

Santosh

IN THE SPECIAL COURT AT BOMBAY

**Constituted under the Special Court [Trial of Offences Relating to
Transactions in Securities] Act, 1992**

**MISCELLANEOUS APPLICATION NO. 54 OF 2018
IN
MISCELLANEOUS PETITION NO. 99 OF 1998**

The Custodian,
Appointed under the Provisions of the
Special Court (Trial of Offences relating to
Transactions in Securities) Act, 1992, and
having its office at 10th Floor, Nariman
Bhavan, 227, Vinay K. Shah Marg, Nariman
Point, Mumbai 400 021

...Applicant

Versus

1. Apollo Tyres Ltd.
A company registered under the
Companies Act, 1956, having its
Registered office at 6th Floor,
Cherupushpam Building, Shanmugham
Rd., Kochi 682031
And
an office at "Apollow House", 7
Institutional Area, Sector 32,
Gurgaon-122001
- 2 (a) Mrs. Jyoti H. Mehta
(b) Mrs. Rasila Mehta
(c) Mr. Aatur H. Mehta, Legal heirs of
Late Mr. Harshad Mehta and are
residing at 32, Madhuli Co-operative
Housing Society Limited, Dr. Annie
Besant Road, Worli, Mumbai – 400 018.
3. The Commissioner of Income Tax
Having office at Aaykar Bhavan, M. K.
Road, Churchgate, Mumbai – 400 020

...Respondents

**WITH
MISCELLANEOUS APPLICATION NO. 52 OF 2018
IN
MISCELLANEOUS PETITION NO. 96 OF 1998**

The Custodian,
Appointed under the Provisions of the
Special Court (Trial of Offences relating to
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having its office at 10th Floor, Nariman
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Gurgaon-122001
- 2 (a) Mrs. Jyoti H. Mehta
(b) Mrs. Rasila Mehta
(c) Mr. Aatur H. Mehta, Legal heirs of
Late Mr. Harshad Mehta
3. Mr. Ashwin Mehta
Adult, resident Indian,
In his capacity as constituted Attorney
for all the members of entities of
Harshad Mehta Group
Respondent Nos.2 & 3 reside at 32,
Madhuli, Dr. Annie Besant Road, Worli,
Mumbai – 400 018.

...Respondents

Mr. Hormaz Daruwalla, Senior Advocate, i/b M/s. Shilpa
Bhate, for the Applicant.

Mr. Tushad Cooper, Senior Advocate, a/w Aditya Singh and
Drishti Doshi, i/b Akash Menon, for Respondent Nos.1.

Mr. Ashwin Mehta, for Respondent Nos.2(a),(b) and (c).

**CORAM: N. J. JAMADAR, J.
Judge, Special Court**

Reserved On: 25th AUGUST, 2023

Pronounced On: 14th JUNE, 2024

JUDGMENT:-

1. As common and, at times, overlapping questions of facts and law may arise in these two applications, they are being decided by this common judgment. Yet, for the sake of better clarity, the facts in both the applications are noted separately.

BACKGROUND:

2. In the wake of the securities scam involving large scale irregularities and malpractices in transactions in the Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions, resulting in diversion of funds from banks and financial institutions to the individual accounts of certain brokers, the Special Court (Trial of Offences Relating to Transaction of Securities) Ordinance, 1992 was promulgated on 6th June, 1992 to deal with the said situation and in particular to ensure speedy recovery of huge amounts, to punish the guilty and restore confidence in and maintain the basic sanctity and credibility of the banks and financial institutions. The

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (“TORT Act, 1992”) replaced the said Ordinance,

3. The TORT Act, 1992 *inter alia* provided for appointment of a Custodian for attaching the property of the offenders with a view to prevent diversion of such properties and also discharge the liabilities out of the attached assets. The Custodian was empowered to notify the parties upon being satisfied that any person has been involved in any offence relating to transactions in securities after the first date of April, 1991 and on and before 6th June, 1992 (the statutory period). On and from the date of the notification under Section 3(2) all the movable and immovable property belonging to such notified person shall stand attached simultaneously with the issue of the notification. The property so attached can only be dealt with by the Custodian in such manner as the Special Court appointed under Section 5 of the TORT Act, 1992, may direct.

4. Late Harshad Mehta was notified under the provisions of the TORT Act, 1992 on 8th June, 1992 alongwith a number of his family members and firms/corporate entities. Simultaneously with the notification, all the properties of late Harshad Mehta and the notified parties associated with him (for

the sake of convenience referred to as “Harshad Mehta Group”) stood attached.

5. Harshad Mehta Group was allegedly holding shares in a number of companies including Apollo Tyres Ltd. (“ATL”), respondent No.1. Respondent Nos.2A to 2C are the legal representatives of late Harshad Mehta.

Facts in Miscellaneous Application No.54 of 2018

6. In discharge of his duties under the TORT Act, 1992, the Custodian, the applicant herein, had filed Petition No.99 of 1998 for recovery of *benami* shares of 128 companies allegedly belonging to the notified entities in Harshad Mehta Group. ATL - R1 was arrayed as respondent No.4 in the said petition.

7. The said petition was disposed by the Special Court by an order dated 8th April, 2003 declaring the shares in 128 companies as the *benami* shares of Harshad Mehta Group and directing its recovery. During the course of the hearing in Petition No.99 of 1998 a statement was made on behalf of the ATL - R1 that the said petition also covered an item of 1,11,995 shares of ATL - R1 for which the latter had issued a stop transfer notice. Thereupon, the Special Court by its order dated 28th February, 2003 directed the Custodian to file an application for recovery of those *benami* shares.

8. The Custodian asserts he could obtain the particulars of 11,16,200 shares of ATL - R1 (upon split of original shares in the ratio 1:10) from ATL - R1 in the month of December, 2016 only. Those 11,16,200 shares of the face value of Rs.1, the particulars which were furnished by ATL - R1 vide letter dated 7th December, 2016, constitute the attached property under Section 3 of the TORT Act, 1992. Resultantly, the said attached property can only be dealt with by the orders of the Special Court.

9. Hence, this application to declare the said 11,16,200 shares of ATL - R1, as *benami* shares of Harshad Mehta Group and thus direct ATL - R1 to transfer and dematerialize those shares in the name of the Custodian/ account Harshad Mehta Group *benami* shares and also for a direction to ATL - R1 to remit the accruals and accretions like dividend, bonus, right share, if any, due on those shares since 1992 till date.

10. ATL - R1 resisted the prayers in the application. It was contended that the relief sought by the Custodian in respect of 11,16,200 shares (post-split) cannot be granted as over 90% of the said shares alongwith relevant transfer deeds were available with ATL - R1 in mutilated condition. ATL - R1 had stopped transfer in respect of those 11,16,200 shares. An aggregate

quantity of 1,06,695 shares of the face value of Rs.10/-, alongwith relevant transfer deeds, were in custody of ATL - R1. Those shares stand in the name of original shareholders in the record of ATL - R1.

11. In respect of 91,625 shares (old) ATL - R1 had received request for transfer and the latter had transferred 84,150 shares as of 30th July, 2000. In fact, 61,750 shares out of 1,11,620 shares (old) also form part of, “damaged/destroyed” category shares declared by late Harshad Mehta vide letter dated 19th October, 1999. There is a clear overlapping of shares in the two categories i.e. mutilated (subject matter of MA/54/2018) and damaged/destroyed shares (subject matter of MA/52/2018).

12. Referring to the findings of the internal scrutiny committee ATL - R1 contends that currently 1,11,620 shares of ATL - R1 constituting the subject matter of the instant application stand in the name of 96 individual/clients. The said fact was brought to the notice of the Custodian vide letter dated 7th January, 2014. Post order dated 20th August, 2003, the Custodian was called upon to take appropriate steps to either issue release order or to get an appropriate order from the Court in respect of those 1,11,620 shares. There was a complete inaction on the part of the Custodian.

13. ATL - R1 further contends that the notified parties are seeking to unjustly enrich themselves by seeking to have double value for the same shares i.e. firstly through the sale of shares to various third parties in the market and, secondly, by availing benefits on the basis of the relief sought by the Custodian for and on behalf of the notified parties. The inaction on the part of the late Harshad Mehta and the members of his group to lay claim over the subject shares since 1992 raises a justifiable apprehension about the genuineness of the claim of the notified parties. Therefore, a formal enquiry by CBI be directed to be conducted in respect of the claim of the notified parties over 11,16,200 subject shares. Thus, none of the prayers in the Custodian's application deserve to be granted.

14. Jyoti Mehta, respondent No.2A, has also filed an affidavit-in-reply. By and large, the reply proceeds on the premise of deliberate inaction and willful disobedience of the orders of the Special Court by the Custodian so as to cause prejudice to the interest of the notified parties. The notified party, however, supports the prayer in the Custodian's application. In addition, a prayer is made to take appropriate action against the Custodian for his alleged deliberate and conscious failure to make compliance with the orders of the Special Court and

violation the orders of the Court and dereliction of the duty of the Custodian, envisaged by the TORT Act, 1992.

15. Respondent No.2A has also filed an affidavit to deal with the affidavit-in-reply filed on behalf of ATL. Controverting the contentions therein, it is, *inter alia*, alleged that the ATL - R1 has been questioning the title of the notified parties and seeking direction for investigation with a view to prevent the recovery of attached assets, after having already disclosed and accepted the ownership of the notified parties over the attached assets. At any rate, ATL - R1 has no locus to question the title of the notified parties over the attached assets.

16. The Custodian after considering the affidavit-in-reply filed on behalf of ATL - R1, affidavit-in-reply filed by respondent No.2A and also the affidavit-in-rejoinder filed by respondent No.2A to the affidavit-in-reply filed by ATL - R1, filed an affidavit-in-rejoinder.

17. It is necessary to note, in the said affidavit-in-rejoinder the Custodian has adopted a restrained approach and refrained from supporting the prayers in the application wholeheartedly, in the least. With reference to the affidavit of ATL - R1 on the aspect of the alleged overlapping of shares claimed in MA/52/2018 and MA/54/2018 the Custodian has prayed that

respondent No.1 be directed to furnish the particulars of 61,759 shares so as to enable the Custodian to verify the same with the particulars of damaged/destroyed shares. A direction is also sought against respondent No.1 to provide exact break-up of 1,06,695 shares (old) alongwith their present status not covered under MA/52/2018. Claiming that the Custodian has no knowledge about the dealings of the notified parties, it is asserted that the Custodian is unable to state anything further about the rival claims of ATL - R1 and the notified parties, and submitted to the orders of the Court.

Facts in Miscellaneous Application No.52 of 2018

18. On 19th October, 1999 late Harshad Mehta informed the Custodian that, prior to 8th June, 1992, about 1,57,594 unregistered shares/debentures of ATL - R1, held by him, had been mishandled and were damaged. The physical share certificates were affected by water and white ants. Consequently, some of the share certificates had been reduced to shreds and powder. Yet, those shares constituted attached assets as they had been purchased by late Harshad Mehta either through the three brokerage firms in the said group or brokerage firms outside the group. Late Harshad Mehta had also submitted a

floppy disk and computerized printouts giving particulars of those shares alongwith letter dated 19th October, 1999.

19. In the month of November, 1999 respondent No.3 brought to the Custodian's Mumbai office certain damaged share certificates stored in a box. Those share certificates were in extremely bad condition and it was difficult to even handle those shares. The Custodian asserts, out of 1,57,515 shares/ debentures mentioned by Harshad Mehta only 11,289 shares and letters of allotment for 700 debentures could be identified and handed over to the Custodian. Thereupon the Custodian filed MA No.96 of 2000 seeking a prayer, *inter alia*, to transfer 11,289 shares of ATL - R1 and bonus and right shares thereon, as accrued.

20. By orders dated 24th January, 2002 and 13th October, 2003 passed in MP No.96 of 2000, the Special Court directed that all the accretions on the said 11,239 shares, which were retained by ATL - R1 shall be given to the Custodian. ATL - R1 was also directed to invoke the indemnity and get back 50 shares from Mr. K. J. Abraham in whose favour duplicate share certificates were issued by ATL - R1 and in the event the said transferee had already further transferred the shares, the monetary value of those shares. Accordingly ATL - R1 registered and

dematerialized 11,239 shares in the name of the Custodian/ account of Harshad Mehta Group under the Client ID No.16186594 on 3rd October, 2003.

21. The custodian claims to have followed the matter with ATL - R1. Vide letter dated 7th January, 2014, ATL - R1 informed the applicant that as per its record, after removal of overlapping and mismatches, 5,80,350 shares of face value of Rs.1 (post split of shares in the ratio as 1:10) were available with respondent No.1. The dividend on those shares from the year 2003 – 2004 was kept in abeyance. ATL - R1 had also furnished the status of 1,57,500 shares of the face value of Rs.10 in the affidavit dated 7th January, 2002 and 23rd September, 2003 filed in MP No.96 of 2000.

22. Referring to the said details furnished by ATL - R1, the Custodian asserts, the said shares constitute attached assets and, therefore, ATL - R1 be directed to transfer the said shares in the name of the Custodian/account Harshad Mehta Group. The Custodian has thus prayed for various reliefs including directions to ATL - R1 to cancel the original shares and issue 5,80,350 duplicate shares of the face value of Rs.1 in the name of the Custodian/account Harshad Mehta Group; transfer the dividend amount; transfer 50 shares of the face value of Rs.10,

the duplicate share certificates in respect of which were issued in favour K. J. Abraham with accruals or the monetary value thereof alongwith interest at the rate of 24% p.a.; account for the shares which ATL - R1 states that are not available with ATL - R1; furnish particulars of the transferees to whom 2,825 shares have been transferred and furnish full particulars of 49,850 shares of face value of Rs.10/- which are stated to be overlapping. Directions have also been sought against respondent Nos.2 and 3, the notified parties, to provide complete details of 16,725 shares of face value of Rs.10/- which are reported to be mismatched shares in folio/certificate by ATL - R1, for enabling the Custodian to realize these shares.

23. ATL - R1 opposed the prayers of the Custodian. At the outset, an unexplained delay of over seven years in the claim of late Harshad Mehta that, 1,57,514 shares belonged to Harshad Mehta and/or his group entities, was highlighted to question the genuineness of the claim. Reference was made to an order passed by this Court in Misc. Application No.88 of 2000 on 28th April, 2001 directing investigation into the alleged dubious conduct of the notified parties in claiming that huge number of shares belonging to them were missing. In the instant case

also, according to ATL - R1, before any order is passed a formal investigation by the CBI is necessitated.

24. ATL - R1 contested the claim of the notified parties that 1,57,514 shares (pre-split) were damaged or destroyed. It was contended that out of the said shares, 61,750 physical shares (pre-split) were received by ATL - R1 as mutilated shares. Out of them over 90% of the share certificates alongwith relevant transfer forms were available with ATL - R1. The balance 10% were returned to the shareholders, who had lodged the same. Secondly, transfer in 58,035 (pre-split) was stopped by respondent No.1 under 'damaged and destroyed category'. Original share certificates in respect of those 58,035 shares are not available with ATL. Those shares stand in the name of various registered holders. Out of them, 20,275 shares were lodged with ATL - R1 for transfer during the years 1997, 1998 and 1999 by various third parties and, therefore, those shares were transferred in the names of those third parties. Thirdly, 18,625 shares (pre-split) out of 1,57,514 shares were transferred and dematted in favour of the third parties prior to receipt of the floppy disk by ATL - R1, from the Custodian. Fourthly, 11,289 shares (pre-split) and 700 debentures were handed over to the Custodian by late Harshad Mehta.

25. Thus, ATL - R1 contends that out of the said 1,57,514 shares, 1,12,139 shares were in circulation in the market as of 19th October, 1999 when late Harshad Mehta claimed that those 1,57,514 shares were mishandled and had become powder. Thus the claim of the notified parties that the said shares were damaged/destroyed is completely false, bogus and devoid of any merit. The notified parties, according to ATL - R1, were trying to illegally and unjustly enrich themselves by claiming 1,57,514 shares of respondent No.1.

26. It is further contended besides the bare statement of the notified parties there is no supporting material in the nature of proof of purchase, proof of payment and transfer documents to support the claim of the notified parties that, the said shares belonged to them. Therefore, ATL - R1 contends the claim of the Custodian is based on unsubstantiated assertions of the notified parties and cannot be legally sustained.

27. With regard to the prayers, ATL- respondent No.1 categorically refutes the claim of the Custodian and the notified parties that the subject shares can be treated as damaged and destroyed shares belonging to the notified parties. As the notified parties have not produced any material to substantiate their claim that the subject shares belonged to them, a direction

for transfer would expose ATL - R1 to the risk of facing litigation for recovery of the shares and dividend from the concerned shareholders. Even otherwise, such a direction would be contrary to the provisions contained in Section 56 of the Companies Act, 2013 read with Rule 6 of the Companies (Share Capital and Debentures) Rules, 2014. Such a direction would also jeopardize the rights/interest of genuine shareholders. ATL - R1 has made an endeavour to furnish the particulars of the accruals and how the Custodian is not justified in seeking the recovery and/or explanation from ATL - R1 about the same.

28. Jyoti Mehta – respondent No.2A has also filed an affidavit-in-reply. Though respondent No.2A has supported the prayers made by the Custodian in the instant application yet a major part of the affidavit-in-reply has been directed to demonstrate that the Custodian has not been diligently pursuing the cause of recovery of the attached assets and, instead, the approach of the Custodian has been prejudicial to the interest of the notified parties, throughout. Various acts or omission of the Custodian were sought to be highlighted in support of the allegation that the Custodian has not been discharging the duties envisaged by the TORT Act, 1992, and allegedly impeding the recovery of the

attached assets and, deliberately, not complying with the orders of the Special Court.

29. As regards the resistance of ATL - R1, respondent No.2A contends that ATL - R1 and its promoters have adopted an adversarial approach towards the notified parties to advance their personal interest. In fact ATL - R1 has no locus to challenge the title of the notified parties to the subject shares. ATL - R1 cannot step into the shoes of any of the rival claimants. At any rate, the lis would be strictly between the notified parties and those who lay adverse claim over the subject shares.

30. At this stage, it is also necessary to note that, upon reflection, a statement was made by the Counsel for the Custodian, on instructions, that the Custodian does not wish to prosecute these applications and MA/39/2018. Thus, on 6th March, 2020, after noting the objections of the notified parties to the withdrawal of the proceedings by the Custodian, in MA/39/2018, respondent Nos.3 and 4 were directed to file a two page note in support of their objection. Such note has been tendered. Resultantly, the real contest was between the notified parties and ATL - R1 as the Custodian wished not to prosecute the applications.

31. It is, in this backdrop, I have heard Mr. Daruwalla, the learned Senior Advocate for the Custodian, Mr. Cooper, the learned Senior Advocate for ATL - R1, and Mr. Mehta, the learned Counsel for the notified parties. The learned Counsel for the parties took the Court through the pleadings and documents on record.

Submissions in Misc. Application No.54 of 2018:

32. Mr. Daruwalla, the learned Senior Advocate, submitted that the stand of the Custodian that the Custodian is not in a position to pursue the application is based on objective material. Refuting the allegations of the notified parties that the Custodian is guilty of dereliction of the statutory duties and is not desirous of prosecuting the application as the Custodian in collusion with ATL - R1 is bent upon causing prejudice to the notified parties, Mr. Daruwalla submitted that the Custodian has been diligently discharging his duties under the TORT Act, 1992 and the decision not to prosecute a fruitless proceedings cannot be termed as an act of bad faith.

33. Mr. Mehta stoutly countered the submissions on behalf of the Custodian. It was urged that it defies comprehension as to how the Custodian who is statutorily enjoined to recover the attached assets can take a somersault after having instituted

the proceedings pursuant to the order passed by this Court in MP/99/1998. Mr. Mehta urged that, in the first place, the Custodian is guilty of inaction for almost 15 years in not pursuing the recovery of the subject attached assets despite the order passed by the Special Court in MP/99/1998 and MA/194/1993 and in the connected matters, dated 13th March, 1997. The Custodian simply proposes to abandon his duty of tracing and recovery of the attached assets. It was further submitted that the Custodian cannot be permitted to approbate and reprobate.

34. Mr. Mehta submitted that the stand of ATL - R1 that the subject shares do not belong to the notified parties also suffers from the same vice of approbation and reprobation. Inviting the attention of the Court to the order dated 28th February, 2003 passed in MP/99/1998, Mr. Mehta submitted that in fact ATL - R1 had voluntarily submitted before the Court that MP/99/1998 also covered an item of 1,11,990 shares of ATL - R1 in which ATL - R1 had issued a stop transfer notice. Secondly, Mr. Mehta submitted that ATL - R1's defence now sought to be raised is also barred by the principle of estoppel by pleadings. In the affidavit on behalf of the ATL - R1 in MP/99/1998 dated 28th July, 2000, a categorical statement was made that having

realized that the mutilated certificates which were received for transfer constituted the *benami* shares of Harshad Mehta Group, for the reasons spelled out in the said affidavit, ATL - R1 had temporarily, put on hold payment of accruals. Comparing and contrasting the stance of ATL - R1 in the said proceedings in MP/99/1998, in general, and the affidavit, in particular, filed in the instant case, Mr. Mehta would urge that diametrically opposite stand is actuated by a design to usurp the legitimate holdings of the notified parties.

35. Mr. Metha further urged that ATL- R1 cannot adopt adversarial approach. Nor can the ATL - R1 be permitted to defeat the rights of the notified parties under the garb of espousing the cause of alleged genuine and *bona fide* shareholders. Taking the Court through the orders passed by the Special Court whereby the persons, who laid claims over the attached assets were directed and called upon to approach the Special Court for certification of their holdings, Mr. Mehta submitted that it was for the concerned shareholders to approach this Court for lifting of the attachment, which is automatic and statutory under the provisions of Section 3 of the TORT Act, 1992.

36. Mr. Mehta submitted that in fact in MA/54/2018 no further determination is required. The rights of the parties stood determined by the orders passed in MP/99/1998. It is on account of inordinate and unexplained delay on the part of the Custodian in discharge of his statutory duties, ATL - R1 got an opportunity to turn around and contest the title of notified parties, which it is not legally entitled to. Therefore, notwithstanding the stand of the Custodian, the prayers in the instant application deserve to be allowed to the fullest, submitted Mr. Mehta.

37. Mr. Cooper, the learned Senior Advocate, resisted the prayers in the application with equal vehemence. At the outset, it was submitted that the broad submission that by seeking to withdraw the applications the Custodian is abandoning his duty does not merit acceptance. Attention of the Court was invited to the previous orders in diverse proceedings whereby the Custodian was permitted to withdraw those proceedings.

38. Mr. Cooper submitted that the very premise of the application preferred by the Custodian that the subject shares are the *benami* shares of Harshad Mehta Group and those constitute attached property under the provisions of TORT Act, 1992, is completely misconceived. There is not a shred of

material to indicate that the notified parties had acquired the subject shares. Even if it is assumed that the subject shares are the *benami* shares of Harshad Mehta Group, still the application for enforcing the said rights pertaining to the *benami* property is not maintainable.

39. Mr. Cooper would urge that in view of the Prohibition of Benami Property Transaction Act, 1988 ("Benami Act, 1988") as amended by Benami Transactions (Prohibition) Amendment Act, 2016, there is a complete prohibition to enforce any right in respect of any property held *benami*. In view of Section 67 of the Benami Act, 1988, the provisions of the said Act have overriding effect. Since the amended Benami Prohibition Act is a subsequent legislation, enacted by the Parliament, it prevails over the provisions contained in TORT Act, 1992. Therefore, the very substratum of the application gets dismantled.

40. Mr. Cooper further urged that the notified parties cannot draw any mileage from the alleged statement made on behalf of ATL - R1 and the affidavit filed on behalf of ATL - R1 in MP/99/1998. It was submitted that the fact-situation in MP/99/1998 was completely different. At no point of time, Mr. Cooper would urge, ATL - R1, conceded that the subject shares belonged to the notified party. Mr. Cooper would urge that even

in the affidavit filed in MP/99/1998 ATL - R1 had specifically prayed that the Special Court may order an investigation into the claims over the subject shares. Even otherwise, according to Mr. Cooper, the order passed by this Court in MP/99/1998 was not complied with both by the Custodian and the notified parties. The latter never disclosed the entities to which the subject shares belonged.

41. Mr. Cooper submitted that in the matter of shares, possessory right confers a good title. In the case at hand, neither can the notified parties be said to have been in possession of the subject shares nor there is any explanation as to how the notified parties lost the possession of the subject shares and the third parties who have lodged the shares came in possession thereof.

42. Lastly, Mr. Cooper joined issue with Mr. Mehta by canvassing a submission that ATL - R1 owes a duty to its shareholders. A substantial number of shares have been lodged for transfer. If the mutilated shares were in possession of the notified parties, the third parties would not have been in a position to lodge the mutilated shares alongwith transfer deeds with ATL - R1. That itself destroy's the case of the notified parties. On the contrary, the notified parties have not placed

any material to evidence the acquisition of the shares. Therefore, the resistance of ATL to transfer the shares in the name of the Custodian, as an attached asset belonging to the notified parties, based on a fundamental objection that the subject shares do not belong to the notified parties, cannot be construed as an adversarial stand.

Submissions in MA/52/2018:

43. Mr. Mehta, in line with the afore-extracted submissions as regards alleged impropriety of the stand of the Custodian and alleged dishonesty in the stand of ATL - R1, urged that the instant application in respect of damaged and destroyed shares is essentially consequential to the order passed by this Court in MP/96/2000 dated 13th October, 2003. While disposing the said petition, liberty was granted to the Custodian to move again if necessary.

44. Taking the Court through the affidavits filed on behalf of the ATL - R1 Mr. Mehta submitted that the stand of ATL - R1 in the said affidavits is in stark contrast with the stand now sought to be taken by ATL - R1. In the said petition, it was the stand of ATL - R1 that out of 1,57,514 shares 85,090 shares completely matched. ATL - R1 had marked stop transfer in respect of 70,999 shares. As late as 7th January, 2014 ATL - R1

had informed the Custodian that ATL - R1 had stopped the transfer in respect of 5,80,350 damaged/destroyed shares (post split face value of Rs.1/- each). Thus these affidavits and documents work out the retribution of the case now sought to be set up by ATL - R1.

45. Countering the aforesaid submission, Mr. Cooper urged that the case of the notified parties that, 1,57,514 shares belonged to the notified parties is *ex facie* untenable. In fact, the very letter dated 19th October, 1999 addressed by Late Harshad Mehta itself destroys the case of the notified parties. It was specifically mentioned in the said letter that the recovery of those shares can be effected only on the strength of purchase and delivery documents of the respective entities. At no point of time, however, any of the notified parties ever produced any document to evidence the acquisition of the subject shares.

46. Mr. Cooper would further urge that even the Custodian's application proceeds on an imaginary foundation. The Custodian has asserted that the subject shares stood in the name of respondent No.2 – the notified parties. It was never the claim of the notified parties that the subject shares stood in their name. Neither the notified parties nor the Custodian were in possession of the subject shares, to claim title on the basis of

possessory right. On the contrary, what the letter dated 19th October, 1999 indicates is that, Late Harshad Mehta was allegedly in possession of shreds and powder. On the basis of such outlandish claim, the genuine shareholders in whose name the shares stood, cannot be deprived of their legitimate holding, submitted Mr. Cooper.

47. The reliance on the orders passed in MA/96/2000 does not advance the case of the notified parties, submitted Mr. Cooper. Taking the Court through the affidavits filed on behalf of the ATL - R1 and the orders passed therein Mr. Cooper strenuously submitted that the order passed in MP/96/2000 dated 13th October, 2003 was confined to 11,289 shares, which were duly transferred. Nothing survived in MP/96/2000. Therefore, the belated endeavour on the part of the Custodian to seek reliefs in respect of the subject shares by banking upon the orders passed in MP/96/2000 is wholly untenable.

48. Mr. Cooper further urged that there is no explanation at all as to how the share reached the hands of the third parties, who have lodged the shares for transfer with the company. Banking upon the provisions contained in Section 46 of the Companies Act, 2013 and Rule 6 of the Companies (Share Capital and Debentures) Rules, 2013, Mr. Cooper urged with a

degree of vehemence that there is not a shred of material to dislodge the presumption of title envisaged by Section 46 of the Companies Act, 2013.

49. Finally, Mr. Cooper would urge that ATL - R1 has been dragged into unwarranted litigation for years together, and suffer a huge costs. As the Custodian has realized the fictitious nature of the claim of the notified party and fairly prayed for disposal of the proceedings, a quietus is required to be given to further harassment of ATL - R1.

50. The aforesaid submissions now fall for consideration.

Consideration:

51. To being with it is necessary to record that I have noted the background of the enactment of TORT Act, 1992, the overarching features of TORT Act, 1992, the circumstances and the historical backdrop in which these applications came to be preferred by the Custodian, the facts in each case of the applications and the submissions canvassed across the bar, elaborately, on purpose. In the backdrop of the clarity on facts, I propose to approach the core controversy in four parts. First, the role of the Custodian under the TORT Act, 1992; the nature of the duties the Custodian is expected to discharge under the TORT Act, 1992. Second, the nature and contours of the

jurisdiction exercised by the Special Court. Third the object of the enactment of TORT Act, 1992. Fourth the resolution of the controversy by applying the principles which emerge under the aforesaid broad heads.

The role and duties of the Custodian under the TORT Act,

1992:

52. At the outset, it must be mentioned that the aspect of the duties and functions of the Custodian under the TORT Act, 1992 assumes special significance in these cases, as the Custodian seeks to withdraw these applications.

53. Under Section 3(2) of the TORT Act, 1992 the Custodian is empowered to notify a person upon being satisfied that such person is involved in any offence relating to transactions in securities within the statutory period. Under Section 4 of the Act, the Custodian is empowered to cancel any contract or agreement entered into during the statutory period in relation to any property of a notified person if he is satisfied that such transaction has been entered into fraudulently or defeat the provisions of the TORT Act, 1992. Under Section 3(4) the Custodian is enjoined to deal with attached property only in such manner as the Special Court may direct.

54. The statutory scheme is such that though the Custodian has the power to attach the property of a person by notifying him under sub-section (2) of Section 3 if he is satisfied about his involvement in any offence relating to the transactions in securities yet the Custodian has not been vested with any authority to deal with the attached assets on his own. Nor the attached assets vest in the Custodian. Section 11 of the TORT Act, 1992 makes the position further clear by providing that the Special Court may make such order as it may deem fit directing the Custodian for the disposal of the property under attachment.

55. The role of Custodian was expounded by a Three-Judge Bench of the Supreme Court in the case of *Canbank Financial Services Limited vs. The Custodian and others*¹

‘ROLE OF CUSTODIAN UNDER THE ACT:

69. The Custodian has three main functions to perform:

(i) He has the authority to notify a person in the Official Gazette, on being satisfied on information received that he has been involved in any offence relating to transactions in securities during the period 1-4-1991 to 6-6-1992.

(ii) He has the authority to cancel any contract or agreement relating to the properties of the notified persons which, in his opinion, has been entered into fraudulently or for the purpose of defeating the provisions of the Act as specified in Section 4.

(iii) He is required to deal with the properties in the manner as directed by the Special Court.

1 (2004)8 SCC 355.

70. The properties of a notified person do not vest in the Custodian. He is not a receiver within the meaning of the provisions of the Code of Civil Procedure or an Official Receiver or an Official Assignee under the Insolvency laws. He is also not an Official Liquidator under the Companies Act. His right is same as that of the notified person. Only when the notified person had a subsisting right in a property, the same being subject to statutory attachment, the custodian can approach the special court for an appropriate direction in relation thereto. In other words, the custodian is not permitted to deal with any property which did not belong to the notified person on the relevant date.

(emphasis supplied)

56. In the case of *L. S. Synthetics Limited vs Fairgrowth Financial Services Limited and another*² another three Judge Bench of the Supreme Court emphasized that the Custodian is required to deal with the properties in the manner as directed by the Special Court.

57. In the case of *Asea Brown Boveri Ltd. vs. Industrial Finance Corporation of India and others*³ the Supreme Court after referring to the decision in the case of *B.O.I. Finance Ltd. vs. Custodian and others*⁴ observed that the Custodian under the Act is required to assist in the attachment of the notified person's property and to manage the same thereof. The properties of the notified persons, whether attached or not, do not, at any point of time, vest in him. He is merely a Custodian and not a receiver nor is he a final liquidator so as to enjoy

2 (2004) 11 SCC 456.

3 (2004) 12 SCC 570.

4 (1997) 10 SCC 488.

control over the properties. In other words, the position of the Custodian is the same as that of the notified person himself. The Custodian remains bound by the obligations incurred by the notified party itself, if not incurred fraudulently or to defeat the provisions of the Act.

58. In the case of *Ashwin S. Mehta and others vs. Union of India and others*⁵, the Supreme Court had an occasion to deal with the exercise of authority by Custodian, which was purportedly without authorization by the Special Court. In that context, the Supreme Court observed, *inter alia*, as under:

“38. As aforesaid, so far as issue of notification in terms of Section 3(2) is concerned, the Custodian derives his power and authority from the Special Court Act but his jurisdiction to deal with property under attachment, flows only from the orders which may be made by the Special Court constituted under the said Act. It is obligatory upon the Custodian to perform all the functions assigned to him strictly in accordance with the directions of the Special Court. In the present case, although we do not find any material on record which may suggest any malafides on the part of the Custodian yet we are convinced that by inviting Apollo to bid, vide letter dated 28th April, 2003, the Custodian did exceed the directions issued to him by the Special Court. However, we feel that this being in the nature of a procedural omission, the alleged violation is not per se sufficient to nullify the sale of shares.”

(emphasis supplied)

59. The aforesaid enunciation of law makes it abundantly clear that the Custodian is enjoined to deal with the attached properties only in the manner directed by the Special Court. In

5 (2012) 1 Supreme Court Cases 83.

a sense, the Custodian stands in the shoes of the notified parties. The rights of the Custodian appear to be co-extensive with that of the notified parties and the obligations incurred by the notified parties bind the Custodian, unless the Custodian invokes the power under Section 4 of the TORT Act, 1992. The necessary corollary of the aforesaid enunciation is that the Custodian does not enjoy any authority to deal with the attached assets independent of the direction that may be issued by the Special Court in the matter of recovery, application and/or disposal of the attached assets.

60. It can, thus, be safely inferred that the Custodian is not a party who can claim that he is *dominus litis* and can withdraw the proceedings involving attached assets, at his choice. The functions and duties of the Custodian are circumscribed by the provisions of the TORT Act, 1992. Conscious of these constraints the Custodian has chosen to make a submission before the Court that, upon reflection, the Custodian finds that these applications do not merit prosecution. Whether this stand of the Custodian is justifiable is the question which wrenches to the fore.

Nature of the jurisdiction exercised by the Special

Court:

61. As noted above, the purpose and object for which the TORT Act, 1992 was enacted was not restricted to punish the persons found guilty in any offence in relation to the transactions in securities but also to ensure that the properties movable or immovable or both belonging to the notified persons were recovered, appropriated and disposed of for the discharge of the liabilities to the banks, financial institutions, State and other creditors. Section 9A of the TORT Act, 1992 thus provides that on and from the commencement of the Amendment Act, 1994, the Special Court shall exercise all jurisdiction, powers and authority as were exercisable immediately before such commencement by any Civil Court in relation to any matter or claim relating to any property standing attached under sub-section (3) of Section 3. The expression, “in relation to any matter or claim” widens the province of the jurisdiction of the Special Court and emphasises that the Special Court shall have power and authority in relation to any matter or claim relating to any property attached under sub-section (3) of Section 3 and to pass such order as it may deem fit directing the Custodian for disposal of the property under attachment, subject to the

priorities ordained in sub-section (2) of Section 11 of the TORT Act, 1992.

62. The nature of the jurisdiction exercised by the Special Court was elucidated by the Supreme Court in the case of *L. S.*

Synthetic (supra) as under:

“18. The jurisdiction of the Special Court is of wide amplitude. Subject to a decision in appeal therefrom, its decision is final.

.....

20. The debt in question is capable of being attached being a property belonging to the notified party and upon such attachment the consequences provided therefrom would ensue and in that view of the matter the Special Court will have jurisdiction to pass an appropriate order in relation thereto by issuing appropriate directions in terms of the provisions of the said Act. As the Special Court had the requisite jurisdiction to deal with the attached property, it is immaterial whether the factum of the statutory provisions is brought to its notice by the notified party himself or by the Custodian. The Court has the requisite jurisdiction; nay a duty to apply itself to the said question once the matter is brought to its notice.

21. The jurisdiction of the Special Court, it is not correct to contend, is confined only to the illegal transactions in securities and properties acquired by the notified person out of the same. Once the properties are attached under Sub-section (3) of Section 3, the Custodian has no other option but to apply the same in such a manner as the Special Court may direct.”

(emphasis supplied)

63. The aforesaid enunciation is of material significance in the facts of the case at hand. The Supreme Court has clarified in emphatic terms that it is not correct to contend that the jurisdiction of the Special Court is confined only to the illegal transactions in securities and properties acquired by the

notified persons out of the same. Once the properties are attached under sub-section (3) of Section 3, the Special Court has the requisite jurisdiction nay a duty to apply itself to the question of application of the attached properties.

Object of Tort Act, 1992 and nature of Attachment:

64. At this stage the purpose for which the attachment of the properties of the notified parties is statutorily provided for, by the TORT Act, 1992, also deserves to be kept in view. The statutory attachment was envisaged as a measure to recover the amounts which were siphoned off from the banks and the financial institutions. The disposal of the attached assets is primarily for the purpose of the discharge of the liabilities towards the said banks and financial institutions. For this purpose, the sub-section (2) of Section 11 mandates the priorities in which the attached assets are to be applied.

65. The nature of attachment and its purpose was explained by the Supreme Court in the case of *Kudremukh Iron Ore Co. Ltd. V/s. Fairgrowth Financial Services Ltd. and Anr.*⁶ The Supreme Court expounded that Section 11 of the TORT Act, 1992 exclusively empowers the Special Court to give directions in the matter of the property of a notified person. The

6 (1994) 4 SCC 246

jurisdictional fact for exercise of the power under Section 11 of the TORT Act, 1992 to deal with the property is that it should have been the property under attachment. It is with respect to the attached property that powers under Section 11 of the Act, 1992 can be exercised by the Special Court.

66. In the case of *Tejkumar Balakrishna Ruia V/s. A.K.Menon and Anr.*⁷, the Supreme Court observed that under sub-Section (3) of Section 3 of the Act, 1992, the property that belongs to a notified person stands attached simultaneously with the notification that makes him a notified party. The words “on and from the date of notification” indicate the point of time at which the attachment takes effect; this is reiterated by the words “shall stand attached simultaneously with the issue of the notification”. This also indicates that no separate notification or order in regard to the attachment is necessary.

67. In the case of *Solidaire India Ltd. V/s. Fairgrowth Financial Services Ltd. and Ors.*⁸ the Supreme Court approved the following statement of law propounded by the Special Court in the case of *Bhoruka Steel Ltd. V/s. Fairgrowth Financial Services Ltd.*⁹:

“Under Section 3 of the 1992 Act, all property of notified

7 (1997) 9 SCC 123

8 (2001) 3 SCC 71

9 (1997) 89 Comp Cas 547

persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only.”

68. The effect of statutory attachment, without any requirement of a formal order of attachment, is that the capacity of the person, in whose hands attached property is found, loses significance. Whomsoever may be the person in whose hands the property belonging to the notified person is found, it stands attached. The knowledge of attachment is not the necessary ingredient for the validity of the attachment. At the same time, neither the attached property vests in the Custodian, nor the rights of the third parties therein are extinguished.

69. In the case of *Harshad Shantilal Mehta vs. Custodian and ors.*¹⁰ the Supreme Court expounded the purpose of the final disposition of the attached assets under Section 11 of the Act, 1992. The Court observed ‘considering that the Act has been

10 (1998) 1 SCC 1.

passed because of diversion of funds from the banks and financial institutions to the individual account 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’. These observations emphasise the underlying object of the enactment of TORT Act, 1992 and the special machinery and regime thereunder.

70. Again in the case of *Ashwin Mehta* (supra) the Supreme Court reiterated the object of the TORT Act, 1992 from the perspective of the recovery of the attached assets for discharge of the liabilities of the State, banks and financial institutions.

The observations in paragraph 33 read as under:

“33. It is plain that the Special Court Act which is a special statute, is a complete code in itself. The purpose and object for which it was enacted was not only to punish the persons who were involved in the act of criminal misconduct by defrauding the banks and financial institutions but also to see that the properties, movable or immovable or both, belonging to the persons notified by the Custodian were appropriated and disposed of for discharge of liabilities to the banks and financial institutions, specified government dues and any other liability. Therefore, a notified party has an intrinsic interest in the realisations, on the disposal of any attached property because it would have a direct bearing on the discharge of his liabilities in terms of Section 11 of the Special Court Act.”

(emphasis supplied)

71. If the aforesaid object of the TORT Act, 1992 is kept in view, in the facts of the case, the thrust of the submission on behalf of the ATL - R1 that the notified parties are trying to enrich themselves unjustly by insisting for recovery of the subject shares, does not merit acceptance, unreservedly. It is true it is conceivable that, post final distribution of the assets of the notified parties and discharge of all their liabilities, there might be surplus, over which the notified parties may lay claim. Yet, at this stage, the primary object of the TORT Act, 1992 cannot be lost sight of. The recovery of the attached assets is to be effected for the purpose of the discharge of the liabilities as envisaged by Section 11 of the TORT Act, 1992. If viewed through this prism, if the properties, which belong to the notified parties and constitute attached assets, are not recovered, that would defeat the provisions of the TORT Act, 1992 as the ultimate loss would be of the instrumentalities of the State, Banks and Financial Institutions for the discharge of whose liabilities the attached assets are required to be recovered, preserved and augmented.

72. The controversy, thus, boils down to the pivotal question as to whether the subject shares bear the character of the attached property ? At this stage, the facts in MA Nos.54 of 2018

and 52 of 2018 deserve to be noted, briefly and distinctly, to explore an answer to the aforesaid question.

Consideration in MA No.54 of 2018

73. Evidently, the genesis of MA No.54 of 2018 is in MP No.99 of 1998. The said Petition was filed by the Custodian seeking orders for recovery of *benami* shares of 128 companies belonging to the notified parties. When the said Petition was listed before the Court on 28th February 2003, a statement was made on behalf of the ATL - R1 that the Petition covers an item of 1,11,995 shares of ATL - R1, in respect of which the Custodian had not moved the Special Court. It is imperative to note that, at that stage itself, ATL - R1 had stated that it had issued stop transfer notice in those 1,11,995 shares.

74. It would be imperative to note the position which ATL - R1 had adopted in MP No.99 of 1998 with regard to the said 1,11,995 shares – mutilated shares. It was affirmed on behalf of ATL - R1 that between May 1997 and November 1997, ATL - R1 had received request from 54 parties in respect of transfer of 91625 shares for transfer and/or replacement of mutilated shares. Those were processed bonafide. From December 1997 onwards, ATL - R1 received simultaneous request in respect of further mutilated shares. Upon scrutiny, it was found that :

“(a) the date of presentation endorsed on the transfer deeds range between 1991 – 1993;
(b) all the transfer deeds have been revalidated by the Registrar of Companies, Maharashtra, during the period 1997-98;
(c) though the certificates are mutilated, in almost all cases, the transfer deeds are intact;
(d) though details have been asked for, the applicants have been unable or unwilling to provide proof of purchase;”

75. ATL - R1 further informed the Court that ATL - R1 had temporarily put on hold payment of dividend, transfer and dematting of the said shares. ATL - R1 *bona fide* believed that those mutilated shares were part of the benami holding of Harshad Mehta group. It was categorically stated that ATL - R1 was prepared to deposit the same with the Custodian or deal with the same in such manner as the Court may direct. It is true, in the said affidavit, it was also prayed that the Court may direct an investigation in respect of the said 1,11,995 shares.

76. Mr. Cooper may be justified in canvassing a submission that ATL - R1 by voluntarily stating before the Court that MP No.99 of 1998 covered subject 1,11,995 shares, and filing an affidavit to the effect that ATL - R1 then *bona fide* believed that the subject shares were the *benami* shares of Harshad Mehta

group did not admit the proprietary title of Harshad Mehta group, over those shares. However, it needs to be emphasised that the said statements were not made by ATL - R1 as a neutral entity claiming no role in the matter. ATL - R1 had spelt out the reasons which aroused the suspicion and strengthened the then belief of ATL - R1 that the subject shares were *benami* shares of Harshad Mehta group. Those reasons, in my considered view, appear to be germane and cannot be lightly brushed aside.

77. Post the disposal of MP No.99 of 1998 declaring vast quantity of shares of various companies as *benami* shares and directions for registration of those shares in the names of the notified parties and consequential directions, lengthy correspondence ensued between the Custodian and ATL - R1. A detailed reference to the said correspondence may not be necessary. A communication addressed by ATL - R1 to the Custodian on 7 January 2014, in a sense, freezes the facts as regards the quantity of mutilated shares, which matched the particulars furnished by the Custodian and in respect of which stop transfer instructions were in operation. Relevant part of the letter dated 7 January 2014 reads as under :

“As desired, we are attaching herewith a detailed note of various categories of the following shares which have been stopped by the Company either on the

instructions of the Special Court or the Office of Custodian, as the case may be.

Categories	Shares stopped as on date (Post split F.V. of Rs.1/- each)
Cascade Holding Pvt. Ltd.	175350
Fortune Holdings Pvt. Ltd.	227250
<u>Mutilated shares</u>	<u>116200</u>
Damaged/destroyed shares (MA No.96/2000)	580350
Missing shares (M.P.No.88 of 2000)	111610

We seek your kind intervention in these matters and would request you to kindly issue necessary instructions or get us suitable Court Order for transfer of these stopped shares in favour of the Office of Custodian or advise us to release stop transfer or provide any other suitable direction in the said matter(s). Please note that the shares of the company were split on 29.08.2007.”

78. A note appended to the said communication in respect of mutilated shares reads as under :

“3. Mutilated shares

The Company filed an affidavit on 28 July 2000 in Misc. Petition No.99 of 1998 to the Special Court stating that 111995 (before split, face value of Rs.10/- each) mutilated shares were received by the company for transfer by various persons. The company did not transfer these shares in favour of the persons who lodged the shares for transfer and retained the same on the belief that these mutilated shares formed part of Benami holding of notified parties.

During hearing of Misc. Petition No.99 of 1998 on 28.02.2003 the Hon’ble Special Court (TORTS), Mumbai, passed the orders that the office of Custodian shall file an application on or before 13.03.2003 for seeking orders for transfer of the said shares in the name of Custodian A/c HMG and the company is called upon to deposit the unpaid dividend on the said shares held in abeyance in favour of “The Custodian, Special Court” payable at Mumbai. Copy of the order is attached (Annexure – E).

As per the directions of the Special Court, the Company have already paid the dividend to the office of Custodian up to financial year 2012-13. Kindly note that to the best of our knowledge, the Office of Custodian has not filed any application for

seeking orders for transfer of said shares in their name. Copy of letter dated 20 September, 2005 received from the Office of the Custodian is enclosed for your reference (Annexure – F).

Presently, the matched stopped cases as per records of the company after removal of overlappings etc., is 1116200 shares (post split Face value Rs.1/-).”

79. The aforesaid note on the mutilated shares is in accord with the stand of the ATL - R1 in MP No.99 of 1998. The note records, ATL - R1 did not transfer the shares as it believed that those mutilated shares formed part of *benami* holding of the notified parties. The dividend on those shares upto the financial year 2012-13 were transferred to the Custodian, pursuant to the order of the Special Court. Matched stop cases, as per the record of the company after removal of overlapping, etc., was 1116200 shares (post split face value of Rs.1/-).

80. In the affidavit in reply to the instant application, ATL -R1 opposed the relief of transfer on the premise that over 90% of the certificates in respect of the aforesaid mutilated shares, along with the relevant transfer deeds were traceable and available with ATL - R1 in mutilated condition. Out of those shares, 1,11,520 shares stood in the name of 96 individuals/entities. The notified parties were trying to unjustly enrich themselves, firstly, through the original sale of duplicate shares in the market, and, secondly, by claiming that the subject shares constitute attached assets. Ex-facie, the

aforesaid stand of ATL - R1 is in complete contrast with the position ATL - R1 had taken before this Court in MP No.99 of 1998.

81. I am conscious that the determination, in a controversy of the present nature, cannot be rested only on the basis of irreconcilable inconsistencies in the stand of a party. However, the fact that the earlier position by ATL - R1 was based on specific reasons (extracted above), which appear to be germane, cannot be lost sight of.

82. The entire thrust of the resistance on the part of ATL - R1 was on the premise that the notified party had not placed on record an iota of evidence to show that they had acquired the subject shares. Neither proof of payment, nor transfer deeds were placed on record. Relying on the position in law that a share certificate is prima facie evidence of title and the person whose name is mentioned on the certificate is entitled to the benefit of the dividend and the accruals on the shares, it was urged that a bald assertion made by late Harshad Mehta after years of being notified, cannot be the foundation of the claim of the notified parties.

83. The aforesaid submissions bring to the fore the nature of the property in the shares. Under Section 82 of the Companies

Act, 1956, shares or debentures or other interest of any member in a company shall be moveable property, transferable in the manner provided by the Articles of the company. Sub-section (1) of Section 84 of the Act, 1956, declares that the certificate under the common seal of the company certifying any shares held by any member shall be prima facie evidence of the title of the member to such shares.

84. Under sub-Section (2) of Section 84, a certificate may be renewed or a duplicate of a certificate may be issued if such certificate is proved to have been lost or destroyed, or having been defaced or mutilated or torn is surrendered to the company. Sub-Section (3) of Section 84 punishes fraudulent renewal of a certificate or issue of a duplicate certificate by a company. Sub-Section (4) of Section 84 envisages prescription of rules to regulate, inter alia, issue of a duplicate certificate.

85. Sub-Rule (3) of Rule 4 of the Companies (Issue of Share Certificates) Rules, 1960, as it then stood, provided that no duplicate share certificate shall be issued in lieu of those that are lost or destroyed, without the prior consent of the Board or without payment of such fees, if any, not exceeding Rs. 2 and on such reasonable terms, if any, as to evidence and indemnity and the payment of out of pocket expenses incurred by the company

in investigating evidence, as the Board thinks fit.

86. Section 27 of the Securities Contracts (Regulation) Act, 1956 provides that it is the holder of any security whose name appears in the book of the company who should receive the dividends.

87. In the light of the aforesaid statutory regime, which then prevailed, the challenge to the claim of the notified parties based on the failure to lodge the share certificates along with the transfer deeds for registration by the notified parties deserves to be considered. At the same time, the distinction between the effectiveness of the transfer as between the transferor and transferee of share and qua the company also deserves to be kept in view.

88. In the case of LIC of *India V/s. Escorts Ltd.*¹¹ the aforesaid distinction was expounded by the Supreme Court, as under :

“A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company’s register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company’s register. Indeed, until the transfer is registered in the books of the company, the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares.”

11 AIR 1996 SC 1370

89. In the aforesaid case, the Supreme Court has postulated that the right of the transferee to get on the register must be exercised with due diligence and the principle of equity which makes the transferor a constructive trustee does not extend to a case where a transferee takes no active interest to get on the register. The inaction on the part of the notified parties in asserting the title to the subject shares is indeed a relevant factor.

90. Though the court may not readily accede to the explanation sought to be offered by Mr. Mehta, premised on the adverse circumstances in which the notified parties allegedly found themselves, to refute the allegations of inordinate and unexplained delay and inaction on the part of the notified parties, yet the fact that the genesis of these transactions is allegedly in the scam which was perpetrated by the brokers in connivance with the officials of the bank and financial institutions, cannot be lost sight of. Therefore, the object and purpose of enactment of TORT Act, 1992 and the overriding effect of the provisions of the TORT Act, 1992 deserve to be kept in view while appreciating the aforesaid submissions.

91. The controversy, therefore, cannot be resolved by merely answering the question as to whether the notified parties had

lodged the shares along with the transfer deeds for registration. Such approach may be in order where the Court were to resolve the controversy between the conflicting claims over the shares in ordinary transactions between the traders. The Court is, therefore, required to take an over all view of the matter considering the circumstances which then prevailed and necessitated the enactment of TORT Act, 1992.

92. This leads me to the submission on behalf of ATL - R1 that in view of the amendment to the Benami Transactions (Prohibition) Act, 1988 brought about by the Amendment Act, 2016, there is a complete prohibition to enforce any right in respect of any property held benami. Section 4 of the Act, 1988 declares that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. Section 5 of the Act, 1988 declares that any property which is the subject matter of benami transaction shall be liable to be confiscated by the Central Government. Section 67 of the Act, 1988 gives an overriding effect to the said Act by providing that the provisions of the said Act, shall have effect notwithstanding anything inconsistent therewith

contained in any other law for the time being in force.

93. Before considering the challenge based on the aforesaid provisions of the Act, 1988, as amended by the Amendment Act, 2016, it must be noted that MP No.99 of 1998 was primarily in respect of lakhs of shares which were held benami by Harshad Mehta group. By an order dated 8 April 2003, this Court declared the shares listed in Exhibit G as benami shares of Harshad Mehta Group and attached those shares. The order notes that about 10 years down the line (from the enactment of the TORT Act, 1992), the Custodian had located 78,80,187 *benami* shares.

94. Mr. Cooper would urge that since the confiscation of benami property under Section 5 and the overriding effect under Section 67 of the Act, 1988, came to be introduced by the Amendment Act, 2016 and the Parliament, despite being aware of the TORT Act, 1992, in its wisdom, did not consider it necessary to carve out an exception for the TORT Act, 1992, the Benami Act, 1988, as amended by Act, 2016, being a subsequent enactment, must prevail.

95. I had an occasion to consider the question of conflict in two legislations containing non-obstante clauses in the context of the provisions of Insolvency and Bankruptcy Code, 2016

vis-a-vis TORT Act, 1992 in the case of *Custodian V/s. M/s. Incab Industries Ltd. and Ors.*¹². The question that arose for consideration therein was, whether the provisions of the Insolvency and Bankruptcy Code, 2016 would prevail over the provisions of the TORT Act, 1992 ?

96. After adverting to the law which governs the resolution of conflict in two legislations containing non-obstante clauses, this Court had observed, inter alia, as under :

“35. The point of time of enactment is not the sole determinant to resolve the conflict where two legislations contain non-obstante clauses. It is well recognized principle of interpretation of statutes that wide amplitude of a non-obstante clause must be kept confined to the legislative policy and such clause be given effect to only to the extent the legislature intended and not beyond. That brings in the necessity to find out the extent to which the legislature intended to give the non-obstante clause overriding effect. The special enactment cannot be held to be superseded by a later enactment only for the reason that the later enactment contains a non-obstante clause, unless there is inconsistency between the two enactments, which warrants an overriding effect to the non-obstante clause in the later enactment.

36. The rule of later enactment prevailing over a former enactment is undoubtedly the rule which ordinarily governs the resolution of the conflict. However, it is equally well settled that the conflict has to be resolved by reference to the purpose and policy underlying the enactment and the legislative intendment.

37. A useful reference in this context can be made to a judgment of the Supreme Court in the case of Jay Engineering Works Ltd. V/s. Industry Facilitation Council and Anr.¹³ where a conflict arose on account of non-obstante clauses contained in two special enactments, namely SICA 1985 and Section 10 of the Interest on Delayed Payment to Small Scale and

12 SPMA 92 of 2006 dated 4 August 2023

13 (2006) 8 SCC 677

Ancillary Industrial Undertakings Act, 1993. In that context, after referring to the previous pronouncements, including a judgment of the Supreme Court in the case of **Allahabad Bank V/s. Canara Bank**¹⁴ the Supreme Court held that both the Acts contain the non-obstante clauses. Ordinary rule of construction is that where there are two non-obstante clauses, the later shall prevail. But it is equally well settled that the ultimate conclusion thereupon would depend upon the limited context of the statutes.”

39. A conflict between the two special Acts, both of which contain non-obstante clauses, can also be resolved by posing a question as to which one of them is more special than the other. As enunciated in the case of **Allahabad Bank (supra)**, there can be a situation in law where the same statute is treated as a special statute vis-a-vis one legislation and again as a general statute vis-a-vis yet another legislation.

97. Applying the aforesaid principles and the test of ascertaining the purpose and policy underlying two enactments and the legislative intendment, this Court concluded as under :

“58. In the backdrop of the aforesaid nature and object of the Act, 1992, in my considered view, the provisions contained in the Act, 1992 cannot be said to have been superseded by the non-obstante clause contained in Section 238 of the IBC. The attached assets if made subject to the regime under IBC 2016 would stand removed from the jurisdiction of the Special Court and, resultantly, cannot be applied for the purpose of discharging all the liabilities of the notified parties in the manner provided by Section 11 of the Act, 1992. That would render the entire mechanism devised by the Act, 1992 to address the extra ordinary situation nugatory and frustrate the very object of recovering the amounts which have been wrongfully diverted from banks and financial institutions.

59. The conspectus of aforesaid consideration is that the fact that the property which stands attached under Section 3(3) either belongs to or is held by a corporate entity, which is under CIRP before the NCLT, would not constitute an impediment in recovering the said attached asset and applying the same for discharging the liability of the notified party under Section 11 of the Act, 1992. Thus, I am impelled to hold that the provisions of IBC 2016, though a later enactment, do

not override the provisions of the TORT Act, 1992.”

98. The aforesaid reasoning, in my considered view, applies with equal force to the controversy now sought to be raised on behalf of ATL - R1. I have extensively referred to the purpose and object of enactment of TORT Act, 1992. If the submissions on behalf of Respondent No.1 is accepted and the benami property is excluded from the purview of the operation of Section 3 of the TORT Act, 1992, then that would surely defeat the very purpose of the enactment of TORT Act, 1992. A substantial portion of the assets of the notified parties held benami, would then be not amenable to attachment and application for the discharge of their liabilities.

99. This takes me to another submission assiduously canvassed by Mr. Coopoe that small and genuine share holders cannot be made to approach this Court for certification of the shares, where the claim of the notified parties is ex-facie untenable.

100. A reference to the few orders of this Court would be necessary. In MA/194/1993 and the connected matters while attaching the *benami* shares of the notified parties at the instance of the Income Tax Department, this Court had directed the Income Tax Department to publish the said order and issue

a notice to state that any person who wishes to apply for release of his shares from attachment can make an application to the Special Court within a period of 16 weeks from the date of publication of the said notice. Secondly, in an order dated 8 April 2003 in MP No.99 of 1998, this Court had directed that a public notice shall be issued by the Custodian listing the names of the entities then declared to be benami along with the folio and number of shares as per Exhibit (H-1). Thirdly, in MP/88/2000 while maintaining stop transfer directions in respect of cases where shares continue to stand in the name of the registered holder as on the date of the notification i.e. 8th June, 1992 till the date of the said order i.e. 5th May, 2001, this Court directed that the purchasers of the shares will have to approach the Special Court for certification and thereupon the Court will examine such cases individually on the basis of *bona fide* of the transaction as well as the proof of payment.

101. It is a matter of record that this Court has instituted a mechanism of certification of the shares which the third parties claim that they had bonafide acquired. Such certification applications are being filed and decided by this Court even after 30 years of the notification of the parties.

102. It is necessary to note that in the affidavit in reply, ATL -

R1 claimed that 90% of the subject shares stand in the name of 96 individuals/entities. It does not appear that those persons/entities have invoked certification mechanism. It would be contextually relevant to note that vide letter dated 7 December 2016, ATL - R1 had furnished a complete list of 11,16,200 new split shares (face value of Rs.1/-) pertaining to mutilated shares (Exhibit B to the application).

103. The factual position which thus emerges is that :

(1) ATL - R1 had voluntarily disclosed that the subject shares were covered by MP No.99 of 1998.

(2) ATL - R1 had stopped transfer of the subject shares even before any order was passed by the Special Court or instructions were given by the Custodian.

(3) The said restraint on transfer of shares still continues.

(4) ATL - R1, as noted above, has transferred dividend to the Custodian.

(5) ATL - R1 has furnished complete list of mutilated shares on which stop transfer instruction operates.

(6) ATL - R1 claimed to have received the request for transfer of shares along with the share certificates and transfer deeds.

(7) Out of the total mutilated shares, 90% shares stand in the names of 96 individuals/entities.

104. In the backdrop of the aforesaid stark facts, can this Court permit ATL - R1 to deal with the subject shares without

examining the genuineness of the claim of the persons who have lodged the certificates for transfer with ATL - R1?

105. In my considered view, if the aforesaid facts are appraised in the light of the object of the provisions of the TORT Act, 1992, the appropriate course would be to continue with the restraint on the transfer, while allowing the parties liberty to approach this Court for certification. Since a grievance is made regarding the inconvenience, trouble and expenses to which the bonafide share holders may be put to, by asking them to approach this Court, in the peculiar facts of the case, as the entire documentary material is stated to be available with ATL - R1, I deem it appropriate to allow ATL - R1 to approach this Court by an appropriate application and satisfy this Court that the persons who have lodged the shares for transfer are the bonafide owners of the subejct shares and the notified parties do not have any right, title and interest therein. This course would equip the court to decide even on the basis of few of the illustrative cases, which may be filed before this Court, in pursuance of the aforesaid liberty to the parties, as to whether a direction for transfer of the subject shares to the Custodian are required to be given or ATL - R1 be permitted to deal with the subject shares in accordance with the governing statutory

provisions.

106. I am, therefore, not inclined to dispose of this application on the strength of the submissions of the Custodian that the application does not merit prosecution. Instead, I deem it appropriate to issue directions on the aforesaid lines.

MA/52/2018

107. On the factual score, it emerges, from the order passed by this Court in MP/96/2000 (availing liberty in which case, the instant application appeared to have been filed), that out of 1,57,514 damaged and destroyed shares 11,239 shares were transferred by ATL - R1 in the name of the Custodian. After taking note of the affidavits filed on behalf of ATL - R1, the said petition was disposed protecting ATL - R1 from any third party claim against it in respect of 11,239 shares transferred to the Custodian with liberty to the Custodian to move again if found necessary.

108. An endeavour was made on behalf respondent No.1 to urge that nothing further survived in MP/96/2000 and the Custodian could not have drawn support and sustenance to the Custodian's instant application from the said order. This challenge merits consideration, as MP/96/2000 was filed primarily on the strength of the letter dated 19th October, 1999

(Exhibit-B thereto) addressed by Late Harshad Mehta to the Custodian. It is, therefore, necessary to examine the subject matter of MP/96/2000, the averments therein, response of ATL - R1, and also the orders passed by the Court, to appreciate the submission that the issue sought to be raised in this application was already concluded in MP/96/2000.

109. On a careful perusal of the averments in MP/96/2000 it becomes evident that the Custodian, after referring to the letter dated 19th October, 1999, wherein Late Harshad Mehta claimed that he had in possession of 1,57,514 damaged and destroyed shares, the correspondence the Custodian entered into with ATL - R1 and the events that subsequently unfolded in the nature of respondent No.3 producing damaged share certificates stored in a box, claimed that out of 1,57,514 shares mentioned by Late Harshad Mehta only 11,289 shares and letter of allotment 700 debentures, that too in torn, mutilated and damaged condition were identified and handed over to the petitioner. Only those shares could be verified with the list of the distinctive and certificate numbers of 1,57,514 shares/debentures provided by Late Harshad Mehta. Custodian was categorical in his assertion that apart from those 11,289 shares and 700 debentures there was no evidence that the balance damaged shares tallied with

the list provided by Late Harshad Mehta or were in his possession. It is with these assertions, the Custodian sought reliefs in two parts. First, qua 11,289 shares and 700 debentures, which were identified, and, second, in respect of the balance 1,45,525 shares.

110. With regard to the balance shares, (with which were are concerned in this application) the relief claimed by the Custodian in prayer clause (k) and (o-(ii)) are material: they read as under:

“(k) The Respondent No.1 be directed to immediately provide full and complete information in the form requested by the Petitioner regarding the entire, 1,57,514 shares in question. Particulars whereof are set out in Exhibit “B” hereto.

.....

(o) Pending the hearing and final disposal of the petition:

.....

(ii) Appropriate interim orders and directions be passed regarding the action, if any, to be taken for the interim protection/preservation of the balance 1,45,524 shares including stopping transfer/ dematerialisation of the same and holding in abeyance the benefits which have accrued thereon.”

111. When MP/96/2000 was listed before the Court on 10th January, 2002 interim order came to be passed in terms of prayer clauses (j) and (k). Prayer (k) is extracted above. Prayer clause (j) reads as under:

“(j) Pending the transfer of the said shares/debentures in favour of respondent Nos.2(a)(b) to 4, their group entities or the petitioner, respondent No.1 be restrained from

transferring the said 11,289 shares and letters of allotment for 700 debentures as per Exhibit 'E' hereto issuing duplicates in respect thereof, disbursing any dividends, interest or issuing any rights or bonus shares to any person other than respondent Nos.2 (a)(b) to 4, their group entities or the petitioner as the case may be.”

112. On 24th January, 2002 again the Court passed a limited order directing ATL - R1 to furnish particulars to the Custodian regarding the names and addresses of the brokers of the shares and other details by the end of February, 2002. Respondent No.1 was also directed to furnish the details of benefit, dividends, bonuses etc. on those shares. In addition, the respondent No.1 was directed to transfer 10,964 out of 11,289 shares to the Custodian and the former was protected from claim from any third party in respect of those shares.

113. Eventually, after considering the affidavits filed on behalf of the respondent, the said MP/96/2000 came to be disposed noting that in all 11,239 shares had already been transferred in the name of the Custodian. Accretions on 11,239 shares, which were retained by respondent No.1 company, were also directed to be given to the Custodian.

114. Undoubtedly, the petition was disposed of with liberty to the Custodian to move again if necessary. But the fact remains that the Court had then noted two affidavits filed on behalf of ATL - R1 wherein ATL - R1 had disclosed the status of the

balance shares claimed by Late Harshad Mehta. It was the categorical stand of ATL - R1 that 1,11,995 shares which formed the subject matter of MP/99/1998 also covered the balance shares in MP/96/2000. Yet, this Court did not issue any direction regarding the balance, 1,45,525 shares.

115. The order passed by this Court disposing of the MP/96/2000 dated 13th October, 2003 is required to be read in the context of the pleadings therein especially the stand of the Custodian that there was no evidence that the balance damaged shares tallied with the list provided by the notified parties or were in the possession of the notified parties. The liberty granted to the Custodian to move again, if necessary, cannot be construed *de hors* the stand of the parties in MP/96/2000 and the orders passed by the Court. To put it in other words, the letter dated 19th October, 1999 which forms the substratum of the instant application was the very foundation of MP/96/2000.

116. I am conscious that in view the special jurisdiction exercised by this Court and the provisions contained in Section 9(4) of the TORT Act, 1992, this Court is not bound by the strict rules of procedure. The Court is empowered to adopt such procedure as it may deem fit consistent with the principles of natural justice. However, it does not imply that the general

principles of *res judicata* and constructive *res judicata*, which are based on public policy, also do not apply. The Court cannot be oblivious to the fact that the subject matter of MP/96/2000 was the very same letter on the strength of which the Custodian now proposes to seek disclosures and recovery. In the totality of circumstances, I am impelled to hold that the submission on behalf of ATL - R1 that the Court at that point of time had not granted the relief may justify an inference that those reliefs qua the balance shares were rejected, cannot be said to be unfounded.

117. The matter can be looked at from another perspective. Even if the letter dated 19th October, 1999 is construed at its face value, the foundational premise was that 1,57,514 shares were in the possession of the notified parties. It was expressly stated in the said letter that those shares were currently lying in the custody of Late Harshad Mehta and steps were being taken to preserve them. In MP/96/2000 the Custodian has approached the Court with a case that what was produced by Ashwin Mehta, respondent No.3 therein, before the Custodian, could lead to identification of 11,289 shares and 700 debentures only. The shares which the notified parties claimed to be in possession, apart from those shares which were eventually

transferred, were not, in the least, in identifiable state, if not shred or powder. That would warrant further material to substantiate the claim.

118. It is in this context, the submission of Mr. Cooper that the concluding part of the letter of Late Harshad Mehta dated 9th October, 1999 destroys the case of the notified parties appears to carry substance. Late Harshad Mehta was clear in his understanding that recovery of those shares could be effected only on the strength of purchase and delivery documents of respective entities for which, (he added) steps had been taken and were being taken. Evidently, the notified parties had not made any endeavour to produce documents evidencing purchase and delivery of those shares, either in MP/96/2000 or thereafter.

119. The entire thrust of the submission of Mr. Mehta was based on the fact that certain quantity of shares matched the distinctive numbers and other particulars furnished by the Custodian to ATL - R1. It may not be necessary to refer to lengthy correspondence that ensued between the Custodian and ATL - R1. The letter dated 7th January, 2014, to which a detail note was appended (extracted above) records that under damaged/destroyed category the matched stopped cases as per

the records of the company after removal of overlappings/mismatches etc. was 5,80,350 (post split face value Rs.1/-). Evidently, there is variance in the contentions in the affidavits filed in MP/96/2000 and the subsequent communications addressed on behalf of the ATL - R1 as regards the quantum of the shares which matched, under damaged/destroyed category. However, that does not seem to be of any significance. Matching on the strength of distinctive numbers, without anything more, by itself, may not sustain the claim of the notified parties. It must be noted that the case of the notified parties was based on the premise that they were in possession of the share certificates and also transfer deeds in majority of the cases.

120. If the fact that this Court had not passed any order in respect of the balance shares, though there were specific prayers and in the affidavits-in-reply, filed on behalf of ATL - R1 the entitlement of the notified parties was sought to be contested by ATL - R1 and the details in respect of those shares were also furnished, is considered in the light of the aforesaid nature of the material on which the claim of notified parties is based, the submission of Mr. Cooper that there is not a shred of material to sustain claim of notified parties merits acceptance.

121. The conspectus of the aforesaid consideration is that if viewed in the light of the aforesaid factors, the stand of the Custodian that MA/52/2018 does not deserve to be prosecuted appears worthy of acceptance. No reliefs can be granted in MA/52/2018. Resultantly, MA/54/2018 is required to be disposed with directions and MA/52/2018 is liable to be dismissed.

122. Hence, the following order:

: O R D E R :

Misc. Application No. 54 of 2018 :-

- (i) The stop transfer instructions in respect of 11,16,200 shares of Apollo Tyres Limited – respondent No.1, the particulars of which are furnished along with the letter dated 7th December, 2016 (Exh-B), shall continue to operate till further orders.
- (ii) The Custodian to publish a public notice containing the list of the aforesaid shares in the Times of India and Indian Express to state that any person who claims to be *bona fide* owner and/or claim to have purchased any of those shares shall apply to this Court for certification of the shares within a period of ten weeks from the date of the publication of the notice.

- (iii) Apollo Tyres Limited – respondent No.1 shall also give notice to the persons who have lodged the shares for transfer and/or requested for dematting of the shares and, where no such requests have been received, to the registered share holders that they may approach this Court for certification of the shares within ten weeks of the publication of the notice by the Custodian.
- (iv) Apollo Tyres Limited – respondent No.1 is also at liberty to file an application before this Court and seek the lifting of stop transfer instructions. In the event such an application is filed, the Court will consider the prayers for lifting of stop transfer instructions on the basis of the material which Apollo Tyres Limited (R1) tenders before the Court.
- (v) Depending upon the outcome of the certification application and/or the application which Apollo Tyres Limited - R1 may file, this Court would decide as to whether the subject shares or any part thereof deserve to be transferred to the Custodian for the account of the notified parties or released from restraint on transfer.
- (vi) The Custodian may file an appropriate report seeking further directions.

(vii) Misc. Application No. 54 of 2018 stands disposed with aforesaid directions.

Misc. Application No. 52 of 2018:-

Misc. Application No. 52 of 2018 stands dismissed.

No costs.

[N. J. JAMADAR, J.]