

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL D.NO. 32945 OF 2007

Dy. Commissioner of Income Tax

.... Appellant

Versus

State Bank of India & Ors.

.... Respondents

With

CIVIL APPEAL Nos. 326-329 of 2008

And

CIVIL APPEAL No. D-1537 of 2008

JUDGMENT

Dr. MUKUNDAKAM SHARMA, J.

1. The present appeals were filed against the judgment and order of the Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as 'Act') for conducting trial of offences related to transactions in securities. By the impugned judgment and order the Special Court allowed the application filed by the respondent No. 1, the State Bank of

India and directed the appellant to deposit an amount of Rs. 546.22 crores with the Custodian alongwith interest at 9% per annum. The Special Court while issuing the said direction held that the income tax liability for the statutory period of the notified party, namely, Mr. Harshad S. Mehta under Section 11 (2)(a) did not at that stage appear to be in excess of Rs. 140 crores approximately, subject to further orders that the Court might pass at a later stage. In the impugned judgment and order a further direction was issued that no useful purpose would be served by keeping the amount lying deposited with the Custodian and, therefore, a direction was also issued to the Custodian to pay to the banks, namely, the State Bank of India and the Standard Chartered Bank against their decrees the principal amount, from the amounts in deposit with the Custodian as also from the amount that was likely to be coming back from the Income Tax Department. As the said amount was inadequate to fully satisfy the claims of the Banks with respect to the principal amount it was further held that the same would be disbursed by the Custodian on pro-rata basis and after receiving an undertaking from the banks to the Court that they would bring back the amount, if so required, on such terms and conditions as may be directed by the Court.

2. As this Court in an order in an interim application recorded the directions of the committee of the Union of India regarding the State Bank of India not requesting for any interim payment, the aforesaid orders and directions were made subject to the condition of the Custodian seeking clarification from this Court and releasing such payment in favour of the concerned parties, only if, permitted by this Court.
3. The issue which is particularly sought to be raised by the appellant, Income Tax Department by filing the present appeal is whether the Special Court constituted under the aforesaid Act was right in scaling down the priority tax demand by delving into the merits of the assessment orders and by deciding the matter as an appellate authority which directions according to the appellant are in violation of the decision of this Court in the case of **Harshad S. Mehta v. Custodian & Ors.** [(1998) 5 SCC 1].
4. The subject matter of the present appeal relates to the security scam of Harshad S. Mehta and the period relevant to the said scam relates to

assessment years 1992-1993 and 1993-1994. The Assessing Officer completed the assessment proceedings for both the aforesaid years in respect of Harshad S. Mehta after gathering information from many sources and after giving an opportunity to the assessee to furnish details/explanations on the same. The Income Tax Officer passed an assessment order assessing the income for the assessment year 1992-1993 at Rs. 2014 crores and for the assessment year 1993-1994 at Rs. 1396 crores. The assessment orders were challenged before CIT (Appeals) by the assessee and were largely confirmed. Cross appeals have been filed by the Revenue as also by the assessee for the assessment year 1992-1993, which are pending with the Income Tax Appellate Tribunal, whereas for assessment year 1993-1994 appeal filed by the assessee is pending for admission. The orders of assessment largely confirmed by CIT (Appeals) resulted in raising a tax demand of Rs. 1743 crores by the Income Tax Department.

5. In terms of the provisions of Section 11 (2) (a) of the Act the Income Tax Department has first right on appropriation of the assets of Harshad S. Mehta lying in the custody of the Custodian against his tax demand for the assessment year 1992-1993 and assessment year 1993-1994 as tax

component. Therefore the Income Tax Department is required to be paid in priority over the liabilities payable to the banks, financial institutions and other creditors particularly for the aforesaid relevant two years which were considered as statutory period.

6. In terms of the aforesaid provisions and at the request of the Income Tax Department, the Custodian had earlier released a sum of Rs. 686.22 crores to the Department pursuant to various orders passed by the Special Court which were confirmed by this Court. The said interim release of funds of Rs. 686.22 crores to the Department was subject to filing of an affidavit/undertaking by Secretary (Revenue), Government of India that the amount would be brought back to the Court/Custodian alongwith interest within a period of four weeks, if so directed by the Special Court.

7. In Harshad S. Mehta v. Custodian & Ors. (Supra) it was held by the Supreme Court that such priority would be restricted to the tax component of the demand for priority period relevant to assessment year 1992-1993 and assessment year 1993-1994. This Court also held that Special Court cannot sit in appeal over the order of tax assessment but in

case of any fraud, collusion or miscarriage of justice in the assessment proceedings where tax assessed is disproportionately high in relation to funds available, the Special Court could scale down the tax liability to be paid in priority.

8. Applications were filed by the State Bank of India (hereinafter referred to as 'SBI') and also by other banks including Standard Chartered Bank (hereinafter referred to as 'SCB') before the Special Court seeking for direction to scale down the priority demand on the ground that there was gross miscarriage of justice in making an order of assessment in the case of the notified party, namely, Harshad Mehta. In the said applications reference was also made to the decrees on admission passed in favour of the banks against Harshad S. Mehta which according to the banks have become final and binding. Relying on the said decrees it was contended on behalf of the banks that passing of decrees prove that the concerned money which are assessed as income in the hands of Harshad S. Mehta as his income was, in fact, money belonging to the banks and therefore there is a miscarriage of justice as the Income Tax Department has considered the said amount/sum to be the income of Harshad Mehta. It was also submitted that miscarriage of justice also crept in, in respect of,

additions on account of oversold securities, unexplained stock and unexplained deposits in banks etc. The aforesaid applications were heard by the Special Court wherein the Income Tax Department refuted the aforesaid submissions that there has been any miscarriage of justice in making the order of assessment in the case of Harshad Mehta. However, the Special Court under the impugned order dated 29.09.2007 accepted the pleas raised by the SBI and other banks in part with a direction to scale down the priority demand in the case of Harshad S. Mehta in the following terms and on following grounds:

Amount in Crores	Added in Income under the Head	Ground on which deducted by the Special Court
1688		Decreed Amount in favour of banks.
1080	Over-sold Securities	As the assessing officer stated that the securities have been delivered by the notified party, therefore, only the difference in purchase and sale price can be taken and not the entire amount.
253	Unexplained Stocks	Consent decrees passed by the Supreme Court were not challenged by the appellant.
101	Unexplained money/ Deposits in Banks	For an amount of Rs. 18.75 crores decree of Special Court in favour of SBI, w.r.t 64.94 and 17.77 crores Bank filing affidavit stating that the amount never transferred into the account of Harshad S. Mehta.

9. Consequently, it was held that if the above amounts are excluded from total assessed income of the statutory period, the total income would be reduced to approximately Rs. 277 crores, and therefore, it was held by the Special Court that the tax liability of Harshad S. Mehta for the aforesaid two assessment years payable under Section 11 (2) (a) of the Act in no case would exceed Rs. 140 crores. In terms of the aforesaid findings and conclusions arrived at by the Special Court directions were issued directing the Income Tax Department to deposit with the Custodian an amount of Rs. 546.22 crores with interest at 9% per annum from the date of receipt of the amounts amounting Rs. 686.22 crores, with a further direction that the said amount which is to be deposited by the Income Tax Department alongwith other amount lying deposited with the Custodian would be released in favour of the banks in terms of observations made in the impugned order.

10. In the light of the aforesaid facts and issues we now proceed to deal with the various contentions raised on behalf of the parties who in support of their contention have referred to various documents on record.

11. During the course of hearing our attention was drawn to two pending applications which were for the deletion of the name of respondent No. 7, namely, State Bank of Saurashtra from array of parties as the said bank was acquired by respondent No. 1, State Bank of India under Notification No. G.S.R. 589 (E) dated 13.08.2008. In view of the aforesaid position, both the applications which were filed for deletion of the name of respondent No. 7 in the appeals are allowed. Ordered accordingly.

12. Mr. G.E. Vahanvati, the Solicitor General of India appearing for the Income Tax Department submitted that the order of the Special Court is perverse as the Special Court while scaling down the figures of Rs. 1688 crores, with respect to the decreed amount in favour of the banks, has failed to even consider the fact that whether or not the said amounts which have been decreed in favour of the bank were actually included in the income of the assessee/notified person for the Statutory period. It was further submitted that unless it was demonstrated and established by the banks that there is a nexus between the amounts which have been decreed in their favour and the amount which has been included in the income of the assessee/notified person for the statutory period, the said

amount cannot be scale down. Elaborating the argument it was submitted that as the banks have failed to prove and establish that the amounts have been wrongly assumed to be the income of the assessee as per the decrees, the Special Courts was neither justified nor legal in assuming that the said amounts were part and parcel of the assessment for the statutory period and thereby directing for the scaling down of the said amounts.

The learned Solicitor General further submitted that the impugned judgment is erroneous not only to the aforesaid extent but also on account of the fact that there has been duplication of amount while scaling down the figures of Rs. 1688 and Rs. 1080 crores. The amount of Rs. 1080 crores was scaled down by the Special court on account of oversold securities and the said amount is arrived at after deducting an amount of Rs. 601.22 crores credited to SBI from an amount of Rs. 1681.79 crores. With regard to the said amount it was submitted that the said amount is arrived at by the assessing officer after taking note of various suits filed by the banks with respect to oversold securities, but he agreed that as at that point of time the suits were pending and there was no decree the claims of the banks were declined by the assessing officer, except the amount of Rs. 601.22 crores for

which the credit was given to the SBI. Thus, according to the learned Solicitor General the figure of Rs. 1080 crores is an integral part of Rs. 1688 crores which is the alleged suit amount claimed by the banks.

On the question of refund and disbursement it was submitted that the application of Section 11(2)(a) can arise only at the stage of final distribution of assets and an order under the said section can be passed only after examining the claims by the Special Court under Section 9(a) of the Act. It was further submitted that even otherwise as per Section 11(2)(a) of the Act the claim of the Income Tax Department on account of taxes due will have priority over the claims of the bank. In order to support the said contention the learned Solicitor General has referred to paragraph 15 of the abovementioned decision of this Court in Harshad S. Mehta v. Custodian & Ors. (Supra) wherein it was held by this Court that before the amounts can be paid to the banks or financial institutions under Section 11(2)(b), the liabilities under Section 11(2)(a) are required to be discharged.

13. On the other hand, Mr. K.K. Venugopal, the learned senior counsel appearing for the respondent No. 9, SCB supported the judgment and order of the Special Court. Negating the abovesaid claims of the

appellant, it was submitted by the learned senior counsel that the decrees in the favour of the banks were with respect to siphoning of funds from the bank and not on account of the oversold securities. As per the learned senior counsel the assessing officer has placed reliance on Annexure – M2 as comprising a list containing such oversold securities and accordingly added the amount into the income of Harshad Mehta. It was further submitted that the department, merely on the fact that the assessing officer has credited an amount of Rs. 601.22 crores in favour of SBI while arriving at the figure of 1080 crores, has come to the conclusion that the decrees for the entire amount of Rs. 1688 crores are on account of over sold securities, which is ex-facie wrong and misconceived and thus the entire contention that there is an duplication is fanciful. In support to the said submission it was submitted that a bare perusal of the said Annexure M-2, which is neither a trading account nor an account which show the purchases and sales effected by the assessee, would make it abundantly clear that the entries reflected therein have nothing to do with any of the claims made by the banks in any of the suit filed by the banks.

In response to the contention of the appellant department that there is no nexus between the amounts which have been decreed in favour of the banks and the amount which has been included in the income of the assessee/notified person, it was submitted that it is not the case of the bank that there is a direct nexus between the amount of the decrees and the individual items added to the income of the notified party but what is submitted is that the decretal amount represents the liability which ought to have been deducted whilst arriving at a conclusion of the tax liability of the notified party.

14.Mr. C. A. Sundaram, learned senior counsel appearing for the respondent No. 1, SBI while concurring with the above said submissions of the learned senior counsel for respondent No. 1 submitted that the amount of Rs. 1681.78 crores, i.e. 1080 crores plus 601.22 crores credited to SBI, was against the oversold securities delivery of which was made by Harshad Mehta, the fact which has been accepted by the assessing officer in the Assessment order. It was submitted that as the assessing officer has included the gross amount without deducting the payable from the receivable, thus, the entire addition per se is wrong and invalid and therefore the same is liable to be deducted from the assessment. On the

question of duplication he submitted that the entire contention is frivolous and misconceived as the decrees for an amount of Rs. 1688 crores were in regard to the transactions which were not complete or concluded whereas the amount of Rs. 1080 crores was in respect of the transactions which were satisfied, concluded and complete and in which case the deliveries were made. It was also submitted that the issue of duplication is an after thought as the Income Tax Department never raised the same before the Special Court and it is raised for the first time before this Court.

15. On the issue of jurisdiction of the Special Court with regard to scaling down both the learned senior counsel submitted that though the Special Court cannot sit in appeal over the assessment of tax authorities and that there can be no question of reopening of any tax assessment before the Special Court as the same has to be determined under the mechanism provided under the relevant tax law, but that it is within the authority and jurisdiction of the Special Court to decide as to how much of the liability would and could be discharged out of the funds in the hands of the Custodian and that in coming to the said decision it will also be within the authority and jurisdiction of the Special Court to direct for

making payment either in full or in part. It was further submitted that for this purpose the Special Court can examine whether there is any fraud, collusion or miscarriage of justice in assessment proceedings and that since in the present case the revenue has raised a fanciful claim of an alleged income of the assessee, to the tune of Rs. 3400 crores, on the basis of “Best Judgment” assessment without disclosing material thereof there has been miscarriage of justice. The learned counsel in support of their contention placed reliance on the observations made by this Court in paragraph 35 of the abovementioned decision of this Court in Harshad S. Mehta v. Custodian & Ors. (Supra) wherein it was held that where the assessment is based on proper material and pertains to the “statutory period”, the Special Court may not reduce the tax claimed and pay it out in full. It was also held that if the assessment is a “best judgment” assessment, the Special Court may examine whether, for example, the income which is so assessed to tax bears comparison to the amounts attached by the Custodian, or whether the taxes so assessed are grossly disproportionate to the properties of the assessee in the hands of the Custodian, applying the Wednesbury Principle of Proportionality. In such cases it was held that, the Special Court may, scale down the tax liability to be paid out of the funds in the hands of the Custodian.

Reference was also made to paragraph 36 wherein it is held that although the liability of the assessee for the balance tax would subsist, and the taxing authorities would be entitled to realise the remaining liability from the assessee, the same will not be paid in priority over the claims of everybody else under Section 11(2)(a).

16. In order to arrive at a finding it would be essential for us to extract the relevant provisions of the Act and the judicial interpretation of the said provisions.

17. The Special Court (TORTS) Act, 1992 was enacted to provide for the establishment of a Special Court for the trial of offences relating to transactions in securities and for matters connected therewith or incidental thereto. Section 3 of the Act requires the appointment of a Custodian thereunder who is, inter alia, required to deal with the properties of the persons notified in such manner as the Special Court may direct. The said section reads as under:

“3. Appointment and functions of Custodian – (1) The Central Government may appoint one or more Custodian as it may deem fit for the purposes of this Act.

(2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April,

1991 and on and before 6th June, 1992, notify the name of such person in the Official Gazette.

(3) Notwithstanding anything contained in the Code and any other law for the time being in force, on and from the date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification.

(4) The property attached under sub-section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.

(5) The Custodian may take assistance of any person while exercising his powers or for discharging his duties under this section and Sec. 4.”

The Special Court has jurisdiction, under Section 7 of the Act, exclusively to hear and decide prosecutions in respect of offences under the said Act, that is to say, offences relating to transactions in securities after 1-4-1991 and on or before 6-6-1992. By reason of the amendment of the said Act and the inclusion of Sections 9-A and 9-B, the Special Court is invested with civil jurisdiction in regard to such transactions. Section 11 of the Act provides the manner in which the liabilities are required to be discharged. The said section reads as under:

“Section 11. Discharge of liabilities. — (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Court may

make such order as it may deem fit directing the Custodian for the disposal of the property under attachment.

(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under:

(a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of Section 3 to the Central Government or any State Government or any local authority;

(b) all amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund; and

(c) any other liability as may be specified by the Special Court from time to time.”

18. In the case of CIT v. A.K. Menon, [(1995) 5 SCC 200] this Court discussed the jurisdiction of the Special Court with respect to tax liability of the notified persons. In paragraph 4 of the judgment it was held as under:

“It is clear that the Special Court has no power to sit in appeal over or overrule the orders of the tax authorities, the Income Tax Appellate Tribunal or the courts in regard to the tax liabilities of notified persons. The only power of the Special Court is to determine the priorities in which claims upon the property under attachment shall be paid. The claims relating to the tax liabilities of a notified person are, along with revenues, cesses and rates entitled to be paid first in the order of priority and in full, as far as may be. In relation to a claim for payment of the tax liability of a notified person, the Special Court has, therefore, only the limited power to determine what, having regard to the funds available, can be paid; that is to say, whether the claim can be satisfied in full or only in part. If a particular tax claim cannot at any time be paid in full, provision would have

to be made for the balance, so far as may be, so that it is not jeopardized.”

19. Subsequently, the aforesaid section of the Act was discussed in detail by this Court in the case of Harshad S. Mehta v. Custodian & Ors. (supra).

In paragraph 11 of the said judgment it was held as follows:

“11. This section obviously deals with disbursement of properties attached under Section 3(3). Since the property (moveable or immovable or both) which is attached is of the person notified, the liabilities which are to be paid or discharged under Section 11(2) are also liabilities of the person notified — whether these liabilities be in respect of payment of revenues, taxes, cesses or rates, or whether they be the liabilities to any bank, financial institution or mutual fund.”

In paragraph 12, however, this Court held that before the Special Court proceeds to make an order under Section 11 (1), the said court must be fully satisfied that the property which is attached and is being disposed of is the property belonging to the notified person. If any person other than the notified person has any share, or any right, title or interest in the attached property on the date of notification under Section 3 of the Act that right of a third party cannot be extinguished. After having held thus this Court proceeds to observe as follows in paragraph 13:

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

This Court thereafter proceeded to interpret the phrase “taxes due” as used in Section 11 (2) (a) and after analyzing the same held as follows in paragraph 23 and 24 :-

“23. “Tax due” usually refers to an ascertained liability. However, the meaning of the words “taxes due” will ultimately depend upon the context in which these words are used.

24. In the present case, the words “taxes due” occur in a section dealing with distribution of property. At this stage the taxes “due” have to be actually paid out. Therefore, the phrase “taxes due” cannot refer merely to a liability created by the charging section to pay the tax under the relevant law. It must refer to an ascertained liability for payment of taxes quantified in accordance with law. In other words, taxes as assessed which are presently payable by the notified person are taxes which have to be taken into account under Section 11(2)(a) while distributing the property of the notified person. Taxes which are not legally assessed or assessments which have not become final and binding on the assessee, are not covered under Section 11(2)(a) because unless it is an ascertained and quantified liability, disbursement cannot be made. In the context of Section 11(2), therefore, “the taxes due” refer to “taxes as finally assessed”.”

In paragraphs 25 the Court dealt with the question that whether the taxes relate to a specific period or to all the taxes due from the notified party. The said question was answered in the following manner:

“25.The Special Court Act is quite clear in its intent. It seeks to cover all criminal and civil proceedings relating to transactions in securities of a notified person between 1-4-1991 and 6-6-1992. The Special Court is empowered to examine all civil claims and to try all offences pertaining to such transactions during the said period. Under Section 3(2), it is the property of such offenders which is attached by the Custodian and which is disbursed under the directions of the Special Court under Section 11(2). Clearly, therefore, as the Special Court is empowered to examine all transactions in securities during the period 1-4-1991 to 6-6-1992, as also all claims relating to the property attached, the Special Court will also have to examine the tax liability of the notified person arising during the period 1-4-1991 to 6-6-1992. As the purpose of the Special Court Act, inter alia, is as far as practicable, to safeguard the funds to which the banks and financial institutions may be entitled, and to ensure that these funds are not done away with, there are provisions for attachment, ascertainment of claims and distribution of funds. However, before the liabilities of a notified person to banks and financial institutions can be discharged, Section 11(2)(a) requires the tax liability of the notified person to be paid. In this context the tax liability can properly be construed as tax liability of the notified person arising out of transactions in securities during the “statutory period” of 1-4-1991 to 6-6-1992. If, for example, any income tax is required to be paid in connection with the income accruing to a notified person in respect of transactions in security during the “statutory period”, that liability will have to be paid before the funds are made available to the banks and financial institutions. Similarly, in respect of any property which is attached, if any rates or taxes are payable for the “statutory period” those rates and taxes will have to be paid before the proceeds of the property are distributed to banks and financial institutions. In the same manner, the liabilities to banks and financial institutions in Section 11(2)(b) are also liabilities pertaining to the statutory period. ...
.....”

What will be the fate of the tax liability of the notified person for any other period was mentioned in para 26, which is as under:

“26. Every kind of tax liability of the notified person for any other period is not covered by Section 11(2)(a), although the liability may continue to be the liability of the notified person. Such tax liability may be discharged either under the directions of the Special Court under Section 11(2)(c), or the taxing authority may recover the same from any subsequently acquired property of a notified person (vide *Tejkumar Balakrishna Ruia v. A.K. Menon* [(1997) 9 SCC 123]) or in any other manner from the notified person in accordance with law. The priority, however, which is given under Section 11(2)(a) to such tax liability only covers such liability for the period 1-4-1991 to 6-6-1992.”

After having held thus, this Court proceeded to determine the jurisdiction of the Special Court with respect to discharge of tax liability out of the funds in the hands of the Custodian. In para 34 and 35 the Court qualified the observation of this Court in the case of CIT v. A.K. Menon (Supra) and held that the Special Court can, for the purpose of discharging tax liability, examine whether there is any fraud, collusion or miscarriage of justice in assessment proceedings. The said aspect was further elaborated in para 36. The said paras are as under:

“34. While we respectfully agree with the finding that the Special Court cannot sit in appeal over the assessment of taxes by the tax authorities, we would like to qualify the Court’s subsequent observations relating to payment in full of all assessed taxes under Section 11(2)(a). There is undoubtedly no question

of any reopening of tax assessments before the Special Court. There is also no provision under the Special Court Act for proof of debts as in insolvency. The provisions in the Special Court Act for examination of claims are under Section 9-A. A claim in respect of tax assessed, therefore, cannot be reopened by the Special Court. The liability of the notified person to pay the tax will have to be determined under the machinery provided by the relevant tax law. The extent of liability, therefore, cannot be examined by the Special Court.

35. But the Special Court can decide how much of that liability will be discharged out of the funds in the hands of the Custodian. This is because the tax liability of a notified person having priority under Section 11(2)(a) is only tax liability pertaining to the “statutory period”. Secondly payment in full may or may not be made by the Special Court depending upon various circumstances. The Special Court can, for this purpose, examine whether there is any fraud, collusion or miscarriage of justice in assessment proceedings. The assessee who is before the Special Court, is a person liable to be charged with an offence relating to transactions in securities. He may not, in these circumstances, explain transactions before the Income Tax authorities, in case his position is prejudicially affected in defending criminal charges. Then, on account of his property being attached, he may not be in a position to deposit the tax assessed or file appeals or further proceedings under the relevant tax law which he could have otherwise done. Where the assessment is based on proper material and pertains to the “statutory period”, the Special Court may not reduce the tax claimed and pay it out in full. But if the assessment is a “best judgment” assessment, the Special Court may examine whether, for example, the income which is so assessed to tax bears comparison to the amounts attached by the Custodian, or whether the taxes so assessed are grossly disproportionate to the properties of the assessee in the hands of the Custodian, applying the Wednesbury Principle of Proportionality. The Special Court may in these cases, scale down the tax liability to be paid out of the funds in the hands of the Custodian.

36. Although the liability of the assessee for the balance tax would subsist, and the taxing authorities would be entitled to realise the remaining liability from the assessee, the same will not be paid in priority over the claims of everybody else under Section 11(2)(a). If the Special Court so decides, it may direct payment of the balance liability under Section 11(2)(c). Otherwise the taxing authorities may recover the same from any oth-

er subsequently acquired property of the assessee or in any other manner in accordance with law. Such scaling down, however, should be done only in serious cases of miscarriage of justice, fraud or collusion, or where tax assessed is so disproportionately high in relation to the funds in the hands of the Custodian as to require scaling down in the interest of the claims of the banks and financial institutions and to further the purpose of the Act. The Special Court must have strong reasons for doing so. In fact, the Income Tax authorities have also accepted that exorbitant tax demands can be ignored, applying the Wednesbury Principles.”

20. From the above mentioned legislative provisions and judicial interpretation in the decision of Harshad S. Mehta v. Custodian & Ors. (supra), in our considered opinion, the following general principles regarding the powers of the Special Court while discharging the tax liability emerge:

- (i) Special Court has no jurisdiction to sit in appeal over the assessment of the tax liability of a notified person by the authority or tribunal or court authorised to perform that function by the statute under which the tax is levied. A claim in respect of tax assessed cannot be reopened by the Special Court and the extent of liability, therefore, cannot be examined by the Special Court.
- (ii) The claims relating to the tax liabilities of a notified person are, along with revenues, cesses and rates entitled, for the statutory

period, to be paid first in the order of priority and in full, as far as may be, depending upon various circumstances.

- (iii) The 'taxes due' refer to 'taxes as finally assessed'. The tax liability can properly be construed as tax liability of the notified person arising out of transactions in securities during the "statutory period" of 1-4-1991 to 6-6-1992.
- (iv) The priority, however, which is given under Section 11(2)(a) to such tax liability only covers such liability for the period 1-4-1991 to 6-6-1992. Every kind of tax liability of the notified person for any other period is not covered by Section 11(2)(a), although the liability may continue to be the liability of the notified person. Such tax liability may be discharged either under the directions of the Special Court under Section 11(2)(c), or the taxing authority may recover the same from any subsequently acquired property of a notified person or in any other manner from the notified person in accordance with law.
- (v) The Special Court can decide how much of the tax liability will be discharged out of the funds in the hands of the Custodian and the Special Court can, for the purpose of disbursing the tax liability, examine whether there is any fraud, collusion or miscarriage of justice in assessment proceedings.

- (vi) Where the assessment is based on proper material and pertains to the “statutory period”, the Special Court may not reduce the tax claimed and pay it out in full, but if the assessment is a “best judgment” assessment, the Special Court may examine whether the taxes so assessed are grossly disproportionate to the properties of the assessee in the hands of the Custodian, applying the Wednesbury Principle of Proportionality and other issues of the said nature. The Special Court may in these cases, scale down the tax liability to be paid out of the funds in the hands of the Custodian. Such scaling down, however, should be done only in serious cases of miscarriage of justice, fraud or collusion, or where tax assessed is so disproportionately high in relation to the funds in the hands of the Custodian as to require scaling down in the interest of the claims of the banks and financial institutions and to further the purpose of the Act. The Special Court must have strong reasons for doing so.

21. In the light of the abovementioned general principles which are culled out from the legislative provision and the decisions referred to above regarding the powers of the Special Court while discharging the tax liability we proceed to analyse the merit of the contentions.

22. So far as the claims are concerned, there could be no dispute with regard to the priority claim of the Income Tax Department in releasing the tax

due. At the same time there could also be no dispute with regard to the fact that if any party other than the notified person has any right, title or interest in the attached property on the date of the notification under Section 3 of the Act the said right of the third party did not and could not have been held to be extinguished.

23. The banks on the basis of the decrees in their favour have contented that their right, title and interest respectively in the attached property on the date of the notification has been extinguished, as the said amount has been included in the income of the notified party for the statutory period and the payment of the same is claimed in priority over the claims of the banks.

24. There could be no disagreement with regard to the fact that if any amount is found due and payable by the banks towards amount advanced by it as loan to Mr. Harshad Mehta, in that event the right of the bank to the extent of the said amount, must be held to be the existing right of the bank on the property which is attached. It also cannot be ignored that the said amount could not have been assessed in the hands of Harshad S. Mehta as his income, for the banks continued to have an existing right on

the aforesaid amount which is required to be released in terms of the decrees which are obtained by the banks and the non-release of the said amount would amount to miscarriage of justice.

However, the fact that decrees have been obtained by the banks in respect of the certain dues of Harshad S. Mehta could not be disputed by the Income Tax Department. It also could not be disputed by the Income Tax Department that the amounts for which decrees have been obtained by the banks have become final and binding. But then, it was submitted that the taxes due have been ascertained and arrived at in terms of the provisions of the Act and that the banks have failed to establish by producing the relevant documents on record that the said amount, which is decreed in favour of the bank, has been wrongly included in the income of the notified party for the statutory period. As the priority in payment of tax liability under Section 11 (2)(a) is only for the statutory period and not for any other period, we find that the appellant is justified while contending that if the banks have a right, title or interest in the attached property on the date of the notification under Section 3 of the Act for which decrees have been obtained and if the banks are claiming that the said amount has wrongly been included in the income of the notified party for the statutory period, then the banks are required to

show the nexus between the said decreed amount and the amount which is included in the income of the notified party for the statutory period.

25. The second disputed question of fact which is also sought to be raised by the Income Tax Department is with regard to the duplication of amount while order for scaling down the amount of Rs. 1688 crores and Rs. 1080 crores. It was contended by the Department that both the aforesaid amounts are with respect to the oversold securities and are one and the same. As mentioned earlier the amount of Rs. 1080 crores was arrived at after taking out the amount of Rs. 601.22 crores from the amount of Rs. 1681.79 crores. The said amount of Rs. 601.22 crores appears to have been recognised as a claim under a pending suit filed by SBI. Consequently, the said amount was credited in favour of the SBI by the Assessing Officer while making the order of assessment.

On the other hand it was submitted by the learned counsel for the respondents that the said contention is untenable in law as the reliance on Annexure M-2 is itself erroneous.

26. The said second issue with respect to duplication is correlated to the first issue and a finding on the said issue can be given, only once the finding with respect to the first issue is arrived at. There is no finding either on the issue of nexus or on the issue of duplication by the Special Court in the impugned judgment. Probably the reason for the same as also mentioned by Mr. Sundaram is that the said issues were not raised before the Special Court and even if they were raised before the Special Court the same were not addressed or considered in the manner in which they should have been so done.

27. For the adjudication of the disputes which are raised in the present appeal a finding on the said issues and questions would be mandatory and the same cannot be dispensed with under any circumstances. It was submitted by the learned senior counsel appearing for the respondents that at this point the matter should not be remanded back to the Special Court for a finding on the said issues and questions and the said finding should also be given by this Court. We considered the said submission. But we find that it would not be possible for us to give any finding on such disputed questions of fact without the same having been looked into by the Special Court after giving opportunity to the parties to file all

relevant documents and papers in support of their contention relating to the aforesaid two issues. Even otherwise, neither the decrees in favour of the banks nor the documents with respect to the suits filed by the banks which indicate the claims of the banks in the suits have been placed before us. Therefore we are not in a position to give any conclusive finding at this stage.

28. In the absence of the relevant documents neither would it be possible nor would it be appropriate for us to give a finding on the said issues and questions. Therefore as a Hobson's choice we are of the opinion that all such disputed questions are required to be decided by the Special Court after giving an opportunity to the parties to place all the relevant documents so as to enable it to come to a proper and considered finding.

29. However, while remanding the matter for a finding on the said issues and questions we decide the issue that if the nexus is shown by the banks between the amounts for which decrees have been obtained, which have become final and binding and the amount which is included in the income in the hands of Harshad S. Mehta by the Department, the same will have to be disbursed to the banks by the Special Court. We also

hold that on account of oversold securities if the delivery has been given by Harshad S. Mehta and the transaction is complete, only the difference between the payable and receivable will be taken and not the gross amount. However the issue as to whether the decrees are on account of oversold securities and, if so, is there any duplication or whether the decrees are on account of siphoning of the funds, is required to be adjudicated by the special Court on appreciation of the relevant documents.

30.To be specific, the Special Court will give its finding on the two below mentioned issues in addition to the other issues, if any :

1. Whether there is any nexus between the decretal amount and the income included in the assessment of the notified person for the statutory period.
2. Whether the decrees are with regard to the Oversold Securities, and if so, whether there is any duplication of amount while scaling down the tax liability.

31.After giving its finding on the said issues, the Special Court will dispose of the matter in the light of the observations made herein above. We may however clarify that so far as the amounts of Rs. 253 crores and Rs. 101 crores are concerned, the appellants have not stated that the said

amount were not included in the income of the notified party for the statutory period. The consent decrees obtained in respect of Rs. 253 crores were not challenged by the appellant which led the Special Court to believe that the appellant has accepted the settlement and accordingly scaled down the said amount from the income of Harshad Mehta. Similar is the case with the amount of Rs. 101 crores. Thus the scaling down of the said amount is upheld and will not be disturbed.

32. It is needless to say that the orders of disbursement made during the pendency of the disputes between the parties cannot be said to be final and the same will have to be interim in nature and would finally get settled and take shape on the determination of the final liability after final adjudication of the disputes by the appropriate forums.

33. In the light of the aforesaid observations and directions and till a decision is taken with regard to the aforesaid issues which are remanded back to the Special Court we direct that the said amount which was directed to be deposited by the Income Tax Department with the Custodian may not be refunded. We therefore set aside the directions of the Special Court, except to the extent mentioned in para 31 and remit the entire matter and claims of the parties to be decided afresh in terms

of the observations made in this order. We also make it clear that none of the observations made in this order would be construed as any observations made by this Court on the merit of the claims. We request the Special Court to decide the aforesaid issues as expeditiously as possible preferably within a period of three months from today and while doing so give an opportunity to the parties to file such documents which are required or desired to be filed in support of the appeals.

34. Accordingly, all the appeals stand disposed in terms of the aforesaid observations and directions.

.....J.
(Tarun Chatterjee)

.....J.
(Dr. Mukundakam Sharma)

New Delhi;
December 3, 2008