolvency Law, distribution is preceded by sale of assets. This distinction can also be seen in the judgment of the Supreme Court in the case of Harshad Mehta (supra). This distinction can also be seen from the provisions of section 11 of the Special Court Act. Section 11(1) expressly refers to the duty of the Custodian to dispose of the assets whereas, section 11(2) refers to distribution. Reliance is placed on the judgment of the Supreme Court in the case of Harshad Mehta (supra). However, on reading the said judgment it is clear that various questions referred by this Court to the Supreme Court, each of the said questions were separately answered. While answering the question, the Scheme of section 11(1), sections 11(2)(a), (b) and (c) are separately considered. Therefore, when reading the judgment, one has to keep in mind the relevant question and the context on which the said question is framed. In para 13 of the said judgment in the context of section 11(1), the Supreme Court has clearly laid down the condition which would attract the said section. The Supreme Court has held that section 11(1) empowers this Court to direct the Custodian to dispose of

the property under attachment. The only condition prescribed by the Supreme Court in the said judgment vide para 13 is the satisfaction of the Special Court before it gives directions for disposal to the effect that the attached property belonged to the notified party. In other words, before the direction of disposal is given, the Special Court should be satisfied that the attached property belonged to the notified party. All subsequent paras of the judgment thereafter, deal with the question of distribution under section 11(2). Therefore, even under the judgment of the Supreme Court this dichotomy between sale and distribution is spelt out. In the present application the Scheme is not for distribution. The Scheme is not under section 11(2). The Scheme squarely falls under section 11(1) for sale. This point is sufficient to reject the above arguments. However, since the learned Advocates for the notified parties have raised various contentions on section 11(2) on the point of distribution, this Court has examined the said judgment in detail. Vide para 16, the Supreme Court formulated six questions, which are relevant for this case. We are essentially concerned with first five questions. In the first question, the Court has answered the meaning of the words 'taxes due'. Under the Income-tax Act, there is a difference between liability and assessment. The Scheme of the Income-tax clearly indicates that liability to pay Income-tax chargeable under section 4(1) of the Act does not depend upon the assessment being made by the Income-tax Officer but, it depends on the enactment of the Finance Act prescribing rate/rates for any assessment year. Therefore, as soon as the rates are prescribed by the Finance Act, the liability to pay taxes arises on the total income which is to be computed by the assessee in accordance with the provisions of the Act. In view of the said difference in the concept of liability and assessment under the Income-tax Act particularly, the question referred to the Supreme Court was whether the word 'due' refer merely to the liability to pay taxes or does it refer to the liabilities which are crystallised into a legally ascertained amount. By the aforesaid judgment, it has been laid down that the words 'taxes due' under section 11(2)(a), which deals with distribution can only refer to the liability, which has been computed in accordance with the provisions of the Income-tax Act. In other words, the Supreme Court has held the words 'taxes due' do not merely refer to the liability which arises under section 4(1) of the Act when the rates are prescribed by the Finance Act, but it refers to the liability to pay tax on the total income which is computed in

accordance with the provisions of the Act. Where the return is filed by the assessee, the ITO is required to check whether the returned income is computed in accordance with the Act. The tax, which becomes payable on the basis of the returns, is an assessed tax. Therefore, the Supreme Court has laid down that the words 'taxes due' referred to the liability which was crystallised into a legally ascertained sum immediately payable. In other words, the expression 'taxes due' is equated with assessed tax. In fact, while answering question No. 1 the Supreme Court has clearly stated in para 24 that the expression 'taxes due' in section 11(2)(a) meant assessed taxes, which are presently payable. The Supreme Court has nowhere stated that the 'taxes due' would mean the taxes which are finally payable. The expression 'taxes due' finds place in section 11(2)(a). It is the section which deals with distribution of assets. Therefore, the Supreme Court has laid down that in the context of distribution, the expression 'taxes due' can only mean assessed taxes. In the circumstances, there is no merits in the contentions of the notified parties that till they have exhausted all their remedies under the Act, the taxes do not become due for payment. The second question which was considered by the Supreme Court was, once again, only in the context of section 11(2)(a) viz. priority to be given to the taxes due in the matter of disbursement/distribution of assets. Question No. 2 has no connection with the sale of assets. The question posed to the Supreme Court was whether the taxes referred to in section 11(2)(a) related only to the statutory period or whether they covered all assessed taxes of the notified persons. In other words, the question was whether priority should be given at the time of distribution to the taxes due only for the statutory period or whether the priority should be given also to the taxes due for pre-statutory period and post-statutory period. This question has no bearing on the point for consideration before this Court. The Supreme Court has laid down that in a given case, if this Court is satisfied that the demand of the Income-tax department is on the higher side, then while deciding the question of priority under section 11(2)(a) with regard to distribution, the entire amount should not be handed over to the department because in the security scam, public money which was deployed in the banks and financial institutions, was involved and the claims of banks and financial institutions will be defeated if the entire disbursement took place in favour of the department because nothing would be left for

distribution in favour of the banks and financial institutions. Therefore, in appropriate cases, the Supreme Court has empowered this Court to scale down the tax demand. Now here also, one has to keep in mind the difference under the Income-tax Act between the liability and quantification of liability. While answering question No. 2, the Supreme Court has only laid down that in certain cases, without discharging the income-tax liability of the notified party, the Special Court may scale down the quantified amount of tax. In other words, the tax amounts could be reduced only for the purposes of section 11(2)(a). It would only empower the Special Court to go into the merits of the assessment order. However, the scaling down is proposed so that the other creditors also get the benefit of distribution. It is the quantum which is to be scaled down and not the liability. Further, para 26 of the said judgment clearly shows that for the purpose of scaling down only, the tax amount due for the statutory period shall be taken into account although the liability of the assessee-notified party shall continue. In fact, the Supreme Court has clarified that every kind of tax liability may be discharged under the directions of the Special Court under section 11(2)(c), but for the purposes of scaling down in appropriate cases, the Court may consider the taxes only for the statutory period. It does not mean that the Special Court cannot consider, at the time of distribution, the tax liability for the pre-statutory and post-statutory period. On the contrary, the Supreme Court has laid down that all such tax liabilities may be discharged under section 11(2)(c) or the department may recover the same from any subsequently acquired property or in any other manner in accordance with law. However, the priority under section 11(2)(a) would cover the liability for the statutory period. There is one more reason that on the coming into force of the notification, all the properties of the notified parties stood attached. If the argument of the notified party was to be accepted, the consequences would be disastrous. It would defeat the provisions of the Act. It would mean that although all the assets of the notified parties stood frozen/attached, the claims in respect of pre-statutory and post-statutory periods would become unenforceable because the claimants will have no machinery and the property against which they could enforce their claim. In the circumstances, there is no merit in the contention advanced on behalf of the notified parties that the claims for pre-statutory and post-statutory periods do not fall under sections 11(2)(a), (b) and (c) of the Act.

The Scheme of the Act is very clear. On the date of the notification, all properties of the notified parties are attached. In the present case, it is established that all the registered shares belonged to notified parties. In the case of sale of attached property, the only condition prescribed by the Act is that the property should belong to the notified party. This is also laid down by the Supreme Court in para 13 of the said judgment. When one comes to distribution/disbursement of assets, the proof of claim is the basis. It is for this reason that in the Supreme Court judgment, it has been laid down in para 27 that the date of distribution arise when this Court completes the examination of claims under section 9-A. Therefore, completion of examination of claim under section 9-A is the condition precedent to the distribution and not to the sale. One more fact may be mentioned. In the present matter on behalf of Dhanraj Mills, it has been contended repeatedly that their liability to pay tax is only to the extent of Rs. 7 crores. According to them the liability is less than Rs. 7 crores. This is on the basis that section 11(2) only refers to the statutory period. According to Dhanraj Mills, the liability for the statutory period is Rs. 7 crores at the highest, which is much less than the assets lying with the Custodian of Rs. 35 crores. However, as stated earlier, section 11(2) cannot be restricted only to the tax liability during the statutory period. It covers all claims including those in respect of the pre-statutory and post-statutory period. Hence, there is no merit in the contentions that the assets are more than the liabilities in the case of Dhanraj Mills. The tax demand against Dhanraj Mills for all the years in Rs. 224 crores (approximately). Moreover, the claim of the Custodian in Misc. Petition No. 51 of 1998 is Rs. 225 crores. Therefore, it cannot be said that assets match the liabilities. This Court need not wait in the matter of framing of the Scheme for sale of shares till all matters are finally decided because even at this stage, it is clear that assets do not match the liabilities. Further, it has been contended on behalf of Dhanraj Mills that under the Act even if the demand falls within the statutory period but, if such demand is not related to the security transactions, it will not fall under section 11(2). It was contended that therefore, in every matter the Custodian should be directed to apply for sale so that the notified party gets an opportunity to prove that there was no nexus. If the demand has no nexus with the security transaction, then it will not fall under section 11(2) even if it relates to the statutory period. Before closing the discussion on Point A, it may be

mentioned that the question of nexus discussed hereinabove has been repeatedly raised by the notified party- Dhanraj Mills. By Misc. Petition No. 16 of the 1998 preferred by Dhanraj Mills, it was urged that Dhanraj Mills came to be notified under the Act vide notification dated 5th August 1992. In the said petition, it was alleged that on the date of the application i.e. 9th February 1998, Dhanraj Mills were holding 10,83,430 shares in the capital of Killick Nixon. By the said petition, Dhanraj Mills prayed for raising the attachment in respect of the said shares. A bare reading of the said petition shows that even in the said Misc. Petition No. 16 of 1998, it was contended by Dhanraj Mills that the shares were not liable to be attached under the Act as they were not connected with the security transactions. It was contended that the shares were purchased out of funds, which have no connection with the security transactions or with any wrongful conduct. Therefore, a declaration was sought from this Court that the said shares should be declared as being free from attachment. By a speaking order dated 14th October 1999 passed by Rane, J., (as he then was), it was held that in view of the judgment in Misc. Petition No. 44 of 1999 in which the same contentions were taken by Dhanraj Mills, the said Misc. Petition No. 16 of 1998 came to be dismissed. In the circumstances, it is not open for the Counsel for Dhanraj Mills to raise the same contention in this petition. Dhanraj Mills had filed Misc. Petition No. 44 of 1999 in which the above contention regarding the nexus was raised by Dhanraj Mills. The petition was also dismissed vide judgment dated 14th October 1999. In Misc. Petition No. 44 of 1999, it was prayed that the assets be freed from statutory attachment. However, it was contended that in paras 58 and 59 of the judgment of Rane, J., in Misc. Petition No. 44 of 1999 it has been held that whenever the plea of no nexus is raised, the Court shall consider the entire factual back ground, the conduct of the parties, the manner in which the dealings were undertaken. Accordingly, it was urged that even according to Rane, J., such plea of no nexus is required to be resisted against factual matrix and, therefore, pending such determination, the assets cannot be sold. On the other hand, it was contended on behalf of the Custodian that in the said judgment Rane, J., has deprecated Dhanraj Mills for repeatedly raising the plea of no nexus. That Rane, J., has categorically held that the said questions has been finally decided by Variava, J., on 8th March 1999 in Misc. Application No. 1 of 1999. It was contended that

repeatedly in order to delay the framing of the scheme, Dhanraj Mills has raised that above contention. It was contended on behalf of the Custodian that in the judgment of Variava, J., dated 8th March 1999 in Misc. Application No- 1 of 1999, Dhanraj Mills had relied upon the judgment of the Supreme Court in the case of the Harshad Mehta (supra). Relying on the said judgment, it was contended on behalf of Dhanraj Mills that the Special Court would have jurisdiction only if the claim was in respect of security transaction during the statutory period. It was contended that even according to the Supreme Court, if the property had no nexus with illegal dealing, then it can be released from attachment. In the said matter, it was contended that monies were taken by CIFCO & Champaklal Investments and CIFCO Finance Limited from Kennilworth Investment Company Private Limited by way of loans and, therefore, the assets has no nexus with the security transaction. In the said Judgment in para 24, Variava, J., had rejected the said argument. The learned judge has clearly considered the judgment of the Supreme Court in Harshad Metha's case (supra) and has laid down that the Supreme Court has only declared that jurisdiction in civil matters is vested in the Special Court if the claim related to any property which stood attached. It was further found on facts that the monies belonged to banks and financial institutions. That they were siphoned out by Respondent No. 4-Dhanraj Mills. That they were diverted to Respondent No. 5 and, thereafter, to Respondent Nos. 1, 2 and 3. The learned Judge has further laid down that if an asset could be used to satisfy any claim then even though such asset may have no nexus, it could be attached. Therefore, all claims will fall under section 11(2). Therefore, the learned Judge has considered the judgment of the Supreme Court in Harshad Mehta's case (supra). The learned Judge has held that there is nexus between the property attached and the illegal dealings in securities by Dhanraj Mills. Hence, there is no merit in the above contentions advanced on behalf of Dhanraj Mills. To complete the reading of judgment of the Supreme Court in Harshad Mehta's case, it may be mentioned that question No. 3 was on the point as to when the taxes under section 11(2)(a) to be said to have become due. This question is once again related only to the distribution of assets under section 11(2)(a). This question arose because it is contended on behalf of the notified parties that only the liabilities, which have been quantified by the final assessment on the date when the Act came into force would fall under section 11(2)(a). Others

contended that the tax liability should have been quantified by the date of the notification. Some others contended that the tax liability should have been ascertained on the date of distribution. The Supreme Court held that section 11(2)(a) contemplates disbursement of assets in terms of priority in favour of the Government so that the tax dues is cleared first in point of time. However, the Supreme Court found that in appropriate cases, the demands may be on the higher side and, therefore, they needed to be scaled down. Therefore, the Supreme Court rejected the arguments advanced on behalf of the notified parties that liabilities should be assessed before 6th June 1992 or they should be finally assessed before the date of notification. 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 9-A 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 precondition of distribution is completion of examination of claims under section 9-A. There can be no quarrel that at the time of distribution, the completion of the examination of claims is required. Therefore, the Supreme Court has stated that the date of distribution will arise when the Special Court completes the examination of claims under section 9-A. (see para 27 of the judgment). However, the entire discussion is in the context of distribution under section 11(2)(a) of the Act. There is no principle of law shown to this Court that sale cannot take place till completion of examination of all claims under section 9-A of the Act. Moreover, we are dealing with Special Court Act. The tax liability of the notified parties for all the years including the statutory period runs into several crores. By way of illustration, the tax liability of Harshad Mehta alone excluding the family members' income for Assessment Year 1992-93 being the net priority demand is Rs. 1,000 crores. For the Assessment Year 1993-94, it is Rs. 624 crores. The question of scaling down will arise, if at all, at the time of distribution. This is apart from the suits decreed. On question No. 4, the Supreme Court has held that in appropriate cases, the tax demand can be scaled down as stated above. This is also a point which arises at

the time of distribution under section 11(2)(a). At that time, this Court will decide how much of the tax liability should be discharged for the priority period out of the funds in the hands of the Custodian. As regards question No. 5 is concerned, the Supreme Court has held that the penalty and interest under the Income-tax Act shall fall under section 11(2)(c). The same will not be paid in priority under section 11(2)(a). If the Special Court so desires, it may direct payment of balance liability under section 11(2)(c). The Special Court Act has also come for consideration from time to time before this Court. In the case of Hitesh Mehta v. Union of India, reported in 1992(111) Bom CR 716, the Division Bench of the Bombay High Court held that section 11 of the Act has been enacted to ensure that attached property is disposed off as per the directions of the Special Court. The Division Bench construed section 3(4) of the Act and came to the conclusion that the said subsection contemplates the power of the Custodian to dispose of the property of the notified party subject to the directions of the Special Court. Before the Division Bench, the validity of the Act was challenged. It was contended that there was no provision under the Act for raising the attachment. That submission was rejected. The Division Bench held that section 11 should be read independently of section 3(4) because section 3(4) only deals with an earlier stage where the properties are initially attached, whereas section 11 of the Act deals with an independent power of the Special Court in connection with disposal of the properties under attachment. In other words, according to the Division Bench of the Bombay High Court, section 11 constituted a separate code by itself on the point of distribution of the property under attachment. That the power under section 11 was separate and distinct from the power under section 3(4). That section 11 ensures that the attached property is distributed as per the directions of the Special Court. That section 3 was enacted only to prevent the property in question from the misappropriation or in any other manner made unavailable for discharge of liabilities. Therefore, as and when the property was attached under section 3(3), it was open to the aggrieved person to approach the Special Court in order to satisfy the Court that the attachment levied was far in excess of the ultimate liability. At this stage it may be noted that none of the notified parties have moved an independent application before this Court stating that the property be released from attachment on the ground that the attachment levied is far in excess of the

ultimate liability. In the case of Custodian v. CIFCO Properties Private Limited (supra), this Court held that the Special Court has jurisdiction under the Act if one of the two conditions are fulfilled viz. if it relates to any properties statutorily attached under section 3(3) and secondly, if the claim arises from a transaction in securities and the notified person is involved. It was also held that the expression 'property, moveable or immoveable or both' used in section 3(3) would also include monies, debts recoverable by the notified parties from a third person. Reliance was placed on section 9-A of the Act, which refers to the above two conditions. Section 9-A(3) also states that no Court other than the Special Court shall have jurisdiction in relation to any matter or claim referred to in section 9-A(I). Therefore, if a matter or a claim related to any attached property under section 3(3) of the Act, then only the Special Court shall have jurisdiction to dispose of such claim. Reading section 9-A with section 11(2), it is clear that all claims relating to attached properties will come within the jurisdiction of this Court. In the said judgment, this Court has already considered the judgment of the Supreme Court in Harshad Mehta's case (supra). This Court has held, in that context, that section 11 of the Act dealt with distribution. This Court further holds that the Special Court would have jurisdiction if the claim related to any attached property under the Act. Hence, this Court has held that all claims pertaining to the attached properties would fall within the exclusive jurisdiction of the Special Court. Therefore, it is not possible to accept the contentions advanced by the notified parties that section 11(2) would only apply to claims arising out of transactions in securities during the statutory period or that the jurisdiction of the Special Court would come in only if the property had nexus with the illegal dealings in securities. In fact, the argument which had been advanced before this Court was expressly advanced before Variava, J-, in the above case of CIFCO Properties (supra). It was rejected. The matter was carried in appeal to the Supreme Court. The appeal has been dismissed on 23rd April, 1999.

(iv) CONCLUSIONS ON POINTS A.

Accordingly, it is hereby declared ---

(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 realise 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 all 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.

9. B. CHALLENGE TO THE VALIDITY OF THE SCHEME :---

On 11th March 1996 an interlocutory order was passed by the Hon'ble Supreme Court inter alia directing the Custodian to draft a Scheme for sale of shares from time to time. The Scheme was accordingly drafted. It was forwarded to Union of India for approval. Pursuant to the directions given by the Apex Court, the Scheme has been placed before this Court. The Scheme has been placed before this Court

under the order of the Supreme Court dated 13th May 1998 in Civil Appeal No. 5326 of 1995. The original Scheme has been modified. It is a revised Scheme. It is placed before this Court for consideration and appropriate orders.

Broadly, it may be mentioned that the Scheme has been framed under section 11(1) of the Act. The Custodian has been appointed under the Scheme as the Chairman of the Disposal Committee. Under section 11(1) of the Act, the Custodian has been appointed to sell the attached assets like a Receiver or a Liquidator. Therefore, the Custodian has been appointed as the Chairman of the Disposal Committee. The main task with the Committee is to assist the Custodian in selling the attached properties. Presently, we are concerned with the sale of shares. As of date, the Custodian is in possession of 3,95,68,362 registered shares. They stand in the names of various notified parties, out of which 2,88,37,515 shares stand in the name of Harshad Mehta Group. The total value of the registered shares in possession of the Custodian is more than Rs. 658 crores. The said registered shares continued to be in the names of notified parties. The above number is exclusive of 'non-tradable shares'. Apart from the registered shares, the Custodian has till date traced out unregistered shares and benami shares. The figures referred to above show that a huge task is required to be undertaken. The office of the Custodian does not have sufficient infrastructure. Therefore, a Committee has been constituted to assist the Custodian in selling the shares. The implementation of the Scheme can only be made in phases. The Committee, which is constituted under the proposed Scheme consist of the Custodian as the Chairman, the Director General (Investigation), Department of Revenue, Ministry of Finance, Managing Director, UTI Securities, Managing Director, ICICI Brokerage Services Limited and the OSD in the branch office of the Custodian at Bombay, who will act as Secretary of the Committee. The Scheme also proposes distribution of work. For example, in the case of unregistered shares, the work of registration would have to be carried out in batches. Similarly, with the introduction of demat, large number of shares of the companies, in respect of which demat facility is available, are also required to be demated. Therefore, an enormous task is required to be carried out. Therefore, the Committee appointed consist of experts, who are fully conversant with the modality of sale. Under the Scheme vide para 4, it is proposed to engage

institutional brokers viz. UTI Securities, ICICI Brokerage Services Limited to undertake sale of registered and benami shares in physical possession of the Custodian. Under the Scheme, it is proposed to initiate conversion of shares in dematerialised form, for which the task shall be given by the Disposal Committee to the broking houses, which would undertake the job themselves or through their subsidiaries under the supervision of the Secretary of the Committee or any other person authorised by the Custodian. As a guideline/norm, it is laid down that the Committee may not split the attached shares of one company between two broking houses but, the Committee will assign the task of selling shares company-wise. Under the Scheme, the proceeds of the sale after deduction of usual brokerage and other charges like custodial service charges will be made available by UTI Securities and ICICI Brokerage Services Limited to the OSD for depositing the amounts in the respective attached accounts of the notified parties. The amounts so received, will be invested in short term deposits of 46/91 days with Nationalised Banks to avoid loss of interest. A monthly report regarding sale of shares indicating the name of the companies, the total number of shares sold, gross as also net proceeds thereof will be prepared by both the abovementioned broking houses. The said report will be forwarded to the Custodian. Under the Scheme, on realisation, a separate notified person-wise statement of the net proceeds will also be prepared by the two broking houses and cross-checked by the Secretary to the Disposal Committee. The same will be forwarded monthly to the Custodian. In the case of registered and benami shares, they shall be processed and cleared for sale by the Disposal Committee. After the said shares are processed and cleared for sale, both the broking houses shall undertake sale of shares in a phased manner. The time for sale of shares shall be decided by the broking houses. However, it shall not be later than three months from the date of clearance by the Committee. So that the best value for the shares as per the prevailing market condition can be procured. The Scheme, however, gives the first priority to the offers received from Public Sector Banks, UTI, Public Finance Institutions and Mutual Funds promoted by banks and Public Financial Institutions. This priority shall be given without affecting the maximisation of the sale proceeds. In cases where the broking houses feel that it was not possible to sell the shares within three months, they shall obtain fresh clearance from the Committee. The

Scheme provides that the broking houses shall see to it that the best value for the shares is obtained; that their decision to sell large quantities of attached shares will not create adverse impact in the capital market in general and also the price of the shares of the company in particular. Under the Scheme, the Committee will scrutinise and process the scrips so as to establish the salability on the basis of a certificate of the custodian's representative to the effect that no certification process was pending either before this Court or before the Stock Exchange. The Committee will also call for clearance from the respective companies certifying that the shares proposed to be sold would actually result in good delivery. Under the Scheme, this task of obtaining clearance from respective companies has been given to U.T.I. Securities/I.C.I.C.I Brokerage Services Limited. It is only after the establishment of the salability of the shares that the Custodian's representative will sign and affix the custodian's stamp on the transfer deeds of the scrips and the transfer deeds so signed by the Custodian's representative, shall constitute good delivery. In respect of demat shares, the custodian shall instruct the depository participants to effect the sale by debiting the account of the concerned notified persons. Under the scheme, it will be the duty of the committee to undertake the packaging and sorting of lots of shares to be sold. This work will be done by the Committee with the assistance of institutional brokers. The period and timing of sale and the quantity to be off loaded will be decided by the Committee so as to ensure the best possible value from the disposal of the attached shares without depressing the market. The Scheme provides for implementation in a phased manner. It lays down that initially, the process will start with sale of registered and benami shares in the physical possession of the custodian and, thereafter, the Scheme shall be extended to cover the unregistered shares and other categories of shares, which are not yet in the hands of the Custodian. Later on, the Scheme will also apply to attached bonds and other securities.

OBJECTIONS TO THE SCHEME :

On behalf of Dhanraj Mills, it was urged that the case of Harshad Mehta Group should not be equated with the case of Dhanraj Mills. That the scheme should not be applied to Dhanraj Mills. That not a single attached shares of T.B. Ruia has fallen under the Scheme. Mr. Parekh contended that Dhanraj Mills have controlling

interest in Killick Nixon Limited, in which they have 10,80,970 shares. He contended that every share stood in the name of Dhanraj Mills. He contended that he has no objection to the sale of shares by the custodian of Dhanraj Mills in other companies listed at serial Nos. 2 of 21 of Exhibit-'2' to the affidavit of Narendra Dangarwalla dated 20th August, 1999. Mr. Parekh contended that the shares of Killick Nixon are thinly traded. They cannot be sold through the Disposal Committee. They can only be sold by inviting private offers as they are thinly traded. He contended that by a separate application the Custodian is free to move this Court for sale of shares of Killick Nixon. At this stage, it would be open to Dhanraj Mills to contest before this Court whereas if the said shares are sold through the Disposal Committee, the right of public hearing before the Court is lost. He, therefore, contended that if at all the scheme was required to be framed Dhanraj Mills should be kept out. He contended that in the case of Dhanraj Mills, there is no complication as in the case of shares of Harshad Mehta. There are no benami transactions. There are no unregistered shares. The title of Dhanraj Mills to the shares of Killick Nixon is not in dispute. He contended that even if the shares were required to be sold through public auction, they may not get a good price because the shares are thinly traded. He contended that the shares of Killick Nixon can only be sold in one lot. They constitute the controlling interest. If they are sold as controlling interest, it would certainly fetch a good price. Therefore, the shares should be sold by private treaty. He further contended that if the Custodian could make an application to this Court for sale of shares of Killick Nixon the matter could be heard and disposed off within a short time. He contended that essentially the Scheme should be made applicable in cases where a large number of shares are involved and simple cases should be kept out from the purview of the Scheme. He contended that Dhanraj Mills has no objection to collection and processing. That he has no objection to discovery. That the only objection was to the sale of shares. He contended that under the Scheme, the Special Court is completely kept out. He contended that under the Act, the Custodian has the power to sell under the directions of this Court. He contended that under the Scheme the entire power is delegated to the Disposal Committee. He contended that the attached assets are valuable assets. That they carry value for the notified parties. He contended that the controlling shares, in any event, cannot be

disposed off under the scheme by the Disposal Committee as if they were routine shares. Mr. Parekh further contended on behalf of Dhanraj Mills that he has serious objection to the constitution of the Committee. He contended that U.T.I. and I.C.I.C.I. were market players. Therefore, they cannot be put on the Committee. Mr. Parekh contended that as far as possible the bureaucracy should be kept out. He contended that institution of brokers like Merry Lynch should be given the task for sale of shares. In any event, he urged that the sale of controlling block of shares should come before the Court and the Court should not permit the sale of controlling block of shares exclusively by the Disposal Committee. He contended that the shares of companies like A.C.C. and Reliance cannot be permitted to be sold by one Committee. He contended that the Custodian should not be on the Committee because, the Government has stakes in the matter and as far as possible, market players, Government officers and banks and financial institutions, whose matters are pending before the Special Court should not be placed on the Committee. That they should be kept out of the Scheme. It was contended that for each lot, the Court should separately constitute a Committee. He objected to the priority being given to offers received from Public Sector Banks, U.T.I. and Mutual Funds promoted by public and Financial Institutions. He urged that there was no reason to give such priority. He contended that this method will fail to achieve the best possible price, particularly in the case of controlling block of shares. It was urged that the scheme virtually provide for a free sale. It was urged that the market may fall if the scheme as framed is implemented. Mr. Parekh vehemently contended that sale of controlling block will result in destabilisation of companies and the management may go into the hands of the benamis of notified parties. He contended that his main objection was to the sale of shares of Dhanraj Mills, which represent controlling interest in Killick Nixon. He contended that the Disposal Committee may make a report to this Court regarding the number of shares which should be sold at a given point of time. Mr. Parekh urged that U.T.I. Securities and I.C.I.C.I. Brokerage Services Limited should not be on the Committee as it may result in conflict of duty and interest. He also relied upon Take Over Regulations framed by S.E.B.I. He contended that the priority, which is contemplated by the Scheme in favour of financial institutions and U.T.I. has been introduced in the Scheme to overcome the embargo placed by the S.E.B.I. Take

Over Regulations. He contended that sale of controlling block cannot take place in view of the Take Over Regulations framed by S.E.B.I. Mr. Parekh contended that the Scheme is vague. The Scheme is not touched upon the important provisions of law. He contended that under the Scheme, the modality of sale is vague. Whether the Committee will invite bids from all parties or only from financial institutions, U.T.I., etc. whether tender will be floated, etc. is not spelt out by the Scheme. Mr. Parekh further contended that if at all the controlling block is to be sold, such a sale can only be pursuant to an application made to this Court and by inviting public offers and also after giving sufficient time to Dhanraj Mills to bring private offers so that the best possible price is procured. It was contended that under section 3(4) of the Special Court Act, the Court is required to give direction for disposal of the attached assets and while doing so, this Court is required to adjudicate upon several issues viz. whether the shares belonged to the notified parties, whether the attachment is required to be raised, etc. He contended that the aggrieved party has right to carry the matter in appeal to the Supreme Court. He contended that in any event on reading section 3 and section 10 of the Special Court Act, it was clear that only the Special Court is empowered to give direction for disposal of the attached assets and this authority cannot be delegated to the Committee. He contended that if one goes through the order of Special Court dated 20th February, 1995 as also the order of the Supreme Court dated 11th March, 1996 being the interim order, as also the final judgment of the Supreme Court in Harshad Mehta's case reported in : [1998]231ITR871(SC) , it is clear that the Scheme for sale of shares was meant only for Harshad Mehta Group and for Fairgrowth Financial Services Limited and not for Dhanraj Mills. He further contended that Dhanraj Mills also owned shares in private limited companies, which cannot be sold through the market as they are not listed. Under the above circumstances, Mr. Parekh has objected to the applicability of the Scheme to Dhanraj Mills. In the alternative, he has contended that, in the event of this Court rejecting his arguments referred to above and in the event of this Court applying the Scheme so as to cover the share holding of Dhanraj Mills in Killick Nixon, along with the controlling block of shares comprising of 10,80,970 shares, the Disposal Committee/the Court should also club 2,90,000 shares in Killick Nixon belonging to Tirth Hotels Private Limited and 2,90,000 shares in Killick Nixon

belonging to Cambridge Bright Wire & Computer Peripherals Private Limited to be sold as a single block so that a higher price per share can be obtained and the proportionate sale consideration will go to Dhanraj Mills and the proportionate sale consideration relating to the shares of above two companies will go to the said two companies.

On behalf of the Harshad Mehta Group, it was urged that the notified parties should be given a say in the sale of shares. Mr. Jethmalani contended that the Brokerage Firms were bound to advice for sale of shares for earning brokerage. Therefore, he contended that portfolio managers should be appointed under the Scheme for sale of shares. This is without prejudice to his argument that the date of distribution has not arrived. He contended that if the shares are sold, tax implication would arise. He contended that controlling block of shares should be dealt with separately. They should not be sold like routine shares. He contended that shares should be sold only after the entire block became saleable. That any piecemeal sale of management block would not fetch the premium. That notified parties will be given a last opportunity to improve upon the existing offers. He urged that the notified parties are aggrieved by massive erosion in their asset base during the last eight years and therefore, the work should be entrusted to portfolio managers of repute, which would result into argumentation of the asset based. He has suggested the names of portfolio managers like Infrastructure Leasing & Financial Services Limited, I.C.I.C.I. Prudential, Birla Mutual Fund, Tata Mutual Fund, Tata Finance, etc.

Mr. Chagla, the learned Senior Counsel, appearing for one of the interveners viz. Apollo Tyres contended that he has preferred the Chamber Summons seeking permission to intervene pursuant to the order of the Special Court dated 19th November, 1999 in Misc. Petition No. 123 of 1995. Mr. Chagla submitted that he had no objection to framing of the scheme. He contended that the attached shares were illegally acquired. That they have come into the hands of the custodian by law. However, he urged that the Court should formulate certain norms with regard to the work of sorting of blocks of shares to be sold. He contended that the best price needs to be obtained. At the same time, it should not lead to fall in the market or destabilisation of companies. The Court should see to it that the bulk

shares do not go into the hands of benamis of the notified parties and, therefore, certain safeguards are required to be formulated. He contended that the issued capital of Apollo Tyres was 3,00,40,104 shares of the f.v. of Rs. 10/-each, aggregating to Rs. 30,04,01,040/-. He contended that the shares sought to be covered by the Scheme in respect of Apollo Tyres would constitute 25% to 30% of the paid up capital. He urged that the Disposal Committee should not be appointed for all shares. He contended that in cases of larger bulk of shares the Court should keep some control in the matter of disposal of shares whether they constitute the controlling interest or otherwise. He contended that the other shares of smaller number can be disposed off as routine shares. Mr. Chagla conceded that it was not for the Court to decide as to when the shares should be sold as the said function could only be performed by experts in the market. He, however, supported the arguments advanced on behalf of, Dhanraj Mills that in the constitution of the Committee, the two Institutional Brokers should not be permitted as there is likelihood of a conflict of duty and interest. He contended that he has serious objection to priority being given to financial institutions and U.T.I. Mr. Chagla, therefore, suggested that in respect of bulk shares, the Court may consider floating of tender subject to the flow price/reserve bid. He suggested for an open tender. He contended that once the highest offer is received, the management should be given an option particularly in the case of controlling block of shares to purchase the same so that, the possibility of distabilisation of the company is avoided. He contended that there should not be a secret take over. In the alternative, he contended that the Committee may sub-divide the lot so that, the Take Over Regulations framed by S.E.B.I. do not come into picture. However, he contended that even in such an eventuality, a tender should be floated so that a best possible price is fetched. He contended that the offer should be accompanied by a certain amount which the Court may decide so that bona fide offers would come before the Court. Mr. Chagla contended that sale of bulk shares should be placed before the Court and not before the Disposal Committee. He also suggested that while fixing the flow price, the six month formula high/low market price could form the basis. In other words, he contended that the average market price of the shares for the last six months could form the basis for fixation of the flow price. He further contended that if in a given case, the best possible price is

not obtained, the Court may also consider giving of buy-back option to companies as provided for under section 77 of the Companies Act.

Mr. Cooper, the learned Counsel appearing on behalf of State Bank of India, supported the Scheme broadly. He, however, has certain objections. He urged that in the composition of the Disposal Committee, there was no representative suggested to represent the banks and financial institutions. He contended that the banks and financial institutions are the biggest creditors after the Income-Tax department. He contended that if the Government nominee could be in the Committee, one fails to understand that there was no representation on behalf of the banks and financial institutions. He contended that ultimately, the banks were also interested in getting the best possible price. He, therefore, suggested that S.B.I. should be on the Committee. He further urged that this Scheme, as framed, lacks transparency. He urged that till today, S.B.I. is not aware of the holdings of the Custodian. He contended that till today, there is total secrecy regarding the shares and assets in possession of the Custodian. He contended that no reason has been given for the said secrecy. He contended that the Custodian acted as a trustee. That he is accountable and in the circumstances, Mr. Cooper suggested that the banks representative should be on the Committee. He also objected to I.C.I.C.I. Brokerage Services Limited and U.T.I. Securities Limited to be placed on the Committee. He suggested that there should be an outside person on the Committee. Mr. Cooper contended that public auction of the shares was not feasible. However, the Disposal Committee can certainly call for private offers from Mutual Funds and other market players like Merry Lynch. He also suggested that the Court may prepare a panel of brokers, who could be invited to bid for larger blocks. He contended that M.F. and F.I.I. (domestic and foreign) can be invited to bid for larger blocks and for smaller blocks the same can be sold through the Committee.

In reply to the above objections, Mr. Joshi on behalf of the Custodian submitted that under section 11(1), the power of sale is given to the Custodian. Therefore, he has been proposed in the Scheme to be appointed as the Chairman. Mr. Joshi contended that the Director General of investigation is put on the Committee as he had investigated the scam. Mr. Joshi contended that there was no merit in the

objection of the notified parties/interveners to the appointment of two institutional brokers on the Committee as they are Brokerage Firms. Mr. Joshi pointed out that U.T.I. Securities Limited is separate and distinct from U.T.I. He contended that the U.T.I. Securities Limited is not scam tainted. He contended that I.C.I.C.I. Brokerage Services Limited is also distinct from I.C.I.C.I. Bank. He contended that I.C.I.C.I. Brokerage Service Limited is also not scam tainted. Mr. Joshi urged that we are dealing with lakhs of shares and, therefore, individual brokers have no role to play. That we require, for the operation of the scheme, institutional brokers, who must have connection with financial institutions. He further contended that under the Scheme, priority has been given to offers from public financial institutions and Mutual Funds promoted by banks and financial institutions because, the financial institutions were in a position to absorb the shares in large numbers without adversely affecting the market. He contended that institutional brokers could tell us as to which shares were to be sold. That they are in the best position to judge the timing for sale of shares. He contended that the Committee proposed to be appointed consist of experts. He contended that there could be no objection to the O.S.D., working as Secretary, as he has also a limb of the Special Court under the Act. He contended that if the Committee constituted consists of experts, then the modality for sale of shares should be left to such committee. He contended that the discretion should be left with the committee to sell the shares either in the market or to financial institutions. He contended that initially the shares were required to be got into saleable condition. Thereafter, the shares were required to be divided between brokerage houses. Lastly, it would be for the brokerage houses to sell the shares in the market or to invite offers from financial institutions, etc. He contended that under the Scheme offers from Banks, Mutual Funds, etc. were required to be given priority. He urged that no guidelines should be given regarding the sale particularly, in view of the fact that the number of shares to be sold, the date and the time when the said shares were to be sold required confidentiality , otherwise it may result in adverse market conditions. He contended that in such matters there cannot be transparency because if such information is leaked into the market, then it may result in depression in the market. He further urged that inviting bids from the public would also not be in the interest of obtaining best possible price. He contended that the best method was

to leave the entire modality Of sale to the institutional brokers. He urged that between the financial institutions, priority can be given to the highest bidder. In the alternative, he contended that for bulk shares, offers could be invited from financial institutions whereas routine sales can be left with the Disposal Committee. In that connection, he contended that he has no objection to the sale of bulk shares. He contended that a suitable norm be laid down by the Court to decide how many shares would constitute the bulk shares. However, he contended that lot preparation should be left with the Committee. Mr. Joshi urged that suitable norms can also be laid down by the Court to decide as to how many shares would constitute the controlling block. However, he added a caveat by submitting that in case of sale of registered shares, the Quantity of shares which would constitute bulk shares should be decided upon a fixed percentage of the paid up capital of the company.

10. FINDINGS ON THE SCHEME.

At the outset, it may be mentioned that the main objection of the notified parties is that under the scheme the Court is divested of the entire control about the attached shares of the notified parties. It was contended that as regards the attached shares with the Custodian broadly there are two types of shares. Firstly, shares which are thinly traded like shares of Killick Nixon and on the other hand there are high value shares. It was urged that the Court should evolve a scheme under which the Court retains control over the Disposal Committee and also in the matter of sale of shares whereas, under the impugned Scheme, there is no mechanism by which the Court retains its control over the sale of shares. The parties before me have no objection to the procedure for registration dematting, etc. They have no objection to the discovery. However, Apollo Tyres have objected to the unregistered shares being registered in the name of the Custodian/notified parties. The matter is pending in the Supreme Court. I do not find any merit in the contentions advanced on behalf of the notified parties that the Scheme should be made applicable only to Harshad Mehta Group and not to Dhanraj Mills. This Court cannot formulate Scheme Groupwise for sale of shares. However, the Court does find merit in the contentions advanced on behalf of notified parties that the Court should not be divested of its entire control over the

sale of shares and that suitable norms should be laid down to regulate the lot preparation and sale of shares. Objections were also advanced regarding the Constitution of Disposal Committee. I do not find any merit in those objections. U.T.I. Securities Limited is separate and distinct from U.T.I. So also, I.C.I.C.I. Brokerage Service Limited is different and distinct from I.C.I.C.I. They were not involved in the scam. Moreover, it is not possible for this Court to screen, process and sell all the shares. This Court cannot decide the time when the shares are to be sold. This Court cannot decide at what point of time the number of shares are required to be sold. In share market operation timing and confidentiality are very crucial. Apart from obtaining the best possible price, there should not be a sudden fall in the market. At the same time, there is also a danger of destabilisation of companies, which is required to be kept in mind. It is for this reason that the Disposal Committee is best equipped to decide as to how many shares should be sold at a given point of time. I do not find any merit in the objections to the constitution of the Disposal Committee. The suggestion of appointing bankers on the Committee is not accepted. In this Court, there are several Banks whose suits/claims are pending before the Court. In certain matters, the tracing process is involved. Identification of the assets is very crucial in such matter. Therefore, I do not wish to enlarge the size of the Disposal Committee. Hence, I do not find any merit in the above objections except on the question of this Court maintaining control in respect of sale of bulk shares. For this purpose, I propose to lay down certain norms regarding lot preparation and sale of bulk shares. Broadly, we can classify the shares into three parts, routine shares, bulk shares and controlling block. Routine shares can be disposed of through the Disposal Committee whereas sale of bulk shares and controlling block of shares would come before this Court. Subject to above, the scheme stands approved in toto. Accordingly, I am ordering initially the sale of all registered shares in possession of the Custodian. It is declared that the scheme shall apply to all the parties including Dhanraj Mills. However, the scheme shall not be implemented in respect of the registered shares of Apollo Tyres as the matter is pending in the Supreme Court. Before concluding it may be mentioned that according to Dhanraj Mills, it was argued in the alternative that if the scheme is made applicable to Dhanraj Mills, then apart from the block of shares of 10,80,970 belonging to Dhanraj Mills, 2.90

lakh shares in Killick Nixon belonging to Tirth Hotels Private Limited and equal number of shares belonging to Cambridge Bright Wire 8s Computer Peripherals Private Limited may also be offered for sale. I do not find any merit in the said contention. Shares belonging to Tirth Hotels Private Limited and Cambridge Bright Wire & Computer Peripherals Private Limited are covered by decrees which are subject matter of Misc. Application Nos. 170 of 2000 and 164 of 2000 respectively. The said two lots are subject matter of securities for payment of monies due from the above two companies to Dhanraj Mills. Hence, they cannot be clubbed together with the block of shares of 10,80,970. Hence, there is no merit in any of the objection advanced to the scheme except to the extent that the control being retained by the Court in respect of the bulk shares and controlling block shares of a given company.

NORMS IN RESPECT OF BULK SHARES (LOT PREPARATION AND SALE):

The Custodian has in his possession as of today 3,95,68,362 of registered shares; 1,89,40,664 unregistered shares and 80,74,647 benami shares. Hence, the total number of shares in possession of the Custodian as on date is 6,65,83,673. Out of 3,95,68,362 registered shares, 2,88,37,515 shares belong to Harshad Mehta Group. The said Group also owns 1,10,60,749 unregistered shares. Out of the entire group of benami shares, 80,74,647 shares belong to Harshad Mehta Group. Therefore, out of 6,65,83,673 shares in possession of the Custodian, 4,79,72,911 shares belong to Harshad Mehta Group. It is not in dispute that Dhanraj Mills has a controlling interest in Killick Nixon. The registered shares standing in the name of Dhanraj Mills of Killick Nixon are 10,80,970.

NORMS FOR PREPARATION OF LOTS OF BULK SHARES :

The Custodian is in possession of 3,95,68,362 registered shares of all notified parties as of date. If the Custodian finds that he is in possession of registered shares of a given company whose market value exceeds Rs. 5 crores as on the date of this judgment i.e. 17th August 2000, then they would constitute bulk shares. If in a given case, at the relevant time, the Custodian is of the view that the number of registered shares in his possession does not exceed the above limit of Rs. 5 crores but in future, after taking into account the unregistered shares and the

benami shares, the said limit is likely to be crossed, then he shall submit his report to the Court for further steps to be taken in that regard. If, however, in the very first instance, the number of registered shares of all notified parties in possession of the Custodian reaches the above limit of Rs. 5 crores then, for the purposes of lot preparation, the said shares will constitute bulk shares.

NORMS FOR SALE OF BULK SHARES :

After debating the registered shares, the Custodian will offer the Bulk Shares to institutional buyers like LIC, GIG, UTI, etc. The offers will be invited in sealed cover. The offers shall be placed before the Court. The Custodian can also invite offers from foreign institutional investors. The Court, however, shall reserve its rights to accept or reject the highest offer or bid that may be received by it for purchase of shares without assigning any reason whatsoever. This process will initially apply, as stated above, to all registered shares in possession of the Custodian. At this stage, the Court is confining the offers only to institutional buyers. If no offers are received from institutional buyers or if best possible price is not likely to come in, then the Court shall consider other alternate options at the relevant time.

NORMS FOR LOT PREPARATION IN RESPECT OF CONTROLLING BLOCK OF SHARES :

If the Custodian finds that a particular group say Harshad Mehta Group has registered shares, which are in possession of the Custodian and which exceed 5% of the paid up capital in a given company, then such shares shall constitute the controlling block of shares in a given company.

NORMS FOR SALE OF CONTROLLING BLOCK OF SHARES :

After completion of demat procedure for registered shares, the Custodian will give public advertisement in the newspapers inviting bids for purchase of Controlling Block of shares. The offers should be for the entire block of registered shares. The offers should be accompanied by a Demand Draft/Pay Order/Bankers cheque representing 5% of the offered amount in cases of thinly traded shares of

companies like Killick Nixon whereas in cases of highly valued shares like Apollo Tyres, the offers shall be accompanied by Demand Draft/Pay Order/Bankers cheque representing 2% of the offered amount. The said Pay Order/Demand Draft/Bankers cheque should be drawn in favour of the Custodian, A/c-name of the notified parties say Dhanraj Mills. The offers can be made by individuals as well as by corporate and other entities. The offerer, whose offer is accepted by the Court, will be required to make payment within 15 days from the date of acceptance of the offer by the Court. Here also, the Court reserves its rights to accept or reject any of the highest offer or bid that may be received by the Court without assigning any reason whatsoever. Once the highest offer is ascertained, the management of the company should be given an option to buy the shares. This is to avoid destabilization of the company. The purchaser (s) shall comply with all regulations including the Take Over Regulations of SEBI. In cases where the Custodian finds that as on the relevant date, he does not possess shares of a company to the extent of 5% or above, but he anticipates that in near future, the limit is likely to reach with the other shares coming in, then the Custodian shall submit his report to the Court for keeping aside such shares of a notified party for future disposal. However, public financial institutions will not be required to make any deposit along with their offer (s).

NORMS IN RESPECT OF ROUTINE SHARES.

All shares, which do not come in the category of bulk shares/controlling block of shares would come in the category of Routine Shares. They can be disposed of by the Disposal Committee directly under the Scheme. They will not come before the Court.

C. PROCEDURE TO BE FOLLOWED BY THE CUSTODIAN FOR REGISTRATION/ DEMATIZATION OF SHARES BEFORE IMPLEMENTATION OF THE ABOVE NORMS :

(i) At present, the shares are in physical form. They shall have to be dematerialised. The work of registration and dematerialisation shall be done by the Agencies as provided for in the scheme. For this purposes, a panel of Agencies will be prepared by the Custodian. Offers will be invited from the said Agencies

including Stock Holding Corporation. The Custodian will submit his report to the Court to empanel such Agencies, whose service charges are reasonable. The Court shall approve the names of the Agencies to be put on the panel of the Custodian for the purposes of registration/demat.

(ii) Notified parties are directed to open demat account with D.P. within four weeks from the date of judgment. Custodian to release funds to meet such expenses.

(iii) After demat, the Custodian will offer the bulk shares to institutional buyers, like LIC, GIC, UTI, etc. In respect of the bulk shares, the Custodian will submit his report along with the offers received before the Court. The Custodian may also invite offers from foreign institutional buyers. The Court, however, shall reserve its rights to accept or reject any of the highest offer or bid that may be received by it for purchase of the said shares without assigning any reason whatsoever. Initially, the process will apply only to the registered shares in possession of the Custodian. As regards bulk shares, at this stage the Court is of the view, that they should be offered to institutional buyers. The alternative options will be considered only in case of institutional buyers failing to offer bids for purchase of bulk shares. At this stage, I do not wish to go into that aspect of the matter.

(iv) In respect of controlling shares, the Custodian will give public advertisement inviting bids for purchase of controlling shares. The offer should be for the entire block of shares. The offer should be accompanied by a Demand Draft/Pay Order/Bankers cheque of 5% of the offer in cases of thinly traded shares like shares of Killick Nixon and 2% of the offer in cases of highly valued shares like Apollo Tyres towards earnest money deposit on which no interest will be payable. The said Pay Order/Demand Draft/Bankers cheque should be drawn in favour of the Custodian A/c-name of the notified party for example the Custodian A/c. Dhanraj Mills. The offers can be made by individuals as well as by corporate and other entities. The offerers whose offer is accepted by the Court will be required to make payment within 15 days from the date of acceptance of the offer by the Court, It is expressly made clear that the Court reserves its rights to accept or reject any of the highest offer or bid that may be received by it for purchase of the shares without assigning any reason whatsoever. Once the highest offer is

ascertained, the management shall be given an offer to buy the controlling block of shares so that the company/management is not destabilised. The obligation to comply with all regulations including the Take Over Regulations framed by SEBI will be on the purchaser. In cases where the Custodian is of the view that as of the date of judgment of this Court, 5% of the paid up capital is not reached from the registered shares available with the Custodian, but that in future the said ceiling likely to be attained from unregistered shares/benami shares or from shares to be traced out in future, then in that event the Custodian shall submit his report to the Court for keeping aside the shares of particular notified parties in a company.

(v) The Scheme is, therefore, accordingly approved in toto subject to the above additions. The Custodian is hereby directed to start the process of registration/demat. The Scheme shall cover all the notified parties. The Scheme shall also apply to shares of Apollo Tyres. The controlling interest of Dhanraj Mills in Killick Nixon has been identified. Therefore, the Custodian is hereby, inter alia, directed to start the process of sale of registered shares of Killick Nixon held by Dhanraj Mills. As regards the shares of Apollo Tyres is concerned, the matter is pending by way of Civil Appeal Nos. 7629 of 1999 and 7630 of 1999. Hence, the Custodian will not take any steps to implement the scheme qua Apollo Tyres shares. Subject to above, I am ordering sale of all registered shares in first instance.

(vi) Subject to above, the Scheme stands approved in toto. The implementation of the Scheme should be done in phases as mentioned hereinabove. The Court reserves its rights to make additions to the above direction depending on the experience gained from sale of registered shares. This is particularly in view of the fact that implementation has to be done in a phased manner not only in the context of registered shares but also in the context of unregistered shares and benami shares. The Scheme not to apply to shares of private limited companies.

THE PURPOSE OF FIXATION OF NORMS.

The norms fixed by the Court hereinabove, is mainly to draw a distinction between routine shares to be disposed of by the Disposal Committee under the scheme on one hand and the bulk shares/controlling block of shares required to be disposed

of in accordance with the machinery formulated hereinabove. These norms are evolved only to draw the distinction between shares which could be sold in a routine manner through the Disposal Committee and shares which are required to be sold through the mechanism mentioned hereinabove, so that the Court keeps its control in the matter of implementation of the Scheme qua the bulk shares/controlling block of shares. This categorisation would also lead to equal distribution of work between Disposal Committee on the one hand and the Court on the other. This categorisation is also evolved so that there should not be destabilisation of a company.

CONCLUSION

In conclusion, I am ordering sale of all registered shares except Apollo Tyres for the time being.

12. In the light of the above discussion, Misc. Petition No. 64 of 1998 is disposed of. No order as to costs.

13. Order accordingly.