BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved On: 06.02.2015
Date of Decision : 13.03.2015

Appeal No. 331 of 2014

DLF Limited
DLF Centre, Sansad Marg,
New Delhi-110 001 …Appellant

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. Janak Dwarkadas, Senior Advocate with Mr. Gaurav Joshi, Senior Advocate, Mr. Vikram Nankani, Senior Advocate, Ms. Anannya Ghosh, Ms. Ritu Bhalla, Mr. Dhruv Dewan, Mr. Kostubh Devnani, with Mr. Rajbeer Sachdeva, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

Mr. B. M. Chatterjee, Senior Advocate with Mr. Pratik Malik, and Mr. Swarnangshu Shekhar, Advocates for the Complainant.

WITH

Appeal No. 392 of 2014

Mr. K. P. Singh
DLF Limited
DLF Centre, Sansad Marg,
New Delhi-110 001 …Appellant

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. J. J. Bhatt, Senior Advocate with Ms. Ritu Bhalla, Ms. Anannya Ghosh, Mr. Dhruv Dewan, and Mr. Kostubh Devnani, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

WITH
Appeal No. 393 of 2014

Mr. T.C. Goyal
DLF Limited
DLF Centre, Sansad Marg,
New Delhi-110 001 …Appellant

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. J. J. Bhatt, Senior Advocate with Ms. Ritu Bhalla, Ms. Anannya Ghosh, Mr. Dhruv Dewan, and Mr. Kostubh Devnani, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

WITH
Appeal No. 394 of 2014

Ms. Pia Singh
DLF Limited
DLF Centre, Sansad Marg,
New Delhi-110 001 …Appellant

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. J. J. Bhatt, Senior Advocate with Ms. Ritu Bhalla, Ms. Anannya Ghosh, Mr. Dhruv Dewan, and Mr. Kostubh Devnani, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

WITH

Appeal No. 395 of 2014

Mr. Rajiv Singh
DLF Limited
DLF Centre, Sansad Marg,
New Delhi-110 001 …Appellant

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. J. J. Bhatt, Senior Advocate with Ms. Ritu Bhalla, Ms. Anannya Ghosh, Mr. Dhruv Dewan, and Mr. Kostubh Devnani, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

WITH

Appeal No. 396 of 2014

Mr. Ramesh Sanka
1611B, Magnolia DLF Phase-V,
Gurgaon …Appellant

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. Gaurav Joshi, Senior Advocate with Ms. Ritu Bhalla, Ms. Anannya Ghosh, Mr. Dhruv Dewan, and Mr. Kostubh Devnani, Advocates i/b Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

AND

Appeal No. 415 of 2014

Kameshwar Swarup
S-08B, Windsor Court,
DLF City, Phase-IV,
Gurgaon- 122 009,
(Haryana) …Appellant

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. Dhaval Kothari, Advocate i/b J. Sagar Associates for the Appellant.

Mr. Rafique Dada, Senior Advocate, with Mrs. Poornima Advani, Advocate and Mr. Manish Chhangani and Mr. Anubhav Ghosh, Advocates i/b The Law Point for the Respondent.

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A.S. Lamba, Member

Per: Jog Singh (For Self & A. S. Lamba)

The appellant, namely, 'DLF Limited', has preferred the present appeal against the **Impugned Order** dated 10th October, 2014, passed by the Whole Time Member (the **WTM)** of the respondent. By the said common **Impugned Order,** the appellant company and six of its Directors along with the Chief Financial Officer (**CFO)** have been restrained from accessing the securities market and in addition to it, have also been prohibited from buying, selling and otherwise dealing in securities directly or indirectly for a period of three years. The **Impugned Order** has been passed pursuant to a Show Cause Notice (**'SCN')** dated 25th June, 2013. All these appeals have been heard together and Appeal No. 331/2014 (DLF Ltd. Vs. SEBI) has been taken as the lead case in which detailed and exhaustive arguments have been advanced and its decision shall govern the fate of connected seven appeals.

2. Antecedental facts leading to the issuance of the SCN as well as passing of the **Impugned Order** are relevant and hence succinctly narrated herein below:

3. The Appellant is a Public Limited Company, registered under the Companies Act, 1956, with effect from 4th July, 1963, at New Delhi. It is mainly engaged in the business of real estate development since then. For the purpose of consolidation of fragmented pieces of land into a bigger chunk for development, the Appellant floats many subsidiaries or associate-companies which are divested after achieving the business objective. The appellant intended to make a public issue of 1,75,00,000 (one crore, seventy five lac) Equity shares of Rs. 2/- each for cash at a price of Rs. 525/-

per equity share. With this objective in mind, the appellant approached various experts, including Auditors, Advocates and **Merchant Bankers** and with their advice and active involvement filed the first Draft Red Herring Prospectus (**first DRHP**) on 11.05.2006. On 31st August 2006, the first DRHP was withdrawn by the appellant and a second DRHP was filed by the appellant on 02.01.2007 with SEBI as per the then existing Disclosure and Investor Protection Guidelines, 2000 ('**the DIP Guidelines**'). Schedule-II in the Companies Act, 1956, read with these DIP Guidelines framed by Sebi prescribe exhaustive modalities and conditionalities for preparing and filing draft and final Prospectus, known as Offer Documents, with Sebi for its concurrence.

4. It is worthwhile to note that the appellant had three wholly owned subsidiaries namely – DLF Estate Developers Limited ('**DLF Estate**'); DLF Home Developers Limited **('DLF Home'**) and DLF Retail Developers Limited **('DLF Retail')** and many associate companies and/or subsidiaries mainly created for the purpose of consolidation of small pieces of land to be developed at a later stage**.** These three wholly owned subsidiaries, however, incorporated three more companies, namely – Sudipti Estates Private Limited ('**Sudipti')** and Felicite Builders and Constructions Private Limited ('**Felicite')** on 24.03.2006 whereas Shalika Estate Developers **('Shalika')** on 26.03.2006. Pertinently, on 29th and 30th of November, 2006, i.e., more than a month before the second DRHP was filed on 02.01.2007, DLF Estate, DLF Home and DLF Retail transferred their shares in Shalika to Felicite, while DLF Estate and DLF Home transferred their shares in Sudipti to Shalika. Furthermore, DLF Estate transferred its equity stake in Felicite to Mrs. Neeti Saxena; DLF Home to Mrs. Madhulika Basak and DLF Retail to Mrs. Padmaja Sanka, who happened to be the wives of DLF employees. This entire exercise led to Sudipti becoming the subsidiary of Shalika and Shalika becoming the subsidiary of Felicite, which finally became the holding-company of about 281 subsidiaries/associate companies.

5. At this stage, it is interesting to note that one Mr. Kimsuk Krishna Sinha

('KKS'), facilitated certain transactions between **'Sudipti'**, an associate company of the appellant as in October, 2006. Six independently registered sale deeds were executed between Sudipti as a Vendee and Shri Pramod Jain and M/s. Mahavir Global Coal Private Limited as the Vendors for purchasing a piece of land. All this was done with the good offices extended by KKS as the Conforming Vendor. As a consideration for this transaction, KKS received Rs. 34,27,31,188/- (Rupees :Thirty Four Crore, Twenty Seven Lac, Thirty One Thousand, One Hundred and Eighty Eight only) by way of cheque from Sudipti. This payment seems to be in addition to the sum of Rs. 6.34 crore paid by different cheques to the vendors separately by Sudipti. After acquiring the land in question, Sudipti entered into a Development agreement with DLF Commercial Project Corporation **('DCPC')** on 09.10.2006 whereby DCPC acquired the rights to substantially all the revenues from the development of the land, the exclusive right to develop as well as to control the use and disposition of land and the authority to transfer the title to the land.

6. KKS filed a criminal complaint on 26th March, 2007, mainly accusing Sudipti, its Directors and its authorized signatory of duping him of about Rs. 34 crore which he allegedly gave to Sudipti in cash and he got an FIR registered on 26th April, 2007, by naming one Mr. Pravin Kumar, who happened to be the nephew of the Chairman of the appellant and also its Key Managerial Employee **('KMP')**. In the said FIR, KKS claimed that he had made cash payment to Sudipti on the basis of an oral understanding that Sudipti would undertake joint development of properties with him and that Sudipti later reneged. The appellant was not a party to this complaint and hence the appellant came to know of the lodging of the complaint on 25th June, 2007.

7. On 29th March, 2007, the appellant's Merchant Bankers certified the accuracy and adequacy of the disclosures made in the Offer Documents as per the norms laid down by the respondent. It was, inter alia, certified that such disclosures made by the appellant were sufficient to enable prospective investors to make an informed

investment decision. Thereafter, the respondent, having applied its mind to the Offer Documents for a few months, finally issued a letter dated 7th May, 2007, to the following Merchant Bankers/Lead Managers – Kotak Mahindra Capital Company Limited, DSP Merrilynch Limited, CITI Group Global Markets India Private Limited, Duetsche Equities India Private Limited, ICICI Securities Limited, Lehman Brothers Securities Private Limited, UBs Securities India Private Limited and SBI Capital Market Limited, calling upon them to ensure that various changes, as prescribed by SEBI in its letter dated 7th May, 2007, must be incorporated before the RHP could be filed with the Stock Exchange/ROC. The respondent made exhaustive observations for making suitable modifications in the offer document in accordance with DIP Guidelines, 2000, read with 13 circulars issued by SEBI from time to time in this regard. The applicant complied with the observations and suggestions as reflected in the Respondent's letter dated 7th May, 2007, and thereafter, filed the RHP with the Registrar of Companies (**ROC**). The IPO was, accordingly, opened for public subscription between 11th to 14th June, 2007. Similarly, the final Prospectus was filed by the Appellant with the ROC on 18th June, 2007 and the shares of the Appellant were ultimately listed on BSE and NSE on 5th July, 2007.

8. In the meanwhile, the seeds of the present controversy appear to have been sown by KKS when the Respondent received a complaint dated 4th June, 2007 on 15th June, 2007, alleging that Sudipti, which was a sister concern of DLF Home and DLF Estate, had duped him of Rs. 34 Crore and that the Appellant was misguiding gullible investors by not following the law. KKS had also lodged an FIR with the Police on 26th April, 2007. Said complaint dated 4th June, 2007 of KKS was forwarded by the Respondent to the Appellant's Merchant Banker for appropriate action and the Merchant Banker, in turn, forwarded the said complaint to the Appellant on 25th June, 2007. The Appellant as well as the **Merchant Bankers** on 11th July, 2007 and 19th July, 2007, respectively replied to the Respondent to the effect that the complaint made by KKS was frivolous and hollow inasmuch as the three subsidiaries, i.e., Sudipti, Shalika and Felicite were not the subsidiaries of DLF

Home, DLF Estate and DLF Retail after 30th November, 2006, and hence, there was no question of erstwhile subsidiaries or associates being mentioned in the second and fresh DRHP filed with the Respondent on 2nd January, 2007. Similarly, the claim for payment of about Rs. 34 crore in cash by KKS to Sudipti was also vehemently denied. Being dissatisfied, KKS approached the Hon'ble Delhi High Court by way of Writ Petition (C) No. 7976 of 2007 on 29th October, 2007, seeking a mandamus to the Respondent to investigate his complaint. Learned Single Judge of the Hon'ble Delhi High Court, allowed the said Writ Petition by its order dated 9th April, 2010. The operative portion of the said order is reproduced herein below for the sake of convenience :

> "26. Accordingly, a direction is issued to the SEBI to undertake an investigation into the aforementioned complaints made by the Petitioner and also the averments made in the affidavits and additional affidavits filed by the Petitioner in the instant case. The said inquiry will be undertaken in accordance with law by the SEBI and completed within a period of three months from today. The SEBI will communicate to the Petitioner a copy of report of investigation together with its decision thereon within a further period of two weeks thereafter. If it comes to a conclusion that any consequential action is to be taken the SEBI will do so without awaiting further directions.
>
> 27. It is clarified that this Court has not pronounced on the merits of the contentions of the parties. The SEBI will proceed in the matter independent of any observations that may have been made by this Court in its previous orders or this order. It will be open to any of the parties, if aggrieved by the decision of the SEBI to seek appropriate remedies that are available to them in law.
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> 28.The petition and the pending applications are disposed of."

However, the appellant as well as the Respondent, both filed Letters Patent Appeals before the Division Bench of Delhi High Court which was initially pleased to stay the said order of Learned Single Bench by its order dated 21st July, 2011 and finally issued the following directions :

> "In view of the aforesaid, the order passed by the learned single Judge is set aside in entirety, SEBI shall examine the complaints and take a decision and communicate it to the parties. Needless to emphasize, SEBI, if so advised in law, can always call for documents. We hope and trust, the SEBI shall act with utmost objectivity regard being had to the law in the field and without being influenced by the counter-affidavit filed by it in the writ petition. The decision shall be taken after hearing the parties within a period of three months from the date of receipt of the order passed today. It needs no special emphasis to mention that we have not expressed any opinion, even remotely, on the merits of the case. The appeals are accordingly disposed of without any

order as to costs."

9. In response to the above said directions dated 21st July, 2011, the Whole Time Member **(1st WTM)** of the Respondent, namely – Mr. Prashant Sharan, heard the parties and by order dated 20th October, 2011, directed an investigation into the complaints of KKS in respect of the Appellant and Sudipti. The operative portion of this order reads as under :

> "16. In view of the foregoing, the following decision is taken in respect of the complaints dated June 4, 2007 and July, 19, 2007.
>
> I. The Securities and Exchange Board of India shall investigate into the allegations levelled by the Complainant, Mr. Kimsuk Krishna Sinha in respect of DLF Limited and Sudipti Estates Private Limited.
>
> II. The said investigation shall focus on the violations, if any, of the provisions of the erstwhile Securities and Exchange Board of India (Disclosure and Investors Protection) Guidelines, 2000 read with the relevant provisions of the Companies Act, 1956.
>
> 17. A formal order would be issued appointing the Investigating Authority. The said Officer shall investigate the matter without being prejudiced by any observations made herein above and shall complete the same as expeditiously as possible. If any violations are brought out in the investigation, the Securities and Exchange Board of India shall proceed in accordance with law.
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> As directed by the Honourable High Court of Delhi, vide the Order dated July 21, 2011, a copy of this decision shall be furnished to Mr. Kimsuk Krishna Sinha, DLF Limited and Sudipti Estates Private Limited."

10. The Writ Petition as well as LPA filed by the appellant against the Respondent's order dated 20th October, 2011, came to be dismissed by the Hon'ble High Court of Delhi on 3rd January, 2012 and 20th November, 2012, respectively. Thereafter, the Respondent issued the SCN dated 25th June, 2013, to the Appellant primarily alleging that the appellant had violated Clauses 6.2 (Material Information), 6.9.6.6 (Related Party Transaction), 6.10.2.3 (Regarding the subsidiaries), 6.11.1.2 (Information about outstanding litigation), 6.15.2 (Declaration) and 9.1 (Guidelines on advertisement) of the DIP Guidelines, 2000, read with Regulation 111 of Issue of Capital and Disclosure Requirement (ICDR) Regulations, 2009, further read with Sections 11, 12 A(a), (b) and (c) of SEBI Act, 1992, read with Regulations 3(a), (b), (c), (d), 4(1), 4(2) (f) and 4(2)(k) of the SEBI (Prohibition of Fraudulent and Unfair

Trade Practices) (**PFUTP)** relating to Securities Market Regulations, 2003, and called upon the Appellant to show cause as to why appropriate directions may not be issued against it under Sections 11(1), 11(4), 11A and 11B of the SEBI Act, 1992, read with Clause 17(1) of the DIP Guidelines, 2000, and Regulation 111 of the ICDR Regulations, 2009.

11. On receipt of the above said SCN, the appellant, by its letter dated 13th August, 2013, sought inspection of the files pertaining to its case, including the correspondence exchanged between the Respondent and the Appellant's **Merchant Bankers.** The Appellant filed its reply dated 1st November, 2013 to the SCN without getting complete inspection of documents, which were in the possession and custody of the Respondent. The Appellant was, however, afforded personal hearing on 4th December, 2013, and 15th January, 2014, and written submissions were also filed on 29th January, 2014, as per the direction of the '2nd WTM'. After a lapse of around nine months, the '2nd WTM' has passed the **Impugned Order** in question, which has led to the present appeal being preferred.

12. Before we deal with the respective contentions of the parties, it would be appropriate to take notice of a few factual developments, concerning the present dispute**,** which have taken place in the meanwhile**.** The FIR lodged by KKS on 26th April, 2007 was found to be false and meritless after thorough investigation into the allegations against the Appellant levelled by KKS. It was found by the Police that the allegation in the complaint against the Appellant was mainly advanced with a view to avoid liability to pay Short Term Capital Gains tax by KKS. Accordingly, the Police filed a Closure Report in the matter of such FIR before the Metropolitan Magistrate, who was pleased to dismiss the protest petition filed by KKS and to uphold the filing of the Closure Report by order dated 27th August, 2009. It appears that KKS has taken up the matter before the Appellate Authority and the same is pending.

13. Even while the proceedings before the Respondent against the Appellant were going on pursuant to SCN dated 25th June, 2013, KKS approached the Hon'ble High Court of Delhi once again by way of Writ Petition No. 3686/2014 levelling serious

allegations against the present Respondent to the effect that it was acting "hand in glove" with the appellant and seeking copies of various SCNs. The present Respondent appears to have filed a counter-affidavit on 10th September, 2014 vehemently opposing the Writ Petition by stating that the Petitioner, i.e., KKS "has abused the process of law besides wasting the time of the Court by indulging in such frivolous and unwarranted litigation."

14. Having, thus, completed the narration of factual events leading up to the present dispute, we now turn to the respective contentions raised by the parties before us.

15. Learned Senior Counsel, Shri Janak Dwarkadas, appearing for the appellant, submitted that the appellant, being in the business of real estate development since last many decades, is required to float associate companies or subsidiaries to acquire small parcels of land at a comparatively lower cost and once that has been done, the appellant starts the process of aggregation of land by consolidating such small pieces into a larger contiguous plot. There is no legal bar of any kind in adopting this business strategy on the basis of the rationale that lower the price of the land, the higher the profit to shareholders of the Appellant-Company. As regards the allegations in the SCN and findings in the **Impugned Order** against the appellant to the effect that the appellant failed to ensure that the Offer Documents contained all material informations which were true and adequate so as to enable the investors to make an informed investment decision and also the allegation that the Appellant actively and knowingly suppressed material information so as to mislead and defraud the Investors in the securities market in connection with the IPO, the Learned Sr. Counsel submits that there was no requirement to disclose Shalika, Sudipti and Felicite in the **second DRHP** since they were not subsidiaries/related parties at the relevant time. On the contrary, if these three companies were shown as subsidiaries, the same would have been a mis-statement in itself.

16. The Appellant further submits that under Sections 11, 11A and 11B of the SEBI Act, SEBI's power is purely remedial and preventive, not punitive. The **Impugned Order,** being primarily punitive in nature, has been passed in excess of SEBI's

jurisdiction. The Inquiry Officer erred in placing a restraint on the Appellant on an immediate basis when the alleged violations took place in the year 2007 without serving any public purpose. As far as materiality of information is concerned, it is stated that, as per clause 6.2 of the DIP Guidelines, materiality would be sufficient if the information, on being true and adequate, leads to an informed decision being made by the investors. In this context, it is contended that even if the Appellant had incorrectly shown the three companies as related parties, it would not have contributed in any way to the investors' decision. This is because the Appellant had accounted for its interest in Sudipti's land by delineating its sole development right on Sudipti's land in the Prospectus. The **Impugned Order** ignores and is also silent on the fact that investors have not come forward with any kind of grievance regarding any alleged wrong or inadequate disclosure in the Offer Documents. Neither has the Appellant benefitted in any way from the alleged inadequate disclosure nor has any loss been caused to the investors.

17. The fact that the miniscule parcel of land concerned was owned by Sudipti in name could not be considered material information when the pertinent information, namely – development rights in relation to it, had been supplied to the investors. The **Impugned Order** failed to note that the RHP was in the public domain from January to May, 2007 on the websites of stock exchanges, SEBI and that of the Appellant's **Merchant Bankers,** yet no investor complaint was received in relation to it. The proposition attempted to be built up by Shri Dwarkadas, in this regard is that the economic interest of the Appellant-Company in Sudipti's land through the acquisition of a bundle of rights in relation thereto had been duly disclosed by the Appellant in the Offer Documents. This could not have been challenged even if Shalika, Sudipti and Felicite were shown as subsidiaries/related parties of Appellant. The commercial and financial disclosure in the Offer Documents would not have undergone a change even if these companies were mentioned in the financial statement as subsidiaries/related parties. It is, thus, submitted by the Learned Sr. Counsel for appellant that showing Shalika, Sudipti and Felicite as subsidiaries/related parties in

the Offer Documents would have been incorrect since these companies had already ceased to be the subsidiaries/related parties of the Appellant-Company, and this fact had been duly verified by the Statutory Auditors. Therefore, the purported non-disclosure of these three companies was not material in the making of investment decisions by the prospective investors.

18. The Appellant submits that in calling the transfer of shares by DLF Estate, DLF Home and DLF Retail in Sudipti, Shalika and Felicite a 'sham' and 'a scheme of camouflaging', the Respondent has lost sight of the fact that none of these transfers suffers from any legal infirmity. On the contrary, these transfers convey a complete and valid legal title on the transferees. In such a situation when the act of transfer of shares is legally permissible, the Respondent cannot call such transfers a sham or camouflage. Another significant point urged on behalf of the Appellant-Company is that the divestment of interest of the Appellant with respect to the said three companies happened long before the Appellant applied for SEBI's permission to come out with the IPO by way of the Second DRHP.

19. Turning to another important limb of his arguments on the question of "Control" of the Board of Shalika, Sudipti and Felicite despite their disinvestment by the Appellant-Company, it is submitted by Shri Janak Dwarkadas that under the Companies Act, 1956, the test of "Control" is referable to the composition of the Board of Directors by controlling appointment thereto and removal therefrom and not otherwise. There is nothing in the **Impugned Order** to substantiate the allegation that the Appellant exercised any kind of control over Shalika, Sudipti and Felicite even after the transfer of shares was effectuated. This has been alleged purely on the basis that the employees of the Appellant's subsidiaries were on the boards of these three companies. The term "control" as envisaged in Section 4 of the Companies Act, 1956, does not include the meaning that SEBI is purporting to give to it. There are two tests provided in the Section, viz., (i) the controlling company should hold more than half of the share capital of the other, and (ii) the controlling company

should control the composition of the board of directors of the other company. It is the contention of the Appellant that purely on the basis of the fact that there was no change in the constitution of the Board of Directors of Shalika Sudipti and Felicite, the **Impugned Order** wrongly seeks to establish retention of control by the Appellant over the three companies in question.

20. It is also stated that the reliance on AS-23 and SAST Regulations is misplaced since neither of the two has any bearing on the present situation. The **Impugned Order** wrongly assumes that the purchase of shares of Sudipti by Shalika was funded by the sellers of the said shares, who were wholly owned subsidiaries of the Appellant. This is incorrectly presumed by relying on the proximity of making payments of the same amounts by DLF Home and DLF Estate to Shalika and the delay of 7 months in making payments for the share subscription in question. Similarly, the importance given to purchase of shareholding of Felicite by the wives of KMPs of DLF to prove that control was retained by DLF is uncalled for. As regards the share holding of Felicite by the spouses of certain employees and/or Key Managerial Personnel (KMP) of DLF, the Ld. Sr. Counsel has further submitted that the concept of KMP, as occurring in AS-18 (Clause 10.8), is different from that mentioned in Clause 6.9.5.8 of the DIP Guidelines. It is also submitted that the SCN commits an error in treating the spouses of shareholders of Felicite and the Directors of Felicite, Shalika and/or Sudipti as the KMPs of the Appellant. Advancing further his submission, it is submitted by the Ld. Sr. Counsel that such persons were not KMPs of DLF for the purpose of AS-18 but KMPs of DLF under clause 6.9.5 which is clearly disclosed by the Appellant in its financial statement for the relevant period and duly reflected in the Prospectus.

21. It is incorrect to say that shareholders of Felicite continued to hold shares only while their spouses remained in the employment of the Appellant. It is a matter of record that Mrs. Rima Hinduja continued to be a shareholder of Felicite even though her husband, namely – Saurabh Monga, ceased to be the employee of the Appellant Company. It is, therefore, contended on behalf of the Appellant that the respective

shareholding by wives was independent of their husbands' employment with the Appellant Company, even if in some cases the shareholders of Felicite became co-terminus with the employment of their respective spouses with the Appellant-Company. It is not barred by either Section 4 of the Companies Act, 1956, and/or AS-21, particularly, for determining the parent-subsidiary relationship. It is also denied by the Appellant that money to purchase shares of Felicite was funded by the respective husbands of transferees who were the KMPs of the Appellant-Company. In this connection, it is submitted that the spouses who ventured to invest in the shares of Felicite or other companies of the Appellant did it by employing funds available from the joint accounts they held with their husbands, and there cannot be any legal bar on such expenditure by the wife from out of any such joint account.

22. Further, referring to the allegations regarding the provisions of Clause 6.10.2.3 of the DIP Guidelines, it is submitted on behalf of the Appellant that the said Clause pertains to the disclosure with respect to the Financial Statement of the Issuer Company. In terms of Clause 6.10.2.1, a Prospectus is required to contain a report by the Auditors of the Issuer Company. In this connection, Shri Dwarkadas, Learned Sr. Counsel, has reiterated factual matrix to repel the Respondent's allegation that despite divestment of equity interest by DLF Estate, DLF Home and DLF Retail; Shalika, Sudipti and Felicite continued to be the subsidiaries of the Appellant because of the alleged control and, therefore, ought to have been disclosed in the Prospectus in terms of Clause 6.10.2.3 of the DIP Guidelines. It is further contended that the **Impugned Order** incorrectly infers that the Appellant violated Clause 6.9.6.6 of the DIP Guidelines by allegedly not disclosing related party transactions pertaining to Shalika, Sudipti and Felicite. However, there was no need to show these companies as related parties since a statement to that effect would have been incorrect as at the time the disclosures were made, the Appellant had already disassociated itself from these companies. As far as disclosures in general are concerned, the Appellant acted on the expert advice of prominent **Merchant Bankers**, Statutory Auditors and Lawyers who provided their expert advice on the Offer Documents and certified the information

provided therein as accurate.

23. Similarly, it is contended that the **Impugned Order** is wrong in holding that the Appellant contravened Clause 6.11.1.2 of the DIP Guidelines by not disclosing that there was an FIR registered by KKS against Sudipti. The appellant submits in this respect that the Respondent has refused to appreciate the fact that the Appellant was completely unaware of the FIR having been lodged against Sudipti at the time the Offer Documents were prepared. The FIR came to the knowledge of the Appellant on 25th June, 2007 when the complaint dated 4th June, 2007 was made available to the Appellant by the Respondent through **Merchant Bankers**. Further, Clause 6.11.1.1(e) of the DIP Guidelines requires disclosures of proceedings which are likely to affect the operation and finances of the Issuer Company. The FIR could not be construed as having any effect on the finances of the Appellant considering the fact that the FIR did not relate to the land owned by Sudipti over which the Appellant had sole development rights but some money-claim by KKS. Further, no competent court ever took cognizance of the FIR. The fact that the FIR was filed against Mr. Praveen Kumar, would be insufficient in law to impute his knowledge to that of the Appellant.

24. Furthermore, the **Impugned Order** is wrong in finding the Appellant guilty of violating the PFUTP Regulations and section 12A of the SEBI Act. The Respondent has failed to appreciate that the definition of "dealing in securities" does not encompass "buying, selling or subscribing pursuant to any issue of securities or agreeing to buy, sell or subscribe to any issue of any securities". And hence would not attract Regulations 3 and 4 of the Regulations. The respondent has erred in holding the Appellant guilty of contravention of the PFUTP Regulations, including "fraud", purely on the premise that the definition of "fraud" in the PFUTP Regulations is inclusive. The **Impugned Order** wrongly holds the Appellant guilty of contravention of Clause 9.1 of the DIP Guidelines. The Appellant submits that the order dated 21st July, 2011 passed by the Hon'ble Delhi High Court required SEBI to examine only the complaints made by KKS to the Respondent dated 4th June, 2007

and 19th July, 2007.

25. The Respondent has filed a detailed affidavit on 01.12.2014 before this Tribunal seeking to justify the impugned action. Shri Rafique Dada, Learned Senior Counsel, also advanced lengthy, strenuous and meaningful arguments in support thereof. It is mainly submitted by Shri Dada that the Impugned Order has been passed after taking a decision on a cumulative consideration of various factors. The three companies, namely – Shalika, Sudipti, and Felicite were still subsidiaries and in control of the Appellant within the meaning of Section 4(1)(a) of the Companies Act, 1956, read with Regulation 2(1)(c) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997 (i.e. Takeover Code). It is submitted by the Ld. Sr. Counsel that even after the transfer of the equity holding of these three companies, there was no change in the composition of the Board of Directors. These Directors were appointed by "DLF-Home", "DLF-Estate" and “DLF Retail” and they constituted employees, Directors and KMPs of the Appellant-Company.

26. Similarly, it is contended by Shri Dada that the registered office, the statutory auditors, and the authorized bank signatories of these three companies also remained the same. The three companies in question did not show any expenses on account of operation, cost of establishment, personnel, rent, electricity, etc. for the years 2006-2007 and 2007-2008. It is, therefore, presumed that the expenses for these companies were being absorbed/incurred by other entities.

27. It is further submitted that funds for acquiring the shares of Sudipti were also made available to Shalika, i.e., the acquirer by "DLF-Estate" and DLF Retail (i.e., the seller and the original share holder). "DLF-Estate", "DLF-Home" and DLF Retail had also made payment to the tune of Rs. 30,000/-, Rs. 30,000/- and Rs. 40,000/- respectively on 29th November, 2006 and 1st December, 2006. It is only after receipt of these payments that Shalika made a payment of Rs. 50,000/- each to "DLF-Home" and "DLF-Estate", which were encashed later on 20th December, 2006 and 3rd April, 2007 respectively. In this context Shri Rafique Dada, Ld. Sr. Counsel for the Respondent submits that no proof of payment of consideration by Felicite for the

purchase of Equity Shares of Shalika has been furnished by the Appellant. It is submitted that the Appellant has only stated that payment of equity shares of Shalika was made by Felicite through composite payments to "DLF-Home", viz. Rs. 24,80,000/-; DLF Retail viz. Rs. 10,20,000/- and "DLF-Estate" Rs. 24,80,000/- on 13th December, 2006, 8th December, 2006 and 7th December, 2006 respectively. It is argued by Shri Dada that the applicant did not provide any break up of amounts to show that the payment towards the purchase of shares of Shalika was a component of the composite payments made by Felicite.

28. Next, the Respondent contends that the equity share holding of Felicite, i.e., holding company of Shalika and Sudipti was bought by Mrs. Madhulika Basak, Mrs. Padmaja Sanka and Mrs. Niti Saxena, respectively, who happened to be the wives of Mr. Surojit Basak, Mr. Ramesh Sanka and Mr. Joy Saxena, working under the Appellant. It is also contended that the payments for this purchase of shares to Felicite were made by these housewives from the bank accounts held by them jointly with their respective husbands. Therefore, the three payments of Rs. 30,000/-, Rs. 40,000/- and Rs. 30,000/- were, in fact, made by Mr. Surojit Basak, Mr. Ramesh Sanka and Mr. Joy Saxena to "DLF-Home", DLF Retail and DFL Estate respectively as consideration for the equity shares of Felicite, and hence were all sham transactions.

29. Respondent further contends that even after the alleged transfer of control of Felicite to the three housewives, Felicite received a payment of Rs. 2,00,00,000/- vide 10 credit entries of Rs. 20,00,000/- each between 29th November, 2006 to 19th December, 2006, i.e., immediately post the transfer of equity share capital of Felicite to the housewives of the permanent employees/KMPs of the Appellant through accounts jointly held by the KMPs and their wives.

30. Further, the Respondent contends that the exact sum of Rs. 20,00,000/- each was received in the joint accounts from the individual bank accounts of the KMPs, where the said sum had been received by them by availing a personal loan of Rs. 20,00,000/- each from Kotak Mahindra Bank without furnishing of any apparent

collateral/security. A total of 2,00,000/- shares each was allotted to the three ladies and even after the transfer of complete shareholding on 30th November, 2006, and further subscription on 14th December, 2006, the shares of Felicite remained with the spouses of the employees, KMPs and Directors of the subsidiaries of the Appellant. The shares of Felicite were held by the wives of the KMPs till the time their husbands were the KMPs of the Appellant and were transferred at the time when their husbands ceased to be the KMPs of the Appellant. Respondent further contends that the personal loans taken by the KMPs were also repaid by them in November, 2009, and a pre-payment of the loan was only done by two KMPs at the time of ceasing of their status as KMPs.

31. A total of 281 companies out of 355 companies claimed to have been disassociated from the Appellant have ultimately become subsidiaries of the Felicite. It is, therefore, concluded by the Respondent that the three companies, Shalika, Sudipti and Felicite were still subsidiaries and in control of the Appellant within the terms of Section 4 (1)(a) of the Companies Act, 1956, and Regulation 2 (1)(c) of the SEBI (SAST) Regulation, 1997, read with couple of Accounting Standards. The case of the Respondent is that the transactions undertaken to show the purported transfer of the shareholding were sham transactions devised as a plan and scheme to show the disassociation of the Appellant with these three companies. The contention of the respondent is that as the three companies were clearly the subsidiaries and within the control of the Appellant, the Appellant was bound within the framework of the DIP Guidelines, 2000 to make necessary and appropriate disclosures in the offer documents submitted by it to the Respondent for the purpose of its IPO.

32. On the strength of the above submissions, Shri Dada, Ld. Sr. Counsel for the Respondent, submits that being entities controlled by the Appellant, the three companies were related parties in terms of AS-18 as the same were squarely covered by the definition of related party, related party transactions and significant influence as provided in the Accounting Standards. Shri Dada has drawn our attention towards the definitions of Related Party Transaction, Control, Significant Influence, etc. as

occurring in AS-18. Shri Dada has submitted that a joint reading of the aforesaid definitions would clearly show that the three companies were related parties of the Appellant within the terms of AS-18, as the Appellant had the ability to control and exercise significant influence on the three companies in the making of financial and/or operating decisions. The failure to make disclosures with regard to the related party transactions pertaining to the three companies is a clear violation of Clause 6.9.6.6 of the DIP Guidelines. As the three companies were the subsidiaries of the Appellant under Clause 6.10.2.3 of DIP Guidelines, 2000, the Appellant was bound to disclose the financial details of the subsidiaries in its Offer Documents and its failure to do so is a clear violation of DIP Guidelines.

33. Next, it is submitted by the Respondent that an FIR bearing No. 249/2007 had been registered by KKS on 26th April, 2007 against Sudipti, Mr. Pravin Kumar and others in relation to an alleged land dealing between him and Sudipti**.** The details pertaining to the registration of the FIR should have been clearly mentioned in the Offer Documents as the same would have reflected the position of Mr. Pravin Kumar as a Director and KMP of the subsidiaries of the Appellant. The Board of Directors of the Appellant was aware about the filing of the F.I.R. The conclusion with regard to the knowledge of the Board of Directors has been drawn by the Respondent on the basis that firstly, post the registration of FIR, Mr. Pravin Kumar was interrogated by the police in relation to the aforesaid FIR; secondly, that Mr. Pravin Kumar, was a Director in the subsidiaries of the Appellant and a KMP and representative of the Appellant's Board of Directors and thus he was duty bound to report the existence of this F.I.R. to the Board of Directors of the Appellant and thirdly, Mr. Pravin Kumar was also the nephew of the Chairman of the Appellant. It is further submitted by the Respondent that the Appellant has, by not disclosing the aforesaid F.I.R., violated Clause 6.11.1.2 read with Clause 6.2 of the DIP Guidelines, 2000. By not disclosing material information such as the holding-subsidiary relationship between the Appellant and the three companies and the disclosures like litigation, financial details and related party transactions of the subsidiaries in the Offer Documents, the

Appellant has concealed material information from prospective investors in the IPO and has violated Clause 9.1 of DIP Guidelines, 2000, and the Offer Document filed with such anomalies cannot be termed as a document containing fair and adequate disclosure with regard to material information.

34. Further, the certification of Directors/CEO/CFO certifying the genuineness of the disclosures in the Offer Documents is doubtful and, thus, they have also violated Clause 6.15.2 of the DIP Guidelines, 2000. It is also the contention of the Respondent that the active role and deliberate suppression of material information and facts in the Offer Documents with a view to mislead and defraud the investors in securities market in the matter of issuing shares to prospective investors makes it a fit case for invoking Section 12-A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations, 2003. The Respondent contends that the alleged plan to camouflage the association of the Appellant with the three subsidiaries through a series of sham transactions amounts to fraud. The Respondent, thus, alleges that the Appellant, in its Offer Documents, had failed to make disclosure on various counts like related party transactions, financial details of subsidiaries and outstanding litigation of subsidiaries thereby violating clauses 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 6.15.2 and 9.1 of the DIP Guidelines, 2000.

35. We have also heard Shri B.M. Chatterjee, Ld. Sr. Counsel on behalf of Shri KKS in Appeal No. 331/2014 pursuant to the directions of Hon'ble Supreme Court. Shri Chatterjee, Ld. Sr. Counsel, fairly adopted the arguments of Sebi in defending the impugned order. He, however, intended to file certain documents, which he had not brought to the notice of the Hon'ble Delhi High Court or the 1st WTM, who had offered KKS an opportunity of hearing. The contents of the impugned order reveal that Sebi itself has not paid any heed to the alleged claim of KKS regarding Rs. 34 crore qua Sudipti. This issue is otherwise also not pertaining to any of the alleged violations of Securities Laws, Regulations or Guidelines. Shri Chatterjee, Ld. Sr. Counsel for KKS produced 3 documents before us, firstly, summons dated 1st May, 2007 from the Police Station, Connaught Place, New Delhi to Mr. Praveen Kumar;

secondly, letter dated 2nd May, 2007, sent by Mr. Praveen Kumar to the Police seeking extension of time to appear before the Police and letter dated 26th May, 2007, issued by the Police to Mr. Praveen Kumar as a reminder. Through these letters Shri Chatterjee attempted to submit that DLF had the knowledge of FIR and its contents, therefore, this fact was liable to be disclosed in the Offer Documents. We have not allowed these documents to be brought on record, particularly, at the appellate stage. This would have enhanced the scope of the appeal at this belated stage of the incident after a lapse of about eight years. Similarly, KKS was duly granted an opportunity to appear before Sebi by the 1st WTM who ordered investigation pursuant to the direction of the Division Bench of Hon'ble Delhi High Court. It is a matter of record that KKS appeared through his Advocate before the 1st WTM but did not produce these documents before Sebi. This could have afforded an opportunity of rebuttal to the Appellant in tune with the principles of natural justice and fair play.

36. Shri Daval Kothari, Ld. Counsel for the Appellant in Appeal No. 415 of 2014 also fairly endorsed the arguments advanced by Shri Janak Dwarkadas, Ld. Sr. Counsel for the Appellant-Company and submitted that the appellant therein was Executive Director-Legal at the relevant time and had only provided his comments on the litigation section of the Offer Documents in his capacity as a person looking after litigation. Apart from the above he had no role to play in the structure of holdings of shares in subsidiaries or in the formation of a plan and process for an IPO. In the absence of any material to show that the Appellant was involved in the subject matter, as held in the case of Mr. G. S. Talwar, benefit of doubt ought to be extended to the Appellant in Appeal No. 415 of 2014.

37. Mr. J. J. Bhatt, Learned Counsel appearing on behalf of the Appellants also espoused the arguments advanced by Ld. Sr. Counsel for DLF in an effective and crisp manner and submitted that in the absence of any provision under the SEBI Act making the Directors/CFO automatically liable for the offences allegedly committed by the company, Sebi is not justified in passing the impugned order against the

Directors/CFO of DLF. In support of the above submission reliance is placed on the decisions of the Hon'ble Apex Court in the case of **Maksud Saiyed Vs. State of Gujarat & Others reported in 2008 (5) SCC 668; Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd. and Others reported in 2007 (5) SCC 388** and **Collector of Customs, Calcutta Vs. Tin Plate Co. of India Ltd. And Others reported in 1997 (10) SCC 538.** Reliance is also placed on decision of the Apex Court in **Sunil Bharti Mittal Vs. CEB (Criminal Appeal No. 34 of 2015 decided on 09/01/2015)** in support of the contention that liability for offending acts of a company can be foisted on its directors only when the applicable statute specifically provides for vicarious liability contained in the statute, there has to be a specific act attributable to a director so as to hold such director responsible for the offending acts committed by or on behalf of the company. Relying on a decision of the Hon'ble Apex Court in case of **Union of India Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. reported in 1969 (1) SCC 91** it is contended that the obligation of the directors is to sign the Offer Documents and once that obligation is discharged bonafide, directors cannot be held liable for any technical violation in the Offer Documents.

38. Shri Gaurav Joshi, Learned Sr. Counsel, appearing on behalf of Mr. Sanka, the Appellant in Appeal No. 396 of 2014 submitted that Mr. Sanka was a Key Managerial Employee of DLF and not a Key Management Personnel of DLF. Under Clause 6.9.5.8 of DIP Guidelines the lead Merchant Banker of the Issuer Company is required to give details of Key Management Personnel as more particularly set out therein. The said clause does not require the lead Merchant Banker to give details of the shareholding, if any, of the wives of Key Management Personnel. Clause 6.9.6 of DIP Guidelines deals with 'Promoters/Principal Shareholders' and clause 6.9.6.6 of the DIP Guidelines requires the lead Merchant Bankers to disclose in the prospectus the 'Related Party Transactions' as per financial statements. The financial statements are strictly drawn as per AS-18. Since Mr. Sanka was not a Promoter/Principal Shareholder, dealing in shares by Mr. Sanka's wife was not required to be disclosed.

Therefore, material information required to be disclosed being in fact disclosed, SEBI is not justified in holding that DLF and its directors are guilty of violating the norms laid down by Sebi. Moreover, the Impugned Order which is passed belatedly after 9 months of giving personal hearing, suffers from serious infirmities as already argued by Shri Janak Dwarkadas, Ld. Sr. Counsel, and deserves to be quashed and set aside in view of the judgment of the Hon'ble Apex Court in case of **Feroze Dotivala Vs. P. M. Wadhwani reported in 2003 (1) SCC 433** and **Anil Rai Vs. State of Bihar reported in 2001 (7) SCC 318.**

39. Upon hearing the learned counsel for the parties at length and perusing the pleadings, the provisions of law, the Rules, the Regulations, the Guidelines, the judgments cited by the parties and certain records submitted by Sebi after some reluctance, we note that after a few rounds of litigation before the Hon'ble Delhi High Court, mainly at the instance of KKS, the Division Bench of the Hon'ble High Court, by its order dated 21.07.2011, called upon Sebi to examine the complaints dated 4th June, 2007 and 19th July, 2007, preferred by KKS and take a decision after hearing the parties. Pursuant thereto, a WTM of Sebi, namely, Shri Prashant Sharan, **(1st WTM)** held certain hearings in the matter and after affording an opportunity of being heard to the parties and in the light of the directions of Hon'ble Division Bench of High Court, passed an order dated 20th October, 2011, directing an investigation to be conducted into the allegations levelled by KKS in respect of DLF and Sudipti, focusing on violations, if any, of the provisions of DIP Guidelines, 2000, read with relevant provisions of the Companies Act, 1956. The SCN dated 25th June, 2013 and the Impugned Order dated 10th October, 2014, passed by the "2nd WTM", Shri Rajiv Agarwal, however, expanded the scope of the enquiry by incorporating alleged the violation of the PFUTP Regulations by the Appellant which was conspicuously missing in the order passed by a Division Bench of Hon'ble High Court of Delhi and also in the order dated 20th October, 2011 passed by the "1st WTM".

40. The SCN dated 25th June, 2013, states that DLF, its Directors and its Chief

Financial Officer had "*.....employed a scheme of camouflaging the association of Sudipti with DLF as disassociation. The noticees have failed to ensure that the Offer Documents (i.e. RHP/Prospectus) contain all material information which is true and adequate, so as to enable the investors to make an informed investment decision in the issue. The noticees have actively and knowingly suppressed several material information and facts in the RHP/Prospectus leading to mis-statements in the RHP/Prospectus so as to mislead and defraud the investors in securities market in connection with the issue of securities of DLF."* The SCN, thus, alleges that DLF has violated Clauses 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 6.1.5.2 and 9.1 of SEBI (Disclosure and Investor Protection) Guidelines, 2000, **("DIP Guidelines, 2000")** read with Regulation 11 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, **("ICDR Rgulation, 2009")** read with Section 11 of SEBI Act, 1992 and also Sections 12-A(a), (b) and (c) of SEBI Act, 1992, read with Regulations 3(a), (b), (c), (d), 4(1), 4(2)(f) and 4(2)(k) of SEBI (Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 **("PFUTP Regulations, 2003")**. The Appellant was, thus, called upon to show cause as to why appropriate directions may not be issued against it under Section 11(1), 11(4), 11A and 11B of the SEBI Act, 1992, read with Clause 17.1 of the DIP Guidelines and Regulation 111 of the ICDR Regulations.

41. We have carefully gone through the Impugned Order and we find that the "2nd WTM" has himself crystalized the whole controversy in the form of following three issues, which, in turn, shaped the arguments advanced by the parties before us.

> (i)Whether the entire share transfer process in *Sudipti, Shalika and Felicite* was executed through sham transactions by DLF and they continued to be subsidiaries of DLF? And, if yes, whether the Noticees employed a scheme by camouflaging the association of Sudipti with DLF as disassociation.
>
> (ii)Whether the Noticees have failed to ensure that the RHP/Prospectus contained the material information which is true and adequate, so as to enable the investors to make an informed investment decision in the IPO of DLF? And
>
> (iii)Whether the Noticees actively and knowingly suppressed several material information and facts in the RHP/Prospectus so as to mislead and defraud the investors in the securities market in connection with the issue of shares of DLF?

42. Issue No. 1 mainly concerns with the allegation that the transaction of transfer of shares by Appellant in the three companies was not genuine and that the Appellant continued to control the same despite divestment. In paragraph 18(e) of the Impugned Order the "**2nd WTM"** has himself noted that on the date of filing of the second DRHP with Sebi, i.e., on 2nd January, 2007, as a result of the transfer of shares by the Appellant, the three companies, i.e., Shalika Sudipti and Felicite were no longer the subsidiaries of DLF. Therefore, the question to be considered, as regards Issue No. 1 enumerated herein-above, is the genuineness of the transactions leading to divestment of the three companies. The determination of this question will tell us whether DLF continued its control over these three companies post-divestment and if it is so, whether DLF violated Clause 6.10.2.3 of the DIP Guidelines, read with other clauses, by not disclosing the same in the "Offer Documents". This is the main allegation levelled against the Appellant as regards Issue No. 1. In order to decide Issue No. 1 against the Appellant, not only has the **"2nd WTM"** considered the concept of 'Control' as appearing in Section 4 of the Companies Act, 1956, but has also applied the definition of 'Control' as given in the Substantial Acquisition of Shares and Takeovers Regulations, 1997, **(SAST Regulations)** and Accounting Standard 23 (AS-23). In addition, the impugned order also takes into account factors such as the Directors of the three companies being employees of DLF/its subsidiaries and, therefore, subject to the control of DLF; the absence of change in the Registered Office (of) Statutory Auditor, of Authorized Signatory, etc.; and the incurring/absorbing of the operational costs of Sudipti and Shalika by some other entity; the funding of the purchase of shares of Sudipti by Shalika from DLF Estate and DLF Home, who were sellers of those shares; the receipt of funds by DLF-Estate, DLF-Home and DLF-Retail from Felicite; and the control of DLF through its KMPs over Felicite.

43. For the sake of convenience, we reproduce different definitions of "Control" which have been taken into consideration by the Respondent to bring home the allegation of 'Control' against the Appellant-Company in the Impugned Order:

Companies Act, 1956 :

4. Meaning of "Holding Company" and "Subsidiary"

(1) For the purposes of this Act, a company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another **if, but only if, -**

(a) that other controls the composition of its Board of directors ; or

(b) that other -

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company ;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital ; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

ILLUSTRATION

Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of clause (c) above, and so on.

(2) For the purposes of sub-section (1), the composition of a company's Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships ; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say -

(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid ;

(b) that a person's appointment thereto follows necessarily from his appointment as director [***] or manager of, or to any other office or employment in, that other company ; or

(c) [that the directorship is held by an individual nominated by that other company or a subsidiary thereof.]

"SAST Regulations, 1997 (i.e., the Takeover Code)

Regulation 2 (1)(c):- "Control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner."

Accounting Standard-23

Clause 3.3 :- "Control : (a) The ownership, directly or indirectly through subsidiary(ies), of more than one-half of the voting power of an enterprise; or

(b) control of the composition of the board of directors in the case of a company or of the composition of the corresponding governing body in case of any other enterprise so as to obtain economic benefits from its activities."

44. Proper appreciation of the scope of Clause 6.10.2.3 is vital for deciding Issue No. 1 and, therefore, we reproduce some preceding clauses too as appearing in the SEBI (Disclosure & Investor Protection) Guidelines, 2000.

Financial Statements :

6.10.1 Selected Consolidated Financial and Operating data.

6.10.2 Financial Information of the issuer company.

6.10.2.1 A report by the auditors of the issuer company with respect to:

(a) profits and losses and assets and liabilities, in accordance with clauses 6.10.2.2 or 6.10.2.3, as the case may require; and

(b) the rates of dividends, if any, paid by the issuer company in respect of each class of shares in the issuer company for each of the five financial years immediately preceding the issue of the Prospectus, giving particulars of each class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares for any of those years;

and, if no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of the Prospectus, containing a statement of that fact (and accompanied (Updated upto February 24, 2009) Page 79 of 370 by a statement of the accounts of the issuer company in respect of that part of the said period up to a date not earlier than six months of the date of issue of the Prospectus indicating the profit or loss for that period and the assets and liabilities position as at the end of that period together with a certificate from the auditors that such accounts have been examined and found correct by them. The said statement may indicate the nature of provision or adjustments made or are yet to be made).

6.10.2.2 If the issuer company has no subsidiaries, the report shall:

(a) so far as regards profits and losses, deal with the profits or losses of the issuer company (distinguishing items of a non- recurring nature) for each of the five financial years immediately preceding the issue of the Prospectus; and

(b) so far as regards assets and liabilities, deal with the assets and liabilities of the issuer company at the last date to which the accounts of the issuer company were made up.

6.10.2.3 If the issuer company has subsidiaries, the report shall:

(a) so far as regards profits and losses, deal separately with the issuer company's profits or losses as provided by 6.10.2.2 and in addition, deal

either:

(i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern the members of the issuer company; or

(ii) individually with the profits or losses of each subsidiary, so far as they concern the members of the issuer company; or, instead of dealing separately with the issuer company's profits or losses, deal as a whole with the profits or losses of the issuer company, and, so far as they concern the members of the issuer company, with the combined profits or losses of its subsidiaries; and

(b) so far as regards assets and liabilities, deal separately with the issuer company's assets and liabilities as provided by 6.10.2.2 and in addition, deal either:

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the issuer company's assets and liabilities; or

(ii) individually with the assets and liabilities of each subsidiaries; (Updated upto February 24, 2009) Page 80 of 370 and shall indicate as respects the assets and liabilities of the subsidiaries, the allowance to be made for persons other than the members of the issuer company."

45. At the outset, it is noted that the DIP Guidelines do not prescribe the definition of expression such as "Control", "Subsidiary" or an "Associate-Company". There are about 30 definitions in Clause 1.2.1 of DIP Guidelines and only the definition of "Company" is enshrined in Clause 1.2.1 (vii). This definition states that the word 'company' means "Company as defined in Section 3 of the Companies Act, 1956". The word 'subsidiary', though undefined, occurs in Regulation 6.10 thereof, which basically pertains to the disclosures with respect to the financial statements of the Issuer Company. Every Prospectus is required to contain a report by the statutory auditors of the company, including profit or losses of its subsidiary, if any. In this regard, the 2nd WTM has made a feeble attempt to draw an analogy between the concept of 'control' as appearing in Section 4 of the Companies Act, 1956, and the definition of 'Control' as occurring in the SAST Regulations, 1997. These SAST Regulations are commonly called the 'Takeover Code' and mainly deal with the takeover of one company by another and the merger as well as de-merger of companies. The present matter is, undoubtedly, not a case of take-over or merger and hence the reliance placed by the "2nd WTM" on the definition of control, occurring in the Takeover Code, 1997, appears to us to be misplaced. We have gone through the SAST Regulations and we note that the title of the Regulations itself is "(Substantial

Acquisition of Shares and Takeovers) Regulation." A simple perusal of these Regulations clearly shows that they have no application in the context of unlisted companies which propose to undertake an Initial Public Offering **(IPO)** since the purport and intent of the same is restricted to the context of takeovers, public offers and acquisition of shares in the listed companies. Therefore, reference made to the definition of 'Control' under the Takeover Code reflects a complete non-application of mind in this regard. This act of the Respondent to shop for clauses and provisions in different statutes, in an arbitrary manner, needs to be condemned. In fact, the pari materia principle ought to be invoked to promote uniformity and predictability in law in order to supplement and not supplant a rule of law by another.

46. Similarly, Accounting Standards are written/policy documents issued by expert accounting bodies, such as, the Institute of Chartered Accountants of India (ICAI), covering the aspects of recognition, measurement, treatment, presentation and disclosure of accounting transactions in the financial statements by the companies. The basic objective of the Accounting Standards is to standardize the diverse accounting policies and practices with a view to eliminate to the largest extent possible the non-comparability of financial statements and ultimately make them more reliable. Accounting Standards, like AS-18, AS-23, AS-24, give their own, and rather slightly different, definition of the expression "Control", possibly to suit the context in which the definition of "Control" is made to sit. Therefore, we do not see much logic in looking to the definition of "Control" as occurring in various Accounting Standards to bring home the allegation of control against the Appellant. If there is any lacuna in the DIP Guidelines, the same cannot be replenished by introduction of the definition of "control", which currently sits in AS-18, AS-23 and AS-24 in a different context altogether. DIP Guidelines are a piece of subordinate legislation authored by the Legislative Wing of Sebi. Hence, we would hope, at least binding on the adjudicatory wing of Sebi itself.

47. In fact, the Accounting Standards are generally issued by the ICAI and may or

may not be accepted by the Government. Under section 211 (3-A) of the Companies Act, 1956, the Accounting Standards have now been framed by the "National Advisory Committee on Accounting Standards" constituted by the Government of India under Section 210-A of the Companies Act. Twenty nine out of thirty-one Accounting Standards have been notified by the Government on 7th December, 2006 as "Companies (Accounting Standards) Rules, 2006". These Rules, inter alia, cover various areas such as Disclosure of Accounting Policies; Valuation of Inventories; Cash Flow Statement; Contingencies and events occurring after the balance sheet date; Net profit or loss for the period, Prior period items and change in accounting polices; Depreciation Accounting; Construction Contracts; Revenue Recognition; Accounting for Fixed Assets; Effects of changes in foreign rates; Accounting for Government Grants; Related Party Disclosure; Consolidated Financial Statements, Accounting for Investments in Associates in Consolidated Financial Statements; Discontinuing Operations; Intangible Assets; Impairment of Assets; Provisions, Contingent Liabilities and Contingent Assets, etc. Thus, the composite scheme of disclosure, as envisaged in the Accounting Standards, makes it abundantly clear that they are primarily to be followed by Auditors while certifying the profit and loss account and balance sheet, etc. of the companies in the financial statement of such companies. This is evident from the provisions of Section 227 of the Companies Act, 1956 as well. The Hon'ble Supreme Court in the case of **J. K. Industries Ltd. Vs. Union of India [2007 (13) SCC 673]** has held that these rules of 2006 are a legitimate aid to construction of the Companies Act as contemporanea expositio.

48. The present case is not one where the Statutory Auditors or Merchant Bankers, on whose shoulders lie the primary responsibility of making true and adequate disclosures, are sought to be proceeded against by the Respondent. The Appellant was bound by law to engage/hire their professional services for drafting and presenting the Offer Documents to Sebi for finalisation before the IPO could be actually opened up for public subscription after registering the same with the ROC. This is how the shares are finally listed on Stock Exchanges. In fact, Merchant Bankers and Auditors

are mandatorily required to be engaged by a company to prepare and present Offer Documents to Sebi. They discharge their respective functions in bringing out an IPO on behalf of a company under the parameters statutorily prescribed by the Respondent itself and in case of default, they are amenable to the jurisdiction of Sebi for action since the primary responsibility for true and adequate disclosure lies with them. In fact, Merchant Bankers are responsible for laying down the foundation of an IPO as per the DIP Guidelines, 2000. An IPO can be filed only through a Merchant Banker on whom an onus is cast to independently assess the capability of other intermediaries prior to recommending them to the Issuer company.

49. It has been held by this Tribunal in the case of **HSBC Securities (India) Pvt. Ltd. Vs. SEBI [Appeal No. 99/2007]** by its order dated 20th February, 2008 that it is the fundamental responsibility of the Merchant Bankers or a Lead Manager appointed from amongst the Merchant Bankers to ensure the truthfulness and adequacy of disclosures contained in the Offer Document. This onerous duty is cast upon the Merchant Bankers and becomes important for the protection of investors' interest by due disclosure by an Issuer Company because Sebi itself seeks to distance itself from the correctness of the disclosures in an IPO and perhaps rightly so. Therefore, in today's disclosure regime, the role of Merchant Bankers has become crucial. Merchant Bankers are also required to certify to the effect that disclosures in the Offer Documents are true, fair and adequate to enable the prospective investors to make an informed investment decision. The Merchant Bankers are registered under the regulations framed by Sebi in exercise of powers conferred upon it by Section 30 of the Sebi Act, 1992, with the previous approval of the Government. A Merchant Banker is, thus, a person who is directly concerned with the management of the IPO by acting as a Manager/Consultant/Advisor to the Issuer Company. It renders corporate advice before and after the issuance of the IPO. The Merchant Bankers are, thus, loaded with the obligation of ensuring compliance with the statutory requirement regarding disclosure because of their expertise in the securities market. They are expected to know the statutory requirements to be complied with in the

matters relating to public issue of shares, etc. Therefore, to our minds, their certification as to the true nature of the disclosures and their fairness and adequacy cannot normally be undermined and bypassed even by the Sebi unless there are strong reasons for doing so. Such reasons should emanate from the manifest exhibition of the incorrectness of the findings of the Accountants and Merchant Bankers, which can be done only by investigating the conclusions arrived at by these entities and the procedures undertaken by them in arriving at such conclusions. Records clearly reveal that the Appellant had engaged the professional and specialized services of 8 to 10 Merchant Bankers and Auditors of national and international repute to advice, draft and float the Offer Documents. None of them has been proceeded against by the Respondent. Auditors can be said to be akin to gatekeepers. If the conclusions reached by them are liable to be ignored in such a callous manner, without at first finding any fault with the Auditors'/ Merchant Bankers' conduct, one wonders whether any purpose is served by having the Offer Documents audited to begin with.

50. The Respondent, if convinced that the information in the second DRHP was, in any manner, inadequate or untrue, in all fairness should have called upon the Merchant Bankers to incorporate additional facts about the three companies in question, in the second DRHP dated 2nd January, 2007, when it directed them vide letter dated 7th May, 2007, to include several other facts in the Offer Document. The Respondent failed to do the needful at that stage even after brooding over the second DRHP from 2nd January, 2007 to 7th May, 2007. The Respondent could have, at the threshold, issued show cause notices to the Merchant Bankers, etc., as well, so as to hold a comprehensive enquiry. This has not been done for years together and there is no explanation from the Respondent for this indifferent attitude and inaction. It appears from the records that the Respondent did seek some clarification/explanation, etc. from the Merchant Bankers before issuing the show cause notice to the Appellant. The Merchant Bankers of the Appellant had duly certified the accuracy of the disclosures in the Offer Documents, confirming firstly, that the offer document forwarded to SEBI was in conformity with the documents, materials and papers

relevant to the Issue; secondly, that all the legal requirements connected with the said Issue as also the guidelines, instructions, etc. issued by SEBI, the government or any other competent authority in this behalf, were duly complied with; and thirdly, that the disclosures made in the DRHP were true, fair and adequate to enable the investors to make a well informed decision as to the investment in the proposed Issue. A copy of the correspondence, despite repeated requests by the Appellant, was not provided to the Appellant so as to enable it to effectively defend its case. This correspondence, undoubtedly, pertained to the Appellant's case and, as such, supplying copies of relevant correspondence or part thereof, would have added a certain degree of credibility and transparency to the matter, particularly when quite a long time had already elapsed between the date of filing of the second DRHP, i.e., 2nd January, 2007 and issuance of the SCN by the Respondent on 25th June, 2013.

51. Be that as it may. Let us now turn to the usage by the "2nd WTM" of the definition of "Control" as given in AS-23 and reproduced and relied upon in the impugned order in paragraph 19 thereof. "The 2nd WTM" has reproduced only clause 3.3 sub-clauses (a) and (b) which provide that – *(a) The ownership, directly or indirectly through subsidiary(ies) of more than one-half of the voting power of an enterprise; and (b) control of the composition of the board of directors in the case of a company or of the composition of the corresponding governing body in case of any other enterprise so as to obtain economic benefits from its activities.* The definition makes it clear that both the conditions need to be present for control to be established. However, before attempting to determine whether or not the two ingredients of the definition have been satisfied in this case, we first need to deal with whether the three companies concerned can even be considered as subsidiaries of the Appellant in the first place. Only once this crucial aspect is decided does the question of control arise. The fact of the matter is that once a policy decision had been taken by DLF to divest all of its subsidiaries, followed by actual divestment of its interest in about 281 companies, there was no occasion for the Appellant to mention the three companies, in question, as subsidiaries or associates as that would have been a patently false

statement on the part of the Appellant. And this factum was duly brought on record by the Appellant before Sebi. Another point to note is that hundreds of such so-called associates or subsidiaries sailing in the same boat were left untouched by Sebi.

52. Before holding that at the relevant time Shalika, Sudipti and Felicite were or were not the subsidiaries of the Appellant and that there was no control as defined in AS-23, one has to look into the Scheme of AS-23 and its real purport. We would like to make note of the fact that except the definition of 'Control', the "**2nd WTM"** has not looked at AS-23 in its totality, which deals with Accounting for Investments in Associates in Consolidated Financial Statements. Para 1 of AS-23 itself makes it abundantly clear that the standard should be applied in accounting for investments in associate companies in the preparation and presentation of consolidated financial statements by an investor. Pertinently enough, Para 1 of AS-23 does not talk of subsidiaries but of investments made by investors in an "associate company" which is defined in para 3.1 of AS-23 as an enterprise in which the investor has "significant influence" and which is neither a subsidiary nor a joint venture of the investor. "Significant influence" is defined in para 3.2 of AS-23 as ""the power" to participate in the financial and/or operating policy decisions of the investee but not control over those policies". Para 3.3 deals with the definition of 'Control' and para 3.4 mentions that a Subsidiary is an enterprise that is controlled by another enterprise known as the parent. Para 4 is important and it lays down a threshold for the determination of "significant influence". For the purpose of presumption of "significant influence" under AS-23, an investor should hold, directly or indirectly, through subsidiaries, 20% or more of the voting power of the investee.

53. At the risk of stating the obvious, "significant influence" does not amount to "control". It is clear from the above discussion that AS-23 is applicable only when an Investor has "significant influence" and not "control". So, even if an entity has 20% interest or more shares in the investee company, the relationship of parent and associate-company cannot be discerned. In any case, nothing is brought on record to

show that the Appellant-Company has more than 20% shares in the three companies in question, i.e., Shalika, Sudipti and Felicite. In the absence of a 20% shareholding, it has to be clearly demonstrated that there was in fact influence exerted by the supposed parent company over the supposed subsidiary. Nothing in the Impugned Order points towards any such influence being exerted. So there is clearly no existence of the component of "significant influence" in this case. Therefore, the "2nd WTM" has totally misdirected himself in applying the definition of 'Control' as sitting in AS-23 to establish the charge of 'Control' against the Appellant-Company.

54. Even otherwise, the scheme, as envisaged under AS-23 mainly pertains to accounting for investment in associates in the preparation and presentation of consolidated financial statements by an Investor and the definition of associate in para 3.1 excludes subsidiary of an enterprise. Therefore, AS-23 cannot have any application in the present case where the Respondent itself is contending that the three companies, i.e., Shalika, Sudipti and Felicite were the subsidiaries of the Appellant-Company. Therefore, the finding in the Impugned Order to the effect that despite transfer of shares by DLF-Estate, DLF-Home and DLF-Retail, the three companies, namely – Shalika, Sudipti and Felicite continued to be the subsidiaries of the Appellant-Company for the purpose of AS-23 and, hence, ought to have been disclosed, as required by Clause 6.10.2.3, etc. of the DIP Guidelines, has no legs to stand on.

55. Now, if we look at the scope of Clause 6.10.2.3 of DIP Guidelines under which the Appellant is alleged to have made disclosure of the subsidiaries because of the alleged control over them, we note that Cl. 6.10.2.3 finds place in Chapter VI of the DIP Guidelines which deals with "Contents of the Offer Document." Under this Chapter, Guideline 6.10 deals with "Financial Statement"; Clause 6.10.2 deals with "Financial Information of the Issuer Company" and Cl. 6.10.2.3 provides that if the Issuer Company has a subsidiary, the profits and losses should be separately dealt with in the Financial Statement with the Issuer Company's profits and losses. In

addition, the financial statement should also deal with the combined profits or losses of the subsidiary as a whole. The whole chapter emphasizes the disclosure of "material information" in the Prospectus which should be true and adequate to enable the investors to make an informed decision to invest or not to invest in the IPO. Thus, it is abundantly clear from a bare reading of Cl. 6.10.2.3 and its placement in the Disclosure Guidelines that it is relatable to the Financial Statement and the report to be prepared by the Auditors of the Issuer Company.

56. In addition, the point to be considered here is that the first DRHP dated 11th May, 2006 which was withdrawn on 11th August, 2006 did mention Shalika, Sudipti and Felicite as associate-companies of the Appellant. This is evident from the extract of the first DRHP annexed by the Appellant with Volume II of the appeal at page 283 to 289. This was withdrawn and the second DRHP was filed on 2nd July, 2007 along with the "Delta View" document clearly indicating all the differences between the second DRHP and the first DRHP. The names of Shalika, Sudipti and Felicite were boldly crossed out in the second DRHP as is reflected from a perusal of pages 559 to 566 of Volume-III of the appeal. The delta view, which forms part of the second DRHP, discloses this aspect in clear terms but no heed seems to have been paid by Sebi to the same. The second DRHP remained with Sebi and in the public domain at least for five months before Sebi could issue detailed and exhaustive observations running into more than 90 pages, to the Appellant to incorporate various changes in the Prospectus. The observations dated 7th May, 2007, issued by Sebi were mandatorily to be complied with by the Appellant. The observations also ex-facie show that Sebi had conducted a threadbare analysis of the second DRHP, running into only about 500 pages, and compared it with the first DRHP. If the appellant had any intention to withhold from Sebi or from the public the factum of Shalika, Sudipti and Felicite being subsidiaries, it would not have mentioned the same in the second DRHP altogether. But this was not the case and, on the contrary, this factual aspect was duly brought to the notice of Sebi by the Appellant. This was the right time for Sebi was to have called upon the Appellant and rather its Merchant Bankers in the

first instance to incorporate some more facts about Shalika, Sudipti and Felicite, if it felt that the relationship of the holding and the subsidiary company still persisted between them. This was not done for obscure reasons.

57. Sebi, therefore, cannot suddenly be allowed to take a somersault after seven years and come to a contrary view, particularly, at the instance of a complainant who had his own vested interest in the matter, and was not a share-holder of the Appellant or even an investor in the IPO or in the capital market in general. Once an informed and well considered decision has been arrived at by the Respondent, the threat of that decision being overturned, after a lapse of an inordinately long period, cannot be allowed to hover over the heads of companies, except in circumstances where favorable treatment meted out to an erring company has led to a glaring miscarriage of justice by exponentially harming interests of the investors concerned. In the present matter, no loss was caused to the investors by Sebi first allowing the IPO proceed as planned. The losses occurred only after Sebi passed the adverse Impugned Order. The findings as regards violation of clause 6.10.2.3 arrived at by 2nd WTM are faulty, irrational and hence cannot be sustained in the facts and circumstances of the present case.

58. Turning to the concept of "Control" as envisaged in Sections 4(1)(a) and 4(2) of the Companies Act, we note that a Company shall, subject to the provisions of sub-section 3, be deemed to be the subsidiary of another only if that other controls the composition of Board of Directors. Section 4(1) of the Companies Act provides that a company can be a subsidiary of another when: firstly; the latter holds more than half of the share capital of the former; or secondly; the latter controls composition of the board of directors of the former. Section 4 (2) provides that control can be said to exist if, and only if:- firstly; a person can be appointed/removed as a Director by the controlling entity without the consent or concurrence of any other person; or secondly; a person cannot be appointed as a Director without exercise of the power to appoint by the controlling entity; or, thirdly; a person's appointment as a Director

follows necessarily pursuant to his appointment to a position held by him in the controlling entity, or, fourthly; the person is nominated as a Director by the Controlling entity or its subsidiary. The composition of the Directors of a Company shall be deemed to be controlled by another company only if that other company exercises power at its sole discretion to appoint or remove the Directors of the other company. Therefore, the Appellant-Company, i.e., DLF, could be said to control the three companies, namely – Shalika, Sudipti and Felicite, only if it can be proved that DLF had exclusive power or sole discretion to appoint or remove the Directors of these three companies and not otherwise. Nothing is brought on record by the Respondent which could conclusively demonstrate that DLF had such unbridled discretion and that it ever attempted to appoint or remove any of the Directors of the three companies after their divestment. We find that the Impugned Order is full of incorrect inferences based on surmises, conjectures and some faint corroboration to support faulty and forced conclusions.

59. Furthermore, any attempt by DLF to remove the earlier Directors of the three companies in question post their divestment would have contravened the provisions of sub-section (2) of Section 4 of the Companies Act, 1956. Continuance of the earlier Board of Directors by an erstwhile subsidiary of a Holding-Company is an issue to be wholly addressed by such subsidiary or its share-holders and unless the erstwhile holding-company is shown to have exerted any sort of influence to keep unchanged the original Directors on the Board of the erstwhile subsidiaries or even remotely attempt to introduce its own nominees on the Board of such subsidiaries, the holding-company cannot be said to be exercise of control over the subsidiary despite transfer of total shares. Therefore, the finding in the Impugned Order that the Appellant-Company controlled the fate of the three companies in question, through originally appointed Directors, even post divestment, cannot withstand the scrutiny of law.

60. Facts and circumstances of the case, thus, lead to an irrefutable conclusion

that the two-pronged test laid down in, is not satisfied in the present case. The Appellant-Company did not hold more than half of the share capital of Shalika, Sudipti and Felicite post divestment. Once a legally sound divestment has taken place, which has been duly signed off by reputed Merchant Bankers and Auditors, such a divestment must be respected. As long as there is a provision of law which allows divestment of shares, such a divestment cannot be trifled with purely on the basis of hypothetical control issues. From November 29-30, 2006, neither was the Appellant-Company holding, directly or indirectly, any equity share capital in Felicite, Shalika and/or Sudipti nor was it enjoying any voting rights, directly or indirectly *qua* these three companies.

61. It is a matter of record that from November 29-30, 2006, the Appellant-Company did not have control over the composition of the Board of Directors of Shalika, Sudipti and Felicite as it had no powers to appoint/remove Directors in these three companies. There is also nothing to show that the shareholders of Shalika, Sudipti or Felicite could not appoint Directors without permission/approval by the Appellant-Company or that they wanted to appoint new Directors and the Appellant-Company prevented them in any manner from doing so. The SCN does not even level an allegation to this effect. In the absence of any charge in the SCN or cogent evidence on record in this regard, drawing help from trivial factors such as no change in address, auditors or delayed payments for purchase of shares and even funding by the sellers, etc., can hardly be countenanced. DLF has categorically submitted that 30% shares of Shalika were held by DLF-Estate, 30% by DLF-Home and 40% by DLF-Retail. These respective shares were sold by these three companies to Felicite on 31st November, 2006, and they received the payment of Rs. 24,80,000/-; 24,80,000/-; and Rs. 10,20,000/- respectively by way of cheques from Felicite on 7th December, 2006, 13th December, 2006 and 8th December, 2006. These were composite payments made by Felicite to these three companies and included the above said considerations of Rs. 30,000/- each in the case of DLF-Estate and DLF-Home and Rs. 40,000/- in case of DLF-Retail. There is no reason to disbelieve this

factual matrix of payment brought on record by the Appellant by way of affidavit duly annexing Statutory Auditors' certificate in respect thereof. If Sebi, at any time, thought this factum to be untrue, it could have very well asked DLF to produce account statement/ledger book entry to satisfy itself that the payment of Rs. 24,80,000/-; Rs. 24,80,000/-; and Rs. 10,20,000/- received by DLF-Estate, DLF-Home and DLF-Retail from Felicite also included the amounts payable by Felicite towards the consideration for purchasing 100% shares of Shalika. Even otherwise, these are not the criteria mentioned in the Companies Act, 1956 or the DIP Guidelines for determining control of a company over another. Once the challenged divestment went through, the Appellant stopped bothering itself with the goings-on in the three companies in question. It is ludicrous to try and find fault with the Appellant in a situation such as this, especially in the absence of any shred of evidence which points towards there being any modicum of control. In law, there are many situations in which a hypothetical situation is put forward to justify certain measures. Such a hypothesis, however, needs to be buttressed by evidence, even on the yardstick of preponderance of probability, which crystallizes the wrongdoing in a satisfactory and convincing manner before such a heavy penalty of being ousted from the market for three years can be levied.

62. We, therefore, find that none of the above ingredients, as culled out of Sections 4(1) and (2) of the Companies Act, 1956, is shown to have been fulfilled in the present case. It would be pertinent to note that the Hon'ble High Court of Kerala in ***M. Velayudhan Vs. Registrar of Companies [MANU/KE/0053/1978 ("Velayudhan")*** has held that the test of control over the composition of the Board of Directors of a company can only be reckoned by applying the conditions specified in Section 4(2) of the Companies Act, 1956. In this regard, the Hon'ble High Court held that :

> "10. .....The term "controls the composition of board of directors" <u>is to be read in accordance with and only in accordance with Sub-section (2) of Section 4 of the Act</u> and that Sub-section conceives of control if, but only if, the Company which claims control can appoint or remove holders of all or a

> majority of the directorship by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person...."

63. The ratio of ***Velayudhan*** was followed with approval by the Division Bench of the Hon'ble Allahabad High Court in ***Dr. Manmohan Sharma Vs. District Magistrate, Ghaziabad & Others [2011 (7) ADJ 781].*** A similar view was expressed by the Division Bench of the Hon'ble Delhi High Court in ***Oriental Industrial Investment Corporation Vs. Union of India [1981] 51 Comp Cas 487 (Del)*** after taking into consideration the enunciation given in Palmer's Company Law (Vol. I, P. 746, 22nd Edn.) in the following words :

> "(20) .....As regards the control of the composition of the board of directors, this requirement is established only if the holding company has the *independent* power to appoint or remove the holders of all or a majority of the directors and the Act states three circumstances in which the requisite power to appoint is considered to exist [S.4(2)]...."

64. Thus, the mere fact that the Directors on the Board of the three companies who might have been the employees of the Appellant-Company or its wholly owned subsidiaries were not removed by the share-holders of these three erstwhile subsidiaries would not lead to an inference of decisive control over the composition of the Board of such companies by the Appellant-Company. We, therefore, hold that the Appellant did not control either the composition of the Board of Directors of these three companies or in any manner attempt to appoint or remove the earlier Directors which was the task of the share-holders of the three erstwhile subsidiaries post the total divestment of shares. A holding company, after it has sold its 100% shares in a subsidiary, practically becomes functus-officio qua the management and control of the erstwhile subsidiary. The finding on Issue No. 1 in the Impugned Order is, thus, unsustainable in law and on fact. Indeed, it is also not the Respondent's case that various share transfers, as reflected in the SCN itself were not legally effectuated. It is a matter of record that all these transactions did convey a complete and legal title on the respective transferees, i.e., Shalika, Sudipti and Felicite. Therefore, once the share transfers are accepted as legally valid transactions, the Respondent could not have condemned such legally binding transactions as sham transactions or

camouflage. It is a matter of record that pursuant to a development agreement, the Appellant-Company secured a bundle of rights over Sudipti's land for development purposes. Therefore, there remained no substance except the title to such land akin to the useless husk that remains once the grains have been sieved. This was immaterial in the larger scheme of disclosure, as envisaged in the DIP Guidelines, 2000, for investors to take an informed decision. Nothing is said to have been gained by the Appellant-Company merely by the non-disclosure of Sudipti, Shalika and Felicite as subsidiaries in the Offer Documents.

65. In the case of **Commissioner of Income Tax Vs. Podar Cement Pvt. Ltd. reported at 1997 (5) SCC 482** the Hon'ble Supreme Court has recognized the concept of dual ownership over property. In this case, the assessee purchased four flats on Nepean Sea Road, Bombay. The possession of the flat was taken after payment of consideration and the flats were also let out to various persons. The legal title of the flats was, however, not conveyed to the assessee. In the circumstances, a question arose as to whether the assessee was liable under Section 22 of the Income Tax Act, 1961, to pay tax on account of income by renting out said four flats. The Hon'ble Supreme Court, after examining various judgments of different High Courts, held in para 55 that :

> "We are conscious of the settled position that under the common law owner means a person who has got valid title legally conveyed to him after complying with the requirements of law such as Transfer of Property Act, Registration Act, etc. But in the context of section 22 of the IT Act having regard to the ground realities and further having regard to the object of the IT Act, namely, 'to tax the income', we are of the view, that owner is a person who is entitled to receive income from the property in his own right."

66. In the abovesaid case of Podar Cement Pvt. Ltd. (supra), the Hon'ble Supreme Court approvingly cited Hon'ble Patna High Court's judgment in the case of **CIT Vs. Sahay Properties & Investment Co. (P) Ltd. reported in 1983 (144) ITR 357.** The relevant observations are reproduced herein below for the sake of convenience :

> "31. The Patna High Court has cited this Court's judgment in Jodha Mal's

case and also number of other judgments of the different High Courts. The High Court had also gone into the concept of "ownership" and referred to passages from G.W. Paton on Jurisprudence, Dias on Jurisprudence, Stroud's Judicial Dictionary and Pollock on Jurisprudence. We may use-fully extract certain passages from the judgment of the Patna High Court.

32. The learned Judges observed at page 361 :

> "The emphasis, therefore, in this statutory provision is that the tax under the Section is in respect of ownership. But this matter is not as simple as it looks. This leaves us to a more vexed question as to what is ownership. Should the assessment be made at the hands of the person who has the bare husk of the legal title or at the hands of the person who has the rights of an owner of a property in a practical sense? Enjoyment as an owner only in a practical sense can be attributed to the term "owner" in the context of this Section - a person who can exercise the rights of the owner and is entitled to the income from the property for his own benefit. It is well- settled, and learned counsel for either side were not at loggerheads, that the section cannot be so construed as to make it an instrument of oppression, to use the language of Hegde, J., in the case of Jodha Mal, (1971) 82 ITR 570 (SC)

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One of the most important of these powers is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use of handling of the thing.....But every owner does not possess all the rights set out above? - a particular owner's powers may be restricted by law or by an agreement he has made with another." (refer to G.W. Paton on Jurisprudence, 4th Edn., pp.517-18).

While dealing with the concept of possession and enumerating the illustrative cases and rules in this respect, Paton says at p.577 in cl.(x):

> "To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others:....."

xxx xxx xxx xxx xxx xxx

Thus the juristic principle from the view point of each one is to determine the true connotation of the term "owner" within the meaning of Section 22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately - a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realising the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here."

Thus, the concept of 'Dual Ownership' is not alien to law. By no stretch of the

imagination can it be said that the Appellant did not have the total development rights in respect of the piece of land (35 acres) in question belonging to Sudipti. The Appellant did not, in any manner, defraud or mislead the prospective investors. We, therefore, hold that the finding on Issue No. 1 in the Impugned Order is perverse and liable to be set aside.

67. Regarding the remaining two issues, the main plank of arguments advanced by Shri Rafiqueue Dada, Ld. Sr. Counsel, centers around violation of certain other provisions of DIP Guidelines, 2000 by the Appellant as regards the non-disclosure of the three companies, i.e., Sudipti, Shalika and Felicite, as its subsidiaries and the FIR lodged by KKS on 26th April, 2007, against Sudipti/Pravin Kumar with Delhi Police. It is, therefore, essential to broadly analyze the scheme of DIP Guidelines, 2000, so as to appreciate the philosophy underlying these Guidelines and the arguments advanced by the Ld. Sr. Counsel, Shri Rafique Dada.

68. The DIP Guidelines have been framed by SEBI under powers conferred by Section 11 of the SEBI Act, 1992, and not under section 30, which lays down due procedure to be followed by Sebi for framing proper Regulations, after seeking approval of the Government and after laying down the same before the Parliament. No introductory remarks, preamble or object and reasons are to be found in the said Guidelines which are divided into seventeen chapters and XXX schedules annexed therewith. **Chapter I** deals with preliminary aspects. Regulation 1.2.1 gives about 30 definitions, including the definition of Advertisement, Company, Issuer Company, Merchant Banker, Public Issue, etc. Regulation 1.3 provides that words and expressions used in the DIP Guidelines, but not defined, shall have the same meanings as has been assigned to them in the Companies Act, 1956, or Securities, Contract (Regulation) Act. As per Regulation 1.4, DIP Guidelines are, inter alia, applicable to all Public Issues to be brought out by any company. Further, the Prospectus shall also contain the information and statements specified in this Chapter

and shall as far as possible follow the order in which the requirements are listed in this Chapter and summarized in Schedule VII A.

68.1 **Chapter II** deals with Eligibility Norms for companies 'Issuing Securities'. Regulation 2.1.1 specifically provides that a company can float a Public Issue of Securities (IPO) only after submission of a Draft Prospectus with the SEBI through an eligible Merchant Banker, at least 21 days prior to the filing of Prospectus with the Registrar of Companies(ROC). If SEBI specifies any changes, the same shall have to be incorporated by the Issuer Company or the Lead Merchant Banker before filing the Prospectus with the ROC. Regulation 2.2 further deals with the conditions that an unlisted company may have to satisfy before making an IPO. **Chapter III** deals with Pricing by Companies Issuing Securities and **Chapter IV** deals with Promoters' Contribution and Lock-in Requirements. Regulation 4.1.1, inter alia, provides that promoters of an Unlisted Company, who wish to bring an IPO, shall have to contribute not less than 20% of the Post-Issue Capital. Regulation 4.11.1 provides that the lock-in period for Promoter's Contribution shall be at least a period of three years.

68.2 **Chapter V** deals with Pre-Issue Obligations and Regulation 5.1 mandates that the Lead Merchant Banker shall exercise due diligence by satisfying himself about all aspects of the **offering, veracity and adequacy of disclosure in the offer documents**. This liability of a Merchant Banker continues even after the completion of the issue process. In addition, the lead Merchant Banker is also required to pay few crores of rupees towards the requisite fee as mentioned in Regulation 24-A of the SEBI (Merchant Bankers) Rules and Regulations, 1992, along with the Draft Offer to SEBI for processing the same. Regulation 5.3.1 also requires a Memorandum of Understanding (MOU) to be entered into between the Lead Merchant Banker and the Issuer Company, specifying their mutual rights, liabilities and obligations relating to the issue. This MOU is also required to be submitted to SEBI. Similarly, a Merchant

Banker is required to furnish a 'Due Diligence' certificate to SEBI in the prescribed format and reflected in Schedule III along with the Draft Prospectus. There are other formalities which the lead Merchant Banker is required to perform in respect of the contents, etc. of the Offer Documents. Regulation 5.6 also provides that the Offer Document is to be made public by the lead Merchant Banker at least for a period of 21 days from the date of filing with the SEBI. Schedule III, inter alia, requires the lead Merchant Banker to submit a certificate stating that various documents, including those relating to litigations, like commercial disputes, patent disputes, disputes with collaborators, etc., and other materials, more particularly referred to in the annexure annexed to Schedule-III. It also provides that the disclosure made in the Draft Prospectus should be true, fair and adequate to enable the Investors to make a well informed decision as to the investment in the proposed issue. Regulation 5.8 deals with 'No Complaints Certificate', which is to be furnished by the lead Merchant Banker to the SEBI after a period of 21 days from the date the Draft Offer Document is made public.

68.3 **Chapter VI** is important and deals with the Contents of the Offer Document. Regulation 6.1 provides that in addition to the disclosure specified in Schedule-II of the Companies Act, 1956, a Prospectus shall also contain certain more disclosures. **In this regard, Regulation 6.2, which is one of the charges in the SCN, requires that the Prospectus shall contain all material information which shall be true and adequate so as to enable the investors to make an informed decision on the investment in the issue**. It also provides that the Prospectus shall comply with various requirements as summarized in Schedule VII-A attached with the DIP Guidelines. Schedule VII-A minutely prescribes innumerable disclosures and the order in which they are supposed to be presented in the Prospectus. **Regulation 6.4.2.2** specifically provides various details to be mentioned on the front outside cover page of the Prospectus, including various aspects relating to the risks in relation to the first issue; general risks to the effect that investors must rely on their own examination of the details of the Issuer Company as may be contained in the Offer

Documents before taking an investment decision. Similarly, it should be made clear on the front page itself that SEBI has not recommended or approved the securities in question and that SEBI does not guarantee the accuracy or adequacy of the Offer Document. Similarly, there has to be a mention of the Issuer's Absolute Responsibility to the effect that the Offer Document contains all information with regard to the Issuer Company and the Issue which is material in the context of the issue. Said information should be true and correct and/or not misleading in any material respect. Similarly, **Regulation 6.7.1** provides that risk factors, other than those mentioned in Regulation 6.4.2.2 (a) (iv), (v) and (vi) shall be printed in clear readable font. The shall factor shall be determined on the basis of their materiality which, in turn, shall be decided taking into various factors mentioned in 6.7.4.1, 2, 3 and so on. **Regulation 6.9** deals with the details of the Issuer Company and requires the company to give its Industry as well as Business Overview. **Regulation 6.9.2.3** deals with the details of 'Property' or 'Purchase of Property'. **Regulation 6.9.5** is an important clause and has many sub-clauses. It deals with management and includes composition of the Board of Directors and the details and interest of Directors, Managing Director, Whole Time Directors, etc. **Regulation 6.9.5.8** deals with 'Key Management Personnel' and requires a paragraph on the "Key Managerial Personnel" to be incorporated in the Prospectus with full details. Sub-para (e) of Regulation 6.9.5.8 provides that any change, except by way of retirement, in the 'Key Senior Managerial Personnel' particularly in-charge of **Production, Planning, Finance and Marketing** shall also be disclosed in the Prospectus. Similarly, a Lead Merchant Banker is also required to verify and ensure that these Personnel are permanent employees of the **Issuer Company. Regulation 6.9.6** requires various details of Promoters/Share-holders to be given in the Prospectus.

68.4 **Regulation 6.9.6.6** deals with "Related party transactions as per the Financial Statements". Regulation 6.10 deals with financial statements and Regulation 6.10.2.1 requires a report by the Auditor of the Issuer Company with

respect to the profits and losses, etc. to be submitted. Regulation 6.10.2.2 provides for the disclosures which are required to be made by the Issuer Company if it has no subsidiary. In case the Issuer Company has subsidiaries, Regulation 6.10.2.3 comes into play and requires the manner in which they should be disclosed. This is also one of the charges in the SCN regarding violation of "DIP Guidelines." The next important **Regulation** is **6.11.1.1** which requires an Issuer Company to disclose about the outstanding litigations. There are various sub-clauses which provide the nature of litigation which could have a materially adverse effect on the position of the Issuer Company and hence are liable to be disclosed. But the main charge in the SCN relates to the violation of Regulation 6.11.1.2 which requires disclosure of the information regarding the outstanding litigations as per Clause 6.11.1.1(e) to be furnished in respect of the subsidiaries of the Issuer Company, if applicable. Regulation 6.12.4 deals with a 'Disclaimer Clause' to the effect that SEBI should not be deemed or construed to have cleared or approved the submission of Offer Document as regards the disclosures contained therein. Further, **Regulation 6.15.2** which deals with declaration provides that the Draft as well as final Prospectuses shall be approved by the Board of Directors of the Issuer Company and shall also be signed along with the Directors by the Managing Director, Chief Executive Officer and Chief Financial Officer of the Issuer Company. They are also required to certify the truthfulness and correctness of the Prospectuses.

68.5 **CHAPTER VI-A** deals with Issue of Indian Depository Receipts; **Chapter VII** deals with Post Issue Obligations.; **Chapter VIII** deals with Other Issue Requirements and **Chapter VIII-A** deals with the Green Shoe Option and have no bearing upon the issue involved in the case in hand. As such, the same are not being dealt with in any detail.

68.6 **Chapter IX** deals with guidelines on advertisement and only **Regulation 9.1** is pressed into service by the Respondent in the SCN and it states that an Issue advertisement shall be truthful, fair and clear and shall not contain any statement which is untrue or misleading.

68.7 **Chapter X** deals with guidelines for Issue of Debt Instruments; **Chapter XI** deals with guidelines on Book Building. **Chapter XII** deals with Guidelines for Issue of Capital by Designated Financial Institutions. **Chapter XII-A** deals with Shelf Prospectus. **Chapter XIII** deals with Guidelines for Preferential Issues; **Chapter XIII-A** deals with Guidelines for Qualified Institutions Placement; **Chapter XIV** deals with Guidelines for Over the Counter Exchange of India Issues; **Chapter XV** deals with guidelines for Bonus Issues and **Chapter XVI** deals with Operational Guidelines, none of which find any place in the SCN.

68.8 **Chapter XVII** which deals with 'Miscellaneous' aspects, inter alia, provides for directions which could be issued in case of a violation of the DIP Guidelines by SEBI in the interest of the Securities Market as well as those of Investors. SEBI is, inter alia, empowered to direct the persons concerned to refund any money collected under an Issue with or without interest. Similarly, persons concerned can be directed not to access the market for a particular period. Any other direction which SEBI may deem fit in the facts and circumstances can also be imposed after affording a reasonable opportunity of being heard to the persons concerned.

69. A perusal of the SCN as well as impugned order reveals that the Appellant is alleged to have violated only clauses 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 6.15.2 and 9.1 of the DIP Guidelines. The said clauses, as occurring in DIP Guidelines, are reproduced herein below for the sake of convenience :

> **Clause 6.2** - "The Prospectus shall contain all material information which shall be true and adequate so as to enable the investors to make informed decision on the investments in the issue."
>
> **Clause 6.9.6.6** - "Related party transactions as per the Financial Statements"
>
> **Clause 6.10.2.3 -** "If the issuer company has subsidiaries, the report shall:
>
> (a) so far as regards profits and losses, deal separately with the issuer company's profits or losses as provided by 6.10.2.2 and in addition, deal either:
>
> (i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern the members of the issuer company; or
>
> (ii) individually with the profits or losses of each subsidiary, so far as they concern the members of the issuer company;

or, instead of dealing separately with the issuer company's profits or losses, deal as a whole with the profits or losses of the issuer company, and, so far as they concern the members of the issuer company, with the combined profits or losses of its subsidiaries; and

(b) so far as regards assets and liabilities, deal separately with the issuer company's assets and liabilities as provided by 6.10.2.2 and in addition, deal either:

(i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the issuer company's assets and liabilities; or

(ii) individually with the assets and liabilities of each subsidiaries;

and shall indicate as respects the assets and liabilities of the subsidiaries, the allowance to be made for persons other than the members of the issuer company."

Clause 6.11.1.2 - "The information about outstanding litigations as per clause 6.11.1.1 (e) shall be furnished in respect of subsidiaries of the issuer company (if applicable)."

Clause 6.15.2 - "Declaration - (a) The draft Prospectus (in case of issues other than fast track issues), red herring Prospectus and Prospectus shall be approved by the Board of Directors of the issuer and shall be signed by all Directors, the Chief Executive Officer, i.e., the Managing Director or Manager within the meaning of the Companies Act, 1956 and the Chief Financial Officer, i.e., the whole-time Finance Director or any other person heading the finance function and discharging that function.

(b) The signatories shall further certify that all disclosures made in the Prospectus are true and correct.)"

Clause 9.1 - "Guidelines on advertisement : 9.1.0 - An issue advertisement shall be truthful, fair and clear and shall not contain any statement which is untrue or misleading."

69.1 It is a matter of record that the DIP Guidelines, 2000 have since been rescinded and replaced by ICDR Regulations, 2009. However, regulation 111, which is in the nature of repeal and savings clause, is also reproduced herein below :

"Repeal and Savings.

111. (1) On and from the commencement of these regulations, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 shall stand rescinded.

(2) Notwithstanding such rescission: (a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;

> (b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

69.2 The foregoing exercise undertaken to analyze the DIP Guidelines in question reveals that the Guidelines are in the nature of directives to be followed by the Companies intending to bring out an IPO in the capital market; and of-course, to bring about uniformity and transparency therein. The concept of materiality envisaged in the DIP Guidelines requires companies to disclose true and adequate information as regards their business affairs to enable a prudent and reasonable investor to take a well informed investment decision in an upcoming IPO.

70. The findings in the impugned order regarding violation of DIP Guidelines by the Appellant are mainly two-fold. Firstly, regarding the non-disclosure of FIR dated 26th April, 2007 and secondly, regarding the Related Party Transactions. The case of the Respondent is that Sudipti, being a subsidiary of DLF at the relevant point of time, the FIR dated 26th April, 2007, filed by KKS against Sudipti and Mr. Pravin Kumar should have been disclosed in the Offer Documents by the Appellant and its failure to do so amounts to contravention of clause 6.11.1.2 read with clause 6.11.1.1(e) of the DIP Guidelines. Both these regulations primarily require disclosure of outstanding litigations, default, etc., pertaining to matters which are likely to affect the operation and finances of the Issuer Company. Such litigations would also include disputed tax liabilities and prosecution under any enactment in respect of Schedule XIII of the Companies Act, 1956. Such a requirement of disclosing outstanding litigation is also cast upon the subsidiaries of the Issuer Company. A reading of the various ingredients of clause 6.11.1.2 read with clause 6.11.1.1(e) of the DIP Guidelines reveals that the mandate of law, regarding disclosure by an Issuer Company, has not been violated by the Appellant in any respect.

71. Although we have already held that Sudipti had ceased to be a subsidiary of the Appellant-Company as on the date of the IPO, assuming that it was still a subsidiary at the relevant point and that it was required to be disclosed in the Offer

Document, we have to now analyze whether there is any evidence on record to show that DLF itself had knowledge of the FIR and its contents on the date of filing of the DRHP or later on the date of the IPO. The Appellant has submitted that it came to know about the filing of FIR against Sudipti and Mr. Pravin Kumar only on 25th June, 2007 when it received a complaint of KKS dated 4th June, 2007 through its Merchant Bankers. In fact, SEBI itself appears to have received this complaint of KKS, which talks about lodging of an FIR dated 26th April, 2007 by him only on 15th June, 2007.

72. No evidence has been brought on record by Sebi to the effect that Appellant had the actual knowledge of the FIR or its contents prior to 25th June, 2007, during the course of the enquiry against the Appellant by allowing him an opportunity to respond to the same. The finding in the impugned order is based on a prima-facie inference drawn by the 1st WTM in its order dated 20th October, 2011 that the Appellant was aware of the filing of the FIR at the relevant time, i.e., prior to the closure of the issue on 14th June, 2007. The 2nd WTM seems to have relied verbatim on this prima-facie finding in holding the Appellant guilty of non-disclosure of the information regarding the FIR in the Offer Document. One prima-facie finding or inference by the 1st WTM and the second prima-facie finding by the 2nd WTM based on the prima-facie finding of the 1st WTM will not make it a case of conclusive proof of knowledge on the part of the Appellant of the FIR in question even if Mr. Pravin Kumar, who was named in the FIR happened to be a close relative of the Chairman of the Appellant-Company and even if he was on the board of Sudipti, etc. Unfortunately enough, we are not living in the Vedic ages, when the bonds between relatives were genuinely strong so that the knowledge of one could tantamount to the knowledge of another. Even in those times though, we highly doubt that such an assumption could be validly held. No evidence, whatsoever, was deemed to be summoned by the '2nd WTM' to ascertain the exact date on which Mr. Pravin Kumar was examined by the Police in respect of the FIR lodged by KKS against Sudipti.

73. Therefore, a half-hearted imputation of knowledge to the Appellant of the FIR in

question for proving violation of Clauses 6.11.1.2 read with 6.11.1.1(e) of DIP Guidelines is unacceptable to this Tribunal. The knowledge of Mr. Pravin Kumar about the registration of FIR against him and Sudipti, therefore, cannot be foisted on the Appellant on the basis of insufficient facts and evidence, particularly when the time of Mr. Pravin Kumar's examination by the police remained totally unexplained during the enquiry before the 2nd WTM as well as before this Tribunal.

74. Even otherwise, the Hon'ble Bombay High Court, in the case of ***Killick Nixon Ltd. & Others Vs. Dhanraj Mills Pvt. Ltd. & Others [MANU/MH/003/1981]*** has held that knowledge of the directors of a company cannot be construed to be the knowledge of the company itself. If the knowledge of the directors is not the knowledge of the company, then the knowledge of a relative of a director can certainly not be the knowledge of the company. The SCN made the conjecture that DLF knew of the FIR before the Issue closed without any factual basis.

75. Next, in this regard we note that the FIR in any case does not amount to litigation in law, because in the case of a criminal proceeding, a case can be said to be initiated only when a competent court takes cognizance of the offence alleged in the charge sheet and not on the mere filing of an FIR. Therefore, the mere registration of an FIR does not lead to the inference that a case is instituted, which would mean "litigation" for the purposes of Clause 6.11.1.1(e) of the DIP Guidelines. In the case of **Jamuna Singh & Ors. Vs. Bhadhai Shah, reported in [AIR (1964) SC 1541],** the Hon'ble Supreme Court held that the scope of right of appeal as enshrined under Section 417(3) of the Criminal Procedure Code was limited to cases instituted upon a complaint before the Magistrate and was not applicable to cases instituted in the Magistrate Court on a Police report. While doing so, the Hon'ble Supreme Court also considered the meaning of the words "institution of a case" and observed that although the Code does not contain any definition of the words "institution of a case", yet an examination of the various provisions of Cr.P.C. makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which

constitute such offence, a case is instituted in the Magistrate's Court. Such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report.

76. Similarly, in the case of **General Officer Commanding, Rashtriya Rifles vs. CBI & Anr. Reported in [(2012) 6 SCC 228], the** Hon'ble Supreme Court has once again analysed the expression "*institution of a case"* and observed that *the meaning of this term has to be ascertained taking into consideration the scheme of the Act / statute applicable. The expression may mean filing / presentation or received or entertained by the Court. The question does arise as to whether it simply means mere presentation / filing or something further where application of the mind of the Court is to be applied for passing an order.* After considering this issue, the Hon'ble Supreme Court in paragraph 41 of the judgment has specifically noted that "thus, in view of the above, it is evident that the expression "institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, it means taking cognizance as per the provisions contained in Cr.P.C."

77. In view of the above discussion of law and fact, we have no hesitation in holding that the particular FIR in question cannot be termed to be one which would affect the operation and finances of the Appellant-Company because the development rights of the Appellant over Sudipti's land were not to be affected at all by the outcome of the said FIR. The pre-requisite for holding a company guilty of violation of Clause 6.11.1.1(e) of the DIP Guidelines is the kind of litigation which is likely to affect the operations and finances of the Issuer company. Therefore, the findings in this regard by the WTM are totally perverse because such an FIR which appears to have been filed for an individual's own interest and, particularly, for settling a claim of Rs. 34 crore cannot be said to have the propensity of jeopardizing the sole and exclusive development right acquired by the Appellant through DCPC so as to affect

its larger operations and finances of developing thousands of acres of land in the case in hand.

78. Lastly, in the context of the FIR dated 27th April, 2007 lodged by KKS, Shri Janak Dwarkadas, Ld. Sr. Counsel for the Appellant, submitted that the police on a thorough investigation found the complaint to be bogus and unacceptable. The motivating factor for preferring such FIR by KKS was to create a safe cover for not paying the short term gains tax which he had earned in the sale of land to M/s. Sudipti Estate Private Limited. It is argued that the police, therefore, submitted a cancellation/closure report before the Additional Chief Metropolitan Magistrate. Finally, the Magistrate accepted the closure report by way of a detailed order dated 27th August, 2009. It seems that KKS has taken up this matter to a higher forum in appeal. Be that as it may. We are not concerned with the alleged bogus or frivolous nature of an FIR, rather our focus is on the question whether the FIR should have been mentioned in the Offer Documents, and that issue has already been answered in favour of the Appellant herein above.

79. Secondly, we look into the argument advanced by Shri Rafique Dada, Ld. Sr. Counsel that a non-disclosure of the relationship with Shalika, Sudipti and Felicite due to the alleged control exercised by the Appellant as a result of the transfer being in the nature of Related Party transactions is material information and that it should have found a place in the Offer Documents. This allegation, being at the heart of the SCN as well as the Impugned Order, has been given our thoughtful consideration. Firstly, we would like to note that the only relevance of Shalika, Sudipti and Felicite for the purpose of disclosure in the Offer Documents and so also for the prospective investors was a parcel of land of about 35 acres held by Sudipti. A perusal of page 72 of the Prospectus clearly shows that the Appellant had fully, properly and fairly accounted for its interest in Sudipti's land in the Offer Document by detailing its sole development right on the piece of Sudipti's land in question. In fact, the Offer Document takes into account about 4575 acres out of 10,255 acres of the total land

reserves of the Appellant-Company over which the Appellant had sole developmental rights. Therefore, to allege that Shalika, Sudipti and Felicite were not mentioned in the Offer Documents is totally wrong.

80. As discussed herein above, the relationship of holding/subsidiary had come to an end on 29th/30th November, 2006 itself. There was no occasion for the Appellant to give a wrong picture in the Offer Documents. The required, true and adequate, in other words, material information, was available with the investors to make an informed decision to invest or not to invest in the IPO. Following disclosures in the Prospectus occurring at page 73 and 393 thereof are regarding the sole development rights of the Appellant, which are very relevant and are reproduced herein below :

> (i) "We acquire sole development rights pursuant to sole development agreements, under which the land owner grants us the right to develop the land for a fixed consideration. In addition, these agreements give us the right to substantially all the revenues from the development, and we would also have the authority to transfer the title to the land....." (**Ref. Page 73 of the Prospectus)**
>
> **(ii)** ".....In stocks we include the cost of land to which we own sole development rights. In respect of lands which we own sole development rights, we have all the benefits and rights in respect of the developments on such land, i.e., we have the exclusive right to develop as well as control its use and dispositions and should we develop plots on the whole or part of such land, we have the absolute right to sell the land to prospective purchasers on such terms and conditions as may be deemed fit and proper by us. Further, we are entitled to all the revenues from the development, including rent, net, in the case of a large number of our sole development agreements of a payment of Rs. 5 lac per acre to the grantor of the rights....." **(Ref. Page 393 of the Prospectus).**

81. The above disclosures cannot be termed as inadequate or untrue for the purpose of DIP Guidelines, particularly **Clause 6.2**, which requires that a Prospectus shall contain all material information which should be true and adequate so as to enable the investors to make an informed opinion as to the investment of the issue. We, therefore, see no force in the allegation in the SCN and finding in the Impugned Order that by transferring the shares of Felicite in favour of the three housewives, the Appellant sought to retain control over Shalika, Sudipti and Felicite. The materiality

envisaged in the DIP Guidelines relates to adequacy and not the arithmetic accuracy of material facts necessary for the purpose of formulating a complete opinion by prospective investors to invest or not to invest in the IPO. Disclosure in the larger scheme of DIP Guidelines, which is required to be made in the Offer Documents, is one which, if concealed, would have a devastating effect on the decision making process of the investors, and without which the investors could not have formed a rational and fair business decision of investment in the IPO. If sufficient and adequate material is brought on record through Offer Documents, the same cannot be said to be hit by the provisions of DIP Guidelines in view of the concept of "material information" and "truthfulness and adequacy" incorporated in the DIP Guidelines, 2000. Therefore, terming the transactions as 'sham transactions' in the present case for bringing them under the clutches of DIP Guidelines is totally misconceived and an exceptional amount of effort on part of the Respondent to bring home the charge of non-disclosure and violation of DIP Guidelines against the Appellant. 'Sham' means a deliberate and "intentional act" of misguiding certain people or even the court by camouflaging the parties' legal rights and obligations and giving them a misleading appearance, as has been held in **Snook Vs. London and West Riding Investment Ltd. reported in 1967 (2) QB 786.** Furthermore, this disclosure requirement, as prescribed in the Sebi Guidelines requiring the companies to make true and adequate disclosures in the Offer Documents is in aid of Schedule II of the Companies Act, 1956, which mainly provides for matters to be specified in the Prospectus and reports to be set out therein.

82. Indeed, post the execution of the development agreement between DCPC and the three companies; all benefits, advantages and privileges in Sudipti's land effectively stood transferred in favor of the Appellant. The three companies had no real economic or productive value, except the legal ownership over Sudipti's land. It was rightly argued by Shri Janak Dwarkadas, Ld. Sr. Counsel for the Appellant that divestment of these companies by the Appellant in favour of outsiders, who happened to be the wives of the Appellant's employees, was done, as a business strategy

because these companies were no longer commercially relevant to the Appellant. It seems logical that such transferees were less likely to thwart the effectuation of the terms and conditions of the development agreement, mitigating the completion risk which could be faced by the Appellant in the development agreement. Such a way of transfer of shares/divestment is perfectly acceptable, not being prohibited by any law, rule or regulation. Moreover, the Prospectus had detailed such risk inherent in the business of the Appellant in para 10 at page 110 of the Prospectus itself. Therefore, once the Appellant's economic interest on Sudipti's land through the acquisition of a bundle of rights in relation thereof had been duly disclosed in the Offer Documents, it is difficult to accept the Respondent's finding that the Appellant was obliged to disclose Shalika, Sudipti and Felicite as its subsidiaries. No additional commercial or financial disclosure in the Prospectus would have been required even if these companies were mentioned as subsidiaries/related parties, which in fact would have been incorrect.

83. We do not find any legal infirmity in purchasing equity stakes by the three women entrepreneurs by utilizing the funds from the joint accounts in question. It is trite law that joint account holders have equal rights to the money in the joint account and, hence, the three spouses cannot be condemned for utilizing the money from the joint accounts just by virtue of being housewives. No legal bar has been pointed out by the "2nd WTM" in any law debarring women entrepreneurs from utilizing the money from joint accounts held with their husbands for investment purposes. Similarly, loans were obtained from the bank legally by the three ladies and no concurrence of a third agency was required for this purpose.

84. Allegations regarding violation of **Cl. 6.10.2.3** have already been dealt with herein above, particularly in paras 44, 45 and 55 in the context of the definition of 'Accounting Standard-23' and it has been held that the allegation does not stand proved against the Appellant.

85. As regards the violation of **Clause 6.9.6.6** of the DIP Guidelines, it is alleged

that Shalika, Sudipti and Felicite were related parties of the Appellant in terms of Accounting Standard-18 **(AS-18)** and their non-disclosure violated the said clause. This is a vital allegation against the Appellant and has been sought to be proved by the "2nd WTM" in the impugned order in paragraphs 35 and 36 simply by observing that the Appellant had an ability to control, directly or indirectly, the three companies in question under AS-23. The appellant also allegedly had the ability to exercise 'significant influence' over the three companies within the meaning of AS-18. As such, the Appellant is held to be guilty of violation of Clause 6.9.6.6 of DIP Guidelines in a cursory manner without dealing satisfactorily with the relevant provisions of AS-18 or AS-23. Therefore, for ascertaining whether the Appellant had 'significant influence' over the three companies, we have to look at the scheme of AS-18 as a whole.

86. The objective of this Standard is to establish requirements for disclosure of – firstly, related party relationships; and secondly, transactions between a reporting enterprise and its related parties. The scope of the standard itself is limited by sub-paragraphs (a) to (e) of paragraph 3 of AS-18, which read as under :

> "(a) enterprises that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the reporting enterprise (this includes holding companies, subsidiaries and fellow subsidiaries);
>
> (b) associates and joint ventures of the reporting enterprise and the investing party or venturer in respect of which the reporting enterprise is an associate or a joint venture;Related Party Disclosures 273
>
> (c) individuals owning, directly or indirectly, an interest in the voting power of the reporting enterprise that gives them control or significant influence over the enterprise, and relatives of any such individual;
>
> (d) key management personnel and relatives of such personnel; and
>
> (e) enterprises over which any person described in (c) or (d) is able to exercise significant influence. This includes enterprises owned by directors or major shareholders of the reporting enterprise and enterprises that have a member of key management in common with the reporting enterprise."

87. **Paragraph 4** provides that certain entities shall not be deemed to be related

parties simply because the two companies have a Director in common. Exemption from compliance is also granted to a single customer, supplier, franchiser, distributor, providers of finance, trade unions, government departments, etc. The disclosure requirements envisaged in this Standard are not to be enforced in many other cases involving confidentiality, etc., which might have been specified by a statute or a regulator or similar other authorities. **Paragraph 10** of AS-18 is very important and provides the manner in which various terms such as related party transactions, control, significant influence, an associate-company, a relative, a subsidiary, etc. are to be understood for the purpose of this standard. Some of these definitions are relevant for the present purpose and are reproduced herein below :

> Related party - parties are considered to be related if at any time during the reporting period one party has the ability to control the other party or exercise significant influence over the other party in making financial and/or operating decisions.
>
> Related party transaction - a transfer of resources or obligations between related parties, regardless of whether or not a price is charged.
>
> Control – (a) ownership, directly or indirectly, of more than one half of the voting power of an enterprise, or
>
> (b) control of the composition of the board of directors in the case of a company or of the composition of the corresponding governing body in case of any other enterprise, or
>
> (c) a substantial interest in voting power and the power to Related Party Disclosures 275 direct, by statute or agreement, the financial and/or operating policies of the enterprise.
>
> Significant influence - participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies.
>
> An Associate - an enterprise in which an investing reporting party has significant influence and which is neither a subsidiary nor a joint venture of that party.
>
> Key management personnel - those persons who have the authority and responsibility for planning, directing and controlling the activities of the reporting enterprise.
>
> Relative – in relation to an individual, means the spouse, son, daughter, brother, sister, father and mother who may be expected to influence, or be influenced by, that individual in his/her dealings with the reporting enterprise.
>
> Holding company - a company having one or more subsidiaries.
>
> Subsidiary - a company:

(a) in which another company (the holding company) holds, either by itself and/or through one or more subsidiaries, more than one-half in nominal value of its equity share capital; or

(b) of which another company (the holding company) controls, either by itself and/or through one or more subsidiaries, the composition of its board of directors.

88. The issue, in this regard, which falls for our consideration is whether there was any reportable related party relationship between the Appellant and the three companies which would have mandated disclosure of the three companies as Related Party in the Financial Statement? We would like to analyze the issue in the context of the five-part test laid down in sub-para (a) to (e) of para 3 of AS-18. The requirement laid down in **sub-para (a)** talks of 'control' by a company over others. We have already held in great detail herein above that the Appellant did not have any control over the composition of the Board of Directors of Shalika, Sudipti and Felicite in terms of Section 4 of the Companies Act, 1956. In the said paragraphs we have already declined to accept the applicability of the concept of control occurring in AS-23. The test regarding control set out in para 3 (a) of AS-18 is also not met with. **Sub-para 3(b)** of AS-18 talks of associates and joint venture of the reporting enterprise. The whole show cause notice as well as impugned order are based on the allegation that the Appellant had control over subsidiaries and not over associate-companies. Therefore, sub-para 3(b) is not applicable in the instant case. Para 10.5 of AS-18 defines an 'associate' as an enterprise in which an investing reporting party has significant influence and which is neither a subsidiary nor a joint venture of that party. Similarly, 'significant influence' has been defined as participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies. In the entire show cause notice or the Impugned Order there is nothing to suggest that the Appellant was participating either in the financial or operating policies of Shalika, Sudipti and Felicite after the divestment of the shareholding by the Appellant. These three companies are also not stated to be joint ventures of the Appellant. Therefore, para 3 of AS-18 is not attracted in the given case.

89. Similarly, other tests provided in para 3(c) and 3(d) of AS-18 are also not

attracted because Shalika, Sudipti and Felicite are all corporate entities whereas sub-paragraphs 3(c) and 3(d) are referable to individuals only. Para 3(e) of AS-18 mainly centres around the ability of an entity to exercise significant influence over other enterprises and it also includes enterprises owned by directors or major share-holders of the reporting enterprise having a member of key management in common. We have already noted hereinabove that no individual or relative of the Appellant was in a position to exercise significant influence over Shalika, Sudipti and Felicite after divestment of the shares in question. In this connection, we also note that no KMP of the Appellant-Company had any influence over these three companies and the impugned order commits a grave error in this regard. As is evident from the Appellant's Financial Statements filed with the Offer Documents for the relevant period that such persons were not KMPs of the Appellant, for the purpose of AS-18 but Key Managerial Personnel of the Appellant, as per clause 6.9.5.8 of the DIP Guidelines and the same was duly disclosed in the Prospectus at pages 122 to 127 thereof under the title "Key Managerial employees."

90. There is a difference between the two categories, i.e., 'Key Managerial Personnel' as per Clause 6.9.5.8 of the DIP Guidelines on the one hand and the 'Key Management Personnel' of the Appellant, for the purpose of AS-18, who could exert significant influence over the three companies on the other. 'Key Management Personnel' under AS-18 is defined as those persons who have the authority and responsibility for planning, directing and controlling the activities of the reporting enterprise. For example, in the case of a company, the managing director(s), whole time director(s), manager and any person in accordance with whose directions or instructions the board of directors of the company is accustomed to act, are usually considered key management personnel; whereas, 'Key Managerial Personnel' under the DIP Guidelines simply lays down the requirement that "a paragraph on the key managerial personnel shall be incorporated giving full details of the personnel recruited as on the date of filing of the Prospectus with the Board indicating name, date of joining, qualification, details of previous employment, etc." The difference,

therefore, between the aforesaid two categories clearly establishes that the two connotations are not only different as concepts but they differ in their scope, ambit and their applicability.

91. It is, thus, evident that 'Key Management Personnel' as defined under AS-18 is a person who has the authority for planning, directing and controlling the activities of the holding-company. Keeping this difference in mind, as far as AS-18 is concerned, the Appellant had duly disclosed names of certain persons as Key Management Personnel for the purpose of AS-18 at pages 291 to 339 of the Prospectus, namely, – Mr. K. P. Singh, Mr. Rajiv Singh, Mrs. Renuka Talwar, Mr. T. C. Goel, Mr. J. K. Chandra, Ms. Pia Singh and Mr. Kameshwar Swaroop.

92. The impugned order, therefore, proceeds on an erroneous footing that the test of reportable "related party transaction" applies to employees named pursuant to clause 6.9.5.8 of the DIP Guidelines when it is only reportable/referable to 'Key Management Personnel' covered under AS-18 because of the simple reason that clause 6.9.6.6 requires disclosure of 'Related Party Transaction' as per the Financial Statement which is to be drawn in accordance with the Accounting Standards. The confusion has arisen in the impugned order because of the use of the acronym "KMPs" interchangeably, which is a misinterpretation of the concept of "KMP" as envisaged in two different rules. We, therefore, hold that the charge of non-disclosure of related party transaction against the Appellant-Company is not established.

93. Further, it cannot be disputed that the predominant consideration for invoking powers under Section 11 of the Sebi Act, 1992 is the investors' interest and the regulation of the capital market. Therefore, particularly when such a remedial power is being used for punishing the Appellant by debarring it from entering the capital market for three years, the Respondent, in all fairness, should have brought on record some complaint by actual investors to the effect that they were misguided by any alleged non-disclosure or wrong disclosure or inadequate disclosure. The two

complaints in question were not registered by investors but by KKS and his complaint was to enforce his own alleged claim of Rs. 34 Crore against Sudipti. The impugned order caused such an adverse impact on the market that various shareholders, whose interest the impugned order claims to protect, lost Rs. 7 to 8 thousand crores in one day alone. This can never be compensated by anybody except the market mechanism, which takes its own time to do so. Creating such chaos in the capital market by passing a seemingly innocuous order, if not reckless, cannot be said to satisfy the twin objectives underlying the Sebi Act, 1992. Therefore, the finding on Issue Nos. 2 and 3 by the 2nd WTM are held to be misconceived and deserve to be quashed.

94. The invocation of the PFUTP Regulations in the present case was seriously contested by Shri Janak Dwarkadas with Shri J. J. Bhatt and Shri Saurabh Joshi, all Ld. Sr. Advocates, who appeared for various Appellants. Shri Rafique Dada, Ld. Sr. Advocate for Respondent, vehemently opposed the proposition put forth by the Appellant that in the light of the Hon'ble Delhi High Court's order and the consequent order of 1st WTM dated 20th October, 2011, the Respondent was obliged to look into the violation of DIP Guidelines only and not the PFUTP. We have patiently heard both the sides on this issue. We note that there was undoubtedly no direction in the order of the Hon'ble High Court or in the order of the 1st WTM to enquire into the two complaints of KKS in the light of the PFUTP Regulations and rather it was treated as a case of violation of Disclosure Guidelines all along, which formed the basis of the dispute before the Hon'ble Delhi High Court as well as before the 1st WTM. In its order dated 20th October, 2011, the 1st WTM extensively dealt with various clauses of the Disclosure Guidelines which could have been prima-facie violated by the Appellant but fraud or unfair trade practice was not an issue till the first WTM passed the order for holding proper investigation into the allegations of KKS. It is also equally true that the complaint of KKS was more or less self-centered. The question of alleged violation of securities laws by the Appellant in the process of the IPO in question was an ancillary issue in his complaint. However, by

the time the SCN dated 25th June, 2013 came to be issued to the Appellants, the Respondent came out with the allegation regarding the fraud played by the Appellant on the investors. The entire SCN is ß on the PFUTP Regulations except a mere mention at its fag end. Incidentally, the three issues framed by the 2nd WTM to adjudicate the allegations levelled in the SCN against the Appellant also do not find any mention of the manner in which the violation of PFUTP Regulations was sought to be dealt with and proved in the Impugned Order except some bald and abrupt conclusions to be seen in paragraphs 45, 46 and 47 therein.

95. We note that the PFUTP Regulations can be pressed into service by Sebi only on sound legal grounds in the most dispassionate manner in order to achieve the objectives underlying the Sebi Act, 1992 and not otherwise. The moot question in this regard is whether the Appellant has committed any such culpable act in the course of bringing out the IPO which can be termed as 'fraud' within the meaning of PFUTP Regulations, 2003. The PFUTP Regulations have been framed to prohibit fraudulent and unfair trade practices relating to the securities market. The PFUTP Regulations are a self-contained code and prescribe a detailed procedure for investigation of any fraudulent act by a person and imposition of penalty, if any, on allegations being proved. Regulation 5 categorically lays down that PPFUTP would trigger where the Chairman, a Member or the Executive Director of Sebi has “reasonable ground to believe” that certain transactions in the Securities are taking place in violation of the PPFUTP Regulation and more importantly in a manner detrimental to the investors' interest. Once such a satisfaction is arrived at “by an order in writing” the Appointing Authority, i.e., the Chairman, Member or Executive Director can direct appointment of an Investigating Authority not below the rank of the Divisional Chief. Next, on completion of such investigation by the Investigating Officer, he is required to submit a report to the Board under Section 11-C of the Sebi Act, 1992, read with Regulations 9 and 10 of the PFUTP Regulations. Regulation 10 specifically provides for consideration of the report by the Board and granting a reasonable opportunity of being heard to the persons likely to be affected by such consideration and issue

necessary directions or take appropriate action only thereafter and in accordance with the Regulations.

96. We note with concern that the above said due procedure established in the PFUTP Regulations has been blatantly violated by the Respondent. Formation of opinion/belief by the Board by an order in writing before invoking PFUTP Regulations on certain existing grounds is a pre-requisite. It is pertinent to note that no such "order in writing" as to the satisfaction of the Appointing Authority regarding existence of certain grounds which could have led to the formation of belief that there was prima-facie violation of such regulations and the securities were being dealt with in a manner detrimental to the investors' interest is brought to our notice. Similarly, nothing was produced before us to show that the report, as required by law to level allegation of fraud against the Appellant, was considered by the Board and that a reasonable opportunity of being heard in consonance with the principles of natural justice was afforded to the Appellant before the impugned order could be passed. The idea in affording an opportunity of being heard to an entity by the Board, as envisaged in the PFUTP Regulations, has a purpose. And that purpose is to afford an effective chance to an entity to rebut even the prima-facie view regarding allegations of fraud nurtured by the Investigating Officer. The significance of such a vital opportunity can never be allowed to be undermined, as that would be a total negation of the principles of natural justice.

97. It is established by law that "....where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden". This has been specifically held by the Hon'ble Apex Court in **Ramchandra Keshav Adke & Others Vs. Govind Joti Chavare & Others, reported in 1973 (1) SCC 559.** In this case, the landlord made an application in September, 1953 to the Mamlatdar to verify and record the surrender of tenancy by the respondent-tenant who did not do anything in the matter. The application somehow came before the Circle Officer who, after recording the statement of tenants and landlord, passed an order handing over the possession to the

applicant. The mutation entries were also made and in April, 1959, the landlord sold that land to other party. The tenant, in November, 1959, made an application before Additional Tenancy Aval Karkun, Miraj, against the landlord and his transferees claiming to be the tenant-in-possession and that the so called surrender was a sham transaction. Said application was dismissed by the Additional Tenancy Aval Karkun, Miraj, and hence the applicant filed Tenancy Appeal before a Special Deputy Collector, Sangli, who held that the impugned order relating to the surrender of tenancy was not passed by a Mamlatdar, as required by the tenancy law and consequently it was without jurisdiction and hence void.

98. The landlord then preferred two Revision Applications before the Maharashtra Revenue Tribunal, which were dismissed by the Tribunal. Similarly, the High Court of Bombay also dismissed two writ petitions filed by the landlord under Article 227 of the Constitution of India. The matter, thus, reached the Hon'ble Supreme Court, which held that the whole process of verification and recording of statements of landlord and tenants and the consequent surrender of land by the tenant to the landlord must have been recorded before the mamlatdar and not before the Circle Officer. Therefore, the orders of Deputy Collector, Tenancy Tribunal and High Court were upheld. The Hon'ble Supreme Court in para 25 very pertinently held that :

> *"25. A century ago, in Taylor V. Taylor, Jassel, M. R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed Vs. Emperor and latter by this Court in several cases, to a magistrate making a record under Section 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where, indeed, the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other." The rule will be attracted with full force in the present case, because non-verification of the surrender in the requisite manner would frustrate the very purpose of this provision. Intention of the Legislature to prohibit the verification of the surrender in a manner other than the one prescribed, is implied in these provisions. Failure to comply with these mandatory provisions, therefore, had vitiated the surrender and rendered it non est for the purpose of Section 5(3)(b)."*

99. Similarly, in the case of **Hukum Chand Shyam Lal Vs. Union of India & Others, reported in 1996 (2) SCC 128,** the Hon'ble Supreme Court has specifically held that where a power is conferred on a certain authority and is required to be

exercised in a certain way, it should be exercised in that manner or not at all. It means, all other modes of performance are necessarily forbidden.

99.1. In this case, the Administrator of Delhi, acting under Section 5 of the Telegraphs Act, 1885, by two separate orders authorized the police to take over temporary possession of the Petitioner's telephone allegedly used for "forward trading" (satta). Both these orders were challenged before the Delhi High Court by way of Writ Petition and a Bench of the High Court allowed both the petitions and quashed the two impugned orders on the ground that resort could not be had to Section 5(1) of the Telegraphs Act for taking temporary possession of the subscribers' telephones. Thereafter, the General Manager, Telephones, Delhi, also passed two orders purporting to act under Rule 422 of the Indian Telegraph Rules, 1951, and disconnected the telephones on similar grounds as the Administrator of the Delhi Government had already done. On being challenged, the High Court of Delhi allowed the Writ Petition and quashed the impugned order and further directed restoration of the telephones to the petitioners. Union of India, feeling aggrieved by the order of the High Court, carried a Special Appeal to the Appellate Bench of the High Court. The subscribers (original petitioners), inter alia, contended before the appellate bench of the High Court that the Divisional Engineer did not apply his mind and record his own reasons about the correspondence of 'any emergency' and, as such, there was contravention of Rules 421 and 422 of the Telegraph Rules. It was argued that the emergency contemplated by Rule 422 is not the same as a 'public emergency' declared under Section 5, but it is an emergency arising out of the breakdown of the telecommunications due to a technical defect, labour trouble, viz. major fire or the like, the existence of which was to be established to the satisfaction of the Divisional Engineer and not any extraneous authority. Stress was laid, in this connection, on the fact that the word "emergency" in Rule 422 is not qualified by the prefix "public", instead, the words used are "any emergency."

99.2 The appellate bench of the High Court, however, set aside the decision of the Learned Single Judge of the High Court and upholding the orders of

disconnection of telephones in question, dismissed the writ petition. On appeal before the Hon'ble Supreme Court, the judgment of Apellate Court of High Court was quashed and set aside and the writ petitions were allowed by directing the respondents to restore the telephone connections to the appellants. In doing so, the Hon'ble Supreme Court held that the Divisional Engineer should have satisfied himself by convincing reasons as to the existence of any emergency as mentioned in Rule 422 of the Telegraph Rules. The expression "any emergency" in Rule 422 was construed by the Hon'ble Supreme Court wider than the "public emergency" used in Section 5 of the Telegraph Act. Therefore, the Divisional Engineer should have arrived at such satisfaction as to the existence of any emergency rationally on relevant material which may include any certificate or report of the appropriate Government so as to the occurrence of a 'public emergency'. The requirement of recording such satisfaction by the Divisional Engineer, with reasons, therefore, is implicit in the rule. That will be a minimal safeguard against arbitrary exercise of this drastic power....." In this background it has been laid down by the Hon'ble Supreme Court in para 18 of the said judgment that :

> "18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided will be violative of the fundamental principles of natural justice. Now, in the present case, if the telephones of the appellants were to be disconnected on the ground of misuse, then they had to give, in consonance with the principles of natural justice, opportunity to the appellants to explain their conduct before taking action under Rule 427 read with Rules 416 and 421. Resort to the wrong and more drastic course provided in Rule 422, on a ground which was not germane to an action under that rule, vitiates the impugned order, particularly when it is manifest that in making the impugned order, the General Manager was influenced more by this ground and less, if at all, by the existence of 'public emergency' certified by the Delhi Administration."

100. Similarly, in a recent case reported in **2014 (2) SCC 401, J. Jayalalithaa & Others Vs. State of Karnataka & Others,** the Hon'ble Supreme Court has revisited the entire jurisprudence beginning from the case of **Taylor Vs. Taylor (1875) 1 Ch. D 426** has held that the principle behind the rule is that if these were not so, the statutory provision might as well not have been enacted. In para 34 of the said

judgment, the Hon'ble Apex Court has specifically held that "*There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim expressio unius est exclusio alterius, meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.*"

101. In this context, Shri Janak Dwarkadas, Ld. Sr. Counsel for the Appellant, also relied upon a judgment in **Morgan Stanley Mutual Fund Vs. Kartick Das, reported in 1994 (4) SCC 225.** In that case, the appellant company therein, namely, Morgan Stanely Mutual Fund, was a domestic mutual fund registered with Securities and Exchange Board of India (SEBI). Its investment management company was also registered with the SEBI. The Board of Trustees of the appellant, which manages the fund, approved a draft scheme (for floating public issue). The scheme was forwarded to SEBI, which approved it on 23.11.1993, after duly scrutinizing and examining the same. The appellant and its Investment Manager, thereafter, took necessary steps, to begin marketing the scheme by issuing advertisement on 13.12.1993, after the same had been approved by the SEBI.

101.1 A suit was filed by Mr. Piyush Agarwal before the Learned Sub-Judge, Tees Hazari, Delhi, seeking injunction restraining the public issue from being floated by the appellant on the ground that the appellant's Offering Circular was not approved by SEBI apart from other irregularities in the same. It was contended that the appellant was seeking to collect money by misleading the public through arbitrary, unfair and unjust means. The Ld. Sub-Judge passed an interim order restraining the public issue from being floating but the High of Delhi stayed the order of Ld. Sub Judge on 04.01.1994.

101.2 On the same day, one Dr. Arvind Gupta, also filed a Writ Petition in the High Court, which was also dismissed on 04.01.1994 itself and he approached the Hon'ble Supreme Court by way of Civil Appeal No. 4587 of 1994. One Kartick Das, yet moved the Calcutta District Consumer Redressal Forum and obtained an interim order in his favour on 04.01.1994 itself. The appellant ultimately challenged this order of District Consumer Redressal Forum before the Hon'ble Supreme by way of Civil Appeal No. 4584/1994.

101.3 This judgment of Morgan Stanley Mutual Fund seems to have been cited before us by Shri Janak Dwarkadas, Ld. Sr. Counsel for the appellant, to impress upon two points :- firstly, that object of an issue in the capital market is primarily to build up capital by involving public. Therefore, as held in para 33 of Morgan Stanley Fund, it is not a practice relating to carrying on any trade. Para 33 of the said judgment reads as under :

> "33. Certainly, clause (iii) and (iv) of Section 2 (1)(c) of the Act do not arise in this case. Therefore, what requires to be examined is, whether any unfair trade practice has been adopted. The expression 'unfair trade practice' as per rules shall have the same meaning as defined under Section 36-A of Monopolies and Restrictive Trade Practices Act, 1969. That again cannot apply because the company is not trading in shares. The share means a share in the capital. The object of issuing the same is for building up capital. To raise capital, means making arrangements for carrying on the trade. *It is not a practice relating to the carrying of any trade.* Creation of share capital without allotment of share does not bring shares into existence. Therefore, our answer is that a prospective investor like the respondent or the association is not a consumer under the Act."

101.4 Secondly, the Ld. Sr. Counsel has drawn our attention towards observation of Hon'ble Supreme Court while imposing a cost of Rs. 25,000/- on the petitioner, Dr. Arvind Gupta, to the effect that -

> "There is an increasing tendency on the part of litigants to indulge in speculative and vexatious litigation and adventurism which the fora seem readily to oblige. We think such a tendency should be curbed. Having regard to the frivolous nature of the complaint, we think it is a fit case for award of costs, more so, when the appellant has suffered heavily. Therefore, we award cost of Rs. 25,000/- in favour of the appellant."

102. The Morgan Stanley (supra) judgment is not of much assistance to the Appellant inasmuch as it was dealing with the expression 'unfair trade practice', etc. in the context of Section 36-A of Monopolies and Restrictive Trade Practices Act,

1969. However, the ratio in Ramchandra Keshav Adke (supra); Hukum Chand Shyamlal (supra) and J. Jayalalithaa (supra) is fully attracted in the present case and we hold that the action of mixing-up of PFUTP Regulations with DIP Guidelines in the manner in which it has been sought to be done, without affording the Appellant any opportunity of being heard in this regard before the 1st WTM, is unjust and a clear violation of principles of natural justice. No matter how wide the power of the Respondent as a regulator, it must follow the law.

103. After a thorough analysis of the facts, circumstances and material brought before us, we are fully convinced that the Appellant did not commit any fraud upon the prospective investors or with respect to the capital market by suppressing any vital information which was material for the investors to form an informed decision to invest in the IPO. We have categorically held herein above and we reiterate that all relevant and material aspects about the Appellant-Company's affairs did find a place in the Offer Documents running into hundreds of pages and vetted by the Sebi in the beginning of the year 2007.

104. It is only after Sebi's clearance that the second DRHP was converted into RHP and only thereafter that the Prospectus was filed before the ROC and the shares of the Appellant-Company were listed on the two Stock Exchanges. The Offer Documents remained in the public domain for months together before being listed on the Stock Exchanges but no actual investor ever complained of any inadequacy of information in the Offer Documents which could have disabled the person to take an informed decision in the matter of investment in the IPO floated by the Appellant-Company pursuant to 2nd DRHP dated 2nd January, 2007. During this long process, neither did Sebi nor did any investor raise any objection as to the inadequacy or the alleged untrue nature of the disclosures in the Offer Documents. The records also reveal that Sebi did find all the disclosures made by the Appellant in the Offer Documents to be satisfactory before the actual listing of the Appellant's shares on Stock Exchanges.

105. Furthermore, 'Fraud' is defined in Regulation 3 (c) of the PFUTP

Regulation as under :

"3(c) 'fraud' includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include-

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent,

(7) deceptive behaviour by a person depriving another of informed consent or full participation,

(8) a false statement made without reasonable ground for believing it to be true.

(9) The act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price."

106. We have minutely looked into Sections 12(a), (b) and (c) of Sebi Act, 1992, along with Regulations 3(a), (b), (c), (d); 4(1), 4(2)(f) and (k) of PFUTP Regulations as well as the definition of fraud. First of all we note that a person could be held guilty of fraud only if he has done an act or omission with a view to induce another person to deal in securities. The Respondent has not been able to attribute any such conduct to the Appellant anywhere in the Impugned Order. Similarly, no false statement has been made by the Appellant in the Offer Documents or the Prospectus. In any event, fraud would mean "a false statement made without reasonable ground for believing it to be true." Similarly, a representation has to be made recklessly and carelessly to investors with the potential of inducing the investors to invest on the basis of such a representation before it can amount to a fraud. A promise made with the intention of not performing it is also said to be a fraud within the meaning of Regulation 3(c)(4). Therefore, an act to be termed as 'fraud' within the meaning of

PFUTP Regulation should have an element of some motive or ill-conceived idea or design. Such an element is completely lacking in the present case. It is pertinent to note that regulation 3(c)(9) specifically talks of fraud in the context of issuance of securities by a Company. It provides that an act of an Issuer of a security would be fraud if a mis-information affects the market price of the security. There is no discussion in the SCN or in the Impugned Order about this aspect. Next, the 2nd WTM is not sure as to what the specific charge of fraud against the Appellant is, for which it is being condemned as guilty of fraud. Elaborating further this point, we make it clear that the Respondent has levelled no specific allegation of violation of any sub-section of Section 12 of Sebi Act, 1992 or any particular regulation or sub-regulation of PFUTP Regulations out of the many instances of fraud mentioned in the definition itself in the Impugned Order, except a bundle of legal provisions. The alleged manner in which that bundle of legal provisions has been violated is left completely unexplained by the Respondent. The Impugned Order is absolutely ambiguous in applying facts as to which specific act of the Appellant allegedly fits into the parameters of fraud prescribed by a particular sub-regulation or regulation of the PFUTP Regulations or that of Section 12 of the Sebi Act, 1992. The charge in the SCN as well as the findings in this regard in the impugned order are, therefore, totally vague and unsustainable in the eyes of law and on fact.

107. Paragraphs 45, 46 and 47 of the impugned order deal with serious allegations of violations of the PFUTP Regulations without adducing an iota of evidence or a single fact amounting to a violation of a particular regulation or particular sub-section of Section 12 of the Sebi Act. The Appellant has presented an exhaustive reply before the 2nd WTM on the question of fraud but the same has been entirely ignored. Without bringing out any piece of reliable or convincing evidence on record, the Appellant has been sought to be held guilty of the gravest possible allegation, leading to a harsh and stigmatic penalty. This Tribunal has consistently held that even if fraud is to be proved on the basis of probability and not the strict principles of evidence, it is incumbent upon the Respondent to bring out cogent,

convincing evidence and prove the charge of fraud against a company only as per the procedure established in the PFUTP Regulations and above all, on the basis of a high degree of probability to prove the same. In the case of **Ess Ess Intermediaries Anand Saurashtra Society Vs. SEBI reported in 2013 SAT 73,** this Tribunal in paragraphs 11 and 12 specifically held as under :

> "11. We now deal with the main issue regarding whether or not the Appellant has violated Regulations 4(1) and 4(2),(a),(b),(e),(g) and (n) of the PFUTP Regulations, 2003. Regulation 4(1), as reproduced above, provides that no person shall indulge in fraudulent and unfair trade practice in securities. Regulation 4(2) provides that dealing in securities shall be deemed to be fraudulent and an unfair trade practice if it involves fraud and may include all or any of the ingredients enumerated in sub-sections (a),(b),(e),(g), and (n) of Regulation 4(2). Regulation 4(2)(a) deals with an act which creates a false impression with respect to trading in the securities market. Regulation 4(2)(b) deals with a situation where the securities are not intended to be transferred but operate only as a device to inflate or depress the price of such securities for wrongful gain or avoidance of loss. Regulation 4(2)(e) deals with manipulation of the price of a security. Regulation 4(2)(g) deals with transactions which are not intended to be performed by taking them to their logical conclusion. Similarly, Regulation 4(2)(n) prohibits circular transactions between intermediaries which are mainly intended to increase commission and also to provide a false appearance of trading in that 11 security. Paras 12 to 15 of the Impugned Order deal with the allegedly manipulative way in which the trades in question were synchronized.
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> xxx xxx xxx xxx xxx xxx xxx
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> 12. **Thus, a perusal of the above stated provisions of Regulation 4 and its sub-regulations reveals that the allegation of fraud can be levelled against a person/entity only for good reasons and on the basis of clear and unambiguous evidence. Such an allegation of fraud may shake the very foundation of the business of the entity in question and may adversely affect the same. Therefore, the onerous task of proving such a serious allegation lies on the person levelling such accusation on the basis of preponderance of probability.** A minute reading of the Adjudicating Officer's Impugned Order dated December 14, 2012 does not demonstrate the manner in which the Appellant's actions have led to the creation of a false market and the basis on which the Appellant has 13 been condemned for the commission of fraud, that too in connivance with others. No evidence has been brought on record to establish a connection between the Appellant and the alleged fraudulent transactions undertaken by Shri Nitin R. Patel. It is a matter of record that the alleged default is the first and only aspersion cast on the Appellant with respect to its business and, heretofore, has not had any of its acts called into question by any authority, regulatory or otherwise. Moreover, it is evident from the Impugned Order that the Appellant has enjoyed no unfair advantage or benefit of any nature owing to the execution of the trades in question, nor have the same resulted in any kind of loss suffered by investors in the scrip of AEL. This is evident from the fact that the Respondent has not received any complaint with respect to any of the allegedly manipulative acts of the Appellant." *(emphasis supplied).*

108. On the question of long delay of about nine months in passing the

Impugned Order by the second WTM after reserving the matter for orders and also the overall delay of about seven years in bringing finality to an issue, we note, even at the cost of repetition that an IPO is an extremely important technique devised for the purposes of capital raising in the securities market. Not only companies but public investors at large are involved in this economic process. Therefore, there has to be expediency and finality in the actions of an enlightened and reputed Regulator like Sebi. Indecisiveness, untimely and highly belated actions will only lead to uncertainty in the minds of companies, shareholders, investors and other intermediaries in the Capital Market. Such actions, like the one in hand, are retrogressive in nature and tend to upset a settled situation belatedly without achieving any good for any actor in the market, whether the companies or the investors.

109. To recapitulate a few facts in brief, the first DRHP was filed with Sebi on 11th May, 2006. It duly indicated 281 associate-companies, including Shalika, Sudipti and Felicite. It was withdrawn on 31st August, 2006 and the second DRHP was filed on 2nd January, 2007. In the meanwhile, on 29th and 30th November, 2006, about 281 associate-companies or subsidaries were divested by the Appellant by selling and transferring its 100% stakes in those companies. This difference in the two Draft Red Herring Prospectus was duly highlighted and disclosed by the Appellant in the second DRHP along in a Delta View document truly giving all the details. Sebi issued observations, running into more than 90 pages, to the Merchant Bankers of the Appellant on 7th May, 2007 for compliance before the second DRHP could actually be converted into the RHP so as to enable the Appellant to file it before the ROC, which is the pre-requisite for getting its shares listed on the Stock Exchange. Pursuant to the letter dated 7th May, 2007 issued by the Sebi, the Appellant converted its DRHP into RHP after complying with the requirements provided in the said letter and filed it before the ROC and the IPO was opened for subscription between 11th and 14th June, 2007. Thereafter, the final prospectus was filed by the Appellant with the ROC on 18th June, 2007 and, thus, the shares were listed on 5th July, 2007.

110. The complaint dated 4th June, 2007, filed by KKS before Sebi did contain the allegation of filing of FIR over and above the main complaint of him being allegedly duped of Rs. 34 Crores by Sudipti and Mr. Pravin Kumar. Sebi did not feel it appropriate to take any action against the Appellant on the complaint dated 4th June, 2007, except seeking some clarification from the Merchant Bankers and the Appellant. KKS filed Writ Petition on 29th October, 2007, seeking a direction to the Sebi to investigate into the allegations raised in the complaint. Thus, the point to be noted is that from 15th June, 2007 to 29th October, 2007, Sebi did not deem it necessary to take any action against the Appellant or the Merchant Bankers so as to rectify the alleged inadequate or incomplete disclosure regarding Shalika, Sudipti and Felicite and some other connected disclosures. Sebi has not shown any satisfactory reason for its indifference and inaction for a period of four months.

111. The matter thereafter remained before the Hon'ble Delhi High Court till 21st July, 2011, when the Division Bench called upon Sebi to consider, and if found appropriate, to investigate the matter for violation of disclosure norms laid down by law. The SCN dated 25th June, 2013, was again issued after a lapse of about 35 months and for this unusual delay of about three years there is no explanation except that some investigation was undertaken for such a long period of three years. The matter does not rest here. Thereafter the show cause notice was issued to the Appellant on 25th June, 2013; the proceedings before the second WTM of Sebi stood closed on 15th January, 2014, and the final order in the form of Impugned Order dated 10th October, 2014, came to be passed only after an inordinate and absolutely unexplained delay of about nine months. This unprofessional attitude adopted by Sebi is not appreciated by the Tribunal.

112. The Hon'ble Apex Court in the matter of **Anil Rai Vs. State of Bihar reported in 2001 (7) SCC 318** held in para 9 that :

> "It is true, that for the High Courts, no period for pronouncement of judgment is contemplated either under the Code of Civil Procedure or the Criminal Procedure Code, but as the pronouncement of the judgment is a part of justice dispensation system, it has to be without delay. In a country like ours where people consider the Judges only second to God, efforts be made to strengthen that belief of the common man. Delay in

> disposal of the cases facilitates the people to raise eye-brows, some time genuinely which, if not checked, may shake the confidence of the people in the judicial system. A time has come when the judiciary itself has to assert for preserving its stature, respect and regards for the attainment of the Rule of Law. For the fault of a few, the glorious and glittering name of the judiciary cannot be permitted to be made ugly. It is the policy and purpose of law, to have speedy justice for which efforts are required to be made to come to the expectation of the society of ensuring speedy, untainted and unpolluted justice."

In the same judgment, para 38 further states that :

> "In 1961, a learned Judge of the Patna High Court expressed his anguish when a Magistrate took nine months to pronounce a judgment. The words used by him for expressing his judicial wrath are the following:
>
> The Magistrate who cannot find time to write judgment within reasonable time after hearing arguments ought not do any judicial work at all. This Court strongly disapproves the Magistrates making such a tremendous delay in the delivery of his judgments."

112.1 We, therefore, safely conclude that an undue delay of about nine months in writing the Impugned Order in the present case is fatal to the concept of fair hearing, rule of law and even violative of Article 21 of the Constitution of India read with Article 14 thereof. Prejudice to a litigant is inherent and writ large due to such unnatural and unexplained delay. It is rightly said that human memory has a short-shelf life and even judges are prone to forgetting arguments of the parties due to long lapse of time.

113. Lastly, terming the Impugned Order as totally unjust, unfair, arbitrary and even irrational, learned senior counsel for the appellant Shri Janak Dwarkadas cited few cases in support of his arguments while stating that the impugned order is not only liable to be quashed and set aside on the ground of the Wednesbury principle of unreasonableness but also on the ground of the principle of proportionality. Shri Rafique Dada, Ld. Sr. Counsel for the Respondent, has refuted this argument on the ground that the Appellant should have known from the stage of the SCN itself that such an extreme order could also be passed against it on culmination of the proceedings before Sebi. Shri Rafique Dada, Ld. Sr. Counsel further contends that the loss of Rs. 7000 or

8000 crore ought to have been contemplated by the Appellant since the inception of the case and that there was nothing unusual about debarring a company from entering the capital market for three years.

114. Since we are quashing the impugned order on the merits itself, we do not propose to enter into the niceties of other arguments advanced by Shri Janak Dwarkadas, Ld. Sr. Counsel, particularly regarding the powers of Sebi to pass only emergent remedial orders to protect the integrity of the market and investors' interest under Section 11, 11(b) and 11(4) of the Sebi Act, 1992. We leave this question open to be considered in an appropriate case in future. For the same reason, we do not propose to consider the true import of Hon'ble Supreme Court's judgment in the case of (i) **SEBI Vs. Shriram Mutual Fund reported in 2006 (5) SCC 361** and (ii) **Bharjatiya Steel Industries Vs. Commissioner, Sales Tax, Uttar Pradesh reported in 2008 (1) SCC 617,** regarding the scope of Sebi's power to impose punishment whenever any violation of Securities Laws is committed by a Company. We leave this question also open to be considered in future if any eventuality arises in a given case so also the question of proportionality.

115. For imposing impugned penalty on the Appellants in the present case, reliance has been placed by the Respondent on the ratio of Hon'ble Supreme Court judgment in the case of **N. Narayanan Vs. Adjuducating Officer of Sebi reported in 2013 (12) SCC 152**. It is misplaced inasmuch as the present case is totally distinguishable from the facts of Narayanan's case. In the case of Narayanan, specific role of directors to inflate figures of the companies revenue-profits and security deposits etc., for personal gain was duly investigated and there was also a definite finding to that effect in that case. A punishment, therefore, cannot be imposed for the sake of imposition.

We may, however, observe that every law seeks to lay down a norm which is required to be followed by all the citizens. Any violation of such a law framed by the Legislature has to be viewed seriously. Various such interconnected norms, laid down by the Parliament or a delegate, provide for certain coercive techniques to secure compliance. A punishment primarily seeks to cause a loss or a deprivation of a right or a privilege or an advantage hitherto freely enjoyed by a person. Therefore, imposition of any punishment on a violator has to be precise, specific and a well thought-of measure, purely with a view to seek the ends of justice. If the punishment proves to be counter-productive and manifestly causes more harm than benefit to the members of society, whose interest the punishment ostensibly claims to subserve, it has to be discarded and termed as an unusual punishment . Such punishment can seriously impair one's business and also affect millions of investors adversely by creating a chaotic situation in the market. Keeping a person out of the market for few years after a long lapse of time when things seem to have settled down in the market, particularly when the company's scrip is showing a definite and positive upward movement, is definitely unjust, unfair and detrimental to the investors' interest.

116. To sum up, it is noted that the Respondent has made an all out effort to bring the charge of control against the Appellant over the three companies, viz. Shalika, Sudipti and Felicite, within the clutches of the provisions of Section 4(2) of the Companies Act, 1956, by unnecessarily stretching the issue to various irrelevant factors which are not germane to the overall scheme of 'control' and 'disclosure' envisaged in the Companies Act, 1956 and also in the DIP Guidelines, 2000. In quest of a more befitting definition of 'Control', the Respondent has gone astray by even applying the definition of 'Control' as

given in an entirely different context in the Takeover Code, 1997 or even certain Accounting Standards, primarily meant for auditors to be followed. Neither the Division Bench of the Hon'ble High Court of Delhi nor the first WTM of Respondent, who ordered investigation pursuant to the Hon'ble Delhi High Court's direction for possible violation of DIP Guidelines, gives any direction or observation which would have the consequence of entwining an element of fraud with the case of violation of DIP Guidelines in the issuance of the IPO in question. If interlacing two completely different concepts emanating from the same word, as defined in two different pieces of regulation/ legislation, were to be adopted in every matter, it would give rise to the most preposterous situation, viz., the conclusion that having different regulations/legislations for different areas of the law is pointless. Instead of there being different laws and statutes for different circumstances and entities, there would be one statute defining all the wrongs and their respective remedies. There is a reason that has not been done. Every Act of the Parliament, just like every set of rules framed by the Respondent, has a distinct rationale behind it. The blurring of lines between different laws and regulations cannot lead to any desirable outcome. Yet, the second WTM, who passed the Impugned Order, has applied the PFUTP Regulations in total disregard of the due procedure incorporated in the said Regulations for alleging and proving a charge of fraud against a company. The allegation of fraud against any company is an extremely serious matter and cannot be pressed into service in a casual manner, as has been done in the present case.

117. Once the business modality of the appellant in floating various associate companies or subsidiaries is not faulted with by the respondent on any legal standard laid down in this regard either in the Companies Act or in the

Regulations framed by the respondent under SEBI Act, 1992, the Respondent is not justified in condemning the appellant for adopting such a business model. The respondent seems to have diverted the issue by leaving out Kimsukh Sinha's main complaint of him being duped of Rs. 34 Crore and making it a case of the appellant duping investors. In order to reach this conclusion of the Appellant misguiding the investors, the respondent has taken into consideration a maze of transactions among the three erstwhile subsidiaries of about 281 associate companies/subsidiaries of the appellant. Such an exercise was, undoubtedly, undertaken by the respondent earlier at the time of considering the DRHP before the shares of the appellant were listed on the stock exchanges. It cannot be denied that the Respondent had cleared the Offer Documents after due application of mind before the same were converted into Final Prospectus for public's consumption. It is also evident that Kimsukh Sinha's complaint dated June 4, 2007 was already on record with the respondent before the appellant was given the go-ahead with respect to the IPO. The Respondent has failed miserably to show that it was handicapped in any manner in not scrutinizing these aspects before permitting the appellant to publish the Final Prospectus. Detailed antecedents of all the erstwhile associate companies were duly analyzed by the respondent in 2006-2007 and no such shortcoming was found therein which could in any manner adversely affect the decision making process of investors. In fact, that was the correct stage when the respondent, as a responsible regulator, should have taken a view to protect the interest of Investors to regulate the market, if in its opinion the Appellant was not making proper disclosures. We have minutely perused the first DRHP; the second DRHP and the Prospectus. These documents were submitted by the appellant and scrutinized by the respondent before the listing of the Issue. Various steps taken by the respondent after intensive and in-depth

analysis of the documents and details submitted by the appellant cannot be termed as an empty formality. The central theme underlying the DIP Guidelines, 2000 is "true and adequate disclosures" in the Offer Documents. It means there should be sufficient, and not arithmetically accurate, disclosures by a company intending to bring out an IPO in the Draft Prospectus and the Final Prospectus to enable the investors to take an informed decision as regards the investment in the said IPO. Facts and records clearly reveal that the Appellant had duly disclosed each and every material aspect of its affairs in the Offer Documents, which was required for a reasonably enlightened and prudent investor to take a well informed decision to invest in the IPO in question.

118. The jumbling up of Rules, Regulations and various provisions occurring and operating in different fields, by the respondents, in the Impugned Order, has led to a grave miscarriage of justice in the present case, inasmuch as the investors have suffered a loss to the tune of thousands of crores of rupees in the capital market on the day following the passing of the order making it a case of "over-regulation". This is certainly not the objective of conferring wide discretionary powers upon Sebi. It has to apply its mind to every set of facts dispassionately without being influenced by any whistle blower. It is pertinent to mention here that while Sebi was being conferred with vast powers in the year 2000 by way of a thorough amendment of the Sebi Act, 1992, the Dhanuka Committee, which had recommended the conferment of such powers, had itself warned against their abuse in clear terms by stating that "Sebi and its officers are often called upon to act both as Regulators and adjudicators of the first instance and consequently there is a considerable scope of mixing up of these rules and for **enthusiastic interpretation and enforcement,** sometimes

without having due regard to settled constitutional law propositions. There is, thus, very heavy responsibility on the Appellate Tribunal to function with independence and provide the necessary expertise required to act as Securities Appellate Tribunal. Having regard to the wide range of powers now conferred upon Sebi and its officers, the Committee earnestly hopes for and would expect independent, unbiased functioning of the Appellate Tribunal, distanced from Sebi and having due regard to the principles of Administrative Law."

119. The Respondent has completely failed to approach the issue in the matter pragmatically. Viewed from any angle, the impugned order is like a troubled sea whose waters only cast up mire and dust and, therefore, the same is liable to be quashed and set aside. Ordered accordingly. The appeal, thus, stands allowed with no order as to costs. Accordingly, for the same reasons, the six connected appeals, i.e., Appeal Nos. 392, 393, 394, 395, 396 and 415 of 2014, also stand allowed but without any order as to costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

13.03.2015
Prepared & Compared By: PK

Per: Justice J.P. Devadhar

120. Appellants in all these appeals, viz DLF Ltd., its Directors/Chief Financial Officer (CFO), have challenged common order passed by the Whole Time Member (WTM) of Securities and Exchange Board of India (SEBI) on October 10, 2014. Hence all these appeals are heard together and disposed of by this common decision.

121. By the impugned order dated October 10, 2014 WTM of SEBI has held that DLF Ltd. ('DLF' for short) has resorted to sham transaction of divesting shares of its subsidiaries/ associates with a view to camouflage its association with those subsidiaries/associates as dissociation and thereby avoid disclosing material information relating to those subsidiaries/ associates in the prospectus issued by DLF, in violation of SEBI (Disclosure and Investor Protection) Guidelines 2000 ('DIP Guidelines'), read with regulation 111 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations') and SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ('PFUTP Regulations'). Consequently, with a view to protect the interest of investors and integrity of the securities market, the appellants are restrained from accessing the securities market and prohibited from buying, selling or otherwise dealing in securities directly or indirectly in any manner whatsoever for a period of three years under Section 11, 11A & 11B of SEBI Act.

122. Facts relevant for deciding the issues raised in these appeals are as follows:-

a) DLF is a public limited company engaged in the business of real estate development.

b) In the year 2006 DLF decided to invite public to subscribe to the securities offered by it through 'Initial Public Offer' ('IPO' for short).

c) As is required in law, DLF filed before SEBI 'Draft Red Herring Prospectus' ('DRHP') on May 11, 2006 wherein it was inter alia disclosed that Sudipti Estates Pvt. Ltd. ('Sudipti') , Shalika Estate Developers Pvt. Ltd. ('Shalika') and Felicite Builders and Construction Pvt. Ltd. ('Felicite') were 'associate companies' of DLF.

d) Before SEBI could consider the said DRHP, DLF withdrew the said DRHP on August 31, 2006 and filed fresh DRHP (second DRHP) on January 2, 2007. In the second DRHP, Sudipti, Shalika and Felicite were not disclosed as 'Associate Companies' as according to DLF, the said three companies had by then ceased to be associates of DLF. Alongwith the second DRHP, the Merchant Bankers of DLF had filed a 'delta view' document indicating all the differences between the

second and the first DRHP including the crossed out names of Felicite, Shalika and Sudipti.

e) On March 29, 2007 Merchant Bankers of DLF certified accuracy of the disclosures made in the DRHP dated January 2, 2007 and stated that the disclosures made in the said DRHP were sufficient to enable the investors to make an informed investment decision.

(f) On 26.4.2007 Mr. K. K. Sinha filed FIR 249/07 at a Police Station at New Delhi alleging that Sudipti and other persons accused therein have cheated the complainant Mr. Sinha for a sum of ₹ 31,09,50,500/. It was further alleged in the FIR that Mr. Praveen Kumar, one of the accused, had represented to the complainant that he was related to the promoters of DLF and was also on the Board of many DLF Group companies including Sudipti and that the complainant would get high returns if 35 acres of land at Gurgaon which the complainant had agreed to purchase from third parties is developed by DLF Group. It was further alleged that Shri Praveen Kumar and Shri Pradeep Singh (accused no. 5) acting on behalf of Sudipti represented to the complainant that they would arrange suitable parcel of land in favour of the complainant

which could be jointly developed by the complainant and the DLF Group. Thus the accused persons lured/induced the complainant not only to transfer the above 35 acres of land in the name of Sudipti for ₹ 34,27,31,188/- but also illegally and unauthorizedly induced the complainant to deliver to Sudipti ₹ 31,09,50,500/- in cash out of the sum of ₹ 34,27,31,188/- received by the complainant from Sudipti on the pretext of acquiring fresh land from third parties which could be developed jointly. As the accused persons failed to show that the amount of ₹ 31,09,50,500/- taken from the complainant has been used for purchase of fresh lands, the complainant felt cheated and hence filed above FIR on 26.4.2007.

(g) On 7.5.2007, SEBI, after scrutinizing the second DRHP gave its detailed observations on the said DRHP. On May 20, 2007 auditors of DLF issued a report stating that they had reviewed the financial statements of DLF including the related party disclosures made therein and in their opinion the same was in accordance with part II of Schedule II of the Companies Act, 1956 as well as the SEBI Guidelines.

(h) DLF complied with the observations made by SEBI on the DRHP and issued the Red Herring Prospectus

(RHP) on 25.5.2007. Thereafter the IPO opened for public subscription on 11.6.2007 and closed on 14.6.2007. The final prospectus was filed with the Registrar of Companies on 18.6.2007 and shares of DLF were listed on the Bombay Stock Exchange (BSE) and National Stock Exchange ('NSE') on 5.7.2007.

(i) In the meantime, on 15.6.2007 SEBI received a complaint dated 4.6.2007 from Mr. K. K. Sinha wherein contents of FIR dated 26.4.2007 were reiterated and it was alleged that Sudipti is a subsidiary of DLF and since Sudpti had duped Mr. K. K. Sinha, SEBI was requested to investigate DLF and take steps against DLF so that gullible investors are not lured into investing in the shares of DLF which are being offered to the investors through the IPO. On 25/06/2007 SEBI forwarded the complaint dated 04/06/2007 to DLF through its Merchant Banker for its comments.

(j) As there was delay on part of SEBI in taking action against DLF, Mr. K. K. Sinha filed another complaint on 19.7.2007 and also initiated proceedings in that behalf before the Delhi High Court, which culminated into several rounds of litigation before the Delhi High Court. Ultimately, pursuant to the directions given by

the Delhi High Court, the WTM of SEBI heard the parties in relation to the veracity of the complaints filed by Mr. K.K. Sinha and by an order dated October 20, 2011 directed SEBI to investigate into the allegations levelled by Mr. K.K. Sinha against DLF and Sudipti. By the said order SEBI was directed to focus its investigation on the violations, if any, of the provisions of the erstwhile DIP Guidelines read with relevant provisions of the Companies Act, 1956.

(k) In compliance with the order of WTM dated October 20, 2011, investigation was carried out by SEBI and on the basis of investigation report a show cause notice was issued to the appellants on 25.6.2013 inter alia alleging that the appellants:-

i) had employed a scheme to camouflage association of Sudipti with DLF as disassociation.

ii) had failed to ensure that the RHP/prospectus ('offer documents' for convenience) contained all material information which is true and adequate so as to enable the investors to make an informed investment decision in the issue.

iii) had actively and knowingly suppressed several material information and facts in the offer documents leading to misstatements in the offer documents so as to mislead and defraud the investors in the securities market in connection with the issue of securities of DLF.

Accordingly, by the said show cause notice, appellants were called upon to show cause as to why appellants should not be held guilty of violating clause 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 6.15.2 and 9.1 of DIP Guidelines read with Regulation 111 of ICDR Regulations, 2009 read with section 11 of SEBI Act and Section 12A (a), (b) and (c) of SEBI Act read with regulation 3(a), (b), (c), (d), 4(1), 4(2)(f) and (k) of PFUTP Regulations. Appellants were also called upon to show cause as to why suitable directions should not be issued against appellants under section 11(1), 11(4) and 11B of SEBI Act, 1992 read with clause 17.1 of DIP Guidelines read with regulation 111 of ICDR Regulations.

(l) another, show cause notice dated 28.8.2013 was also issued under Rule 4 of the SEBI (Adjudication Rules) for imposition of penalty under section 15HA and 15HB of the SEBI Act. Admittedly, the said show cause notice is yet to be adjudicated.

(m) the appellants filed their reply to the show cause notice dated 25/06/2013 denying the allegations made in the show cause notice. Thereafter, personal hearing was offered to the appellants on 04/12/2013 and 15/01/2014.

(n) by the impugned order passed on 10/10/2014 the appellants are held guilty of violating DIP Guidelines and PFUTP Regulations and accordingly appellants are restrained from accessing the securities market and prohibited from buying, selling or dealing in securities in any manner whatsoever for a period of three years. Challenging the impugned order, all these appeals are filed.

123. Mr. Dwarkadas, Mr. Bhatt, Mr. Joshi, learned senior Advocates and Mr. Parekh, learned Advocate appearing on behalf of respective appellants submitted that the impugned order passed after about 9 months from the last date of personal hearing suffers from various infirmities and the said order has been passed by totally ignoring and misconstruing the arguments advanced on behalf of the appellants. It is submitted that even though DLF was disassociated with Sudipti, Shalika and Felicite prior to the filing of second DRHP due to divestment of the shares of the said three companies held by 100% subsidiaries of DLF, in the impugned order it is erroneously held that the above share transfer process was sham and that DLF continued to exercise control over the said three companies even after the divestment of shares.

124. Counsel for DLF submitted that the back-ground facts which led to association and subsequent disassociation of DLF with the said three companies are as follows:-

a) As a business policy, DLF engaged in real estate development has been establishing various 100% subsidiaries/associates for the purpose of acquiring lands at cheaper rates so that the said lands could ultimately be developed by DLF.

b) Sudipti, Shalika and Felicite were the three out of several associates of DLF. 100% shares of those three companies were held by DLF Estate Developers Ltd. ('DEDL'), DLF Home Developers Ltd. ('DHDL') and DLF Retail Developers Ltd. ('DRDL') which were 100% subsidiaries of DLF in the following manner:-

i) Felicite { DEDL (30%), DHDL (30%), DRDL (40%) }

ii) Shalika { DEDL (30%), DHDL (30%), DRDL (40%) }

iii) Sudipti { DEDL (50%), DHDL (50%) }

Thus, on the date of filing first DRHP on 11/05/2006 Sudipti, Shalika and Felicite were subsidiaries/associates of DLF and therefore in the first DRHP filed with SEBI on 11/05/2006 it was disclosed that Sudipti, Shalika and Felicite were associates of DLF.

c) Sometime in September, 2006 Sudipti purchased about 35 acres of land situated at Gurgaon from Shri Pramod Jain and Mahavir Global Coal Pvt. Ltd as the vendors (with Mr. K. K. Sinha as the confirming vendor). Admittedly Mr. K. K. Sinha has received ₹ 34,27,31,188/- by way of cheques from Sudipti as confirming vendor and vendors viz. Pramod Jain & Mahavir Global Coal Pvt. Ltd. have separately received ₹ 6.34 crores from Sudipti by cheque payment. For purchase of the said lands by Sudipti, funds were provided by the related enterprises of DLF.

d) On October 9, 2006 Sudipti entered into a Development Agreement with DLF Commercial Projects Corporation ('DCPC') a partnership firm in which DLF had 74% interest. Pursuant to the said Development Agreement, DCPC was entitled to all the revenues from the development of the said land, exclusive right to develop as well as control, use and

disposition of the said land and the authority to transfer the said land. Thus, by virtue of above development agreement, DLF (through DCPC) acquired Sole Development Rights over Sudipti's land and by that development agreement Sudipti granted DCPC the right to develop the land for a fixed consideration of ₹ 5 lac per acre. Apart from the above, under the aforesaid Development Agreement, DCPC had the absolute right to sell the said land to prospective purchasers on such terms and conditions as DCPC deemed it fit and proper.

e) On 29.11.2006 entire shareholding of Felicite held by DHDL (30%), DEDL (30%) and DRDL (40%) were sold to Mrs. Madhulika Basak, Mrs. Niti Saxena and Mrs. Padmaja Sanka, who happened to be wives of Mr. Surojit Basak, Mr. Joy Sexana and Mr. Ramesh Sanka respectively who were employees of DLF.

f) On 30.11.2006, 100% shares of Shalika held by DHDL (30%), DEDL (30%) and DRDL (40%) were sold to Felicite. On the same day 100% shares of Sudipti held by DHDL (50%) and DEDL (50%) were sold to Shalika. Thus, as a result of above transactions that took place on 29th and 30th November, 2006 Sudipti became subsidiary of Shalika and Shalika became

subsidiary of Felicite. In other words from 30.11.2006, Felicite became the ultimate holding company of Shalika and Sudipti. In view of the transfer of shares that took place on 29th and 30th November, 2006, Felicite, Shalika and Sudipti ceased to be 'Associates' of DLF and therefore in the second DRHP filed on 2.1.2007 Felicite, Shalika and Sudipti were not shown as associates of DLF.

125. Counsel for DLF submitted that without considering aforesaid facts in proper perspective, in the impugned order, the WTM of SEBI has held that all the three issues framed therein stand established against the appellants. The three issues framed in the impugned order by the WTM of SEBI read thus:-

"(i) Whether entire share transfer process in Sudipti, Shalika and Felicite was executed through sham transactions by DLF and they continued to be subsidiaries of DLF? And, if yes, whether the Noticees employed a scheme by camouflaging the association of Sudipti with DLF as dissociation?

(ii) Whether the Noticees have failed to ensure that the RHP/ Prospectus contained material information which is true and adequate, so as to enable the investors to make an informed investment decision in the IPO of DLF? and

(iii) Whether the Noticees actively and knowingly suppressed several material information and facts in the RHP/Prospectus so as to mislead and defraud the investors in the securities market in connection with the issue of shares of DLF?"

126. In the impugned order it is held that all the above three issues stand established. It is held that the purported transfers of shareholding in the said three companies were sham transactions devised as a plan, scheme, design and device to camouflage association of DLF with the three companies as dissociation. It is held that by failing to ensure that the offer document contain material information which is true and adequate, appellants have violated clauses 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 9.1 and 6.15.2 of DIP Guidelines. It is also held in the impugned order that the appellants actively and deliberately suppressed material facts in the offer documents so as to mislead and defraud investors and thus, the appellants have violated section 12A of SEBI Act read with regulations 3 and 4 of PFUTP Regulations.

127. Arguments advanced by the counsel for DLF in relation to each of the allegations made in the show cause notice and also in relation to the findings recorded in the impugned order are summarized as follows:-

Violation of clause 6.2 of DIP Guidelines

128. Counsel for DLF submits that decision of SEBI in holding that divestment of shares of Felicite, Shalika and Sudipti by DLF (through its

subsidiaries) was with a view to camouflage association of DLF with those three companies as dissociation and consequently, failure to disclose material information relating to those three companies in the offer documents amounts to violating clause 6.2 of DIP Guidelines cannot be sustained for the following reasons:-

a) As per clause 6.2 of DIP Guidelines, the prospectus should contain all material information which shall be true and adequate so as to enable the investors to make informed decision on the investment in the issue. In the present case, on the date of filing second DRHP on 2.1.2007, Sudipti, Shalika and Felicite had ceased to be subsidiaries/related parties and therefore there was no requirement of disclosing the said three companies in the prospectus and in fact disclosing the same in the prospectus would have been a misstatement in itself.

b) Without prejudice to the above and in the alternative, it is submitted that the show cause notice did not set out any adverse effect on investors as a consequence of purported non disclosure and in the absence of making such fundamental enquiry as to whether the investors were prejudicially affected or not, which is the core question to be considered before exercising powers under section 11/11B of SEBI Act, SEBI is not justified in holding the appellants to be guilty of violating clause 6.2 of DIP Guidelines.

c) While investing in DLF's IPO, the investors were guided only by what was stated in the prospectus. The alleged non disclosure of Felicite, Shalika and Sudipti in the offer documents, therefore, played no role in the formation of investor judgment of whether to subscribe to the issue or not.

d) At any rate, alleged non disclosure of the names of the above three companies in the offer documents did not have any bearing on the formation of investor judgement whether to subscribe to the IPO or not. Moreover, it would be incorrect to suggest that if any of the disclosures allegedly suppressed in the offer documents had indeed been made, an investor would not have subscribed to the issue, because:-

i) the only relevance of Felicite, Shalika and Sudipti for the purpose of offer documents (and therefore to any prospective investor) was the land of about 35 acres held by Sudipti (and therefore indirectly by Felicite and Shalika). Even though the said three companies were not named in the offer documents as subsidiaries/related parties, DLF had fully and fairly accounted for its interest in Sudipti's land

in the offer documents by detailing its 'Sole Development Rights' in Sudipti's land which formed part of 37.9% (4575 acres out of 10255 acres) of the total land reserves of DLF over which DLF had sole development rights.

ii) By acquiring Sole Development Rights (through DCPC) over Sudipti's land (a fact duly disclosed in the offer documents) DLF became entitled to virtually all benefits, advantages and privileges arising out of the development on such land, with only the legal title over the land remaining with Sudipti. In other words, besides the shell of legal ownership, all legal rights in Sudipti's land stood transferred to DLF.

iii) Relying on decisions of the Apex Court in case of CIT vs. Podar Cement Pvt. Ltd reported in (1997) 5 SCC 482 AND Dr. K.A. Dhairyavan vs. J.R. Thakkar reported in 1959 SCR 799 it is submitted that concept of dual ownership is recognised in India where the legal title remains with the owner whilst another

person may be entitled to all benefits, advantages and privileges arising out of such land. In the present case, after the execution of development agreement, although legal title in respect of 35 acres of land remained with Sudipti, all rights flowing therefrom were vested with DLF Ltd and since that material information was disclosed, SEBI is not justified in holding that the appellants have suppressed material information.

iv) After execution of the Development Agreement which effectively transferred all benefits, advantages and privileges in Sudipti's 35 acre land in favour of DLF (through DCPC), the three companies were virtually rendered as shells, with no real economic or productive value in them except the legal ownership over Sudipti's land. The divestment of the shares of the three companies by DLF in favour of outsiders (which turned out to be wives of DLF's employees) were undertaken because the said three companies were no longer commercially relevant to DLF and

the divestment of shares was not with a view to exercise control over those three companies. It is submitted that transferees in question were less likely to thwart effectuation of the terms and conditions of the Development Agreement and this mitigated to some extent, the completion risk faced by DLF in executory contracts such as the Development Agreement.

v) Economic interest of DLF on Sudipti's land through the acquisition of bundle of rights in relation thereto being disclosed in the offer documents, it would not have made any difference, even if Felicite, Shalika and Sudipti were shown as subsidiaries/related parties of DLF. Therefore, the commercial and financial disclosures in the offer documents would not have undergone a change even if the three companies were mentioned in the financial statements as subsidiaries/related parties (even though showing Felicite, Shalika and Sudipti as subsidiaries/ related parties would have been incorrect since

the three companies had ceased to be subsidiaries of DLF as verified by the statutory auditors). Therefore, purported non disclosure of Sudipti, Shalika and Felicite was not material for the investment decision by prospective investors.

vi) No investor has lodged any complaint with SEBI with regard to the veracity of the disclosures in the offer documents or alleged that the disclosures in the offer documents had adversely affected their interests even though the offer documents remained in public domain from January to May 2007 on the websites of the stock exchanges, SEBI and all the merchant bankers. Moreover, neither in the show cause notice it is alleged nor in the impugned order it is held that the purported non disclosures or misstatements have led to any direct or indirect benefits or advantage accruing to DLF by reason of such non disclosures or misstatements. Therefore, it becomes

inconceivable as to why DLF would go through 'a scheme by camouflaging the association of Sudipti with DLF as disassociation' when DLF did not stand to gain any benefit or advantage from such non disclosure or wrong disclosure. In other words DLF had no motive to make the non disclosures as alleged, since there could be nothing that could have been gained by DLF by merely avoiding the disclosures of Sudipti as a subsidiary/related party in its offer documents.

vii) Considerations for exercise of statutory powers by SEBI under section 11 viz interest of investors and development of securities market are absent in the present case. The main object of the said provision is to safeguard the market and not to penalise persons for any violation. Section 11/11B are not penal provisions but are preventive and remedial in nature. In the absence of any evidence on record to suggest that any member of the public was

misled into investing in the IPO of DLF, SEBI is not justified in passing the impugned order against the appellant. In support of the above contention reliance is placed on decisions in the case of Indian Bank Mutual Fund & Ors vs. SEBI [Manu/DE/2648/2006], UBS Securities Asia Ltd. vs. SEBI [(2005) SAT 96], Ritesh Aggarwal and Anr. Vs. SEBI [(2008) 8 SCC 205], BPL Ltd. vs. SEBI [(2002) SAT 19], Chairman vs. Shriram Mutual Funds [(2006) 5 SCC 361] and Bharjatiya Steel Industries vs. CST [(2008) 11 SCC 617].

viii) The impugned order completely fails to address the issue of complete absence of any investor prejudice as a result of the alleged discrepancies in DLF's offer documents. Thus the impugned order is conspicuously silent on the fundamental issue of whether DLF's actions led to any investor prejudice. It is a serious infirmity in the impugned order which goes to the

root of the matter and renders the impugned order entirely unsustainable.

ix) In the context of materiality of the FIR filed against Sudipti, the impugned order in para 39 notices the Development Agreement between Sudipti and DCPC and further observes that.... "such Development rights gave DLF substantially the right to all revenues from development including rent and the authority to transfer title to the land...". Consequent to that finding, the impugned order holds the FIR to be material in as much as it had the propensity to 'jeopardize' the development rights and concludes that ".... I therefore find that at the relevant point of time the FIR in question had a direct bearing on the activities of DLF for which the subscriptions were invited in its IPO....". Thus, the impugned order is inherently contradictory in as much as it relies on the importance of development rights to hold the FIR to be material but chooses not to decide the issue of materiality of non

disclosure of Sudipti in view of the self same grant of development rights (when as a matter of fact, the natural extension of above is that the purported non disclosure of Sudipti as subsidiary/related party was not material).

x) In para 43 of the impugned order, while holding that the test of materiality of the information as envisaged in clause 6.2 of DIP Guidelines is that the information should be true and adequate so as to enable the investors to make informed decision on the investments in the issue, it is held that "...In this case, all the information which were not disclosed as found hereinabove, were material information...". This demonstrates indeed that the respondent has not considered the relevant and important aspect of no investor being misled in the matter. Thus the aforesaid finding in paragraph 43 of the impugned order is patently wrong being unsupported by any reason whatsoever. The consequent finding in the said paragraph that DLF has violated

clause 6.2 of the DIP Guidelines is therefore misplaced and legally vitiated.

xi) Similarly, in para 47 of the impugned order it is observed that "....case of active and deliberate suppression of any material information so as to mislead and defraud the investors in the securities market in connection with the issue of shares of DLF in its IPO is clearly made out in this case...." without identifying how the purported non disclosures were material and worse still how the prospective investors could be potentially misled or defrauded. Similarly, Para 48 of the impugned order records that ".....I am satisfied that the violations as found in this case are grave and have larger implications on the safety and integrity of the securities market...". There is no basis for such sweeping statement and the said finding is entirely unsubstantiated.

Violation of clause 6.10.2.3 of DIP Guidelines

129. Counsel for DLF submitted submit that the findings recorded in para 37 of the impugned order that by failing to disclose in the offer documents the financial details relating to its subsidiaries, DLF has violated clause 6.10.2.3 of DIP Guidelines, cannot be sustained for the following reasons:-

a) Clause 6.10.2.3 of DIP Guidelines is relatable to the report to be prepared by the auditors of the issuer company. In the present case, neither the report prepared by the auditors is questioned nor adverted to it in the show cause notice and therefore, the allegation of contravention of clause 6.10.2.3 is simply not maintainable against DLF.

b) Post divestment of shares by DEDL, DHDL and DRDL, Felicite, Shalika and Sudipti ceased to be subsidiaries of DLF. Clause 1.3 of DIP Guidelines provide that words and expressions not defined in the said Guidelines will bear the meaning assigned to them under the Companies Act, 1956 and/or the Securities Contracts (Regulations) Act, 1956 (SCRA). The term 'subsidiary' is neither defined under the DIP Guidelines nor under the SCRA. Therefore, recourse is required to be made to the provision of Companies

Act, 1956 to reckon whether a company is subsidiary of another or not.

c) Under Section 4 of the Companies Act, 1956 a company can be said to be a subsidiary of another, when, firstly, either the latter holds more than half of the share capital of the former or secondly, the latter controls composition of the Board of Directors of the former. Section 211 (3A) of the Companies Act requires that financial statements/balance sheets of a company to be drawn up in accordance with the applicable Accounting Standards. Accounting Standard 21 ("AS-21") which provides for consolidation of accounts of subsidiaries for drawing up financial statements contains a like test for determination of parent subsidiary relationship.

d) In the present case, both the aforesaid tests specified under Section 4 of the Companies Act are not satisfied, because, post divestment of shares on November 29-30, 2006, neither DLF held more than half of the shares capital nor controlled composition of the Board of Directors of Felicite, Shalika and Sudipti.

e) Under Section 4(2) of the Companies Act, a company shall be deemed to have power to appoint to a directorship of another company with respect to which

any of the following conditions are satisfied, that is to say:-

1) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid;

2) that a person's appointment thereto follows necessarily from his appointment as director or manager of, or to any other office or employment in, that other company; or

3) that the directorship is held by an individual nominated by that order company or a subsidiary thereof."

In the present case, there is nothing on record to show that after November 29-30, 2006, DLF had any power to appoint/ remove directors of Felicite, Shalika and Sudipti. Similarly, there is also nothing on record to show that the shareholders of Felicite, Shalika and Sudipti could not appoint directors without permission/approval by DLF. Thus the three companies were not subsidiaries of DLF and therefore were not included as such in the report of the auditor in the offer documents. Moreover, even assuming for the sake of argument that such facts and circumstances

exist, even then the legal tests specified under Section 4 of the Companies Act, 1956 are not met with.

f) Allegation in the show cause notice (para 15.7) that under AS-23, the three companies ought to have been disclosed as subsidiaries of DLF Limited is without any merit, because, AS-23 relates to Accounting for Investments in Associates in the Consolidated Financial Statements. The definition of 'associates' in para 3.1 of AS-23 specifically excludes subsidiary/joint venture of the investor. Therefore, AS-23 can have no application to the present case where SEBI is contending that Felicite, Shalika and Sudipti were subsidiaries of DLF. In any event, the three companies cannot be reckoned as associates of DLF (post divestment) because there is nothing to show that post divestment DLF Limited had 'significant influence' over Felicite, Shalika and Sudipti as contemplated under para 3.2 of AS 23, because, neither DLF had the power to participate in the financial and/or operating policy decisions nor had control over the policies of those three companies post divestment.

g) In para 19 & 20 of the impugned order reference is made to the definition of the expression 'control' under

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('SAST Regulations') to substantiate the finding that DLF had control over the three companies post divestment. That allegation is totally misplaced, because, SAST Regulations have no application in the context of unlisted companies and scope of that regulation is restricted to the context of takeovers, public offers and acquisition of shares in a listed company. In any event, even the tests laid down under regulation 2(1) (c) of SAST Regulations relating to the expression 'control' are not satisfied in the present case.

h) Allegation of SEBI that transfer of shares of Felicite, Shalika and Sudipti by DLF's wholly owned subsidiaries viz. DEDL, DHDL and DRDL was a 'Sham' and that DLF (and its executive directors) had employed 'a scheme of camouflaging' the association of Sudipti with DLF as a 'Disassociation' is totally misdirected. It is not the case of SEBI that various share transfers detailed in the show cause notice were not legally effectuated or that the same did not convey a complete and legal title on the respective transferees. The show cause notice did not question the validity and legality of the share transfers. Therefore, having accepted the share transfers to be valid and legally

binding transactions, SEBI could not allege such transactions to be 'Sham' or 'Camouflage'. It is not in dispute that pursuant to the Development Agreement between Sudipti and DCPC, DLF secured bundle of rights over Sudipti's land over which the development was to be undertaken solely by DLF and it was only the shell of title that remained with Sudipti as legal owner. Therefore, it is inconceivable as to why DLF would go through 'a scheme by camouflaging the association of Sudipti with DLF as dissociation' when nothing could have been gained by DLF by merely avoiding the disclosure of Sudipti, Shalika and Felicite as subsidiaries in its offer documents.

i) Decision of SEBI that even after the divestment of shares, DLF 'controlled' Felicite, Shalika and Sudipti as contemplated under Section 4 of the Companies Act, 1956 cannot be sustained for the following reasons:-

i) fact that post divestment, the spouses of shareholders of Felicite, were employees of DLF does not fulfil the test of 'control' under Section 4 of Companies Act. Moreover, the spouses of shareholders of Felicite were not Key Management

Personnel but were Key Managerial Employees of DLF as disclosed in the offer documents in accordance with clause 6.9.5.8 of the DIP Guidelines. As per AS-18, Key Management Personnel are those persons who have authority for planning, directing and controlling the activities of DLF. Therefore, fact that the spouses of employees of DLF were Key Managerial Employees of DLF under clause 6.9.5.8 of DIP Guidelines could not be a ground for SEBI to consider them to be Key Management Personnel under AS-18 and accordingly hold them to be subject to control of DLF due to their employee-employer relationship.

ii) Allegation that the spouses of Key Managerial Employees continued to be shareholders of Felicite only till their husbands (Key Managerial Employees) were in the employment of DLF is incorrect. The records of Felicite indicate that Mrs. Rima Hinduja continued to be shareholder of Felicite even though her husband, Gaurav Monga ceased to be an

employee of DLF. Shareholdings of the wives were independent of their husband's employment with DLF. Without prejudice to the above, it is submitted that even if the shareholding of the shareholders of Felicite was coterminous with the employment of their respective spouses with DLF, it does not fulfill the legal tests laid down in Section 4 of the Companies Act and/ or AS 21 for determination of parent/ subsidiary relationship.

iii) There is no disability in law against a housewife from investing in shares. There can be no adverse inference drawn merely because the purchase consideration has been advanced from the joint account held by transferee and her employed spouse. Mr. Ramesh Sanka, CFO of DLF, in his reply dated 27/11/2013 indicated that it was customary for his wife Mrs. Padmaja Sanka to fund her expenses out of their joint accounts. Mr. Sanka has further stated that Mrs. Padmaja Sanka's investment decisions were independent of

his employment with DLF. Moreover, it is entirely irrelevant for the purposes of determining the parent/ subsidiary relationship as per Section 4 of Companies Act and/or AS 21, if any personal loan was taken by the spouses of the transferees of Felicite shares.

iv) Under the Companies Act, 1956, the test of control is referable to composition of Board of Directors by controlling appointment thereto and removal there from, and not otherwise. SEBI's reliance on the fact that there was no change in the Board of Directors of Felicite, Shalika and Sudipti, despite divestment of equity stake by DEDL, DHDL and DRDL does not advance their case that DLF was controlling the composition of the Board of Directors of the three companies. The fact that the shareholders of Felicite, Shalika and Sudipti did not change the existing directors on the Board of the three companies, cannot be implied to mean an assumption of decisive control over the composition of the Board of the

three companies in terms of Section 4(2) of Companies Act 1956 and AS 21. Furthermore, the fact that the directors on the Board of Felicite, Shalika and/or Sudipti were employees of DLF/ its subsidiaries does not satisfy the ingredients of control over the composition of Board of Directors prescribed under Section 4(2) of the Companies Act, 1956 and AS 21.

v) Relying on a decision of the Kerala High Court in case of M. Velayudhan vs. Registrar of Companies reported in (1980) 50 Comp. Cas 33, decision of the Delhi High Court in case of Oriental Industrial Investment Corporation Ltd. vs Union of India reported in (1981) 51 Comp. Cas. 487 and a decision of the Allahabad High Court reported in Manmohan Sharma vs. District Magistrate reported in 2011 SCC online (All) 1128 it is contended that in the absence of any evidence to suggest even remotely that post divestment on 29-30 November, 2006 the shareholders of Felicite, Shalika and/or Sudipti could

have appointed or removed a director without affirmation of DLF, it could not be held that post divestment DLF continued to control the three companies. There is no allegation that DLF on its own and/or its subsidiaries had any power in law to appoint/remove the directors of Felicite, Shalika and Sudipti. Fact that the shareholders of Felicite, Shalika and Sudipti did not change the prior Board of Directors of the three companies does not imply decisive control of DLF over the Board of Directors of those three companies as contemplated under Section 4(2) of the Companies Act, 1956 and AS 21. Similarly, mere fact that an employee of one company is sitting on the Board of another company does not create any legal inference of control of the latter company by the former much less make the latter subsidiary of the former. Moreover, directors of Felicite, Shalika and Sudipti were not Key Management Personnel of DLF.

vi) No adverse inference could be drawn from the fact that shares of Sudipti were sold at par, because, admittedly, the amount of ₹ 45 crore received by Sudipti as performance deposit under the Development Agreement from DCPC was an outstanding liability in the books of account of Sudipti and as a consequence, Sudipti's net asset was less than ₹ 10/- per share.

vii) SEBI has incorrectly assumed that DEDL, DHDL and/or DRDL funded Shalika for purchasing the shares of Sudipti. What was given was the share subscription money and delayed payment of shares subscription by signatories to the Memorandum/Articles of Association of a company is permissible in law.

viii) Transactions between Felicite and DLF and/or subsidiaries after the divestment were in the ordinary course of business and cannot create a presumption of continued relationship which would

indicate that DLF was exercising control over Felicite.

ix) Fact that Sudipti and Shalika did not have operational expenses during 2006-2007 and 2007-2008 cannot be inferred against DLF, because, during the period from the date of incorporation of Sudipti and Shalika till November 30, 2006, these companies did not have substantial business which would require them to incur substantial operational expenses. DLF is unaware of the operational expenses and financial position of Sudipti and Shalika post November, 2006.

x) Allegation that there was no change in any of the authorized signatories is not entirely correct and in any event, these facts do not satisfy the test of control under Section 4 of the Companies Act/or AS 21.

xi) Allegation that there is no conclusive evidence of payment received by DEDL, DHDL and DRDL from Felicite towards sale of shares of Shalika is without any

merit, because, consolidated remittance of the purchase price was paid by Felicite to DEDL, DHDL and DRDL.

xii) During the period September- October 2006, Sudipti was funded through a series of transactions involving DLF's partnership firm, subsidiaries/ associates, because the intention was to acquire land in the name of Sudipti so as to avoid exorbitant demands from sellers of land which DLF was desirous of developing and Sudipti was one of the vehicles to acquire land. Post acquisition of land, Sudipti transferred the development rights over the land in favour of DLF (through DCPC). There is, therefore, nothing questionable in DLF directly/indirectly financing the purchase of land by Sudipti.

xiii) Fact that DLF and Sudipti have filed simultaneous appeals against orders of Delhi High Court would not fulfill the test of Section 4 of the Companies Act 1956 and AS 18. At any rate, DLF and Sudipti had engaged their own separate lawyers.

Hence, decision of SEBI that even after divestment of shares, DLF continued to control, Felicite, Shalika and Sudipti is without any merit.

j) The financial statement i.e. balance sheet of DLF for the year ending March 31, 2007, was scrutinized by its statutory auditors who after applying themselves to the relevant facts and circumstances and the applicable test of parent/subsidiary relationship had not included the financials of Felicite, Shalika and Sudipti in the report prepared in accordance with clause 6.10.2.3. The same statutory auditor had issued a reconfirmatory opinion confirming the disclosures in the report annexed to the offer documents. Moreover, M/s Haribhakti & Co. in their independent professional capacity have also opined that Felicite, Shalika and Sudipti did not meet the legal parameters laid down by Section 4 of the Companies Act, 1956 and AS 21. Since experts in the field of accountancy have confirmed the accuracy of the financial statements and conformity thereof with relevant accounting practices, SEBI is not justified in speculating to the contrary. DLF had acted bonafide on the basis of advice received from renowned Merchant Bankers and legal advisors who had minutely and rigorously scrutinized the offer documents to ensure

compliance with all applicable norms. In particular, the Merchant Bankers of DLF had certified the accuracy of the disclosures in the offer documents, by stating specifically that such disclosures were sufficient to enable investors to make an informed investment decision. Where a company has acted on professional advice, in the absence of sufficient evidence to establish the charge of misleading the public, it cannot be held that the said company has willfully failed to disclose material information. In support of above contention, reliance is placed on a decision of this Tribunal in case of Sundaram Finance Ltd. vs SEBI reported in (2003) SAT 35 and order of SEBI dated 10/10/2012 passed in case of M/s Vakrangee Software's Ltd.

k) The impugned order in paras 20-21 recognizes the legal test of control under Section 4(2) of the Companies Act, 1956 as being relatable to …. "appoint or remove majority of directors from the Board(s)…. without the consent or concurrence of any other person…". Yet, abandoning the above legal test, it is concluded in para 23 that DLF had control over Sudipti, Shalika and Felicite by virtue of the fact that employees of DLF were directors of those three companies at the relevant point of time, by holding

that…. "through this employer-employee relationship DLF was in a position to influence the management decisions of these three companies even after the aforesaid transfer of shareholding in them…".

l) No basis is set out in the impugned order for arriving at the conclusion that DLF was influencing the 'management decision' of Felicite, Shalika and Sudipti. At any rate, the ability of a company to influence the management decisions of any other company is not a test for reckoning control under Section 4 of the Companies Act, 1956.

m) Impugned order erroneously concludes in para 25 that …. "DLF through its employees was involved in day to day operations of these three companies and was associated with these three companies even after November 29-30, 2006…." on the basis of the fact that various persons who were employees of DLF became bank account signatories of Shalika, Sudipti and/or Felicite after November 30, 2006, overlooking DLF's submission that such appointment had no relationship whatsoever with their employment with DLF.

n) Findings recorded in para 24 to 32 of the impugned order viz. no change in the authorized bank account signatories/registered office address/statutory auditors

of the three companies post November 30, 2006, allegation that shares of Sudipti were purchased by Shalika from the funds advanced by DEDL and DHDL and the findings relating to purchases made by Mrs. Basak, Mrs. Sanka and Mrs. Saxena etc. do not satisfy the test of control prescribed by Section 4 of Companies Act, 1956. The impugned order fails to appreciate that the law (i.e. Section 4 of the Companies Act, 1956 and AS 21) prescribes an objective test for reckoning a parent-subsidiary relationship and subjective tests applied in the impugned order cannot be relied on to reckon a relationship of parent-subsidiary. Therefore, the findings arrived at para 33 of the impugned order that the… "purported transfers of shareholding in the said three companies were Sham transactions, devised an a plan, scheme, design and device to camouflage the association of DLF with these three companies as holding-subsidiary…" is flawed and legally infirm. SEBI has erred in drawing an analogy with certain other 355 companies since the enquiry in the show cause notice was limited to Felicite, Shalika and Sudipti alone.

o) Assuming while denying that DLF ought to have disclosed Sudipti, Shalika and Felicite as subsidiaries and consolidated their accounts with the accounts of

DLF as alleged in the show cause notice, the same would not have made any material difference to the decision of investors to invest in shares of DLF, because:-

i) net total loss of Sudipti, Shalika and Felicite in the Financial Year 2006-2007 was ₹ 8 lac (approximately).

ii) DLF's total consolidated profit for the year 2006-2007 as disclosed in the financial statements was ₹ 1941.300 crore.

iii) if loss of three companies (₹ 8 lac) were to be adjusted from the profits of DLF (₹ 1941.300 crore), the net adjusted profit of DLF would have been varied only to the extent of 0.004%.

Therefore, assuming that there is failure to disclose that the three companies were subsidiaries/associates of DLF, such failure would not have made any material difference to the decision of investors to invest in shares of DLF.

p) Merchant Bankers, legal advisors and auditors would have issued certificates only on being satisfied that the disclosures made in the offer documents were sufficient and appropriate.

The Merchant Bankers are governed by and subject to stringent regulations made by SEBI and in case of any violation, SEBI is empowered to proceed against them. Fact that SEBI has not proceeded against the Merchant Bankers in relation to DLF's offer documents shows that it did not view the alleged violations qua the offer documents seriously. Therefore, when the impugned order does not in any manner impeach the credibility of the above certificates, does not question the basis on which those certificates were issued and when, neither the Merchant Bankers, auditors nor the legal advisors were called upon to participate in the proceedings against DLF nor asked to explain/certify the contents of their certificates, SEBI is not justified in holding that DLF is guilty of not disclosing material fact relating to the said three companies.

q) M/s Walker, Chandiok & Co., statutory auditor of DLF were also auditors of DEDL for the Financial Year 2006-2007 i.e. the year in which the divestment took place. It cannot, therefore, be said that the statutory auditor was unaware of the circumstances surrounding the divestment. In fact, even after issuance of the show cause notice, the said statutory auditor has issued reconfirmatory opinion, which was placed before SEBI along with the reply to the show cause notice.

Similarly, even after commencement of investigation by SEBI, 4 out of the 8 Merchant Bankers in the IPP have not expressed any reservations on the disclosures regarding the subsidiaries of DLF in the IPP documents.

Contravention of clause 6.9.6.6 of DIP Guidelines

130. Clause 6.9.6.6 of DIP Guidelines provide that the offer document shall interalia contain 'Related party transactions as per financial statements'. In terms of Section 211(3A) of the Companies Act 1956, financial statements/balance sheets of a company have to be drawn up in accordance with the applicable Accounting Standards. The applicable Accounting Standard for the purpose of reckoning related party transaction is AS-18. As per paragraph 10.1 of AS-18, parties are considered to be related ('related party') if at any time during the reporting period one party has the ability to control the other party or exercise significant influence over the other party in making financial and/or operating decisions.

131. Paragraph 10.2 of AS 18 defines 'control' as follows:-

"a) Ownership, directly or indirectly, of more than one half of the voting power of an enterprise, or

b) Control of the composition of the Board of Directors in the case of a company or of the composition of the

corresponding governing body in case of any other enterprise, or

c) A substantial interest in voting power and the power to direct, by statute or agreement, the financial and/or operating policies of the enterprise."

132. Paragraph 10.4 of AS-18 defines 'significant influence' as follows:-

"Participation in the financial and/or operating policy decisions of an enterprise, but not control of those policies".

133. In the impugned order at para 36 it is held that DLF had the ability to control, directly or indirectly, Sudipti, Shalika and Felicite under AS-23 and that the DLF had also the ability to exercise 'significant influence' over Sudipti, Shalika and Felicite in relation to their financial or operational decisions. Counsel for DLF submitted that there is no merit in the above findings recorded by SEBI for the following reasons:-

a) Reference in the impugned order to AS-23 to reckon whether Sudipti, Shalika and Felicite were the related parties of DLF is erroneous, because, the relevant Account Standard in relation to related parties in AS-18 and not AS-23.

b) In the show cause notice there was no allegation that DLF had the ability to exercise significant influence over Sudipti, Shalika and Felicite and therefore,

finding in that behalf is in excess of and beyond the allegations in the show cause notice.

c) In any event, DLF was not exercising 'control' over Sudipti, Shalika and Felicite neither in terms of ownership over the voting power nor in terms of control over the composition of Board of Directors nor DLF had any interest in the voting power of Sudipti, Shalika and Felicite and there is nothing to indicate that DLF had the power to direct by statute or agreement the financial and/or operating policies of the three companies.

d) Impugned order overlooks the fact that the expression 'significant influence' as appearing in clause 10.4 of AS-18 is defined differently from the word 'control' as defined in clause 10.2 of AS-18. Therefore, it was obligatory for SEBI to show in the show cause notice through objective facts, in what manner DLF was in a position to exercise 'significant influence' over the affairs of Sudipti, Shalika and Felicite. SEBI has completely failed to discharge this burden of proof.

Therefore, the allegation that DLF has violated clause 6.9.6.6 of the DIP Guidelines is wholly unsustainable.

Contravention of clause 6.11.1.2 of the DIP Guidelines

134. Clause 6.11.1.1(e) of the DIP Guidelines provides that 'outstanding litigations', defaults etc. pertaining to matters likely to affect operations and finances of the issuer company (in the present case of DLF) including disputed tax liabilities, prosecution under any enactment in respect of Schedule XIII to the Companies Act, 1956 etc. shall be disclosed. Clause 6.11.1.2 of the DIP Guidelines provides that the information about outstanding litigations as per clause 6.11.1.1(e) shall be furnished in respect of subsidiaries of the issuer company (if applicable).

135. In para 39 of the impugned order it is held that since the offer documents included the sole development rights procured from Sudipti by DCPC…. " the FIR in question had a direct bearing on the activities of DLF…". In para 40 of the impugned order it is held "since the charges alleged in the said FIR, if proved against Mr. Praveen Kumar would have affected his position as a director of the aforesaid promoter group company and subsidiaries of DLF which would have also had a material impact on the operations of these companies and consequently on the operations of the DLF…." and… "FIR was material information…irrespective of the fact whether Sudipti was subsidiary of DLF".

136. Counsel for DLF submitted that there is no merit in the aforesaid findings for the following reasons:-

a) Assuming without admitting that Sudipti was a subsidiary of DLF at the relevant point of time, FIR filed by Mr. K. K. Sinha against Sudipti was not

known to DLF until June 25, 2007, because, on that day DLF received from its Merchant Bankers a letter from SEBI enclosing therein a letter dated June 4, 2007 written by Mr. K.K. Sinha to SEBI which referred to the registration of the said FIR. Since DLF came to know of the FIR only on June 25, 2007 the question of making disclosure in the offer documents did not arise.

b) Observations made by the WTM of SEBI in his order dated October 20, 2011 that DLF was aware of the filing of the FIR at the relevant time i.e. prior to the closure of the issue on June 14, 2007 was a prima facie observation and that observation could not be construed as constructive knowledge, because, in para 17 of the said order it was specifically stated that the findings recorded therein would not be binding on SEBI and the Investigating Officer was required to independently apply his mind and carry out the investigation. In the absence of any investigation carried out by the Investigating Officer, in the impugned order, it could not be held that DLF was aware of the filing of the FIR at the time of issuing the offer documents.

c) Fact that Mr. Praveen Kumar is the nephew of the Chairman of DLF cannot be a ground to assume that

DLF would have been aware of the filing of FIR at any time before receipt of the letter dated June 25, 2007 from SEBI. In other words, Mr. Praveen Kumar's knowledge of the registration of the FIR (assuming that he himself was aware of the registration of the FIR prior to June 25, 2007) cannot be a ground to hold that DLF was aware of the FIR prior to June 25, 2007.

d) Relying on a decision of the Bombay High Court in the case of Killick Nixon Ltd. and Ors. Vs. Dhanraj Mills Pvt. Ltd. and Ors. Reported in (1983) 54 Comp.cas 432 (Bombay) it is submitted on behalf of DLF that knowledge of the directors of a company cannot be construed to be knowledge of the company itself. If the knowledge of the directors is not the knowledge of the company, then the knowledge of a relative of a director cannot certainly be knowledge of the company.

e) Without prejudice to the aforesaid submissions it is submitted that the FIR was not required to be disclosures in the offer documents for the following reasons:-

i) There was no requirement of making any disclosure under clause 6.11.1.2 since Sudipti was not a subsidiary of DLF at the relevant time.

ii) FIR does not amount to litigation in law. This is because in the case of the criminal proceeding, a case can be said to be instituted only when a Competent Court takes cognizance of the offence alleged in the charge sheet and not on the mere filing of the FIR. Therefore, the mere registration of an FIR does not lead to the inference that a case is instituted, which would be 'litigation' for the purpose of clause 6.11.1.1(e) of DIP Guidelines. In support of the above contentions reliance is placed on decisions of the Apex Court in the case of General Officer Commanding, Rashtriya Rifles Vs. Union of India reported in (2012) 6 SCC 228, Jamuna Singh and Ors. Vs. Bhadai Shah reported in AIR 1964 SC 1541.

iii) Clause 6.11.1.1(e) of the DIP Guidelines requires discloser of only litigation which is 'likely to affect operations and finances' of the issuer company or at any rate the subsidiary in question. It is submitted that the FIR in question cannot be said to be one which could 'affect operations and finances' of DLF and/or Sudipti because the same would not have resulted in either DLF being deprived of the development

rights over Sudipti's land or Sudipti itself loosing land parcel.

iv) Upon investigation of the FIR filed by Mr. K. K. Sinha against Sudipti, the Police did not find merit in the allegations made in the FIR and filed a closure report. Upon consideration of the said closure report and the protest petition filed by Mr. K. K. Sinha, the Learned Additional Chief Metropolitan Magistrate by his order dated August 27, 2009 accepted the closure report and permitted Mr. K. K. Sinha to prosecute the complaint as a private complaint. The filing of the closure report by the Police and its acceptance by the learned Magistrate by a reasoned order adds credence to DLF's submission that the FIR was in any case a misplaced and frivolous proceeding to begin with and therefore could not be said to be a material information.

v) Moreover FIR in question had no bearing on the activities of DLF because the FIR related to the alleged duping of Mr. K. K. Sinha by Sudipti and certain others in relation to an amount of ₹ 34 crore which had been taken by them from

Mr. K. K. Sinha on an alleged solemn assurance which was ultimately stated to have been reneged from. Thus, the FIR per se did not relate to the land owned by Sudipti over which DLF had sole development rights. At any rate, the said FIR did not negatively impact the acquisition and continuance of the sole development rights in favour of DLF so as to be covered by clause 6.11.1.1(e) of the DIP Guidelines. Alternatively and without prejudice to the above, it is submitted that the mere lodgement of an FIR could never be said to have the propensity of jeopardizing the sole development rights acquired by DLF (through DCPC) so as to have effect on the 'operations and finances' of DLF. This would be more so since the sole development rights acquired from Sudipti constituted less than 0.05% of land bank of DLF as on the date of the offer documents.

vi) Since cognizance of the FIR was not even taken by a Competent Court, it does not become material and consequently does not become liable for disclosure just because one of the accused therein is a director in one or more subsidiaries of the issuer company.

vii) Clauses 6.11.1.1 and 6.11.1.2 of the DIP Guidelines do not require disclosure of litigation against the directors of subsidiaries of the issuer company.

viii) Findings recorded in para 41 of the impugned order that Mr. Praveen Kumar was Key Managerial Employee of DLF reporting directly to its Board of Directors is totally incorrect. It is submitted that the fact that Mr. Praveen Kumar was a Key Managerial Employee of the appellant at the relevant time is wholly insufficient in law to make his knowledge that of DLF. If the knowledge of the directors of a company cannot be construed to be the knowledge of the company, the knowledge of a Key Managerial Employee of the company can certainly not be attributed to the company.

ix) In para 41 of the impugned order reference is made to the purported interrogation of Mr. Praveen Kumar by the Police which fact is brought out in the impugned order for the first time and the same never formed part of the allegations in the show cause notice. At any rate it is submitted that the said finding is not borne

out from the records of the matter and hence cannot be sustained.

x) The parity drawn in the impugned order between the FIR filed by the Mr. K. K. Sinha and the FIR filed by Mr. Harish Kumar Puri and Mr. Leelu Ram (para 42) in order to contend that DLF ought to have disclosed the FIR filed by Mr. K. K. Sinha is completely wrong. It is submitted that the disclosure of the said two FIR's were not made pursuant to clause 6.11.1.2 read with clause 6.11.1.1(e) of DIP Guidelines. The complaint filed by Mr. Harish Kumar Puri against DLF and its directors interalia alleged acts of criminal conspiracy, cheating, abuse of official position. The disclosure of such proceedings was mandated under clause 6.11.1.1(b) &(c) of DIP Guidelines and was accordingly disclosed by DLF in the offer documents. In so far as the FIR by Leelu Ram is concerned, a Competent Court had taken cognizance of the same and was trying the accused named therein at the time of the second DRHP. Mr. Leelu Ram's case was therefore not one of an FIR simpliciter. These facts were brought to the notice of SEBI vide reply filed by

DLF to the show cause notice, however, without considering the said facts impugned order is passed solely basis of the allegations made in the show cause notice. Accordingly, it is submitted that non-disclosure of the FIR did not amount to contravention of clauses 6.11.1.2 of the DIP Guidelines.

Voilation of clause 9.1 of the DIP Guidelines

137. Clause 9.1 of the DIP Guidelines make it obligatory on the lead Merchant Banker to ensure compliance of the said Guidelines by the Issuer Company. Clause 1.2.1 (iii) of the DIP Guidelines define the expression 'Advertisement' to include notices, brochures, pamphlets, circulars, show cards, catalogues, hoardings, playcards, posters, insertions in newspapers, pictures, films, cover pages of offer documents or any other print medium, radio, television programmes through any electronic medium. Without disclosing as to how DLF had contravened clause 9.1 of the DIP Guidelines it is alleged in the show cause notice that the appellants have violated clause 9.1 of the DIP Guidelines on ground that the appellants (a) employed a scheme by camouflaging the association of Sudipti with DLF as disassociation (b) failed to ensure that the offer document contained all material information which is true and adequate so as to enable the investors to make an informed investment decision in the issue (c) actively and knowingly suppressed certain material information and facts in the offer documents leading to misstatements in the offer

documents so as to mislead and defraud the investors in securities market. In para 44 of the impugned order it is held that since the offer documents contained misleading disclosures with regard to the material information and the offer documents did not contain fair and clear disclosures with regard to those material information, the appellants have violated clause 9.1 of the DIP Guidelines.

138. Counsel for DLF submitted that aforesaid findings are completely bald and without any basis. Neither in the show cause notice nor in the impugned order it is indicated as to which sub clause of clause 9.1 had been violated by DLF and in what manner. As a matter of general practice, list of subsidiaries/ related parties and pending legal proceedings are never advertised by the issuer company and therefore findings on alleged contravention of clause 9.1 of the DIP Guidelines must fail.

139. Counsel for DLF further submitted that even otherwise, clause 9.1 does not create any obligation upon an Issuer Company to comply with the guidelines on Advertisement. On the contrary, as per clause 9.0, the responsibility to ensure compliance with the obligation under clause 9.1 is on the lead Merchant Banker and therefore, violation of clause 9.1 of DIP Guidelines cannot be held against DLF. At any rate allegation of employing sham transaction and allegation of actively and knowingly suppressing material information and facts in the offer documents are untenable in view of the submissions already made in that behalf.

Contravention of clause 6.15.2 of DIP Guidelines

140. Counsel for DLF submitted that the findings recorded in para 44 of the impugned order to the effect that the Directors/CEO/CFO of DLF have failed to ensure that the disclosures in the offer documents were true and correct and thereby contravened clause 6.15.2 of the DIP Guidelines cannot be construed as contravention by DLF. The said finding demonstrates complete non application of mind by SEBI more so since it speaks of certification by the 'CEO' of DLF, when no such designation holder had either certified the prospectus nor been arrayed in the proceedings. At any rate, according to DLF the primary allegation that there are non-disclosures and incorrect disclosure in the offer document itself is unsustainable and consequently the charge of violating clause 6.15.2 is also not sustainable. Moreover, the Directors and the CFO had proceeded on the expertise of Merchant Bankers, statutory auditors and legal advisors while certifying the accuracy of the disclosures in the offer documents. They acted in a manner any prudent Board of a company would have acted. Therefore, since the Directors and the CFO acted honestly and bonafide on the basis of expert opinion, it cannot be said that they have violated clause 6.15.2 of the DIP Guidelines.

Violations of PFUTP Regulations.

141. Counsel for DLF submitted that in the impugned order it is held that DLF by failing to ensure that the offer documents contain all material informations which are true and adequate so as to enable the investors to make an informed investment decision in the issue, and by actively and

knowingly suppressing several material information and facts in the offer documents leading to misstatements in the offer documents with a view to mislead and defraud the investors in the securities market, DLF has violated Section 12A of the SEBI Act and PFUTP Regulations. It is submitted that the aforesaid findings are unsustainable for the following reasons:

a) PFUTP Regulation is a self-contained code and lays down the procedure for investigation and imposition of penalty for violating the said Regulations. Regulation 5 provides for appointment of an Investigating Authority by the Appointing Authority. Regulation 9 provides for submission of report by the Investigating Authority to the Appointing Authority. Regulation 10 provides that the Board shall consider the report submitted under Regulation 9 and after giving reasonable opportunity of hearing to the persons concerned issue such directions or take such action as mentioned in Regulations 11 and 12 of PFUTP Regulations.

b) While appointing the Investigating Officer to investigate the complaints against DLF, the WTM of SEBI in his order dated October 20, 2011 had not issued any direction to investigate the violations, if any, under the PFUTP Regulations. In any event, there is nothing on record to suggest that the report of

Investigating Authority in relation to the alleged PFUTP violations were submitted to the Appointing Authority as provided under Regulation 9. There is nothing on record to suggest that the Board has considered the said report as provided under Regulation 10. Therefore, in the absence of following the procedure laid down under the PFUTP Regulations, any action commenced in violation of the procedures prescribed under the PFUTP Regulations cannot be sustained. In this connection reliance is placed on decision of the Apex Court in the case of Ramchandra Keshav Adke vs. Govind Joti Chavarre reported in (1975) 1SCC 559 and Hukum Chand Shyam Lal vs. UOI & Ors. reported in AIR 1976 SC 789.

c) Without prejudice to the above, it is submitted that Regulation 3 of PFUTP Regulation prohibits certain "dealings in securities". Expression "dealing in securities" has been defined under Regulation 2(b) as follows:

> "*Dealing in securities" includes an act of buying, selling or subscribing pursuant to any issue of any security or agreeing to buy, sell or subscribe to any issue of any security or otherwise transacting in any way in any security*

by any person as principal, agent or intermediary referred to in section 12 of the Act."

On a bare reading of the above definition, it is submitted that an issuer company issuing shares for the purposes of listing on a stock exchange would not come within the scope of Regulation 3. As a natural corollary, Regulation 4(2) which provides for the circumstances in which "dealing in securities shall be deemed to be a fraudulent or an unfair trade practice" would have no application in the present case. Therefore, actions of DLF in connection with the IPO would not amount to "dealing in securities" and hence would not attract Regulation 4(2).

d) "Dealing in Securities" as defined under Regulation 2(b) of PFUTP Regulations is an essential ingredient of the definition of "fraud" as defined under Regulation 2(c) of PFUTP Regulations. In the instant case it cannot be said that any act, omission or concealment was caused by DLF while "dealing in securities" which would satisfy the definition of "fraud" for the purposes of PFUTP Regulations.

e) Charge levelled against DLF relates to dissociation of Sudipti by the subsidiaries of DLF. In view of the fact

that transfer of shareholding in Sudipti by DLF's subsidiaries being consummated by November 30, 2006, i.e. much prior to DLF's second DRHP, the alleged non-disclosure of association with Sudipti has no bearing or correlation to the securities market.

f) Assuming for the sake of argument that DLF could be said to be "dealing in securities" in connection with the IPO, even then DLF cannot be alleged to have committed "fraud" under Regulation 2(c) of PFUTP Regulations. This is for the reason that in order to constitute fraud, the impugned act, expression, omission or concealment should be directed "to induce another person or his agent to deal in securities". In the present case, it cannot be said (nor is there even a faint suggestion to that effect in the show cause notice or in the impugned order) that the disassociation of Sudipti, Shalika and Felicite by DLF and/or the omissions of the names of these companies from the offer documents was intended to induce (or had result of inducing) investors and general public to buy/subscribe to DLF's shares in the IPO.

g) Additionally, DLF's issue would not amount to "trade practice" within the scope of Regulations 4 of PFUTP Regulations which prohibits "manipulative, fraudulent

and unfair trade practices". Regulation 4(1) provides that without prejudice to the provisions of Regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities. Regulation 4(2) indicates the circumstances in which "dealing in securities" shall be deemed to be "a fraudulent or an unfair trade practice" "if it involves fraud". Regulation 4(2) also provides instances amounting to "a fraudulent or an unfair trade practice" set out in clauses (a) to (r). SEBI has failed to appreciate that for the purposes of invocation of Regulation 4, an act must amount to a "trade practice". In order to be so, it has to be repetitive in nature. Issuance of shares for the purposes of raising capital is not a trading activity and hence would not amount to "trade practice". In this regard, it may be noted that the expression "trade practice" has not been defined in the PFUTP Regulations, however, the import of the term stands judicially formulated by a decision of Monopolies and Restrictive Trade Practices Commission order dated 10/12/1990 in case of Auto Agents & Bajaj Auto RTP Enquiry No. 129/1986) and decision of the Apex Court in case of Morgan Stanley Mutual Fund vs. Kartick Das reported in (1994) 4 SCC 225.

h) Without prejudice to the above, it is submitted that even otherwise no case is made out under Regulation 3(a),(b),(c),(d) 4(1), 4(2) (f) and (k) of the PFUTP Regulations read with Section 12 A (a), (b),(c) of the SEBI Act, 1992. The essential prerequisite under the aforestated statutory regime is intent to defraud, deceive or otherwise cause an intentional manipulative or misleading practice. The requirement of a positive intent to defraud, manipulative or mislead would in any case not be satisfied in the present facts since DLF has demonstrated that it acted bona fide on the advise of experts such as merchant bankers, auditors and legal advisors while finalizing the offer documents. Since the offer documents had been rigorously scrutinized and approved by such independent external experts, none of whom pointed out any material discrepancy or non-compliance with applicable regulations while approving the offer documents, an allegation of deceitful contrivance and/or deliberate manipulation is hardly made out against DLF. The fact that DLF gained absolutely no benefit or advantage as a result of the allegedly "fraudulent practice" also operates as a strong presumption against the tenability of the aforesaid charges against DLF.

i) DLF's bona fides are further established by the fact that while filing the second DRHP on January 02, 2007, it had filed documents (delta view) indicating all differences between First DRHP and Second DRHP including differences in relation to the related party disclosure. This document is mentioned in the covering letter filed along with the Second DRHP. SEBI had reviewed all documents filed along with the Second DRHP, including the "delta view" document. In exercise of its powers as the market regulator, SEBI has also issued comments on the disclosures made in the Second DRHP. DLF therefore, had the legitimate expectation that SEBI while acting in its regulatory capacity and issuing comments had reviewed all documents placed before it along with the Second DRHP. SEBI in its affidavit in reply dated December 1, 2014 to the present appeal has taken the position that SEBI does not approve offer documents in terms of clause 6.4.2.2(a)(v) the offer document and therefore, no reliance can be placed on the delta view document filed by the appellant. This assertion loses sight of DLF's argument that the submission of the delta view document exhibited its bona fides in the matter and that DLF had not carried out the divestment

in a clandestine manner, as alleged in the show cause notice.

j) It is settled law that imposing punishment under the PFUTP Regulations on the ground of commission of fraud requires clear and unambiguous evidence and a high degree of probability, which is lacking in the present case. In support of the above contention reliance is placed on decisions of this Tribunal in case of Ess Ess Intermediaries Anand Saurashtra Society vs. SEBI reported in MANU/SB/0020/2013 and decision of this Tribunal in case of Prashant J. Patel vs. SEBI reported in MANU/SB/0096/2010.

k) The impugned order deals with the above arguments in a circulatory manner. It merely notes the definition of 'fraud' and the definition of 'dealing in securities' and then holds that divestment of shares of Sudipti, Shalika and Felicite by DLF was sham and that DLF had suppressed several material information in the offer documents. On the above basis, the impugned order 'jumps' to the conclusion that DLF has actively and knowingly suppressed material information and facts in the offer documents so as to mislead and defraud the investors in connection with issuance of shares and the same would be covered within the scope of Section

12A of SEBI Act and Regulations 3 and 4 of PFUTP Regulations. Hence decision of SEBI that DLF has violated PFUTP Regulations cannot be sustained.

142. Counsel for DLF further submitted that the proceedings arising out the of show cause notice dated June 25, 2013 are vitiated on account of violation of the principles of Natural Justice as inspite of repeated requests SEBI has failed to give inspection of the correspondence between SEBI and the Merchant Bankers of DLF. Inspection of those documents would have thrown light on the discussions between SEBI and Merchant Bankers on disclosure in the offer documents.

143. It is submitted by the counsel for appellant that in the present case, the violations alleged against DLF are technical and venial in nature, because, the alleged suppression of Felicite, Shalika and Sudipti as subsidiaries/related parties in the offer documents would at the highest amount to suppression of aggregate loss of about ₹ 8 lac (approx.) from the consolidated accounts of DLF for the year 2006-07. Assuming while denying that the disclosure of three companies was material to the protection of investor's decision, there is nothing in the show cause notice or in the impugned order to establish that by means of the above alleged suppression, investors have lost in the IPO of DLF/its directors have gained in any manner. Similarly, assuming that the alleged suppression of the FIR constitutes non-disclosure, it is again a technical and venial breach and neither in the show cause notice nor in the impugned order it is

recorded that by reason of non disclosure of FIR, investors have lost in the IPO or DLF/its directors have gained in any manner.

144. It is submitted by counsel for DLF that even though para 15.13 of the show cause notice alleges that facts were suppressed in the offer document, neither the show cause notice nor the impugned order disclose any mens rea. In the absence of mens rea, Sections 11, 11A, 11(4) and 11B of the SEBI Act could not be invoked which are discretionary, remedial and not punitive in nature. It is well settled law that punishment must fit the crime, otherwise it will be hit by Wednesbury principle of unreasonableness and rule of proportionality. It is well settled law that no penalty ought to be imposed for a technical and venial breach of statutory obligations. In support of the above contentions reliance is placed on the decision of the Apex Court in Bharjatiya Steel Industries vs. CST reported in (2008) 11 SCC 617, Maharashtra Land Development System vs. State of Maharashtra reported in (2011) 15 SCC 616 and Chairman, All India Railway Recruitment Board vs. K. Shyam Kumar reported in (2010) 6 SCC 614 and Hindustan Steel Ltd vs. State of Orissa reported in AIR 1970 SC 253.

145. It is further submitted that DLF is a public limited listed company with about 4.5 lac shareholders, and has a constant need to access the capital market in order to carry on its business operations. By the impugned order harshest and most disproportionate punishment that could have been imposed under Section 11(4)(b) of the SEBI Act has been levied that too for a period of three years. Such a punishment can be

imposed in the rarest of rare case for offenders indulging in grave acts of fraud and having serious implications on the securities market.

146. It is also submitted by the counsel for DLF that the impugned order does not contain any reasons as to why such harsh directions are issued save and except making reference to the judgment of the Supreme Court in the case of N. Narayanan reported in (2013) 12 SCC 152 which judgment has no application of facts of the present case. The N. Narayanan's case was a case where the directors of the company had inflated company's revenue profits, security deposits and receivables which were relied upon by investors while taking investment decisions.

147. It is also submitted by counsel for DLF that debarment order is not in the interest of the investors is seen from the fact that on the day subsequent to the day when the impugned order came to the knowledge of general public, the market capitalization of the DLF was reduced by about ₹ 7,500 crores (consequent to steep fall of 30% in the share price of DLF). Neither the show cause notice nor the impugned order justify how the said ban on the appellant company can either be in the interest of investors or securities market.

148. It is further submitted by the counsel for DLF that the phrase 'dealing in securities' appearing in the operative paragraph of the impugned order (para 50) is being interpreted by SEBI to include dealing by DLF in its own investments made in the shares of its unlisted subsidiaries as well as investments made in the Mutual Funds. Thus, in

effect, the impugned order stifles DLF. The impugned order has also restricted the ability of DLF to reduce its debts through equity financing. This not only stretches the financial capacity of DLF but also acts as a burden on the banking system. Further, DLF has been incapacitated from floating bonds, debentures and like financial instruments.

149. Mr. J. J. Bhatt, learned counsel appearing on behalf of the appellants, while adopting the arguments advanced by counsel for DLF submitted that in the absence of any provision under the SEBI Act making the Directors/ CFO automatically liable for the offences allegedly committed by the company, SEBI is not justified in passing the impugned order against the Directors/CFO of DLF. In support of the above submission reliance is placed on the decisions of the Apex Court in the case of Maksud Saiyed vs. State of Gujarat and Ors. reported in (2008) 5 SCC 668, Commissioner of Central Excise, Bangalore vs. Brindavan Beverages (P) Ltd. and Ors. reported in (2007) 5 SCC 388 and Collector of Customs, Calcutta vs. Tin Plate Co. of India Ltd. and Ors. reported in (1997) 10 SCC 538. Reliance is also placed on decision of the Apex Court in Sunil Bharti Mittal vs. CEB (Criminal Appeal No. 34 of 2015 decided on 09/01/2015) in support of the contention that liability for offending acts of a company can be foisted on its directors only when the applicable statute specifically provides for vicarious liability of directors for the actions of the company. It is further contended that in the absence of a provision for vicarious liability contained in the statute, there has to be a specific act attributable to a director so as to hold such director responsible for the offending acts committed by or on behalf of the

company. Relying on a decision of the Apex Court in case of UOI vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. reported in (1969) 1 SCC 91 it is contended that the obligation of the directors is to sign the offer documents and once that obligation is discharged bonafide, directors cannot be held liable for any technical violation in the offer documents.

150. Mr. Joshi learned Senior Advocate appearing on behalf of Mr. Sanka (appellant in Appeal No. 396 of 2014) submitted that Mr. Sanka was Key Managerial Employee of DLF and not Key Management Personnel of DLF. Under clause 6.9.5.8 of DIP Guidelines the Lead Merchant Banker of the issuer company is required to give details of Key Management Personnel as more particularly set out therein. The said clause does not require the lead Merchant Banker to give details of the shareholding if any, of the wives of Key Management Personnel. Clause 6.9.6 of DIP Guidelines deals with 'Promoters/Principle Shareholders' and clause 6.9.6.6 of the DIP Guidelines requires the lead Merchant Banker to disclose in the prospectus the 'related party transactions' as per financial statements. The financial statements are drawn as per 'Accounting Standard 18 ('AS 18'). Since Mr. Sanka was not a Promoter/Principal shareholders, dealing in shares by Mr. Sanka's wife were not required to be disclosed. Therefore, material information required to be disclosed being in fact disclosed, SEBI is not justified in holding that DLF and its directors are guilty of violating the norms laid down by SEBI. Moreover, the impugned order which is passed belatedly after 9 months of giving personal hearing suffers from serious infirmities and deserves to be quashed and set aside in view of the judgement of the

Apex Court in case of Feroze Dotivala vs. P.M. Wadhwani reported in (2003) 1 SCC 433 & Anil Rai vs. State of Bihar reported in (2001) 7 SCC 318.

151. Mr. Dada, learned Senior Advocate, appearing on behalf of respondent, on the other hand, supported the impugned order by referring to various documents annexed to the show cause notice issued to DLF and also made detailed submissions on findings recorded in the impugned order which are considered in the subsequent paragraphs of this decision.

152. Mr. Chatterjee, learned Senior Advocate appearing on behalf of Mr. K. K. Sinha who is permitted to be heard in the matter pursuant to an order passed by the Apex Court, sought to tender an affidavit in reply containing several additional documents which are not on record. Mr. Chatterjee submitted that Mr. K. K. Sinha could not tender those documents earlier as he was not allowed to participate in the investigation carried out by SEBI. We have declined to accept the affidavit in reply because, accepting additional documents at this stage would amount to enlarging the scope of the appeal. Moreover, in an appeal, correctness of an order has to be decided on the basis of documents on record and not by introducing new documents and that too at the instance of a person who is not a party to the proceedings.

153. On being permitted to argue on behalf of Mr. K. K. Sinha, without filing the affidavit in reply, Mr. Chatterjee, fairly stated that he would adopt the arguments advanced by Mr. Dada learned Senior Advocate for SEBI, who has dealt with the merits of the case extensively. However,

Mr. Chatterjee sought to rely on three communications which according to him would establish beyond doubt that the appellants were aware of filing FIR prior to 25/06/2007. Although we have not permitted Mr. Chatterjee to tender new documents, since it is contended that the said three communications ex-facie falsify the case of DLF, we have deemed it proper to look at those three communications and give an opportunity to the appellant to comment on the said communications. The said three communications are (one) summons dated May 1, 2007 addressed by the Sub-Inspector of Police station at Connaught Place, New Delhi to Mr. Praveen Kumar, (two) letter dated May 2, 2007 addressed by Mr. Praveen Kumar seeking time to attend the Police Station and (three) reminder letter dated May 26, 2007 addressed by the Sub Inspector of the Police Station at Delhi to Mr. Praveen Kumar. Mr. Nankani and Mr. Joshi, counsel for appellants, apart from opposing admission of above communications at this belated stage, submitted that the said communications do not support the claim sought to be raised against the appellants.

154. Mr. Kothari Counsel for appellant in Appeal No. 415 of 2014 submitted that the appellant therein was Executive Director-Legal at the relevant time and had only provided his comments on the litigation section of the offer document in his capacity as a person looking after litigation. Apart from the above he had no role to play in the structure of holdings of shares in subsidiaries or in the formation of a plan and process for an IPO. In the absence of any material to show that the

appellant was involved in the subject matter, as held in case of Mr. G. S. Talwar, (Non-Executive Director of DLF) benefit of doubt ought to be extended to the appellant in Appeal No. 415 of 2014.

155. We have carefully considered rival submissions.

156. Basic question that is to be considered in these appeals is, whether DLF/ its directors/CFO have resorted to sham transfer of shares with a view to camouflage association of DLF with Felicite, Shalika and Suditpi as dissociation and if so, whether failure to disclose material information/ facts relating to those three companies in the offer documents filed by DLF constitutes violation of DIP Guidelines/ ICDR Regulations and PFUTP Regulations. If the answer to the above question is in the affirmative, then the question to be considered is, whether in the facts of present case, SEBI is justified in restraining the appellants from accessing the securities market and prohibiting them from buying, selling or dealing in securities for a period of three years under Section 11,11A &11B of SEBI Act read with relevant provisions of DIP Guidelines/ICDR Regulations and PFUTP Regulations framed by SEBI.

157. Section 11A of SEBI Act provides that without prejudice to the provisions contained in the Companies Act 1956, SEBI may, for the protection of investors, inter alia frame regulations on matters relating to issue of capital, transfer of securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies. Section 11B of SEBI Act interalia empowers SEBI to issue such directions

in the interest of investors or orderly development of the securities market as it deems fit to any company in respect of matters specified in Section 11A. Section 11(4) of SEBI Act provides that without prejudice to the provisions contained in Section 11(1),(2),(2A) & 3 and Section 11B of SEBI Act, SEBI may, in the interest of investors or securities market pass an order in writing either pending investigation/inquiry or on completion of such investigation/inquiry, inter alia, restraining a person from accessing the securities market and also prohibiting any person associated with securities market to buy, sell or deal in securities for such period as it deems fit. Similar provisions are also contained in the Guidelines/Regulations framed by SEBI. Powers conferred upon SEBI under Section 11,11A & 11B of SEBI Act are independent of the penalty and adjudication proceedings contained in Chapter VIA of SEBI Act.

158. From the aforesaid provisions, it is clear, that where a person violates the Guidelines/Regulations framed by SEBI, then, apart from initiating adjudication proceedings for imposition of penalty under chapter VIA of SEBI Act, it is open to SEBI to pass an order, in the interest of investors or securities market inter-alia to restraint/prohibit that person from accessing the securities market or issue such direction as deemed fit under Section 11(4)/11B of SEBI Act.

159. Before dealing with the merits of rival contentions, we may deal with the basic argument of appellants that in the absence of any investigation or finding recorded in the impugned order that the interest of investors were prejudicially affected on account of non-disclosure of material

information/facts relating to Felicite, Shalika and Sudipti in the offer documents, SEBI is not justified in passing restraint/ prohibitory order under Section 11/11B of the SEBI Act. There is no merit in the above contentions, because, firstly, language used in Section 11/11B of SEBI Act do not even remotely suggest that the remedial steps enumerated therein could be taken only when it is established that the interest of investors were in fact prejudicially affected by the violations committed. Secondly, Guidelines/Regulations are framed with a view to protect the interests of investors and violating the said Guidelines/Regulations itself would be detrimental to the interest of investors/securities market and in such a case, SEBI would be justified in taking such remedial action under Section 11/11B of SEBI Act as it deems fit in the interest of investors/securities market whenever the violations are committed. Thirdly, Section 11(4) of SEBI Act contemplates passing of restraint/ prohibitory order in the interest of investors either pending investigation or on completion of investigation. Thus, the emphasis is primarily on protecting the interests of investors and not on investors being actually prejudiced due to violations. Fourthly, fact that the powers conferred upon SEBI to take remedial/preventive measures under Section 11/11B of SEBI Act are discretionary in nature does not mean that those provisions are to be invoked only when the interest of investors are actually prejudiced on account of the violations committed.

160. Accepting the argument of the appellants that the remedial/preventive measures under Section 11/11B of SEBI Act could be invoked only when the interest of investors/securities market were in fact prejudiced by the

violations, would in effect mean, construing those provisions narrowly which is not warranted from the words used in those provisions. Very fact that Section 11/11B, empowers SEBI to take remedial/preventive measures even before establishing any violations, clearly shows that SEBI has very wide powers and the said powers can be invoked even before establishing any violations. In such a case, construing the provisions of Section 11 & 11B narrowly, as suggested by the appellants would amount to defeating the object with which those provisions are enacted and hence argument advanced by the appellants cannot be accepted.

161. It is true that in a given case, fact that no investors were not prejudiced by the violations committed by a person may be a relevant factor to be taken into consideration while considering the quantum of remedial/ preventive measure taken against that person. However, fact that no investors were found to be prejudiced by the violations committed, would not bar SEBI from taking remedial/preventive measures under Section 11/11B of SEBI Act. In other words, for passing restraint/ prohibitory order under Section 11/11B, it is not a condition precedent or mandatory for SEBI to establish that the interests of the investors/securities market were actually affected/ prejudiced on account of the violations committed. To put it simply, remedial/preventive measures can be taken in the interest of investors/securities market as and when Guidelines/ Regulations are violated, even if it is not established that the investors were actually prejudiced by such violations.

162. Reliance placed by counsel for appellants on decisions of this Tribunal in case of UBS Securities Asia Ltd. (Supra), BPL Ltd. (Supra), decision of Delhi High Court, in case of Indian Bank Mutual Fund (Supra) and decisions of the Apex Court in case of Ritesh Agarwal (Supra) and Bharjatiya Steel Industries (Supra) are misplaced. None of those decisions lay down a proposition of law that unless it is established that the investors were actually prejudiced on account of the violations committed by a person, restraint/prohibitory order under Section 11/11B, cannot be passed against that person. In all those cases either it is held that there are no violations or it is held depending on facts of each case, that the remedial/preventive measure taken by SEBI without establishing that the interest of investors are prejudiced cannot be sustained. In none of those cases it is held that before passing restrain/prohibitory order under Section 11/11B, SEBI must mandatorily establish that the interest of investors are actually prejudiced on account of violations committed. Thus, none of the aforesaid decisions support the case of appellants.

163. Considerable arguments were advanced by counsel on both sides on certain observations made by this Tribunal in case of Pyramid Saimira Theatre Ltd. vs. SEBI (Appeal No. 242 of 2009 decided on 07/04/2010). In that case, this Tribunal held that the ratio laid down by the Apex Court in case of Shriram Mutual Fund (Supra) while dealing with Chapter VIA of SEBI Act, would apply to all the provisions of SEBI Act. That observation was made while dealing with the argument, that a company being a juristic person does not have a mind of its own and in the absence identifying the

responsible officer who has committed the fraudulent act, the said fraudulent act or the guilty state of mind could not be attributed to the company. While holding that the theory of 'the directing mind' evolved in criminal proceedings would not apply to the Civil action taken by SEBI against the company therein for the wrong committed, this Tribunal, relying on a decision of the Bombay High Court in case of SEBI vs. Cabot International Capital Corporation reported in (2004) 51 SCL 307 which is approved by the Apex Court is case of Shriram Mutual fund (Supra), held that the ratio laid down by the Apex Court in case of Shriram Mutual Fund (Supra) rendered in the context of Chapter VIA of SEBI Act would apply to all the provisions of SEBI Act and Regulations framed by SEBI. Apex Court in case of Shriram Mutual Fund has held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain as to whether a person has committed violations intentionally or not. That decision continues to be good law and the said decision is not overruled by the Apex court in its subsequent decision in case of Bharjatiya Steel Industries (Supra). In fact, after referring to the decision in Shriram Mutual Fund (Supra) it is held by the Apex Court in case of Bharjatiya Steel Industries (Supra) that where discretion is conferred upon the adjudicatory authority, the principle of mens rea would be held to be imperative and where there is no discretion, principle of mens rea may not be held to be imperative.

164. It is evident that neither the decision of the Apex Court in case of Bharjatiya Steel Industries (Supra) rendered in the context of the provisions contained in the U.P. Trade Tax Act, runs counter to the ratio laid down by

the Apex Court in case of Shriram Mutual Fund (Supra) nor the decision of this Tribunal in case of Pyramid Saimira (Supra) seeks to lay down a proposition that remedial/preventive measures must be mandatorily taken against a violator even if there is no mens rea. What is held in case of Pyramid Saimira (Supra) is that, the principle laid down by the Apex Court in case of Shriram Mutual Fund(Supra) that it is not necessary to establish mens rea for imposing penalty under Chapter VIA would equally apply for taking remedial/preventive measures under Section 11/11B. That does not mean that in every case remedial/preventive measures under Section 11/11B must be taken against a person who has violated the Guidelines/Regulations framed by SEBI, even when there was no mens rea in committing such violations. In other words, what is held in case of Pyramid Saimira (Supra) is that, whenever a person is found to violate the SEBI Guidelines/Regulations, it is open to SEBI to take remedial/preventive measures under Section 11/11B, even if there is no mens rea in committing such violations.

165. Now, turning to the merits of the case, first question, to be considered herein is, whether SEBI is justified in holding that the transaction of transferring shares of Felicite, Shalika and Sudipti by DLF (through its subsidiaries) were sham transactions devised and undertaken with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation thereby giving false impression to the investors that DLF was not connected with the said three companies.

166. Admittedly, on the date of filing first DRHP, entire shares of Felicite, Shalika and Sudipti were held by three 100% subsidiaries of DLF (DEDL, DHDL and DRDL) and therefore it was obligatory on part of DLF to disclose the names of Felicite, Shalika and Sudipti in the DRHP issued for the purposes of its IPO and disclose material information relating to those three companies. Accordingly, in the first DRHP filed on 11/05/2006 DLF had disclosed the names of Felicite, Shalika and Sudipti as 'associates' instead of disclosing them as subsidiaries of DLF. Since the dispute in the present case relates to disclosing information/facts relating to these three companies in the offer documents issued by DLF either as 'subsidiaries' or 'associates', it is not necessary to go in to the question as to whether the three companies ought to have been disclosed as 'Subsidiaries' instead of disclosing them as 'associates' of DLF.

167. On 31/08/2006, DLF withdrew the first DRHP filed on 11/05/2006 and filed second DRHP on 02/01/2007. In the second DRHP, neither the names of Felicite, Shalika and Sudipti nor material information in respect of those three companies were disclosed as according to DLF, 100% shares of those three companies held by DEDL, DHDL and DRDL were divested on 29-30/11/2006 and hence there was no obligation to disclose names of Felicite, Shalika and Sudipti or to disclose material information relating to those three companies.

168. Contention of DLF that on account of transferring entire shares of Felicite held by 100% subsidiaries of DLF in favour of three house wives on 29/11/2006, DLF stood dissociated from Felicite and hence DLF was not

required to disclose material information/facts relating to Felicite has been rejected in the impugned order by holding that the entire process of transferring shares of Felicite was a sham transaction in view of following facts:-

a) entire shareholding of Felicite incorporated on 24/3/2006 was held by DEDL (30%), DHDL (30%) & DRDL (40%) who are 100% subsidiaries of DLF. Though DEDL, DHDL and DRDL subscribed to 100% shares of Felicite on 24/03/2006, DRDL, DHDL and DEDL paid share subscription amount of ₹ 40,000/-, ₹ 30,000/- and ₹ 30,000/- to Felicite belatedly on 12/10/2006, 16/10/2006 and 19/10/2006 respectively.

b) immediately after paying above share subscription amount, DEDL, DHDL and DRDL on 29/11/2006 sold their entire shareholding in Felicite to three ladies viz Mrs. Madhulika Basak, Mrs. Niti Saxena and Mrs. Padmaja Sanka who are house wives of Mr. Surojit Basak (Senior Vice President [Finance] of DLF), Mr. Joy Saxena (Senior Vice President [Finance] of DLF and CEO- Retail of DLF) and Ramesh Sanka (Group CFO of DLF) respectively. Mr. Basak, Mr. Saxena and Mr. Sanka were also directors of several other group companies of DLF. Thus, on 29/11/2006, 100% shares of Felicite held by 100% subsidiaries of DLF were transferred to three house wives whose spouses were Key Managerial employees of DLF.

c) even though the three house wives purchased 100% shares of Felicite on 29/11/2006, consideration in respect thereof was paid by them to DHDL, DRDL and DEDL belatedly on 2/12/2006, 7/12/2006 and 13/12/2006 respectively. Above payments were made from the bank accounts held by them jointly with their respective husbands.

d) on 30/11/2006, Felicite purchased 100% shares of Shalika from DLF (through its subsidiaries) and on the same day Shalika purchased 100% shares of Sudipti from DLF (through its subsidiaries). Thus on 29/11/2006 DLF (through its subsidiaries) divested shares of Felicite to three house wives and on 30/11/2006 DLF (through its subsidiaries) divested shares of Shalika to Felicite and divested shares of Sudipti to Shalika. In other words, the modus operandi adopted by DLF in divesting the shares of Felicite, Shalika and Sudipti was a first to divest the shares of Felicite to three house wives whose spouses were Key Managerial employees of DLF, and thereafter divest the shares of Shalika to Felicite and divest the shares of Sudipti to Shalika.

e) Felicite (acquired by three house wives on 29/11/2006) increased its share capital on 14/12/2006 and allotted increased shares to seven house wives whose spouses were all Key Managerial employees of DLF. As a result, the shareholding of three house wives in Felicite stood reduced from 40%, 30% and

30% to 10.1% each and the balance 70% shares (approx) were held by seven house wives whose spouses were all Key Managerial employees of DLF. Thus, the three house wives who acquired 100% shares of Felicite on 29/11/2006 got their shareholding reduced from 100% to 30% (10% each approximately) on 14/12/2006 by resorting to increase in shares capital of Felicite. As a result of increase in the share capital, Felicite received ₹ 2 crore between 29/11/2006 to 19/12/2006 from ten house wives (including three house wives acquired 100% shares of Felicite on 29/11/2006) whose spouses were Key Managerial employees of DLF.

f) All the three house wives in their statement recorded before the Investigating Officer of SEBI stated that apart from acquiring shares of Felicite as investment, they were not involved in the running Felicite and hence unable to reply/comment in relation to acquisitions/purchases by Felicite.

g) Mr. Prem Kumar Vadhera (retainer of two subsidiary companies of DLF) and Mr. Rajendra Kumar Raheja (employee of DLF and employee cum-director of subsidiary/associate companies of DLF) were the directors of Felicite before the three house wives became 100% shareholders of Felicite and they continued to be the directors of Felicite even after the three house-wives became 100% shareholders of Felicite.

h) Mr. Surojit Basak and Mr. V.S. Khanna were not bank account signatory of Sudipti and Shalika before 30/11/2006 and Mr. Harshdeep Sachdeva, Mr. Joydeep Das Gupta and Mr. Debashis Mukherjee were not the bank account signatories of Felicite before 30/11/2006. However, all these employees of DLF became authorized bank account signatories of the respective companies after 30/11/2006. Mr. Surojit Basak a permanent Key Managerial Employee of DLF (as disclosed in the Red Herring Prospectus) was a common authorized bank account signatory for Felicite, Shalika and Sudipti.

i) Subsequent to the alleged transfer of shares, registered office of Felicite, Shalika and Sudipti were shifted along with a number of other DLF companies to 1E, Jhandenwala Extension, which is the address where various DLF companies are situated.

j) Shares of Felicite held by Niti Saxena were sold to DHDL on 19/06/2008 as her husband Mr. Joy Saxena (Key Managerial employee of DLF) was due to retire in August 2008. Similarly, shares of Felicite held by Mrs. Seema Sethi were sold on 04/04/2007 as her husband Mr. Sanjay Sethi (Key Managerial employee of DLF) retired in March 2007. Mrs. Seems Sethi had sold the shares of Felicite to Mrs. Rima Hinduja, wife of Mr. Gaurav Monga, who was the Vice-President, Finance of DLF. Thus, Mrs. Niti Saxena and Mrs. Seema Sethi continued

to be the shareholders of Felicite as long as their spouses continued to be the Key Managerial employee of DLF.

k) The personal loans taken by the spouses of the shareholders of Felicite in November/December 2006 were repaid by them in November 2009, except by Joy Saxena and Sanjay Sethi who repaid the same in June 2008 and May 2007, respectively. Thus, the personal loans taken by the respective spouses were utilized to buy shares of Felicite in the names of their respective wives and the loans were repaid at the time of their retirement.

l) From the bank account statement of Felicite, it is seen that out of the amount of ₹ 2 crore received by Felicite on account of increase in the share capital, almost entire amount of ₹ 2 crore was transferred by Felicite to DLF, DEDL, DHDL and DRDL. Thus, the money that came to Felicite from the joint accounts of Key Managerial employees of DLF through their wives, went back to DLF and its subsidiaries, even after the claimed date of dissociation.

m) In the year 2006-2007 Felicite had no fixed assets or inventory. As per the P&L account of Felicite, in the year 2006-2007, Felicite had acquired 281 companies of DLF (including Shalika) and had incurred total loss of about ₹ 8 lac (approx)

169. Contention of DLF that on account of transferring entire shares of Shalika held by 100% subsidiaries of DLF to Felicite on 30/11/2006, DLF stood dissociated from Shalika and therefore DLF was not required to disclose material information/facts relating to Shalika has been rejected in the impugned order by holding that the entire process of transferring shares of Shalika was a sham transaction in view of following facts:-

a) Shalika was incorporated on 26/3/2006 and on that day 100% shares of Shalika were held by DEDL (30%), DHDL (30%) and DRDL (40%).

b) Shalika received its first cheque book from its banker on 28/11/2006. Thus from the date of incorporation on 26/03/2006 till 28/11/2006 there were no banking transaction carried out by Shalika.

c) On 29/11/2006 the opening balance in the account of Shalika was zero. On 29/11/2006 Shalika received ₹ 40,000/- from DRDL and ₹ 30,000/- from DHDL being the share subscription money which was payable by them on subscribing to the shares of Shalika at the time of incorporation on 26/03/2006. Thus, on 29/11/2006 total amount in the account of Shalika was ₹ 70,000/-. On 30/11/2006 Shalika purchased 100% shares of Sudipti from DHDL & DEDL and issued two cheques for ₹ 50,000/- each to DHDL and DEDL being the consideration for purchasing 100% shares of Sudipti.

d) On 1/12/2006 Shalika received ₹ 30,000/- from DEDL being the share subscription money in respect of the shares Shalika that were purchased on 26/03/2006.

e) Two cheques for ₹ 50,000/- each issued by Shalika on 30/11/2006 to DEDL and DHDL were encashed by them on 20/12/2006 (after 21 days) and 03/04/2007 (more than 90 days from date of issuing the cheque) respectively.

f) According to DLF, 100% shares of Shalika held by DEDL (30%) DHDL (30%) and DRDL (40%) were sold to Felicite on 30/11/2006 for ₹ 30,000/-, ₹ 30,000/- and ₹ 40,000/- respectively. From the bank statements of Felicite it is seen that on 7/12/2006, 13/12/2006 and 8/12/2006 DEDL, DHDL and DRDL received amount of ₹ 24,80,000/-, ₹ 24,80,000/- and ₹ 10,20,000/- respectively by way of cheque payment from Felicite. According to DLF the said payments made by Felicite to DEDL, DHDL and DRDL were composite payments and the said payments included payment of ₹ 30,000/- ₹ 30,000/- and ₹ 40,000/- being the price for purchasing 100% shares of Shalika from DEDL, DHDL and DRDL by Felicite. Except claiming that the above payments were composite payments, DLF has not produced any account statement/ ledger/ book entry to substantiate that the amount of ₹ 24,80,000/-, ₹ 24,80,000/- and ₹ 10,20,000/- received by DEDL, DHDL and DRDL from Felicite included the amount of ₹ 30,000/-,

₹ 30,000/- and ₹ 40,000/- being the price payable by Felicite for purchasing 100% shares of Shalika from DEDL, DHDL and DRDL respectively.

g) Prior to transfer of 100% shares of Shalika held by DEDL, DHDL and DRDL (100% subsidiaries of DLF) Mr. Lovekush Sharma and Mr. Rajendra Gupta, both employees of DLF were the directors of Shalika. They were also directors in various other subsidiaries of DLF. These two directors continued to be directors of Shalika even after 100% shares of Shalika were transferred by DEDL, DHDL and DRDL to Felicite on 30/11/2006.

h) Prior to 30/11/2006, bank account signatories of Shalika were Mr. Arun Kumar Bhagat (director in two subsidiaries of DLF and also authorized signatory of Sudipti), Surojit Basak (Senior Vice President of DLF, director of various subsidiaries of DLF and also authorized signatory of Felicite), Mr. Praveen Kumar (Managing Director of DEDL, director in 21group companies of DLF, nephew of Mr. K.P. Singh, Chairman of DLF) Mr. S.K. Gupta, Mr. Manik Khanna and Mr. V.S. Khanna. All these authorized signatories of Shalika continued to be authorized signatories of Shalika even after 100% shares of Shalika held by DEDL, DHDL and DRDL (100% subsidiaries of DLF) were transferred to Felicite on 30/11/2006.

i) M/s. Ashok Jai & Co., statutory Auditors of Shalika continued to be statutory Auditors even after 100% shares of Shalika were sold by DEDL, DHDL and DRDL to Felicite on 30/11/2006.

j) Subsequent to Felicite acquiring shares of Shalika, the registered office of Shalika was shifted along with Sudipti and Felicite and many other entities of DLF to 1E, Jhandenwala Extension.

k) During the years 2006-2007 and 2007-2008 no expenses were accounted for by Shalika towards cost of establishment such as rent, electricity, telephone charges, property taxes or salary.

l) In the year 2006-2007, Shalika had no fixed assets or inventory. It was a loss making company and the only activity carried out by Shalika was to acquire shares of Sudipti.

170. Contention of DLF that on account of transferring entire shares of Sudipti held by 100% subsidiaries of DLF to Shalika on 30/11/2006, DLF stood dissociated from Sudipti and therefore DLF was not required to disclose material information/ facts relating to Sudipti has been rejected in the impugned order by holding that the process of transferring shares of Sudipti was a sham transaction in view of following facts:-

a) Sudipti was incorporated on 24/3/2006 with DEDL and DHDL (100% subsidiaries of DLF) each holding 50% shares of Sudipti.

b) In September-October 2006, Sudipti purchased about 35 Acres of land through 6 separate registered sale deeds from Mr. Pramod Jain and Mahavir Global Coal Pvt. Ltd. with Mr. K. K. Sinha as the confirming vendor.

c) Between 14/09/2006 and 06/10/2006 Sudipti was funded by DLF's subsidiary and associate companies through Vikram Electrical Equipments Pvt. Ltd. ('Vikram' for short) to the extent of ₹ 37.41 crore and out of that amount, ₹ 34.25 crore was paid by Sudipti to Mr. K. K. Sinha who was the confirming vendor for acquiring 35 Acres of land from Pramod Jain and Mahavir Global Coal Pvt. Ltd.

d) On 9/10/2006 Sudipti entered into a development agreement with DCPC (subsidiary of DLF) for development of above 35 Acres of land and on 9/10/2006 Sudipti received ₹ 45 crore as performance deposit from DCPC under the aforesaid development agreement.

e) On 26/04/2007 Mr. K. K. Sinha filed FIR No. 249/2007 at Connaught Place Police Station, Delhi alleging that Sudipti and its directors and Shri Praveen Kumar and others named therein have duped him to the tune of ₹ 34 crore after Sudipti acquired 35 Acres of land with Mr. K. K. Sinha as the confirming vendor.

f) In between, on 29/11/2006, DLF (through its subsidiaries) divested shares of Felicite to three house wives, on 30/11/2006

divested shares of Shalika to Felicite and divested its 100% shareholding in Sudipti to Shalika. There is no explanation as to why 100% shares of Sudipti held by two subsidiaries of DLF (DEDL and DHDL) were transferred to Shalika on 30/11/2006, when 100% shares of Shalika were held by DEDL, DHDL and DRDL who are all 100% subsidiaries of DLF.

g) Sudipti was funded through a series of transactions involving DLF's partnership firm, subsidiaries, associates and Key Management employees for the purpose of acquiring aforesaid lands. Shalika had zero bank balance on 29/11/2006 and from the date of incorporation in March 2006 till 30/11/2006 Shalika had not carried out any commercial transaction. When questioned as to why Shalika deemed it fit to acquire shares of Sudipti, (a husk company according to DLF) when Shalika itself was a husk company without any assets/funds whatsoever, there was no explanation offered by DLF.

h) Board of Directors of Sudipti consisting of Arun Kumar Bhagat (director of Sudipti from 11/05/2006 and also director in two other subsidiaries of DLF) and Mr. Vipen Jindal (director of Sudipti from 11/05/2006 till 26/03/2009 who is also Senior Vice President (Finance) of DLF continued to be directors of Sudipti even after 100% shares of Sudipti were transferred to Shalika on 30/11/2006.

i) Similarly, bank account signatories of Sudipti were Mr. Arun Kumar Bhagat (director in two subsidiaries of DLF and also authorized signatory of Shalika), Surojit Basak (Senior Vice President (Finance) DLF, director in several subsidiaries of DLF and also authorized signatory of Shalika and Felicite), Mr. Praveen Kumar (Managing Director of DEDL, director in 21 group companies of DLF and also director of Vikram), Mr. S.K. Gupta, Mr. Manik Khanna and Mr. V.S. Khanna. Even after transfer of 100% shares of Sudipti by DEDL and DHDL in favour of Shalika, these bank account signatories continued to be the bank account signatories of Sudipti.

j) After transferring 100% shares of Sudipti by DEDL and DHDL in favour of Shalika, the registered office of Sudipti was shifted to 1E, Jhandenwala Extension along with Shalika and Felicite and many other subsidiaries/ associates of DLF.

k) M/s. Chandra Gupta and associates who were statutory Auditors of Sudipti before transfer of shares continued to be statutory auditors even after the transfer of shares.

l) As per bank account statement, Sudipti had zero bank balance on 15/06/2006 and during the years 2006-2007 and 2007-2008 there were no expenses accounted towards cost of establishment like rent, electricity, telephone charges, property taxes or salary whereas, it had only an inventory of about ₹ 45 crores worth of land as on 31/03/2007.

171. Whether on the basis of above facts on record, SEBI is justified in holding that divestment of shares of Sudipti, Shalika and Felicite by DLF were sham transactions undertaken with a view to camouflage association of DLF with Sudipti, Shalika and Felicite as dissociation and thereby avoid disclosing material information relating to those three companies in the offer documents, is the question.

172. As rightly contended by counsel for SEBI, the expression 'sham transaction' (as discussed in Snook vs. London and West Riding Investment Ltd. reported in 1967 2 QB 786) means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create.

173. It is contended that the business model adopted by DLF was to first incorporate subsidiary/associate companies for acquiring lands at cheaper rates and once the lands are acquired, the said subsidiary/associate companies would transfer the development rights in respect of those lands in favour of DLF. Once the development rights are transferred, it is contended that the said subsidiary/associate companies become shell companies and therefore, the shares of the said subsidiary/associate companies are divested by transferring the shares of those companies to third parties. Since, Felicite, Shalika and Sudipti were incorporated in March 2006 as subsidiary/associate companies of DLF, as per the business model they were

to acquire lands which could be later on developed by DLF. There is nothing on record to suggest that Felicite and Shalika had acquired any lands till 29/11/2006. If Felicite and Shalika had not acquired lands till 29/11/2006, then Felicite and Shalika could not be said to have become shell companies and consequently divesting the shares of those two companies could not be said to be in accordance with the business model allegedly adopted by DLF. Since, there is no explanation as to why the shares of Felicite were divested to three house wives whose spouses are all Key Managerial employees of DLF and in the absence of any explanation as to why shares of Shalika were divested to Felicite after divesting the shares of Felicite to three house wives whose spouses were Key Managerial employees of DLF, it cannot be said that the divestment of shares in Felicite and Shalika were bonafide transactions.

174. In so far as Sudipti is concerned, admittedly Sudipti had acquired about 35 Acres of land in September/October 2006 by utilizing funds provided by DLF and on 09/10/2006 Sudipti had entered into a Development Agreement with DLF through DCPC under which all rights attached to 35 Acres of land were transferred to DLF (through DCPC) and Sudipti had received ₹ 45 crore from DCPC as performance deposit towards performance of aforesaid Development Agreement.

175. Ordinarily, it would have been prudent for DLF to continue its association with Sudipti at least till 35 Acres of land belonging to Sudipti were developed by DLF as per Development Agreement dated 09/10/2006 and more particularly when DLF had supplied funds to Sudipti for

acquisition of 35 Acres of land and DLF (through DCPC) had deposited ₹ 45 crore with Sudipti as performance deposit to ensure development of the said land as per Development Agreement dated 09/10/2006. Assuming that the business model of DLF required DLF to dissociate itself from Sudipti on execution of the Development Agreement dated 09/10/2006 on ground that Sudipti had become a shell company, in the present case, instead of divesting the shares of Sudipti to third parties, DLF on 29/11/2006 has chosen, first to divest the shares of Felicite to three house wives whose spouses were all Key Managerial employees of DLF, thereafter, divested 100% shares of Shalika to Felicite on 30/11/2006 and on the same day divested 100% shares of Sudipti to Shalika. In the absence of any explanation as to why shares of Felicite and Shalika were divested even before those two companies had acquired any lands (for being developed by DLF) which was the object for which they were incorporated, and in the absence of any explanation as to why shares of Sudipti (a shell company according to DLF) were divested to Shalika (also a shell company according to DLF) it is apparent that the divestment of shares of Felicite, Shalika were not bonafide transactions carried out in the ordinary course of business.

176. If divestment of shares of Felicite, Shalika and Sudipti by DLF were bonafide transactions, then, on divestment of shares, DLF would have been totally dissociated with Felicite, Shalika and Sudipti. However, the events that took place on 29-30/11/2006 and even thereafter, leave no manner of doubt that DLF continued to be associated with Felicite, Shalika and Sudipti as can be seen from the following:-

a) decision of DLF to divest 100% shares of Felicite held by DEDL, DHDL even before Felicite could achieve the object with which it was incorporated is (acquiring land) is not only strange, but is also contrary to the 'business model' allegedly adopted by DLF. It is equally strange as to how, the three house wives whose spouses were Key Managerial employees DLF came to know that DLF (through its subsidiaries) was intending to divest 100% shares of Felicite. Further, it is strange that on 29/11/2006, 100% shares of Felicite were sold to three house wives (claimed to be third parties) without executing any transfer document and without receiving the sale consideration on 29/11/2006.

b) it is relevant to note that one out of the three house wives who purchased shares of Felicite did not have demat account and none of them had acquired shares of any company prior to 29/11/2006. In such a case, it is difficult to believe that divestment of shares of Felicite by DLF to three house wives whose spouses were Key Managerial employees of DLF was not stage managed and was a bonafide transaction.

c) the three house wives who acquired 100% shares of Felicite on 29/11/2006 from DLF have made statement before the Investigating Officer of SEBI that apart from

investing in the shares of Felicite they were not involved in the running of Felicite. Admittedly, Board of Directors as well as the bank account signatories of Felicite, Shalika and Sudipti appointed by DLF prior to 29/11/2006 continued to be the Board of directors/ bank account signatories of Felicite, Shalika and Sudipti even after 29/11/2006. Since, the three house wives who had acquired 100% shares of Sudipti on 29/11/2006 were not involved in the running of Felicite, it is obvious that DLF continued to run Felicite (consequently Shalika & Sudipti) through the Key Managerial employees of DLF appointed as Board of Directors of Felicite by DLF.

d) Since the three house wives (whose spouses were Key Managerial employees of DLF) have categorically stated that they were not involved in the running of Felicite even after acquiring 100% shares of Felicite (consequently Shalika and Sudipti), it is impossible to believe that from 29/11/2006 the Board of Directors of Felicite, Shalika and Sudipti who were all employees of DLF started running Felicite, Shalika and Sudipti independently without being controlled either by DLF or by three house wives. In other words, it is impossible to believe that after 29/11/2006 the Key Managerial employees of DLF were controlled by DLF to the extent they were discharging duties as employees of DLF and

they were acting independently while discharging their duties in their capacity as Board of directors of Felicte, Shalika and Sudipti.

e) Divestment of shares was a game plan adopted by DLF is evident from the fact that on 29/11/2006, the bank balance of Shalika was zero and till 29/11/2006 Shalika had not even obtained cheque book. On 29/11/2006 DLF (through its subsidiaries) provided funds to Shalika so that Shalika could acquire shares of Sudipti on 30/11/2006 from the subsidiaries of DLF. Thus, on the one hand, DLF sold the shares of Sudipti to Shalika and on the other hand DLF supplied funds to Shalika for purchasing the shares of Sudipti. It is true that funds provided by the subsidiaries of DLF to Shalika on 29/11/2006 were towards the share subscription money. However, the very fact that the share subscription amount which was required to be paid in March 2006 was paid on 29/11/2006 leaves no manner of doubt that the said payment was made with a view to facilitate acquisition of shares of Sudipti by Shalika.

f) If the decision of three house wives to acquire entire shares of Felicite held by the subsidiaries of DLF on 29/11/2006 and thereafter making Felicite to acquire entire shares of Shalika and Shalika to acquire entire

shares of Sudipti from the 100% subsidiaries of DLF on 30/11/2006 was an independent decision taken by the said three house wives, then it is inconceivable that within two weeks of their acquiring 100% shares of Felicite, they would on 14/12/2006 decide to increase the share capital of Felicite so as to reduce their shareholding in Felicite from 100% to 30% (10% each approximately) and ensure that the freshly issued shares of Felicite are allotted to seven house wives whose spouses are all employees of DLF. It is relevant to note that the spouses of all the ten house wives (three house wives who initially acquired 100% shares of Felicite + seven house wives who were allotted shares by increasing the share capital) had obtained loan of ₹ 20 lac each from Kotak Mahindra Bank and the same were transferred to Felicite through the joint bank account held by the spouses of the respective house wives for the purpose of acquiring shares on increase in the share capital. Thus, personal loans taken by the Key Managerial employees were utilized to buy shares of Felicite in the name of their respective wives. It is equally interesting to note that loan of ₹ 20 lac were sanctioned to Mr. Joy Saxena, Mr. Ramesh Sanka and Mr. Surojit Basak on 07/11/2006, 10/11/2006 and 15/12/2006, even before the shares of Felicite were acquired by their respective wives on

> 29/11/2006 and decision to increase the share capital of Felicite was taken by the shareholders of Felicite viz: the three house wives on 14/12/2006. Thus, it is evident that the three house wives who acquired 100% shares of Felicite from DLF on 29/11/2006 were only name lenders to show on record that on divestment of shares on 29-30/11/2006, DLF ceased to be associated with Felicite, Shalika and Sudipti, when in fact, DLF continued to be associated with those three companies even after divestment of shares and in fact DLF was running those three companies through the Board of Directors appointed by DLF who are all employees of DLF.

177. It is true that when 100% shares of a company are acquired by third parties it is not mandatory that the existing Board of Directors and authorized signatories must be replaced and it is open to the third parties to run the company through the existing Board of Directors and authorized signatories. However in the present case, the three house wives who had acquired 100% shares of Felicite from the subsidiaries of DLF (consequently shares of Shalika and Sudipti) had categorically stated that they were not involved in the running of Felicite. Therefore, in the facts of present case, it is evident that since the three house wives who acquired 100% shares of Felicite were not involved in the running of Felicite, it is abundantly clear that DLF continued to run Felicite (consequently Shalika

and Sudipti) even after divestment of shares through the Board of Directors appointed by DLF. Thus, it is beyond doubt that DLF had adopted a modus operandi of divesting shares of Felicite, Shalika and Sudipti with a view to camouflage its association with Felicite, Shalika and Sudipti as dissociation.

178. Argument of DLF that transfer of shares of Felicite (consequently shares of Shalika and Sudipti) by DLF in favour of the wives of its employees were for administrative convenience and maintenance of continued confidentiality for acquisition of any contiguous parcels of land which may be required in time clearly runs counter to the argument of DLF that divestment of shares were effected with a view to dissociate DLF from the three companies. Very fact that the shares of Felicite were divested to three house wives (whose spouses were Key Managerial employees of DLF) with a view to thwart effectuation of the terms and conditions of the Development Agreement and the completion risk faced by DLF, clearly shows that DLF was aware of the serious consequences of divesting the shares of Sudipti to third parties. When development of 35 Acres of land belonging to Sudipti were yet to commence and moreover, DLF (through DCPC) had deposited ₹ 45 crore with Sudipti as performance deposit, it was not in the interest of DLF to effectuate any change in the management of Sudipti. But for unknown reasons, DLF chose to divest the shares of Felicite to three house wives and then divest the shares of Shalika to Felicite and divest the shares of Sudipti to Shalika but continued to run those three companies through the Board of Directors who are employees of DLF. Thus, divestment of shares was only a ruse to camouflage association of DLF with those three companies as dissociation.

179. Apart from above, the bank account statement of Felicite show that during December 2006 to March 2007 (i.e. after divestment) there were several financial transactions between Felicite and DLF/ its subsidiaries viz DEDL, DHDL and DRDL and DLF Housing, which indicates continued relationship of DLF with Felicite even after the claimed dissociation. From the bank statements it is seen that as a result of increase in share capital, Felicite received ₹ 2 crore (at the rate of ₹ 20 lac) from each of the three house wives who had purchased 100% shares of Felicite from DLF and also from seven house wives to whom shares of Felicite were allotted after increasing the share capital. It is not in dispute that thereafter, almost entire amount of ₹ 2 crore was transferred by Felicite to DLF and its subsidiaries. In its reply to the show cause notice, DLF had stated that the aforesaid financial transactions related to 'commercial transactions in the ordinary course of business' and that such transactions cannot create any presumption in law of a 'continued relationship' between Felicite, DLF and its subsidiaries resulting in Felicite being a subsidiary/associate of DLF. During the course of arguments, DLF for the first time sought to place on record certificates issued by its auditor as well as the auditors of its subsidiaries to demonstrate that Felicite had paid the above amounts to DLF and its subsidiaries as and by way of consideration for selling shares of various DLF companies by them to Felicite. Correctness of the said certificates are seriously disputed by SEBI. For the purposes of present appeals it is wholly immaterial as to whether the amounts were received by DLF and its subsidiaries from Felicite on account of commercial transactions or on

account of share transfer. What is relevant to note is, that Felicite continued to acquire various DLF companies even after the alleged dissociation, which clearly justifies the inference drawn by SEBI that even after divestment of shares Felicite was run by DLF through the Board of Directors who are all employees of DLF. Similarly, Shalika and Sudipti were run by DLF through the Board of Directors who are all employees of DLF. In other words, assuming that the divestment of shares are not per se illegal, fact that the said divestments have been made to camouflage association of DLF with the three companies as dissociation would render the transaction in question to be sham transactions. Therefore, in the facts of present case, decision of SEBI in holding that DLF resorted to sham transaction of divesting shares of Felicite, Shalika and Sudipti with a view to camouflage its association with Felicite, Shalika and Sudipti as dissociation cannot be faulted.

180. Once it is held that the transactions of share transfer that took place on 29-30/11/2006 were sham transactions entered into with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation, the question then to be considered is, whether such sham transactions amount to violating the provisions contained under the DIP Guidelines.

181. As per Clause 6.2 of DIP Guidelines (now replaced by ICDR Regulations) it was obligatory on part of DLF to ensure that offer documents contain all material information which is true and adequate, so as to enable the investors to make an informed investment decision. There can

be no dispute that if shares of Felicite, Shalika and Sudipti were not divested, then DLF would have been required to disclose material information relating to those three companies in the offer documents as set out in various Clauses in DIP Guidelines.

182. Argument of DLF is that on the date of filing second DRHP on 02/01/2007 the three companies had ceased to be subsidiary/related parties on account of divestment of shares and therefore there was no requirement of disclosing material information relating to those three companies in the offer documents. That argument would have been acceptable if it was found that the divestment of shares was a bonafide transaction. However, in the present case, facts set out herein above lead to inescapable conclusion that divestment of shares was not a bonafide transaction, but a sham transaction entered into obviously with a view to avoid disclosing material information relating to the three companies in the offer documents. Where the material information required to be disclosed in the offer documents are not disclosed by resorting to sham transactions, then it would amount to failing to disclose material information which is true and adequate and thereby violate Clause 6.2 of DIP Guidelines.

183. Argument of DLF based on the decision of the Apex Court in case of Podar Cement Pvt. Ltd. (Supra) and Dr. K.A. Dhairyavan (Supra) that in view of concept of duel ownership being recognised in India, disclosing interests of DLF in 35 Acres of land belonging to Sudipti amounts to disclosing material information relating to Sudipti cannot be accepted,

because, assuming that the total land held by DLF under the head 'Sole Development Rights' includes 35 Acres of land belonging to Sudipti, that does not amount to disclosing Sudipti as 'subsidiary/associate' of DLF. Object of various Clauses in the DIP Guidelines (now ICDR Regulations) is to ensure that various information set out therein are disclosed in the offer documents and not merely to included the lands belonging to the subsidiaries/associates. Therefore, assuming that the 35 Acres of land belonging to Sudipti was included in the total land that could be developed by DLF, it would not amount to disclosing true and adequate material information as contemplated under the DIP Guidelines. Hence, aforesaid decisions do not support the contention of DLF.

184. Argument of DLF that after executing the Development Agreement in respect of 35 Acres of land in favour of DLF (through DCPC) Sudipti had become commercially irrelevant and therefore, shares of Sudipti were divested is unbelievable, because, if Sudipti on execution of Development Agreement had become commercially irrelevant, then shares of Sudipti alone ought to have been divested. In the present case, instead of divesting the shares of Sudipti, DLF has resorted first to divest the shares of Felicite to three house wives whose spouses were Key Managerial employees of DLF and then divested the shares of Shalika to Felicite and thereafter divested shares of Sudipti to Shalika. Felicite could not be said to have become commercially irrelevant because, Felicite incorporated for the purpose of acquiring lands for DLF to develop had not acquired any land since incorporation till 29/11/2006. In fact the activity actually carried on by

Felicite during the financial year ending on 31/03/2007 i.e. before and after divestment of shares in favour of three house wives, was to acquire in all 281 subsidiary/associate companies of DLF. In such a case Felicite could not be said to have become commercially irrelevant, because it had neither acquired any lands nor entered into any development agreement with DLF. Moreover, Felicite was catering to the needs of DLF in divesting the shares of subsidiaries/associates of DLF which are claimed to have become shell companies. Very fact that Felicite even after divestment of shares continued to acquire shell companies of DLF, gives credence to the inference drawn by SEBI that even after divestment of shares, Felicite was run by DLF through the Board of Directors of Felicite who are employees of DLF. This conclusion is further fortified by the statement of three house wives that they were not running Felicite. If three house wives who acquired 100% shares of Felicite were not running Felicite, then obviously Felicite was run by DLF through the Board of Directors who were all employees of DLF. Since, the Board of Directors of Felicite, Shalika and Sudipti consisting of employees of DLF continued even after divestment of shares it is apparent that DLF was running Felicite, Shalika and Sudipti even after divestment of shares.

185. It is contended on behalf of DLF that the divestment of shares of Felicite (consequently divestment of shares of Shalika and Sudipti) to three house wives whose spouses were employees of DLF was with a view to ensure that there was less chance of thwarting the effectuation of the terms and conditions of the Development Agreement between Sudipti and DLF

(through DCPC) and mitigate to some extent the completion risk faced by DLF in executing the Development Agreement. This argument of DLF, precisely contradicts its claim that on execution of Development Agreement, Sudipti had become a shell company and hence the shares of Sudipti were divested. Even according to DLF, inspite of executing Development Agreement, there was a possibility of the development of the lands in question being scuttled if there was total dissociation on account of divestment of shares, of Sudipti, Therefore, DLF adopted a modus operandi of sham divestment of shares through three house wives whose spouses were Key Managerial employees of DLF. Admittedly the three house wives were not running Felicite (consequently, Shalika and Sudipti) and hence, it is evident that DLF continued to run Felicite, Shalika and Sudipti even after the divestment of shares, through the Board of Directors of the respective companies, who were also Key Managerial employees of DLF. Thus, in violation of Clause 6.2 of DIP Guidelines DLF has resorted to sham transaction of divesting shares with a view to avoid disclosing material information relating to Felicite, Shalika and Sudipti in the offer documents which are true and adequate.

186. Contention that there was no motive for DLF to make non disclosures and there was nothing that could be gained by DLF by merely avoiding disclosure of Sudipti as a subsidiary/related party of DLF is without any merit, because, the very act of resorting to sham transaction of divesting shares with a view to camouflage association of DLF with three companies as dissociation is sufficient to hold that the prospectus did not contain all

material information which is true as stipulated under Clause 6.2 of DIP Guidelines. In such a case it becomes academic to go into the question as to whether there was any motive for resorting to sham transactions and whether the investors were actually prejudiced by such violations.

187. Once it is held that DLF has resorted to sham transaction of share transfer with a view to camouflage its association with three companies as dissociation and thereby avoid disclosing material information relating to Felicite, Shalika and Sudipti, then, it obviously means that apart from failing to make true and adequate disclosure as contemplated under Clause 6.2 of DIP Guidelines, DLF has violated various other Clauses which deal with material information such as Clause 6.9.6.6 (related party transactions), Clause 6.10.2.3 (financial particulars relating to subsidiaries), Clause 6.11.1.2 (information relating to outstanding litigation) Clause 9.1 (Guidelines on advertisement).

188. Although considerable arguments were advanced by counsel on both sides on the question as to whether DLF violated Clauses 6.9.6.6, 6.10.2.3, 6.11.1.2 and Clause 9.1 of DIP Guidelines, it is relevant to note that all those Clauses deal with the material information which are required to be disclosed in the offer documents. It is the case of DLF that material information relating to Felicite, Shalika and Sudipti were not required to be disclosed due to divestment of shares of those three companies. Once it is held that divestment of shares is a sham transaction executed with a view to avoid disclosing material information relating to those three companies in the offer documents, then, it follows as a natural corollary that material

information set out in various Clauses in Chapter VI of DIP Guidelines are not complied. In such a case, it becomes academic to go into the question as to how many Clauses specified in Chapter VI of DIP Guidelines have been violated. Therefore, without going into the merits of rival contentions on the issue as to whether DLF has violated Clauses 6.9.6.6, 6.10.2.3, 6.11.1.2 & 9.1 of DIP Guidelines it is held that by resorting to sham transaction of divesting shares of Felicite, Shalika and Sudipti, DLF has avoided making disclosure of material information relating to those three companies in the offer documents in violation of Clause 6.2 of DIP Guidelines and consequently violated various other Clauses in Chapter VI of the DIP Guidelines which relate to disclosing material information in the offer documents. It was strongly contended by the Counsel for DLF that on divestment of shares it could not be said that DLF had 'control' over Felicite, Shalika and Sudipti as contemplated under Section 4 of the Companies Act, 1956. As rightly contended by the Counsel for SEBI, the basic question to be considered herein is, whether, entering into sham transactions with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation and thereby avoid disclosing material information relating to those three companies in the offer documents amount to violating various Clauses under the DIP Guidelines/ PFUTP Regulations and not the question as to whether DLF controlled the three companies in violation of Section 4 of Companies Act, 1956. Since it is established that even after the divestment of shares, DLF continued to run those three companies through the Board of Directors of those three companies who are all employees of DLF and that conclusion is further corroborated by the

statements made by three house wives that they were not involved in the running of Felicite (consequently Shalika and Sudipti), it is apparent that DLF while continuing to run the three companies, failed to disclosure material information relating to those three companies in the offer documents in violation of DIP Guidelines/PFUTP Regulations. In such a case, considering the rival contention as to whether, DLF was exercising 'control' over the three companies as contemplated under Section 4 of Companies Act, 1956 becomes academic and hence not considered.

189. At this stage, it would be appropriate to consider the additional argument sought to be canvassed by SEBI by filing an affidavit on 19/01/2015. In that affidavit it is contended for the first time that in the DRHP as also in the final prospectus, there is a heading titled 'subsidiary entities at any time during the year'. It is contended that in the first DRHP filed on 11/05/2006, the auditors of DLF instead of disclosing the names of Felicite, Shalika and Sudipti under the heading 'subsidiary entities at any time during the year' had included the names of those three companies under the heading 'Associates'. However, in the second DRHP dated 02/01/2007 or in the RHP dated 25/05/2007 or in the final prospectus dated 18/06/2007, neither the names of Felicite, Shalika and Sudipti were included under the heading 'subsidiary entities at any time during the year' nor included under the heading 'Associates'. Relying on Clause 22 of AS-21, it is contended on behalf of SEBI that even assuming that DLF had dissociated itself from Felicite, Shalika and Sudipti on 29-30/11/2006, the result of operation of those three companies with DLF till the date of cessation of the

relationship ought to have been included in the consolidated statement of profit and loss account of DLF and failure to do so constitutes failure to disclose material information relating to those three companies in the offer documents.

190. Counsel for DLF apart from submitting that the above contentions which were neither raised in the show cause notice nor dealt with in the impugned order cannot be allowed to be urged at this belated stage, submitted that there is no merit in the above contention of SEBI, because, in the present case, the parent subsidiary relationship between DLF and Sudipti was a temporary relationship and therefore, as per para 11 of AS-21, DLF was not required to comply with para 22 of AS-21.

191. It is well established in law that correctness of an order is to be decided only on the basis of reasons set out in the impugned order and not on the basis of reasons which are not be found in the impugned order. Since the financial statements are prepared by the auditors and the auditors of DLF have not been questioned by SEBI on the above aspects of the matter, it would not be proper to express any opinion behind the back of the auditors of DLF. Although, above argument sought to be raised by SEBI for the first time before this Tribunal is an interesting argument worth considering, since the views of the auditors who prepared the said financial statements of DLF is not available on record, in the facts of present case it would not be just and proper to express any opinion on the above argument which is being raised for the first time before this Tribunal that too after conclusion of arguments on both sides. Accordingly, contention of SEBI that the

impugned order ought to be sustained on the basis of additional argument raised before this Tribunal for the first time is not entertained in the facts of present case.

192. However, argument of DLF that the net financial losses incurred by Felicite, Shalika and Sudipti during the year 2006-2007 being approximately ₹ 8 lac compared to the total profit of DLF during the same period amounting to ₹ 1941 crore, failure to include aforesaid losses in the consolidated financial statements of DLF would not make any material difference is without any merit, because, if the law commands that loss/profit of the subsidiaries/ associates to be taken into account in the consolidated financial statements of the parent company, then, irrespective of the fact that the quantum of loss /profit is negligible, the said loss/profit must be taken into account in the consolidated financial statements of the parent company. Hence the argument that even if the negligible loss incurred by the three companies in the offer documents it would have no material effect on the investor decision cannot be accepted.

193. Next question to be considered is, whether, SEBI is justified in holding that DLF has actively concealed the fact about filing of FIR by Mr. K. K. Sinha against Sudipti and others and whether, failure to disclose FIR in the offer documents amounts to suppressing outstanding litigation in the offer documents in violation of Clause 6.11.1.2 of DIP Guidelines.

194. In the present case, since inception DLF has been contending that the FIR filed by Mr. K. K. Sinha on 26/04/2007 against Sudipti and others including Mr. Praveen Kumar came to its knowledge on 25/06/2007 and by that time IPO process was completed and hence DLF cannot be said to have failed to disclose filing of FIR in the offer documents.

195. Before considering the question as to whether the filing of FIR constitutes outstanding litigation, it would be appropriate to consider the question as to whether SEBI is justified in rejecting the contention of DLF that the FIR filed by Mr. K. K. Sinha came to its knowledge on 25/06/2007.

196. The WTM of SEBI by his order dated 20/10/2011, while appointing the Investigating Authority to investigate into the allegations levelled by Mr. K. K. Sinha against DLF, had recorded his prima facie observation that in all probability DLF was aware of the FIR registered against Sudipti, because Mr. Praveen Kumar (one of the accused in the FIR) was closely associated with DLF and Mr. Praveen Kumar and others against whom the FIR was filed were interrogated by the police authorities in connection with FIR. However, in view of the plea that DLF came to know about the filing of FIR on 25/06/2007, the WTM of SEBI directed the Investigating Authority to investigate the matter and find out as to whether there is any truth in the contention of DLF that filing of FIR came to its knowledge on 25/06/2007. In para 17 of the said order it was specifically recorded that the Investigating Authority shall investigate the matter without being prejudiced by the prima facie observation made in the said order.

197. In para 41 of the impugned order, which is passed after the conclusion of investigation, the argument of DLF that the FIR dated 26/04/2007 came to its knowledge on 25/06/2007 has been rejected by recording thus:-

> *"In this regard, I note that SCN has sought to attribute knowledge of the aforesaid FIR on DLF and its directors not merely on the basis of relation of Mr. Praveen Kumar with Mr. K. P. Singh, Executive Chairman of DLF. Apart from this fact, other factors such as he being a 'key managerial employee' of DLF reporting directly to its Board of directors, as disclosed in the Prospectus and his interrogation by the Police in relation to the aforesaid FIR lead to conclusion that the Board of directors of DLF cannot feign ignorance of this FIR on the date of signing/issuing the RHP. Therefore, the fact of filing of aforesaid FIR that was subsisting on the date of issuance of RHP/Prospectus, should have been disclosed therein."*

198. From the aforesaid findings recorded in the impugned order it is apparent that the Investigating Authority had failed to investigate the plea of DLF that filing of FIR against Sudipti came to its knowledge only on 25/06/2007. Failure on part of the Investigating Authority to investigate the above issue inspite of specific directions given by the WTM of SEBI to that

effect in his order dated 20/10/2011, amounts to gross misconduct and dereliction of duty.

199. It is equally surprising to note that by the impugned order, the WTM of SEBI has held that DLF knew about the filing of FIR, solely based on the prima facie observations contained in the order dated 20/10/2011 which was passed before investigation. Merely because the Investigating Authority had failed to comply with the directions contained in the order dated 20/10/2011, the WTM of SEBI could not have proceeded to reject the contention of DLF solely based on the prima facie observations made in the order passed before investigation. Without ascertaining the date on which Sudipti or Mr. Praveen Kumar were served with a copy of the FIR, without ascertaining the date on which they were interrogated by the police authorities and in the absence of any other evidence which falsifies the claim of DLF, the WTM of SEBI could not have rejected the contention of DLF that the FIR came to their knowledge on 25/06/2007. It was totally improper on part of WTM of SEBI to rely on the prima facie observations made in the order dated 20/10/2011, especially when it was specifically recorded in the said order that the investigation be carried without being influenced by the prima facie observations made therein. Thus, the impugned decision of WTM of SEBI in so far as it holds that despite knowledge, DLF has failed to disclose FIR in the offer documents is based on conjectures and surmises and hence cannot be sustained.

200. During the course of arguments, Mr. Chatterjee, learned counsel appearing on behalf of Mr. K. K. Sinha (complainant) sought to tender three communication dated 01/05/2007, 02/05/2007 and 26/05/2007 which according to him clearly establish that DLF was aware about the filing of FIR prior to 25/06/2007 and the claim made by DLF to the contrary is false.

201. Counsel for appellants apart from doubting genuineness of the aforesaid three communications have submitted that the said three communications ought not to be entertained at this belated stage. However, in the interest of justice, we deemed it proper to look into those three communications. First communication dated 01/05/2007 is the summons issued by the Investigating Officer, Police Station, Connaught Place, New Delhi calling upon Mr. Praveen Kumar, Director of Sudipti to attend police station on 03/05/2007 in connection with a case registered on the compliant of Mr. K. K. Sinha. FIR was not enclosed along with that communication and therefore, it cannot be said that by communication dated 01/05/2007 Mr. Praveen Kumar was made aware about the FIR filed against Sudipti and others including Mr. Praveen Kumar. Second communication dated 02/05/2007 is the letter addressed by Mr. Praveen Kumar to the Investigating Officer seeking three days time to appear before the Investigating Officer. Merely seeking time to attend the Police Station cannot be a ground to infer that on 02/05/2007 Mr. Praveen Kumar was aware about filing of FIR against Sudipti as also against Mr. Praveen Kumar. Third communication dated 26/06/2007 is merely a reminder letter issued by the police authorities calling upon Mr. Praveen Kumar to join the

investigation within three days of the receipt of the said communication. That communication also does not convey the date on which the FIR was served upon Mr. Praveen Kumar. Thus, none of the communications relied upon by Mr. Chatterjee, learned counsel for Mr. K. K. Sinha throw any light as to the date on which Mr. Praveen Kumar came to know about the filing of FIR and consequently the date on which DLF came to know about the filing of FIR.

202. Assuming that registration of a case referred to in the communication dated 01/05/2007 is referable to registering an FIR, then, without knowing the contents of the said FIR it is impossible to assume that Mr. Praveen Kumar/ Sudipti, were aware about the contends of the FIR and that through them DLF must have acquired knowledge about the contents of FIR and therefore DLF ought to have disclosed about the filing of FIR in the offer documents. Fact that Sudipti in its letter dated 16/06/2010 has not disputed receipt of FIR does not mean that Sudipti had received copy of the FIR before 25/06/2007 as it could have been received on or after 25/06/2007. In these circumstances, since the final prospectus was filed on 18/06/2007 and there is no evidence to show that DLF had knowledge about the filing of FIR against Sudipti prior to 25/06/2007, the WTM of SEBI was not justified in rejecting the contention of DLF that filing of FIR came to its knowledge on 25/06/2007. Once it is held that there is no basis to disbelieve the claim of DLF that filing of FIR against Sudipti came to its knowledge on 25/06/2007, then the question as to whether FIR constitutes outstanding

litigation which ought to have been disclosed in the offer documents becomes academic and hence not answered.

203. Question thereafter to be considered is, whether SEBI is justified in holding that the directors and the CFO of DLF have violated Clause 6.15.2 of the DIP Guidelines.

204. Counsel for the directors of DLF have argued that in the absence of any specific provision under the SEBI Act making the directors/CFO automatically liable for the offences allegedly committed by the company, the directors cannot be made liable for the offences allegedly committed by the company by applying the principles of vicarious liability. There is no merit in the above contentions, because, in the present case, the directors and the CFO are not held vicariously liable, but are held individually and directly liable for the misstatements in the offer documents. Hence, various decisions relied upon in support of the contention that the directors cannot be made vicariously liable for the misdeeds of the company would have no bearing on the facts of present case.

205. The Board of Directors and the CFO who has signed the prospectus on behalf of all the directors are individually and directly held liable, because, they were the persons who while running the day to day affairs of DLF had adopted a modus operandi of divesting the shares of Felicite, Shalika and Sudipti with a view to camouflage association of DLF with

those three companies as dissociation and thereby avoid disclosing material information relating to those three companies in the offer documents issued by DLF. Thus, the Board of Directors/CFO of DLF having resorted to sham transactions and thereby avoid disclosing material information relating to those three companies in the offer documents in violations of SEBI Guidelines/Regulations, could not have represented to the investors by signing a declaration in the offer documents to the effect that all relevant provisions of the Act and the Guidelines issued by SEBI have been complied with and that all the statements made therein are true and correct.

206. Reliance placed by the counsel for appellants on the decision of the Apex Court in case of Rai Bahadur Shreeram Durga Prasad (P) Ltd. (Supra) is misplaced. In that case Apex Court has held that the customs authorities were only required to see that no goods are exported without furnishing the prescribed declaration and once that stage has passed and thereafter if the declaration was found to contain false/incorrect statements, then, it was for the Reserve Bank/the Director of Enforcement to take penal action and it was not open to the customs authorities to take penal action. In the present case, SEBI is the authority to ensure compliance of the Guidelines issued by it and SEBI is the authority to take action if the Guidelines are violated. Thus, the decision of the Apex Court in case of Rai Bahadur Shreeram Durga Prasad (P) Ltd. (Supra) is distinguishable on facts and has no relevance to the facts of the present case.

207. It was contended by the Counsel for Mr. Sanka that, Mr. Sanka was only a Key Managerial employee and not a Key Managerial Personnel and therefore, Clause 6.9.5.8 of DIP Guidelines which requires details of the shareholding if any, of the wives of Key Managerial Personnel could not be held against Mr. Sanka. It was further contended that Clause 6.9.6.6 of DIP Guidelines read with AS-18 relates to Promoters/Principle shareholders and since Mr. Sanka was neither a Promoter nor a Principle shareholder, it could not be said that Mr. Sanka had violated Clause 6.9.6.6 of DIP Guidelines. Both these arguments are without any merit, because, as noted above, Mr. Sanka is primarily held liable for being party to the sham transactions of divesting shares with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation and thereby avoid disclosing material information relating to those three companies in the offer documents. Once it is held that the Board of Directors/CFO are guilty of resorting to sham transactions with a view to avoid disclosing material information relating to aforesaid three companies, then it follows as a matter of course that material information required to be disclosed as more particularly set out in various Clauses of DIP Guidelines have not been complied with. In such a case it becomes academic to go into the question as to how many Clauses of DIP Guidelines which enumerate the material information required to be disclosed in the offer documents have been violated. Similarly, the argument that the benefit of doubt given to Mr. G. S. Talwar must also be extended to other directors who are appellants before this Tribunal, because, there is no material to show that the said directors had participated or were involved in the day to day decision making of DLF is also without any merit, because

Mr. G. S. Talwar being a non-executive director, it was possible that he may not have been involved in the day to day decision making process of DLF, but the same yardstick cannot be applied to directors who have filed appeals before this Tribunal as they constituted the Board of Directors and were directly involved in the day to day decision making process of DLF and had made a declaration stating that the offer documents contain true and adequate material information as stipulated under the SEBI Guidelines/Regulations. Therefore, the benefit of doubt extended to Mr. G. S. Talwar cannot be extended to other directors of DLF.

208. As rightly contended by the counsel for SEBI, decision of the Apex Court in case of N. Narayanan v/s A.O., SEBI reported in (2013) 12 SCC 152, is applicable to the present case, because, the directors/CFO of DLF took decision to divest the shares of three subsidiary/associate companies of DLF by way of sham transactions with a view to avoid disclosing material information relating to those three companies in the offer documents and then represented to the investors by signing a declaration in the offer documents to the effect that the statements made therein are true and correct. In such a case, the directors of DLF cannot contend that they have not committed any violations and that no direction need be passed against them under Section 11/11B of SEBI Act.

209. Question then to be considered is, whether SEBI is justified in holding that the appellants have violated PFUTP Regulations. It is contended by way of preliminary objection that without following the due

procedure prescribed under regulation 5, 9 & 10 of PFUTP Regulations, SEBI could not have held that DLF has violated PFUTP Regulations. There is no merit in the above contention because, firstly, the directions given in the order dated 20/11/2006 to the Investigating Officer to focus the investigation relating to the violations if any, under the DIP Guidelines cannot be construed to mean that the Investigating Officer was prohibited from investigating into the possible violation under the PFUTP Regulations. Secondly, SEBI has filed an affidavit stating therein that the investigation report submitted by the Investigating Officer after completion of investigation which included report on violation committed under the PFUTP Regulations was considered by the appointing authority namely the WTM of SEBI on 17/05/2013 and thereafter, show cause notice in accordance with the power delegated to Deputy General Manager duly approved by Executive Director was issued by the Chief General Manager, who is a person holding two ranks superior to that of Deputy General Manager. It is further stated in the affidavit filed by SEBI that after issuance of show cause notice, the matter was referred to Mr. Rajeev Kumar Agarwal, WTM of SEBI who as per office note issued by the Chairman SEBI on 23/01/2013 was designated as a member to hear and decide Section 11B & 11(4) matters which arise from the investigations conducted by the Investigation Department Division 6 to 10 and since the investigation in the present case was carried out by Division 7, the same was heard and decided by Mr. Rajeev Kumar Agarwal, WTM of SEBI. These submissions are not controverted and moreover, there is no reason to disbelieve the above statements made by SEBI in their affidavit. Hence the preliminary objection

raised by DLF to the effect that the impugned order has been passed without following the procedure prescribed under the PFUTP Regulations cannot be sustained. Once it is held that due procedure prescribed under PFUTP Regulations have been followed, then reliance placed by counsel for DLF on decisions of the Apex Court in case of Ramachandra Keshav Adke (Supra) and in case of Hukum Chand Shayam Lal (Supra) in support of the contention that where a power is required to be exercised by a certain authority in a certain manner, then the said power should be exercised in that manner or not or at all would have no relevance to the facts of present case, because, requisite procedure has been followed by SEBI in the present case.

210. Question then to be considered is, whether on merits SEBI is justified in holding that DLF has violated PFUTP Regulations. Basic charge levelled and held against DLF is that DLF has resorted to sham transaction of share transfer with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation and thereby avoid disclosing material information in the offer documents, which constitutes 'fraud' under regulation 2(c) of PFUTP Regulations.

211. It is contended on behalf of DLF that to constitute 'fraud' under regulation 2 (c), it must be shown that the alleged non-disclosure was intended to induce another person or his agent to deal in securities and in the present case there is nothing to show that the dissociation of Felicite, Shalika and Sudipti by DLF and the omission to disclose material

information in respect of those companies in the offer documents was intended to induce (or resulted in inducing) investors and general public to buy/subscribe to DLF's shares in the IPO and therefore, DLF cannot be held guilty of committing fraud under PFUTP Regulations. As rightly contended by the counsel for SEBI, expression 'fraud' under regulation 2(c) of PFUTP Regulations is an inclusive definition and is not restricted to the categories specified therein. Moreover, under regulation 2(c), any act, expression, omission or concealment committed whether in a deceitful manner or not would constitute 'fraud'. Therefore, plain reading of the above provision makes it abundantly clear that intention to deceive is not an essential requirement for constituting 'fraud' under regulation 2(c) of PFUTP Regulations and any representation made to the investors by resorting to sham transactions would amount to committing 'fraud' under regulation 2(c) of PFUTP Regulations.

212. Similarly, argument of DLF that in the present case, no act, expression, omission or concealment was caused by DLF while 'dealing in securities' as contemplated under regulation 3 read with regulation 2(b) of PFUTP Regulations is also without any merit, because, expression 'dealing in securities' under regulation 2(b) is an inclusive definition and is not restricted to the categories specified therein. Therefore, any act, omission or concealment in the offer documents issued to the investors/general public for the purpose of subscribing shares of a company in the IPO would be an act, omission or concealment while dealing in securities. To accept the argument of DLF would mean that a company which has indulged in

committing fraudulent act, omission or concealment in the offer documents issued to the investors/general public for subscribing to the shares of that company in the IPO, cannot be proceeded against under PFUTP Regulations on ground that there is no dealing in securities. Offering shares to the investors/general public under the IPO by issuing offer documents is one of the modes of dealing in shares and in such a case, resorting to sham transactions with a view to camouflage the facts and thereby avoid disclosing material facts in the offer documents would constitute violation of PFUTP Regulations.

213. It is contended on behalf of DLF that an issuer company issuing shares for the purpose of listing on a stock exchange would not come within the scope of regulations 3 and as a natural corollary Clauses (a) to (r) in regulation 4(2) which provides for the circumstances in which 'dealing in securities shall be deemed to be fraudulent or an unfair trade practice' would have no application in the present case. There is no merit in the above contention, because, as noted above, the entire device or game plan adopted by DLF was to indulge in sham transactions of share transfer with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation and thereby avoid disclosing material information relating to those three companies in the offer documents. Though the said act of commission and omission may not amount to trade practice, the said act of commission and omission committed during the course of subscribing to an issue of shares would constitute 'fraud' as defined under regulation 2(c) and consequently would be covered under various prohibited categories

specified under regulation 3 and regulation 4(1) and 4(2) (f) & (k) of PFUTP Regulations.

214. Argument of DLF that it acted bonafide on the advice of experts such as Merchant Bankers, auditors and legal advisors is fallacious. It is not the case of DLF that sham transactions were executed as per the advice given by any Merchant Banker, auditor/ expert professional or legal advisor. It is not the case of DLF that but for the advice given by the Merchant Banker/auditor/legal advisor, sham transactions would not have taken place. In the absence of any investigation conducted/ any finding recorded against the Merchant Bankers, auditors/ expert professional or legal advisor in the impugned order and in the absence of categorical assertion on part of DLF that entering into sham transaction and the consequences thereof are solely attributable to Merchant Banker, auditors or the legal advisors, it is not possible to accept the contention of DLF that divestments of shares were undertaken by DLF under the bonafide advice given by Merchant Bankers, auditors and legal advisors which are now found to be sham transactions. In other words, it is possible that the Merchant Bankers/Auditors may have issued the certificates/reports under the bonafide belief that the facts furnished to them are true and correct. However, if the facts furnished to them by DLF is distorted or sham, it is not open to DLF to contend they acted bonafide on the basis of the certificates/ reports submitted by the Merchant Bankers/ Auditors/legal advisors.

215. Question then to be considered is, whether in the facts of present case, initiating remedial/preventive action under Section 11/11B of SEBI Act is

warranted and if so, whether the action taken against the appellants by SEBI is proportionate to the violations committed by the appellants.

216. Resorting to sham transaction of share transfer with a view to camouflage association of DLF with Felicite, Shalika and Sudipti as dissociation and thereby misleading the investors by not disclosing material information relating to Felicite, Shalika and Sudipti in the offer documents is no doubt highly objectionable. Such a dubious method adopted by DLF is highly detrimental to the investors/general public in the securities market. Therefore, with a view to send stern message to DLF and to other listed companies that such dubious methods are not adopted again, it was necessary for SEBI to take remedial action under Section 11/11B of SEBI Act. In such a case, fact that considerable time has been taken in investigating the matter and in passing the impugned order, cannot be a ground to hold that in view of passage of time no action need be taken under Section 11/11B of the SEBI Act. Similarly, fact that in the present case, no investor is found to have been prejudiced by the violations committed by the appellants cannot be a ground to hold that no action need be taken under Section 11/11B, because, to ensure that no such dubious method is adopted again, SEBI must act immediately and SEBI cannot wait till the investors are actually prejudiced on account of adopting such dubious method hereafter. In these circumstances decision of SEBI in taking remedial measures under Section 11/11B of SEBI Act cannot be faulted.

217. Last question that is to be considered is, whether, in the facts of present case, SEBI is justified in restraining the appellants from accessing the securities market and prohibiting them from buying, selling and dealing in securities for a period of three years.

218. Appellants are restrained from accessing the securities market and prohibited from buying, selling or otherwise dealing in securities for a period of three years on ground that by resorting to sham transactions they have violated Clauses 6.2, 6.9.6.6, 6.10.2.3, 6.11.1.2, 6.15.2 & 9.1 of the DIP Guidelines and regulations 3(a), (b), (c), (d), 4(1), 4(2) (f) & (k) of PFUTP Regulations. As noted earlier, violation of Clause 6.2 of DIP Guidelines is the basic violation committed by the appellants and violation of other Clauses is nothing but different facets of the very same violation. From the impugned order, it is apparent that the restraint/ prohibitory order for three years is passed against the appellants by taking into consideration different facets of the very same violation. Apart from the above, there are several other mitigating factors which are in favour of the appellants viz:

a) although resorting to sham transaction deserves stern action, in the facts of present case, since the material information relating to Felicite, Shalika and Sudipti were insignificant, even if the same were disclosed in the offer documents, it would have had little impact on the investor decision to invest in the shares of DLF.

b) there is nothing on record to suggest that the investors were prejudiced on account of DLF failing to disclose material information relating to Felicite, Shalika and Sudipti.

c) there is nothing on record to suggest that failure to disclose material information relating to three companies in violation of various Clauses under Chapter VI of DIP Guidelines/PFUTP Regulations has led to any direct or indirect benefit or advantage to DLF or its directors.

d) DLF has already borrowed huge funds for acquiring lands/development rights and further funds would be necessary for development of the said lands. If DLF is restrained/prohibited from accessing the securities market for a long period, it would seriously cripple the functioning of DLF and consequently, the interests of 4.5 lac investors in DLF would be seriously prejudiced. Object of passing restraint/ prohibitory order under Section 11/11B of SEBI Act is to ensure that no such violations are committed in the future and not to stifle the violator.

e) Since the impugned order to the extent it holds that DLF has failed to disclose FIR in the offer documents despite having knowledge about filing of FIR is held to be

unsustainable, the restraint/prohibitory order imposed on the appellants for a period of three years would have to be modified accordingly.

In the circumstances set out hereinabove, impugned order passed against the appellants is modified by restricting the restraint/prohibitory order for a period of six months commencing from the date of passing the impugned order on 10/10/2014.

219. To sum up:-

a) Decision of SEBI that DLF has resorted to sham transaction of divesting shares of Felicite, Shalika and Sudipti with a view to camouflage association of DLF with those three companies as dissociation cannot be faulted.

b) By resorting to sham transaction DLF has avoided disclosing material information relating to those three companies in the offer documents and thereby failed to disclose true and adequate material information relating to those three companies in violation of Clause 6.2 of DIP Guidelines.

c) Once it is held that by resorting to sham transaction, DLF has failed to disclose material information in violation of Clause 6.2 of DIP Guidelines, it

obviously follows that various material informations specified in different Clauses in Chapter VI of DIP Guidelines have not been complied with.

d) Similarly, decision of SEBI, that DLF has concealed material information relating to the three companies by resorting to sham transaction and misled the investors by signing a declaration that the information disclosed in the offer documents are true and adequate in violation of PFUTP Regulations cannot be faulted.

e) Directors/CFO of DLF who were directly involved in the day to day running of DLF were the persons responsible for DLF to resort to sham transaction and therefore they are equally guilty of violating DIP Guidelines/PFUTP Regulations.

f) Decision of SEBI that DLF had knowledge about the filing of FIR prior to 25/06/2007 and that DLF has actively concealed the same in the offer documents is baseless and devoid of any merit as there is no material whatsoever, to show that DLF was aware about the filing of FIR prior to 25/06/2007. Hence, the impugned order to the extent it holds that DLF was aware about the filing of FIR prior to 25/06/2007 and that the DLF has actively concealed the FIR in the offer documents is unsustainable and accordingly quashed and set aside.

g) By order of WTM of SEBI dated 20/10/2011, the Investigating Officer of SEBI was specifically directed to investigate as to whether DLF had knowledge about the filing of FIR prior to 25/06/2007. Despite that specific direction, the Investigating Officer of SEBI has failed and neglected to investigate that issue which was an important issue having direct bearing on the merits of the case. Thus, the Investigating Officer of SEBI is guilty of gross misconduct and dereliction of duty and failure on his part to comply with the directions contained in the order dated 20/10/2011 has led to miscarriage of justice.

h) resorting to sham transaction with a view to camouflage association of DLF with three companies as dissociation being a dubious method adopted by appellants it was necessary for SEBI to send stern message to DLF and other listed companies by taking remedial action under Section11/11B of SEBI Act so that such dubious methods are not adopted hereafter.

i) Since the impugned order is held to be partially unsustainable and there are several mitigating factors in favour of the appellants as more particularly set out hereinabove, the restraint/prohibitory order imposed on the appellants for a period of three years is reduced to a

period of six months commencing from the date of passing the impugned order on 10.10.2014.

220. All appeals are disposed of in the above terms, with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

13.03.2015
Prepared & Compared By: PK

Per: Tribunal

As per the majority decision, impugned order dated 10.10.2014 is quashed and set aside and all appeals are allowed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

13.03.2015
Prepared & Compared By: PK

After the majority decision quashing the impugned order dated 10.10.2014 has been pronounced, learned counsel for the SEBI Ms. Poornima Advani & Mr. B.M. Chatterjee, learned Senior Counsel,

have prayed for stay of the majority decision. We find no good reasons to stay the majority decision quashing the impugned order. Since the appellant has already suffered for the last more than 5 months for no fault, the prayer for stay of majority decision is, therefore, not allowed.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

13.03.2015
Prepared & Compared By: PK

After the aforesaid order was pronounced, Mrs. Poornima Advani learned counsel for SEBI and Mr. B.M. Chatterjee, learned counsel for complainant made oral applications seeking stay of the operation of the order passed in the above appeals. In view of the conflicting views in the matter, the operation of the order passed by the Tribunal is stayed for a period of four weeks. Oral applications are disposed of accordingly.

Sd/-
Justice J.P. Devadhar
Presiding Officer

13.03.2015
Prepared & Compared By: PK