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IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING TO TRANSACTIONS IN SECURITIES) AT BOMBAY

MISC. PETITION NO. 215 OF 1995

Growmore Research & Assets Management Ltd. .. Petitioners

Vs.

A. K. Menon, Custodian .. Respondent

Mr. S. J. Vazifdar with Mr. A. B. Chinoy and Mr. A. D. Chaugule i/b. M/s. Chaugule & Co. for Petitioners.

Mr. A. M. Setalvad with Mr. J. Chandran i/b. M/s. P. M. & Mithi & Co. for Respondent No. 1.

Mr. A. S. Bobde with Mr. S. G. Mandrekar and Mr. B. M. Chatterjee for Income Tax on Notice.

Mr. N. H. Seervai with Mr. Vijay Garg i/b. M/s. Malvi Ranchoddas & Co. for T. B. Ruia.

CORAM : S. N. VARIAVA J.
JUDGE, SPECIAL COURT

12th February 1996.

ORAL ORDER :

1. On my board today there are approximately 23 Applications taken out by the various members, firms, Companies, entities of the Harshad Mehta Group. By these they pray for release of monies for payment of fees of various Advocates. Apart from this there are two other Applications, by Mr. Hiten Dalal (another Notified Party) for release of fees. In the 23 Applications of the Harshad Mehta Group release is sought of approximately Rs. 1.50 crores by

way of Advocates fees. During the course of arguments, Mr. Vazifdar very fairly stated that a number of other Applications are also likely to be filed for release of Advocates fees. He fairly pointed out, on a question from Court, that release of a further sum of approximately Rs. 2 crores is going to be asked for. Thus, release is sought and will be sought of app. Rs. 3.5 crores by the Harshad Mehta Group. This only towards Advocates fees for work done by various Advocates during the last 3 years.

2. Mr. Vazifdar has submitted that these Petitions raise three questions:-

(1) Whether this Court has power or jurisdiction to raise from attachment a part of the property/assets of a Notified Party for the purposes of payment of legal expenses.

(2) If there is such a power, whether it should be exercised for such a purpose. and

(3) If the Court has power and is willing to exercise the power then in what manner it can or should exercise such power.

3. By this Order only these questions are being answered. The facts of each case, including this case, are not being looked into except by way of examples. Each Petition including this Petition will then have to be separately dealt with. It must also be mentioned that by these Petitions release is sought for Advocates fees. However, the Court cannot forget or ignore the fact that on the same principles release may be sought for many other

purposes.

4. Mr. Vazifdar submitted, on the first question, that this Court has power to release monies for such purposes. He submitted that this Court derives this power under Sections 3(4), 9A(1) and Section 11(1) of the Special Court (Trial of Offences Relating to Transactions in Securities) Act (hereinafter, for the sake of brevity, referred to as the said Act). For the sake of convenience these Sections are reproduced herein.

> "3(4). The property attached under sub-section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.
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> 9A(1). On and from the commencement of the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Ordinance, 1994, the Special Court shall exercise all such jurisdiction, powers and authority as were exercisable, immediately before such commencement, by any civil court in relation to any matter or claim--
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> (a) relating to any property standing attached under sub-section (3) of Section3;
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> (b) arising out of transactions in Securities entered into after the 1st day

of April, 1991 and on or before the 6th day of June, 1992, in which a person notified under sub-section (2) of Section 3 is involved as a party, broker, intermediary or in any other manner.

11. Discharge of liabilities.- (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Code may make such order as it may deem fit directing the Custodian for the disposal of the property under attachment.

One other Section which would also be relevant would be Section 11(2). This reads as follows:-

11(2). The following liabilities shall be paid or discharged in full, as far as may be, in the order as under:-

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

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

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

5. Mr. Vazifdar relied upon a Judgement dated 24th of July 1992 in Writ Petition No. 1547 of 1992. By this Petition Mr. Hitesh Mehta, one of the brothers of Mr. Harshad Mehta, had challenged the constitutional validity of the said Act and the Notification dated 8th June 1992 issued by the Custodian by which Mr. Hitesh Mehta was Notified. The Division Bench of the Bombay High Court whilst considering Section 3(4) has held that the power of the Special Court to give directions to the Custodian in respect of any attached property must necessarily bring within its ambit, the power to order the release of such property or any part of it from attachment. The Division Bench has held that if a Notified Party approaches the Special Court and makes out, for example, a case that the property which is attached or a portion of it has no nexus of any sort with the illegal dealings in securities during the relevant period and/or that there are no claims or liabilities which have to be satisfied by attachment and sale of such property, the Special Court would have the power to direct the Custodian to release such property from attachment. The Division Bench has held that the Special Court could, after looking at all the relevant circumstances, also come to the conclusion that the entire property should be released from attachment. The Division

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Bench has held that the Special Court could also direct the Custodian to de-notify the name of the Notified person. It must also be mentioned that the Division Bench has held that the Notification and Attachments under Sections 3(2) and 3(3) are designed to prevent the property in question being misappropriated. The Division Bench has held that the purpose is to make the attached assets available for the discharge of liabilities which may ultimately be fastened on to the persons concerned. The Division Bench has held that it is always open to an aggrieved person to approach the Special Court in order to satisfy it that the attachments levied is far in excess of the ultimate liability which that person may be required to discharge.

6. Mr. Vazifdar submitted that the Division Bench of the Bombay High Court has held that this Court has power to release from attachment, attached assets of a Notified Party. However, to be noted that to do this the Court has to be satisfied that 1) the attached property has no nexus of any sort with any illegal dealings in securities during the relevant period and, 2) that there are no claims or liabilities which have to be satisfied.

7. Mr. Vazifdar submitted that this Judgement is in consonance with the scheme of the Act. He submitted that the Custodian acts under the directions of the Court and gets his power from the Court. He points out that the position of the Custodian under the said Act is different from the position of the Custodian under the Sick Industries Textile

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Undertakings Act where the power is vested absolutely in the Custodian. He submitted that under the said Act it is the Special Court which has power including the power of giving directions and releasing attached assets, if thought fit.

8. In support of this Mr. Vazifdar relied upon an Order dated 19th April 1995 in Misc. Application No. 585 of 1994 wherein this Court has held that the Custodian is not a representative assessee.

9. Mr. Vazifdar submitted that attached property cannot remain in limbo. He submitted that if it were to be argued that this Court has no power to release attached properties it would lead to an absurd consequence. He submitted that in that case this Court could never preserve, protect and/or augment the attached property. He submitted that the Legislature could never have intended such a thing.

10. Mr. Vazifdar then relied upon a Ruling of this Court dated 20th February 1995 on certain questions of law raised by this Court. The questions of law were as follows:-

> "1. Whether the priority created by Section 11 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 is only in respect of amounts due prior to the date of Notification and/or whether the priority would also apply to amounts due after the date of the Notification.

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

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

11. Mr. Vazifdar referred to paragraphs 41 to 49 of this Order and submitted that the ratio laid down therein is that the liabilities which are to be paid are those which have arisen during the period that the Court called "the year of the Scam" and upto the date of Notification. Mr. Vazifdar submitted that Advocates fees which are claimed in all these Petitions are not liabilities or expenses for the year of the Scam or upto the date of the Notification. He submitted that for that reason these claims would not fall under Section 11(2).

12. Mr. Vazifdar submitted that Section 11(2)(c) would not apply where raising of attachment is sought for the purposes of preserving, protecting and/or augmenting property of the Notified Party. He submitted that if expenses for preservation, protection and/or augmentation of the attached assets were to be covered by Section 11(2) then it would lead to an absurd situation inasmuch as the Court would have no

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power to release any monies for preservation, protection & augmentation of the attached assets.

13. Mr. Vazifdar submitted that prior to the final distribution there would be several expenses which the Court would have to disburse by or on behalf of a Notified Party. He submitted that if such expenses are for the purposes of preservation, protection & augmentation of the attached assets, then they could not be covered by Section 11(2)(c). He submitted that such expenses would fall under the powers of the Court under Sections 3(4) and 11(1).

14. Mr. Vazifdar further submitted that in fact this Court has been exercising such a power and releasing expenses for the purposes of preservation, protection and/or augmentation of attached assets. As and by way of examples, he showed to the Court the following Orders:-

(a) Order dated 3rd August 1993 in Misc. Application No. 118 of 1993.

(b) Order dated 3rd August 1993 in Misc. Application No. 120 of 1993.

(c) Order dated 3rd February 1994 in Misc. Application No. 270 of 1993, and

(d) Order dated 15th September 1995 in Misc. Application No. 350 of 1995.

15. Mr. Vazifdar pointed out that by all these Orders monies have been released for remuneration of auditors, purchase of computers, purchase of furnitures, payment of stamp duty for registration of shares. He also reminded the

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Court that in a very large number of matters the Court has released monies for payment of Call Monies and/or for purchase of Rights Shares. He submitted that the Court has been doing all this with the purpose of ensuring that assets of Notified Parties are preserved, protected and/or augmented. He submitted that this is for the purpose of ensuring that on the date of distribution the attached assets are available for the benefit of the general bodies of creditors.

16. Mr. Vazifdar submitted that the Advocates fees fall in the category of monies required for the purposes of preservation, protection and/or augmentation of the attached assets. He submits that if monies are not released towards the Advocates fees then there would be no proper legal representation and/or investigation which could result in the preservation or collection of attached assets. He further submitted that under Section 9-A(1)(a) of the said Act this Court has the same power, whilst dealing with attached assets, as a Civil Court had before the amendment of the said Act. He submitted that so far as Civil Courts are concerned, there could have been an Attachment before Judgement under Order 38 Rule 5, or an Attachment in Execution under Order 21 of the Code of Civil Procedure. He submitted that the Civil Courts always have power to release from attachment properties for the purpose of meeting legal expenses. He submitted that genuine legal expenses would not amount to an intention to defeat and/or delay the Decree which is likely

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to be passed or which has been passed. He submitted that it is for this reason that Sections 11(1) of the said Act gives to this Court the power to make such Orders as is deem fit directing disposal of the property under attachment. He submitted that Section 11(1) is different and distinct from Section 11(2) which provides for discharge of the liabilities set out therein. He submitted that the said Act therefore provides for two contingencies or stages. One being under Sections 3(4) and 11(1) i.e prior to the actual distribution and the second being under Section 11(2) i.e. the final distribution. He submitted that the provisions of the said Act make it very clear that even prior to the distribution this Court can give directions and Orders even disposing of property under attachment. He submitted that these provisions therefore clearly give a power to this Court to release monies from attached assets for the purposes of preservation, protection and/or augmentation of the attached assets including in appropriate cases the fees of Advocates.

17. On the second question, Mr. Vazifdar submitted that if this power is there it should be exercised for such a purpose. He submitted that this should be done for three reasons viz:

(1) legal representation helps in preserving, protecting and/or augmenting the attached assets. In this behalf, he drew the attention of this Court to an Judgment dated 18th September 1995 passed in Misc. Application No. 221 of 1993. In this Judgement, this Court has held as follows:-

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"128. In a Judgment dated 13th March 1995 in Special Court Suit No. 13 of 1994, this Court has observed as follows:

> "52.....The Court has been noticing that there is a growing tendency not to honor debts/commitments. The tendency nowadays is to let the creditor go to Court. The tendency is to file some defense even when there is none. In many cases the defense taken is absolutely false. The whole intention is to use laws delays. Thereafter the attempt is to delay hearings as long as possible. It is only when it is found that it is not possible to delay any longer that, in most cases consent terms or a decree on admission are taken. In some cases even at the stage of trial the false defense is persisted in with the intention of whiling away further time in Appeals. In my view this is because parties know that litigation takes a number of years. In my view this is because parties know that ultimately the Courts will only award nominal interest and costs. Also today litigation has become prohibitively

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expansive. Many parties with genuine cases cant afford to litigate. Just how expansive litigation is, is best indicated by this case. Because litigation is so expansive and takes so long, many parties with genuine claims are forced to settle/compromise. They are forced to give up, in many cases, a substantial part of their genuine claim. Also even if a party ultimately succeeds he does not in reality get his entire claim. The amount actually spent by him in litigating is never awarded. The successful party is thus out of pocket. Nowadays this is in a sizable amount. This hurts the genuine party. The dishonest party does not mind. He is sitting on the property or money, using it and in most cases making money out of it. This further encourages parties to be dishonest. In my view it is time that Courts actively curbed this tendency to file false cases or to take up false defenses merely with a view to delay payment or deliver up property. In my view if a Court is convinced that an absolutely false case has been filed or

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an absolutely false defense has been taken up, with a view to use laws delays, than the Courts should now grant a prohibitively high rate of interest. In my view the Courts must now grant actual costs incurred in conducting the litigation. In my view a dishonest litigant must be made to bear not just his own costs but also the entire costs of the other party. In other words the litigation must be at the costs and consequences of the dishonest litigant. In my view this is absolutely necessary, in present times, to bring home the message that using laws delays is not going to be remunerative. In my view it is time the message is brought home to dishonest litigants that using laws delays is going to be an expansive proposition. Of course I hasten to add that this drastic step must be taken and used very cautiously, sparingly and only in cases where the Court is certain that there is an absolutely false case or defense. To this Court it is clear that merely because a Court does not accept a case or defense is no ground for granting

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high interest or costs. It must also be mentioned that the Special Courts Act provides that the Civil Procedure Code does not apply. In my view, the facts set out hereafter, show that this is a fit case where actual costs must be awarded. It may only be mentioned that this Court has framed Regulations for conduct of trials before this Court. In these Regulations the Court has clarified that costs will include actual costs."

129.....The Custodian has had to fight this litigation at public costs in order to discharge the public function cast on him. The Custodian can hardly afford to bear such costs on a regular basis. The Notified party has also had to bear costs. This ultimately will come out of attached assets. Thus a large amount, which should be used for distribution to genuine creditors may have to be used for paying lawyers fees. The Court has not yet finally decided whether lawyers fees can be released in priority. That question is pending. However prima facie it does appear that the Custodian will have no evidence. The only persons who can contest and bring all facts before the Court are the Notified parties. They need to be properly represented. This costs monies. Court may

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therefore have to make a distinction between cases where Notified parties are litigating or defending in their own interest and cases where attached assets are being sought to be recovered. Even in cases where the assets are being augmented for distribution purposes it may be difficult to release monies towards Advocates fees as this would deprive creditors. In my view one way out would be that in cases where it is found that a genuine claim has been falsely resisted, the other side must be made to pay actual costs. This could then be handed over to Advocates. This would also be a deterrent to dishonest defenses being adopted."

18. Mr. Vazifdar also relied upon the Judgement dated 13th March 1995 in Suit No. 13 of 1994. The relevant portion of that Judgment has already been reproduced in the Judgement dated 18th September 1995 in Misc. Application No. 221 of 1993. He submitted that this Court has noted that dishonest defences and/or claims may be taken up or made. He submitted that this Court has already prima facie held that the Custodian would have no evidence. He submitted that this Court has noted that it is only Notified persons who can contest and bring all facts before the Court. He submitted that this Court has therefore left open the question whether amounts could be released for paying Advocate fees. He

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submitted that if Advocates fees are not released then a Notified Party who may have a genuine case will not be able to contest or defend litigation. He submitted that in all cases the Court would not or may not award cost to Notified Parties. He submitted that unless the Notified Party was in a position to have legal representation and contest litigation, dishonest parties would file frivolous litigation or falsely defend against Notified Parties.

(2). Mr. Vazifdar submitted that this Court has already in an Order dated 26th July 1993 in Misc. Application No. 53 of 1993 held that all properties belonging to a Notified Party whether owned on the date of the Notification or obtained subsequent to the date of the Notification stand attached. He submitted that this shows that this Court has already held that even if a Notified Party acquires or earns subsequent to the Notification, those earnings or acquisitions would stand attached. He submitted that therefore a Notified Party has no monies or assets which can be used for the purposes of paying Advocates fees. He submitted that there is thus no way by which a Notified Party could get legal assistance unless and until the fees are released by the Court.

(3). Mr. Vazifdar submitted that even in general principles and on equitable grounds a party must always be permitted to take legal assistance of his choice. He submitted that merely because the Legislature have levied a statutory attachment does not mean that the right of a party

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to have legal assistance of his choice has been done away with. He submitted that the attachment is only for the purposes of ensuring that payment is made in the priorities laid down under Section 11(2). He submitted that the right of the Notified Party to have legal assistance of his choice cannot and is not done away with as the Notified Party continues to be the owner of the property. He submitted that by the said Act the Notified Party is not divested of ownership of the property and therefore so long as the expenses are not with intention of delaying or defeating a just claim the expenses must be released. He submitted that these are genuine expenses which are on par with the Auditors fees, purchase of computers and furniture, release of monies for purchase of Rights Shares or payment of Call Monies or for payment of stamp duty etc.

19. Mr. Vazifdar submitted that most Civil litigation is necessarily for the purposes of preserving, protecting and/or augmenting the attached assets. He submitted that this would also be so in criminal matters. He submitted that even in criminal matters the right of the Notified party to have legal representation of his choice is not done away with. He submitted that the Notified Parties must be presumed to be innocent until they are proved guilty beyond a reasonable doubt. He submitted that in criminal matters the Notified Party must be held entitled as of right to a legal representation of his choice. He submitted that this is because a Notified Party is not an indigent person or a

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pauper.

20. In this behalf, Mr. Vazifdar relied upon the observation of the Supreme Court in the case of Gurbaksh Singh Sibbia etc. v/s. State of Punjab reported in (1980) Criminal L. J. Pg. 1125 wherein the Supreme Court has observed as follows:-

> " It was observed that the principle to be deduced from the various sections in the Cr. P. C. was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence. "

21. Mr. Vazifdar submitted that these observations of the Supreme Court are in respect of bail, but that they also apply to fees of Advocates. He submitted that undoubtedly in criminal cases the Notified person wants to establish his innocence and remain out of jail. He submitted that just as a Notified Party can defend himself better, if he enjoys freedom, similarly a Notified Party would be in a position to preserve, protect and/or augment his property better, if he was enjoying freedom. He submitted that if in criminal

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mattes the Notified Party is not properly represented then he may be convicted in which case his civil cases would also get affected. He submitted that for this reason even in criminal matters Advocates fees should be released for the purposes of obtaining proper legal representation of his choice. He submitted that a right to legal representation is fundamental to a person's liberty and property.

22. On the 3rd question Mr. Vazifdar submitted that as a normal rule this Court ought to permit every Notified Person the opportunity to avail of legal representation of his own choice irrespective of how expensive it may be. He submitted that so long as there is no fraud involved and the Court is satisfied that this is not a manner of siphoning of the attached assets, there is no reason why the normal rule that a person is entitled to legal representation of his choice should not apply to a Notified Party. He submitted that alternatively the Court must, either by itself or through the medium of the Custodian and from case to case, depending on various factors like the stake involved, complexity of the question involved etc, decide what fees are to be released. He submitted that in such a case no hard and fast rule can be framed but the Court would have to decide on the facts and circumstances of each case.

23. Mr. Seervai appearing for Mr. T. B. Ruia fully supported Mr. Vazifdar and submitted that undoubtedly this Court has power. He submitted that if it was to be argued or held that this Court had no such power then the said Act

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would be open to challenge under Articles 14, 19and/ or 21 of the Constitution of India. Mr. Seervai relied upon the cases of The Corporation of Calcutta & Anr. vs. Liberty Cinema reported in A.I.R. (1965) S. C. Pg. 1107 and R. L. Arora vs. State of Uttar Pradesh reported in A.I.R. (1964) S. C. Pg. 1230 and submitted that statute must be interpreted in a manner which would uphold the constitutionality of the statute. He submitted that an interpretation should not be one which would lay open the statute to challenge on grounds of constitutional virus.

24. Mr. Seervai submitted that the Court has in fact been passing such Orders as demonstrated by Mr. Vazifdar. He submitted that it could not even be suggested that the numerous Orders already passed by this Court are bad in law and without jurisdiction. He submitted that recourse to a Court of law is the foundation of a civilised society. He submitted that in all civilised society there is a fundamental right to have proper legal representation of his own choice. Mr. Seervai submitted that undoubtedly the power is a discretionary power. He submitted that unless some elaborate guidelines are laid down by this Court, the Court may have to consider each and every case on its own merit. He submitted that however the discretion would have to be used judicially, fairly, justly and reasonably. He submitted that the main consideration in each matter should be whether the case or defence is genuine or not.

25. Mr. Seervai submitted that the Court should not

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decide the questions involved on the basis of the amounts likely to be involved. He submitted that the questions have to be decided as questions of law irrespective of what the consequences may or may not be. He submitted that merely because large amounts may be involved would be no ground by itself to refuse to hold that the Court has power. Mr. Seervai submitted that grave civil liabilities attached to a Notified Party. He submitted that in many matters complicated questions of law are involved. He submitted that the litigation can affect the Notified Party's right of liberty, business and/or livelihood. He submitted that it is therefore absolutely necessary for a Notified Party to be properly represented. He submitted that proper legal representation may involve large amounts having to be spent in having the complicated questions of law or facts answered correctly and favourably.

26. Mr. Seervai submitted that even in criminal matters the fundamental right to legal representation remains. He submitted that these rights are protected by Article 21 of the Constitution of India and legal fees should be released in order to enable the Notified Parties to defend themselves in criminal matters.

27. Mr. Seervai next submitted that even in cases where a Notified Party does not have enough assets to meet his liabilities such a situation cannot be relevant on the question as to whether or not the Court has power. He submitted that this fact can only be relevant on the question

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of amounts which the Court may ultimately release. He submitted that the mere fact that a Notified Party does not have enough assets to meet his liabilities, cannot be a ground for refusing to release legal fees or expenses to a Notified Party.

28. Mr. Rao appearing on behalf of Hiten Dalal adopted the arguments of Mr. Vazifdar and Mr. Seervai. He basically made the same submissions as made by Mr. Vazifdar and Mr. Seervai. His submissions were to the effect that a Notified Party has a right to legal representation of his choice and a right to defend himself. He submitted that a Notified Party continues to remain innocent until he is proved guilty. He submitted that the Notified Party has been forced to come to Court by virtue of the enactment of the said Act. He submitted that the present system prevailing in this country does not provide for any alternate method by which a Notified Party can get legal representation or assistance. He submitted that many of the matters are of such complexity that it is impossible for a Notified Party to defend himself without proper legal assistance.

29. Mr. Setalvad on behalf of the Custodian submitted that the present Applications, by the Harshad Mehta group, are not bonafide. He submitted that all the Applications by the Harshad Mehta Group are filed in August 1995. He submitted that these are for release of Advocates fees for the last 3 years. He submitted that therefore the Notified Party have already incurred these expenses on a liberal scale

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for the last several years. As and by way of example, he points out that in this very matter release is sought of a sum of Rs. 96,000/- as and by way of fees of Advocate Mr. Mistry. He points out that this is in respect of some work which he had done earlier. He points out that the sum of Rs. 90,000/- is in respect of the a Memo dated 14th April 1995 in respect of a matter where the last date of hearing was on 1st September 1993. He submits that similarly release is sought of amount of Rs. 5250/- in respect of a Memo dated 15th May 1995 for settling Grounds of Appeal on 30th October 1993. Mr. Setalvad submits that these are not cases where a party has first come to Court and asked for release prior to the event. He submits that, without permission of the Court or even intimation to the Court, the parties have chosen their own Counsel, incurred excessive expenses by way of legal fees and then come after 3 years for release of those fees.

30. Mr. Setalvad refers, by way of example, to para 3 of Misc. Petition No. 215 of 1995 wherein the following has been set out:-

> "3. ... The Petitioner states that earlier it had submitted to this Hon'ble Court an application for release of funds for meeting several expenses. The Petitioner submits that the same was not pressed only because a clear picture of its assets and liabilities had not emerged till then and it was keen and desirous to establish to this Hon'ble Court that it has sufficient assets to meet its

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liabilities."

Mr. Setalvad submits that even today there is no clear picture of the assets and liabilities. He submits that today in fact it appears that the liabilities are far in excess of assets. Mr. Setalvad refers to paragraph 4 of this Application wherein the Petitioners have made averments in respect of the demands of Income Tax Department. Mr. Setalvad submits that on the basis of the Ruling given by this Court on 20th February 1995 on the question of law raised by this Court, the demands by the Income Tax Department are in the region of Rs. 2114 crores. He points out that the claim for Rs. 2114 crores is only for taxes excluding penalty and interest. He submits that on the Ruling given by this Court this sum of Rs. 2114 crores has to be paid in priority under Section 11(2)(a) of the said Act. He points out that that the other claims and demand of the Income Tax Department are also to be paid. He submits that Court has already held that those are payable but that those would be payable under Section 11(2)(c) of the said Act. He points out that the Income Tax Department has claimed another sum of app. Rs. 3000 crores towards interest and penalty. Mr Setalvad submitted that even if the other liabilities, of this group, are not considered the liabilities are far in excess of the assets.

31. Mr. Setalvad submitted that in spite of knowing this the expenses have already been incurred on a lavish scale. He submitted that once the expenses are already

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incurred they are liabilities which can only be paid in the manner set out under Section 11(2) of the said Act. He submitted that these are all liabilities which would squarely fall under Section 11(2)(c). He submitted that the Court can only pay such liabilities in the Order set out under Section 11(2) and cannot pay these amounts out of turn and in a priority.

32., Mr. Setalvad submitted that for the present, this Group is seeking release of a sum of app. Rs. 1.5 crores. He pointed out that further release is going to be sought of app. another Rs. 2 crores. He submitted that this is only by way of legal or Advocates fees. He submitted that one does not know as to how many other Applications in respect of other matters will be made for release of amounts. He submits that very likely this group will have incurred lavish expenses on other things also. He submitted that therefore once expenses are already incurred then they have become liabilities which can only be paid under Section 11(2)(c).

33. Mr. Setalvad next submitted that the Court has before it numerous types of matters. He submitted that the Court has before it criminal matters and applications in criminal matters, Applications/Petitions which are undoubtedly for preservation, protection and/or augmentation of the attached assets of Notified Parties or matters which are required to be defended for this purpose. He submitted that there are also cases before this Court where the Notified Party has been caught out in an impropriety, if not

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an illegality, and that impropriety has resulted in a number of matters before this Court. He submits that in such cases it is the action of the Notified Party which has resulted in the matters coming before the Court and there is no reason why the Court should release monies to enable a Notified Party to defend himself in those matters. By way of example, he pointed out the various matters involving benami shares and matters where it had become necessary for the Court to call upon Notified Parties to disclose their assets because they were not otherwise willingly doing so.

34. Mr. Setalvad also, by way of example, referred to Misc. Petition No. 402 of 1995 (which is also on my board today). He submits that these are fees of Mr. Jaisinghani. He shows paragraph 5 of that Petition wherein it is stated that Mr. Jaisinghani has agreed to a lump sum fee which included any number of cases on that day and that for the same fees Mr. Jaisinghani would render professional services by way of conferences, settlement of drafts, advises. It is also stated that Mr. Jaisinghani has agreed to appear and has appeared on behalf of the employees who have been involved in various criminal matters arising out of the transactions of the Applicant firm. Mr. Setalvad also pointed out that in this Application, fees are being claimed in respect of the appearances in the matters concerning benami transactions. Mr. Setalvad submits that fees could never be released from attached assets for and on behalf of employees. He submitted that there is absolutely no reason why fees should be

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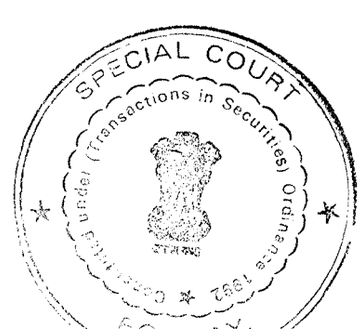
released at all for matters involving benami shares.

35. Mr. Setalvad submitted that this Court undoubtedly has power to release funds for the purposes of preservation, protection and/or augmentation of the attached assets of a Notified Party. Mr. Setalvad submitted that these could be done in both civil as well as criminal matters. He submitted that the Court could not say who was to be engaged or who was to appear on behalf of a Notified Party. He submitted that however the Court must govern the fees which would be paid. He submitted that these must be done prior to the fees being incurred on behalf of a Notified Party. Mr. Setalvad submitted that Central Government has a penal of fees which it pays to the Public Prosecutors and the Special Public Prosecutors who appear before this Court. He submitted that even under the Company Court Rules, Rule 348 lays down that the fees which would be paid would only be as per the Schedule which is annexed to the Company Court Rules. He submitted that the Court can prescribe fees which may be similar to the fees paid by the Central Government to its Advocates.

36. Mr. Setalvad also relied upon the authority in the case of Re: BRITISH FOLDING BED CO. Ex parte THE TRUSTEE v. N. A. WOODIWISS & CO. reported in (1948) All E. R. Pg. 216 wherein it has been held that as a general rule a trustee in bankruptcy may, in his discretion, adopt and pay for services rendered to a bankrupt after notice of an act of bankruptcy, where such services have clearly resulted in a



benefit or profit to the bankrupt's estate commensurate with the services rendered, but that the trustee must be very strict in the application of such a formula.

37. Lastly Mr. Setalvad submitted that the prima facie view taken by this Court in paragraph 129 of the Judgement dated 18th September 1995 in Misc. Application No. 221 of 1993 is the correct view and should be finally adopted by this Court.

38. Mr. Bobde, on behalf of Income Tax Department submitted that it was arguable that for the purposes of preservation, protection and/or augmentation of the attached assets, the Court would have power to release amounts. He submitted that such a power cannot be found in Section 3(4) but that such a power could be implied in Section 11(1). He submitted that the power under Section 11(1) is however subject to Section 11(2). He submitted that if a claim clearly falls under Section 11(2) then in respect of those liabilities [covered by Section 11(2)] the Court cannot exercise power under Section 11(1) and release amounts.

39. Mr. Bobde also fairly submitted that the Court must normally interpret the law in a manner whereby a person can protect and defend not only his property but also his person. He submitted that if such a view is taken then even in criminal matters this Court would have power to release Advocates fees. Mr. Bobde submitted that the only test which the Court should apply should be whether the Court would have granted the expenses if they were asked for by the Custodian.

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Mr. Bobde submitted that if the Court is satisfied that the Custodian could legitimately incur such expenses and that the Court would grant those expenses then the Court should normally release those expenses. Mr. Bobde submitted that the manner in which the power is to be exercised and the quantum which is to be released would depend from case to case.

40. Mr. Bobde, however, pointed out to this Court the Criminal Law (Amendment) Ordinance of 1944 whereunder Section 9(1)(a) provides as follows:-

> "9(1)(a). providing from such of the attached property as the applicant claims an interest in, such sums as may be reasonably necessary for the maintenance of the applicant and of his family, and for the expenses connected with the defence of the applicant where criminal proceedings have been instituted against him in any Court for a scheduled offence; "

Mr. Bobde submitted that this may indicate that whenever the Legislature wanted Courts to release monies for payment of Advocates fees in criminal matters, the Legislature specifically so provided. He submitted that in the said Act there is no such express provision. He submitted that this could mean that the Legislature did not want this Court to release fees in criminal matters. This, in spite of the fact

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that normally a law should be interpreted in a manner where a person could defend himself and his property. He submitted that the said Act only provides for cases where this Court can issue directions or Orders in respect of the attached assets or property. He submitted that the Legislature not having specifically conferred on this Court any power to issue directions in respect of the person of the Notified Party could imply that fees could not be released in criminal matters. He submitted that the Ordinance of 1944 is still in force. In support of this, he relied upon the authorities in the cases of M. M. Sales & Exports v. State of Uttar Pradesh reported in A.I.R. (1974) Allahabad Pg. 263 and State of Bihar v. Santo Kumar Mitra and others reported in A.I.R. (1952) Patna Pg. 148. He pointed out that under the said Act the attachment has not been levied by the Court but that there is a statutory attachment. He submitted that the Court can therefore only act or exercise such power as have been expressly conferred by the said Act.

41. Mr. Vyas also appearing on behalf of the Income Tax Department showed to Court a Resolution dated 9th July 1981 providing for free legal aid in the Supreme Court. He submitted that a similar provision also exist in Maharashtra. Mr. Vyas submitted that all the assets are attached because these are monies belonging to Banks and Financial Institutions and have to be returned to them. He submitted that there is no power in this Court to release any monies. He submitted that in criminal matters, in any event, monies

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cannot be release for defence of the Notified Party who is an Accused.

42. Mr. Vazifdar took strong exceptions to the suggestion that the Petitions were not bonafide. He submitted that Petitions or Applications for the balance fees were not filed on the advise of Counsel. He submitted that a Notified Party is not under the control of the Court and thus a Notified Party does not require to come to Court before incurring expenses. He submitted that so long as the power to release monies for such purpose exists, it makes no difference whether the party came first to Court or whether release of funds are asked for after the event. He submitted that irrespective of the point of time at which release is sought all that the Court is concerned with is the question whether the expenses were/are necessary or not.

43. Mr. Vazifdar pointed out that the Orders have been passed by this Court for release of Societies charges, after the charges became due and payable. He submitted that by its Order the Court has released arrears of payment of Societies charges. He submitted that this shows that the liability or the expenses were already incurred. He submitted that irrespective of the fact that the liabilities or expenses were already incurred, this Court released the amounts because they were necessary for the purposes of preserving, protecting and/or augmenting the attached assets and the property of the Notified Party. He submitted that once the Court comes to the conclusion that the expenses have been

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incurred in preservation, protection and/or augmentation of the attached assets then the Court must release the amounts and/or expenses irrespective of whether the Application was made first or after incurring the expenses.

44. Mr. Vazifdar again submitted that this Court should not lay down a Schedule of Fees but must determine each matter case by case.

45. Mr. Seervai further submitted that he understands the difficulty in divesting the legal submissions from ground reality. He submitted that however the Court must still decide these legal submissions without being weighing down by facts of any particular Notified Party. He submitted and in my view rightly, that if a Notified Party was to apply for the legal aid, he would be probably laughed out of Court. He submitted that to apply for legal aid a person has to pass means test and a Notified Party could never pass such a test.

46. Mr. Seervai submitted that in fact Section 75(2) of the Presidency Town Insolvency Act and Section 66(2) of the Provincial Insolvency Act give to the Court power to release monies for payment of Advocates fees. He submitted that such a power must be read into this Act also. He repeated that if such a power was not read into the said Act then it would be open to challenge on constitutional grounds.

47. Mr. Seervai submitted that the Criminal Law (Amendment) Ordinance was enacted before the Constitution. He submitted that it was enacted at a time when there were no

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fundamental rights. He submitted that after the Constitution every person has a fundamental right to legal representation of his choice. He submitted that after the Constitution there can be no law which prevent legal representation of a party's own choice. Mr. Seervai submitted that under Section 2 of the said Act, the term "Code" is to mean the Code of Criminal Procedure. He submitted that Section 9 of the said Act provides that the Code of Criminal Procedure has to apply to this Court. He submitted that under Section 303 of the Code of Criminal Procedure every accused has a right to have a lawyer of his choice. He submitted that in criminal matters far from there being an implied power there is an express power in this Court to release fees for Advocates. He submitted that this is because all Notified Parties who are accused have a right to have lawyers of their choice. He submitted that therefore in criminal matters it would not be possible for this Court to lay down any scale of fees. He again emphasized that the right to have legal representation is protected by Article 22(1) of the Constitution of India.

48. I have considered all the rival submissions. As, has been seen except for Mr. Vyas it has been correctly conceded by everybody that for the purposes of preservation, protection and/or augmentation of the attached assets the Court has power to release monies. Mr. Vyas's contention that Notified Parties must in all cases approach the Legal Aid Society is not acceptable. Till distribution takes place the Court would have to preserve, protect and/or augment

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attached assets. Thus monies may have to be released for preservation, protection and/or augmentation of the attached assets. This the Court would have to do whether or not the Notified party himself took any interest in the preservation, protection and/or augmentation of attached assets. Thus the power of the Court to take decisions and if necessary to release monies has nothing to do with and is not dependent on a Notified party appearing before the Court. If the argument of Mr. Vyas were to be accepted, it would mean that unless the Notified Party actively participates the Court could never protect, preserve or augment the attached assets. Thus the argument that a Notified party can seek legal aid, even if accepted will not throw any light on the question whether this Court has power to give directions, including directions for release of monies in appropriate cases, for the preservation, protection and/or augmentation of the attached assets. It cannot be denied, and it has not been denied, that the Court must preserve, protect and/or augment the attached assets so that they are available for distribution. For this purpose it would be absolutely necessary to release monies in appropriate cases. The Legislature was aware that pending distribution it would become necessary for Court to issue appropriate directions, including directions for disposal of attached assets. The Legislature has thus provided the power to give appropriate directions under Sections 3(4) and 11(1) of the said Act. The powers given to Court under Sections 3(4) and 11(1) are distinct from and

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different to the powers under Section 11(2). Section 11(2) deals with distribution. Sections 3(4) and 11(1) may also apply at the stage of distribution but they further empower the Court to give directions at any stage i.e. even prior to distribution. It is thus irrelevant whether or not the Notified Party can or cannot approach the Legal Aid Society. The powers of the Court have nothing to do with the capacity of a Notified Party to approach the Legal Aid Society. Even otherwise, in my view, Mr. Seervai was absolutely right when he submitted that Notified Parties could never get Legal Aid under the existing Rules. They could never pass the means test. It will have therefore to be held that Section 3(4) and Section 11(1) give to this Court powers to release monies or expenses for the purposes of preservation, protection and/or augmentation of the attached assets.

49. However, whilst Sections 3(4) and 11(1) give to this Court such a power, it necessarily has to be in respect of the liabilities which do not get covered by Section 11(2) of the said Act. If an expense or a liability is of a nature which is covered by Section 11(2), then the Court has no discretion or power. In such a case, the Court "shall" only distribute that liability in the Order and in the manner set out under Section 11(2).

50. I am unable to accept the submissions of Mr. Vazifdar that Section 11(2) only deals with liabilities incurred during the year of the Scam or upto the date of the Notification. The Order dated 20th February 1995 on the

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questions of law, nowhere lays down that only liabilities incurred during the year of the Scam or upto the date of the Notification are to be paid under Section 11(2). That Order merely lays down that such liabilities are to be paid in priority under Section 11(2)(a) and (b). As has been set out in that Order, the wording of Section 11(2)(a) and (b) are significantly different from the wording of Section 11(2)(c). Under Section 11(2)(a) and (b) the revenues, taxes, cesses and rates "due" , and under Section 11(2)(b) all amounts "due" are to be paid. As against that under Section 11(2)(c) what has to be distributed is "any other liability as may be specified by the Special Court". This would also include liabilities which may have been incurred after the date of the Notification.

51. As has been stated above, this Court has power to release monies and give directions regarding preservation, protection and/or augmentation of the attached assets. All the Orders passed by this Court, which have been relied upon by Mr. Vazifdar, are in cases where monies have been released for the preservation, protection and/or augmentation of the attached assets and/or for the purposes of fulfilling the duties cast on this Court under the said Act. Thus, the fees for Auditors, monies for purchase of computers and furnitures were released in order to enable this Court to arrive at a correct picture of assets and liabilities then take up the work of distribution under Section 11(2) of the said Act. The release of monies towards call monies and for

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purchase of rights shares were for preservation and/or augmentation of the attached assets. However to be noted that in all those cases the Court first came to the conclusion that it was necessary that the monies be released. It was only thereafter that the monies were released.

52. Mr. Vazifdar and Mr. Seervai had argued that it makes no difference that the expenses were first incurred and then claimed. They had submitted that so long as the Court has power and so long as the Court concludes that the expenses are for preservation, protection and/or augmentation of attached Assets the Court must release the expenses. Mr. Vazifdar and Mr. Seervai had strongly relied on fact that monies towards rents and societies charges had been released by the Court after they were incurred. They had submitted that the Orders of this Court releasing monies towards rent and/or societies charges establishes that expenses can first be incurred and then claimed. They had emphasised that a Notified party is not under the control of the Court.

53. These submissions cannot be accepted for a number of reasons. Firstly the examples given by Mr. Vazifdar are expenses which are automatically incurred in respect of an attached assets eg. the taxes, cesses, rents (in respect of tenanted premises) societies outgoings (in respect of the premises owned in Cooperative Societies) etc. These would be expenses by way of revenue expenses. Such expenses will necessarily arise regularly and from month to month. Normally in such cases except for taxes, these would be paid

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only after they accrue or are incurred. Merely because such expenses are paid after they accrue or are incurred cannot and does not mean that any or all expenses for preservation, protection and/or augmentation of the attached assets could be first undertaken without the permission of the Court and a claim in respect thereof made subsequently. Also to be noted that whilst the Court has released monies for payment of rent and/or societies charges, the Court has not released monies for payment of penalties and/or interest levied. This on the ground that these squarely fall under Section 11(2) and thus cannot be released at this stage.

54. Secondly what has to be seen is whether any direction or order is necessary from the Court. If no direction or order is necessary then it would be indicative that the claim is for liabilities payable under Section 11(2). In cases of taxes, cesses, rents and/or society charges, even though they are already incurred the Court has to pass some direction or order for the preservation and/or protection of the concerned property. Thus even though are incurred or have accrued unless the Court passes direction or orders for payment the concerned property would be in jeopardy in as much as a right to evict or take possession may arise in the landlord or society or the appropriate authority may be able to take coercive action or levy penalty etc. In other cases once the liability has been incurred or accrued there may be no necessity for the Court to pass any direction or order for preservation or protection of the

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property. This can be demonstrated by way of examples. The Notified party may decide that he would like to have his house painted and refurbished. He may decide that it is necessary not just for preservation but also for increasing its value. If he first applies to the Court, the Court can decide whether it is necessary or not. The Court may not consider it necessary. Even if the Court considers it necessary it may lay down guidelines and/or restrict the amount which is to be spent. In such cases the Court would have power to give directions or orders for release of monies on the ground that it is necessary. However if the Notified party without first coming to Court, appoints very expensive contractors, selects the most expensive paint and material and gets the work done, then there is nothing further left for the Court to do. Here the liability is already incurred. The contractors and others have already completed the work. The work of preservation and/or augmentation, even presuming it is so, has already been completed. All that now remains is a claim for payment for work already done. Unlike in the earlier instance even if now the Court does nothing and does not release payment there can be no loss or deterioration to the asset. Thus for preservation, protection and/or augmentation of asset there is no necessity to pass any order or give any direction. In such cases the liability is one which now the Court can only certify for payment under Section 11(2)(c). As it falls under Section 11(2)(c) the Court cannot, even if it wanted to, pay it except in the

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manner set out under Section 11(2). The said Act provides that the Court "shall" meet those liabilities in the priority set out in Section 11(2).

55. To take another example. Suppose a Company announces a Rights Issue. Applying for Rights Shares, if it is favourable, would result in augmenting the assets. The Court undoubtedly would have power to release monies to apply for Rights Shares. But if the Company on its own, without the Court releasing any money, decides to allot the Rights Shares and unconditionally allots them to the Notified Party, then there is nothing further which the Court needs to do for the purposes of augmentation the attached assets. However if the Company was to conditionally allot i.e. only on payment being received within a particular period, then the Court may still have to issue directions or orders. In the first case i.e where there is unconditional allotment and there is no direction or order necessary for preservation the liability would then fall under Section 11(2)(c). In the second case, as a direction or order is necessary the Court could decide whether to release payment or not.

56. In my view, Advocates fees, where services are already rendered without permission of this Court, fall in the first category where whatever was necessary for preservation, protection and/or augmentation has already been done without Courts permission. In these cases the Notified Party has chosen to incur the expenses and the Advocates have already rendered services. They have become creditors of

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certain fees or price. In such cases the Court can, if it is satisfied that the claim is genuine, only certify it for payment under Section 11(2)(c). Also why should the Court allow a Notified Party to put the Court in an awkward position of having to refuse or cut down fees or price. Most importantly such a practice, if allowed, may result in the Notified party availing of services or goods without having the money or the capacity to pay for them. It can also result in a complete or substantial depletion of the attached assets. Only by way of example, this Court has seen that the assets of Mr. Hiten Dalal are far less than his liability. Mr. Hiten Dalal is in this Court almost as much as the Harshad Mehta Group. If it was held otherwise and Mr. Hiten Dalal permitted to incur expenses in the region of Rs. 3.5 crores then his assets would be substantially depleted and almost nothing left for distribution. It is to be immediately clarified that the Court is not saying or even suggesting that the claims for Advocates fees are bogus or false or got up. The Court is not even suggesting that these Petitions are an attempt to siphon off attached assets. The Court has not the slightest doubt that in all these pending Petitions the claims are genuine. The Court has not the slightest doubt that these are Advocates fees which have been incurred. However, this does not detract from the position that to allow Notified Parties to freely incur expenses as they like, is to allow them to substantially deplete attached assets and/or to enjoy services or receive goods without

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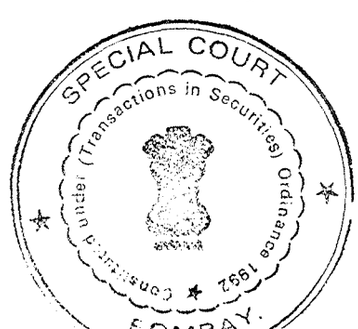
the Notified Party. The test now to be applied is whether there would be any jeopardy or loss to the assets if the Court does not pay. The test is whether, for preservation, protection and/or augmenting the assets any directions or orders now need to be passed. To the extant that work has already been done no further directions or orders are necessary. If at all for future services directions or orders are necessary those can be passed as set out hereafter. But for the past services now no directions or orders are necessary. Thus the Advocates fees for services already rendered are clearly liabilities which the Court can only certify under Section 11(2)(c). Now as per the provisions of the said Act the Court "shall" only pay the same at the time of distribution under Section 11(2). They being covered by Section 11(2)(c) the Court cannot, even if it wants to, release them under Sections 3(4) or 11(1). In my view, the submission of Mr. Setalvad to this effect is correct and has to be and is accepted. Though not relevant on the question under consideration, it must be mentioned that Mr. Setalvad is also right that the Harshad Mehta group of Notified Parties appear to have incurred these expenses on a lavish scale. However that is not the reason for holding that these fall under Section 11(2)(c).

57. There is another reason why the submission that, expenses can be first incurred and release of monies sought subsequently, cannot be accepted. Under Section 3(4) as well as Section 11(1) it is only the Court which can give



directions or orders. Thus the decision as to whether or not a particular expense is or is not necessary for the preservation, protection and/or augmentation of attached assets can only be taken by the Court. Even the Custodian cannot take such a decision. The said Act does not give to a Notified party any right to incur expenses for preservation, protection and/or augmentation of attached assets. Thus Notified party cannot decide whether a particular expense is necessary or not. The Notified party cannot present the Court with a fait accompli. If, without the permission of the Court or without the Court having first decided that such expenses are necessary, a Notified Party on his own decides to incur such expenses and deals with third parties who render services or provide material or goods, then it would amount to substituting the discretion of the Court by the opinion of the Notified Party. This can never be permitted.

58. Mr. Vazifdar submitted that even if the expenses are already incurred the Court could and should release them if it is satisfied that they were necessary for the presevation, protection and/or augmentation of the attached assets. He submitted that the Court could, even in such cases, decide how much is to be released. I am unable to accept this submission. If services are already rendered or goods delivered in the expectation of a certain fee or price, then the Court cannot after the event seek to cut down the fee or price. It would be most unfair to the person who rendered services or delivered the goods in expectation of

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having the capacity to pay for them. Also to be remembered that these principles would apply not just to Advocates fees but also to various other expenses which possibly have already been incurred or may be incurred.

59. For all the above reasons the submission of Mr. Vazifdar and Mr. Seervai that merely because they have first incurred cannot be a ground for holding that the liabilities fall under Section 11(2)(c) cannot be and is not accepted. The only type of expenses which would fall under Section 3(4) and Section 11(1) are those expenses where the Court has first decided are necessary for the preservation, protection and/or augmentation of the attached assets or those where even after they are incurred the Court still has to pass some direction or order for the preservation, or protection of the asset. It will have to be held that Advocates fees for services already rendered fall under Section 11(2)(c) and can only be paid at time of distribution and in the priority set out in Section 11(2).

60. It must be mentioned that, as far as possible, the Court has been protecting the Advocates inasmuch as in a number of matters the Court has directed that the costs recoverable from the other side be paid directly to the concerned Advocate. This is the only extent to which the Court can go to protect Advocates. Beyond this, the provisions of the said Act being clear, with reluctance, it will have to be held that the Court cannot release monies when liabilities are already incurred and are covered by

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Section 11(2)(c). In such a case the Court has no power or discretion to release such monies.

61. The above is in respect of expenses already incurred. As seen they may have been for preservation, protection and/or augmentation of the attached assets. In the Petitions Advocates fees are also claimed for services rendered in criminal cases and in matters which may have nothing to do with preservation, protection and/or augmentation of attached assets. In the view taken earlier these also would be expenses which the Court may or may not certify for payment under Section 11(2)(c). However as it has been argued that these must also be released it is necessary to deal with the question whether Court has any power to release monies for such expenses. In my view, Mr. Vyas was right when he submitted that there is no express provision which permits the Court to release monies towards the payment of legal fees for protection of the person of the Notified Parties. The question before the Court would be whether such a power can be implied. Such a question would arise mainly in criminal cases. However, it would also arise in cases where Notified Persons make various other applications which have nothing to do with preservation, protection and/or augmentation of attached assets eg. applications for relaxation of bail condition preventing them from leaving their home town in order to enable them to have a holiday or attend some social function. Also as stated by Mr. Setalvad in matters pertaining to benami shares and other

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matters which have been necessitated by the conduct of the Notified Party secreting attached assets a further question will also arise whether fees should be released even if Court has power.

62. In my view, the answer to this depend on the question whether or not a Notified Party is, as of right, entitled to legal representation and to engage Advocates of his choice irrespective of how expensive the cost may be. If a Notified Party is so entitled as a matter of right, then amounts may have to be released. If, however, there is no such right then the Court will have to consider what is to be done in each case.

63. As has been set out earlier, the argument has been that all persons including Notified Persons have a right to avail of legal representation of their own choice. Mr. Seervai has submitted that it is a fundamental right guaranteed by Articles 14, 19 and 21 of the Constitution of India. As set out earlier, reliance has also been placed upon Section 303 of the Code of Criminal Procedure and Article 22(1) of the Constitution of India. As set out earlier, it has been submitted that to hold otherwise would render the said Act open to challenge on the ground that it is ultra-vires the Constitution of India.

64. In my view, it is difficult to accept submission that legal representation in criminal matters also assist in preservation, protection and/or augmentation of attached assets. However Mr. Seervai is right when he submitted that

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an interpretation must be one which would not leave the said Act open to challenge on the ground of constitutional validity. In my view, such a power must necessarily be implied in the Act. It would have to be accepted that every person including Notified Parties have a right to legal representation of his choice. This necessarily means that persons can engage Advocates of their choice. This irrespective of whether the matter is a civil case or a criminal case. However, this does not automatically mean that fees must be released. As stated above if the fees are already incurred they will be paid at time of distribution under Section 11(2). If the services are already rendered the right of the Notified Party to have legal representation of his choice is already fulfilled. The concerned Advocate has been good enough to appear and plead. The Court has permitted them to appear and plead. Nothing further needs to be done to ensure that the right of legal representation is not affected. Thus the question of release of monies for fees incurred upto date, whether in civil matters or criminal cases, will be taken up for consideration at time of distribution under Section 11(2).

65. The next question is what is to be done about Advocates fees, when an application for release of fees is made in advance and before the services are rendered. It is already held that Notified Parties has a right to legal representation of their choice. However an argument based on constitutional rights ignores ground realities. The right to

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have legal representation and the right to have an Advocate of one's choice in reality can only be enjoyed by those who can afford the legal fees of the Advocates. A pauper, an indigent person and/or an insolvent also have this right to legal representation of their choice. However if they cannot afford to pay the fees the right is illusory. It is illusory not because law prevents it, but because Advocates also have fundamental rights and they cannot be forced to work for anybody or everybody. Advocates may well refuse to work free or for a nominal fee. Thus a pauper or an indigent person or an insolvent may not get the services of Advocates of their choice. They may like to have the best but they cannot get the best. They may then have to settle for legal aid. Thus, ultimately the right to legal representation and to have an Advocate of one's choice is circumscribed by the capacity to pay. To be noted that the law is not prohibiting the right to legal representation of one's own choice.

66. The arguments of Mr. Vazifdar and Mr. Seervai in respect of the right of legal representation of one's own choice have necessarily proceeded on the footing that the attached assets belong to a Notified Party. The arguments have been on the footing that the Notified Party could afford Advocates of his choice. This may not necessarily be true in the case of all Notified parties. Nobody can claim that he/she is entitled to spend somebody else's monies for his defence. Such a thing has not even been suggested. Mr. Vazifdar and Mr. Seervai have however submitted that till

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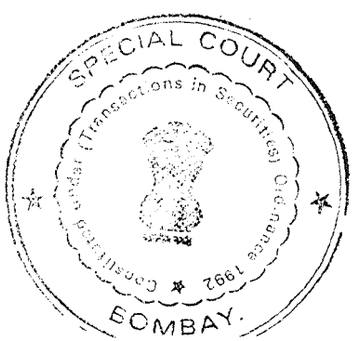
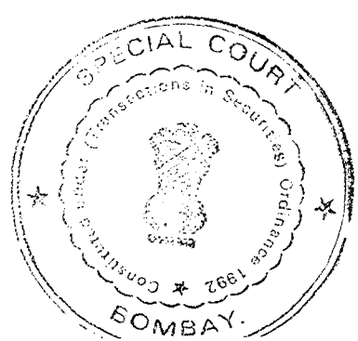
such time as a Notified Party is held to be guilty he must be presumed to be innocent. There can be no dispute with that proposition. However for the purposes of distribution the Court is not concerned so much with the innocence or guilt of the Notified Party. For purposes of distribution the Court is more concerned with seeing whether these persons have entered into transactions in securities between the stated period and whether there are liabilities of the nature set out in Section 11(2).

67. From the large number of civil matters before this Court it has been seen that all the Notified Parties have in fact entered into transactions in securities during the stated period. The Court has seen that these transactions have resulted in a large number of claims against the Notified Parties and also of course in a large number of claims by the Notified Parties. This Court has in an Order dated 14th December 1993 in Misc. Application No. 11 of 1993 and Misc. Petition No. 23 of 1993 held as follows:-

> 59. In my view, all these arguments overlook the object and purpose for which this Act has been enacted. The Custodian is not making any claim in any of the applications. All that the Custodian is doing is that he is bringing to the attention of the Court the fact that third parties are in possession of the properties which stand attached under the provisions of the Act. There can be no



dispute that once the property stands attached, this Court has power to give directions in respect of that property. These directions would include directions to hand over, to the Court or to the Custodian (on behalf of the Court), the property which stands attached. Undoubtedly the Special Court Act is a very loosely drafted piece of legislation. However this undoubtedly is due to the fact that it has been enacted under the very pressing and urgent circumstances which then prevailed. It is a matter of common knowledge that large amounts of public money have been siphoned off into private pockets and into various other channels. Till date it is not fully known as to where the public monies have been diverted. In my view, the purpose of the Act is clear. **The purpose of the Act is not just to punish the guilty persons. The purpose of the Act is also to recover the large amounts of public money which has been siphoned off.** The Legislature was faced with a peculiar situation. It was a known fact that a large amount of these funds had been used and diverted in transactions in securities. In any case it would have been diverted into other channels. Undoubtedly the Legislature was aware that by various methods, third party rights and obligations would have been created. Therefore,



the Legislature, without looking into each transaction could not abrogate all rights. This Act therefore does not automatically abrogate, curtail or take away any third party rights. However, at the same time the purpose and object being to recover public monies, a machinery had to be devised for testing each transaction. Section 4 dealt with a completed contract. As stated above in such cases the right, title and interest in the property having already passed, there would be no attachments. In all other cases, the best course was to stop further dealings. Thus a statutory attachment was provided for. The Legislature was well aware that every single transaction would have to be enquired into. The whole purpose and object of the Act is to channel the enquiry into one forum so that one Court can have before it the entire picture. It is therefore provided that it would be only the Special Court which can pass directions in respect of the property which stand attached. It is therefore provided that it would be the Special Court which would then distribute the property in the manner laid down under Section 11(2). It is therefore provided, under Section 13, that the provisions of the Act would prevail over all contracts, other Acts, Decrees of Courts etc.

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61. It is also to be remembered that the Notified parties themselves would not have had any right in the public monies which were siphoned off. These continue to be properties of the Banks/Financial Institutions. Any properties purchased out of these public monies would not thus belong to the Notified Party but would be, really speaking property of the Bank/Financial Institution whose monies were used to acquire that property. Thus the Notified Parties themselves would have no right and could not really speaking create any right in favour of any third party in that property. Yet completed rights, in favour of third parties could not be automatically abrogated. What the Act provides for is recovery of properties not yet transferred and a logical and equitable return to the Banks/Financial Institutions. Thus by the Special Court Act what the Legislature has sought to provide is speedy trial of offences, immediate attachment of properties, establishment of a forum where all rights can be agitated (apart from trial of offences) and a final and orderly distribution of all properties. .....

62. To repeat these are not cases where the Custodian is seeking to recover anything or make a claim of anything or to put himself in a better position than a Notified Party. This are cases

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wherein there are statutory attachments and a statutory provision for distribution of property by the Court. It is this Court which has to recover the properties, for the purposes of a effective distribution under Section 11(2) of the Act. . One of the main objects of the Act being to recover large amounts of public money which have gone into private pockets and there being statutory attachments of properties of Notified Parties such statutory attachments would operate even if the properties are in the hands of a third party pursuant to an illegal contract. After attachment such properties can only be dealt with under the directions of this Court. All such property must therefore be available for distribution under Section 11(2). (emphasis supplied)

68. Also in Order dated 15th June 1997 in Misc. Application No. 57 of 1993 the Court has held as follows:-

"... Also for adjudicating on such claims it is not necessary that all parties should be notified or have committed an offence. It is sufficient if the dispute is in respect of property of a notified party. As stated above a person would be notified, only provided, the Custodian is satisfied that a person is involved in an offence relating to transactions in Securities. In this case the 2nd Respondent is a notified party. The dispute is in

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respect of a claim arising out of attached property of the 2nd Respondent. It is not necessary that 1st Respondent must also have committed an offence or that a particular civil claim or dispute should have arisen directly as a result of any offence."

69. In an Order dated 22nd July 1993 in Misc. Application No. 96 of 1992 this Court has held as follows:-

25. 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

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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. ..... 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.

26. 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

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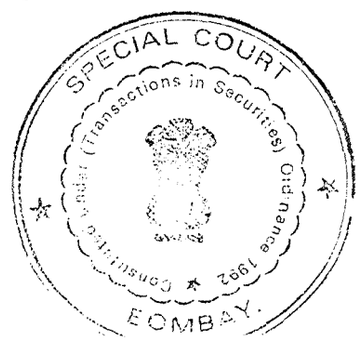
by the Custodian and an automatic statutory attachment of all properties belonging to such Notified Party. That there has to be distribution is clear from Section 11.

28..... 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." (emphasis supplied)

70. So far as this Court is concerned these authorities are binding. Thus, it is to be seen that this Court has held that these are not properties of Notified Parties. These are properties and/or monies which have been siphoned off from Banks and Financial Institutions. The said Act proceeds on the footing that these continue to be properties of the Banks and Financial Institutions. Any property purchased from these public monies also does not belong to the Notified Party, but is really speaking the property of the Bank and/or Financial Institutions whose monies are used to acquire that property. Thus, it has already been held that a Notified Party does not have any right and cannot create any right in favour of third parties in that property. Thus, in cases where the liabilities

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exceed assets, what the Notified Party is seeking to do is not spend his own money or property. The Notified party is seeking to spend public money which belongs to Banks and Financial Institutions. As the property is to be returned to the Banks and Financial Institutions, till it is so returned, it will have to be preserved , protected and/or augmented. It is preserved, protected and/or augmented not for the Notified party but on behalf of the Party to whom it will ultimately be returned. Thus expenses for preservation, protection and/or augmentation of the property can and will be incurred. However a Notified Party having no right to the money or the property cannot claim that it be used for the defence of his person. He cannot claim that public monies be used for his defence. To accept such an argument would amount to allowing the person who siphoned off the monies to then being allowed to use the monies for his own ends instead of returning it to its rightful owner.

71. Thus it is only in cases where the assets are more than sufficient to meet the liability that it can be said that the Notified Party is seeking to spend his own money. it is only in those cases that the Notified party can insist that he be allowed to spend as he likes on his own defence.

72. The Court has before it a picture of what are the assets and liabilities of Notified Parties. Undoubtedly this picture includes pending claims against Notified Party and/or by Notified Parties. It is correct that till there has been adjudication of those claims the full and correct picture

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would not be available. However, in many cases the Court has before it, Assessment Orders issued by the Income Tax Department. The Supreme Court has recently in an Order dated 18th July 1995 in Civil Appeal No. 6323 of 1995 held that the Special Court has no power to sit in Appeal over or overrule the Orders of the Tax Authorities. The Supreme Court has held that the only power of the Special Court is to determine the priority in which the claim upon the property under attachment is to be paid. The Supreme Court has held that the tax liabilities of a Notified Party along with the revenue, cess and rates is entitled to be paid first in order of priority and in full. The Supreme Court has held that in relation to claims for payment of taxes, the Special Court has only the limited power to determine what, having regard to the funds available, can be paid i.e. whether that claim can be paid in full or only in part. The Supreme Court has held that if any claim cannot be paid in full then provision will have to be made for the balance. Thus, so far as the Assessed claims of the Income Tax Department are concerned, this Court is bound to pay them in full. Therefore in cases where the Assessed Claims of the Income Tax Department exceed the available assets of a Notified Party, the available asset will have to be used to pay off that liability. In such a case there is no asset available for meeting Advocates fees or other expenses. In such a case the Notified Party is in no better position than a pauper or an indigent person. If the money is not available the right to legal representation is

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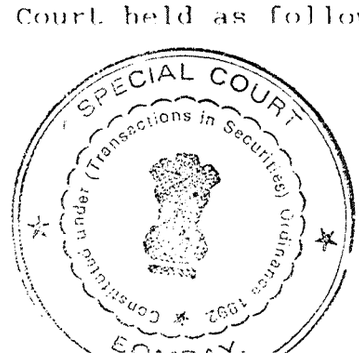
illusory. It is illusory not because the law prevents it, but because there is no money. It must also be mentioned that there are cases where the assets are sufficient to meet the Assessed claim of the Income Tax Department. However they may not be sufficient to meet all the claims and liabilities of that Notified Party. Many of these claims are not yet adjudicated upon and/or may not be decided at the time that the Court is considering release of monies. However even in such cases the Court cannot presume that the pending claims are unjustified. The Court will have to keep them in mind. If by doing so the Court finds that the assets are not sufficient to meet the liabilities the Court still cannot release monies, which are likely to be public monies for the private defence of the Notified Party. In that case also payment can only be made when it is finally decided that the monies are monies belonging to the Notified Party.

73. When this was pointed out, it was sought to be submitted that till such time as Notified Party is convicted of an offence, it cannot be said that these assets would be available for distribution. It was submitted that till that time it could not be said that these are public assets. It is correct that this Court in an Order dated 2nd July 1993 on the M. A. 107 of 1993 held that before distribution can take place a Notified Party must be convicted of an offence. However, whilst so stating the Court has overlooked that in an Order dated 15th June 1993 in Misc. Application No. 57 of 1993 the Court held as follows:-



"Also for adjudicating on such claims it is not necessary that all parties should be notified or have committed an offence. It is sufficient if the dispute is in respect of property of a notified party. As stated above a person would be notified, only provided, the Custodian is satisfied that a person is involved in an offence relating to transactions in Securities. In this case the 2nd Respondent is a notified party. The dispute is in respect of a claim arising out of attached property of the 2nd Respondent. It is not necessary that 1st Respondent must also have committed an offence or that a particular civil claim or dispute should have arisen directly as a result of any offence."

In an Order dated 22nd July 1993 in Misc. Application No 96 of 1992 this Court has held as follows:-

"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.

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In my view, they are neither unreasonable nor unjust nor irrational nor inequitable. In my view, there is a reasonable classification meant for meeting the object, viz., recovery of public monies and for return of the same to the bodies from whose pockets it went out in the first instance in a speedy manner."

Further, in an Order dated 3rd August 1993 in Misc. Application No. 120 of 1993 and other connected Applications the Court has also held as follows:-

" ... This Court has been established because public monies have been siphoned out from Financial Institutions and/or Banks into private pockets. Apart from criminal trials, the Court has under Section 11 of the Special Court Act, to pay off liabilities in the manner set out therein. This from property belonging to Notified Parties. Today the Court cannot ignore the fact that generally speaking when these family members run businesses as a group, there is a large amount of interlinking. Today the Court does not have before it the assets and liabilities picture of any of these 1st Respondents. In my view, the Court must for the present not forget that all these individuals/Firms/Private Limited Companies are part of the same family group and were carrying on

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various businesses as such.

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Further in my view, the Court is not just constituted merely to conduct trials. Under Section 11 of this Act, the Court is also entrusted with the task of paying off liabilities in the manner laid down therein. Today it prima facie appears to Court that monies which have been siphoned off have gone into private pockets. All these 1st Respondents are closely linked to the "Prime Accused". Therefore, whether they are Notified or not, the Court is entitled to and/or bound to call upon these parties to disclose their assets and to explain as to how they have come in possession of these various assets. Even if these parties had not been Notified, I fail to see how they could have refused to give the relevant information to the Custodian or the Court. This information is necessary to find out whether any monies siphoned off have gone into the pockets of any of these parties."

Thus the Court has already noted that distribution is of civil liabilities and claims. The Court is also having civil jurisdiction. It has before it a picture of all claims and liabilities. Therefore, the Court knows what are the liabilities and from what sort of transactions these

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liabilities are incurred. The Court has seen that in most cases the liabilities are in transactions in securities during the stated period. If that be so, then there is no reason why these liabilities cannot and should not be distributed merely because the Notified Party has not been convicted of any offence. It must however be mentioned that this question has not arisen for decision in this case and the observations made in this para must not be taken to be final. These must be considered to be mere prima facie observations till this question is decided in an appropriate matter. Even if it is held that there can be no distribution till the Notified Party is convicted, even then in cases where the assets are not sufficient to meet liabilities, the Court cannot release monies till all criminal cases end. The Court cannot presume that the prosecution will fail in all cases. This is not to say that the Court is presuming that the Notified party is guilty. All that the Court is saying that assets cannot be allowed to be used till the matter is finally decided.

74. Thus in such cases i.e. where the assets are not sufficient to meet the liability the Notified Party is in no better position than a pauper or an indigent person. As the assets are not sufficient to meet the liabilities and till it is clear that these are not public monies which have to be returned to the Banks and Financial Institutions they cannot be spent. If that be so, then the so-called right to have legal representation of one's own choice is an illusory

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right. As stated above, even though such a power can be implied, the Court can never exercise the power. To do so is to allow an indigent or a pauper Notified Party to use public monies for his own private defence. To do so would mean to put the Notified Party on a pedestal. It would mean that a private citizen who is a pauper would have no right to insist that he get legal representation of his choice, but a Notified Party will get a right to use public monies. It is because of this that the said Act makes no provision in respect of the release of attached assets in such cases. In all such cases, the Court will have to ascertain whether the assets are sufficient to meet the liabilities. If the assets are clearly sufficient to meet the liabilities then there is no difficulty at all. In that case the right to legal representation of his choice can be freely enjoyed by the Notified Party because the surplus assets would be assets belonging to the Notified Party. However, when the assets are not sufficient to meet liability then it is clear that the assets (which are available) are available only for the purposes of distribution and paying of all the liabilities mentioned under Section 11(2). They cannot be fettered away or used for any purpose other than for preservation, protection and/or augmentation of the attached assets. The same would have to be preserved till it is decided that the assets are sufficient to meet liability. They cannot be allowed to be frittered away. In all such cases there is no money belonging to the Notified Party which he can freely

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spend as he likes. If there is no money belonging to a Notified Party then there is no question of release of any monies by the Court in favour of a Notified Party. As stated above, the Notified Party has a right to legal representation of his choice. He is always free to convince the Advocate of his choice to appear on his behalf so long as it is clearly understood that the Court is not releasing any amounts for such appearances. This because the Notified Party does not have any money to pay the Advocates.

75. From the above, it is clear that the right of a Notified Party whether in civil or criminal matters to have legal representation of his choice is not curtailed by the said Act. Thus, the Act is not open to any challenge on constitutional ground. However, these rights stand curtailed by the fact that there are no funds available which the Notified Party can call his own funds. All funds which are available are, in cases where the assets are less than the liability, public funds and public monies which have to be returned to the Banks and Financial Institutions to whom they belong and/or used for payment of liabilities set out in Section 11(2). If the Notified Party has no monies then the Notified Party is in no better position than a pauper or an indigent person or an insolvent. Thus the so-called right to have legal representation of his choice even though not curtailed by the Act is in effect an illusory right.

76. That this is the position is very clear from the fact that the Legislature whenever it intends to provide for

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legal expenses for the purposes of private defence, specifically so provides. As is seen the Legislature has so specifically provided in Section 9(1)(a) of the Criminal Law (Amendment) Ordinance. As is seen that Ordinance is still in force. If the Legislature wanted to specifically provide for payment of legal expenses in criminal matters, irrespective of whether the assets were more than sufficient to meet the liabilities or not, the Legislature would have so specifically provided. The fact that they have not so done clearly indicates that the Legislature did not want public monies to be utilized for payment of legal fees for private defence of Notified Parties. The intention of the Legislature is clear. Public monies can be utilised only for disbursements of the liabilities in the priority set out in Section 11(2). If there is surplus it can be used for payment of such expenses as the Notified Party desires but not otherwise.

77. It must be mentioned that Mr. Seervai had contended that the Criminal Law (Amendment) Ordinance is a pre-constitutional law. He submitted that after the enactment of the Constitution any law which sought to abrogate a fundamental right would be void. I fail to understand this. The Criminal Law (Amendment) Ordinance 1944 seeks to give a right to receive, from attached assets, monies for legal fees. It provides for a right which is in keeping with the fundamental right. Therefore the Criminal Law (Amendment) Ordinance can hardly be said to be

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unconstitutional.

78. To sum up the said Act provides no restriction on the right of legal representation of one's choice. This Act places the Notified Party in the same position as any private citizen. If the Notified Party has capacity to pay he can avail of legal representation of his choice and in all matters irrespective of what sort of matter it is. If, however, he has no capacity to pay, then like any other indigent person, his right would be illusory. It is quite clear that public monies cannot be used for the purposes of allowing the Notified Parties to have legal representation of their choice. If that were to be so, then it would mean that a Notified Party is being funded by the Banks and Financial Institutions for his own defence. It would then mean that a Notified Party is being put on a pedestal and public monies are being used for his own defence. This, the Legislature could never have intended and has specifically not so provided. It is only in such cases i.e. where the assets are not sufficient to meet the liabilities, that the Court has to consider what is to be done.

79. As has been set out earlier, Mr. Seervai relied upon Section 75 (2) of the Presidency Town Insolvency Act and the corresponding Section 66(2) of the Provincial Insolvency Act. He submitted that even in cases of insolvency the Court has the power to release monies for legal expenses. Whether or not these Sections empower Courts to release Advocates fees is, in my view, a debatable question. Even if such a

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power was there, the authority of British Folding Pred Co. relied upon by Mr. Setalvad would suggest that such fees can only be paid where such services have already resulted in a benefit or profit to the estate. Even then it must be commensurate to the service rendered. For other purposes no such power exists either in the Insolvency law or in the said Act. However, it must be mentioned that if the argument of Mr. Seervai is to be accepted and it is to be held that Section 75(2) of the Presidency Town Insolvency Act and Section 66 (2) of the Provincial Insolvency Act permit a Court to release amounts towards the legal fees, then it would strengthen Mr. Bobde's submission that when the Legislature so desires it specifically so provides. It would then strengthen the submission that when the Legislature does not so provide it clearly does not so desire.

80. Thus, to sum up, it will have to be held that for the purposes of preservation, protection and/or augmentation of the attached assets the Court has power to incur expenses. This irrespective of whether the assets are sufficient to meet the liabilities or not. This power is given to Court so that the assets are available for distribution. This power of Court would only be where the liability is not of a nature which falls under Section 11(2). If a liability is of a nature covered by section 11(2), then the Court "shall" discharge it in the manner/priority set out therein. Thus the power is only in respect of expenses which the Court first concludes are necessary for preservation,

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protection and/or augmentation of the attached assets. They may, in some cases, have already been incurred, but the Court would still be required to pass some directions or orders for preservation, protection and/or augmenting the asset. Generally these would be in the nature of revenue expenses. If without the sanction of the Court any expense is incurred and the Court is then not required to pass any direction or order then it becomes a liability under Section 11(2)(c) and can only be paid in the priority set out therein. This in spite of the fact that the Notified Party may purportedly have incurred these for the purposes of preservation, protection and/or augmentation of the attached assets. This because, as stated above, the Notified Party cannot on his own decide what is necessary and what is not necessary for preservation, protection and/or augmentation of the attached assets. It is only this Court which can so decide. The Notified party cannot put the Court in an awkward position of having to refuse or cut down fees or expenses after third parties have already dealt with the Notified Party on certain expectations. The Court could never be presented with a fait accompli. As stated above to hold otherwise would be to give an opportunity to Notified Parties to substantially deplete, if not exhaust, the attached assets and/or to receive services and goods without having the capacity to pay for them. It must be mentioned at this stage that even in cases which are for preservation, protection and/or augmentation of attached assets, as set out hereafter there may be some cases

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where no fees should be released.

81. As set out above Mr. Setalvad had pointed out that there are many civil matters which are not for preservation, protection and/or augmentation of attached assets. He had also submitted that there were some civil matters which were occasioned by reason of impropriety on part of the Notified party. Mr. Setalvad had submitted that, even though the Court has powers it should not release fees in such matters. He had also submitted that fees cannot be released for services rendered to the employees. Mr. Setalvad and Mr. Bobde had also submitted that the Court should prescribe the fees which it will release. This Court has now held that in all these Petitions the claim falls under Section 11(2)(c). Thus so far as these Petitions are concerned it is not really necessary to decide these questions at this stage. Payment under Section 11(2)(c) will only be made provided all other prior liabilities are discharged. If there is a surplus after distribution it will then be monies of the Notified Party. In that case, at this stage, Court prima-facie sees no reason why payment should not be made for services already rendered to a Notified Party or at his behest to somebody else. In that case Court prima-facie sees no reason why payment should not be at the rate agreed to by the Notified Party. At this stage it must be clarified that all Petitions on board today are not for release of monies for fees already incurred. Some Petitions were filed for release of monies towards Advocates fees prior to their being incurred. Those will be dealt with

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separately.

82. In cases where Applications are filed prior to expenses being incurred, if the Court is satisfied that it is for preservation, protection and/or augmentation of attached assets the Court can release monies to pay for the same. However the Court must keep in mind the fact that if no expense is necessary than there should be no waste of public monies. If the Court decides that the expense is necessary it will also decide how much is necessary to be released. In all other cases the Court would have to see if the assets are sufficient to meet the liabilities or not. If the assets are not sufficient or not likely to be sufficient the said Act does not provide for release of monies for other purposes including for private defence of the Notified Party.

83. Whether an expenses is necessary for preservation, protection and/or augmentation of the attached assets will have to be decided by the Court in each matter. No hard and fast rule can be laid. Even in cases where a direction or order is necessary there may be many Petitions/Applications where no complicated questions of law arise and where the Order is almost a formality. These therefore do not require any Advocate or legal representation. For example, release of monies for Rights Shares, payment of Call Monies, payment of rents/society charges, permission to leave the home town etc. Even though these may be for preservation, protection and/or augmentation, these are not matters where any Advocate is required. In fact a number of persons are regularly

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appearing in person and obtaining orders from this Court. The Notified Party can also personally approach the Court. There is no reason why, in cases where the assets are not sufficient to meet the liability, any monies should be released for such expenses. Also in cases where attempts are first made to secrete assets or where matters have arisen due to impropriety of the Notified Party or due to an attempt to secrete assets, there is no reason why good Public Monies should be spent. The Notified Party can always give his explanation to the Court personally. Thus, no monies can be released in such matters.

84. In all civil cases where some question of law and/or complicated facts are involved the Custodian would be a party. The Custodian is always represented by an Advocate. If the matter pertains to preservation, protection and/or augmentation of the attached assets of a Notified Party, the Custodian always supports such Petitions/Applications. In fact at one stage, the Custodian was filing Applications for such purposes and for recovery of assets. In such case, there is no conflict of interest between the Custodian and the Notified Party. It must be mentioned that when the Custodian started filing such Applications, this Court frowned upon the Custodian. This Court made it clear that it was for the Notified Party to file such Applications and that the Custodian may, if he was so advised support the Notified Party. At that time the question of Advocates fees was not before the Court. The Court had not considered what was to

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happen if the Notified Party could not afford to pay legal fees. Now that the question has arisen, in my view, there is nothing wrong in the Notified Party getting the Custodian to file or defend Applications/Petitions which are for preservation, protection, augmentation and/or recovery of attached assets. This provided the assets are not sufficient to meet the liabilities. Clarified that the Court is not saying that the Custodian must so file or defend. It is open to the Custodian to do as advised by his lawyers. If the Custodian chooses not to assist the Notified party can then personally approach this Court. Simple matters can then be disposed off without intervention of lawyers. In cases where it is necessary the Court will try and provide legal assistance. In cases which are for recovery of assets in the hands of third parties also, provided there is no conflict of interest the Notified party, could always brief the Advocates of the Custodian in the same manner as they would brief their own Counsel. This would ensure that the Notified Party gets proper legal assistance/representation. Here also if the Custodian does not agree then the Notified Party can approach the Court and the Court will try and provide legal assistance. In cases where the Court provides legal assistance payment will be as set out hereafter. It is thus clarified that if the Notified party wishes to have an Advocate of his choice and the Advocate is willing to work on the same fees, the Notified party can have the lawyer of his choice. Applications by Notified party for legal assistance

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can be oral.

85. The question then arises in respect of the matters which are not for preservation, protection and/or augmentation of the attached assets of a Notified Party. In such case, the Custodian may or may not be involved. As already stated above, if the assets are not sufficient to meet liabilities then the said Act makes no provision for release of monies for such purposes. This is because in such cases the Notified Party would be like a pauper and/or an indigent person. However, a pauper or an indigent person can approach and would most likely get legal aid. As has been set out above a Notified Party would not get any legal aid. The result of this would be that the Notified Party, whose assets are less than his liabilities, can never get any legal representation in criminal matters and/or matters which do not pertain to preservation, protection and/or augmentation of attached assets. It would amount to saying that a Notified Party has no right to legal representation. This could not have been intention of the Legislature. As legal aid is not possible this Court will then have to ensure that a Notified Person procures legal assistance through the agency of this Court. For that purpose some amounts will have to be released towards legal fees. The only question then would be what amounts should be released. As stated above, in cases where the assets are more than the liability, there is no difficulty. The Notified Party can spend as much as he likes and get an Advocate of his choice no matter how

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expensive they are. However, if the assets are not sufficient to meet the liabilities the Court will have to decide from case to case whether or not fees are to be released and in what amount. To be immediately clarified that now this decision must be prior to the liability being incurred. The Court cannot and should not forget that public monies are going to be used. Thus only what is necessary can be spent. The Court has already before it a scale of fees which are paid by the Central Government to its Advocates including the Public Prosecutors. The Court has also before it a scale of fees which the Custodian pays to his Counsel and Advocates. As far as the Court is concerned, the normal scale paid to the Public Prosecutors and Advocates for the Custodian appear to be most reasonable and proper. In view of the Court on these scales there should be no difficulty in procuring legal assistance either by the Notified Party or the Court. On these scales both the Custodian and the C.B.I. have got very efficient and competent lawyers. There is thus no reason why those scales should not be applied and paid to lawyers of the Notified Parties or the lawyers the Court will endeavour to procure for the Notified Party. To be remembered that there will be a large number of matters for each Notified Party. In some matters, particularly the criminal matters, the trial would be long. Therefore even if small fees are paid in each matter because of the volume and/or duration of trial substantial fees will ultimately be earned by the concerned lawyer. Also clarified that if the Court so

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consider it necessary it can certify and pay special fees in appropriate matters.

86. Thus in all the Petitions, by the Harshad Mehta group, payment can only be at time of distribution under Section 11(2). Mr. Vazifdar fairly states that in this view the Petitions need not be considered at this stage. He fairly states that the Petitions must be taken up at time of distribution. He however asks for some time to enable the Petitioners to study this Order, apply their mind and Appeal against the Order if so advised. The Petition is accordingly adjourned for three weeks.

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