" Hon'ble Court has laid down the law that no interest or penalty is leviable on a solvent notified person for period covering the notification because he has been prevented by notification from discharging his obligations.
Para 98

RULING ON QUESTIONS OF LAW FRAMED BY COURT:

Mr. T. R. Andhyarujina, Advocate General, along with Mr. M. S. Doctor as Amicus Curie.

Mr. A. M. Setalvad with Mr. G. R. Joshi i/b P. M. Mithi & Co. for the Custodian.

Mr. A. K. Bobde with Mr. S. G. Mandrekar, and Mr. B. Chatterjee for the Income Tax Department in Misc. Application Nos. 194 of 1993 and 215 of 1993.

Mr. L. S. Vyas for the Income Tax Department in Misc. Application Nos. 332 of 1994, 371 of 1994, 372 of 1994, 231 of 1994, 331 of 1994, 443 of 1991 and 444 of 1994.

Dr. Balasubramanian for the Income Tax Department in Misc. Application Nos. 194 of 1993, 107 of 1993, 188 of 1993, 76 of 1992, 77 of 1992, 78 of 1992, 103 of 1993, 23 of 1992 and 182 of 1993.

Mr. E. P. Bharucha with Mr. Z. Kamdin and Mr. Rubens i/b Gagrat & Co. for Standard Chartered Bank.

Mr. S. D. Parekh i/b Malvi Ranchhoddas & Co. for Dhanraj Mills Ltd. & Mr. T. B. Ruia in M. A. No. 431 of 1994.

Mr. S. D. Parekh i/b Dhru & Co. for Fairgrowth Financial Services Ltd. in M. A. Nos. 110 of 1992, 230 of 1994, 301 of 1994 and 342 of 1994.

Mr. S. B. Jaisinghani with Mr. K. G. Desai i/b

SPECIAL COURT (Trial of Offences relating to Transactions in Securities) Act, 1992 BOMBAY

-5 AUG 1995

Mahimtura & Co. for M/s. Harshad S. Mehta & Mr. Harshad S. Mehta in M. A. No. 107 of 1993.

Mr. Jehangir Mistry with Mr. A. D. Chaugule i/b Mahimtura l& Co. for M/s. Jyoti H. Mehta & Mrs. Jyoti H. Mehta M. A. No. 107 of 1993.

Mr. Mahesh R. Jethmalani with Mr. A. D. Chaugule i/b Mahimtura l& Co. for M/s. Ashwin S. Mehta & Mr. Ashwin S. Mehta in M. A. No. 107 of 1993.

Mr. Virag Tulzapurkar with Mr. V. Dhond and Mr. P. B. Palkhiwalla i/b Little & Co. for BOI Finance & State Bank of Saurashtra.

Mr. K. V. M. Pai, Commissioner of Income Tax, II Circle present.

CORAM: HON'BLE MR. JUSTICE
S. N. VARIAVA,
JUDGE, SPECIAL COURT.
20th February 1995.

ORAL ORDER:

1. This Court has been functioning since June 1992. Now so far as two Notified Parties are concerned, viz., the Harshad Mehta Group and Fairgrowth Financial Services Ltd., the time is approaching for distribution of their assets under Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992

(hereinafter for brevity's sake referred to as "the Special Court Act"). For this purpose, the Court has already appointed Auditors who are looking into and preparing accounts including list of assets and liabilities of these parties. In case of Fairgrowth Financial Services Ltd., under directions of Court, the Custodian has also issued a Public Notice calling upon the parties to lodge their claims, if any. The Custodian has also received claims from some parties.

2. In the meantime, the Income Tax Department has filed before this Court a large number of Applications, for payment in priority, of tax, interest and penalty. There are approximately 24 such Applications. Out of these approximately 17 Applications are against the Harshad Mehta Group. By these 17 Applications, a sum of approximately Rs. 1,380 crores has been claimed. I am also informed that the Income Tax Department is also in the process of re-opening assessment of various Notified parties. Undoubtedly this will take some time. Further by reason of the fact that many Notified Parties have not paid Advance Tax or filed Income Tax Returns, penalties and interest are also sought to be levied by the Income Tax Department under the various provisions of the Income Tax Act.

3. As is well known large amounts are due

to Banks and Financial Institutions. Many of these Banks and Financial Institutions are making claims under various documents in their favour. Some of these claims are by way of mortgages, hypothecations, pledges, assignments of debts and even by way of bankers lien, set off and/or right to adjust accounts. Many of the Banks and Financial Institutions are claiming interest including in some cases penal interest.

4. As the time for distribution has come closer, some questions of law have arisen for consideration. These must be answered in order to enable distribution. The Court had, therefore, framed the following questions:

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

5. The Court had put up a Notice that all parties interested in making submissions on these questions would be heard. The Court had also

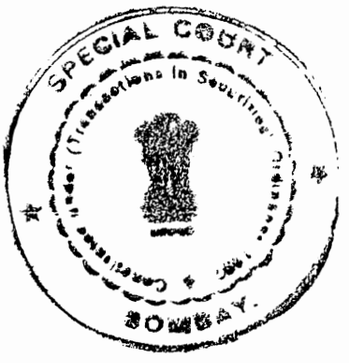
requested the Learned Advocate General Mr. T. R. Andhyarujina, to act as an amicus curie and assist the Court. Pursuant to this Notice, the Court heard all parties on 24th, 25th, 27th and 30th January 1995.

6. The Learned Advocate General and his Junior Mr. M. S. Doctor have been of great assistance to Court. The Court expresses its appreciation for the efforts put in by them and the assistance rendered by them.

7. On behalf of the Custodian, Mr. A. M. Setalvad appeared with Mr. G. R. Joshi. Mr. E. P. Bharucha made submissions on behalf of Standard Chartered Bank. Mr. Virag Tulzapurkar made submissions on behalf of B.O.I. Finance and State Bank of Saurashtra. Mr. S. D. Parekh made submissions on behalf of Fairgrowth Financial Services Ltd., Dhanraj Mills Ltd. and Mr. T. B. Ruia. On behalf of the Income Tax Department, in various Applications, various Counsel are appearing. All of them desired to make submissions. The Court permitted all of them to make submissions. Thus on behalf of the Income Tax Department, Mr. A. K. Bobde, Mr. B. Chatterjee and Mr. L. S. Vyas made submissions. Dr. Balasubramanian is also appearing for the Income Tax Department in various Applications. He started making submissions stating

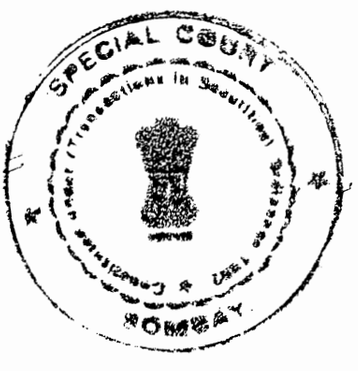
that he was making them on behalf of the Income Tax Department. However, at one stage Mr. Bobde interrupted to say that the submissions of Dr. Balasubramanian should not be taken to be on behalf of the Income Tax Department. Dr. Balasubramanian then claimed that he was merely assisting the Court on a question of law. Similarly on behalf of the various members of the Harshad Mehta Group various Counsel appear in various Applications. They also desired to be heard. The Court has heard them all. Thus Mr. S. B. Jaisinghani made submissions on behalf of Mr. Harshad Mehta and M/s. Harshad Mehta. Mr. M. R. Jethmalani made submissions on behalf of Mr. Ashwin Mehta and M/s. Ashwin Mehta. Mr. J. Mistry made submissions on behalf of Mrs. Jyoti Mehta and M/s. Jyoti Mehta.

8. At this stage itself it must be mentioned that in 1992-93 a number of Banks and Financial Institutions had claimed rights in properties standing attached. At that stage, the Custodian had contended that notwithstanding the special rights claimed by Banks and Financial Institutions, distribution could only take place under Section 11 of the Special Court Act. The Custodian had submitted that even secured creditors have now to stand in line and be paid only at the time of distribution under Section 11 of the



Special Court Act. On 22nd July 1993, this Court had, after hearing all the concerned parties, passed an Order in Misc. Application No. 96 of 1992. In that Order, it is inter-alia, held as follows:

> These are the rival submissions before this Court. In all honesty it must be stated that the said Act appears to be very loosely drafted. However this is due to the pressing circumstances and the urgency then prevailing. In my view, in spite of this, the intentions and objects sought to be achieved have been brought out. Undoubtedly there is great force in the submission that private rights cannot be abrogated or curtailed without compensation. However Mr. Setalvad has not even contended that private rights have been taken away. Mr. Setalvad has admitted that all private rights are preserved. Mr. Setalvad's submission has been that the said Act provides for distribution in a particular manner only. There can also be no dispute with the proposition that the interpretation of a statute must be one which must be just, reasonable and sensible. The question is whether the interpretation sought to be given by the Custodian is unreasonable, unjust and/or would in any way be violative of Articles 14 or 19. It is also well settled principle of interpretation that the interpretation must be one which would further the object for which the Act was enacted. One has therefore to see the circumstances under which this Act came into existence and the objects which are sought to be achieved. The Act was necessitated by reason of the unprecedented situation wherein very large amounts of public monies had been siphoned off into private pockets. Most of these monies came from Financial Institutions and/or Banks. Sad as it may seem, the reality was also that legal proceedings took unduly long. Thus the guilty would under normal circumstances have operated with impunity for years,



before the law caught up with them, if at all. Further even the recovery proceedings would have been bogged down in legal delays. The possibility also existed of all the assets being secreted and/or transferred. This in order to completely defeat claims and thus make recovery impossible. Apart from that with the apparent involvement of so many Financial Institutions and Banks, most of them Nationalised Bodies, the possibility also existed of these bodies being embroiled in unnecessary and protracted litigations against each other. This because monies taken out of one Bank or Financial Institution would have been placed first into an account of the Notified Party with another Bank or utilised to pay off debts of other Banks or financial Institutions. Also properties and assets purchased out of monies taken out of one Bank/Financial Institution may have been pledged or hyphoticated with another. The Financial Institutions or Banks were most likely to have documents in their favour or make claims on the basis of Bankers Rights of Lien, set off or adjustment. In my view, by this Act the Legislature therefore sought to provide : (1) for a speedy trial of offences; (2) Immediate attachment and thus freezing of all assets of parties suspected to be involved and thus preventing any further transfers or alienations; (3) A reasonable, rational and equitable distribution of the property by this Court as it would have the total picture. This last would ensure a much speedier return of monies than under the present legal system.

That these were the objectives is clear from the provisions of the said Act. The first object is clear on a plain reading of the Act. The second object is achieved by the provisions regarding a person being "Notified" on prima face satisfaction by the Custodian and an automatic statutory attachment of all properties belonging to such Notified Party. That there has to be distribution is clear from Section 11. Whilst these were the objects, the Legislature has also kept in mind the fact that there may

be contractual rights in favour of third parties, Financial Institutions and/or Banks. Undoubtedly these rights were not to be affected. This is clear from Section 4 which gives the Custodian the power to set aside contracts under certain conditions. Also as stated earlier it was clear that most of the money which was siphoned off was from Banks and Financial Institutions. As is well known these bodies normally have securities in their favour. In case of Banks, in law, there would also be the right of lien, set off and/or adjustment. It cannot be presumed that the Legislature was not aware of this. By Section 11(2) of the said Act the Legislature has provided for payment of liabilities towards tax and Government dues and of Financial Institutions and Banks. A plain reading of Section 11(2) shows that it provides for payment to all creditors. This would include secured creditors and persons having special interests. This is in keeping with Bankruptcy Laws under Insolvency Acts and Companies Act. In these Acts also the distribution is to all creditors. When therefore there is a provision for distribution to all creditors, if the Legislature wishes to exclude secured creditors, the Legislature specifically so provides. In this case also if the Legislature had intended to keep secured creditors and persons having special interests out of the purview of Section 11, the Legislature would have said so. If the distribution was to be only among the unsecured creditors as suggested by Mr. Mehta, Mr. Kapadia, Mr. Doctor and Mr. Tulzapurkar, then the simplest thing would have been to add the words "of unsecured creditors" between the words "the following liabilities" and "shall be paid or discharged in full, as far as may be, in the order as under :" in Section 11(2). To accept this argument would require incorporating into Section 11(2) words which the Legislature purposely omitted to incorporate.

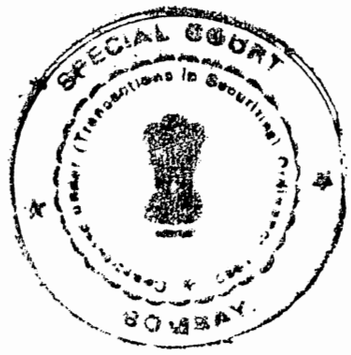
Further an interpretation which would render a Section or part thereof nugatory must always be avoided. Section 13 of the said Act provides that the

provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other law or in any instrument having effect by virtue of any law or in any Decree or Order of any Court, Tribunal or Authority. The provision regarding distribution would be the only provision against the absolute claims and rights under prior contracts. This only if the interpretation of the Custodian is accepted. If Mr. Mehta's, Mr. Kapadia's, Mr. Doctor's and Mr. Tulzapurkar's interpretations are to be accepted, then there is no provision in this Act which would be inconsistent with any contract. This interpretation would render ineffective and virtually nugatory the words "inconsistent therewith contained ..... or in any instrument having effect by virtue of any law". Further secured creditors and persons having special interests may get Decrees or Orders of Courts in their favour. Section 13 provides that provisions of this Act prevail even over any Decree and Order of any Court, Tribunal or Authority. This would include even Decrees and Orders obtained by secured creditors or persons having a special interest in property. If secured creditors and persons having special interests were meant to stand outside, then Section 13 would have had to provide that Decrees and Orders obtained by such persons was to prevail over the provisions of this Act. No such provision has been made. Therefore, Section 13 is very indicative of the intention of the Legislature. It is incorporated for this purpose and is fully applicable.

I am also unable to accept submission that such an interpretation would have the effect of depriving, secured creditors and/or persons with special interest, of their rights. None of the rights under contracts or under law are abrogated or done away with. All that Section 11(2) provides for is an equitable and rational distribution of, what was public money in the first instance. It also seeks to cut out legal delays and unnecessary litigations between Nationalised bodies. Thus for

example if there are rival claims between two Financial Institutions and/or Banks over the same property, then the right of a Financial Institution having a security or special interest would necessarily prevail over the claim of another Financial Institution/Bank. Thus on this interpretation, no right is abrogated or done away with. However it must be admitted that to the extent that the debts/liabilities must be paid in the order set out in Section 11(2) certain anomalies do arise. This only to the extent that a private individual, even one having security or a special interest, will be paid after all Government dues, Financial Institutions, etc. are paid. To that extent there is a risk of a private person losing out. This however is the only instance. In cases of Financial Institutions and/or Banks the only precedence over them are dues of taxation and other revenue dues. Obviously the Legislature contemplated, and as events have now shown, by and large the Government dues towards taxes, rates, cess, etc. would not deflate the assets. The Legislature has provided for payment of taxes, cesses etc on a priority because these are recurring liabilities. If these are not paid during the period that it takes to distribute the assets, then penalties may be incurred or the Statutory body would get a right of recovery in a summary manner. This would create unnecessary complications. Whilst paying these dues the Court could and would keep in mind the claims of parties over specific properties or assets, so that the statutory dues would, as far as possible be paid out of unencumbered property in the first instance. So far as private persons are concerned there appears to be rational as to why they are put last. As is known, almost all the monies were siphoned off into private pockets from Financial Institutions and/or Banks. It has then been diverted into shares and stocks, various Private Companies, partnerships and their businesses, or given as loans, etc. Thus, the Notified party has in most cases purchased the property or asset out of public money.

The money was not his property. It belonged to the Financial Institution/Bank from whose pocket it came. The object is to collect public money and return it to the Financial Institutions and/or Banks from where it came in the first instance. This is clear because what is to be distributed is "property belonging to a Notified Party". This Court has under Section 4(2) the power to see whether a person is correctly Notified. It is only after the Court is so satisfied that the distribution would arise. Thus even when private rights/special interests are created, it is out of public monies or assets acquired out of public monies. As stated above in most cases, the Notified Party would have had no right to the monies siphoned out from Financial Institutions/Banks. Any asset bought by him out of these monies would be, strictly speaking, held by him in trust for the Financial Institutions/Banks. Thus private parties entering into contracts with a Notified Party would get only such rights as the Notified Party had. They cannot get a better title, except may be in cases of Negotiable Instruments and/or shares. If the Notified Party had no right, the third party will get none. It is for this reason that in Section 11(2)(c) the words used are "any other liability as may be specified by the Special Court from time to time." The object of putting private individuals last is obviously with the objective that public money must be used to first meet liabilities like tax and revenue, etc., and then be returned to Financial Institutions and Banks. This distribution ensures that dues of the Financial Institutions and Banks, from whose coffers the money came in the first instance, will be met in an orderly fashion, without these bodies litigating for years with each other. It may only be mentioned that, by now a number of claims have been received by the Court claiming security or special interest. Out of the large number of such claims only two or three are by private individuals. Thus factually also the anticipation of the Legislature has been proved correct. Also



this Court dealing with distribution of properties of the Notified parties would have a complete picture before it. It is in a position to ascertain whether the Notified party has used monies of Banks and Financial Institutions and how and where it is so used. It is correct that the jurisdiction of normal civil Courts is not done away with. But an additional forum is provided for enforcement of rights and claims by asking for distribution. However it is only if the entire distribution is by this Court that this Court can have any effective control. If by way of enforcements of special rights/interests properties are to be excluded or parties are permitted to execute Decrees and Orders dehors this Court, then in effect nothing would be left for this Court to distribute. It is for this reason that the Legislature has provided in Section 13 that the provisions of this Act prevail even over any Decree or Order of any Court or Tribunal. Thus even a person or body having a Decree or Order in their favour must approach this Court for distribution. The distribution can only be as laid down in Section 11. In my view, the classification is a reasonable, rational, equitable and logical. They have been incorporated to meet the objective and have a clear nexus with the objective. In my view the Section provides for the distribution of the property in an orderly fashion. In my view, such an interpretation is not subject to any attack either under Article 14 or Article 19.

In my view, therefore, it will have to be held that even though the contractual and special rights in property have not been abrogated or done away with, they can only be enforced subject to the order of payments laid down under Section 11 of the said Act. All such parties, whether decree holders or otherwise, must come before this Court and put their case before this Court. They may make their claim directly before this Court or enforce their claim in normal Civil Courts and then approach this Court on the basis of Decrees or Orders obtained from any Court or

> Tribunal. Even when parties elect to make their claim in the normal Civil Court, in my view, it would be preferable and advisable that the parties intimate this Court. This so that the Court could then take note of the pending claim. This Court will then consider and/or keep in mind what rights they have in respect of a particular property and at the time of ultimate distribution all such contractual rights and/or special interests will be taken into account.
>
> In this view, it will be necessary in any case to consider, in each Petition/Application, what is the right that is being claimed and whether in fact that party has got that right. Thereafter in the event of it being held that the party has a right as claimed, it will be kept in mind at the time of distribution under Section 11 of the said Act."

Thus earlier this Court has already taken a view that liabilities for taxes, rates, cess, etc. are given a priority because they are recurring liabilities, which if not paid, would incur penalties. Whilst expressing that view, the questions now under consideration were not before the Court. On a proper consideration, for reasons set out hereafter, that view does not appear to be correct.

9. As stated above, the first question is:

> " Whether the priority created by Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 is only in respect of amounts due prior to the date of Notification and/or whether the priority would also apply to amounts due after the date of the Notification."

10. The Learned Advocate General has submitted that this involves the interpretation and construction of the Special Court Act. He submitted that Section 11 provides for discharge of liabilities. He emphasized that the word used is "liability" and not "debts". The Learned Advocate General pointed out that on a plain reading of Section 11, it is clear that the Section merely provides for distribution of liabilities in certain priorities and not for payment of debts and/or pro rata abatement of debts. He submitted that Section 11(2)(a) talks of "all revenues, taxes, cesses and rates due". He submits that similarly Section 11(2)(b) talks of "all amounts due from the person so Notified by the Custodian to any Banks and Financial Institutions or mutual fund". He points out that under Section 11(2)(c) the word "due" has not been used. He points out that under Section 11(2)(c) other "liabilities" as may be specified by the Special Court from time to time are to be paid. The Learned Advocate General submitted that there is significance in use of the word "due" in Section 11(2)(a) and (b). He submitted that the word "due" must have reference to a point of time. He fairly pointed out that in the Act, words to the effect "presently due" or "due in future" or "contingent liability" have not been used. He points out that

similarly words to the effect "due from time to time" or "periodically due" have not been used. He submits that the Legislature was well aware that the liabilities under Section 11(2)(a) would arise periodically and from time to time. He submitted that the intention of the Legislature must, therefore, be ascertained from the objects/scheme of the Special Courts Act.

11. The Learned Advocate General referred to Blacks Legal Dictionary wherein it is stated as follows:

> "The word `due' always imports a fixed and settled obligation or liability, but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise signification being determined in each case from the context. It may mean that the debt or claim in question is now (presently or immediately) matured and enforceable, or that it matured at some time in the past and yet remains unsatisfied, or that it is fixed and certain but the day appointed for its payment has not yet arrived. But commonly, and in the absence of any qualifying expressions, the word `due' is restricted to the first of these meanings, the second being expressed by the term `overdue', and the third by the word `payable'."

The Learned Advocate General also referred to P. Ramanatha Aiyar's Law Lexicon, 1987 Edition, Pg. 367, wherein the word "due" has been defined as follows:

> "Due As a noun, an existing obligation; an indebtedness; a simple indebtedness

> without reference to the time of payment; a debt ascertained and fixed though payable in future; As an adjective, capable of being justly demanded; claimed as of right; owing and unpaid, remaining unpaid; payable; regular; formal; according to rule or form."

The Learned Advocate General relied upon the case of **UNION OF INDIA v. RAMAN IRON FOUNDRY** reported in A. I. R. (1974) S. C. Pg. 1265. In this case, Clause 18 of a Contract between the Union of India and the Respondents Raman Iron Foundry arose for consideration by the Supreme Court. The Supreme Court held as follows (at Pg. 1271):

> ".... Now the sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a `debt', for a sum due is the same thing as a debt due. The classical definition of `debt' is to be found in Webb v. Stenton, (1883) 11 QBD 518] where Lindley, L. J., said `.... a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation'. There must be debitum in praesenti: solvendum may be in praesenti or in futuro - that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello, (1869) 37 Calif. 524, which was approved by this Court in Kesoram Industries v. Commissioner . of Wealth Tax, (1966) 2 SCR = AIR (1966) SC 1370, clearly brings out the essential characteristics of a debt:
>
> ^^`Standing alone, the word `debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to

> distinguish between the two, we say of the former that it is a debt owning, and of the latter that it is a debt due'. This passage indicates that when there is an obligation to pay a sum of money at a future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti it is a debt due. A sum due would, therefore, mean a sum for which there is an existing obligation to pay in praesenti or in other words, which is presently payable..."

Thus in this case the Supreme Court is laying down that the sum would be due when there is an existing obligation to pay the same now or in future.

12. The Learned Advocate General also referred to Section 530 of the Companies Act, 1956. He pointed out that even under the Companies Act, all revenues, taxes, cesses and rates due at the relevant date and having become due and payable within 12 months next before the relevant date get a priority. He submitted that even under the Companies Act, priority is given to revenues, taxes, cesses and rates only upto the relevant date and for a period of 12 months prior thereto .

13. The Learned Advocate General submitted that even though under Section 11 does not specify the period of time when the liabilities are deemed to be due, some period must be imported into the Section. He submitted that the period must be ascertained keeping in mind the scheme and the object of the Special Courts Act. He submitted

that the Special Courts Act was enacted because a large amount of public money was diverted into private pockets. He submitted that most of it came from Banks and Financial Institutions. He submitted that the object of the Special Courts Act was inter alia to recover these amounts and return it to the Banks and Financial Institutions. He submitted that there can be no doubt that the Banks and Financial Institutions are entitled to get back their monies. He submitted that the object of the Special Courts Act is also to ensure a speedy disbursement or distribution of the attached assets. He submitted that the Act must be construed keeping in mind the above object.

14. The Learned Advocate General pointed out that even though this was the object of the Special Courts Act ~~that~~ the Banks and Financial Institutions are placed second in order of priority. He pointed out that the liabilities of Banks and Financial Institutions is to be paid after payment of liabilities of revenues, taxes, cesses and rates. He submitted that the Legislature was well aware that such liabilities are recurring liabilities which will arise every year. He submitted that the intention could never be to indefinitely postpone the payment to Banks and Financial Institutions. He submitted that

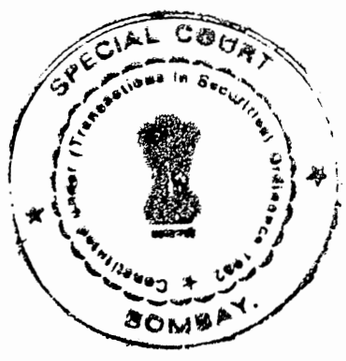
therefore the only interpretation which can be given is the term `liability due' must be `liability due' on the date of Notification'.

15. The Learned Advocate General submitted that under the Special Courts Act, attachment of properties of Notified Parties take place on a Notification. He submitted that it is these attached properties which are to be distributed. He submitted that therefore it is the liabilities due on the date of attachment which must be taken into account. He submitted that this is the only way in which the Special Courts Act can be harmoniously construed and by which the object of the Special Courts Act is achieved. He submitted that any other interpretation would postpone indefinitely the distribution of liabilities of Banks and Financial Institutions and liabilities under Section 11(2)(c). He submitted that this would be so because the claim for revenues, taxes, cesses and rates would go on for ever and the concerned authorities could then legitimately claim that, nothing should be distributed, as the future dues are not yet satisfied. He submitted that this could never be the intention of the Legislature.

16. The Learned Advocate General fairly submitted that the point of time could also be the date of distribution. He however submitted that

this would create a number of difficulties. He submitted that that would not be reasonable and harmonious construction. He pointed out by way of an example that the Income Tax Department could now re-assess, make larger demands and levy penalties and interest. He submitted that this Court would not be sitting in Appeal over the assessment orders by the Income Tax Department. He submitted that that could only be done by the Tribunal or the Tax or Writ Bench of the High Court or the Supreme Court. He submitted that thus by reason of re-assessment, levy of penalty/interest the Income Tax Department may have very large claims. He submitted that Notified Parties may be challenging those claims. Yet this Court could not distribute the assets until the disputed claims are finally settled at the stage of the Supreme Court. He submitted that it is well known that all this would take a number of years. He submitted that the very object of speedy distribution would be defeated. He submitted that that may also result in defeating the object of returning the monies to Banks and Financial Institutions inasmuch as there might be nothing left to pay to the Banks and Financial Institutions.

17. In support of his submission that the interpretation must be one which would further

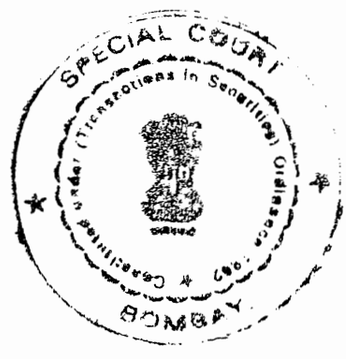


the object of the Act, the Learned Advocate General cited the case of **STATE BANK OF TRAVANCORE v. MOHAMMED KHAN** reported in (1981) 4 S. C .C. Pg. 82. In this case, an agriculturist owed a debt to a Banking Company which was later amalgamated with a subsidiary Bank. The question was whether after Kerala Agriculturists' Debt Relief Act, 1970, the Subsidiary Bank had a right to recover the debt. Under the said Act, the word "debt" included any debt exceeding Rs. 3,000/- borrowed under a single transaction and due before the commencement of the Act to any Banking Company. The argument before the Supreme Court was that there was a debt due before the commencement of the Act. It was argued that as there was a debt due before the commencement of the Act, it was recoverable by the Subsidiary Bank. The express provisions of the Act fully supported this argument. The Supreme Court however held as follows (Pgs. 89 and 90):

> "16. The learned Attorney-General is apparently justified in making this submission which rests on the plain language of clause 1(l) of Section 2(4), the plain grammatical meaning of the words of the statute being generally a safe guide to their interpretation. But having considered the submission in its diverse implications, we find ourselves unable to accept it.
> 17. In order to judge the validity of the submission made by the Attorney-General, one must of necessity have regard to the object and purpose of the Act. The object of the Act is to relieve agricultural indebtedness. In order to

achieve that object, the legislature conferred certain benefits on agricultural debtors but, while doing so, it excluded a class of debts from the operation of the Act, namely, debts of the description mentioned in clauses (a) to (n) of Section 2(4). One class of debts taken out from the operation of the Act is debts owed to banking companies, as specified in clause (l). The reason for this exception is obvious. It is notorious that money-lenders exploit needy agriculturists and impose upon them harsh and onerous terms while granting loans to them. But that charge does not hold true in the case of representative institutions, like banks and banking companies. They are governed by their rules and regulations which do not change from debtor to debtor and which, if anything, are intended to benefit the weaker sections of society. It is for this reason that debts owing to such creditors are excepted from the operation of the Act.

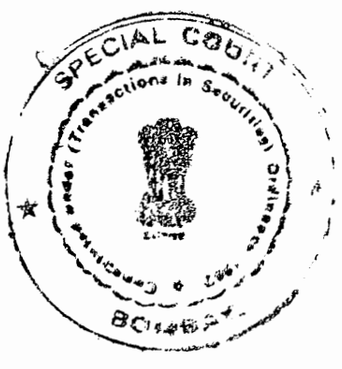
18. A necessary implication and an inevitable consequence of the Attorney-General's argument is that in order to attract the application of clause (l) of Section 2(4), it is enough to show that the debt was, at some time before the commencement of the Act, owed to banking company: it does not matter whether it was in its inception owed to private money-lender and, equally so, whether it was owed to such money-lender on the date of the commencement of the Act. This argument, if accepted, will defeat the very object of the Act. The sole test which assumes relevance according to that argument is whether the debt was owed, at any time before the commencement of the Act, to a banking company. It means that it is enough for the purpose of attracting clause (l) that, at some time in the past, may be in a chain of transfers, the right to recover the debt was vested in a banking company. A simple illustration will elucidate the point. If a private money-lender had initially granted a loan to an agricultural debtor on usurious terms but the right to recover that debt came to be vested in a banking company some time



before the commencement of the Act, the debtor will not be able to avail himself of the benefit of the provisions of the Act because, at some point of time before the commencement of the Act, the debt was owed to a banking company. And this would be irrespective of whether the banking company continued to be entitled to recover the debt on the date of the commencement of the Act. Even if it assigns its right to a private individual, the debtor will be debarred from claiming the benefit of the Act because, what is of decisive importance, according to Attorney-General's argument is the fact whether, some time before the commencement of the Act, the debt was due to a banking company. We do not think that the legislature could have intended to produce such a startling result.

19. The plain language of the clause, if interpreted so plainly, will frustrate rather than further the object of the Act. Relief to agricultural debtors, who have suffered the oppression of private money-lenders, has to be the guiding star which must illumine and inform the interpretation of the beneficent provisions of the Act. When clause (l) speaks of a debt due `before the commencement' of the Act to a banking company, it does undoubtedly mean what it says, namely, that the debt must have been due to a banking company before the commencement of the Act. But it means something more: that the debt must also be due to a banking company at the commencement of the Act. We quite see that we are reading into the clause the word `at' which is not here because, whereas it speaks of a debt due `before' the commencement of the Act, we are reading the clause as relating to a debt which was due `at' and `before' the commencement of the Act to any banking company. We would have normally hesitated to fashion the clause by so restructuring it but we see no escape from that course, since that is the only rational manner by which we can give meaning and content to it, so as to further the object of the Act.

20. There is one more aspect of the matter which needs to be amplified and it



> is this: When clause 1(l) speaks of a debt due before the commencement of the Act, what it truly means to convey is not that the debt should have been due to a banking company at some point of time before the commencement of the Act, but that it must be a debt which was incurred from a banking company before the commencement of the Act.
> 21. Thus, the application of clause (l) is subject to these conditions: (i) The debt must have been incurred from a banking company; (ii) the debt must have been so incurred before the commencement of the Act; and (iii) the debt must be due to a banking company on the date of the commencement of the Act. There are cumulative conditions and unless each one of them is satisfied, clause (l) will not be attracted and the exclusion provided for therein will not be attracted and the exclusion provided for therein will not be available as an answers to the relief sought by the debtor in terms of the Act."

Thus the Supreme Court read the words into the statute. In its own words the Supreme Court restructured the clause in order to further the object of the Act.

18. The Learned Advocate General also relied upon the case of **SIRAJ-UL-HAQ KHAN v. THE SUNNI CENTRAL BOARD OF WAQF** reported in A. I. R. (1959) S. C. Pg. 198. In this case the question was of interpretation of the words "any person interested in a waqf" appearing in Section 5(2) of the U. P. Muslim Waqf. The Supreme Court held that it was well settled that in construing the provisions of a statute, the Court should be slow to adopt a

construction which tends to make any part of the statute meaningless or ineffective. The Supreme Court held that the Court must make an attempt to reconcile the relevant provisions so as to advance the remedy intended by the statute. The Supreme Court held that in such cases, it was legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provisions and to make whole of it effective and operative. On these principles, the Supreme Court held that a literal construction of the phrase "any person interested in a waqf" would render a part of the sub-section wholly meaningless and ineffective. The Supreme Court held that the Legislature intended that the decision of the Commissioner of Waqf that a particular transaction is a waqf can be challenged by persons who do not accept the correctness of the said decision. The Supreme Court held that it was that class of persons who were obviously intended to be covered by the words "any person interested in a waqf". The Supreme court held that what was meant was "any person interested in what is held to be a waqf". The Supreme Court thus added words to advance the remedy intended by the statute.

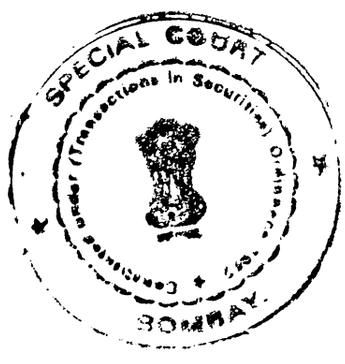
Based on the above authorities, the Learned Advocate General submitted that in order to

further the object of the Act, the Court must read into Section 11(2)(a) the words "liability due on date of Notification".

19. Mr. Setalvad adopted the arguments of the Learned Advocate General. He further submitted that the object of the Amendment Act of 1994 was to ensure expeditious settlement of claims and to recover amounts. He also relied upon the Action Taken Report of the Government of India whereunder it is mentioned as follows:

> "28. In November 1993, an Inter Disciplinary Group (IDG) was set up by the Governor, RBI, under the Chairmanship of the Custodian, and with representatives from RBI, CBI, Income Tax and Enforcement Directorate. It was charged with the specific purpose of tracing the funds involved in the problem exposure of Banks/Financial Institutions. The Inter Disciplinary Group was able to reconcile the total problem exposure figures at Rs. 3729.48 crores on account of amounts outstanding against Harshad Mehta Group - Rs. 1559.74 crores, the Dalal Group - Rs. 1886.68 crores and Fairgrowth Financial Services Ltd. - Rs. 283.06 crores.
> 29. The Custodian has Notified 41 persons and has attached assets worth around Rs. 2910 crores based on November, 1994 valuation. Out of the assets attached by the Custodian, the value of attached assets of HSM group is about Rs. 2034 crores as against problem exposure of Rs. 1559.74 crores and in case of FFSL it is Rs. 456 crores as against problem exposure of Rs. 283.06 crores. Only in case of Dalal Group there is a shortfall of Rs. 1466.77 crores against problem exposure of Rs. 1886.68 crores."

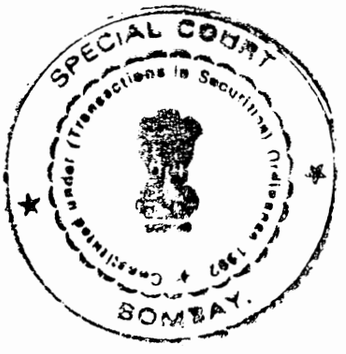
20. Mr. Setalvad also relied on the case of



GOVERNMENT OF INDIA v. TAYLOR reported in (1955) AC Pg. 491. In this case the question was whether in a winding-up of an English Company trading in India, the liabilities payable by the Official Liquidator included claims for Indian tax. The House of Lords held as follows (Pgs. 508/509):

> ".... But it is said that under section 302 of the Companies act, 1948, the 'liabilities' which the liquidator in a voluntary winding-up is bound to discharge include an obligation to pay tax due to a foreign State. All turns on the meaning of the word 'liabilities' in this section. On the one hand it is said by the respondents that it means only those obligations which are enforceable in an English court, and on the other hand that its meaning is extended - I do not know how far - but at least so far as to cover liabilities for foreign tax in respect of which the company might have been sued in the courts of the country imposing it.
>
> My Lords, I have no hesitation in adopting the former of these meanings. I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding-up is voluntary or by the court....."

21. Mr. Setalvad also relied upon the case of **WINTER v. INLAND REVENUE COMMISSIONERS** reported in (1963) AC Pg. 235. In this case the deceased person had "control" of a Company within the meaning of Section 55 of the Finance Act, 1940,



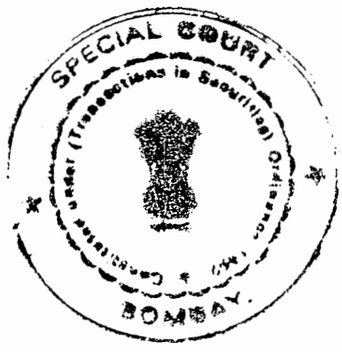
during the five years ending with his death on March 29, 1953. Thus the shares held by him in the Company fell to be valued for Estate Duty purposes by reference to the net value of the Company's assets pursuant to Sections 50 and 55 of the Act of 1940. The assets of the Company included five ships for which, at the deceased's death, the Company had received Capital Allowances under Part X of the Income Tax Act, 1952, leaving a sum as "expenditure unallowed" as defined by Section 297 of the Act of 1952. The ships were sold during the period November, 1953 to February, 1954 for a sum greater than the expenditure unallowed, and this gave a rise to balancing charge under Section 292 of the Act of 1952, resulting in additional Income Tax and Profits Tax assessments at the current rates. The question was whether under Section 50(1) of the Finance Act of 1940 as applied by Section 55(2)(a) of that Act, any allowance could be made for the balancing charge that would have been due at the date of death in valuing the shares of the Company for Estate Duty purposes at the deceased's death on the ground that such charge had been a "contingent liability" at the date of death. Whilst considering this question, the Court held as follows (Pg. 247):

> " No doubt the words `liability' and `contingent liability' are more often

> used in connection with obligations arising from contract than with statutory obligations. But I cannot doubt that if a statute says that a person who has done something must pay tax, that tax is a `liability' of that person. If the amount of tax has been ascertained and it is immediately payable it is clearly a liability; if it is only payable on a certain future date `it must be a liability which has' not matured at the date of `death' within the meaning section 50(1). If it is not yet certain whether or when tax will be payable, or how much will be payable, why should it not be a contingent liability under the same section?"

22. Mr. Setalvad also relied upon Black's Law Dictionary, 6th Edition Pg. 499 wherein the word "due" has been defined as meaning "presently payable".

23. Mr. Setalvad also relied upon the case of **In re STOCKTON MALLEABLE IRON COMPANY** reported in (1875) Law Reports 11 Ch. D. Pg. 101. In this case, the Company had a first and paramount lien upon all shares of any member for any money due to the Company from him alone or jointly with any other person. A member transferred some shares. On the date that the Transfer Forms were lodged with the Company, the Company was a holder of a Bill of Exchange drawn by the member. The maturity date of the Bill of Exchange had not yet arrived. The Court held that the word "due" must necessarily meant "due and payable on that date".



24. Based upon the above Mr. Setalvad submitted that the whole object of Section 11(2)(a) was to lay down an order of priority. He submitted that it was inherent in the scheme of the Special Courts Act that in laying down such priorities, a common date should be fixed on which the liabilities of the different class of creditors are crystallised. He submitted that this was similar to settled principles in Law of Bankruptcy where the theory is to stop all things at the date of bankruptcy and to divide the wreck of the man's property as it stood at that date.

25. Mr. Setalvad submitted that it was correct that Section 11 did not specifically limit the word "due" to amounts due at a relevant date as in the Companies Act. He submitted that however such an interpretation would be in full corroboration with object and scheme of Section 11. He submitted that as the principle and object of the Special Courts Act was to ensure that the Banks and Financial Institutions whose properties had been diverted could recover those properties, the Court must interpret Section 11 in order to further the object. He submitted that for that purpose, the word "liability" must necessarily refer to legally enforceable claim. He submitted that it must necessarily refer to a claim which has been

ascertained and is immediately payable. He submitted that if it is a liability which is payable in future, it is not a liability which has matured on the relevant date. He submitted that if it is not yet certain whether or when the tax would be payable, then it would be merely a contingent liability. He submitted that it necessarily followed that the term `liabilities due' under Section 11(2)(a) and (b) referred to amounts due and payable by a person Notified on the date of Notification. He submitted that therefore so far as taxes are concerned, it could only refer to such taxes where an Assessment Order is already passed and demand made prior to the date of the Notification.

26. Mr. Setalvad submitted that the provisions of the Special Courts Act would prevail over the Income Tax Act. Before me nobody has disputed this proposition. However, as Mr. Setalvad has cited authorities, it may only be mentioned that in support of this contention, he relied upon the case of **THE UNION OF INDIA v. INDIA FISHERIES PVT. LTD.** reported in A. I. R. (1966) S. C. Pg. 35. In this case, the Supreme Court was considering the provisions of the Income Tax Act and the Companies Act. The Supreme Court held that Section 49E of the Income Tax Act which entitled

the Tax Authorities to adjust the refund amount due against any other tax due did not apply when the provisions of the Companies Act were attracted.

Mr. Setalvad also relied upon the authority in the case of **S. V. KONDASKAR, OFFICIAL LIQUIDATOR v. V. M. DESHPANDE, INCOME TAX OFFICER** reported in A. I. R. (1972) S. C. Pg. 878. In this case also, the Supreme Court held that while the Company Court could not determine what tax was due once the Tax Authorities determined the tax due, it was for the Company Court to decide whether the claim was a lawful liability and also to decide to what extent the Income Tax Department would get priority.

27. Mr. E. P. Bharucha fully supported Mr. Setalvad. He further submitted that it was not as if the demands for revenues, taxes, cesses and rates were existing. He submitted that Section 11(2) created four level of priorities, each higher level excluding the lower levels. He submitted that highest priority under Section 11(2)(a) was only to such demands as were crystallised. He submitted, by way of example, that these would be Tax dues where Assessment Orders were passed and Demand Notices issued or Demands by the State Government for land revenue or by Municipal Corporation for rates prior to the date of Notification.

He submitted that the next level was under Section 11(2)(b) all dues upto the date of Notification were to be repaid to the Banks and Financial Institutions. He submitted that in these two categories, the Court was given no discretion. He submitted that the third level of priority was given by Section 11(2)(c). He submitted that in this case, it was open to the Court to ascertain what claims may be distributed by it. He submitted that the claims of the Income Tax Department or claims of property taxes, etc. for period subsequent to the date of Notification would fall under Section 11(2)(c). He also submitted that if any other interpretation is given, then the very object of the Act to recover and give back to Banks and Financial Institutions what they had lost would be defeated.

28. Mr. Parekh also fully supported Mr. Setalwad. He further submitted that the term `liability due' under Section 11(2)(a) must necessarily mean only those liabilities where assessments are over and Orders passed. He submitted that under Section 149 of the Income Tax Act, the Income Tax Department has powers to re-open assessments for a period of ten years. He submitted that the Income Tax Department was re-opening assessments of Notified Parties. He

submitted that this itself would take a number of years. He submitted that then there would be Appeals right upto the Supreme Court. He submitted that therefore, the entire distribution would be stalled if any other view were to be taken.

29. Mr. Parekh also submitted that most of the parties were Notified in July or August 1992. He submitted that therefore there was a broken period of the assessment year 1993-94. He submitted that if the Court holds that the term `liabilities due' does not mean merely those liabilities which were crystallized by way of Assessment Orders, then the question would also arise as to what would be the liability for the broken period upto the date of Notification in assessment year 1993-94. He submitted that that would create the problem of ascertaining how tax for that period was to be computed.

30. Mr. Parekh also submitted that normally owners are free to deal with their assets, even if they are debtors for large amounts to several Banks and Financial Institutions. He submitted that as a normal rule, Banks and Financial Institutions have security on the assets of debtors which over-ride tax claims of the State. He submitted that under normal circumstances, any normal Civil Court would have taken a long time before all claims were

settled and all disputes adjudicated upon. He submitted that the Parliament was aware that the Scam took place because of collusion of public servants, Bank Officials and brokers who diverted the funds into the hands of private parties. He submitted that the Parliament intended to provide a quick remedy for recovery by the Banks and Financial Institutions. He submitted that the interpretation must be one which would further this object and not render it nugatory. He submitted that unless the Court accepts the interpretation given by Mr. Setalvad, the liabilities under Section 11(2)(a) would, in most cases, wipe out the assets and nothing would be available for distribution under Sections 11(2)(b) and (c). He submitted that this would defeat the object of the Special Courts Act.

31. As against this, Mr. Jaisinghani, Mr. Bobde, Mr. Mistry and Mr. Jethmalani have submitted that the period of time must necessarily be the point of time at which distribution takes place.

32. Mr. Jaisinghani submitted that Sections 11(1) and (2) must be read together and must operate together. He submitted that under Section 11(1), the Court is empowered to give such Orders as it may deem fit directing the Custodian to

dispose off the property under attachment. He submitted that these Orders which a Court may pass under Section 11(1) are, amongst others, Orders regarding distribution as per the priority laid down under Section 11(2). He submitted that therefore, this Section itself contemplates the point of time at which the `liabilities due' are to be ascertained. He submitted that reading the two sub sections together it necessarily follows that the point of time must be the point of time at which an Order for distribution is passed by the Court. He submitted that the mere ground that an Order for distribution may be delayed or may vary from party to party is no ground for interpreting otherwise. He submitted that the term "liabilities due" is not restricted to cases where assessment Orders are passed and demands made. He submitted that under the Income Tax Act, the tax liability is due even though there is no assessment or demand. He submitted that, under Section 207 of the Income Tax Act, there is a liability to pay Advance Tax, even though there is no assessment. He submitted that similarly under Section 140A, a party is first liable to pay tax on the basis of self-assessment even though there is no demand for such tax.

33. Mr. Jaisinghani relied upon the authority in the case of RAJRATNA NARANBHAI MILLS

CO. LTD. v. SALES TAX OFFICER reported in 71 Co. Cases Pg. 149. In this case the question was about the priority of debts due by way of revenue, taxes, cesses, rates on a winding-up of a Company. The Supreme Court whilst considering this question in the context of Section 530(1)(a) of the Companies Act, held that the priority was in respect of such debts which were born within the time frame of those twelve months and as such due and becoming due and payable within those twelve months next before the relevant date, ascertainable if necessary later, if not already ascertained. The Supreme Court has thus interpreted the word "due" as meaning "due and payable but not necessarily ascertained".

34. Mr. Jaisinghani further submitted that if the interpretation of Mr. Setalvad is accepted, then it would mean that most Notified Parties would in effect have no tax liabilities which are to be paid in priority. This submission has been dealt with in greater detail by Mr. Mistry and is set out hereafter.

35. Mr. Mistry supported Mr. Jaisinghani. He submitted that interpretation of Mr. Setalvad cannot be accepted. He submitted that if it is held that only those tax liabilities which were assessed and in respect of which demands were made fall

under Section 11(2)(a), then in effect and in practical terms only tax liabilities for the year ending 31st March 1990 would be payable under Section 11(2)(a). Mr. Mistry submitted that the liability for tax arises on the last date of an Assessment Year. In support of this, he relied upon the authority in the case of **COMMISSIONER OF WEALTH TAX v. K. S. N. BHATT** reported in 145 I. T. R. Pg. 1. In this case, the Supreme Court has held that the Income Tax liability crystallizes on the last day of the previous year relevant to the Assessment Year under the Income Tax Act.

36. Mr. Mistry submitted that under Section 153 of the Income Tax Act, the time limit for completion of assessment is three years. He submitted that as most of the parties were Notified in July or August 1992, in practical terms, the assessment for the years 1990-91, 1991-92 and 1992-93 would not have been completed on the date of Notification. He submitted that if, therefore, the interpretation of Mr. Setalwad were accepted, it would mean that taxes payable for Assessment Years 1990-91, 1991-92 and 1992-93 would not have a priority. He submitted that these were the years of Scam. He submitted that on the interpretation of Mr. Setalwad the taxes due for the years of Scam would not be paid at all. He submitted that this

would be so because in all probabilities, after distribution to the Banks and Financial Institutions, nothing would be left for payment of tax.

37. Mr. Mistry also relied upon the authority in the case of **COMMISSIONER OF WEALTH TAX v. VADILAL LALLUBHAI** reported in 145 I. T. R. Pg. 7. In this case, the Supreme Court has laid down that it was settled law that Income Tax liability becomes crystallized on the last day of the previous year corresponding to the particular Assessment Year. The Supreme Court held that the liability is a perfected debt on the last day of the previous year. The Supreme Court held that the object and purpose of assessment procedure is merely to quantify the precise amount of tax liability. The Supreme Court then held as follows (Pgs. 9-10):

> ".... The process is initiated ordinarily by the assessee filing a tax return, and thereupon the assessment machinery swings into motion. The tax return is scrutinised by the assessing authority and in accordance with the procedure detailed in the relevant statute the assessing authority proceeds to determine the true figure, in its opinion, of the assessee's taxable income or taxable wealth or total value of the taxable gifts, depending on whether it is a case of income-tax, wealth-tax or gift-tax. The assessment order made by the assessing authority specifies the assessed income, wealth or value of the gifts, and on that corresponding tax liability is computed, followed by a

> notice of demand. The assessment order may be subjected to consideration in appeal before the A.A.C. and thereafter the case may be carried in second appeal to the Appellate Tribunal, in reference to the High Court and ultimately in appeal before this Court. At every stage, the endeavor of the authority, tribunal or court is to adjudicate on questions which will lead in the final result to a true determination of the tax liability. There may be cases where the assessment finally made may be re-opened in accordance with the procedure and subject to the conditions stated in the relevant statute. There may also be cases where a rectification of apparent errors is effected pursuant to jurisdiction granted by the relevant statute. Both these proceedings are similarly intended for the true quantification of the tax liability....."

38. Mr. Jethmalani supported Mr. Jaisinghani and Mr. Mistry. In support of his submissions, he relied upon the authority in the case of **CHATTURAM v. COMMISSIONER OF INCOME TAX** reported in 15 I. T. R. Pg. 302, wherein it is held as follows (Pgs. 307-8):

> " It was next contended that in the present case notices under Section 22(1) and (2) of the Income Tax Act were already issued before the Notification of 26th May, 1940. The notices were the foundation of the jurisdiction of the Income Tax Officer. At that time the Finance Act of 1940 was not operative in the area in question and the Governor, by his Notification, cannot give jurisdiction to the Income Tax Officer in respect of his ultra vires notices. This contention is founded on a misunderstanding of the jurisdiction of the Income Tax Officer and the operation of the Income Tax Act. The income tax assessment proceedings commence with the issue of a notice. The issue or receipt

of a notice is not, however, the foundation of the jurisdiction of the Income Tax Officer to make the assessment or the liability of the assesses to pay the tax. It may be urged that the issue and service of a notice under Section 22(1) or (2) may affect the liability under the penal clauses which provide for failure to act as required by the notice. The jurisdiction to assess and the liability to pay the tax, however, are not conditional on the validity of the notice. Suppose a person, even before a notice is published in the papers under Section 22(1), or before he receives Notice under Section 22(2) of the Income Tax Act, gets a form of return from the Income Tax Office and submits his return, it will be futile to contend that the Income Tax Officer is not entitled to assess the party or that the party is not liable to pay any tax because a notice had not been issued to him. The liability to pay the tax is founded on Sections 3 and 4 of the Income Tax Act, which are the charging sections. Section 22 etc., are the machinery sections to determine the amount of tax. Lord Dunedin in **Whitney v. Commissioner of Inland Revenue** ((1926) A.C. 37; 10 Tax Cases. 88) stated as follows:- `Now, there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex hypothesis has already been fixed. But the assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay'. In **W. H. Cockerline & Co. v. Commissioner of Inland Revenue,** ((1930) 16 Tax Cas. 1) Lord Hanworth, M. R., after accepting the passage from Lord Dunedin's judgment quoted above, observed as follows:- `Lord Dunedin, speaking, of course, with accuracy as to these taxes, was not unmindful of the fact that it is the duty of the subject to whom a notice is given to render a return in order to enable the Crown to make an assessment

> upon him; but the charge is made in consequence of the Act, upon the subject; an assessment is only for the purpose of quantifying it'. He quoted with approval the following passage from the judgment of Sargant, L. J., in the case of **Williams** (not reported):-
> `I cannot see that non-assessment prevents the incidence of the liability, though the amount of the deduction is not ascertained until assessment. The liability is imposed by the charging section, namely, Section 38 (of the English Act) the words of which are clear. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified, and then quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately'."

39. Mr. Jethmalani also relied upon the authority in the case of **KESORAM INDUSTRIES & COTTON MILLS LTD. v. COMMISSIONER OF WEALTH TAX** reported in 59 I. T. R. Pg. 767. In this case, the Supreme Court has again reiterated that the liability for tax arises on the last day of the Accounting Year even though its quantification may be subsequent.

40. Mr. Bobde fully supported Mr. Jaisinghani, Mr. Mistry and Mr. Jethmalani. He also submitted that under the Act, once the property stands attached, it is available for distribution at a later point of time. He submitted that a Notified Party may come into

possession and become an owner of the property even subsequent to the date of Notification. He submitted that even those properties would stand attached and available for distribution by this Court. He submitted that therefore necessary date must be the date of distribution.

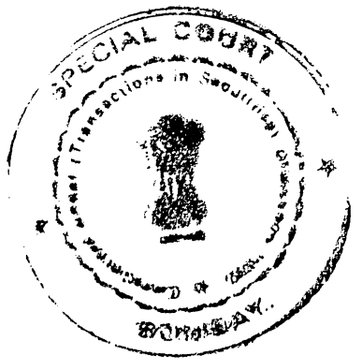
41. These are the rival submissions on the first question. It is to be seen that all parties are agreed that the term "liabilities due" must have reference to a point of time. The only conflicting views are whether the point of time is the date of Notification or whether it is to the date of distribution.

42. The Court has considered both the views. Undoubtedly in interpreting a statute the Court must keep in mind the object for which the statute was enacted. It is well known that there was a huge Scam under which public monies belonging to Banks and Financial Institutions were siphoned off into private pockets. One of the objects of the Special Courts Act is undoubtedly to recover all those monies and return them to Banks and Financial Institutions. It is with this purpose, that the Special Court has been set up. The intention was also to provide a speedier resolution of disputes, recovery and/or distribution than under the normal Civil Laws. However it is also clear that the

Legislature was aware that even though the remedy may be speedier, the recovery and distribution would not be immediate and would take some time.

43. In my view the Legislature has fixed priorities keeping the above in it's mind. There appears to be a good reason why the Legislature has not specified the date on which liabilities are to be deemed `due'. In my view this becomes clear on a reading of the various provisions of the Special Courts Act. If the wording of an Act are clear, unambiguous and do not defeat the object of the Act, then the plain meaning must be given effect to. The Court has to interpret, not on the basis of what happens subsequently, but on the basis of what the intention of the Legislature was at time of enactment.

44. In my view, it is clear that when the Legislature gave a first priority to revenues, taxes, cesses and rates, it did so anticipating that there would be enough left over to pay the Banks and Financial Institutions. The Legislature was aware that liabilities like revenues, taxes, would have priority over unsecured creditors. The Legislature was aware that most of the money which has been siphoned out was in transactions in securities. Banks and Financial Institutions who d lost monies under securities transactions



would, in most cases be unsecured creditors. The fact that a priority is given to revenue, taxes, cesses and rates clearly indicates that, even though the object was to return monies lost by the Banks and/or financial Institutions, it was not to be at the cost of revenue, taxes, cesses and rates. The priority normally available to these claims over unsecured creditors is maintained. Under the Special Courts Act the relevant period is between 1st April 1991 to 6th June 1992. This for purposes of the Special Courts Act is (for want of a better term) the `year of the scam'. In my view, it is clear that the intention of the Legislature was to pay off, in priority, `liabilities due' during the year of the scam and upto the date of Notification. This would so in respect of liabilities under Section 11(2)(a) and 11(2)(b). Thus liabilities due for revenue, taxes, cesses and rates and amounts due to Banks and/or Financial Institutions, upto date of Notification are to be paid in a priority. In my view this much is clear. The argument that `liabilities/amounts due' upto date of distribution are to be paid is not acceptable. This is also clear from the fact that under Section 11(2) the Court must discharge liabilities, as far as possible, in full. As stated above it would necessarily take some years before

distribution takes place. The Legislature was well aware that as time flowed, liabilities would keep on increasing because of recurring liabilities of revenues, taxes, cesses and rates as well as interest and costs under claims of Banks and Financial Institutions would keep on mounting over a period of time. In my view, therefore, the point of time which the Legislature contemplated is a point of time where there was a reasonable probability of repaying everybody in full. It is quite certain that the later the point of time the less the likelihood of parties being repaid in full. In my view, it is, therefore, clear that the priorities which were laid down were in respect of what was due on the date of Notification. This is not to say that the other liabilities or debts are done away with. All that is meant is that other liabilities and debts would fall under Section 11(2)(c).

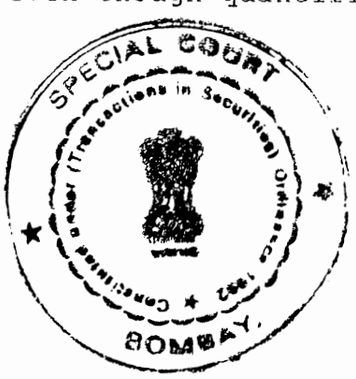
45. There is another reason also why the term `liabilities/amounts due' must have reference to the date of Notification and not the date of distribution. It is clear that at or before distribution Court would have already ascertained/ specified liabilities which are to be distributed. Thus if it was to be liabilities/ amounts due on date of distribution then Legislature would have

used the words `liabilities as may be specified by Court from time to time'. The Legislature has so provided under Section 11(2)(c). Under Section 11(2)(c) all liabilities upto date of distribution, which the Court has specified from time to time are to be discharged. Under Section 11(2)(a) and 11(2)(b) the Legislature has knowingly used the word `due'. The intention is clear. It was to have reference to some point of time other than the point of time of distribution. The only other point of time, under the Special Courts Act, is the date of Notification.

46. However the question still arises whether the taxes, which are to be paid in priority, are only those where an assessment has taken place and demand made prior to date of Notification. The Legislature was well aware that it normally takes 2 to 3 years before final assessment is completed and demands made. Thus in practical terms only assessments and demands for the years 1989/90 or at the most 1990/90 would have been made. In practical terms assessments for the year of the scam would not have been made. To accept the arguments of Mr. Setalvad, Mr. Parikh and Mr. Bharucha would mean that under Section 11(2)(b) amounts due upto date of Notification are to be paid, but under Section 11(2)(a) taxes due

upto assessment year 1989/90 and/or at the most 1990/91 would be paid in priority. This would necessitate giving a different meaning to the word `due' under Section 11(2)(a) and under Section 11(2)(b). In my view the Legislature clearly intended a same point of time when it used the word `due' in both sub-sections of Section 11(2). An interpretation which arbitrarily gives different meanings should not be and is not accepted.

47. Further under the Income Tax Act, a liability falls due on the last day of the Accounting Year. The various authorities of the Supreme Court cited by Mr. Jaisinghani, Mr. Mistry and Mr. Jethmalani make this position very clear. The authorities of the Supreme Court also make it clear the liability to pay Tax is a present liability though the tax becomes payable after it is quantified. The authorities of the Supreme Court make it clear that there is a perfected debt on the last date of the accounting year. These authorities are binding on this Court. Any other contrary authority, English or Indian, cannot be considered to be good law in India. All persons got Notified in July and August/or 1992. Therefore `liabilities for taxes due' would be liabilities including and upto Assessment Years 1992-93. These would have fallen due even though quantification is to be at a



later date. Merely because the assessments are not completed and demands not made does not mean that this is not a liability which does not get priority under Section 11(2)(a). Once it is a liability due it gets a priority. The crystallization of the exact amount payable may take place at a later date.

48. At the same time in my view it was not the intention of the Legislature to postpone indefinitely the return of properties to Banks and Financial Institutions. The Legislature intended distribution in priority upto date of Notification yet did not want distribution to be held up when Court had recovered and was ready to distribute. It is for this reason that no point of time has been specified under Sections 11(2)(a) and 11(2)(b). This is the only reason why a point of time could not be specified. This makes certain other things clear. As stated above the Legislature was aware that normally it takes 2 to 3 years before assessments are completed and demands made. The Legislature was also aware that it would take at least 2 to 3 years before distribution could take place. The reasonable anticipation was that assessments upto assessment years 1992/93 would be completed before distribution took place. However if assessment was not completed before distribution

the Court was not to wait for the assessment and demand. Court can only distribute ascertained amounts and/or liabilities. Whilst distributing Court will only take into consideration such liabilities as have been ascertained, quantified and crystallised. Thus if assessments are not completed Court will not have before it any ascertained and/or quantified amount. The priority would then be lost. Similarly if assessment for any year has been re-opened and the re-assessment proceedings are in progress the Court whilst distributing will only take into account figures as per the earlier assessments. This unless and until the re-assessment proceedings are completed and an Order passed. This, in my view, will also have the effect of encouraging the Income Tax Department to proceed expeditiously and not in its usual slow manner.

49. This, so far as question No. 1 is concerned.

50. As set out above, the second question is:

> " Whether the phrase 'taxes' as used in Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 can only mean amounts due as and by way of taxes or whether it would also include penalties and interests, if any."

51. The Learned Advocate General has drawn the attention of this Court to a para in Law of Income Tax by Kanga & Palkhivala. On page 1630, it has been mentioned as follows:

> "Power to levy penalty. - Penalty is not additional tax. - This section makes provision for the imposition of a penalty on contumacious or fraudulent assessees. Its provisions do not violate the fundamental rights under the Constitution (28 ITR 601; 36 ITR 140; 97 ITR 660; 99 ITR 448; 159 ITR 477). The penalty is in addition to the income tax, if any, determined as payable by the assessee; but penalty is not additional tax (111 ITR 347; 139 ITR 548). The Supreme Court's observations to the contrary in **Abraham v. ITO** (41 ITR 425) and **CIT v. Bhikaji Dadabhai** (42 ITR 123) are, it is submitted, incorrect. Tax and penalty, like tax and interest, are distinct and different concepts under this Act (42 ITR 57L 48 ITR 182; 77 ITR 107; 76 ITR 642; 96 ITR 175; 96 ITR 562; 108 ITR 787; 121 ITR 326; 151 ITR 584). However, the word `assessment' would cover penalty proceedings, if it is used (as it is in some sections) to denote the whole procedure for imposing liability on the taxpayer, and that is the correct ratio of the Supreme Court's decisions in Abraham's case and Bhikaji Dadabhai's case.
>
> The power to impose a penalty is given to the AO and the CIT(A). The power of the AO to impose a penalty does not cease when an appeal is filed against the assessment (83 ITR 750).

52. The Learned Advocate General has submitted that the view of the author as set out in this para is the correct view. He has submitted that the authorities of the Supreme Court in the case of **Abraham v. I. T. O.** reported in 41 I. T. R.

Pg. 425 and in the case of C. I. T. v. Bhikaji Dadabhai reported in 42 I. T. R. Pg. 123 must be restricted to the facts of those cases and must not be construed to mean that the Supreme Court is saying that penalty is an additional tax for all purposes.

53. The Learned Advocate General referred to the case of C. A. ABRAHAM v. INCOME TAX OFFICER reported in A. I. R. (1961) S. C. Pg. 609 wherein the Supreme Court has held that the Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty. He submitted that this shows that the concept of tax and penalty are two different concepts.

54. He also relied upon the authority of the Supreme Court in the case of COMMISSIONER OF INCOME TAX v. BHIKAJI DADABHAI & CO. reported in A. I. R. (1961) S. C. Pg. 1265. In this case, the Supreme Court held that penalty has been regarded as additional tax. The Supreme Court, however, held that there are distinct provisions made for recovery of tax and penalty. The Supreme Court held that this did not alter the true character of penalty imposed. The Supreme Court held that imposition of penalty is a necessary concomitant or incident of the process of assessment, levy and collection of tax.

55. The Learned Advocate General also relied upon the authority in the case of **COMMISSIONER OF INCOME TAX v. EXPRESS NEWSPAPERS (P.) LTD.** reported in 11 I. T. R. Pg. 347. In this case, after considering various authorities, the Madras High Court has held that penalty is not an additional tax.

56. Mr. Andhyarujina also referred to **LAW OF INCOME TAX** by Sampat and Iyer, 8th Edition, wherein on Pgs. 4524-5 and 5919-20 it is observed as follows:

> "6. Tax, penalty interest, fine or any other sum. - These different expressions denote different things. The expression `tax' has been defined in Section 2(43) to mean income tax and super tax (so long it was leviable). It is different from penalties, fines and interest levied under the Act (116 ITR 620), but it includes the surcharge and additional surcharge, if any, levied under the relevant Finance Act (83 ITR 346; 101 ITR 24). Tax and penalty are different (149 ITR 233) though penalty has sometimes been described as additional tax (41 ITR 425; 42 ITR 123). So also tax and interest are distinct and different concepts (42 ITR 57; 48 ITR 182; 45 ITR 47). The 1922 Act referred only to tax, penalty or interest but the 1961 Act has added the categories of fines and of `any other sum' payable under the Act.
> 7. Penalty is additional tax. - In the context of the provisions contained in the 1922 Act, the Supreme Court in **Abraham (CA) v. ITO** (41 ITR 425) held that penalty is only additional tax, which is designated as penalty, and which is imposed in view of the dishonest and contumacious conduct of the assessee. The Supreme Court in **CIT v. Bhikaji Dadabhai & Co.** (42 ITR 123) in the context of Hyderabad Income Tax Act which

ceased to have effect from 1 April, 1950, reiterated the position and held that the levy, assessment and collection of income tax would comprehend the levy of penalty also. Again, in **Jain Brothers v. Union of India** (77 ITR 107), the Supreme Court had to deal with the legality of the levy of a penalty under the 1961 Act, with reference to a return filed under the 1922 Act before 1 April, 1962, when the 1961 Act came into force. Upholding the levy of penalty in such a case, the Supreme Court observed: `Although penalty has been regarded as an additional tax in a certain sense and for certain purposes, it is not possible to hold that penalty proceedings are essentially continuation of the proceedings relating to assessment where a return has been filed'. On the other hand, though penalty is recovered by including it in the notice of demand under section 156 and for purposes of recovery it is treated as tax and, therefore, provisions contained in section 220, et seq apply, where a penalty has already been imposed but has not been paid, the income tax authority has no power to impose a further penalty for failure to pay penalty already imposed, as it cannot be said that the imposition of penalty is also a mode of recovery of tax (29 ITR 456; 69 ITR 709; 46 ITR 762; 68 ITR 840). Obviously the theory of treating penalty as an additional tax is only for certain purposes and cannot be extended beyond its scope (99 ITR 507; 96 ITR 175; 106 ITR 384; 106 ITR 682; 98 ITR 540). The Income Tax Act carries within it a dichotomy in this regard and this dichotomy would be destroyed if penalty is construed as only a part of the tax (122 ITR 1014)."

57. The Learned Advocate General submitted that interest is also a different concept from tax. In support of this, he relied upon the authority in the case of BHOR INDUSTRIES LTD. v. COMMISSIONER OF

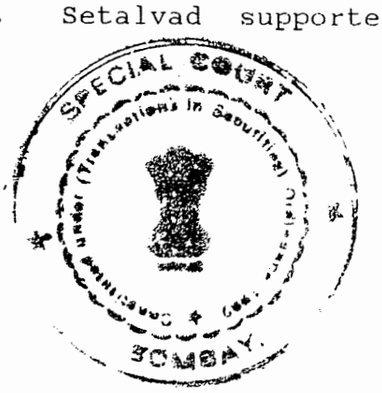
INCOME TAX reported in A. I. R. (1961) S.C. Pg. 1100 wherein the Supreme Court held that interest is not to be treated as tax even though it is recoverable along with tax.

58. Mr. Andhyarujina also relied upon the authority in the case of **P. S. SUBRAMANYAN, ITO v. SIMPLEX MILLS LTD.** reported in 48 I. T. R. Pg. 182 wherein the Supreme Court rejected the contention that interest was part of tax. The Supreme Court held that it cannot obviously be suggested that interest is tax paid by the assessee.

59. The Learned Advocate General also relied on the authority in the case of **COMMISSIONER OF INCOME TAX v. NONSHI DEVSHI KATTAWALA (P) LTD.** reported in 45 I. T. R. Pg. 47. In this case, the Kerala High Court has held that tax, interest and penalty are three distinct and different items dealt with under the Income Tax Act.

60. The Learned Advocate General also relied upon the authority in the case of **COMMISSIONER OF INCOME TAX v. T. RAJA & SATYANARAYANA MURTHY** reported in 96 I.T. R. Pg. 175. In this case, the Andhra Pradesh High Court has held that proceedings for levy of penalty are independent proceedings and the appropriate stage for levy of penalty is after the completion of the assessment proceedings.

61. Mr. Setalvad supported the Learned



Advocate General. He submitted that the word 'tax' would not include interest or penalty. He submitted that this is very clear if one looks at the provisions under the Provincial Insolvency Act, 1920 and the Presidency-Towns Insolvency Act, 1909. He submitted that under Section 61 of the Provincial Insolvency Act, 1920 and Section 49 of the Presidency-Towns Insolvency Act, 1909 all debts due to Government or local authorities have priority. He submitted that if the intention of the Legislature was to give priority to interest and penalties, the Legislature would have used similar words in the Special Court Act. He submitted that the Legislature has chosen to give priority only to taxes.

62. Mr. Setalvad points out that under the Income Tax Act, there are a number of provisions which provide for payment of monies in addition to taxes. He referred to Sections 215, 216 and 217 whereunder interest is payable if advance is not paid in full. He also referred to Section 220(2) of the Income Tax Act wherein interest is levied for failure to comply with a Notice of Demand. He also pointed out that under Section 2(43) of the Income Tax Act, word "tax" had been defined to mean Income Tax chargeable under the provisions of the Act. He points out that under Section 4, the rate which is

payable on tax is the rate specified in the relevant Finance Act. He submitted that the term "tax" as defined in the Income Tax Act is conceptually different from payments required by law to be made because tax is not paid within the prescribed time or at all. He submitted that such amounts cannot be equated with tax.

63. Mr. Setalvad also submitted that there is no ambiguity in the Special Court Act. He submitted that even if there was an ambiguity, a narrow meaning had to be given in order to further the object of the Act. He submitted that paramount object being to ensure repayments to Banks and Financial Institutions, if a wider meaning is given, then that object would be frustrated.

64. Mr. Parekh, Mr. Jaisinghani, Mr. Bharucha, Mr. Mistry and Mr. Tulzapurkar all supported the submissions of the Learned Advocate General and Mr. Setalwad.

65. Mr. Mistry and Mr. Bharucha also pointed out the provisions of Sections 219, 220, 221, 229, 234A, 234B and 234C of the Income Tax Act. They pointed out that all these Sections make a distinction between tax, interest and penalty. They point out that under Section 229 of the Income Tax Act, interest, fine and penalty are to be recovered as tax. They point out that if interest,

penalty and fine were tax, then there would be no need for a Section like Section 229. They point out that Section 229 had to be incorporated because interest, penalty and fine are not tax. They also relied upon the authority of the Supreme Court in the case of **ASSOCIATED CEMENT CO. LTD. v. COMMERCIAL TAX OFFICER** reported in A. I. R. (1981) S. C. Pg. 1887. In this case, the Supreme Court has held that tax, interest and penalty are three different concepts

66. They also relied upon the authority in the case of **BHOR INDUSTRIES LTD. v. COMMISSIONER OF INCOME TAX** reported in 42 I. T. R. Pg. 57. Here again it has been held that interest is different from tax.

67. On the other hand Mr. Bobde, Dr. Balasubramanian, Mr. Chatterjee and Mr. Vyas have submitted that penalty is an additional tax. They relied upon the Judgment of the Supreme Court in the above mentioned two cases, viz, Abraham v. ITO (41 ITR 425) and CIT v. Bhikaji Dadabhai (42 ITR 123). They submitted that these authorities of the Supreme Court are very clear and that they would be binding on this Court.

68. Mr. Vyas also submitted that the Income Tax Act is enacted by drawing authority from Item No. 82 of VIIth Schedule of Constitution of India

where Union of India (Central Government) is empowered to levy and collect `Taxes' on income other than agricultural income. He submitted that Article 270 of Constitution of India deals with taxes to be levied by Central Government and to be shared between State Government and Central Government. He submits that there it is also mentioned that taxes on income will be levied and collected by Central Government and will be shared with State Governments. He submitted that the Income Tax Department levies and collects income tax, interest and penalties as provided for under the Income Tax Act. He submits that all amounts collected, whether collected as tax, interest and/or penalty are shared with State Governments in the ratio decided by the Finance Commission from time to time. He submitted that if `Taxes' would only mean income tax and not penalty and interest levied under the Act, Central Government need not share interest and penalties with State Governments. He submits that the term `taxes' has a wide meaning and because of the wide meaning of the word `Taxes' the Central Government is sharing income tax, interest and penalties levied under Income Tax Act with State Governments. He submits that this shows that the meaning of the term `taxes' is not restricted only to tax but it is

wide enough to cover interest, penalty and other cess levied under Income Tax Act which was enacted in view of the provisions of the Constitution. He submitted that, in the Special Courts Act in Section 11(2)(a), the word used is `Taxes'. He submitted that as the term `taxes' as used in the Constitution includes interest and penalty, so also under Special Courts Act the term `taxes' must be held to include interest and penalty. In other words the term `Taxes' as used in Section 11(2)(a) of the Special Courts Act should have the same meaning as in the Constitution.

69. Dr. Balasubramanian also submitted that penalty, interest and fine are also under the same statute, viz., the Income Tax Act. He submitted that the statute refers to income tax, dividend tax, surcharge, etc. He submitted that as various terms have been used in the statute, they must all be deemed to be tax. He submitted that on this basis even penalty and interest should be construed to be tax. He submitted that whatever is part of process of assessment must be deemed to be tax.

70. I have considered the rival submissions. In my view, the question of interpretation of statute only comes in if there is any ambiguity in the statute. In my view, so far as this question is concerned, the provisions of the Special Courts

Act are very clear. Under the Special Courts Act, what is given priority to is only `revenue, tax, cess and rates' . The term "tax" has been defined under the Income Tax Act itself. Under Section 2(43), "tax" only means in relation to an Assessment Year the income tax chargeable under the provisions of this Act. There cannot be the slightest doubt that neither penalty nor interest is income tax. The authorities of the Supreme Court which are relied upon and referred to by Mr. Bobde do not lay down that for all purposes penalty must be construed to be an additional tax. As is seen in the Provincial Insolvency Act, 1920 and the Presidency-Towns Insolvency Act, 1909, priority is given to all debts of the Government. If the intention was to give priority to all debts, then the Legislature would have used the same term under the Special Courts Act also. Under the Special Court Act, the Legislature has chosen to give priority only to `tax' and nothing else. The language of the Section being clear, it is not open to this Court to try and widen that ambit. In my view, the submission of Dr. Balasubramanian that because all these terms appear in the Income Tax Act, they must all be construed as tax, is a submission which merely needs to be stated to be rejected. The authorities of the Supreme Court and

the various other Courts are clear. The term "tax, penalty" and "interest" are conceptually different. Priority has been given only to tax and nothing else.

71. That brings us to the third question which is as follows:

> " Whether penalty and/or interest can be levied on or charged to Notified Parties after the date of Notification."

72. This question arises because under the Special Courts Act all properties of the Notified parties stands attached. The Notified parties are no longer in a position to deal with the attached properties. Thus even though there is no declaration of bankruptcy, the effect is that Notified parties cant deal with their properties in the manner which they otherwise would have been entitled to deal. Once attachment takes place, those properties can only be disposed off in the manner as directed by this Court. Thus even though there is no insolvency or winding-up, the practical effect of these provisions is very akin to an insolvency or winding-up. For all practical purposes, the hands of a Notified Party are completely tied up. A Noticed party may have assets sufficient to pay off certain liabilities. Yet by reason of the Special Courts Act, he cannot

do so. Thus under various contracts or under various other laws, the Notified Party may be required to do certain things. Yet by reason of the Special Courts Act, he could be precluded from doing those things. This could be better illustrated by way of examples. Under Section 234B of the Income Tax Act, a Notified Party is liable to pay advance tax. If he fails to pay such advance tax or if the tax paid is less than 90% of the assessed tax, he becomes liable to pay interest at 2% per month. Similarly under Section 220(2), if a demand has been made to pay any tax, interest or penalty and ~~the~~ a Notice of Demand is served on the party and if within 30 days of such service, the amount is not paid, interest is leviable at the rate of 1.5% per month. Similarly there are provisions for imposing penalty under the Income Tax Act. Also Banks and Financial Institutions continue to charge interest and in some cases even penal interest on unpaid amounts. A Notified party may have enough assets to pay Advance Tax and/or the amount of the demand notice, yet the Notified party is unable to do so as all his assets are attached and the time for distribution has not yet arisen. Similarly a Notified party having sufficient assets may have opted to pay off some Bank or Financial Institution. This so that

interest would stop running. Yet now the provisions of the Special Courts Act prevent the Notified party from making any payments. It is in this context that the Court raised the question whether penalty and/or interest can be levied or charged on Notified Parties after the date of Notification.

73. The Learned Advocate General relied upon the case of **RAJRATNA NARANBHAI MILLS CO. LTD. v. SALES TAX OFFICER** reported in 71 Co. Cases Pg. 149. He submitted that a Notification under the Special Court Act has the same effects as a winding-up and/or bankruptcy. He submitted that this being the case, the Court must apply the same principles as apply in cases of bankruptcy.

74. Mr. Setalvad supported the Learned Advocate General. He relied upon the case of **BARODA BOARD & PAPER MILLS LTD. v. INCOME TAX OFFICER** reported in 46 Co. Cases Pg. 2511 wherein the Gujarat High Court has held that no penalties could be recovered against a Company after it has been ordered to be wound up. This on the footing that it could not rationally be regarded as an Assessee in Default. Mr. Setalvad points out that the Supreme Court has, in the case of **Rajratna Naranbhai Mills Co. Ltd.** (supra), specifically approved this part of the Judgment.

75. Mr. Setalvad also relied upon the case

of **INCOME TAX OFFICER v. OFFICIAL LIQUIDATOR** reported in 52 Co. Cases Pg. 156. In this case, the Kerala High Court has held that the Income Tax Authorities cannot prove a claim for interest for periods subsequent to a winding-up under Section 220(2) of the Income Tax Act. The Kerala High Court held that the provisions of Section 220(2) should be confined to an assessee who is free to comply with the requirements of that Section. The Kerala High Court has held that where Insolvency Rules have to be applied, then interest cannot be claimed from the Company in liquidation for period subsequent to the winding-up.

76. Mr. Setalvad also draws support for this submission from the observations in the case of **In re SAVIN** reported in 7 Ch. Appeals Pg. 760. He also relied upon passages from Mulla on Law of Insolvency, 3rd Edition, Pg. 354, wherein it has been mentioned that interest accruing after adjudication is not admitted to proof. It has also been set out in Mulla that there are two exceptions to the above rule. The exceptions are where the debt is payable at a future date with interest and/or where there is a surplus. It is mentioned that the theory of bankruptcy is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at that

date.

77. Based on this, Mr. Setalvad submitted that after the date of the Notification, no interest or penalty could be claimed. Mr. Setalvad submitted that this is so because of properties of Notified Parties stand attached and it cannot be said that such persons were at fault.

78. Mr. Parekh has submitted that the statute is drastic. He submitted that all activities of Notified Parties have come to a stand still and there is in effect a legal disability akin to bankruptcy. He submitted that by virtue of attachment of all properties, all profit making activities have come to an end. He submitted that any interpretation which would lead to an unreasonable result must be disregarded. He submitted that the Court must adopt an interpretation which must be reasonable and practical. He submitted that, after the legal disabilities in which the Notified party is placed, if the Court were to still hold that the Notified parties continue to remain liable to pay interest and/or penalty, then it would lead to very unfair results. He submitted that in most cases it would make the Notified party bankrupt or insolvent. He submitted that for this reason, the Court must hold that the Notified Party is not liable to pay any

penalty or interest. Mr. Jaisinghani, Mr. Mistry and Mr. Jethmalani supported these arguments.

79. Mr. Bharucha on the contrary submitted that there is no abrogation of any rights of any parties. He submitted that in the absence of any express provision abrogating any right, the right to claim interest would continue to run. He fairly admitted that the Notified Parties were under a disadvantage. He submitted that however that would not mean that Banks and Financial Institutions could not charge interest. He submitted that it would be for the Court, to keep in mind the fact of the Notified party being under a disadvantage and in each case, depending on its facts, decide whether or not interest/ penalty should be granted.

80. Mr. Bobde submitted that the Special Courts Act does not automatically abrogate or set aside all provisions of all other statues. he submitted the non obstante clause in Sections 11 and 13 of the Special Courts Act will operate only if there is anything contrary to or inconsistent with the provisions of the Special Courts Act. Mr. Bobde submitted that under Section 11 this Court is given powers to give directions and to distribute properties of Notified parties. He submitted that however the powers given to the Tax authorities to assess and levy taxes, interest and/ or penalties

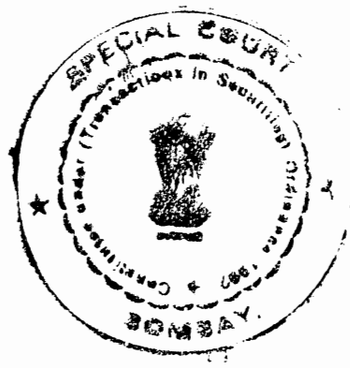
are not abrogated. He submits that the Tax Authorities can still exercise all the powers given to them under the various tax laws. He submits that this Court cannot ~~ever~~ sit in Appeal over the Orders passed or assessments made. He submits that the Appeals would continue to be as per the normal law. He submitted that at the highest this Court could refuse to release monies, if it considers a claim or demand unjust or exorbitant. In support of his submission Mr. Bobde relied upon the case of **S. V. Kondaskar, Official Liquidator of Colaba Land & Mills Co. Ltd v/s V. M. Deshpande, I. T. Officer** reported in 83 I. T. R. Pg. 685. In this case the Supreme Court held that the I. T. Officer was entitled to commence or continue assessment or re-assessment proceedings in respect of a Company ordered to be wound up without obtaining leave under Section 446(1) of the Companies Act, 1956. The Supreme Court held that the liquidation Court would have full powers to scrutinise the claim of the revenue after the income-tax has been determined and its payment demanded from the Liquidator. The Supreme Court held that it would be open to the liquidation Court to then decide how far under the law the amount of income-tax determined by the department should be accepted as a lawful liability on the funds of the Company in

liquidation. The Supreme Court held that at that stage the winding up Court can fully safe-guard the interests of the Company and its creditors.

81. Dr. Balasubramanian submitted that the Notification did not make Notified Parties physically extinct. He submitted that the Notified Party continued to be an assessee and that the Special Courts Act made no change to the Tax Laws. He submitted that by virtue of the Special Courts Act, no exemption was granted to the Notified party. He submitted that a Notified party continued to remain bound by the provisions of the Income Tax Act. He submitted that if a contrary view was taken, then there would be exercise of discretion in favour of Notified/guilty parties which discretion would not exist in favour of an ordinary/good citizen of the country.

82. Dr. Balasubramanian also submitted that by virtue of Sections 2 and 11 of the Special Courts Act, in effect a Notified Party was put into a civil death. He submitted that the Notified party had an absolute disability. He submitted that the Custodian became a Representative Assessee on behalf of the Notified Parties. He submitted that now it was the duty and the obligation of the Custodian to file returns and pay taxes.

83. At this stage Mr. Bobade interrupted and



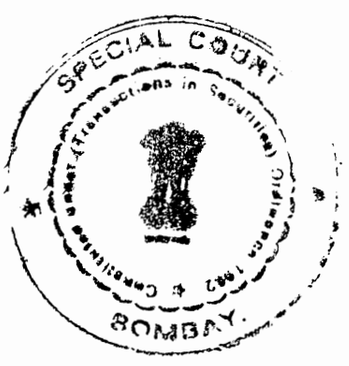
informed Court that these must not be deemed to be arguments on behalf of the Income Tax Department. One Mr. K. V. M. Pai, Commissioner of Income Tax, II Circle also asked Mr. Bobde to inform Court that Dr. Balasubramaniam was not instructed by the Tax Department to make any such submissions on their behalf. Dr. Balasubramanian then stated that he was merely assisting the Court. In my view this last submission of Dr. Balasubramanian i.e. that the Custodian is a Representative Assessee, merely needs to be stated to be rejected. All that happened is that the properties stand attached under the provisions of the Special Courts Act. There is no vesting of properties in the Custodian. The Custodian is neither an agent nor a guardian nor a manager nor an administrator nor a trustee of the Notified parties. The Custodian does not become the owner of the property nor does he step into the shoes of a Notified party. The Custodian is merely an Officer of this Court and nothing more. He has to deal with the property as per the directions of the Court.

84. Mr. Tulzapurkar submitted that the Special Court Act does not deal with substantial rights or obligations of any party. He submitted that the Special Courts Act does not confer any substantive rights nor does it take away or

discharge obligations and/or liabilities. He submitted that the Special Courts Act merely secures properties of Notified Parties from further alienation so that they would be available for distribution to creditors. He submitted that the Special Courts Act merely lays down a manner of distribution. He submitted that in laying down the manner of distribution, some artificial priorities had been created.

85. Mr. Tulzapurkar submitted that the Special Courts Act is not inconsistent with the General Law. He submitted that the only provision which is inconsistent with General Law was the creation of the priority. He submitted that interest forms an integral part of contractual obligations of parties. He submitted that none of the contractual obligations have been discharged by the Special Courts Act. He drew the attention of this Court to Section 4, of the Special Courts Act, wherein the Custodian could cancel any contract entered into fraudulently or with a view to defeat the provisions of this Act. He submitted that this makes it clear that all contracts, unless canceled by the Custodian under Section 4, remain binding and in force even against Notified Parties.

86. Mr. Tulzapurkar submitted that a pending contract could be discharged only under the



Doctrine of Impossibility of Performance. He submitted that the enactment of the Special Courts Act has not resulted in impossibility of performance, such as to free the Notified Party from his obligation to perform a contract as a whole or to perform his obligation as regarding payment of interest. Mr. Tulzapurkar submitted that the only disability contemplated by Law is under Section 56 of the Contract Act. He submitted that the Special Courts Act does not frustrate any contracts. Mr. Tulzapurkar submitted that the effect of frustration under Section 56 would be that the other party would also stand discharged of the contract. He submitted that almost all the Notified Parties have in fact approached this Court for fulfillment of contracts by way of Applications for right shares, by way of payment of installments for purchase of properties, for permission to complete agreements to sell, etc. He submitted that this Court has in fact granted those Applications and permitted performance of those contracts. He submitted that so long as the contract subsists, the obligation to pay interest and/or penalty does not stand frustrated.

87. Mr. Tulzapurkar submitted that merely because performance becomes more onerous, it does not lead to a discharge of the contract on the

ground of impossibility. He pointed out that under Section 537 of the Companies Act, the Official Liquidator could disclaim onerous contracts. He submitted that there was no such provision in the Special Courts Act.

88. In support of his contention that there was no frustration, Mr. Tulzapurkar relied upon the authority of the Supreme Court in the case of **ALOPI PARSHAD & SONS LTD. v. UNION OF INDIA** reported in A. I. R. (1960) S. C. Pg. 588 as well as the authority of the Supreme Court in the case of **SETH MOHAN LAL v. GRAIN CHAMBERS LTD.** reported in A. I. R. (1968) Pg. 772. He also relied upon the passage in Pollock & Mulla's Indian Contract & Specific Relief Act on Pg. 622, 11th Edn. which reads as follows:

> "More Onerous - Narrow Limits of Doctrine. - Doctrine of frustration must be applied within very narrow limits (Tsakirogolou & Co. Ltd. v. Noblee Thorl (1961) 2 WLR 633: (1961) 2 All.E.R. 179; (1962) AC 93). Frustration is not to be lightly held to have occurred (Ibid; (1959) 2 WLR 179; David Contractors Ltd. v. Fareham Urban District Council (1956) AC 696). It is useful within its proper limits (Ibid; Twenteshe Overseas Trading Co. Ltd. v. Uganda Sugar Factory (1945) APC 144). Disappointed expectations do not lead to frustration (David Contractors Ltd. v. Fareham Urban District Council, 1956 AC 696; (1956) 3 WLRl 37; Kunjukrishnan v. State of Kerala AIR 1983 Kerala 73)."

89. Mr. Tulzapurkar also relied upon an

unreported Judgment of our High Court dated 22nd June 1987 in Misc. Petition No. 40 of 1984 in A. S. First Appeal No. 245 of 1979 (**STATE BANK OF INDIA v. EDWARD TEXTILE MILLS LTD.**). In this case, the question was whether under the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974, the Commissioner for Payment was bound to pay a claim along with interest thereon. The Court held that the liability which is incurred is a liability to pay the amount advanced together with interest thereon. The Court held that the liability would include liability to pay interest until such time as the loan is repaid in full.

90. Relying upon this Judgment, Mr. Tulzapurkar submitted that the liabilities would necessarily include the liabilities to pay the sum with interest. He submitted that as the liability is to pay the principal amount along with interest, the Court should not interfere and/or abrogate substantive rights of a party particularly when the statute does not either by express or necessary inference abrogate such rights.

91. In support of this last submission, Mr. Tulzapurkar relied upon the case of **CHINA VENKATARAJU v. PULAVARTHI LAKSHMANASWAMI** reported in A. I. R. (1931) Madras Pg. 729.

92. Mr. Tulzapurkar also referred to the

provisions of the Insolvency Act and the Companies Act. He pointed out that under Section 49 of the Presidency-Towns Insolvency Act, 1909 as well as under Section 61(6) of the Provincial Insolvency Act, 1920, even in cases of insolvency, interest is payable. He submitted that a Notified Party should not be put on a higher footing.

93. Mr. Tulzapurkar relied upon the authority in the case of **In the matter of DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO. LTD.** reported in A. I. R. (1934) All. Pg. 189 wherein it was held that on a winding-up of a Company, a creditor should be given interest before paying preferential share-holders. The Court also held that interest need not be granted at the contractual rate.

94. Mr. Tulzapurkar also relied upon the case of **SABAPATHI RAO v. SABAPATHI PRESS CO. LTD.** reported in (1931) Co. Cases Pg. 102 wherein it has been held that if there is a surplus, then the appropriation should be first towards interest and then towards principal.

95. Mr. Tulzapurkar submitted that there was no disability. He submitted that in many cases, the Notified Parties have no monies to repay the amounts due to Banks and Financial Institutions. He submitted that in any case they would not have been in a position to repay the debt. He submitted

that merely because a person was not in a position to repay his debts, would not be a ground or disability which would prevent interest from running. He submitted that this position did not change merely because a person was Notified.

96. Mr. Tulzapurkar next submitted that even assuming that there was a disability, it was a self-induced disability. He submitted that the Notified Party could not by reason of this self-induced disability claim any benefit or discharge. He submitted that if a Notified Party by reason of a self-induced disability is granted discharge, then it would work prejudice against an innocent third party whose claims were to be recovered against a Notified Party.

97. In support of this contention, Mr. Tulzapurkar relied upon the authority in the case of **D. R. MEHTA v. TIN PLATE DEALERS ASSOCIATION LTD.** reported in A. I. R. (1965) Madras Pg. 400. He also relied upon certain passages to this effect in Mulla and Chitty on Contract and in the Law of Contract by Tritel. Mr. Tulzapurkar submitted that the Court should not hold that Notified Parties are not liable to pay interest or penalty. He submitted that the interest and/or penalty would be leviable, however the Court could, in individual cases where the Notified was not at fault, decide

that it will not award interest and/or penalty on the amounts due.

98. I have considered the rival submissions. There is no doubt that a Notification places a Notified party at a disadvantage. He is no longer able to deal with his property. All profit making activities have come to an end. However the law is clear. No rights can be abrogated unless the statute does so expressly or by necessary implication. At the same time law cant be such that it prevents a party or puts restraint on him but does not absolve him from adverse consequences of such restraint. In my view, the Court will have to make a distinction between different types of cases. The following are just by way of example. They are not exhaustive. Each case would have to be decided on its own merit. Just by reason of Notification interest and/or penalty would not automatically stop running under contracts. However if the Court finds that a Notified party would have been able to pay off his debt, but could not do so only because of the Notification, the Court can at that stage absolve him from the liability to pay interest or reduce the interest. In such cases Court would not permit penalty to be levied. However if the Notified party, did not have assets enough to meet his liability, then merely because

he is Notified will not absolve him from liability to pay interest and/or penalty. This because even if he had not been Notified he would still have been default and been liable to pay interest and/or penalty. In this case the Notification has made no difference. Another type of case would be where a Notified Party is prevented, by reason of Notification, from doing things which are required to be done by him under other Acts or contracts. In such cases, if the provisions of the Special Courts Act prevents a Notified Party from doing that thing, then by reason of this legal disability, no penalty or interest can be levied on that party. Thus no penalty or interest can be imposed for non-fulfillment of an act which a Notified Party is prevented from doing by reason of the Special Court Act. In such cases even though the provisions of some other Act or contract lay down consequences for non-performance, the provisions of the Special Courts Act will prevail. This is because in such cases there would be a conflict between the provisions of the Special Courts Act and that other law and/or contract. In cases of such conflict, the provisions of the Special Court Act must prevail. To take an example, under Section 234B of the Income Tax Act, every assessee is liable to pay Advance Tax. All

parties were Notified between June 1992 to August 1992. All of them would be liable to Advance Taxes for the Financial Year ending March 1993 and for the subsequent years. However as seen earlier, taxes only upto Assessment Year 1992-93 can be paid in priority. These would have to rank as ordinary debts under Section 11(2)(c). This therefore can only be released after the entire distribution has taken place. Even if the Notified Party were to make an Application to this Court to pay the Advance Tax, the Court would refuse it. Thus monies for payment of Advance Tax have not been released. Thus a Notified Party has been prevented from paying Advance Tax. Thus, under the Special Courts Act, there is a legal disability to pay Advance Tax. Yet under the Income Tax Act there is a compulsion to pay Advance Tax. There is a conflict between the provisions of the Special Courts Act and the Income Tax Act. The provisions of the Special Courts Act must prevail. Under the Income Tax Act if Advance tax is not paid, for such non-payment interest can be levied. This obviously on the footing that the Assessee is in default. However a Notified party, has been prevented by law from paying Advance Tax. He is not a defaulting party. He has not paid Advance Tax because of legal restraint on him. The law has prevented him from

paying Advance Tax. In my view, in such cases i.e. where there is a conflict between the provisions of the Special Courts Act and some other Act/contract, the contrary provision must necessarily give way. If there is this legal disability, then there is no the question of the Notified Party being foisted with the liability to pay interest and/or penalty. Similarly under Section 220(2) of the Income Tax Act, a Demand Notice may have been served on a party. That Demand Notice may be for tax, interest and/or penalty. Under the Income Tax Law, the sum specified in the Notice must be paid within 30 days. Under the Income Tax Act, if the same is not paid within 30 days, the assessee is liable to pay interest at 1.5% per month. Here again by reason of the legal disability, imposed by the Special Courts Act, the Notified Party is not in a position to pay the amounts demand by that Demand Notice. If that is so, then the Notified Party cannot be said to be in default. Then there is no question of the Notified Party becoming liable to pay interest under Section 220(2). The same would apply in respect of penalty under the Income Tax Act. Thus in cases where, by reason of the legal disability, a Notified party is prevented from doing something there can be no levy of interest or penalty on the Notified party for not doing that

thing. However where the Special Courts Act does not prevent a party from doing something required to done under some other Act/contract and the Notified party does not perform his obligation he will be liable to pay interest and/or penalty. Just by way of example under the Income Tax Act penalty can be levied for not filing a return; penalty can be levied for failure to produce evidence to support the return of income. These are not matters where any disability is imposed on a Notified party by the Special Courts Act. There is nothing in the Special Courts Act which prevents a Notified party from filing his returns within time. There is nothing in the Special Courts Act which prevents a party from producing evidence in support of his return. If a Notified party has failed to file his return in time and/or failed to produce evidence in support his return, he does so at his own peril. In this case, there is no conflict between the Special Courts Act and the Income Tax Act. If there is no conflict, the provisions of the Income Tax Act will continue to apply. Of course in such cases, the Court may not release amounts for payment of interest/penalty or only release it after discharge of other liabilities. But merely because this Court may not release amounts does not mean that interest/ penalty cannot

be imposed. As stated above these are mere examples. In each case, the Court would have to examine whether there is a legal disability by reason of the Special Courts Act. If the Special Courts Act prevents a Notified Party from doing a certain thing, then there can be no interest/penalty. If on the other hand, the Special Courts Act has not prevented or disabled a person nor abrogated any right, then the provisions of other Laws/contracts will continue to apply.

99. It must be mentioned that Mr. Parekh had submitted that after distribution takes place, even if this Court does not release amounts towards interest/penalty, for the balance a Notified party may be sued in normal Civil Courts. He submits that if this Court holds that interest/penalty continue to apply then the normal Civil Court would then be bound to award interest/penalty as per the contract. He submitted that this would result in a Notified Party becoming insolvent. He submitted that this would be most inequitable. In my view, there is no reason for presuming that normal Civil Courts would not take into consider the fact that there was a legal disability. If a party had sufficient assets to pay, but could not pay/perform an obligation only by reason of Notification, I am quite sure not only this Court but the normal Civil

Courts will also take that into consideration and not grant interest or penalty or reduce the interest. It must not be forgotten that this Court would have already refused to release monies towards interest/penalty and given its reasons for doing so. This can be no reason for holding otherwise.

100. This answers all question. To this Court it is clear that these are vital questions. These answers vitally affect Banks/Financial Institutions, Revenue and Notified parties. In the not to distant future distribution of the assets of Harshad Mehta group and of Fairgrowth Financial Services Pvt. Ltd. is to take place. It would be advisable that these questions get settled by the Supreme Court. The Court has noticed that in all matters the Custodian, has correctly, been only placing legal positions before this Court and accepting the Judgments of this Court. The Custodian being an Officer of this Court, is taking no contentious attitude. These being important questions I direct the Custodian to file an Appeal in the Supreme Court within time. I also direct the Custodian to appear and make submissions in Appeals, if any, filed by any party. It is clarified that the Custodian is not to merely support this Ruling. The Custodian must canvas such

legal submissions, including what was canvassed before this Court, as his legal adviser deems fit and proper.

101. The Officer on Special Duty to send a copy of this Ruling to the Ministry of Finance and the Department of Legal Affairs, Government of India.

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Date on 5/8/05
No. 85
Examined by Mrs. Dhuri
Compared with Mr. Belosay
Ready on 6/8/05
Delivered on 6/8/05

SPECIAL COURT (Trial of Offences relating to Transactions in Securities) Ordinance, 2001 BOMBAY

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