BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Misc. Application No. 67 of 2013
And
Appeal No. 124 of 2013

Date of decision: 23.07.2013

1. Alchemist Infra Realty Limited
   723, DLF Tower "A",
   Jasola District Centre,
   New Delhi – 110 044.

2. Mr. N. Madhav Kumar
   723, DLF Tower "A",
   Jasola District Centre,
   New Delhi – 110 044.

3. Mr. Brij Mohan Mahajan
   723, DLF Tower "A",
   Jasola District Centre,
   New Delhi – 110 044. …Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East)
Mumbai - 400 051. …Respondent

WITH

Appeal No. 123 of 2013

1. Alchemist Infra Realty Limited
   723, DLF Tower "A",
   Jasola District Centre,
   New Delhi – 110 044.

2. Mr. N. Madhav Kumar
   723, DLF Tower "A",
   Jasola District Centre,
   New Delhi – 110 044. …Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East)
Mumbai - 400 051. …Respondent

Mr. S.K. Kapur, Senior Advocate with Mr. Vinay Chauhan, Mr. Prateek Jalan, Mr. Rishad Medora and Mr. Prashant Ingle, Advocates for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody and Mr. Akhilesh Singh, Advocates for the Respondent.

CORAM : Jog Singh, Member
A. S. Lamba, Member

Per : Jog Singh

1. Both the instant appeals have been preferred by three Appellants, namely, Alchemist Infra Realty Limited (Appellant No. 1), Mr. N. Madhav Kumar, Director (Appellant No. 2) and Mr. Brij Mohan Mahajan, Director (Appellant No. 3). In Appeal No. 123 of 2013, the Appellants have only challenged the action of the Respondent in returning outright their request for a consent order without any consideration whatsoever as required by the two circulars dated April 20, 2007 read with Circular dated May 25, 2012. In Appeal No. 124 of 2013, however, Appellants have mainly challenged the impugned order dated June 21, 2013 by which the Respondent has held that Appellant No. 1 had launched Collective Investment Schemes ("CISs") without obtaining any registration from the Respondent as mandated by the provisions of Section 12(1B) of the SEBI Act, 1992 and Regulation 3 of the SEBI (Collective Investment Schemes) Regulations, 1999 ("CIS Regulations"). With the consent of learned senior counsel for both the parties, the two appeals are taken up for final hearing and are heard together. Accordingly, both the appeals are being disposed of by the present order.

Appeal No. 124 of 2013:-

2. Appellant No. 1 is stated to be a public limited company carrying on business of development of high quality infrastructure and real estate in and around India, while Appellant No. 2 and 3 are its Directors and all three

Appellants have their registered office in New Delhi. Appellant No. 1 was incorporated on April 2, 2002 and it commenced business within a week of its incorporation but is not listed on any Stock Exchange.

3. The case of Appellant No. 1 is that it is not dealing in any "securities" as defined under the SEBI Act, 1992 or Securities Contracts (Regulation) Act, 1956 ("SCRA"). Appellant No. 1, therefore, submits that it is not connected with the securities market in any manner and that its affairs are governed by the Ministry of Corporate Affairs, Government of India as per the provisions of the Indian Companies Act, 1956. The submission advanced on behalf of Appellant No. 1 is that its business operations are not covered by any of the provisions of the SEBI Act, SCRA or CIS Regulations in question. Therefore, no certificate of registration was required to be obtained by Appellant No. 1 in terms of the above said Acts or the CIS Regulations.

4. Even before commencing its business transactions with potential purchasers of land, Appellant No. 1 had its own land or interest therein in Yamunanagar. Appellant No. 1, thus, submits that diverse people from all across the country are purchasing land from it and all necessary legal formalities including agreements and/or conveyance deeds are duly executed by and between Appellant No. 1 and the concerned purchasers. For this purpose, the applicable stamp duty is also paid in accordance with the provisions of the Indian Stamp Act. The purchasers of land also enter into an agreement with Appellant No. 1, called the 'Supervision Agreement' to develop, work, control and supervise the said land for a particular period of time and a management fee is also charged by Appellant No. 1 for performing this task, on behalf of the purchasers. Thereafter, the deed of conveyance is

passed on to the Appellant No. 1 and a Certificate of Property is issued to the purchaser by Appellant No. 1, in which the expected value of the said piece of land after the expiry of a fixed period of time is also mentioned.

5. After expiry of the agreed fixed period of time, agreed between the two parties, the purchaser has the option of requesting Appellant No. 2 to identify a suitable party for disposing of the said land at a mutually agreed price. Not only this, a Special Power of Attorney is also executed by Appellant No. 1 in favour of the nominee by the two parties in question which is duly notarized. Therefore, it is contended on behalf of Appellant No. 1 that all the ingredients of a ‘sale’ as defined under the Transfer of Property Act, 1882 are present in the instant case. If the development period is over, the purchaser of land is free to sell it to whosoever he thinks proper. It is submitted to be a mere prudent business practice prevailing in similar trades in the market. However, even during the development period the purchaser is stated to be the absolute legal owner of the land if the land cannot be developed due to any unforeseen reason, the tenure of the ‘Supervision Agreement’ can be flexibly extended, but this factum alone does not in any way dilutes the title of the owner of the piece of land.

6. It is also one of the submissions of Appellant No. 1 that land sold by it to various buyers is acquired by Appellant No.1 from its own resources. Appellant No. 1 supervises and develops the land sold to buyers when the latter express a desire to that effect. Such a practice is stated to be common in the real estate sector and it results in achieving benefits of economies of scale.

7. Further, Appellant No. 1 submits that the amount of money received by it from various buyers of land is classified as consideration against ‘stock in trade’ and not as deposits received from the general public or loan or borrowing from creditors. Thus, the submission is that it is purely a case of transaction of sale and purchase of land and no more. By no stretch of the imagination can it be termed as a Collective Investment Scheme since none of the four ingredients specified in Section 11(AA) of the SEBI Act are met with. In this connection, the main submissions advanced by Mr. S.K. Kapur, learned senior counsel for the Appellants who appeared with Mr. Vinay Chauhan, Mr. Prateek Jalan, Mr. Rishad Medora and Mr. Prashant Ingle, learned counsel made various submissions which can be summarized as under:

(a) Appellant No. 1 was the owner of land prior to it entering into transactions with its customers / clients and was not offering any scheme or arrangement and the purchasers of the land cannot be called investors, since they become registered owners of land, being sold to them and the purchasers may, at their discretion, sell the same in the future or may continue to retain it;

(b) The payments made by the purchasers are not pooled or utilized for the purposes of the alleged scheme or alleged arrangement or the Appellant No. 1’s business transactions and there is no arrangement between the purchasers and the Appellant No. 1 to share any profit;

(c) The common objective of all business and/or commercial transactions is to make profit and in this case the purchaser obtains ownership of the land as consideration and

Appellant No. 1 receives money as consideration by virtue of the business transactions entered into by and between the purchasers and the Appellant No. 1;

(d) The Appellant No. 1 does not guarantee any profit to the purchaser. Moreover, the sale consideration being received by the Appellant No. 1 is not being managed by the Appellant No. 1 on behalf of the purchasers;

8. Referring to the latest ruling of Hon'ble Supreme Court in the case of **M/s. P.G.F. Limited & Ors. v. Union of India & Anr. [2013 AIR SCW 2420]** decided on March 12, 2013, learned senior counsel Mr. S.K. Kapur has taken a lot of pains to distinguish it through a threadbare analysis of M/s. P.G.F. Limited vis-à-vis the case of Appellant No. 1. For the sake of convenience the points raised by Mr. S.K. Kapur, learned senior counsel can be summarized as below:-

(a) In the case of PGF, sale of land was not immediately made, the same was dependent on certain other time bound contingencies, whereas, in the case of Appellant No. 1 sale of land is immediate; not dependent on any time bound contingency;

(b) In the case of PGF, the company continued to retain absolute control over the land, whereas, Appellant No. 1 develops, works and supervises the land in terms of a Supervision Agreement entered into by and between Appellant No. 1 and its customers / clients, which is not compulsorily renewed and upon the expiry of the same, the customers / clients have complete control over the land;

(c) In the case of PGF, sample agreement does not disclose how much would be the cost of the land and how much money would be spent on development, whereas, in case of Appellant No. 1 where is a separate agreement for working, development and supervision of land; amount paid for land and amount for working, development and supervision of land are distinct and clearly demarcated;

(d) In the case of PGF, there was no development of land, whereas, in case of Appellant No. 1 there is substantial

development of land; not disputed by SEBI or by any customer / client;

(e) In the case of PGF, sale deed executed, no registration; agreement mentions, without any specific time stipulation, that sale deed will be executed in favour of the customer and will be duly registered, whereas, in case of Appellant No. 1 deed of conveyance executed / registered upon payment;

(f) In the case of PGF, possibility of joint sale deeds being executed, whereas, in case of Appellant No. 1 no joint sale deed is executed;

(g) In the case of PGF, agreements are one-sided and arbitrary, whereas, in case of Appellant No. 1 agreements are not arbitrary, one-sided or unfair;

(h) In the case of PGF, genuineness of documents appears to be doubtful, whereas, in case of Appellant No. 1 genuineness of documents has never been questioned;

(i) In the case of PGF, there is uncertainty in the transactions to the disadvantage of the investors, whereas, in case of Appellant No. 1 no uncertainty at all in the transactions; terms and condition are clear and adhered to; no complaint ever received by Appellant No. 1; no complaint ever received by Respondent.

(j) In the case of PFG, customers were assured of a high amount of appreciation in the value of the land after its development; nothing but a return, whereas, in the case of Appellant No. 1 no returns / appreciation assured or guaranteed to customers / clients;

9. Before turning to the submissions made by Mr. Shiraz Rustomjee, learned senior counsel for the Respondent who appeared with Mr. Mihir Mody and Mr. Akhilesh Singh, learned counsel, we feel it appropriate to mention certain developments in the matter. Firstly, the Appellants have approached the Hon'ble High Court of Jharkhand at Ranchi raising some grievances connected with the present matter. A Single Bench of the Hon'ble High Court of Jharkhand at Ranchi, by an order dated May 10, 2013 directed the Respondent to conclude the enquiry within six weeks from the date of receipt of a copy of the order. The Appellants have preferred Letters Patent Appeal before the Division Bench of the same High Court against the order dated May 10, 2013 but the same is stated to have been withdrawn by the Appellants in the recent

past. Therefore, we do not consider it necessary to deal with this aspect any further. Secondly, the Appellants have also approached the Hon'ble High Court of Delhi seeking a direction to the Respondent to objectively consider the request of the Appellants for a consent order in the matter, in terms of, inter alia, paragraph 21 of the Show Cause Notice dated November 21, 2012 issued to the Appellants by the Respondent. However, this submission was not recorded in the order dated June 5, 2013 by the High Court probably due to inadvertence. By order dated June 5, 2013 passed in Writ Petition No. 3917 of 2013, the Hon'ble High Court of Delhi, inter alia, granted time to Appellant No. 1 to file a reply to the Show Cause Notice before the Respondent on or before June 11, 2013 and the matter was directed to be heard by the Respondent on or before June 18, 2013 and a final order was directed to be passed on June 26, 2013.

10. Learned senior counsel, Mr. Rustomjee, appearing for the Respondent submits that they have perused documents, including a sample application form in which details of the customer are captured and a deed of indenture wherein the consideration to be paid by the investor is recorded. The deed of indenture does not mention the area of plot being purchased by the customer; moreover, *"wherever the share of the customer is mentioned, it is always denoted as proportionate undivided interest and that the purchaser shall not be entitled to claim division and/or partition of the said proportionate undivided interest and shall continue to hold and enjoy the same with its co-owners without any objection"*. The Respondent has also perused the Supervision Agreement which states that Appellant No. 1 has agreed to work, manage, control and supervise a customer's plot situated at Behanta Zila, Tehsil Kolaras, District Shivpuri (Madhya Pradesh) for a fixed period on behalf of the

customers and the company shall endeavor to ensure that at the end of the said tenure the customer may receive consideration as per the expected value of the plot after expiry of the said fixed tenure. The sample certificate of property perused by the Respondent does not specify the area or the exact location of the plot. It is submitted that on perusal of a filled up application form, facts not appearing in the sample application form come to light. Paragraph 29 of the Impugned Order being relevant is reproduced hereinbelow:

> "29. On an analysis of the filled up application form, it is observed that following facts did not appear in the sample application form provided by Alchemist vide letter dated September 15, 2011, namely:-
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> i. "The application can be made for a minimum amount of Rs. 1000/- & in multiple of Rs. 1000/-.
>
> ii. Under category F, Alchemist allots immovable property in consideration to the amount paid to the company, and such land can be leased out to the company under 'Fixed term tenancy Agreement'. To enter this agreement minimum land holding should be of 300 sq ft (if not specified otherwise) and additional holdings should be in the multiples of 100 sq. ft. Presently the lease amount is fixed at Rs. 3300/- per annum for a period of 3 years on an area of 300 sq.ft. The amount will be increased proportionately in accordance with the land holdings. This amount will be made available to the 'allottee' in equated monthly installments spread through the lease period."

11. The Respondent submits that after having perused all documents submitted by the Appellants the following points emerge:-

i. While applying, the investors necessarily have to execute a supervision/development agreement with the Company. Without executing the same, an investor would not be eligible to file the applications;

ii. The plot of land as mentioned in the conveyance deed cannot be identified. The investor does not know where his property is a he gets only an undivided interest in a large land holding;

iii. On termination of the development agreement, there is no indication that the land will get conveyed fully to the investor. On the other hand, the investor gets the option, either to extend his tenure of development / supervision or to request the Company to find a suitable purchaser;

iv. The Company guarantees a certain value below which the property would not be acquired back from him.

v. Pursuant to entering into the development agreement, the investor has no right to interfere with the working, managing, controlling and supervising of the said plot in any manner whatsoever. He only gets a right to inspect the land and that too the entire land holding and not his plot as the same cannot be identified as mentioned above, and the inspection could be done with due notice and intimation to the company.

12. On the basis of the abovesaid analysis of records the Respondent submits that the business carried on by the Appellants cannot be termed as simple sale and purchase of land, and that the scheme carried on by the Appellants is in the nature of a CIS since it satisfies all conditions stipulated by Section 11AA of the SEBI Act.

13. We have heard both the learned senior counsel for the parties at length and minutely perused a copy of the appeal along with documents annexed thereto.

14. The CIS Regulations of 1999 were implemented on the basis of recommendations of the Dave Committee so as to safeguard the interest of hapless investors hoping to earn huge profits by putting their life savings into schemes floated by various entities assuring the investors of exponentially high returns. Although it is true that originally the CIS Regulations were introduced to regulate the agro and plantation industry when it was observed that a number of such companies were luring investors with false promises of windfall gains on investing in their schemes. However, the legislature decided to enlarge the scope of these Regulations to bring under their aegis all other schemes launched by entities in any field as long as they fell within the four corners of the definition of a CIS as provided by Section 11AA of the SEBI Act.

15. Before we deal with the merits of the case, we find it necessary to reproduce Sections 11AA and 12(1B) of the SEBI Act along with Regulations 3 and 73 of the CIS Regulations.

Securities and Exchange Board of India Act, 1992 :-

"11AA. (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which,-

(i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day to day control over the management and operation of the scheme or arrangement.

(3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement-

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;

(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);

(v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 1956);

(vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under section 620A of the Companies Act, 1956 (1 of 1956);

(vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982 (40 of 1982);

(viii) under which contributions made are in the nature of subscription to a mutual fund;

shall not be a collective investment scheme."

"12(1B) No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations :

Provided *that any person sponsoring or causing to be sponsored, carrying or causing to be carried on any venture capital funds or collective investment schemes operating in the securities market immediately before the commencement of the Securities Laws (Amendment) Act, 1995, for which no certificate of registration was required prior to such commencement, may continue to operate till such time regulations are made under clause (d) of sub-section (2) of section 30.*

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this section, a collective investment scheme or mutual fund shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a component of investment besides the component of insurance issued by an insurer.]

(2) Every application for registration shall be in such manner and on payment of such fees as may be determined by regulations.

(3) The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations :

Provided *that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard."*

CIS Regulations :

"3. No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme."

"73. (1) An existing collective investment scheme which:

- *(a) has failed to make an application for registration to the Board; or*
- *(b) has not been granted provisional registration by the Board; or*
- *(c) having obtained provisional registration fails to comply with the provisions of regulation 71;*

shall wind up the existing scheme.

(2) The existing Collective Investment Scheme to be wound up under sub-regulation (1) shall send an information memorandum to the investors who have subscribed to the schemes, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the scheme, the amount repayable to each investor and the manner in which such amount if determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the scheme.

(4) The Board may specify such other disclosures to be made in the information memorandum, as it deems fit.

(5) The information memorandum shall be sent to the investors within one week from the date of the information memorandum.

(6) The information memorandum shall explicitly state that investors desirous of continuing with the scheme shall have to give a positive consent within one month from the date of the information memorandum to continue with the scheme.

(7) The investors who give positive consent under sub-regulation (6), shall continue with the scheme at their risk and responsibility :

***Provided** that if the positive consent to continue with the scheme, is received from only twenty-five per cent or less of the total number of existing investors, the scheme shall be wound up.*

(8) The payment to the investors, shall be made within three months of the date of the information memorandum.

(9) On completion of the winding up, the existing collective investment scheme shall file with the Board such reports, as may be specified by the Board."

16. We see from the provisions reproduced above that Section 11AA lays down the conditions which need to be satisfied before any scheme or arrangement launched by a particular company can be called a CIS, viz., the money collected from investors should be pooled and then utilized as a whole for the purposes of the scheme, the investors should have contributed their money with the objective of deriving profits in any form, whether "income, produce or property", the entire working and operation of the scheme is managed by the concerned company on behalf of the investors, and the investors have no modicum of control over daily activities with respect to the arrangement in question. Section 12(1B) of the SEBI Act, 1992 succinctly provides that all persons intending to float any scheme or arrangement in the nature of a CIS, shall do so only after obtaining a certificate of registration

from SEBI. Further, Regulation 3 of the CIS Regulations, states that only a Collective Investment Management Company shall sponsor CISs. Regulation 73 provides for the winding up of an existing scheme in certain cases viz., failure to make an application for registration to SEBI; refusal of SEBI to grant provisional registration or failure to comply with the provisions of Regulation 71, once provisional registration is obtained from SEBI. Finally, Regulation 74 provides that in case a company carrying on business in the nature of a CIS does not wish to obtain provisional registration with the SEBI, it may devise a scheme of repayment of money collected from investors in accordance with the CIS Regulations.

17. At this stage it would be pertinent to note a submission, regarding the interpretation of said Regulation 73, by Mr. Kapur, the learned senior counsel appearing for the Appellants, that it applies 'only' to CISs which were in existence in the year 1999 when the CIS Regulations were legally enforced by publication in the Official Gazette. We have thoroughly pondered over this submission and even revisited the CIS Regulations to unearth their true import. And we note that the CIS Regulations in question were promulgated by the Government of India to protect the interests of lacs of gullible investors who are prompted to invest in such schemes by advertisement, publicity etc. Therefore, we are of the considered opinion that a wider interpretation, which is in tune with the underlying purpose envisaged by the said Regulations, has to be adopted. We, therefore, hold that Regulation 73 is applicable to all the CISs which were existing at the time when the CIS Regulations were introduced, as also to the CISs which may have been launched at any point in time thereafter. The tentacles and reach of Regulations 73, thus, cover a vast expanse of the corporate world and SEBI has jurisdiction over all such CISs

which do or do not conform to the requirements of registration etc. laid down in the said Regulations irrespective of the date of launch of a scheme which according to SEBI has all the trappings of a CIS, and this conclusion has been reached by the Respondent in accordance with law and in the facts and circumstances of the case.

18. Now, the issue before us, i.e., whether or not the business carried on by the Appellants is in the nature of CIS, is not res-integra anymore in the light of the Hon'ble Supreme Court judgment in the case of PGF Ltd. vs. Union of India and Ors. At this stage, it is pertinent to reproduce certain paragraphs of the Hon'ble Supreme Court's judgment which expertly deal with the basic ingredients of a CIS:-

> *"51. A conspectus consideration of the scheme of development of the land purchased by the customers at the instance of the PGF Limited and the promised development under the agreement disclose that there was wholesale uncertainty in the transactions to the disadvantage of the investor' concerned. The above factors and the factors, which weighed with the Division Bench in this respect definitely disclose that PGF Limited under the guise of sale and development of agricultural land in units of 150 sq. yrds. i.e. 1350 sq. ft. and its multiples offered to develop the land by planting plant, trees etc., and thereby the customers were assured of a high amount of appreciation in the value of the land after its development and attracted by such anticipated appreciation in land value, which is nothing but a return to be acquired by the customers after making the purchase of the land based on the development assured by the PGF Limited, part with their monies in the fond hope that such a promise would be fulfilled after successful development of the bits of land purchased by them."*
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> *"52. The above conclusion of ours can be culled out from the sample documents placed by the appellants before the Court. The appellants, however, failed to supply any material till date to demonstrate as to how and in what manner any of the lands said to have been sold to its customers were developed and thereby any of the customer was or would be benefited by such development. It is imperative that the transaction of the PGF Limited vis-a-vis its customers has necessarily to be examined as to its genuineness by subjecting itself to the statutory requirement of registration with the second respondent followed by its monitoring under the regulations framed by the second respondent. All the above factors disclose*

that the activity of sale and development of agricultural land propounded by the PGF Limited based on the terms contained in the application and the agreement signed by the customers is nothing but a scheme/arrangement. Apart from the sale consideration, which is hardly 1/3rd of the amount collected from the customers, the remaining 2/3rd is pooled by the PGF Limited for the so called development/improvement of the land sold in multiples of units to different customers. Such pooled funds and the units of lands are part of such scheme/arrangement under the guise of development of land. It is quite apparent that the customers who were attracted by such schemes/arrangement invested their monies by way of contribution with the fond hope that the various promises of the PGF Limited that the development of the land pooled together would entail high amount of profits in the sense that the value of developed land would get appreciated to an enormous extent and thereby the customer would be greatly benefited monetarily at the time of its sale at a later point of time. It is needless to state that as per the agreement between the customer and the PGF Limited, it is the responsibility of the PGF Limited to carry out the developmental activity in the land and thereby the PGF Limited undertook to manage the scheme/arrangement on behalf of the customers. Having regard to the location of the lands sold in units to the customers, which are located in different states while the customers are stated to be from different parts of the country it is well-neigh possible for the customers to have day to day control over the management and operation of the scheme/arrangement. In these circumstances, the conclusion of the Division Bench in holding that the nature of activity of the PGF Limited under the guise of sale and development of agricultural land did fall under the definition of collective investment scheme under Section 2(ba) read along with Section 11AA of the SEBI Act was perfectly justified and hence, we do not find any flaw in the said conclusion."

"53. We, therefore, hold that Section 11AA of the SEBI Act is constitutionally valid. We also hold that the activity of the PGF Limited, namely, the sale and development of agricultural land squarely falls within the definition of collective investment scheme under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act and consequently the order of the second respondent dated 06.12.2002 is perfectly justified and there is no scope to interfere with the same. In the light of our above conclusions, the PGF Limited has to comply with the directions contained in last paragraph of the order of the second respondent dated 06.12.2002. We also hold that while ensuring compliance of the order dated 06.12.2002, the second respondent shall also examine the claim of the PGF Limited that it had stopped its joint venture scheme as from 01.02.2000 is correct or not by holding necessary inspection, enquiry and investigation of the premises of the PGF Limited in its registered office or any of its other offices wherever located and also examine the account books other records and based on such inspection, enquiry and investigation issue any further directions in

accordance with law. Whatever amount deposited by the PGF Limited pursuant to the interim orders of this Court relating to joint venture scheme shall be kept in deposit by the second respondent in an Interest Bearing Escrow Account of a Nationalized Bank. The second respondent shall also verify the records of the PGF Limited relating to the refund of deposits of the customers who invested in the joint venture schemes and ascertain the correctness of such claim and based on such verification in the event of any default noted, appropriate further action shall be taken against the PGF Limited for settlement of the monies payable to such of those investors who participated in any such joint venture schemes operated by the PGF Limited. It will also be open to the second respondent while carrying out the above said exercise to claim for any further payment to be made by the PGF Limited towards settlement of such claims of the participants of the joint venture schemes and charge interest for any delayed/defaulted payments. As far as the deposit made by the PGF Limited with the second respondent on the ground that the such amount could not be disbursed to any of the investors for any reason whatsoever the second respondent, based on the verification of the records of the PGF Limited, arrange for refund/disbursement of such amount back to the participants of the joint venture schemes with proportionate interest payable on that amount. The above directions are in addition to the directions made by the Division Bench of the High Court."

"54. Having noted the conduct of the PGF Limited in having perpetrated this litigation which we have found to be frivolous and vexatious in every respect, right from its initiation in the High Court by challenging the vires of Section 11AA of the SEBI Act without any substantive grounds and in that process prolonged this litigation for more than a decade and thereby provided scope for defrauding its customers who invested their hard earned money in the scheme of sale of land and its development and since we have found that the appellants had not approached the Court with clean hands and there being very many incongruities in its documents placed before the Court as well as suppression of various factors in respect of the so called development of agricultural land, we are of the view that even while dismissing the Civil Appeal, the PGF Limited should be mulcted with the exemplary costs. We also feel it appropriate to quote what Mahatma Gandhi and the great poet Rabindranath Tagore mentioned about the greediness of human being which are as under:

"Earth provides enough to satisfy every man's need, but not every man's greed.

-Mahatma Gandhi-

The greed of gain has no time or limit to its capaciousness. Its one object is to produce and consume. It has pity neither for beautiful nature nor for living human beings. It is ruthlessly ready without a

moment's hesitation to crush beauty and life out of them, molding them into money."

-Rabindranath Tagore-

"55. In this respect, it will be worthwhile to note what the PGF Limited disclosed before the second respondent in its letter dated 15.01.1998 alongwith the covering letter dated 20.05.2002. The details mentioned therein disclose that the total amount received by the PGF Limited under different schemes from 01.01.1997 to 31.12.1997 was approximately Rs.186.84 crores. Its paid up capital was stated to be Rs.94,90,000/-and it mobilized Rs.815.23 crores under joint venture schemes from 01.04.1996 to 30.06.2002. The future liabilities towards joint venture schemes was projected in a sum of Rs.655.41 crores. Total outstanding liabilities payable to investors under the old closed schemes as on 30.06.2002 was stated to be Rs.497 crores. As against the above, till 31.10.2002, the PGF Limited stated to have made a net payment of Rs.115.93 crores leaving the balance due in a sum of Rs.393.69 crores approximately. The above details have been noted by the second respondent while mentioning the submission of the PGF Limited in its order dated 06.12.2002. Thus, we are convinced that the PGF Limited deliberately did not furnish the amounts till this date what was collected from the customers who made their investments in the so-called venture of sale and development of agricultural lands. Therefore, it is explicit that the PGF Limited was playing a hide and seek not only before the second respondent, but was also taking the Courts for a ride. We have noted in more than one place in our order that inspite of our repeated asking the appellants did not come forward to disclose the details of any development it made in respect of the lands alleged to have been sold to its customers. There is also no valid reason for not disclosing the details before the court. As in one of its activities, namely, joint venture scheme alone, it had mobilized Rs.815.23 crores, it can be easily visualized that in its activities of sale and development of land such mobilization would have far exceeded several thousand crores. In such circumstances, the appeal is liable to be dismissed which may have costs."

19. In light of findings of the Hon'ble Supreme Court and the discussion above, we note that the features on the basis of which Mr. Kapur has attempted to distinguish the judgment in the case of P.G.F. Ltd., do not appear to be variables which ought to be taken into account while deciding whether or not the business of the Appellants is in fact in the nature of a CIS. On the contrary, we note that the scheme carried on by the Appellants, under the pretext of

being a real estate business, falls squarely within the parameters of the concept of a CIS as elucidated by the Hon'ble Supreme Court in its judgment and as dealt with above.

20. We note from the records that the contributions of the customers are quite evidently pooled together and then utilized for the purposes of the scheme carried on by the Appellants. The fact that neither the area nor the location of a particular plot of land being supposedly sold to the investor is mentioned in the 'Certificate of Property' provided for our perusal demonstrates that the money received from a particular investor is not utilized for the purchase and development of one particular plot, but for all the land owned by the Appellants in general. Even from the application form we observe that there is no space ear-marked therein with respect to specifics of the plot allotted to the investors. Further, the plot of land has all along been denoted as a 'proportionate undivided interest'. All of the above denotes that the business of the Appellants is not really in the nature of regular real estate.

21. On a minute perusal of the application form we note that the Appellants unequivocally assure the investors of high returns in the form of profits which may be immovable property. The following extract evidences the said finding:-

> *"AND WHEREAS the said COMPANY has undertaken certain development of the said land and has caused the same to be divided into several plots and has been carrying on diverse types and kinds of activities thereat, giving substantial yields and profits."*

22. The investors therefore seem to be contributing to the scheme with the clear view of receiving profits, whether in the form of returns or of property whose value increases owing to the developmental activities carried on by the

Appellants. At this stage it is pertinent to quote the Hon'ble Punjab and Haryana High Court, which held in the case of P.G.F. Ltd. v. Union of India that, *"when each customer / investor is a recipient of 'property' it is apparent that each customer / investor is admittedly a recipient of one of the benefits contemplated under Section 11AA(2)(ii), namely, 'property'"*. Further, we note that the 'Certificate of Property' which happens to be the only instrument held by the investor, states clearly that *"the Estimated value of the said undivided share after development is expected to be not less than Rs. (Rupees……..) on expiry of tenure under the said Agreement"*. This leads us to the indisputable conclusion that the scheme carried on by the Appellants involves investment by its customers with the hope of receiving profits at some future date. In that sense, we find that the 'Certificate of Property' is more in the nature of a certificate of investment. We further note that the said certificate falls completely within the scope of the definition of the terms "securities" as provided in Section 2(h) of SCRA which as amended by the Securities Laws (Amendment) Act, 2004, w.e.f. October 12, 2004, now includes units or <u>any other instrument</u> issued by any Collective Investment Scheme to the investors in such schemes. Therefore, the certificate issued to the investors readily falls within the meaning of the expression "securities".

23. Finally, we note that as in the case of P.G.F. Ltd., in the present case too, the property in question, the investment involved and the management thereof are all in the hands of the Appellants with the customers having no role to play whatsoever, since the scheme is operated by the Appellants on the customers' behalf. In this connection, we note that the Supervision Agreement executed between the Appellants and their customers states that during the period of development, although the customer may inspect the land, he would

so only after informing the company of such intention and after giving due notice to the Appellants. Further, the agreement in question also states that there shall be no interference of the investor as regards the working, management, control and supervision of the land in question in any manner. Further, the fact that a power of attorney giving an authorized representative of the Appellants the authority to execute documents and deeds on behalf of the customer is executed by all investors proves beyond a shred of doubt that the property along with the contribution received under the scheme is managed by the Appellants. The point which emanates from the aforesaid discussion is that the role of the customers is no more than that of hapless investors, standing and observing the show from the sidelines as it is run by the Appellants.

24. The above discussion of law and fact leads us to one in inescapable conclusion that the Appellants were / are under an obligation to apply for registration with the SEBI as per the requirements laid down in the CIS Regulations and the SEBI Act. In this connection, it is pertinent to note that in the interpretation of such regulatory measures, like the CIS Regulations in hand, the most important task is to determine the ‘pith and substance’ of the provisions concerned, i.e., their true and essential character. The whole scheme of CIS as enshrined in the SEBI Act, 1992 and the CIS Regulations, 1999 as already discussed hereinabove is the welfare of millions of innocent investors by duly protecting their interests. The legislative intent and idea of the Parliament as well as SEBI seem to bring more transparency to the affairs of various CISs by duly regulating the same. Closing or winding up such CISs is an extreme measure to be resorted to in rare cases of adamant companies who do not wish to abide by the CIS Regulations, in the matter of registration and other conditionalities laid down therein.

25. In light of the above, we have no hesitation in upholding the impugned order dated June 21, 2013 finding no legal infirmity with the same. Now, keeping in view the large number of investors involved, i.e., around one and a half million, and the long and tedious process of implementing the scheme of repayment involved which would entail a number of steps before money is finally received by the investors, including going through more than one and a half applications; ascertaining the amount / money to be paid in each and every case; disposing off the property; writing and dispatching cheques to the investors etc., we are inclined to grant them a longer period of time than that provided by SEBI. However, we feel that the time frame of five years sought by Appellants would be unnecessarily long, and in the facts and circumstances of the case, a period of eighteen months would duly suffice, with a rider that the Appellants shall submit a report to SEBI every six months giving accurate details regarding the progress made while executing the scheme of repayment in question. In case any eventuality arises in future for the Appellants to seek further extension of time to implement SEBI's order in question, the Appellants may approach SEBI for extension of time and SEBI will consider the same and pass appropriate order depending upon progress made by Appellants in respect of implementation of impugned order. To this extent, the impugned order dated June 21, 2013 stands modified. With the aforesaid directions the Appeal is, accordingly, dismissed. Misc. Application No. 67 of 2013 preferred by the Appellants also, therefore, stands disposed of. No costs.

Appeal No. 123 of 2013:-

26. It is a matter of record that a Show Cause Notice (SCN) dated November 21, 2012 was issued by the Respondent to the Appellants under Sections 11 and 11B of the SEBI Act, 1992 read with Regulation 65 of the Securities and Exchange Board of India (CISs) Regulations, 1999 requiring the

Appellants to show cause within 21 days as to why appropriate action should not be taken against them for violation of various provisions of the SEBI Act and the CIS Regulations enumerated in the SCN. It is evident from paragraph 21 of the said SCN that the Respondent SEBI itself had called upon the Appellants to avail of the consent process in terms of circulars dated April 20, 2007 and May 25, 2012, if they so desired. Accordingly, the Appellants preferred the consent application on June 11, 2012 which was returned by the Respondent by order dated June 18, 2013 without any consideration, whatsoever.

27. Mr. S. K. Kapur, learned senior counsel, submitted on behalf of the Appellants that the Respondent has no authority in law or under the two circulars to return the request of the Appellants without considering it as per the procedure established by law. In this context, it is argued that a consent application can be returned only on the grounds mentioned in Clauses 8 and 9 of circular dated May 25, 2012 for rectification and resubmission.

28. On the other hand, learned senior counsel for the Respondent, Mr. Rustomjee, submits that this appeal itself is not maintainable. Learned senior counsel submits that paragraph 21, as contained in SCN dated November 21, 2012 is a “standard form” clause and as such would not give a right to any person to get his matter resolved through the consent mechanism.

29. Having heard both the learned counsel for the parties at length, we are of the considered opinion that, in the facts and circumstances of the case, SEBI should not have returned the request of the Appellants made pursuant to paragraph 21 of the SCN and in accordance with the two circulars dated April

20, 2007 and May 25, 2012 issued by SEBI for a consent order un-ceremoniously. We appreciate that there was a time-frame prescribed by the Hon'ble High Court of Delhi to pass a final order in the matter on or before June 26, 2013, but the application for consent order in question was preferred by the Appellant before SEBI only on June 11, 2013 and a request was made by the Appellant on June 13, 2013 for adjournment of the hearing scheduled on June 15, 2013 before SEBI, which was turned down on June 13, 2013 itself. The Respondent, in all fairness, should have sought an extension of time to consider the consent application in accordance with law and in the alternative should have called upon the Appellants to do the needful. Without any such exercise having been undertaken by the Respondent, it is unreasonable on their part to simply return an application for a consent order by not processing the same and taking it to its logical conclusion in accordance with the procedure established by law. In case the consent application was to be decided in favour of the Appellants, the whole case would have been closed. And, in case the same was rejected, the parties would have been at liberty to have recourse to law, if so advised.

30. Lastly, Mr. Shiraz Rustomjee, learned senior counsel for the Respondent attempted to justify the action of the Respondent in returning the consent application, at the threshold itself, by fairly producing notings no.DRA1/ON/459/2013 dated June 13, 2013. However, this is neither a policy decision nor binding law. It does not have any legal force because of the simple reason that it is not in the form of a formal circular or guidelines which can be issued by the Respondent only as per law.

31. With reference to the said notings no.DRA1/ON/459/2013 dated June 13, 2013, it may further be noted that it deals with consent application from the Appellant in respect of show cause notice dated November 21, 2012 issued by SEBI under Section 11 and 11B of SEBI Act, 1992 and Regulation 65 of SEBI (CIS) Regulations, 1999.

32. In paragraph 1 of the note some deficiencies in consent application of the company have been pointed out for which consent application has been returned to the Appellant. Paragraph 2 deals with the SCN of SEBI containing allegations against the Appellants who are stated to be operating schemes in the nature of CISs without obtaining a certificate of registration from SEBI; and that the Appellants mobilized money from investors without registration with SEBI, in violation of Section 12(1B) of the SEBI Act and Regulation 3 of the CIS Regulations and seeking an explanation as to why directions under Section 11 and 11B of the SEBI Act read with Regulation 65 of the CIS Regulations, not be issued to the Appellants. Paragraph 3 of SEBI's note contains Regulation 73 of the CIS Regulations, which authorises SEBI to direct the Appellants in a given case to wind up a CIS scheme and refund money to investors within a specified period, in case any existing company operating a CIS has failed to make an application for registration. It is suggested in paragraph 3 of SEBI's note that "it may not be appropriate to consider applications (in respect of CIS violations) without the applicant(s) first making the refund to the investors, as mentioned in CIS Regulations. Only thereafter, if it may desire so, it can seek a settlement of enforcement proceedings. However, it appears in the present case that no such refunds have been made".

33. Thus, paragraph 2 speaks of allegations against the Appellants and also deals with directions to be issued to a company which has violated Section 12 (1B) of the SEBI Act and Regulation 3 of the CIS Regulations. While paragraph 3 deals with Regulation 73 of CIS Regulations regarding powers of SEBI to issue directions for violations of section 12(1B) of the SEBI Act and Regulation 73 of the CIS Regulations.

34. It is evident from the above said analysis that there is a clear contradiction in SEBI's note particularly in paragraphs 2 and 3 thereof in as much as allegations against the Appellants have been taken as confirmed violations and penalty specified, which cannot be done unless the alleged violations against Appellant are upheld, which has not happened in the present case.

35. Further, in paragraph 4 of SEBI's note, it is stated that recently SEBI had passed directions under the CIS Regulations in respect of certain companies situated in North-Eastern States, but it is not stated if it were under the consent mechanism or otherwise. Thereafter, SEBI has stated in paragraph 4 that during pendency of the consent application, SEBI shall keep in abeyance the enforcement proceedings in respect of which consent is sought, which delays disposal of enforcement proceedings. Here, it may be noted that the first part deals with non-enforcement during pendency of the consent application and the second part deals with delay in enforcement proceedings due to disposal of consent application. Here it may be stated that delay in disposal of the consent application may be due to SEBI or the Appellants' conduct, but delay in general cannot be held against the Appellants, when the consent procedure exists and the SCN specifically advises the parties to submit a consent application.

36. Next, paragraph 5 of the SEBI's note deals with consent application becoming non-consentable when investors rights are affected and paragraph 6 of SEBI's note also deals with the fact that violations of CIS Regulations may not necessarily be consentable. However there is big difference between companies against whom allegations exist and violations which have been proved. It may be repeated that SEBI has invited the application of consent in the SCN from the Appellants, which is why now they cannot say that CIS violations should not be covered under consent procedure.

37. The above so-called policy decisions of SEBI reflected in the said notings do not have a sound legal basis and fail to distinguish between allegations and clear violations and hence cannot be accepted.

38. Be that as it may, since we have already dismissed the Appellants' main appeal in respect of CIS by granting additional time to comply with SEBI's directions contained in the impugned order therein, we rest the matter here itself and dispose of the present appeal as above. Ordered accordingly. No costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

23.07.2013
Prepared and compared by:
msb