HARSHAD SHANTILAL MEHTA A

v.

CUSTODIAN AND OTHERS

MAY 13, 1998

[SUJATA V. MANOHAR, S.P. KURDUKAR AND B
D.P. WADHWA, JJ.]

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992:

C

Sections 11(2) and 3(3)—Disbursement of properties attached under Section 3(3)—Liabilities to be paid or discharged under Section 11(2) are of the person notified—If any person other then the notified person has any share, right, title or interest in the attached property on the date of notification under Section 3(3), right of third party cannot be extinguished—Any D *application of third party has to be decided by the Special Court before proceeding under Section 11.*

Section 11—Disbursement of attached properties—In case of properties of the notified persons already mortgaged/pledged to banks or financial institutions on the date of attachment—Held, the liabilities mentioned in E *Section 11(2)of the Act which were to be paid from the proceeds of the sale of the attached property, would only refer to proceeds of the sale of the right, title and interest of the notified person in the attached property and not the entire property itself.*

F

Section 11(2)(a)—'Tax due'—Meaning—Unascertained and unassessed tax which is not legally binding on the assessee not covered by Section 11 (2)(a)—Discharge of tax liability of notified person—Do not include penalty or interest under Income Tax Act—Remedy of notified person assessed to penalty or interest would be to approach the tax authorities under the taxing statute—Income Tax Act, 1961—S. 2(43). G

Words and phrases—"Tax due"—Meaning of—In the context of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992.

Section 11(2)(a) & 9-A—Tax liability—When it becomes due—Date of H

distribution—When the Special Court completes the examination of claims under Section 9-A—If on this date any liability for the statutory period is legally assessed and the assessment is final and binding on the notified persons—Held, that liability will be considered for payment under Section 11(2)(a).

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 deals with offences involving amounts of unusual magnitude procured by brokers from banks and financial institutions. The Special Court which was set up for a quick prosecution or adjudication of claims in respect of two notified parties, and the time was approaching for the distribution of their assets under Section 11 of the Act which was attached under Section 3(3) of the Act. In this case there were interpretational difficulties generated by the casual drafting of the Act and the Special Court had raised three questions pertaining to distribution of assets under Section 11(2) of the Act.

Disposing of the appeal, this Court

HELD : 1.1. Since the property (movable and immovable or both) which is attached is of the person notified, the liabilities to be paid or discharged under Section 11(2) of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, are also liabilities of the person notified- whether these liabilities be in respect of payment of revenues, taxes, cesses or rates, or whether they be the liabilities to any bank, financial institution or mutual fund. Before the Special Court makes any order under Section 11(1), the Special Court must be satisfied that the property which is attached and is being disposed of, is the property belonging to the notified persons. If any person other than the notified person has any share, or any right, title or interest in the attached property on the date of notification under Section 3, the right of the third party cannot be extinguished. The only right which the Custodian has, in respect of the right of the third parties in such properties, is conferred by Section 4 under which, if the Custodian is satisfied that any contract or agreement which was entered into by the notified party within the "statutory period" in relation to an attached property is fraudulent or entered into for the purpose of defeating the provisions of the Special Court Act, he can cancel such contract or agreement. There is no other provision under the Special Court Act which affects the existing rights of a third party on the date of attachment, in the property attached. The attached property also does not vest in the Custodian. In this regard the position of a Custodian is different from that of an official liquidator or a company in

winding up. Had the Act provided of the extinguishment of any subsisting rights of other persons in the attached property, the Act could well have been considered as arbitrary or unconstitutional. [400-D-H] A

1.2. Directions for disposal under Section 11(1) can be given only after the Special Court has satisfied itself that the property under attachment is the property which belongs to notified person. The directions for disposal can be in respect of the right, title and interest of the notified person in the attached property. If, therefore, any application is filed before the Special Court by a third party claiming the property so attached and/or for releasing the right, title and interest of a third party in the property from attachment, the Special Court will have to decide the application before proceeding under Section 11. [401-A-B] B C

C.B. Gautom v. *Union of India,* [1993] 1 SCC 78; *Hitesh Shantilal Mehta* v. *Union of India,* (1992) 3 Bom. C.R. 716 and *B.O.I. Finance Ltd.* v. *Custodian,* [1997] 10 SCC 488, relied on. D

2. If in the property "belonging to" a notified person, another person has a share or interest, that share or interest is not extinguished. Of course, if the interest of the notified person in the property is not a severable interest, the entire property may be attached. But the proceeds from which distribution will be made under Section 11(2) can only be the proceeds in relation to the right, title and interest of the notified person in that property. The interest of a third party in the attached property can not be sold or distributed to discharge the liabilities of the notified person. This would also be the position when the property is already mortgaged or pledged on the date of attachment to a bank or any third party. This, however, subject to the right of the Custodian under Section 4 to set aside the transaction of mortgage or pledge. Unless the Custodian exercises his power under Section 4, the right acquired by a third party in the attached property prior to attachment does not get extinguished nor does the property vest in the Custodian whether free from encumbrances or otherwise. The ownership of the property remains as it was. [403-C-E] E F G

3. The words "taxes due" occur in Section 11(2)(a) dealing with distribution of property. At this stage the taxes "due" have to be actually paid out. Therefore, the phrase "taxes due" cannot refer merely to a liability created by the charging section to pay the tax under the relevant law. It must refer to an ascertained liability for payment of taxes quantified in accordance H

A with law. Taxes which are not legally assessed or assessments which have not become final and binding on the assessee, are not covered under Section 11(2)(a) because unless it is an ascertained and quantified liability, disbursement cannot be made. In the context of Section 11(2), therefore, "the taxes due" refer to "taxes as finally assessed". [405-C-D]

B *State of Rajasthan* v. *Ghasilal,* [1965] 2 SCR 805; *Associated Cement Co. Ltd.* v. *Commercial Tax Officer,* (1981) 48 STC 466; *Chatturam* v. *CIT,* (1947) 15 ITR 302; *Whitney* v. *IRC, (1926)* AC 37; *Kalwa Devaduttam* v. *Union of India,* (1963) 49 ITR 165; *Doorga Prasad* v. *Secy. of State,* 13 ITR 285 and *Raymond Synthetics Ltd.* v. *Union of India,* [1992] 2 SCC 255, relied

C on.

Black's Dictionary, p.499; Jowitt's Dictionary of English Law, Vol.I. 2nd Edn; 669; Wharton's Law Lexicon, 14th End., p.365, referred to.

4. As the Special court is empowered to examine all transactions in securities during the period 1.4.1991 to 6.6.1992, as also all claims relating

D to the property attached, the Special Court will also have to examine the tax liability of the notified person arising during the period 1.4.1991 to 6.6.1992. As the purpose of the special Court Act, *inter alia,* is as far as practicable, to safeguard the funds too which the banks and financial institutions may be entitled, and to ensure that these funds are not done away with, there are

E provisions for attachment, ascertainment of claims and distribution of funds. However, before the liabilities of a notified person to banks and financial institutions can be discharged, Section 11(2)(a) requires the tax liability of the notified person to be paid. In this context the tax liability can properly be construed as tax liability of the notified person arising out of transactions in securities during the "statutory period" of 1.4.1991 to 6.6.1992. If any

F income tax is required to be paid in connection with the income accruing to a notified person in respect of transactions in security during the "statutory period" that liability will have to be paid before the funds are made available to the banks and financial institutions. Similarly, in respect of any property which is attached, if any rates or taxes are payable for the "statutory period"

G those rates and taxes will have to be paid before the proceeds of the property are distributed to banks and financial institutions. In the same manner, the liabilities to banks and financial institutions in Section 11(2)(b) are also liabilities pertaining to the statutory period. Every kind of tax liability of the notified person for any other period is not covered by Section 11(2)(a),

H although the liability may continue to be the liability of the notified person.

Such tax liability may be discharged either under the directions of the Special Court under Section 11(2)(c), or the taxing authority may recover the same from any subsequently acquired property of a notified person or in any other manner from the notified person in accordance with law. The priority, however, which is given under Section 11(2)(a) to such tax liability only covers such liability for the period 1.4.1991 to 6.6.1992. [405-G-H; 406-A-E]

Tejkumar Balakrishan Ruia v. *A.K. Menon,* [1997] 9 SCC 123, relied on.

5.1. Tax liability under Section 11(2)(a) refers to such liability for the period 1.4.1991 to 6.6.1992. It would not be correct to hold that the liabilities arising during this period should also be finally assessed before 6.6.1992 (the date of the Act) or the date of notification. It must refer to the date of distribution. The date of distribution arrives when the Special Court completes the examination of claims under Section 9-A. If on that date, any tax liability for the statutory period is legally assessed, and the assessment is final and binding on the notified person, that liability will be considered for payment under Section 11(2)(a). [406-H; 407-A-B]

5.2. The Special Court cannot sit in appeal for the assessment of taxes by the tax authorities. There is undoubtedly no question of reopening of tax assessments before the Special Court. There is also no provision under the Special Court Act for proof of debts as in insolvency. The provisions in the Special Court Act for examination of claims are under Section 9-A. A claim in respect of tax assessed, therefore, cannot be reopended by the Special Court. The liability of the notified person to pay the tax will have to be determined under the machinery provided by the relevant tax law. The extent of liability, therefore, can not be examined by the Special Court.[410-C-D]

5.3. But the Special Court can decide how much of that liability will be discharged out of the funds in the hands of the Custodian. This is because the tax liability of a notified person having priority under Section 11(2)(a) is only tax liability pertaining to the "statutory period". Secondly payment in full may not be made by the Special Court depending upon various circumstances. The Special Court can, for this purpose, examine whether there is any fraud, collusion or miscarriage of justice in assessment proceedings. The assessee who is before the Special Court, is a person liable to be charged with an offence relating to transactions in securities. He, may not, in these circumstances, explain transaction before the Income tax authorities, in case his position is prejudicially affected in defending criminal

A charges. Then, on account of his property being attached, he may not be in a position to deposit the tax assessed or file appeals or further proceedings under the relevant tax law which he could have otherwise done. Where the assessment is based on proper material and pertains to the "statutory period", the Special Court may not reduce the tax claimed and pay it out in full. But, if, the assessment is a "best judgment" assessment, the Special Court may B examine whether, for example, the income which is so assessed to tax bears comparison to the amounts attached by the Custodian, or whether the tax so assessed are grossly disproportionate to the properties of the assessee in the hands of the Custodian, applying the Wednesbury principle of proportionality. The Special Court may in these cases, scale down the tax liability to be paid C out of the funds in the hands of the Custodian. [410-E-H; 411-A]

5.4. Although the liability of the assessee for the balance tax would subsist, and the taxing authorities would be entitled to realise the remaining liability from the assessee, the same will not be paid in priority over the claims of everybody else under Section 11(2)(a). If the Special Court so D decides, it may direct payment of balance liability under Section 11(2)(c). Otherwise the taxing authorities may recover the same from any other subsequently acquired property of the assessee or in any other manner in accordance with law. Such scaling down, however, should be done only in serious cases of miscarriage of justice, fraud or collusion, or where tax E assessed is so disproportionately high in relation to the funds in hands of the Custodian as to require scaling down in the interest of the claims of the banks and financial institutions and to further the purpose of the Act. The Special Court have strong reasons for doing so. In fact, the Income Tax authorities have also accepted that exorbitant tax demands can be ignored, applying the Wednesbury Principles. [411-B-D]

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Tejkumar Balakrishna Ruia v. *A.K. Menon,* [1997] 9 SCC 123; *State of Punjab* v. *Rattan Singh,* [1964] 5 SCR 1098; *S.V. Kondeaskar* v. *V.M. Deshpande,* [1972] 1 SCC 438 and *CIT* v. *A.K. Menon,* [1995] 5 SCC 200, relied on.

G *Lahore High Court (Bench of three Judges) in Governor-General In Council* v. *Sargodha Trading Co. Ltd., 11 ITR 368; In re Calvert,* [1899] 2 QBD 145 and *Ravi Paint Colour and Varnish Works Ltd.* v. *Federation of Pakistan,* [1955] 27 ITR 475, referred to.

6.1. Neither penalty nor interest can be considered as tax under Section H 11(2)(a). Provisions for imposition of penalty and interest are distinct from

the provisions for imposition of tax. [411-F-G] A

6.2. Since the liabilities covered under Section 11(2)(a) are only liabilities arising during the period 1.4.1991 to 6.6.1992, and do not cover penalty and interest, the question whether the Special Court can absolve a notified person from imposition of penalty or interest after the date of the notification does not really arise. In any case, interest or penalty for any B action or default after the date of notification, are not covered by the Act. However, a taxing statute is a code in itself for imposition of tax, penalty or interest. The remedy of a notified person who is assessed to penalty or interest, after the notified period, would be to move the appropriate authority under the taxing statute in that connection. If it is open to him under the relevant taxing statute to contend that he was unable to pay his taxes on C account of the attachment of all his properties under the Special Court Act, and that there is a valid reason why penalty or interest should not be imposed upon him after the date of notification, the authorities concerned under the taxing statute can take notice of these circumstances in accordance with law for the purpose of deciding whether penalty or interest can be imposed on the notified person. The Special Court is required to consider this question D only from the point of view of distributing any part of the surplus assets in the hands of the Custodian after the discharge of liabilities under Sections 11(2)(a) and 11(2)(b). The Special Court has full discretion under Section 11(2)(c) to decide whether such claim for penalty or interest should be paid out of any surplus funds in the hands of the Custodian. [412-B-E]

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7. In view of the interpretation put on Section 11 and Section 3(3), the challenge to the constitutional validity of Section 11 read with Section 3(3) does not survive. If, according to the bank or financial institutions, any of the properties attached belongs to the banks or financial institution concerned, it is open to the bank or financial institution to file a claim before the Special Court in accordance with law. Obviously, until such a claim is determined, F the property attached cannot be sold or distributed under Section 11. [413-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5326 of 1995 Etc.

G

From the Judgment and Order dated 20.2.95 of the Special Court, Bombay in M.A. No. 107 of 1993.

Ram Jethmalani, Atul Setelwad, Harish N. Salve, F. S. Nariman, Arun Jaitely, Dipankar Gupta, Dr. V. Gauri Shankar, S.D. Parekh, Bhimrao Naik, S.B. Jaisinghani, Mahesh Jethmalani, Ms. Lata Krishnamurti, A. Subba Rao, A.T. H

A Rao, Rajiv Kapur, Sanjay Kapur, Ms. Shubhra Kapur, Subhash Sharma, Ms. Nina Gupta, Neeraj Sharma, Ms. Vaishali Deshpande, Ms. Arpita Roy Choudhary, Sanjay Katyal, Vineet Kumar, Tushar K. Cooper, S. Rajappa, C. Radhakishna, B.K. Prasad, S.N. Terdol, S.K. Dwivedi, A.K. Sharma, Ms. Vijay Lakshmi Menon, Ms. Anuradha Dutt, B.V. Desai, N.K. Niraj, P.J. Mehta and
B Janakalyan Das for the Appearing parties.

The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. The Special Court (Trial of Offenders Relating Transactions in Securities) Act, 1992 is a special Act with its own special problems. The offences it deals with involve amounts of unusual
C magnitude procured by brokers from banks and financial institutions. Unfortunately, the proceedings before the Special Court, which was set up for a quick prosecution or adjudication of claims have been trapped in unusual legal and interpretational difficulties generated by the casual drafting of the Act that leaves much to the skills and good sense of the courts. The present
D appeals before us relate to the interpretation of Section 11 of the Act.

Civil Appeal No. 5225 of 1995 is filed by the Custodian appointed under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 against a judgment and order of the Special Court Judge dated 20.2.1995. The appeal is filed by the Custodian pursuant to
E directions contained in the impugned judgment itself. The other appeals have been filed by various notified persons under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the 'Special Court Act') from the same judgment and order of the Special Court Judge. A writ petition challenging the constitutional validity of Section 11 of the Special Court Act pending in the Delhi High Court has also been
F transferred to this Court for consideration along with these appeals, as common questions of law arise. All these appeals along with the transferred case have been heard together. We have also heard various intervenors in these appeals.

The Special Court has observed that it has been functioning since June 1992. In respect of two notified parties, namely, the Harshad Mehta Group and
G Fairgrowth Financial Services Ltd., the time is approaching for distribution of their assets under Section 11 of the Special Court Act, 1992. In view of the different possible interpretations of the provisions of Section 11, the Special Court has raised certain questions of law. After hearing all concerned parties, the Special Court has answered these questions in the impugned judgment, somewhat in the fashion of an Originating Summons. The Custodian has
H raised certain additional questions which arise in interpreting and implementing

Section 11 of the Special Court Act. The questions raised by the Special Court are as follows: A

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

To appreciate the points at issue, it is necessary to look briefly at the provisions of the Special Court Act. The Statement of Objects and Reasons D relating to the Act states, "In the course of the investigations by the Reserve Bank of India, large scale irregularities and malpractices were noticed in transactions in both the Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions. The said irregularities and malpractices led to the diversion of funds from banks and financial institutions to the individual accounts of E certain brokers, (2) To deal with the situation and in particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence in and maintain the basic integrity and credibility of the banks and financial institutions, the Special (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992, was promulgated on 6th June, F 1992. The Ordinance provides for the establishment of a Special Court with a sitting Judge of a High Court for speedy trial of offences relating to transactions in securities and disposal of properties attached. It also provides for appointment of one or more custodians for attaching the property of the offenders with a view to prevent diversion of such properties by the offenders." The Ordinance was replaced by the Act. G

Under Section 3 of the Special Court Act sub-sections (1), (2), (3) and (4) are as follows :

> "3. *Appointment and functions of Custodian*—(1) The Central Government may appoint one or more Custodian as it may deem fit H

A for the purposes of this Act.

(2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 6th June 1992, notify the name of such person in the Official Gazette.

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

C

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

(5)....."

D The Custodian has, therefore, the power to notify the names of persons involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on or before 6th of June, 1992. On such notification all properties of the notified person stand attached. Under Section 4, the Custodian is given the power, if he is satisfied that any contract or agreement entered into at any time after 1st of April, 1991 and on or before 6th of June, 1992 E in relation to any property of the person notified has been entered into fraudulently or to defeat the provisions of this Act, to cancel such contract or agreement. On such cancellation the property shall stand attached. Both Sections 3 and 4, therefore, deal with the Custodian's powers relating to transactions in securities entered into during a very specific period, namely, 1st of April, 1991 and on or before 6th of June, 1992 (hereinafter referred to F as the statutory period).

Under Sections 7 and 8 the jurisdiction of the Special Court in respect of prosecution of offences is confined to offences referred to in Section 3(2) i.e. during the statutory period. Section 9-A which has been introduced by G the Amending Act 24 of 1994, deals with jurisdiction, powers, authority and procedure of the Special Court in civil matters. Under sub-section (1) it is provided as follows :-

"(1) On and from the commencement of the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Act, H 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 -

(a) relating to any property attached under sub-section (3) or Sec. 3;

(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 Sec.3 is involved as a party, broker, intermediary or in other manner.

(2).....

(3).....

(4).....

(5)....."

Jurisdiction of the Special Court in civil matters is, therefore, in respect of any matter or claim relating to any property which is attached under Section 3(2), or any matter or claim arising out of transactions in securities entered into during the "statutory period".

Under Section 9-B the jurisdiction of the Special Court in arbitration matters is also with reference to those matters or claims which are covered by Section 9-A (1).

Therefore, the jurisdiction of the Special Court in civil as well as criminal matters is in respect of transactions during the statutory period of 1st of April, 1991 to 6th of June, 1992; and in relation to the properties attached, of a notified person. The entire operation of the said Act, therefore, revolves around the transactions in securities during this statutory period.

Section 11 deals with discharge of liabilities and distribution of the property attached. It provides as follows :-

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

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

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

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

B

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

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

D Before the Special Court makes any order under Section 11(1) the Special Court must be satisfied that the property which is attached and is being disposed of, is the property belonging to the notified person. If any person other than the notified person has any share, or any right, title or interest in the attached property on the date of notification under Section 3, E that right of a third party cannot be extinguished. There is no provision in the Special Court Act which extinguishes the right, title and interest of a third party in any property which is attached as a consequence of a notification under Section 3. The only right which the Custodian has, in respect of the rights of third parties in such properties, is conferred by Section 4 under which, if the Custodian is satisfied that any contract or agreement which was F entered into by the notified party within the "statutory period" in relation to an attached property, is fraudulent or entered into for the purpose of defeating the provisions of the Special Court Act, he can cancel such contract or agreement. There is no other provision under the Special Court Act which affects the existing rights of a third party on the date of attachment, in the property attached. The attached property also does not vest in the Custodian. G In this regard, the position of a Custodian is different from that of an official liquidator of a company in winding up. Had the Act provided for the extinguishment of any subsisting rights of other persons in the attached property, the Act could well have been considered as arbitrary or unconstitutional (Vide *C.B. Gautam* v. *Union of India and Ors.*, [1993] 1 SCC H 78 at page 105 to 110).

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

It has also been submitted before us by one of the notified parties (*Dhanraj Mills* v. *Custodian*) that properties belonging to notified persons which have no nexus with the transactions in securities ofthe notified person during the "statutory period", also cannot be attached under Section 3. Reliance is placed on the decision of the Bombay High Court in the case of *Hitesh Shantilal Metha* v. *Union of India & Anr.* (1992) 3 Bom. C.R. 716 (to which one of us was a party) in this connection. Our attention is drawn to the following passage in the High Court's judgment (at page 719), "If the person.....approaches theSpecial Court and makes out, for example, a case that the property which is attached has no nexus of any sort with the illegal dealings in securities belonging to banks and financial institutions 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, in our view, the Special court would have the power to direct the Custodian to release such property from attachment". Hence a property not having any nexus with the illegal dealings in securities can be released from attachment by the Special Court in an appropriate case.

The question of distribution of attached property under Section 11(2) has to be considered thereafter. Before going into the questions raised in that connection, one must examine whether Section 11(2) lays down any priorities. Although it was contended before us by some of the appellants that Section 11(2) does not lay down any priorities, the language of Section 11(2) is quite clear. The words, "in order as under" in Section 11(2) lay down the properties for distribution. In fact, it has been so held by this Court while interpreting Section 11 in the case of *B.O.I. Finance Ltd.* v. *Custodian & Ors.*, [1997] 10 SCC 488 at page 497. Referring to Section 11(2) of the Act, this Court has said that sub-section (2) of Section 11 provides for the priorities in which the liabilities of the notified person are to be discharged from out of the attached properties. Considering that the Act has been passed because of the diversion

A of funds from the banks and financial institutions to the individual accounts of certain brokers, the implication of Section 11 (2) (b) clearly is, that after the discharge of the liabilities under Section 11(2)(a), the amounts which are paid to the banks would probably be those funds which were diverted from the banks by reason of malpractice in the security transactions. However, before the amounts can be paid to banks or financial institutions under Section
B 11(2)(b) the liabilities under Section 11(2)(a) are required to be discharged.

The Special Court has raised three questions pertaining to distribution under Section 11(2). We would, however, like to expand the three questions in order to bring out the points at issue which have been argued before us.
C The questions can be reframed as follows :

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

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

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

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

(5) Whether taxes include penalty or interest?

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

G The Custodian has raised certain further questions. We propose to consider one such question which has a bearing on the questions which have been framed by the Special Court. The question is whether in the case of mortgaged/pledged properties of the notified persons already mortagaged/ pledged to the banks or financial institutions on the date of attachment, the
H words of Section 3 (3) "any property movable or immovable or both belonging

to any person notified" would refer only to the right, title or interest of the notified person in the mortgaged/pledged property and not the entire property itself. If so, the liabilities mentioned in Section 11(2) which are to be paid from the proceeds of the sale of the attached property, would only refer to proceeds of the sale of the right, title and interest of the notified person in the attached property.

The last question can be answered first. As stated above, Section 3(3) clearly provides that the properties attached are properties which belong to the person notified. The words "belong to" have a reference only to the right, title and interest of the notified person in that property. If in the property "belonging to" a notified person, another person has a share or interest, that share or interest is not extinguished. Of course, if the interest of the notified person in the property is not a severable interest, the entire property may be attached. But the proceeds from which distribution will be made under Section 11(2) can only be the proceeds in relation to the right, title and interest of the notified person in that property. The interest of a third party in the attached property cannot be sold or distributed to discharge the liabilities of the notified person. This would also be the position when the property is already mortgaged or pledged on the date of attachment to a bank or to any third party. This, however, is subject to the right of the Custodian under Section 4 to set aside the transaction of mortgage or pledge. Unless the Custodian exercises his power under Section 4, the right acquired by a third party in the attached property prior to attachment does not get extinguished nor does the property vest in the Custodian whether free from encumbrances or otherwise. The ownership of the property remains as it was.

Question No. 1

The first question on which the arguments have been advanced, relates to the meaning of the phrase "tax due" used in Section 11(2)(a). Black's Law Dictionary at page 499 defines the word `due', inter alia, as, "owing; payable; justly owed..... Owed or owing as distinguished from payable. A debt is often said to be due from a person where he is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived.....The word `due' always imports a fixed and *settled obligation or liability, but with reference to the time for its payment there is considerable ambiguity in the use of the term,* the precise signification being determined in each case from the context." (underlining ours) Jowitt's Dictionary of English Law Vol. I, 2nd Edn. at page 669 defines `due' as, "anything owing,

A that which one contracts to pay or perform to another..... As applied to a sum of money, 'due' means either that it is owing or that it is payable; in other words, it may mean that the debt is payable at once or at a future time. It is a question of construction which of these two meanings the word 'due' has in a given case".

B Wharton's Law Lexicon, 14th Edn. at page 365 defines 'due' as anything owing. It has the following comment, "It should be observed that a debt is said to be due the instant that it has existence as a debt; it may be payable at a future time".

C Our attention has been drawn to Section 530(1)(a) of the Companies Act where the language used in "taxes, cesses and rates due and payable" and Section 61(1)(a) of the Provincial Insolvency Act, 1920 which refers to all debts due to the Crown. In the *State of Rajasthan & Ors.* v. *Ghasilal,* [1965] 2 SCR 805, this Court considered the provisions of the Rajasthan Sales Tax Act, 1955. It observed, that Section 3 which is the charging section of the D Rajasthan Sales Tax Act, read with Section 1, makes tax payable i.e. creates a liability to pay the tax. That is the normal function of a charging section in a taxing statute. But till the tax payable is ascertained by the Assessing Authority under Section 10 or by the assessee under Section 7(2), no tax can be said to be due. For till then there is only a liability to be assessed to tax. A similar view was taken by this Court in its later decision in *Associated* E *Cement Co. Ltd.* v. *Commercial Tax Officer, Kota & Ors.,* (1981) 48 S.T.C. 466 at page 480 holding that until the tax payable is ascertained by the Assessing Authority or by the assessee, no tax can be said to be due; for till then there is only a liability to be assessed to tax.

F The Federal Court in the case of *Chatturam and Ors.* v. *Commissioner of Income-Tax, Bihar,* (1947) 15 ITR 302 at page 308 held that the liability to pay the tax is founded on Sections 3 and 4 of the Income Tax Act which are the charging sections. Section 22 etc. are the machinery sections to determine the amount of tax. It cited the observations of Lord Dunedin in *Whitney* v. *Commissioners of Inland Revenue,* (1926) AC 37 as follows :- "Now, there are G three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statue which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex hypothesi has already been fixed. But assessment particularizes that exact sum which a person liable has to pay. Lastly, come H the methods of recovery if the person taxed does not voluntarily pay." (See

in this connection, *Kalwa Devadattam and Ors.* v. *Union of India and Ors.*, (1963) 49 ITR 165, 171; *Doorga Prosad* v. *The Secretary of State* 13 ITR 285, 289 and *Ramyond Synthetics Ltd. and Ors.* v. *Union of India and Ors.*, [1992] 2 SCC 255 at 286-288.

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

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

Question No. 2

Do these taxes relate to any particular period or do they cover all assessed taxes of the notified person? The Special Court Act is quite clear in its intent. It seeks to cover all criminal and civil proceeding relating to transactions in securities of a notified person between 1st of April, 1991 and 6th of June, 1992. The Special Court is empowered to examine all civil claims and to try all offences pertaining to such transactions during the said period. Under Section 3(2) it is the property of such offenders which is attached by the Custodian and which is disbursed under the directions of the Special Court under Section 11(2). Clearly, therefore, as the Special Court is empowered to examine all transactions in securities during the period 1.4.1991 to 6.61992, as also all claims relating to the property attached, the Special Court will also have to examine the tax liability of the notified person arising during the period 1.4.1991 to 6.61992. As the purpose of the Special Court Act, inter alia, is as far as practicable, to safeguard the funds to which the banks and financial institutions may be entitled, and to ensure that these funds are not

done away with, there are provisions for attachment, ascertainment of claims and distribution of funds. However, before the liabilities of a notified person to banks and financial institutions can be discharged, Section 11(2)(a) requires the tax liability of the notified person to be paid. In this context the tax liability can properly be construed as tax liability of the notified person arising out of transactions in securities during the "statutory period" of 1.4.1991 to 6.6.1992. If, for example, any income-tax is required to be paid in connection with the income accruing to a notified person in respect of transactions in security during the "statutory period", that liability will have to be paid before the funds are made available to the banks and financial institution. Similarly, in respect of any property which is attached, if any rates or taxes are payable for the "statutory period" those rates and taxes will have to be paid before the proceeds of the property are distributed to banks and financial institutions. In the same manner, the liabilities to banks and financial institutions in Section 11(2)(b) are also liabilities pertaining to the statutory period. However, the extent to which liability under Section 11(2)(a) is to be discharged is dealt with a little later.

Every kind of tax liability of the notified person for any other period is not covered by Section 11(2)(a), although the liability may continue to be the liability of the notified person. Such tax liability may be discharged either under the directions of the Special Court, under Section 11(2)(c) or the taxing authority may recover the same from any subsequently acquired property of a notified person (vide 1997 (9) SCC 123) or in any other manner from the notified person in accordance with law. The priority, however, which is given under Section 11(2)(a) to such tax liability only covers such liability for the period 1.4.1991 to 6.61992.

Questions No. 3

At what point of time should this tax liability have become quantified by a legal assessment which is final and binding on the notified person concerned? It is contended before us by some of the parties that only that liability which has become ascertained by final assessment on the date of the Act coming into force should be paid under Section 11(2)(a). Others contended that it should have been so ascertained on the date of the notification. The third contention is that it should have been so ascertained on the date of distribution. Since we have held that tax liability under Section 11(2)(a) refers only to such liability for the period 1.4.1991 to 6.6.1992, it would not be correct to hold that the liabilities arising during this period should also be finally

assessed before 6.6.1992 (the date of the Act) or the date of the notification. It must refer to the date of distribution. The date of distribution arrives when the Special Court completes the examination of claims under Section 9A. If on that date, any tax liability for the statutory period is legally assessed, and the assessment is final and binding on the notified person, that liability will be considered for payment under Section 11(2)(a), subject to what follows.

Question No. 4

The next question is, whether the assessed tax liability for the statutory period requires to be discharged in full under Section 11(2)(a) or whether the Special Court has any discretion in relation to the extent of payment to be made under Section 11(2)(a)? The banks who have large claims against the notified persons have strenuously urged that the Special Court is not required to pay the tax liability in full, but has some discretion as to the extent to which such liability will be paid. They have emphasised the words `shall be paid or discharged in full as far as may be' in Section 11(2) as indicating some discretion in the Special Court regarding payment of liabilities under Section 11(2)(a). They point out that at the time when the said Act was enacted or when the Ordinance which it replaced was promulgated, the full extent of the funds involved in malpractices leading to the diversion of funds from banks and financial institutions to the pockets of the brokers, was not known. Even after the submission of report by the Janakiraman Committee, a special group known as an inter-disciplinary group was required to be set up to trace the end use of funds involved in this fraud. Auditors were appointed to check instances of differences where the attached assets were short of problem exposure. It was, therefore, expected that the available funds from attached assets would be speedily restored to the banks and financial institutions. It was also expected that even after the discharge of tax liabilities for the relevant period, substantial funds would be left over for being paid to the banks and financial institutions concerned.

It is submitted that the Act was not intended to secure taxes and, therefore, if the Special Court finds that the tax liabilities are such, and their manner of assessment is such, that it would result in the entire funds being paid over to the taxing authorities, the Special Court would have discretion in deciding how much should be paid over to the taxing authority and how much should come to the banks and financial institutions. It is submitted with some justification that Section 11 should be construed in the context of the purpose for which it was framed; as was done by this Court in the case of *Tejkumar Balakrishna Ruia* v. *A.K. Menon & Anr.*, [1997] 9 SCC 123 where

A the Court said that if two interpretations are possible, purposive interpretation should be resorted to. The Court in that case held that the income or property obtained by a notified person after the date of the notification could not be attached under Section 3(3). The purposive interpretation in the present case is to be resorted to for the purpose of ensuring that amounts realised from the properties attached come back to the banks and financial institutions.
B

Our attention was drawn to the provisions relating to examination of claims in insolvency or of a company in winding up. Debts have to be proved in insolvency before they can be considered for payment either in part or in full. Explaining the powers of the insolvency court, this Court in The *State of Punjab* v. *S. Rattan Singh,* [1964] 5 SCR 1098 at page 1109 said, "It is well-
C settled that the Insolvency Court can, both at the time of hearing the petition for adjudication of a person as an insolvent and subsequently at the stage of the proof of debts, re-open the transaction on the basis of which the creditor had secured the judgment of a court against the debtor. This is based on the principle that it is for the Insolvency Court to determine at the time
D of the hearing of the petition for Insolvency whether the alleged debtor does owe the debts mentioned by the creditor in the petition, and whether, if he owes them, what is the extent of those debts. A debtor is not to be adjudged an insolvent unless he owes the debts equal to or more than a certain amount, and has also committed an act of insolvency. It is the duty of the Insolvency
E Court, therefore, to determine itself the alleged debts owed by debtor irrespective of whether those debts are based on a contract or under a decree of court. At the stage of the proof of the debts, the debts to be proved by the creditor are scrutinised by the Official Receiver or by the Court in order to determine the amount of all the debts which the insolvent owes as his total assets will be utilised for the payment of his total debts and if any debt is
F wrongly included in his total debts that will adversely affect the interest of the creditors other than the judgment creditor in respect of that particular debt as they were not parties to the suit in which the judgment debt was decreed. *That decree is not binding on them and it is right that they be in a position to question the correctness of the judgment debt."*

G

It is on behalf of all these creditors that the Insolvency Court or the Official Receiver scrutinises the debts, whether claimed under a decree or otherwise. The same is the position of a company in winding up because the rules of insolvency apply to winding up proceedings as well. In relation, however, to claims for taxes which are assessed in accordance with law by
H the taxing authorities, a question arose whether the court in winding up of

an insolvent company,could go behind an income tax assessment if there are suspicious circumstances. In 1943 the Lahore High Court, *Bench of three Judges) in Governor-General In Council* v. *Sargodha Trading Company Ltd.,* 11 ITR 368 held, differing fromthe view taken by the English Court In Re Calvert (1899) 2 Q.B.D. 145, that a court in liquidation can examine even a claim based on income-tax assessment if there are suspicious circumstances.This view, however, was subsequently overruled by the Lahore High Court in Pakistan in *Ravi Paint Colour and Varnish Works Ltd.* v. *Federation of Pakistan,* (1955) 27 ITR 475. The Court held that in maters relating to asessment of income tax, the machinery that can be brought into action is the one provided by the Income Tax Act which is a complete code by itself. The jurisidiction of the civil court is impliedly barred. When a company is under liquidation, the Income Tax Authorities can prove their claim against the company by the production of the assessment order made by them. A company under liquidation is still an assessee and subject to Income Tax law; and if the liquidator feels aggrieved by the assessment he must pursue the same remedies as are open to any other assessee.

In the case of *S.V. Kondaskar* v. *V.M. Deshpande and Anr.,* [1972] 1 SCC 438 at page 449 this Court examined the question whether under the Income Tax Act before commencing re-assessment proceedings, leave was required to be taken by the income tax authority of the Company Court under Section 446 of the Companies Act, when the assessee-company was in winding up. This Court said that the Income Tax Act is a complete code with respect to assessment and re-assessment of income tax. The proceedings under the Income Tax Act would not fall within the meaning of the expression 'other legal proceedings' in Section 446 and, therefore, leave would not be required of the Company Court for commencing such proceedings. This Court, however, went on to observe, (in paragraph 18) "We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the Revenue after income tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then, to decide how far, under the law, the amount of income tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can full safeguard the interests of the company and its creditors under the Act".

A Explaining this decision, this Court (a bench of two judges) in the case of *Assistant Commissioner of Income Tax* v. *A.K. Menon & Ors.*, [1995] 5 SCC 200, held that the Special Court under the present Act has no power to sit in appeal over the orders of Tax Authorities, Tribunals or Courts. The claims relating to tax liabilities of a notified person are, along with revenues, cesses and rates, entitled to be paid first in the order of priority and in full as far as B may be.

While we respectfully agree with the finding that the Special Court cannot sit in appeal over the assessment of taxes by the Tax Authorities, we would like to qualify the Court's subsequent observations relating to payment C in full of all assessed taxes under Section 11(2)(a). There is undoubtedly no question of any reopening of tax assessments before the Special Court. There is also no provision under the Special Court Act for proof of debts as in Insolvency. The provisions in the Special Court Act for examination of claims are under Section 9A. A claim in respect of tax assessed, therefore, cannot be reopened by the Special Court. The liability of the notified person to pay D the tax will have to be determined under the machinery provided by the relevant tax law. The extent of liability, therefore, cannot be examined by the Special Court.

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

grossly disproportionate to the properties of the assessee in the hands of the Custodian, applying the Wednesbury principle of proportionality. The Special Court may in these cases, scale down the tax liability to be paid out of the funds in the hands of the Custodian.

Although the liability of the assessee for the balance tax would subsist, and the Taxing Authorities would be entitled to realise the remaining liability from the assessee, the same will not be paid in priority over the claims of everybody else under Section 11(2)(a). If the Special Court so decides, it may direct payment of the balance liability under Section 11(2)(c). Otherwise the taxing authorities may recover the same from any other subsequently acquired property of the assessee or in any other manner in accordance with law. Such scaling down, however, should be done only in serious cases of miscarriage of justice, fraud or collusion, or where tax assessed is so disproportionately high in relation to the funds in the hands of the Custodian as to require scaling down in the interest of the claims of the banks and financial institutions and to further the purpose of the Act. The Special Court must have strong reasons for doing so. In fact, the Income Tax Authorities have also accepted that exorbitant tax demands can be ignored, applying the Wednesbury Principles.

Question No. 5

One other connected question remains: whether "taxes" under Section 11(2)(a) would include interest or penalty as well? We are concerned in the present case with penalty and interest under the Income Tax Act. Tax, penalty and interest are different concepts under the Income Tax Act. The definition of "tax" under Section 2(43) does not include penalty or interest. Similarly, under Section 157, it is provided that when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand as prescribed. Provisions for imposition of penalty and interest are distinct from the provisions for imposition of tax. Learned Special Court judge, after examining various authorities in paragraphs 51 to 70 of his judgment, has come to the conclusion that neither penalty nor interest can be considered as tax under Section 11(2)(a). We agree with the reasoning and conclusion drawn by the Special Court in this connection.

Question No. 6

The Special Court has, in the impugned judgment, also dwelt at some

length on the question whether it can absolve a notified person from imposition of penalty or interest after the date of the notification. Since the liabilities covered under Section 11(2)(a) are only liabilities arising during the period 1.4.1991 to 6.6.1992, and do not cover penalty and interest, this question does not really arise. In any case, interest or penalty for any action or default after the date of the notification, are not covered by the Act. However, we must reiterate that a taxing statute is a code in itself for imposition of tax, penalty or interest. The remedy of a notified person who is assessed to penalty or interest, after the notified period, would be to move the appropriate authority under the taxing statute in that connection. If it is open to him under the relevant taxing statute to contend that he was unable to pay his taxes on account of the attachment of all his properties under the Special Court Act, and that there is a valid reason why penalty or interest should not be imposed upon him after the date of notification, the concerned authorities under the Taxing Statute can take notice of these circumstances in accordance with law for the purpose of deciding whether penalty or interest can be imposed on the notified person. The Special Court is required to consider this question only from the point of view of distributing any part of the surplus assets in the hands of the Custodian after the discharge of liabilities under Section 11(2)(a) and 11(2)(b). The Special Court has full discretion under Section 11(2)(c) to decide whether such claim for penalty or interest should be paid out of any surplus funds in the hands of the Custodian.

This, we hope, answers all questions which arise for determination in the present appeals. Pursuant to an interim order dated 26.8.1996, certain payments have been made to Income Tax Authorities. The Income Tax Authorities, however, have given an undertaking which is filed by the Secretary (Revenue) in the Ministry of Finance, Union of India, that the Union of India shall, within four weeks of being called upon so to do, either by this Court or by the Special Court in this or any other proceeding under the Special Court Act, bring back to Court the moneys so paid or part or parts thereof as directed, and pay thereon interest at a rate not less than 18% per annum as this Court or the Special Court may direct from the date of receipt until the date of return thereof. The Special Court shall examine the claim of the Income Tax Authorities for taxes due under Section 11(2)(a) in the light of our judgment and decide whether any amount paid to the Income Tax Authorities under the interim orders of this Court requires to be returned. The Special Court shall pass appropriate orders thereon in the light of the undertaking given.

This Court, by an order dated 11.3.1996, had also directed the Custodian to draft a scheme in respect of the shares held by the Custodian whereby such shares can be sold from time to time. The Custodian was also directed to forward the scheme for the approval of the Union of India. Pursuant to these directions, the Custodian forwarded a draft scheme` for approval to the Union of India. The Ministry of Finance, Department of Economic Affairs (Banking Division) approved the draft scheme sent by the Custodian with certain modifications. The final scheme incorporating the modifications by the Union of India has been filed in this Court. This scheme, with further modifications, if any, shall be considered by the Special Court and appropriate orders may be passed by the Special Court in respect of the scheme so submitted.

In view of the interpretation which we have put on Section 11 of the Special Court Act and Section 3(3) of the Special Court Act, the challenge to the constitutional validity of Section 11 read with Section 3(3) does not survive. If, according to any of the banks or financial institutions, any of the properties attached belongs to the bank or financial institution concerned, it is open to that bank or financial institution to file a claim before the Special Court in that connection and establish its right to the property attached or any part thereof in accordance with law. Obviously, until such a claim is determined, the property attached cannot be sold or distributed under Section 11. Transfer Case No. 5 of 1998 is, therefore, dismissed.

All the appeals are disposed of as above with no order as to costs.

R.K.S. Appeals disposed of.