BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 131 of 2011

Date of Decision: **18.10.2011**

1. Sahara India Real Estate Corporation Limited
   (formerly also known as Sahara India "C"
   Junxion Corporation Limited).
   1, Kapoorthala Complex, Aliganj, Lucknow.

2. Mr. Ashok Roy Choudhary
   Sahara India House,
   New Hyderabad Colony,
   Lucknow – 226 007.

3. Mr. Ravi Shankar Dubey
   14/32, Yaman, Sahara Estate,
   Jankipuram, Lucknow – 226 021.

4. Ms. Vandana Bhargava
   B-48, J-Park, Mahanagar,
   Lucknow – 226 006.

5. Mr. Subrata Roy Sahara
   Sahara Shaher, Gomti Nagar,
   Lucknow – 226 024. …… Appellants

Versus

1. Securities and Exchange Board of India
   Plot No.C4-A, G Block,
   Bandra (E), Mumbai – 400051.

2. Union of India, through
   Ministry of Corporate Affairs
   The Ministry of Corporate Affairs,
   Shastri Bhawan, New Delhi – 110011. …… Respondents

Mr. Fali S. Nariman, Senior Advocate with Mr. Subash Sharma, Mr. Satish Kishanchandani, Mr. Jatin Pore and Ms. Tanu Banerjee, Advocates for the Appellants.

Mr. Arvind Datar, Senior Advocate with Mr. Prateek Seksaria, Mr. Jayesh K. Ashar, Mr. Mobin Shaikh and Mr. Mihir Mody, Advocates for Respondent no.1.
Mr. Darius Khambata, Additional Solicitor General with Mr. Aditya Mehta and Mr. Som Sinha, Advocates for Respondent no.2.

CORAM : Justice N. K. Sodhi, Presiding Officer
P.K. Malhotra, Member
S.S.N. Moorthy, Member

Per : Justice N. K. Sodhi, Presiding Officer

Whether the Optionally Fully Convertible Debentures (OFCDs) issued by the appellants are public issues required to be compulsorily listed on a stock exchange and whether these are "securities" as defined in the Securities Contracts (Regulation) Act, 1956 (for short SCRA) and whether the Securities and Exchange Board of India (hereinafter referred to as Sebi) has jurisdiction to regulate them and what effect section 55-A of the Companies Act, 1956 has had on the powers of Sebi in regulating unlisted companies are primarily the important questions of law that arise for our consideration in these two appeals. Appeal no.131 of 2011 has been filed by Sahara India Real Estate Corporation Limited and its directors/shareholders and Appeal no.132 of 2011 has been filed by Sahara Housing Investment Corporation Limited and its directors/shareholders and these companies shall be referred to hereinafter as the company and housing company respectively. Both the companies are group companies and these appeals involve identical questions of law and fact. Since the main arguments were addressed in Appeal no.131 of 2011, the facts are being taken from this case. The decision in this appeal shall govern the other appeal as well.

2. The company was originally incorporated as Sahara India "C" Junxion Corporation Limited on October 28, 2005 as a public limited company under the Companies Act and it changed its name to the present one on March 7, 2008. It is unlisted, that is, its shares are not listed on any stock exchange. Its issued, subscribed and paid-up capital as stated in its Red Herring Prospectus (for brevity RHP) is one lac equity shares of ₹ 10 each amounting to ₹ 10 lacs. Presently, it has three directors, namely, Vandana Bharrgava, Ravi Shankar Dubey and Ashok Roy Choudhary. The first two were appointed on January 28, 2008 and Ashok Roy Choudhary was appointed on February 29, 2008. These directors do not draw any remuneration from the company nor do they hold any share capital therein. The three directors who were on the board of directors at the time of incorporation resigned from directorship almost around the same time when the present directors were appointed. As per the Balance Sheet of the company as on December 31, 2007, its cash and bank balances were ₹ 6,71,882 and its net current assets were worth ₹ 6,54,660 only. It had no fixed assets nor any investments as on that date. Its operational and other expenses for the three quarters ending

December 31, 2007 were ₹ 9,292 and the loss carried forward to Balance Sheet as on that date was ₹ 3,28,345.

3. The company in its extraordinary general meeting held on March 3, 2008 resolved through a special resolution passed in terms of section 81(1A) of the Companies Act to raise funds through unsecured OFCDs by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara India Group of companies without giving any advertisement to the general public. The company authorized its board of directors to decide the terms and conditions and revision thereof, namely, face value of each OFCD, minimum application size, tenure, conversion and interest rate. In pursuance to the authority given by the company, its board of directors in their meeting held on March 10, 2008 resolved to issue unsecured OFCDs by way of private placement the details of which are mentioned in the RHP that was filed in the prescribed format with the Registrar of Companies, Kanpur (for short RoC). In part I of the RHP under general information, the company, as against the column regarding the names of the stock exchanges where it had made an application for the listing of the present issue, stated that "**We do not intend the proposed issue to be listed in any stock exchanges(s)**." In the column relating to the size of the present issue, this is what the company stated:

> "The present issue consists of Unsecured Optionally Fully Convertible Unsecured Debentures with option to the holders to convert the same into Equity Share of Rs.10 each at a premium of to be decided at the time of issue equal to the face value of the Optionally Fully Convertible Unsecured Debentures to be privately placed aggregating to Rs. **** since it is a Red Herring prospectus the quantum and the price is to be determined at a future date"

Terms of the present issue were also stated in the RHP and it is not in dispute that the company has issued three different types of OFCDs labelling them as Abode Bonds, Real Estate Bonds and Nirmaan Bonds and a gist of their particulars was appended as annexure I to the RHP in a tabular form and the same is reproduced hereunder for facility of reference:

Particulars	**Nature of OFCDs**		
	Abode Bond	**Real Estate Bond**	**Nirmaan Bond**
Tenure	120 months	60 months	48 months
Face Value	Rs.5,000/-	Rs.12,000/-	Rs.5,000/-
Redemption Value	Rs.15,530/-	Rs.15,254/-	Rs.7,728/-
Early Redemption	After 60 months	NIL	After 18 months
Conversion	On completion of 120 months.	On completion of 60 months	On completion of 48 months
Minimum Application Size	Rs.5,000/-	Rs.12,000/-	Rs.5,000/-
Nominee System	Double Nominee	Double Nominee	Double Nominee
Transfer	Yes	Yes	Yes

The total project costs were stated to be around ₹ 20,000 crores (Rupees twenty thousand crores) and the RHP specifically states that "**The projects are being financed partly by this issue as well as with the Capital, Reserves and other sources of the Company**." The company declared that the funds shall be utilised for the purpose of financing the acquisition of lands, development of townships, residential apartments, shopping complexes etc. The proceeds, according to the company, shall also be utilised for construction activities which would be undertaken in major cities of the country. The company has also stated in the RHP that it is "**in advance stage of finalizing the deals for acquiring the lands at various places across the country however, no agreement has been made till the date of this red herring prospectus**." It has also been mentioned that allotment would be made within two months from the date of receipt of the application and OFCD certificates would be issued on surrender of the allotment letter. As regards restriction, if any, on transfer and transmission of shares/debentures, the RHP in clause 13 of the prescribed format states as under:

13. Restriction if any on transfer and transmission of shares/debentures and on their consolidation/splitting	Nil

The RHP was presented before the RoC on March 13, 2008 and the same was registered by him on March 18, 2008.

4. Having got the RHP registered, the company then circulated in April 2008 the information memorandum along with the application forms to the so called friends, associates, group companies, workers/employees and other individuals connected/associated in any manner with Sahara group of companies for subscribing to OFCDs purporting to be by private placement. A gist of the particulars of the bonds as referred to in paragraph 3 above read with the other clauses of the RHP makes it clear that the price of each bond had been determined when the RHP was filed. This information memorandum had a recital that it was private and confidential and not for circulation and the same is reproduced hereunder:

> "PRIVATE & CONFIDENTIAL
> (NOT FOR CIRCULATION)
>
> **INFORMATION MEMORANDUM FOR PRIVATE PLACEMENT OF OPTIONALLY FULLY CONVERTIBLE UNSECURED DEBENTURES (OFCD)**
>
> This Memorandum of Information is being made by Sahara India Real Estate Corporation Limited (formerly Sahara India 'C' Junxion Corporation Limited) which is an unlisted Company and neither its equity shares nor any of the bonds/debentures are listed or proposed to be listed. This issue is purely on the private placement basis and the company does not intend to get these OFCD's listed on any of the Stock Exchanges in India or Abroad. This Memorandum for Private Placement is neither a Prospectus nor a Statement in Lieu of prospectus. It does not constitute an offer for an invitation to subscribe to OFCD's issued by Sahara India Real Estate Corporation Limited. The Memorandum for Private Placement is intended to form the basis of evaluation for the investors to whom it is addressed and who are willing and eligible to subscribe to these OFCD's. Investors are required to make their own independent evaluation and judgment before making the investment. The contents of this Memorandum for Private Placement are intended to be used by the investors to whom it is addressed and distributed. This Memorandum for Private Placement is not intended for distribution and is for the consideration of the person to whom it is addressed and should not be reproduced by the recipient. The OFCD's mentioned herein are being issued on a private placement basis and this offer does not constitute a public offer/invitation."

The terms and conditions on which the OFCDs were issued were contained in the application forms and their salient features may now be noticed. As would be seen from the table in para 3 above, there were three kinds of OFCDs issued by the company and these had been named as Abode Bonds, Real Estate Bonds and Nirmaan Bonds. The Abode Bond has a face value of ₹ 5000 for five bonds with a tenure of 120 months and

its redemption value is ₹ 15,530/- and the minimum application size is ₹ 5000. This bond can be redeemed prematurely after 60 months and the holder can also exercise an option for its conversion into one fully paid equity share of ₹ 10 each at a premium of ₹ 990 each provided the option is exercised on the completion of 119 months i.e. one month prior to the date of its maturity. The bond holder can transfer the bonds to any person including persons other than those to whom the bonds were offered and the transfer is made subject to the approval of the company. As regards the Real Estate Bond, an applicant can apply for a minimum of two bonds of ₹ 6000 each by paying ₹ 200 per month and additional bonds can be subscribed by paying additional ₹ 100 per month for 60 months. Weekly, monthly, quarterly, half yearly and yearly payments are also accepted in the same proportion. This bond which has a face value of ₹ 12000 can be redeemed after 60 months for a sum of ₹ 15,254 (redemption value). A holder of this bond can also exercise the option for conversion against the face value of each bond into ten fully paid equity shares of ₹ 10 each at a premium of ₹ 590 provided the option is exercised on the completion of 59 months i.e. one month prior to its redemption. This bond can also be transferred to any other person subject to the approval of the company. Nirmaan Bond has a face value of ₹ 5000 for five bonds with a tenure of 48 months and an applicant can apply for a minimum of five bonds of ₹ 1000 each and in multiples of ₹ 1000 thereafter. The redemption value of this bond is ₹ 7,728. This bond can also be converted into two fully paid equity shares of ₹ 10 each at a premium of ₹ 190 provided the option is exercised after 47 months i.e. one month prior to redemption. This bond is also transferable to any other person with the approval of the company. All the three bonds enable the bond holders to avail of loan facility as per the terms and conditions in the application forms. Nirmaan Bond and Real Estate Bond have an additional feature of death risk cover. The nominees(s) of the deceased bond holders are entitled to receive the death risk cover amount as enumerated in the terms and conditions of their issue. It is pertinent to mention here that as per clause 13 of the RHP, as reproduced in para 3 above, there was no restriction imposed on the transfer of the OFCDs whereas in the terms and conditions enumerated in the application forms, the transfer has been made subject to the approval of the company. This fact is being noticed here since much was said on behalf of the appellants that the fetter imposed on the transfer of OFCDs made them

non-marketable as a result whereof they were not 'securities'. We shall deal with this aspect later.

5. The issue of OFCDs floated by the company is an open ended scheme and it started collecting subscriptions from the investors with effect from April 25, 2008 and till April 13, 2011, the company had collected ₹ 19400,86,64,200 (nineteen thousand four hundred crores, eighty six lacs, sixty four thousand and two hundred only). As on August 31, 2011, the company had a total collection of ₹ 17656,53,22,500 (seventeen thousand six hundred and fifty six crores, fifty three lacs, twenty two thousand and five hundred only) after meeting the demand for premature redemption. This amount has been collected from as many as 2,21,07,271 (two crores twenty one lacs seven thousand two hundred and seventy one) investors.

6. While processing the draft red herring prospectus submitted by Sahara Prime City Limited, one of the Sahara group of companies, in respect of its proposed initial public offer, Sebi noticed from the disclosures made therein that the two appellant companies before us had issued OFCDs presumably in contravention of the provisions of the Companies Act, the Securities and Exchange Board of India Act, 1992, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 and the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (the latter three shall be referred to hereinafter as the Sebi Act, guidelines and the regulations respectively). By letter dated May 12, 2010, Sebi sought information from the company regarding the OFCDs. Despite the grant of extension of time, the information was not furnished and instead a letter dated May 31, 2010 was addressed to the Minister of Corporate Affairs, Government of India (by name) with the following request:

> "In the circumstances, we humbly request that we may be guided/advised as to our locus standi or legal standing vis-à-vis our regulatory authority whether the Company is governed by Ministry of Corporate Affairs, or SEBI, in view of the provisions of Section 55A(c) of the Companies Act, 1956."

There is nothing on the record to show that the Ministry of Corporate Affairs ever gave its advice. Since the information sought by Sebi had not been furnished, it ordered investigations under section 11C of the Sebi Act and on the basis of the material collected

during the course of the investigations, it prima facie found that the company and the housing company were collecting sizeable amounts of money from the public without making proper disclosures and without conforming to the investor protection norms governing public issues. With a view to protect the interests of investors and with a view to prevent the company from collecting further funds from the public, Sebi passed an ex-parte order on November 24, 2010 restraining the company from mobilizing funds under the RHP. The company was directed not to offer its OFCDs or any other securities to the public or invite subscription in any manner whatsoever till further directions. A similar direction was issued to the housing company as well. The ex-parte order was treated as a show cause notice and proceedings were initiated against both the companies. Feeling aggrieved by the ex-parte order, the company filed a writ petition before the Lucknow Bench of the High Court of Allahabad. The writ petition was admitted and the operation of the order impugned therein was stayed. Sebi then challenged the order of the Allahabad High Court by filing special leave petition before the Hon'ble Supreme Court. There was some further litigation between Sebi and the company and it is not relevant for us to go into the details thereof. However, during the pendency of the proceedings before the Hon'ble Supreme Court and in pursuance to the directions issued by it, Sebi passed a final order holding that the company and the housing company had contravened the provisions of sections 56, 73, 117A, 117B and 117C of the Companies Act. The whole time member also held the company guilty of violating different clauses of the guidelines read with the regulations. The housing company was found guilty of violating the provisions of the regulations. The whole time member, by his common order dated June 23, 2011, directed both the companies and its promoters/directors to forthwith refund the monies collected by them through the RHP and the red herring prospectus dated October 6, 2009 issued by the housing company along with interest at the rate of fifteen per cent from the date of receipt of money till the date of payment. Some consequential directions have also been issued. The two companies have also been restrained from accessing the securities market for raising funds till such time repayments are made to the investors to the satisfaction of Sebi. Further, the promoters/directors of the two companies have been restrained from associating themselves with any listed company and any public company which intends to raise money from the public till such

time the aforesaid payments are made. Since the proceedings were pending before the Supreme Court, the order dated June 23, 2011 passed by Sebi was placed before their Lordships. The pending special leave petitions were disposed of on July 15, 2011 by directing the appellants before us to withdraw their writ petitions from the Allahabad High Court with a further direction to them to file an appeal before this Tribunal and all contentions raised by the parties were kept open. It is in pursuance to this direction that the present appeals have been filed challenging the order dated June 23, 2011 passed by Sebi.

7. We have heard the learned senior counsel for the parties who have taken us through the voluminous record and the impugned order.

8. Mr. Fali S. Nariman, learned senior counsel pointed out that the appellants had made true and complete disclosures in the RHP which was presented to the RoC who after considering all aspects of the matter registered the same and no information had been withheld by the appellants. He then strenuously argued that Sebi had no jurisdiction to pass the impugned order as OFCDs issued by the company are not 'securities' within the meaning of Sebi Act read with SCRA and section 2(45AA) of the Companies Act. He also argued that in view of the fetters imposed on their transferability, they were not marketable and hence not securities. He contended that OFCD is a 'hybrid' as defined in section 2(19A) of the Companies Act and not having been included in the definition of securities in SCRA, it cannot be regarded as a security so as to be regulated by Sebi. It was also argued by Mr. Nariman, that the issue of OFCDs was not a public issue and that these were offered to the investors on private placement basis and, therefore, they were not required to be mandatorily listed. He pointed out that the company had made its intention clear from the beginning in the RHP wherein it stated that it did not intend to get the issue listed on any stock exchange. The learned senior counsel then argued that assuming OFCDs were securities, these had been issued by an unlisted company which did not intend to get them listed and by virtue of the provisions of section 55A(c) of the Companies Act, it was the Central Government which could administer the company and the issue of OFCDs. According to the learned senior counsel, Sebi had no jurisdiction in the matter. Mr. Nariman, then argued that Sebi had grossly erred in law in holding that

the appellants had violated section 73(1) of the Companies Act which provides for compulsory listing of public issues. He contended that even if it be assumed that OFCDs are securities and the issue was a public issue, the same was exempt from the provisions of the SCRA under section 28(1) thereof. The argument is that OFCDs are convertible bonds and having been issued at a price agreed upon at the time of issue were exempt from listing. The show cause notice dated May 20, 2011 and the impugned order dated June 23, 2011 have also been challenged on the ground that the appellants are alleged to have violated some provisions of the guidelines which stood rescinded much before the issue of the show cause notice and since no action was taken by Sebi till the promulgation of the regulations, the previous wrongs, if any, were not saved by Regulation 111(2) of the regulations. What was argued by the learned senior counsel was that Sebi could not take any action against the appellants for the violation of the guidelines. The learned senior counsel for the appellants brought to our notice certain correspondence emanating from Sebi whereby the complaints pertaining to unlisted companies were sent to the Ministry of Corporate Affairs observing that unlisted companies are not regulated by it. He referred to the affidavit filed by Sebi in one of the cases in Bombay High Court where also a similar stand had been taken. He also referred to the written submissions filed by the Ministry of Corporate Affairs before the Allahabad High Court stating that unlisted companies were regulated by it. He strenuously argued that since Sebi, a statutory regulator and the Ministry of Corporate Affairs had been taking a consistent stand that listed companies alone are regulated by Sebi and the unlisted ones by the Central Government, they cannot be allowed to change their stand in the present case without any justifiable reasons. He cited some case law in support of his submissions to which reference shall be made later.

9. Mr. Sudipto Sarkar, learned senior counsel appearing for the appellants in Appeal no.132 of 2011 adopted all the arguments of Mr. Nariman and contended that jurisdiction over unlisted companies rests only with the Central Government and not with Sebi. He referred to the provisions of section 2(h) of SCRA and argued that in view of the fact that transfer of OFCDs from one investor to another had been made subject to the approval of the issuer company and this fetter on their transferability, according to him, makes them

non marketable as a result whereof they cease to be securities. He took us through the impugned order and pointed out that the whole time member had violated the principles of natural justice in as much as he has placed reliance on certain facts which were collected behind the back of the appellants which were never put to them. In particular, he referred to paras 17.9 and 26.7 of the impugned order wherein reliance has been placed on some enquiries made by the investigating authority on the instructions of the whole time member and the result of those enquiries, though relied upon, was never put to the appellants. It was also argued by Mr. Sarkar that action has been taken against the housing company for violating some of the provisions of the regulations which, according to him, apply only to listed companies. The argument is that the housing company, being an unlisted company, is not governed by the regulations. He also questioned the direction issued by the whole time member under section 73(2) of the Companies Act directing the appellants to refund the amounts collected from the investors on the ground that such a direction, if at all, could be issued only by the Central Government and not by Sebi. According to Mr. Sarkar, the impugned order is wholly without jurisdiction.

10. Shri Arvind Datar, learned senior counsel appearing for Sebi while supporting the impugned order has vehemently refuted the contentions advanced on behalf of the appellants. He also took us through the relevant provisions of law and contended that OFCDs issued by the company are securities and in view of the provisions of sections 11, 11A and 11B of the Sebi Act, Sebi alone has jurisdiction to pass the impugned order and issue directions to the appellants with a view to protect the interests of investors in securities. He referred to the various provisions of the Companies Act particularly those which were inserted by the Companies (Amendment) Act, 2000 and contended that the issue of OFCDs by the company was a public issue since the securities had been offered to more than fifty persons and, therefore, the issue required compulsory listing on a stock exchange. He contended that since the company failed to make an application for listing, it violated section 73(1) of the Companies Act. Referring to the provisions of section 55A of the Companies Act, the learned senior counsel for Sebi submitted that this provision of law did not whittle down the powers of Sebi under the Sebi Act and that the

intention of a company as referred to in this section and in section 73 of the Companies Act was not to be inferred from what the company professes in the RHP and that the same had to be judged from its actions. While controverting the submission made on behalf of the appellants that OFCDs were not listable on any stock exchange, Shri Datar pointed out that only convertible bonds and not OFCDs had been exempt from the provisions of SCRA and that the two were different as is evident from the definition of 'securities'. He also argued that whatever had been done by the appellants prior to the rescission of the guidelines has been saved by Regulation 111(2) of the regulations and that Sebi was justified in not only issuing a show cause notice but also in passing the impugned order issuing necessary directions to the appellants. He also refuted the argument on behalf of the appellants that in view of the earlier stand taken by Sebi while dealing with some complaints and the one taken in an affidavit filed in the Bombay High Court, it could not lightly change its stand. The learned senior counsel for Sebi contended that there can be no estoppel against law and that the circumstances in which the affidavit was filed in the Bombay High Court were altogether different.

11. Mr. Darius Khambata, the learned Additional Solicitor General appearing on behalf of Ministry of Corporate Affairs, Government of India (respondent no.2) also made his submissions on the question of jurisdiction of Sebi to pass the impugned order. He supported Mr. Datar and contended that Sebi alone had the jurisdiction in the matter and that the impugned order does not suffer from lack of jurisdiction. He vehemently argued that OFCDs were securities and, therefore, Sebi has the jurisdiction to regulate the issue and also the issuer company. He referred to the provisions of the Sebi Act to contend that Sebi had wide powers therein to protect the interests of investors in securities and, according to him, it did not matter whether the securities or the issuer companies were listed or unlisted. He also adverted to the provisions of section 55A of the Companies Act to contend that this provision neither overlaps the provisions of the Sebi Act nor does it contradict those provisions. According to the learned Additional Solicitor General, section 55A does not confer any substantive powers on Sebi and that it only allocates the responsibility of administering the sections enumerated therein and declares that Sebi shall administer those sections to the extent mentioned in that section

in regard to listed companies and companies which intend to get their securities listed. His argument is that Sebi Act is a self contained enactment and the powers of Sebi, thereunder are in no way affected by the insertion of section 55A in the Companies Act. He also refuted the argument advanced on behalf of the appellants that OFCDs were not listable in view of the provisions of section 28(1)(b) of SCRA. According to him, there was no legal bar on the listing of OFCDs. Referring to the stand taken by Sebi while dealing with some earlier complaints and also the stand taken by it in its affidavit filed in the Bombay High Court in a case where the provisions of section 55A of the Companies Act alone had come up for consideration, the learned Additional Solicitor General contended that there is no estoppel against law and, therefore, any statement on the interpretation of any legal provision of law cannot bind Sebi or the Central Government.

12. From the rival contentions of the parties, the primary questions that arise for our consideration have been enumerated in the opening part of our order. We shall now proceed to deal with those issues.

13. Let us first deal with the question whether the appellants made a true and complete disclosure in the RHP as was sought to be argued by their learned senior counsel. While opening his arguments, Mr. Nariman, learned senior counsel for the appellants made reference to the extraordinary resolution passed by the company on March 3, 2008 and also to the resolution passed by the board of directors on March 10, 2008 authorising the issue of unsecured OFCDs. He also drew our attention to the RHP that was filed in Form no.62 before the RoC and made a detailed reference to those portions thereof where the company had made it clear that it did not intend the proposed issue to be listed on any stock exchanges(s). He also referred to the project cost which was around ₹ 20,000 crores and the projects were to be financed partly by this issue and partly with the capital reserves and other resources of the company. Since the capital reserves and other sources of the company as disclosed in the RHP were very meagre, it is expected that the company will collect around ₹ 20,000 crores from the investors. The learned senior counsel also highlighted that the company had made it clear from the beginning that it was not approaching the public and that the OFCDs were being offered to the investors on a private placement basis. He also pointed out from the

RHP **that OFCDs would be offered only to those persons "to whom the Information Memorandum was circulated and/or approached privately who are associated/affiliated or connected in any manner with Sahara Group of Companies, without giving any advertisement in general public."** After referring to the RHP and the resolutions passed by the company, the learned senior counsel strenuously argued that true, full and faithful disclosures had been made in the RHP and nothing had been concealed therein and it is on this count that the RoC registered the RHP on March 18, 2008. He referred to the provisions of section 60 of the Companies Act which deals with registration of prospectus and contended that the mandate of the law is that the RoC shall not register a prospectus unless he is satisfied that the requirements of sections 55 to 58 and 60 of the Companies Act which provide for matters to be stated and reports to be set out in the prospectus have been complied with. The argument is that since the RoC registered the RHP, he was satisfied that the information provided therein was true and complete and that the provisions of the Companies Act had been fully complied with and that the appellants cannot be faulted for withholding any information from the RoC who was the competent authority in this regard.

14. We are unable to agree with the learned senior counsel and are of the view that the company has concealed more than what it has revealed in the RHP. It is true that the company had disclosed that it did not intend the proposed issue to be listed on any stock exchange(s) and that the issue consists of unsecured OFCDs with an option to the holders to convert the same into equity share of ₹ 10 each at a premium to be decided at the time of issue. The company had also disclosed that the issue was made on a private placement basis and that the OFCDs would be offered only to such persons to whom the information memorandum would be circulated. What it did not disclose was the fact that the information memorandum was being issued to more than thirty million persons inviting them to subscribe to the OFCDs and there lies the catch. As will be seen from the discussion that follows, any offer or invitation to subscribe to for shares or debentures if made to fifty persons or more shall be treated as a public issue and all provisions of law relating to public issues as discussed hereinafter shall apply. By stating that the issue was a private issue and that the company did not intend to get it listed on any stock exchange

even when it was a public issue, it (the company) withheld from the investors/public all the necessary information that is required to be disclosed to them in a public issue. The RHP is bereft of any disclosures in this regard. The company from the very beginning knew that it was going to collect an amount of about ₹ 20,000 crores as its own capital and reserves as disclosed in the RHP were negligible and that it intended to issue the information memorandum to millions of investors. The fact that the invitation to subscribe to OFCDs was going to be made to more than fifty persons was carefully camouflaged in the RHP as a result whereof the RoC was misled. Had it been disclosed that the offer was being made to millions of investors, perhaps the RoC would not have registered the RHP and, in any case, he would have raised several queries in this regard and would not have treated the issue as one made on private placement basis. This concealment is, indeed, very significant and goes to the root of the controversy. Having got the RHP registered on March 18, 2008, the company circulated the information memorandum to the prospective investors in April 2008. The information memorandum, if at all was to be circulated, should have been circulated prior to the filing of the RHP as is the requirement of section 60B of the Companies Act. It may be mentioned that the information memorandum and the RHP carry the same obligations as are applicable in the case of a prospectus. It was in the information memorandum that the company disclosed to the prospective investors that **"if the number of interested parties to this issue exceeds fifty the company shall approach the Registrar of Companies to file a red herring prospectus as per section 67(3) of the Companies Act, 1956."** We wonder why this statement was made in the annexure to the information memorandum when the RHP had already been registered in which no such disclosure had been made. The company always knew that the number of persons who would subscribe to the OFCDs would exceed fifty and that the issue would be public and yet it kept on harping both in its resolutions and also in its RHP that it was an issue on private placement basis and it was able to convince the RoC that it was a private issue. What is interesting to note is the fact that the parties subscribing to the OFCDs may exceed fifty was told only to the prospective investors and not to the RoC. Again, the company had stated in the RHP that there would be no restriction on the transfer of OFCDs but in the terms and conditions contained in the application form, the transfer was made subject to the

approval of the company. Having withheld this condition from the RoC, much was sought to be made out of this condition to contend that OFCDs were not freely transferable and hence not securities. Not only did the company withhold material facts from the RoC, it also failed to furnish to its shareholders all material particulars of persons from whom capital was sought to be raised on private placement basis thereby depriving them from taking an informed decision in the matter. It is not enough to tell them that OFCDs would be offered to friends, associates, group companies, employees etc. Private placement is made to a handful of known persons whose number is less than fifty and who agree to offer money in any form on mutually agreed terms which are then approved by the shareholders in an extraordinary general meeting. As is clear from the resolution, the particulars of the persons are conspicuously absent. They had also been informed that OFCDs would be issued on private placement basis and that the company would not be approaching the public through advertisement. The fact that information memorandum was circulated to more than thirty million persons through ten lac agents and more than 2900 branch offices is nothing but advertisement to the public. This vital fact was withheld from all concerned. It is, therefore, evident that the intention of the company and its promoters from the very beginning was not bonafide. In this view of the matter, we cannot but hold that the appellants concealed some very vital facts from the RoC and from its shareholders and also from the investors and we are satisfied that the disclosures made in the RHP were not true and fair.

15. Even the conduct of the RoC leaves much to be desired. We say so because when the RHP was presented to him, the fact that the company had a capital base of only ten lacs with no other assets or reserves and was a loss making company and was going to collect ₹ 20,000 crores by private placement, should have alerted him and he should have made necessary queries in this regard. It is reasonable to assume that he knew that an offer/invitation made to fifty or more persons would make it a public issue and he ought to have enquired as to the number of persons to whom OFCDs were proposed to be offered and their particulars. The appellants tell us that no such queries were made. Had he made such a query he would have known that the offer would be made to more than fifty persons which would have made the issue of OFCDs a public issue. In that event he

would have had no option but to insist upon the company to make all the necessary disclosures required to be made in a public issue. As already observed, no such disclosure has been made. Further, the RoC ignored the instructions contained in circular no.F.7/91-CL-V dated March 1, 1991 issued by the then Department of Company Affairs, Government of India which were brought to our notice by the learned senior counsel for the appellants. The circular as such has not been placed before us but an extract from Volume 81, Company Cases (Statutes) at page 204 where the contents of the same have been referred to has been placed before us by Mr. Nariman. Since the contents of the extract have not been disputed by any party, we did not think it necessary to ask the Government of India to produce a copy thereof. As an administrative measure, the Government of India by this circular had directed that a prospectus would not be registered by the Registrar of Companies if Sebi had informed him that the contents of the prospectus contravened any law or rules. As per this circular, it was incumbent upon him to submit to Sebi a draft prospectus for scrutiny. On receipt of the draft, Sebi was required to scrutinise the disclosures made therein to see if it contained adequate information for the investors. Admittedly, this was not done and we are of the view that the RoC while registering the RHP with undue haste had acted in dereliction of his duty.

Whether OFCDs are securities and whether Sebi has jurisdiction to regulate them

16. This brings us to the first issue whether OFCDs are securities and whether Sebi has the power to regulate them. Challenge before us is to an order passed by Sebi holding that OFCDs issued by the company are securities within the meaning of the Sebi Act read with SCRA and that it has jurisdiction to regulate such securities. One of the grounds on which the jurisdiction of Sebi is sought to be challenged is that OFCDs are not securities and, therefore, these could not fall within the ambit of its authority. The word ‘securities’ has not been defined in the Sebi Act and section 2(i) thereof mandates that it shall have the meaning assigned to it in section 2 of SCRA. Clause (h) of section 2 of SCRA gives an inclusive definition of the term ‘securities’, the relevant part of which reads as under:

> "2(h) "securities" include-
>
> *(i)* shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
>
> ……..
>
> ……..."

It is also necessary to reproduce sub-section (2) of section 2 of the Sebi Act which reads thus:

> "2(2) Words and expressions used and not defined in this Act but defined in the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Depositories Act, 1996 (22 of 1996) shall have the meanings respectively assigned to them in that Act."

Definition of the term 'securities' was inserted in the Companies Act for the first time by adding clause (45AA) in section 2 by the Amendment Act of 2000 with effect from December 13, 2000 and this is how it reads:

> "(45AA) "securities" means securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and includes hybrids."

The term 'hybrid' was also introduced in the Companies Act by the same amendment by inserting clause (19A) in section 2 which reads as under:

> "(19A) "hybrid" means any security which has the character of more than one type of security, including their derivatives;"

The learned senior counsel for the appellants pointed out that OFCDs issued by the company have the characteristics of more than one type of security namely, debt and equity and Nirmaan Bonds and Real Estate Bonds have an additional element of insurance in them, that is, death risk cover and, therefore, these are hybrids as defined in section 2 of the Companies Act. According to the learned senior counsel, since hybrids have been specifically included in the definition of 'securities' in the Companies Act, the intention of Parliament is clear that these constitute financial instruments which are distinct and separate from those already included in the definition. According to the learned senior counsel, if the term 'securities' by itself included 'hybrid' there was no need to add the phrase "and includes hybrids" in the definition. Having pointed out this, Shri Nariman goes on to argue that a similar inclusion not having been made in the definition of 'securities' in SCRA, it is clear that hybrids are not securities within the

meaning of SCRA and consequently under the Sebi Act. There is yet another argument raised by Shri Nariman to contend that OFCDs are not securities. He referred to the definition of 'securities' in SCRA and contended that different types of financial instruments that have been included therein like shares, scrips, stocks, bonds, debentures or debenture stock have necessarily to draw their meaning and colour from the words "or other marketable securities of a like nature" which follow. The argument is that before these financial instruments could be regarded as securities, they have to be 'marketable'. He argued that the word 'marketable' means that the instrument(s) should be freely transferable in the securities market. He drew support from the following observations of the Division Bench of the Bombay High Court in Dahiben Umedbhai Patel and Others vs. Norman James Hamilton and Others 57 Comp. Cases 700 wherein the definition of 'securities' under section 2(h) of SCRA had come up for consideration:

> "In order that securities may be marketable in the market, namely, the stock exchange, the shares of a company must be capable of being sold and purchased without any restrictions."

After referring to the definition of securities, the learned senior counsel took us to the terms and conditions contained in the application forms that were issued to the investors and pointed out that a restriction had been imposed on their transferability. He specifically referred to condition no.9 of Nirmaan Bonds which imposes a fetter on the bond holder in the matter of transfer. The condition imposed is this "Bond Holder can transfer the bond to any other person, subject to the terms and conditions and approval of the company." Similar condition is there in the other OFCDs as well. Shri Nariman argued that since the transfer of the OFCDs was subject to the approval of the company, these were not freely transferable and hence not marketable. On this ground as well, the learned senior counsel contended that OFCDs were not securities within the meaning of SCRA.

17. We have given our thoughtful consideration to the aforesaid submissions made on behalf of the appellants and regret our inability to accept the same. In our opinion, reference to the definition of 'securities' in the Companies Act is wholly misplaced and impermissible. Sebi Act is a self contained code which deals with all matters pertaining

to securities and the securities market and we can turn to only those other statutes as permitted by section 2(2) thereof. The capital market has witnessed a tremendous growth in the recent times by the increasing participation of the public and it was felt that their confidence in that market could be sustained only by ensuring investor protection. With this end in view, Parliament enacted the Sebi Act in the year 1992 to deal effectively **with all matters relating to the capital market**. As is clear from the preamble, it has been enacted primarily for the establishment of Sebi **to protect the interests of the investors in securities and to promote the development of and to regulate the securities market**. Sebi has been set up as a statutory body under section 3 of Sebi Act and section 11 thereof enjoins a duty on it to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit. In section 2(i) Parliament has given a mandate that the definition of 'securities' has the meaning assigned to it in section 2 of SCRA. In view of this mandate we can only look to the definition of securities in SCRA and any reference to that definition in the Companies Act is not legally tenable. This mandate has been reiterated in section 2(2) of the Sebi Act. It provides that words and expressions used and not defined therein but defined in SCRA or Depositories Act shall have the meanings assigned to them in those Acts. Here again, reference to Companies Act is conspicuous by its absence and we cannot look to any definition contained therein. Parliament in its wisdom included 'hybrids' in the definition of 'securities' when that definition was inserted in the Companies Act in the year 2000. Why that inclusion was made is not relevant for our purpose because we can only look to the definition as contained in SCRA where there is no such inclusion. It would, thus, follow that Sebi steps in the moment 'securities' are issued or dealt with within the meaning of SCRA. Conversely, if an instrument is not a security within the meaning of the Sebi Act, it will have no jurisdiction to deal with or regulate such an instrument. It is in this context that the appellants have questioned the jurisdiction of Sebi by contending that the OFCDs issued by the company are not 'securities'. Clause (h) of section 2 in SCRA gives an inclusive meaning to the term securities which has to be bodily lifted and read into the Sebi Act. When we do this, securities include, among others, shares and debentures. The word 'debenture' has not been defined in the Sebi Act and by virtue of sub-section (2) of

section 2 of that Act, we can look to the definition only if given in SCRA or in the Depositories Act. This term has not been defined in those Acts either. In this view of the matter, the word 'debenture' will have to be understood in the manner as it is understood in the securities market or by those connected therewith. A debenture as understood in the capital market is a debt security issued by a company called the issuer which offers to pay interest in lieu of the money borrowed for a certain period. In essence, it represents a loan taken by the issuer who pays an agreed rate of interest during the life time of the instrument and repays the principal normally, unless otherwise agreed, on maturity. Unlike other fixed income instruments such as fixed deposits, bank deposits etc., they can be transferred from one party to another. The securities market recognises different forms of debentures which could be categorised on the basis of (i) convertibility of the instrument and (ii) security. On the basis of convertibility, these are classified as:

(a) Non Convertible Debentures: These instruments retain the debt characteristics and cannot be converted into equity shares.

(b) Partly Convertible Debentures: A part of these instruments are convertible into equity shares in the future and it is the issuer who decides the ratio of conversion and this is normally done at the time of subscription.

(c) Fully Convertible Debentures: These are fully convertible into equity shares in the future and upon conversion, the investor becomes a shareholder and enjoys the same status as ordinary shareholder of the company.

(d) Optionally Convertible Debentures: The investor has the option to either convert these debentures into shares at a price decided upon by the issuer or agreed upon at the time of issue or get them redeemed at the time of maturity. These debentures may be fully or partly convertible.

On the basis of security, debentures could be secured or unsecured. Holders of secured debentures are secured by a charge on the fixed assets of the company whereas in the case of unsecured debentures, if the issuer fails to pay, the investor has to stand in queue with other unsecured creditors. When examined in this background, we are clearly of the view that OFCDs issued by the company are a form of debentures. The word 'debenture'

as used in the definition will necessarily include all forms of debentures. The company itself has named the instruments as 'Optionally Fully Convertible Debentures'. In other words, it has issued debentures which are fully convertible at the option of the investors and this is clear from the terms and conditions contained in the application form. OFCDs are not new instruments and are widely known to the securities market and, as already stated, understood as a form of debentures.

18. We may now deal with the question whether OFCDs are 'hybrids' as argued by the learned senior counsel for the appellants and, if so, what is the effect. The word 'hybrid' has neither been used nor defined in the Sebi Act and not even in SCRA. It has to be understood as it is commonly understood in the capital market. A hybrid security is a security that combines two or more different financial instruments. They generally combine both debt and equity characteristics and are heavily influenced by the price movement of the underlying stocks into which they are convertible. New types of hybrids are being introduced all the time in the developed markets to attract investors as these are modern means adopted by companies to raise capital. The definition of 'hybrid' as introduced in the Companies Act in the year 2000 is no different from what the term is understood in the market. The OFCDs issued by the company being fully convertible debentures have the characteristics of debt and equity. The Nirmaan Bonds and the Real Estate Bonds have an additional element of insurance namely, death risk cover. The learned counsel for the appellants mentioned during the course of the hearing that the insurance component was quite minimal in the bonds and has now been given up. However, the fact remains that the OFCDs are a combination of debt instrument and equity interest and in this view of the matter they are 'hybrids'. A mere look at the definition of securities in clause (h) of section 2 of SCRA would make it clear that the first three types of instruments namely, shares, scrips and stocks belong to the family of equity instruments whereas the other three like bonds, debentures and debenture stock fall within the category of debt instruments. When shares and debentures are included in the term 'securities', any instrument having the characteristics of both would also be covered. Having included all the six types of instruments in the definition, it goes on to include "other marketable securities of a like nature". Even if one were to assume that

hybrid securities being a combination of any two or more of these instruments are not 'debentures', they come under 'any other marketable security' within the meaning of section 2(h) of the SCRA. Such instruments are marketable in the securities market and we were informed by the learned senior counsel for Sebi that optionally fully convertible debentures by eight other companies stand listed on the National Stock Exchange of India Ltd. We are clearly of the view that merely because OFCD is a hybrid security, which is a combination of more than one type of instruments, it will not go out of the purview of the definition of securities. We are unable to agree with the learned senior counsel for the appellants that merely because 'hybrids' have not been included in the definition of 'securities' in SCRA when that term was inserted in the Companies Act for the first time in the year 2000, it would take hybrid securities out of the purview of the definition of 'securities' in SCRA. As already observed, in view of the provisions of sections 2(i) and 2(2) of the Sebi Act, reference to the definitions in the Companies Act is impermissible. In this view of the matter, we hold that OFCDs are hybrid securities covered by the definition of 'securities' in Sebi Act read with SCRA.

19. The other argument of the learned senior counsel for the appellants that because of the restriction imposed on the transfer of OFCDs these had ceased to be marketable and hence not securities also deserves to be rejected. There is no basis for the argument. In the RHP that has been registered by the RoC, the company itself had stated in clause 13 as noticed in paragraph 3 of our order that there was no restriction on the transferability of the shares/debentures. How can the company be now heard to say that there was a fetter on their transfer. The condition that transfer of OFCDs was subject to the approval of the company was subsequently put in the application forms that were sent to the investors. We are also of the view that any restriction on the transfer of shares or debentures issued by a company is not permissible in view of the provisions of section 111A(2) read with sections 9 and 82 of the Companies Act. Even if one were to assume that a condition that transfer of OFCDs was subject to the approval of the company could be imposed, such a condition, in our view, does not take away the marketability of the instrument. The word 'marketable' would imply that a product is capable of being bought and sold in the market. There need not be an actual sale.

Moreover, in the present case, OFCDs could be transferred to persons other than those to whom they were offered. The plea that OFCDs were not marketable had been forcefully argued during the course of the hearing but when clause 13 of the RHP read with annexure I thereto was pointed out, the learned senior counsel had no answer. It is interesting to note that in the written submissions filed on the conclusion of the hearing, this plea does not find mentioned therein. It appears that the appellants have given it up. Be that as it may, we are of the considered view that OFCDs are marketable and hence 'securities'.

20. Having held that OFCDs are 'securities' within the meaning of Sebi Act, let us see what powers Sebi has to deal with and regulate them. Chapter IV of the Sebi Act deals with its powers and functions. Section 11 which is the heart and soul of the Sebi Act casts a duty on Sebi to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit. This section, as originally enacted in the year 1992, reads as under:

"POWERS AND FUNCTIONS OF THE BOARD

11. Functions of Board.

(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for –

(a) regulating the business in stock exchanges and any other securities markets;
(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;
(c) registering and regulating the working of collective investment schemes, including mutual funds;
(d) promoting and regulating self-regulatory organisations;
(e) prohibiting fraudulent and unfair trade practices relating to securities markets;
(f) promoting investors' education and training of intermediaries of securities markets;
(g) prohibiting insider trading in securities;

(h) regulating substantial acquisition of shares and take-over of companies;
(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges and intermediaries and self- regulatory organisations in the securities market;
(j) performing such functions and exercising such powers under the provisions of the Capital Issues (Control) Act, 1947 (29 of 1947) and the Securities Contracts (Regulation) Act, 1956 (42 of 1956), as may be delegated to it by the Central Government;
(k) levying fees or other charges for carrying out the purposes of this section;
(l) conducting research for the above purposes;
(m) performing such other functions as may be prescribed."

Parliament noticed some shortcomings in the Sebi Act and felt that the provisions of section 11 as they originally stood were not enough to enable Sebi to effectively carry out its duties. There was no provision to enable Sebi to deal with certain intermediaries and persons associated with the securities market and with companies in regard to matters relating to issue of capital and transfer of securities. Sebi Act then came to be amended by Act 9 of 1995 with a view to enable Sebi to function in a more effective manner so that it could, among others, regulate companies regarding matters relating to issue of capital, transfer of securities and other matters incidental thereto. With this end in view, sections 11A and 11B came to be added with effect from January 25, 1995 and they are reproduced hereunder for facility of reference:

"11A. **Matters to be disclosed by the companies.**- Without prejudice to the provisions of the Companies Act , 1956 (1 of 1956), the Board may, for the protection of investors, specify, by regulations,-

(a) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and
(b) the manner in which such matters,

shall be disclosed by the companies."

11B. **Power to issue directions. –** Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,-

(i) in the interest of investors, or orderly development of securities market; or
(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
(iii) to secure the proper management of any such intermediary or person,

it may issue such directions,-
(a) to any person or class of persons referred to in section 12, or associated with the securities market; or
(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market"

With the aforesaid amendments, Sebi had been armed with powers to protect the interests of investors even by regulating companies in matters relating to issue of capital, transfer of securities and other matters incidental thereto. It could also lay down the manner in which the companies would make the necessary disclosures but all this could be done only by framing regulations. Additionally, Sebi had also been given powers to issue directions of the kind referred to in section 11B and these could be issued only for investor protection or for regulating the securities market. In other words, Sebi could now issue directions for the purpose of carrying out its duties enjoined by section 11(1). The passage of time and the growing importance of the securities market in the economy placed new demands upon Sebi and a need was felt to further strengthen its mechanisms for investigations and enforcement so that it is better equipped to carry out its duties enjoined by section 11. By Amending Act 59 of 2002, Sebi Act was further amended comprehensively and section 11, among others, was amended and section 11A was substituted to give more powers to Sebi to discharge its functions more effectively. Sub-sections (2A) and (4) which were inserted in section 11 and the substituted section 11A read as under:

> "(2A) Without prejudice to the provisions contained in sub-section (2), the Board may take measures to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market.
> …….
>
> (4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-
>
> (a) suspend the trading of any security in a recognised stock exchange;
>
> (b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
>
> (c) suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position;

(d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;

(e) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation:

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or sub-section (2A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

……..

11A. (1) Without prejudice to the provisions of the Companies Act, 1956 (1 of 1956), the Board may, for the protection of investors, -

(a) specify, by regulations –
(i) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and
(ii) the manner in which such matters shall be disclosed by the companies;
(b) by general or special orders –
(i) prohibit any company from issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;
(ii) specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.

(2) Without prejudice to the provisions of section 21 of the Securities Contracts (Regulation) Act, 1956(42 of 1956), the Board may specify the requirements for listing and transfer of securities and other matters incidental thereto."

From the aforesaid legislative amendments it can be seen that Sebi was being conferred with wide powers from time to time to enable it to carry out its duties more effectively. The 1995 amendments introducing sections 11A and 11B to the Sebi Act specifically gave powers to it to regulate companies in regard to issue of capital, transfer of securities and other matters incidental thereto and it could also provide for the manner in which companies would make the necessary disclosures. While inserting section 11A in the year 1995, Sebi was empowered to specify by regulations matters relating to issue of capital, transfer of securities etc., the amendment to section 11A in the year 2002 gave powers to it to prohibit by general or special orders as well, any company from issuing prospectus, any offer document or advertisement soliciting money from the public for the issue of securities and specify the conditions subject to which these could be issued. In other words, what Sebi could earlier do by framing regulations can now be done by passing general or special orders in respect of matters enumerated in clause (b) of Section 11A. When section 11A was introduced in the year 1995 enabling Sebi to regulate companies, it was simultaneously empowered by inserting section 11B to issue necessary directions, among others, to companies in respect of matters specified in section 11A. Section 11B gives wide powers to Sebi to issue directions to persons associated in any manner with the securities market. The expression **'any person …….. associated with the securities market'** would cover not only an individual but also a juristic person and, therefore, it would have jurisdiction over companies associated with the securities market.

21. A reading of the provisions of sections 11, 11A and 11B of the Sebi Act as they now stand discloses the scope and width of the powers vested in Sebi which can be exercised for protecting the interests of investors in securities and for regulating the securities market. Sebi as a market regulator can take any of the measures mentioned in sub-sections (2) and (4) of section 11 to carry out the duties assigned to it under section 11(1). The measures referred to in sub-section (2) and (4) are only illustrative and not exhaustive and in a given case Sebi can take such measures as it deems appropriate keeping in view the circumstances of the case. In our view, Sebi has all the powers to take whatever steps it thinks necessary to safeguard the interests of investors in

securities and to regulate the securities market and with these objectives in view it can issue appropriate directions under sections 11A and 11B of the Sebi Act. The words employed in these provisions are of wide amplitude and having regard to the fact that we are dealing with a growing capital market where new economic trends including financial instruments are emerging on a regular basis, widest possible interpretation needs to be given to the provisions of the Sebi Act subject, of course, to the two parameters enumerated in section 11(1) namely, protection of the interests of the investors in securities and promotion and regulation of the securities market. Such an interpretation alone would advance the object of the Sebi Act. The scope of these provisions had recently come up for our consideration in Parsoli Corporation Ltd. and others vs. Securities and Exchange Board of India, Appeal no.146 of 2010 decided on August 12, 2011 and we observed as under:

> "The Board is a statutory body established under section 3 of the Act and section 11 thereof enjoins a duty on it to protect the interests of investors in securities and to promote the development of and to regulate the securities market. Parliament in its wisdom has left it to the Board to take such measures as it thinks necessary to carry out these duties. The powers of the Board in this regard are, indeed, very wide and it can do anything and take any action/step in order to perform its functions/duties. Howsoever wide the powers be, every action of the Board has to be judged on the twin tests of investor protection and development and regulation of the securities market. In other words, the Board may be free to do anything but whatever it does has to be for the protection of the interests of investors or for the development and regulation of the securities market. It has the freedom to play only within these parameters. Having left it to the Board to take such measures that are necessary for investor protection and regulation and development of the securities market, sections 11(2) and 11(4) without diluting the powers of the Board under section 11(1) suggest some of the measures which it can take in this regard."

We are clearly of the view that the words employed in sections 11, 11A and 11B of the Sebi Act do not make any distinction between listed and unlisted companies and also take within their sweep all securities whether listed or unlisted. These provisions apply to all companies listed or unlisted. This view of ours gets strength from the fact that wherever Parliament wanted to give powers to Sebi only in regard to listed companies and companies which intend to get their securities listed, it has made specific provisions in that regard in section 11 (2A) and in the proviso to section 11(4) of the Sebi Act which were introduced in the year 2002. It follows that Parliament did not intend to restrict the powers of Sebi in regard to the other provisions contained in Chapter IV of the Sebi Act which apply to 'securities' and companies, whether listed or unlisted. In the case before

us, the company though unlisted has issued OFCDs which are 'securities' within the meaning of the Sebi Act and is, therefore, a person associated with the securities market. It would fall within the regulatory jurisdiction of Sebi dehors the provisions of any other law. The argument of the learned senior counsel for the appellants that since the company is unlisted, it cannot be regulated by Sebi cannot be countenanced. We are also of the view that when it comes to regulating the securities market and protecting the interests of investors in securities, Sebi Act is a stand alone enactment and Sebi's powers thereunder are not fettered by any other law including the Companies Act. Sebi Act, SCRA and the Depositories Act, 1996 are cognate statutes as they deal with different aspects of 'securities' and the securities market and they alone govern the capital market.

Whether the issue of OFCDs is a public issue requiring mandatory listing

22. As noticed earlier, the company issued OFCDs to raise funds approximating to ₹ 20,000 crores purporting to be by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara India Group of Companies without giving any advertisement to the general public. RHP issued by the company in this regard and the resolutions passed by it and its board of directors have already been referred to in the earlier part of the order. The respondents including Sebi seriously dispute that the issue of OFCDs was by way of private placement and it is their case that it was a public issue. The consequences of an issue by way of private placement are distinct from the consequences when shares or debentures are offered to the public. In the case of a public issue, the provisions of the Companies Act relating to prospectus are applicable whereas these do not apply to a private placement. The question that we need to consider is whether the present issue is one of private placement as claimed by the appellants or a public issue as alleged by the respondents. The answer to this question is found in section 67 of the Companies Act. This section tells us when can an offer made by a company be construed as an offer to the public. The relevant part of this section as it stood prior to its amendment by the Amending Act 53 of 2000 is reproduced hereunder for ease of reference:

> **"67. Construction of references to offering shares or debentures to the public, etc.**

> (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.
>
> (2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture-holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.
>
> (3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances—
>
> > (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
> >
> > (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation:"

According to sub-section (1), shares or debentures are said to be offered to the public if they are offered to a section of the public whether they are members or debenture holders of the company or its clients. Similarly, sub-section (2) states that public will be said to have been invited to subscribe to the shares or debentures of a company if the invitation is extended to any section thereof whether they are members or debenture holders or clients of the issuer company. Sub-section (3) then is in the form of an exception to the aforesaid two sub-sections and it lays down that no invitation or offer shall be an offer to the public if it cannot be made to persons other than those receiving the invitation/offer. To put it differently, an offer or an invitation shall be to the public if the same can be passed on to persons other than those to whom it is made. In other words, an offer/invitation without the right of renunciation in favour of others cannot be termed as an offer or invitation to the public. This then being the position of law, it came to the notice of the Government of India as is clear from its press note dated July 6, 1992 a copy of which was produced by the learned senior counsel for Sebi that some companies were misusing the aforesaid provisions by making an offer to a large number of persons but not giving them a right of renunciation in favour of others and superscribing their brochures/advertisements by the captions "Confidential/For Private Circulation only". In

such eventualities the offer/invitation did not become a public offer even though the same was made to any number of persons. With a view to curb this menace, Parliament added a proviso to section 67 (3) of the Companies Act by the Amending Act 53 of 2000 with effect from December 13, 2000 and it reads as under:

> "Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:
>
> Provided further ……."

Prior to the introduction of this proviso, the number of persons to whom the offer or invitation was made was not the governing factor but whether it was made to the public or not. Now with the introduction of this proviso, a number has been fixed beyond which an offer/invitation will become a public issue. The language of the proviso is unambiguous and Parliament has made it clear beyond doubt that any invitation or offer of shares or debentures made to fifty persons or more shall be a public offer. The statement of objects and reasons in the Amending Act 53 of 2000 also makes it clear that Parliament intended to provide that any offer of shares or debentures to fifty or more persons shall be treated as a public issue. Since the company has, admittedly, offered its OFCDs (debentures) to more than fifty persons we have no hesitation in concluding that the issue floated by the company is a public issue. In the instant case, the company by issuing the information memorandum to millions of investors and superscribing the same with the caption "PRIVATE AND CONFIDENTIAL (NOT FOR CIRCULATION)" has played the same mischief which was noticed by the Government of India in its press note dated July 6, 1992 and which the Parliament has now overcome by inserting the proviso to section 67(3) of the Companies Act. It could have got away with it prior to December 2000 but not after the proviso was inserted.

23. There is yet another reason why the issue of OFCDs by the company is a public issue. Section 60B was also inserted in the Companies Act by the Amending Act 53 of 2000. The relevant part of this section reads thus:

> **"60B. Information memorandum**
>
> 60B. (1) A public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus.

> (2) A company inviting subscription by an information memorandum shall be bound to file a prospectus prior to the opening of the subscription lists and the offer as a red-herring prospectus, at least three days before the opening of the offer.
>
> (3) The information memorandum and red-herring prospectus shall carry same obligations as are applicable in the case of a prospectus.
>
> (4) Any variation between the information memorandum and the red-herring prospectus shall be highlighted as variations by the issuing company.
>
> Explanation.- For the purposes of sub-sections (2), (3) and (4), "red-herring prospectus" means a prospectus which does not have complete particulars on the price of the securities offered and the quantum of securities offered.
>
> (5) to (9) ……."

Clause (19B) was also inserted in section 2 of the Companies Act by the same amending Act defining information memorandum and it reads as under:

> "(19B) "information memorandum" means a process undertaken prior to the filing of a prospectus by which a demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed, by means of a notice, circular, advertisement or document;"

Information memorandum, according to the aforesaid definition, is a process undertaken by a company to elicit the demand for the securities proposed to be issued and the price at which those could be offered. In other words, the company by issuing an information memorandum tries to assess the demand for the proposed securities in the market and the price which the public would be willing to offer for the 'securities'. When a company is trying to assess the demand for its securities and the price which the investors would be willing to offer, it is obvious that it will approach the public for this purpose and not a handful of persons associated with the company on private placement basis. It follows that an information memorandum is meant for the public. This process is synonymous with the book building process usually employed by companies which come out with public issues to raise funds.

24. Section 60B(1) is an enabling provision which enables a public company making an issue of securities to circulate information memorandum to the public before filing a prospectus. It is not mandatory to circulate such a memorandum but if a company chooses to do so, it has to be circulated to the public obviously for the purpose of

assessing the demand and the price which the public would be willing to offer. In the instant case, the company has, admittedly, circulated an information memorandum. It is, thus, clear that it approached the public to raise ₹ 20,000 crores notwithstanding what it professed in the RHP and in the information memorandum. Not only in law but also on facts the issue is a public issue because the company has approached more than thirty million investors out of which more than 22.1 million have invested in the OFCDs and it has raised more than ₹ 19,400/- crores. In the process, the company claims to have utilized the services of its staff in 2,900 branches/service centers in the country and availed the services of more than one million agents/representatives through whom the investors were approached. How can such an issue be described as one by way of private placement. For these reasons as well, we hold that the issue of OFCDs by the company was a public issue as it had approached the public.

25. Before we proceed further, we may refer to the implications that flow from a public issue. It is the requirement of law that every issuer making a public issue of securities, as has been done by the company, has to file a draft offer document with Sebi through a registered merchant banker. Not only is a merchant banker to be appointed but also a registrar to the issue and they are independent market intermediaries having separate roles to play. The draft offer document is then put up for public comments and Sebi examines the same making sure that all investor protection measures have been complied with. The directions, if any, issued by Sebi have to be incorporated by the merchant banker in the offer document. Again, an unlisted issuer like the company becomes eligible for making a public issue only if it has net tangible assets of atleast ₹ 3 crores in each of the preceding three full years. It must also have distributable profits in atleast three of the immediately preceding five years. Its net worth should be of atleast ₹ 1 crore in each of the preceding three years. The law further enjoins that in a public issue by an unlisted company, the promoters should contribute not less than 20 per cent of the post issue capital which should be locked in for a period of three years. Companies coming out with a public issue are required to obtain a credit rating from atleast one credit rating agency registered with Sebi. Even the public issue has to be graded by such an agency. In case the public issue pertains to debentures, as is the case before us, the

issuer cannot even come out with a prospectus till it appoints a debenture trustee and creates a debenture redemption reserve for the redemption of such debentures. Apart from these requirements, the issuer is required to make several disclosures in terms of the guidelines and the regulations. Last but not the least, is the requirement of obtaining prior in-principle approval for listing of the security from a recognised stock exchange(s). Admittedly, none of these requirements have been complied with by the company and we are of the firm view that it cannot be allowed to bypass all the aforesaid regulatory requirements which are meant for investor protection merely by describing the issue in the RHP as a private issue and by stating that it does not intend to get the same listed when the law enjoins otherwise. We are amazed that both the company and the housing company have collected huge sums of money close to ₹ 40,000 crores from the unsuspecting investors without putting in place investor protection measures and without making the necessary disclosures to them or to Sebi thereby making a mockery of the regulatory system prevailing in the capital market. In the circumstances, Sebi was justified in taking action against the company.

26. Now we come to the concomitant issue – whether OFCDs issued by the company require mandatory listing. This issue need not detain us for long. The provisions of section 73 of the Companies Act answer this question. Sub-sections (1) and (2) thereof are relevant for our purpose and these are reproduced hereunder for facility of reference:

> **"73. Allotment of shares and debentures to be dealt in on stock exchange-**
>
> (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchange for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.
>
> (1A) ……
>
> (2) Where the permission has not been applied under sub-section (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed,

> having regard to the length of the period of delay in making the repayment of such money.
>
> (2A) to (7)……"

A plain reading of section 73(1) makes it clear that a company intending to offer shares or debentures to the public has to do so by issue of a prospectus and before that is issued, it must make an application to one or more recognized stock exchange(s) for permission for the shares and debentures to be dealt with in the stock exchange(s). The company has breached every requirement of this sub-section. Referring to the words "company intending to offer shares or debentures to the public" appearing in this sub-section, it contends that it never intended to offer the OFCDs to the public and, therefore, it was not necessary for it to either come out with a prospectus or make an application to any recognized stock exchange seeking permission for listing. The learned senior counsel for the appellants referred to the recitals in the RHP and the information memorandum and argued that the company from the beginning had no intention to offer the debentures to the public which, according to him, have been offered on private placement basis. We cannot agree with the learned senior counsel. The intention of the company as referred to in section 73(1) of the Companies Act is to be judged not by what it professes in the RHP or in the information memorandum but by what it actually does. In other words, the intention is to be judged from its conduct. The word "intend" does not mean the mental intention or desire of an individual or a company. It is well settled that a man intends the natural consequences of his acts and he has to be judged by what he does and not by what he thinks. We have already held above that the company has approached the public when it reached out to more than thirty million persons through more than a million representatives and it knew from day one that it was coming out with a public issue. In view of the fact that OFCDs have been issued to more than 22.1 million investors, the company has gone to the public and is, therefore, estopped from contending that it is not going to the public and that it does not intend to get the securities listed. The law enjoins that when shares or debentures are offered to the public, as has been done in the present case, the provisions of section 73(1) are to be complied with. The company having made a public issue cannot escape from complying with the requirements of section 73(1) of the Companies Act by saying that it did not intend to get its OFCDs listed on any stock

exchange. In this view of the matter, we cannot but hold that the issue of OFCDs, being a public issue, was required to be listed on a recognized stock exchange and that the company wilfully defaulted to comply with the provisions of section 73(1) of the Companies Act. We have no hesitation in upholding the findings of the whole time member in this regard.

The effect of section 55A of the Companies Act on the powers of Sebi to regulate unlisted companies.

27. Referring to the provisions of section 55A of the Companies Act, Mr. Nariman, learned senior counsel for the appellants forcefully argued that the company being an unlisted company which did not intend to get its securities listed falls in clause (c) of section 55A and, therefore, it could be regulated only by the Central Government and that Sebi had no jurisdiction in this regard. He further argued that before the introduction of section 55A, Sebi had no power to administer any provision of the Companies Act nor could it deal with any of its violations. The learned senior counsel also contended that this section has for the first time introduced the concept of listed public companies and unlisted public companies and demarcated the powers of Sebi and the Central Government in regard to their regulation. His argument is that now listed public companies and those public companies which intend to get their securities listed are to be administered by Sebi to the limited extent referred to in the section and the unlisted public companies by the Central Government. According to the learned senior counsel, the company before us being an unlisted public company, Sebi had no power to administer it and consequently the impugned order is without jurisdiction. Strong reliance was placed on a Division Bench judgment of the Bombay High Court in Kalpana Bhandari and others vs. Securities and Exchange Board of India, 125 Company Cases 804 wherein the provisions of section 55A of the Companies Act had come up for consideration and a similar view was taken. He argued that the decision in Kalpana Bhandari's case, being one of a jurisdictional High Court, was binding on this Tribunal. Reliance was also placed on a Single Bench judgment of the Kerala High Court in Kunnamkulam Paper Mills Ltd. vs. Securities and Exchange Board of India and another, Writ Petition (c) 19192 of 2003 decided on July 30, 2009. It was also argued that

section 60B which deals with information memorandum has not been included in the parenthetical part of section 55A and like all other provisions of the Companies Act, it is to be administered by the Central Government and not by Sebi. According to the learned senior counsel, Sebi had no jurisdiction to hold that the company could not resort to the route of section 60B for raising capital while describing the same as one by way of private placement. The learned senior counsel also challenged the findings of the whole time member that statements made in the RHP were untrue and he argued that all this lay in the domain of the Central Government. He relied upon the Explanation to section 55A to contend that all matters pertaining to prospectus could be dealt with only by the Central Government. The learned senior counsel then referred to letters of Sebi dated April 21, 2010 and June 23, 2010 by which complaints received by it in regard to unlisted companies had been forwarded to the Ministry of Corporate Affairs for appropriate action observing that Sebi deals only with listed companies. Reference was also made to the affidavit filed on behalf of Sebi in the Bombay High Court in Kalpana Bhandari's case (supra) wherein a similar stand had been taken. It was strenuously argued that a statutory body like Sebi which had been taking a consistent stand in the past that it had jurisdiction only over listed companies could not now, without any justifiable reasons, change its stand and exercise jurisdiction over the company which is unlisted. He referred to several judgments of the Supreme Court where the learned Judges had observed that statutory authorities having taken a particular stand in the past cannot suddenly take a different and inconsistent stand as that would result in the law being in a state of confusion. Reliance was placed on Collector of Central Excise vs. Tata Engineering and Locomotive – 2003 (11) SCC 193; Birla Corporation Ltd. vs. Commissioner of Central Excise, Baroda – 2005 (6) SCC 95; Jayaswals NECO Ltd. vs. Commissioner of Central Excise, Nagpur – 2007 (13) SCC 807 and Indian Oil Corporation Ltd. vs. Collector of Central Excise, Baroda – 2007 (13) SCC 803.

28. Since the answer to the aforesaid contentions raised on behalf of the appellants depends upon the interpretation and scope of section 55A of the Companies Act, it is necessary to refer to the provisions of this section. Section 55A was inserted in the

Companies Act by the Amending Act 53 of 2000 with effect from December 13, 2000. It reads thus:

> **"55A. Powers of Securities and Exchange Board of India.—**
>
> The provisions contained in sections 55 to 58, 59 to 81,(including sections 68A, 77A and 80A) 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall,—
>
> (a) in case of listed public companies;
> (b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India,
> be administered by the Securities and Exchange Board of India; and
> (c) in any other case, be administered by the Central Government.
>
> Explanation.—For removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, Tribunal or the Registrar of Companies, as the case may be."

A plain reading of the aforesaid provision would leave no room for doubt that by enacting section 55A Parliament has entrusted Sebi with the power to administer certain provisions of the Companies Act which have been referred to therein. While entrusting this power it has restricted the same to matters relating to issue of securities, transfer of securities and non-payment of dividend and that, too, only in regard to listed public companies and public companies which intend to get their securities listed. In regard to all other matters and in relation to unlisted companies, the Central Government continues to administer the enumerated provisions. In other words, the Parliament has declared that the enumerated sections to the extent they deal with issue of securities, transfer of securities and non-payment of dividend by listed public companies and those intending to get their securities listed shall be administered by Sebi and in all other cases by the Central Government. The reason why this power was entrusted to Sebi appears to be quite obvious. The three matters namely, issue of securities, transfer of securities and non-payment of dividend are matters which pertain to the capital market and the Parliament in its wisdom thought that the enumerated provisions in so far as they deal with these matters in regard to listed companies and those intending to get their securities listed should be administered by the capital market regulator. The entrustment of this power to Sebi is in addition to the powers it already has under sections 11, 11A and 11B

of the Sebi Act and does not whittle down its powers under these provisions. The statement of objects and reasons of the Amending Act makes it clear that Parliament brought about changes in the Companies Act to provide for good corporate governance and for protection of investors. The provisions in so far as they relate to investor protection were entrusted to Sebi for regulation including their enforcement. We are unable to agree with the learned senior counsel for the appellants that prior to the insertion of section 55A in the Companies Act, Sebi had no power to deal with companies in respect of matters enumerated in section 55A. Even prior to the insertion of section 55A in the year 2000, Sebi had powers under section 11A of the Sebi Act which was introduced in January 1995 to regulate companies in regard to matters relating to issue of capital, transfer of securities and other matters incidental thereto. It is pertinent to mention that Sebi was established in the year 1988 through a Government resolution for the purpose of regulating the securities market and for protecting the interests of investors and even before it assumed a statutory status, it was regulating the securities market and taking steps to protect the interests of investors by administrative measures. One such measure was through its circular dated December 16, 1991 which pertained to "INVESTOR GRIEVANCES – RIGHTS AND REMEDIES". Reference to this circular was made during the course of hearing by the learned senior counsel for the appellants. This circular deals with matters relating to issue of capital and investor protection. Sebi has been regulating companies in matters of issue of capital and ensuring investor protection right from its inception. It is, therefore, incorrect to say that Sebi has been given powers in this regard for the first time with the insertion of section 55A in the Companies Act. From this discussion of ours it follows that both the Central Government and Sebi had been administering the provisions of the Companies Act – Sebi only in regard to matters relating to issue of capital, transfer of securities etc. and investor protection and in all other matters the Central Government.

29. Section 60 of the Companies Act makes it mandatory for a company to register a prospectus with the Registrar of Companies before publication, that is, before the company goes to the public to raise capital. The Government of India by its circular dated March 1, 1991 to which reference has been made in the earlier part of our order,

mandates the Registrar of Companies not to register a prospectus unless a draft thereof had been sent to Sebi which would scrutinise the same to find out whether adequate information/disclosures had been made therein for the investors. Sebi is then required to give its comments which have to get incorporated in the prospectus before it is registered. The purpose of this circular as it appears was to ensure that the Central Government and Sebi worked in tandem in the matter of regulating the companies and protecting the interests of investors. It appears that in practice some difficulties were experienced which necessitated the Parliament to make the declaration in section 55A of the Companies Act as mentioned above. Section 55A as enacted declares that the sections enumerated therein shall be administered by Sebi in regard to listed public companies and those public companies which intend to get their securities listed on any recognized stock exchange in so far as they relate to matters regarding issue and transfer of securities and non-payment of dividend and in all other cases those provisions would be administered by the Central Government. The insertion of section 55A in the Companies Act does not in any way affect the powers of Sebi under the Sebi Act whereunder it can deal with both listed and unlisted companies.

30. We are also unable to accept the contention of Mr. Nariman that section 60B has not been included in section 55A of the Companies Act and, therefore, Sebi has no jurisdiction to administer this provision. It may be recalled that the whole time member has, in the impugned order, recorded a finding that the company could not take the section 60B route to mobilise funds because on the one hand it claims that OFCDs have been issued by private placement and on the other it has issued an information memorandum which is only meant for the public. The argument is that it was the Central Government which could object to this route being adopted and not Sebi. There is no basis for this argument. A mere perusal of section 55A of the Companies Act would reveal that, among others, sections 59 to 84 have been enumerated therein which, beyond doubt, would include section 60B which is an independent section. It would, thus, follow that Sebi can administer this section as well and its criticism of the route followed by the company to raise funds is not without merit.

31. We may now deal with the argument of Mr. Nariman that the company being an unlisted company which does not intend to get its securities listed on any recognized stock exchange falls under clause (c) of section 55A of the Companies Act and, therefore, it could be regulated only by the Central Government. We have given our serious consideration to this argument and are unable to accept the same. The company though unlisted does not fall in section 55A(c). It falls in clause (b) of section 55A as, in our view, the company intended to get the OFCDs listed though it professed to the contrary. Intention of the company under clause (b) must mean legal intention which has necessarily to be judged from the facts and circumstances of the case and from its conduct. Having gone to the public by circulating the information memorandum it cannot be heard to say that it did not intend to get the securities listed. When a company goes to the public, law mandates that it must get its securities listed and, therefore, in law it will be assumed that it intended to get its securities listed. It is this intention which is contemplated in clause (b) of section 55A. The word 'intend' used in clause (b) of section 55A and the word 'intending' used in section 73(1) are both verbs and have the same meaning. We have discussed this aspect earlier in paras 21 to 25 of our order while dealing with the question whether the issue of OFCDs is a public issue requiring mandatory listing. For the reasons recorded therein which apply *mutatis-mutandis* to the word 'intend' used in clause (b) of section 55A, we hold that the company had the intention in law to get its securities listed and, therefore, falls in clause (b) of section 55A so as to be regulated by Sebi. A public company may intend not to get its securities listed provided it does not approach the public to raise funds. We cannot resist observing that overemphasis by the company in its RHP and the information memorandum on the recitals that the issue was by way of private placement and that it did not intend to get the issue listed was only to bypass the mandatory provisions of the Companies Act and an effort to get out of the clutches of the market regulator. It must be remembered that listing is an admission of a security to dealings on a recognized stock exchange and gives a valuable right to the investor to trade which alone can provide liquidity. If an issue is a public issue, investors cannot be deprived of this right to trade. How can a company go to the public issuing securities and not get the security listed. This is unheard of in the securities market and impermissible in law. In view of our findings that the company

intended to get its OFCDs listed, it has to be held that it falls in clause (b) of section 55A and is amenable only to the regulatory jurisdiction of Sebi. Now coming to the two cases cited on behalf of the appellants. As already noticed, strong reliance was placed on Kalpana Bhandari's case (supra). We are of the view that this judgment is of no help to the appellants. That case pertains to preferential allotment that was made in the year 1993 when the proviso to section 67(3) of the Companies Act had not been inserted. Section 67(3) as it then stood permitted such preferential allotment to more than 30,000 investors as was made in Kalpana Bhandari's case without being treated as a public issue so as to attract the provisions of section 73(1) of the Companies Act. The proviso now makes an issue a public issue if the offer is made to fifty or more persons. Since the learned judges of the Bombay High Court were not called upon to deal with the proviso to section 67(3), the decision is not applicable to the facts of the present case. Moreover, the Bombay High Court also did not deal with the provisions of the Sebi Act and the powers of Sebi under sections 11, 11A and 11B of this Act as those did not come up for their consideration. For this reason as well, the decision of the Bombay High Court is inapplicable. The judgment of the Kerala High Court in Kunnamkulam Paper Mill's case (supra) is also not applicable to the case before us because the learned single Judge in that case had not considered the proviso to section 67(3) of the Companies Act which makes all the difference. For this reason, we say so with all respect, that the judgment is *per incuriam.* Here also the learned single Judge did not discuss the powers of Sebi under sections 11, 11A and 11B of the Sebi Act.

32. This brings us to the next argument of the learned senior counsel for the appellants challenging the findings recorded by the whole time member that the company had made untrue statements and misstatements in the RHP. He referred to para 2(b) of the show cause notice dated May 20, 2011 issued to the company and other appellants wherein the details of the misstatements have been referred to. It was argued by the learned senior counsel that even if untrue/misstatements had been made in the RHP, it was only the Central Government which could question the company and not Sebi. He drew our attention to the Explanation to section 55A of the Companies Act and forcefully argued that Parliament had clarified that powers in regard to matters relating to

prospectus etc. could be exercised only by the Central Government, Company Law Board or the Registrar of Companies, as the case may be and not by Sebi. It was argued that the whole time member has assumed jurisdiction over matters relating to prospectus which he did not have and even the misstatements could be objected to only by the Central Government. We have carefully considered this argument and are unable to accept the same. We have already discussed the provisions of section 55A of the Companies Act in the earlier part of our order observing that Sebi has been given the power to administer the enumerated provisions therein in regard to listed public companies and those public companies which intend to get their securities listed on any recognized stock exchange in so far as they relate to three matters namely, issue of securities, transfer of securities and non-payment of dividend. The Explanation to section 55A is a declaration made by Parliament for the removal of doubts. It has to be read harmoniously with the main provisions of the section and it cannot be read in a manner which takes away the powers given by the main provisions. The declaration has been made in regard to powers of the Central Government relating to "all other matters". These words when read with the main provision would mean matters other than issue and transfer of securities and non-payment of dividend. When we read the Explanation harmoniously with the main provision, it would mean that even with regard to matters contained in a prospectus, Sebi would exercise powers in regard to the aforesaid three subjects and with regard to all other subjects in the prospectus, it would be the Central Government or the RoC. In other words, a prospectus, to the extent it deals with issue and transfer of securities and non-payment of dividend, would be regulated by Sebi. It must be remembered that a long list of matters referred to in Schedule II to the Companies Act have to be set out in a prospectus some of which may relate to issue and transfer of securities and non-payment of dividend. It is only in regard to these matters that Sebi will regulate the prospectus and in regard to "all other matters", the Central Government. In this view of the matter, we cannot agree with the learned senior counsel that Sebi could not take action for the untrue statements and mis-statements in the RHP.

33. The matter can be looked at from another angle as well. What we are examining is the power of Sebi to comment upon and take action for the untrue statements and

misstatements made in the RHP. This power has been specifically given to Sebi in section 11A of the Sebi Act which was substituted in the year 2002 and the same has already been reproduced in the earlier part of this order. A bare perusal of clause (b) of section 11A would make it clear that Sebi can by a general or special order prohibit any company from issuing a prospectus or any offer document or advertisement soliciting money from the public for the issue of securities. We are of the view that dehors the provisions of the Companies Act, the impugned order in this regard has to be upheld and we cannot accept that Sebi has assumed jurisdiction which it did not have.

34. We may now take notice of another argument of the learned senior counsel for the appellants that Sebi, which has taken a consistent stand in the past that it had jurisdiction only over listed companies, could not now, without any justifiable reason, change its stand and exercise jurisdiction over the company which is unlisted. In support of his argument Mr. Nariman, placed reliance on the press note no.3 dated July 2, 2001 issued by the Department of Company Affairs, which, inter-alia, provides that investors' complaints of unlisted companies would be dealt with by the Department of Company Affairs. He also referred to a letter dated April 21, 2010 whereby Sebi forwarded the complaints with regard to OFCDs floated by the company and the housing company to the Ministry of Company Affairs for examination and necessary action as both these companies are unlisted. Reference was also made to the letter dated June 23, 2010 by which complaints relating to unlisted companies of the Reliance group of Industries were also forwarded to the Ministry of Corporate Affairs. It was argued by the learned senior counsel that since Sebi has not been dealing with the complaints relating to unlisted companies, it cannot acquire jurisdiction over the company. Reference was also made to the affidavit filed by Sebi in the Bombay High Court in Kalpana Bhandari's case (supra) where it had been stated that Sebi had the power to regulate listed public companies and public companies intending to get its shares listed on any recognized stock exchange in so far as they relate to issue and transfer of securities. It was argued by Mr. Nariman that there is no justifiable reason available on record which may necessitate Sebi to change its consistent stand with regard to jurisdiction over unlisted companies being with the Central Government. We are unable to accept this argument of the learned senior

counsel. The press note relied upon does not in any way advance the case of the appellants. The then Department of Company Affairs was receiving a number of complaints from the general public relating to companies and also investor complaints and by the press note dated July 2, 2001, the Department laid down the broad guidelines for dealing with and disposing of those complaints. It was through this press note that the general public was informed that investors' complaints of unlisted companies would be dealt with by the Department of Company Affairs. This press note was not interpreting either the provisions of the Sebi Act or of the Companies Act and, in any case, this press note is not the source from where Sebi draws its powers. We are also of the view that by letters dated April 21, 2010 and June 23, 2010 Sebi had merely forwarded the complaints relating to unlisted companies to the Ministry of Corporate Affairs in compliance with the aforesaid press note and it had not considered the legal position. In the affidavit filed by Sebi in Kalpana Bhandari's case (supra) it did take the stand that it had power only to regulate listed public companies and those public companies intending to get is securities listed on any recognized stock exchange to the extent referred to in section 55A of the Companies Act. It was also stated that the unlisted companies were regulated by the Central Government. We are clearly of the view that neither Sebi nor the Ministry of Corporate Affairs can be held bound by what was stated in the affidavit or in the aforesaid press note because there is no estoppel against law. The legal position as we have discussed in the earlier part of our order is that Sebi has the power to regulate all companies listed or unlisted if they are associated in any manner with the securities market. Whether Sebi has the power to deal with such companies or whether they are to be regulated by the Central Government are complicated and important questions of law pertaining to jurisdiction which are to be decided on the interpretation of the provisions of the Sebi Act and the Companies Act and the parties cannot be held bound either by press notes or by letters issued by their officers. Statement of an officer on the interpretation of any legal provision of law cannot bind Sebi or the Central Government. There is no principle of administrative law that statutory bodies like Sebi cannot be permitted to alter their interpretation of a provision of a statute particularly when the matter pertains to jurisdiction. We are in agreement with the learned senior counsel for the respondents that the case law cited on

behalf of the appellants is of no help to them. In Tata Engineering and Locomotive's case (supra), the Central Excise Department had accepted an earlier decision of the Tribunal in the case of Bajaj Auto in regard to the interpretation of a notification. No appeal was filed in the case of Bajaj Auto whereas an appeal was filed in the case of Tata Engineering and Locomotive Company where the Tribunal followed its earlier view. It was on these facts that the learned judges of the Supreme Court held that the Department having accepted the Tribunal's interpretation of the notification in one case was precluded from taking an inconsistent stand in the other. This decision does not advance the case of the appellants. In Birla Corporation's case, Indian Oil Corporation's case and Jayaswals NECO's case cited by the appellants, the position was similar. In the case before us, Sebi had only forwarded the complaints pertaining to unlisted companies to the Central Government as per the press note issued by the Government. The case law relied upon by the appellants is nowhere close to the facts of the present case.

35. The next argument of the learned senior counsel for the appellants is that OFCDs issued by the company are convertible bonds which had been issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of SCRA are not applicable in view of section 28(1)(b) thereof. He relied upon the opening words of section 28(1) "The provisions of this Act shall not apply to…'' to contend that the whole of SCRA does not apply to the bonds including section 9(m) thereof and, therefore, the provisions relating to listing of securities shall not apply. His argument is that convertible bonds having been issued at a price agreed upon at the time of issue are not listable in view of the exemption granted under section 28(1) of SCRA. We are not impressed with this argument. The provisions of section 28(1)(b) may now be referred to.

> "28. **Act not to apply in certain cases-**
>
> (1) The provisions of this Act shall not apply to –
>
> (a) ……..
> (b) any convertible bond or share warrant or any option or right in relation thereto, insofar as it entitles the person in whose favour any of the foregoing has been issued to obtain at his option from the company or other body corporate issuing the same or from any of its shareholders or duly appointed agents shares of the company or other body corporate, whether by conversion of

> the bond or warrant or otherwise, on the basis of the price agreed upon when the same was issued."

A plain reading of the aforesaid provision makes it clear that what is exempt under section 28(1)(b) of the SCRA are convertible bonds or share warrants or any option or right in relation thereto provided they are issued at a price agreed upon at the time of their issue. We have dealt with the definition of 'securities' as given in clause (h) of section 2 of SCRA and observed that the definition is inclusive in as much as it includes shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature. Since six different forms of financial instruments have been specifically included in the definition of 'securities', it is reasonable to assume that each one of them is different from the other. Had they been the same, there would have been no need for the Parliament to include all. Bonds and debentures have been separately included and, therefore, they are different from each other. We have already held in the earlier part of our order that OFCDs issued by the company are debentures. As they are debentures, they are different from bonds though they both fall in the category of debt securities. In a loose sense, the terms 'bonds' and 'debentures' are sometimes used interchangeably in the securities market but legally these cannot be understood as same financial instruments because the Parliament has included them separately in the definition of securities. What has been excluded from the provisions of SCRA under Section 28(1)(b) are convertible bonds and not debentures. It is pertinent to mention here that the company itself in the RHP and in the information memorandum has described the instruments as "Optionally Fully Convertible Debentures". It follows that the exclusion under section 28(1)(b) of SCRA is not available to the OFCDs issued by the company.

36. Learned senior counsel on both sides argued at length on the amendments carried out in section 28 of SCRA, more particularly in relation to the insertion of clause (b) in section 28(1) in regard to the convertible bonds and share warrants. It is not necessary to go into the details of the amendments as the language of section 28(1)(b) is unambiguous and leaves no room for doubt that it is only the convertible bonds and share warrants of the type referred to therein that are excluded from the applicability of SCRA and not

debentures which are a separate category of securities in the definition given in section 2(h) thereof.

37. We shall now deal with the argument of the learned senior counsel for the appellants that the whole time member violated the principles of natural justice. He argued that during the course of the proceedings, the whole time member directed the investigating officer to make enquiries in regard to certain facts and basing himself on his conclusions he found that the issue of OFCDs was a public issue but the findings of the investigating officer had not been furnished to the appellants. It is contended that the appellants had no opportunity to counter the findings of the investigating authority. Reference in this regard was made to paras 17.9 and 26.7 of the impugned order where the whole time member has placed reliance on the facts collected by the investigating authority behind the back of the appellants. This is what the whole time member has observed in these paragraphs:

> "17.9. I note that the Investigating Authority had, as directed by me, made enquiries with two of the subscribers (who are residing in Mumbai) to such OFCDs made by the companies. These investors had stated that their investments in such instruments were made on the basis of the representations made by the local agents (employed by the companies) and that they had no connection, whatsoever, with the two Companies themselves or to the Sahara India Parivar. ..……..
> ……
> 26.7. For the purpose of my own understanding, I had directed the Investigating Authority to do a snap verification of any four addresses from a randomly selected locality in Mumbai itself (as the Learned Counsel had submitted that complete addresses are given in respect of investors in urban areas). Out of four investors, the Investigating team tried to identify, even after strenuous efforts with the Post Office, two of them were simply not traceable. As to the two investors who were identified, both of them invested in the OFCDs, just because they were approached by the Agents in their locality. They had no prior association with the issuer or the Sahara Group. Evidently, on the face of it, the OFCDs are subscribed to, not by persons belonging to the Sahara India Parivar as claimed, but by the public, and such subscriptions are solicited through the usual marketing efforts that are typically needed to canvass deposit business from the general public. Both of them had hardly any awareness of the convertibility in these instruments."

There is merit in the contention of the appellants. As already observed, one of the primary questions that arose before the whole time member was whether the issue of OFCDs was a public issue or one by way of private placement. The appellants have been contending throughout that it was a private issue and that they had not approached the public and that the OFCDs were being offered only to their friends, associates, group

companies, workers/employees and other individuals associated/affiliated or connected with Sahara group of companies. In order to find out whether this fact was true, the whole time member directed the investigating authority to find out on a random check whether the company had approached members of the public or their own associates as claimed. The investigating authority appears to have recorded the statements of some persons to whom OFCDs have been offered and concluded that they were not the associates of the company. The whole time member relied upon these conclusions to hold that the issue was a public issue. We agree with the learned senior counsel for the appellants that the whole time member could not rely upon the conclusions arrived at by the investigating authority without furnishing his report to the appellants which they were entitled to controvert. We are, therefore, satisfied that the principles of natural justice to this extent had been violated. We are also of the view that this violation by itself will not vitiate the impugned order. Independently of the observations made in paragraphs 17.9 and 26.7 of the impugned order there is enough material on the record to hold that the issue of OFCDs was a public issue. From the affidavit filed on behalf of the company, it is clear that the OFCDs were offered to millions of investors. This fact by itself makes the issue a public issue and it was not necessary for the whole time member to look into the findings of the investigating officer which were recorded behind the back of the appellants. Moreover, on the facts of this case, it is a legal issue based upon the interpretation of the provisions of the Companies Act. We have ignored the observations made in the two paras of the impugned order while recording our findings in the earlier part of the order that the issue was a public issue. In view of our findings, the observations made in the aforesaid two paragraphs of the impugned order are of no consequence.

38. It was also argued on behalf of the appellants that there was no investor complaint received either by Sebi or by the Central Government and, therefore, there was no justification for Sebi to assume power and issue directions as contained in the impugned order. We are not sure whether there were any complaints received by Sebi or not but assuming that there were none, does it mean that the company can come out with a public issue without complying with any of the requirements prescribed for such an issue. We have already held that not only was the issue of OFCDs a public issue but the company

flouted every requirement of section 73(1) of the Companies Act and did not comply with any of the investor protection norms as prescribed by law. In this view of the matter, the argument of the appellants has only to be rejected.

39. The learned senior counsel for the appellants then challenged the show cause notice dated May 20, 2011 to the company and other appellants on the ground that the same was without jurisdiction. It was pointed out that OFCDs were issued by the company in the year 2008 and it is alleged in the show cause notice that the company had violated different clauses of the guidelines pertaining to investor protection and disclosures and since no action was taken by Sebi till the time the guidelines came to be rescinded on the promulgation of the regulations with effect from August 26, 2009, Sebi could not issue the show cause notice under the regulations alleging violation of the guidelines. According to the learned senior counsel, the regulations do not have any retrospective operation and they cannot apply to the wrongful acts, if any, committed by the company in the year 2008. It is argued that regulation 111 of the regulations which deals with repeal and savings does not save the omission on the part of Sebi to proceed against the company when the guidelines were in force. It is submitted that if Sebi had taken any action or issued the show cause notice when the guidelines were in force, its action could continue but that is not the case here. We do not find any merit in this contention also. Let us first turn to the provisions of regulation 111 of the regulations to see how untenable the argument is. This regulation reads thus:

> "**Repeal and Savings**
>
> 111. (1) On and from the commencement of these regulations, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 shall stand rescinded.
>
> (2) Notwithstanding such rescission:
>
> (a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under he corresponding provisions of these regulations;
>
> (b) any offer documents, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been field or made under the corresponding provisions of these regulations."

It is common ground between the parties that the regulations were promulgated with effect from August 26, 2009 and it is with effect from this date that the guidelines were rescinded. Sub-regulation (2) of regulation 111 saves anything done or any action taken or purported to have been done or taken in respect of the guidelines notwithstanding the fact that they had been rescinded. The opening words of clause (a) of sub-regulation (2) are "anything done". These words are of wide purport and would include anything done by the company or by anyone else. These cannot be given a restrictive meaning to include only something done by Sebi as contended on behalf of the appellants. Anything done or action taken by any person under the guidelines will be deemed to have been done under the corresponding provisions of the regulations. It follows that all wrongful acts committed by the company when the guidelines were in force are to be treated as having been done under the regulations. In this view of the matter, all wrongful acts committed by the company prior to the promulgation of the regulations could be the subject matter of a show cause notice issued after the promulgation of the regulations. We cannot agree with the learned senior counsel for the appellants that by issuing the impugned show cause notice, retrospective effect is given to the provisions of the regulations. We do not find any infirmity in the show cause notice on this score and the whole time member was right in holding the company guilty of violating the guidelines read with the regulations.

40. The regulations, therefore, apply to all public issues by all companies whether they are listed or unlisted. Challenging the direction issued by the whole time member, the learned senior counsel for the appellants contended that the direction pertaining to the refund of monies collected through the OFCDs could, if at all, be given by the Central Government and that Sebi could not direct the appellants to make the refund. We have no hesitation in rejecting this contention as well. Section 73 is one of the enumerated provisions referred to in section 55A of the Companies Act and Sebi has to administer the same in so far as it relates to issue of securities by companies which intend to get their securities listed. We have already recorded a finding that the company flouted the mandatory provisions of section 73(1) the consequences of which are referred to in sub-section (2) which requires the issuer company to refund forthwith the money

collected from the investors. In view of this provision of law we cannot find any fault with the direction. In any case, Sebi has ample power under sections 11, 11A and 11B of the Sebi Act to issue such a direction which is obviously meant to protect the interests of investors.

41. We may now notice an argument that was raised by Mr. Sudipto Sarkar learned senior counsel in the appeal filed by the housing company (Appeal no.132 of 2011). He strenuously argued that the case of this company was different from that of the company only to the extent that the latter had been charged for violating the provisions of the guidelines whereas the former is charged for violating the regulations. He is right in contending that the company has been found guilty of violating the guidelines read with the regulations and that the charge against the housing company is that it violated the regulations but that, in our opinion, makes no difference. The housing company issued its red herring prospectus in October 2009 when the regulations were in place and since it had not made the necessary disclosures nor complied with the investor protection norms prescribed thereunder it has been found guilty of violating the regulations. In the case of the company we have already noticed that it violated the guidelines pertaining to disclosures and investor protection and it has been found guilty of violating those provisions read with the regulations. This slight difference in the two appeals has no impact either on the outcome of the appeals or on the legal issues involved therein. He however contended that the regulations apply only to listed companies and since the housing company is an unlisted company, it is not governed by the regulations and the impugned order is without jurisdiction. This argument has no merit. Regulation 3 of the regulations deals with their applicability and it may be reproduced hereunder for facility of reference:

> "**Applicability of the regulations.**
>
> 3. Unless otherwise provided, these regulations shall apply to the following:
> (a) a public issue,
> (b) a right issue, where the aggregate value of specified securities offered is fifty lakh rupees or more;
> (c) a preferential issue;
> (d) an issue of bonus shares by a listed issuer;
> (e) a qualified institutions placement by a listed issuer;
> (f) an issue of Indian Depository Receipts.

A plain reading of Regulation 3 leaves no room for doubt that the regulations apply to all public issues as mentioned in clause (a) thereof. We have already held in the earlier part of our order that the issue of OFCD was a public issue and, therefore, it is squarely governed by the regulations. Again, Regulation 3(a) makes no distinction between listed or unlisted public issues nor does it differentiate between listed and unlisted companies.

42. Before concluding, we may mention that in view of our findings that OFCDs issued by the company are securities and that the issue was a public issue requiring mandatory listing and that Sebi has the jurisdiction under the Sebi Act to deal with all kinds of securities and companies, whether listed or not, the appeals could be disposed of on those findings and the impugned order upheld. It was not necessary for us to deal with the other contentions raised on behalf of the appellants. Since detailed arguments were addressed by all the parties on the other issues raised in both the appeals, we thought it appropriate to record our findings thereon.

In the result, both the appeals are dismissed and the impugned order upheld. The appellants in both the appeals shall now repay within six weeks from today the amount collected from the investors on the terms as set out by the whole time member in the impugned order. Parties shall bear their own costs.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
P.K. Malhotra
Member

Sd/-
S.S.N. Moorthy
Member

18.10.2011
Prepared and compared by
RHN/PTM