

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HON'BLE THE CHIEF JUSTICE MRS. MANJULA CHELLUR

&

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE

THURSDAY, THE 20TH DAY OF DECEMBER 2012/29TH AGRAHAYANA 1934

WA.No. 2203 of 2009 () IN WPC/19192/2003

AGAINST THE JUDGMENT IN WPC.19192/2003 DATED 30-07-2009

APPELLANT/1ST RESPONDENT IN THE WP:

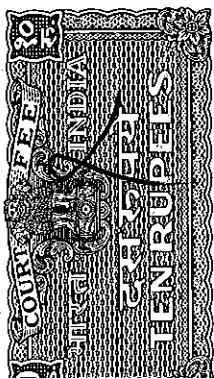
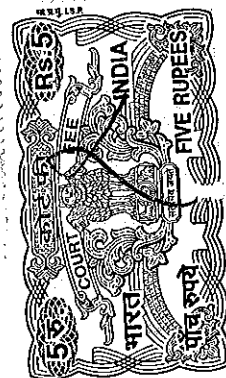
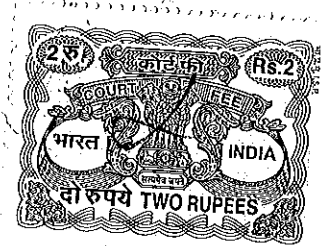
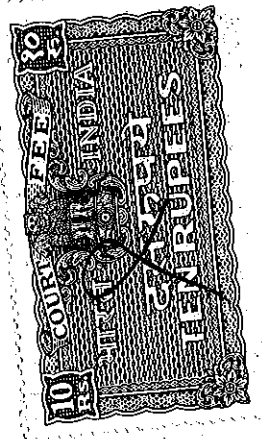
SECURITIES & EXCHANGE BOARD OF INDIA
REP. BY ITS CHAIRMAN, MITTAL COURT
B WING, 224, NARIMAN POINT
MUMBAI-400021, (PRESENT ADDRESS
IS 'SEBI BHAVAN' PLOT NO.C-4A, BANDRA - KURLA
COMPLEX, BANDRA EAST, MUMBAI 400 051.

BY ADV. SRI.K.M.JAMALUDHEEN

RESPONDENTS/PETITIONERS 1 TO 13 AND 2ND RESPONDENT IN THE WRIT PETITION:

1. KUNNAMKULAM PAPER MILLS LTD ROAD, AKKIKAVU,
KUNNAMKULAM - 68-519,
REP., BY ITS MANAGING DIRECTOR K.C. RAJAN.
2. K.C. RAJAN, MANAGING DIRECTOR, KUNNAMKULAM
PAPER MILLS LTD., KOONTHOOR HOUSE, VYSSERI
KUNNAMKULAM.
3. T.A. MOHAMMEDALI, THEKKETHVALAPPIL HOUSE,
OTHALUR WEST, KOKKUR, MALAPPURAM.
4. K.C. APPUKUNJAN, KOOTHOOR HOUSE,
AYYAPATH ROAD, CHOWANNOOR, KUNNAMKULAM.
5. K.P. GEORGE, KALLACHUMURY HOUSE,
LOWER BAZAR, CHIRALAYAM, KUNNAMKULAM.
6. M.M. MOHAMMED ASRAF, MANAMKANDATH HOUSE,
KOKKUR, MALAPPURAM.

VK



WA.No. 2203 of 2009 () IN WPC/19192/2003

7. A.P.MOHAMMEDALI, PALLIMANAYAYIL HOUSE,
PERUMPILAVU, KUNNAMKULAM.
 8. C.P. MATHEW, CHEMMANNUR HOUSE,
GURUVAYOOR ROAD, KUNNAMKULAM.
 9. P.M.BENNY, PANAKAL HOUSE,
THEKKEPPURAM, KUNNAMKULAM.
 10. SEBASTAIN CHOONDAL, CHOONDAL, TRICHUR.
 11. P.M.PRABHAKARAN, AISWARYA,
THIPPILASSERY, KARIKKAD, KUNNAMKULAM.
 12. P.D.GOPALAN, PRABITHA, KARIKKAD, KUNNAMKULAM.
 13. C.U.BINOY, CHUNGATH HOUSE, CHITTANJOOR, KUNNAMKULAM,
PETITIONERS 3 TO 13 ARE REP. BY K.C.RAJAN, THEIR ATTORNEY.
 14. THE REGISTRAR OF COMPANIES, KERALA,
OFFICE OF THE REGISTRAR OF COMPANIES, M.G.ROAD
ERNAKULAM, KOCHI-682011, NOW OFFICE AT
THRIKKAKARA P.O., KAKKANAD, ERNAKULAM.
- R1 BY ADVS.SRI.ISSAC M.PERUMPILLIL
SRI.JIJO PAUL KALLOOKKARAN
- R14 BY ADV.SRI.P.PARAMESWARAN NAIR,
ASST.SOLICITOR GENERAL OF INDIA

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30.7.2012
THE COURT ON ON 20-12-2012 DELIVERED THE FOLLOWING:

VK



**MANJULA CHELLUR, CJ
& A.M.SHAFFIQUE, J**

W.A. No. 2203 of 2009

Dated this the 20th the day of December, 2012

J U D G M E N T

SHAFFIQUE, J

This appeal is filed by the Security Exchange Board of India (SEBI), the first respondent in the writ petition challenging the judgment of the learned Single Judge quashing Ext.P8 order passed by SEBI.

2. SEBI initiated proceedings against the petitioners when the 1st petitioner company made allotment of 173995 equity shares of Rs.10/- each to 163 persons on 28.3.2001 which included members who were not the existing share holders. It is alleged that the Company has violated Ss.56, 60, 69, 72 and 73 read with the first proviso to S.67(3) of the Companies Act and the provisions of SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred as 'SEBI Guidelines').

3. According to the petitioners, there is no power vested in SEBI either under the Companies Act, 1956 or the SEBI Guidelines to pass Ext.P8 order as the company is not a listed



company and it had only offered rights issue.

4. Initially when Ext.P3, show cause notice dated 29.6.2001 was issued by SEBI, the petitioners objected to the same by filing an application before the Company Law Board but the same happened to be dismissed. Subsequently objection was filed and after considering the objection of the petitioners, Ext.P8 came to be passed.

5. In Ext.P8 order SEBI observed that, in the offer document circulated by the Company to the shareholders, it was indicated that the shareholders had a right to renounce the shares offered to them in favour of any other person but no provision was made in the said offer to provide information to the public about the company, its directors, financial position etc to enable the renouncee to take a decision in the matter. The Company had 296 shareholders and when the offer was made to issue right shares in the ratio of 1:4 with the right to renounce the shares, fresh allotment had been made in respect of 173995 shares in favour of 163 allottees of which several of them were not existing shareholders. This, according to SEBI is in violation



of S.67 of the Companies Act. They specifically referred to S.67(3) of the Companies Act inserted by Companies (Amendment) Act, 2000 which provides that in the case of an offer made by a Company to 50 or more persons the same shall tantamount to be a public offer. Since the allotment was for more than 50 persons, it is regarded as a public issue and in that view of the matter the Company should have followed SEBI Guidelines. According to them, the effect of S.67 as amended is that all the provisions of the Companies Act and Articles of the Company relating to the offer or invitation to public will be applicable in a case where it is made to a section of the public in all cases where the number of offerees or invitees is 50 or more. Therefore according to them the offer document is deemed to be a prospectus as defined under S.2(36) of the Companies Act and hence the company and its directors have violated S.56 read with Schedule II, Ss.60, 70 and 73 of the Companies Act and the provisions of SEBI Guidelines, and in that view of the matter the impugned order was passed calling upon the petitioners to refund the money collected under the issue



made by offer documents dated 15.2.2001 to the investors with interest not below the bank rate charged by the Commercial Banks for long term fixed deposit and failure to do so would invite penalty under section 15HB of the Securities Exchange Board of India Act, 1992 (hereinafter referred as the SEBI Act) and also prosecution under S.24 of the SEBI Act. In Ext.P8 order the source of power to pass order is described as section 3(4) read with sections 11 and 11B of the SEBI Act read with clause 17.1 of SEBI Guidelines.

6. The main ground raised by the petitioners is the lack of jurisdiction of SEBI, as according to them, in so far as the first petitioner company is an unlisted company SEBI has no jurisdiction and that offer or rights issue to more than 50 shareholders with the right of renunciation would not amount to a public offer.

7. The learned Single Judge after an elaborate consideration of the matter opined that by virtue of S.55A of the Companies Act, Central Government alone has the power to deal with matters complained of and therefore the appellant cannot usurp the jurisdiction vested with the

Central Government and on that basis the writ petition is allowed and Ext.P8 is quashed.

8. The learned senior counsel Sri.V.T.Gopalan appearing on behalf of the appellant contended that when the petitioners decided to issue right shares as per Ext.P2 notice dated 15.2.2001 in order to raise capital of the company and offered one share each for every four shares held by each shareholder with the right to renounce shares to persons other than existing shareholders it becomes a public issue as provided under Section 67 (1) and (2) of the Companies Act. Though S.67(3) provides an exception, by virtue of the 1st proviso to sub section (3) which was inserted by the Companies (Amendment) Act, 2000 thereby indicating that if the offer or invitation is made to 50 or more persons the exemption under S.67(3) will not apply in respect of the company, sub sections (1) and (2) clearly applies. Therefore, according to the learned senior counsel, the effect of the amendment to S.67 inter alia makes it clear that the offer of rights issue to share holders with the right of renunciation is also deemed to be an offer or invitation



to the public as held by the Supreme Court in **Needle Industries (India) Ltd. vs Needle Industries Newey (India) Holding Ltd. and others ((1981) 3 SCC 333)**.

According to the learned senior counsel, the materials verified by SEBI discloses that the offer was accepted by 163 persons and some of the rights shares are allotted to persons who were not shareholders, which clearly attracts a public issue and hence the violation is made out. Learned counsel also brought to our notice certain provisions of the SEBI Act as well as Securities Contracts (Regulation) Act, 1956 in order to canvass the position that Ext.P8 order was issued within the provisions of the Companies Act and the provisions of the SEBI Act. S.3(iii)(c) of the Companies Act is also relied upon to contend that the section prohibits any private company making invitation to the public to subscribe for any shares or debentures of the Company. According to the learned counsel S.73 of the Companies Act mandates to list the securities on the stock exchange when the securities are issued to the public so as to give investors liquidity and an exit route for their investment. In that view



of the matter the learned counsel supports Ext.P8 order. It is also pointed out that without disclosing the pendency of the above case, the company had availed of the Easy Exit Scheme for striking off the name of the Company from the list of Companies. Reliance was also placed on the following judgments:

(i) **Securities and Exchange Board of India v. Ajay Agarwal, ((2010) 3 SCC 765)** wherein the Supreme Court with reference to SEBI Act held as under:

"The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. It is a well-known canon of construction that when the court is called upon to interpret provisions of a social welfare legislation the paramount duty of the court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it. Keeping this principle in mind if we analyse some of the provisions of the Act it appears that the Board has been established under

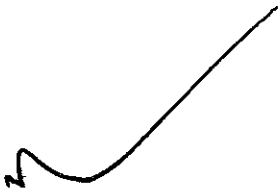


Section 3 as a body corporate and the powers and functions of the Board have been clearly stated in Chapter IV and under Section 11 of the said Act".

(ii) **Tata Motors Limited v. Pharmaceutical Products of India Limited, (2008) 7 SCC 619**, wherein Supreme Court while considering the provisions of Companies Act with reference to Sick Industrial Companies (Special Provisions) Act held as under:

"21. It was conceded by Mr Sundaram SICA being a special law vis-à-vis the 1956 Act, it shall prevail over the latter. The learned counsel, however, qualifies his submission by contending that SICA only excludes the provisions of the Companies Act when they are inconsistent with each other.

22. The provisions of a special Act will override the provisions of a general Act. The latter of it (SICA Act) will override an earlier Act. The 1956 Act is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to SICA.



23. *Wherever any inconsistency is seen in the provisions of the two Acts, SICA would prevail. SICA furthermore is a complete code. It contains a non obstante clause in Section 32.*

24. *SICA is a special statute. It is a self-contained code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA".*

(iii) **Allahabad Bank v. Canara Bank, ((2000) 4 SCC 406)** is relied upon emphasize that special Act like SEBI Act is to prevail over Companies Act, in view of the fact that it is a general Act. Paragraph 38 and 39 is relied upon which reads as under:

"38. At the same time, some High Courts have rightly held that the Companies Act is a general Act and does not prevail under the RDB Act. They have relied upon Union of India v. India Fisheries (P) Ltd.

39. There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis



yet another legislation. Such situations do arise as held in LIC of India v. D.J. Bahadur. It was there observed:

"... for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law".

For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in Damji Valji Shah v. LIC of India (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the Companies Act, 1956 can be treated as a general statute. This is clear from para 19 of that judgment. It was observed:

"Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general



Act, viz., the Companies Act which is an Act relating to companies in general."

(emphasis supplied)

Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute".

(iv) **The Madras stock exchange Limited vs S.S.R.Rajkumar (2003(2) Law Weekly 190)** is relied upon to contend that as between the Companies Act and the Securities Contracts (Regulation) Act, the latter is the special law in relation to stock exchanges and stock broking while the Companies Act is the general law which deals with various matters enacted therein.

9. On the other hand, it is contended by the learned counsel for the respondents after referring to various provisions of the Companies Act, SEBI Act and SEBI Issue of Capital and Disclosure Requirement Regulations, that SEBI has no jurisdiction in the matter as the rights issue had been made in terms of S.81(1)(c) of the Companies Act and



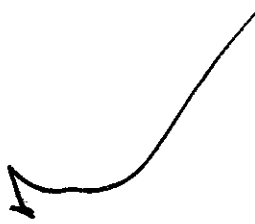
so far as the first respondent Company is not a listed company SEBI has no power to pass Ext.P8 order and their jurisdiction is barred under section 55(A) of the Companies Act. It is contended that Needle Industries case (supra) has no application to the facts of this case as the rights shares are issued under section 81(1)(c) of the Companies Act. It is also contended that a deeming provision will not confer any right on SEBI to take action under the SEBI Act for the alleged violation as the meaning of public issue in the deeming provision cannot be imported to any other provisions. The learned counsel also relied upon the following judgments.

(i) **Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661** is relied upon to contend that legal fiction of public issue is created for a definite purpose which cannot be imported for other purposes. Paragraph 33 of the said judgment which is relied upon reads as under.

"The 'situs' of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of

the judge-made law of the land, or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories:.....

We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of Cl. (1) (a) can legitimately be used for the entirely foreign and collateral purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of Cl. (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been



the actual facts from the start”.

(ii) **Harish Tandon v. ADM, (1995) 1 SCC 537** is relied upon to indicate the scope of a deeming provision, wherein Supreme Court held as under:


“12. On behalf of the respondents, it was urged that the expression ‘deemed’ occurring in subsections (2) and (4) of Section 12 as well as in the Explanation (i) of Section 25 should not be read as conclusive. It should be read as “deemed until the contrary is proved”. Reference was made to the cases Gray v. Kerlake; Robert Batcheller & Sons Ltd. v. Batcheller and Spencer v. Kennedy where it was observed that if the word ‘deemed’ is held to be conclusive, then it shall amount to imputing to the legislature the intention of requiring the court to hold as a fact something directly contrary to the true fact. It was also said that such deemed clauses should be read to mean as required by the statute, until the contrary is proved.

13. *The role of a provision in a statute creating*




legal fiction is by now well settled. When a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion. In the well-known case of **East End Dwellings Co. Ltd. v. Finsbury Borough Council** Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, observed:

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it. ... The statute says that you must imagine a certain state



of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

That statement of law in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the case of State of Bombay v. Pandurang Vinayak. From the facts of that case it shall appear that Bombay Buildings (Control on Erection) Ordinance, 1948 which was applicable to certain areas mentioned in the schedule to it, was extended by a notification to all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act which again extended to areas mentioned in the schedule with power under sub-section (3) of Section 1 to extend its operation to other areas. This Court held that the deemed clause in Section 15 of the Act read with Section




existence of a fact which does not really exist."

16. *Recently in the case of M. Venugopal v. Divisional Manager, Life Insurance Corpn. of India after referring to the case of East End Dwellings Co. Ltd. v. Finsbury Borough Council it was said that when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, must inevitably have flowed".*

(iv) In **Brinjanandan Singh vs. Jamuna Prasad (AIR 1958 Patna 589)** a Division Bench held that fiction in the realm of law has a definite role to play and it cannot be stretched to a point where it loses the very purpose for which it is used and in no case should it be allowed to perpetrate injustice.

(v) **East End Dwellings Co. Ltd. v. Finsbury Borough Council (1952) A.C.109**, is also relied upon to contend that when a legal fiction is created, although it is required to be taken to the logical conclusion but the same



would not mean that the effect thereof would be extended so as to transgress the scope and purport for which it is created. This judgment is referred in Harish Tandon's case (supra).

10. On a consideration of the submissions made by the counsel appearing for the parties concerned and the facts involved in the matter, the point that requires for consideration is whether SEBI has jurisdiction to pass Ext.P8 order and whether S.55(A) of the Companies Act bars the jurisdiction of SEBI and power is vested only with the Central Government.

11. The first point that requires to be considered is whether the rights issue made by the petitioners is a public issue or not. The petitioner company had invoked section 81 (1)(c) of the Companies Act for the rights issue which reads as under:

81. Further issue of capital.—(1)[Where at any time after the expiry of two years from the formation of a company or at any time after the expiry of one year from the allotment of shares in that company made for the first time

after its formation, whichever is earlier, it is proposed to increase the subscribed capital of the company by allotment of further shares, then,]—

(a) such [further] shares shall be offered to the persons who, at the date of the offer, are holders of the equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid up on those shares at that date;

(b) the offer aforesaid shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days from the date of the offer within which the offer, if not accepted, will be deemed to have been declined;

(c) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (b) shall contain a statement of



this right;

(d)

Explanation.—In this sub-section, “equity share capital” and “equity shares” have the same meaning as in Section 85.

That a public company is entitled to increase the subscribed capital by allotment of further shares unless otherwise provided in the Articles of the Company is clear from clause (a) and (b). That the offer so made shall be deemed to include a right exercisable by a person concerned to renounce the shares offered to him or any of them in favour of any other person is clear from clause (c).

12. By virtue of S. 67(1) and (2) of the Companies Act an offer to the public to subscribe the shares or debentures is to be construed to include offer or invitation of any section of the public. Section 67(1), (2) and (3) of the Companies Act reads as under:

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 :

[Provided that nothing contained in this subsection 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 that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in Section 4-A of the Companies Act, 1956 (1 of 1956).]



No doubt S.67 (3) clearly indicates that such offer or invitation shall not be applicable under certain circumstances as provided under sub section 3(a) and (b). But the first proviso to sub section (3) clearly indicates that the deeming provision under S.67(1) and (2) applies in respect of subscription of shares or debentures made to 50 or more persons. That being the situation when a company exercises its power under S.81(1)(c) which gives right to a shareholder to renounce the shares in favour of persons who are not shareholders and when such a right is given to 50 or more persons that also will be deemed to be an offer made to any section of the public as provided under S.67(1) and (2).

13. When an offer is made to a section of public necessarily the company will have to comply with the provisions applicable in respect of public issue. Then the question involved would be whether the company had complied with such procedures necessary for a public issue and whether SEBI has the power to interfere in the matter and pass orders similar to Ext.P3 or Ext.P8 as the case may



be.

14. According to the appellant the allotment of shares is not in accordance with the SEBI Guidelines, as it is in violation of sections 56, 60, 69, 72 and 73 of the Companies Act read with first proviso to S.67(3) of the Act. Therefore the question to be considered is whether there is a bar of jurisdiction in terms of S.55A of the Companies Act as held by the learned Single Judge. S. 55A reads as under:

55-A. Powers of Securities and Exchange

Board of India.—*The provisions contained in Sections 55 to 58, 59 to 81 (including Sections 68-A, 77-A and 80-A), 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206-A 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 the 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, the [Tribunal] or the Registrar of Companies, as the case may be.]

Going by section 55A, SEBI will have jurisdiction only in respect of matters in relation to certain provisions under the Companies Act so far as they relate to the issue and transfer of securities in case of **“listed public companies or in case of those public companies which intend to get their securities listed on any recognized Stock Exchange in India”**. The argument of the appellant is that on a close reading of the provisions of SEBI Guidelines would



indicate that when a rights issue is made by an unlisted public company the provisions thereof applies.

15. What are the procedures prescribed for a public issue is available under SEBI Guidelines. The guidelines had been issued by SEBI under S.11 of the SEBI Act. Clause 1.2.1.(XXXIII) of the SEBI Guidelines defines "Public issue" as an invitation by a company to the public to subscribe to the securities offered through a prospectus. Clause 1.2.1 (xxv) defines "Rights issue" as an issue of capital under sub section(1) of section 81 of the Companies Act, 1956 to be offered to existing shareholders of the company through letter of offer. Clause 1.2.1(xx) defines offer document as prospectus in case of public issue or offer for sale and letter of offer in case of rights issue. Clause 1.4 of the guidelines reads as under:

" 1.4 Applicability of the guidelines

(i) These guidelines shall be applicable to all public issues by listed and unlisted companies, all offers for sale and rights issues by listed companies whose equity share capital is listed



except in case of rights issues where the aggregate value of securities offered does not exceed Rs.50 lakhs;

Provided that in the case of the rights issue where the aggregate value of the securities offered is less than Rs.50 lakhs the company shall prepare the letter of offer in accordance with the disclosure requirement specified in these guidelines and file the same with the Board for its information and for being put on the SEBI web site.

(ii) Unless otherwise stated all provisions in these guidelines applicable to public issues by unlisted companies shall also apply who offers for sale to the public by unlisted companies”.

In view of the above provision it cannot be disputed that SEBI guidelines do apply in respect of unlisted companies also. Then the question is whether the rights issue of the petitioners can be treated as a public issue for the purpose of the SEBI Act and the SEBI Guidelines which has the force



of law. It is not in dispute that SEBI Act being a special Act and with reference to matters stated therein definitely overrides the provisions of the Companies Act. This principle of law is undoubted as held by the Supreme court in Securities and Exchange Board of India v. Ajay Agarwal, ((2010) 3 SCC 765), Tata Motors Limited v. Pharmaceutical Products of India Limited, (2008) 7 SCC 619 and Allahabad Bank v. Canara Bank, ((2000) 4 SCC 406) (supra).

16. In this regard it will useful to refer to the preamble to SEBI Act, which reads as under:

“An Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto”.

Section 2 (1) (i) of SEBI Act defines securities as under:

In this Act, unless the context otherwise requires,—

(i) “securities” has the meaning assigned to it in

Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).



Section 2. (h) of Securities Contracts (Regulation) Act, 1956 (42 of 1956) defines "securities" as under:

(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;*

[(i-a)

There cannot therefore be any dispute that shares are also securities as defined under the SEBI Act and the SEBI Guidelines do apply as the intention is to protect the interests of investors in securities. The argument of the respondent is that the deeming provision under section 81 (1)(c) read with section 67(1) and (2) at best treats the rights issue as a public issue only for limited purpose of the Companies Act, which cannot be imported to any other provision of law including SEBI Act or SEBI Guidelines and therefore the exercise of jurisdiction by SEBI is bad in law.

17. The letter of offer sent by the applicant to the shareholders is deemed to be a prospectus as defined under



S.2(36) read with 67(1) and (2) of the Companies Act, 1956. Therefore when rights issue is defined under Clause 1.2.1 (xxv) of SEBI guidelines as an issue of capital under sub section(1) of section 81 of the Companies Act, 1956 to be offered to existing shareholders of the company through letter of offer, it cannot be said for a moment that the SEBI Guidelines does not apply to the factual circumstances involved in the case. When such specific provision is made in the SEBI Guidelines with reference to rights issue as well, and the statute itself has treated the rights issue as a public issue we do not think that the principle of law in the judgments relied upon by the counsel for respondents will have any application to the facts of this case. Further Clause 17.1 of the SEBI Guidelines inter alia provides that in case of violation of guidelines, the Board may in the interest of the security market and in the interest of the investors may pass directions under S.11B of the SEBI Act and sub-clause (a) indicates that it can direct the persons concerned to refund the money collected under an issue to the investors with or without requisite interest as the case may be.



18. The further question is whether SEBI's jurisdiction is excluded by the specific provision under S.55A of the Act. We have no hesitation to come to a finding that the first respondent company was inviting shares from public by virtue of notice dated 15.2.2001 and going by the deeming provision under S.67(1) and (2) necessarily the company has to comply with the procedure prescribed for inviting public issue of shares. It is needless to state that the Companies Act is a codifying statute. From the preamble to the Companies Act itself it is clear that it is to consolidate and amend the law relating to companies and certain other associations. It is in fact a consolidation of all the prevailing laws which existed during the relevant time in respect of organization and management of joint stock companies. Section 55A is incorporated with effect from 13.12.2000 by the Companies (Amendment) Act, 2000 by which SEBI is permitted to administer the provisions contained in the said section in so far as they relate to issue of transfer of securities and non-payment of dividend in relation to



listed public companies and in the case of those public companies which intend to get their securities listed on any recognized Stock Exchange in India. Sub-clause (c) further indicates that in any other case administration is by the Central Government. Reading of S.55A by itself makes it clear that it operates only in a permitted field where SEBI is given the power to administer certain provisions contained in the Companies Act and in respect of certain category of Companies. Such a provision in the Companies Act will not in any way preclude SEBI from exercising any other right which it has under the provisions of SEBI Act and SEBI guidelines framed thereunder. SEBI guidelines have been framed with a view to provide greater degree of accountability and for safeguarding the interest of the investors and for various other matters specified thereunder. Such being the situation, when action is taken by SEBI by issuing directions under S.11B of the Act read with Clause 17.1 of the SEBI Guidelines, we are of the view that S. 55A of the Companies Act does not bar the jurisdiction of SEBI. S.55A is only an enabling provision permitting SEBI to deal



with certain matters arising under the provisions of the Companies Act as well. The power given to Central Government does not preclude SEBI from taking action in terms with the SEBI Guidelines. Therefore, when SEBI Act had been enacted for the purpose of management of the security interest of investors and when specific provisions are made relating to the administering of listed as well as unlisted companies in the SEBI Guidelines, S.55A cannot be taken as a bar of jurisdiction for SEBI to interfere in respect of a matter in which specific conferment of power had been given under the SEBI Act as well as SEBI Guidelines. In other words, S.55A of the Companies Act by itself will not create bar of jurisdiction for SEBI to pass orders in respect of matters specifically provided under the SEBI Act and the SEBI Guidelines.

19. Having found that SEBI has jurisdiction in the matter, the next question is whether this Court should consider the contentions urged by the petitioner on merits or should parties be relegated to the alternate remedy as provided under Clause 15T of the SEBI Guidelines.



20. The petitioner has chosen to file a writ petition challenging Ext.P8 order on the ground that SEBI lacks jurisdiction to pass such an order and that alone seems to have been considered by the learned Single Judge. Under such circumstances when an appellate forum is provided under the guidelines itself, we do not think that the case requires to be heard on merits and it is open for the appellant to approach the appellate forum to challenge Ext.P8 order if felt aggrieved by the same. The petitioners are free to approach the appellate authority. The dismissal of the writ petition shall not preclude the right of the petitioners to file an appeal in accordance with law..

In the result, the appeal is allowed and the judgment of the learned single judge is set aside without prejudice to the right of the respondents to approach the appellate authority.

**MANJULA CHELLUR
(CHIEF JUSTICE)**

**A.M.SHAFFIQUE
(JUDGE)**

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