

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 10.09.2015

Date of Decision : 13.10.2015

Appeal No. 62 of 2013

Osian's-Connoisseurs of Art Private Limited

G2B- Nariman Bhavan,

Nariman Point,

Mumbai- 400 021

...Appellant

Versus

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

2. A. K. Muthuswamy,
S/o. Late Mr. Krishnamurthy,
Old No. 30, New No. 67, Bishop Garden,
Raja Annamalaipuram,
Chennai- 600 028
Tamil Nadu

...Respondents

Mr. Janak Dwarkadas, Senior Advocate with Mr. Vyapak Desai and
Mr. Siddharth Ratho, Advocates i/b Nishith Desai Associates for the
Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Tomu Francis,
Advocate for Respondent No. 1

Mr. Mahadevan Krishna Iyer, Advocate for Respondent No. 2

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

Per: Justice J.P. Devadhar

1. Appellant is aggrieved by the order passed by the Whole Time
Member ("WTM" for short) of Securities and Exchange Board of India

(“SEBI” for short) on April 15, 2013. By that order the appellant is held guilty of sponsoring and managing “Collective Investment Scheme” (“CIS” for short) without obtaining certificate of registration from SEBI, in contravention of Section 12(1B) of the Securities and Exchange Board of India Act, 1992 (“SEBI Act” for short) and Regulation 3 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (“CIS Regulations” for short). By the said order, appellant inter alia, is directed to wind up the said CIS and refund the monies collected but not paid to the investors. In addition, the appellant is also directed to pay the amount of profits/income earned, if any, that is due to the investors as per the terms of its offer or pay interest at the rate of 10% per annum on the amount invested from the date of investment till the date of refund, whichever is higher.

2. Facts relevant for the purpose of present appeal as set out in the memorandum of appeal are as follows:-

- a) Appellant is a company registered under the Companies Act, 1956. Appellant is a leading auction house and archive in the country and has been primarily engaged in the business of holding public auction of artworks for several years which has been the major source of revenue for the appellant. Appellant is also engaged in the business of providing investment advisory and art custodial management services.

- b) By a Trust Deed dated March 10, 2006 the appellant settled a private Trust called Osian's Art Fund ("Trust" for convenience) under the Indian Trusts Act, 1882 under which Oseta Investments Trustee Company Private Limited ("Trustee" for convenience) was appointed as a Trustee to the Trust. The Trustee in turn appointed the appellant as Asset Management Company ("AMC" for short) of the Trust. Thus, the appellant is the sponsor and AMC of the Trust.
- c) Sometime in June 2006 the appellant as AMC of the Trust launched a fund called "The Osian's Art Fund Scheme Contemporary 1" ("Art Fund" for short) by inviting subscriptions from various privately placed investors to enable the appellant to make investments in artworks (paintings, sculpture, graphic art and drawings) of various artists. The objective of the scheme was to collect capital from select private high-net worth investors for investment by way of acquisition, holding, management, trading or disposal of Indian as well as foreign art or any other property whatsoever including antiquities for the purpose of providing facilities for the participation by persons as beneficiaries in such properties or

investments and in the profits or income arising therefrom. From the aforesaid scheme in all ₹ 102.40 crore was collected by the appellant from 656 investors for the purpose of acquiring artworks.

- d) Prior to the launching of the scheme the appellant had formal meeting with SEBI's Director Mr. Pradeep Kar on February 15, 2006 and also had informal discussions and correspondence with SEBI on the question as to whether the scheme would attract registration under any of the regulations framed by SEBI. However, no response was received by the appellant from SEBI in that behalf.
- e) Pursuant to the Asset Management Agreement dated June 08, 2006 executed by and between the appellant and the Trustee of the Trust, the appellant as AMC of the Trust has been managing the Art Fund after obtaining approval from the Board of the Trustee Company from time to time.
- f) With a view to understand the nature of activities carried on by the appellant, SEBI by its letter dated June 18, 2007 sought certain information from the appellant which was furnished by the appellant on July 3, 2007.

- g) On perusal of the information furnished by the appellant, SEBI formed a prima facie opinion that the scheme/fund which was floated and managed by the appellant is a CIS covered under Section 11AA of the SEBI Act, 1992. Since the said CIS was managed by the appellant without obtaining certificate of registration as required under Section 12 (1B) read with Section 11(2)(c) of SEBI Act and Regulation 3 of CIS Regulations, SEBI issued a show cause notice to the appellant on October 12, 2007. The Trustee (Oseta) wide its letter dated December 21, 2007 assumed the responsibility to respond to the show cause notice and filed its reply for itself and on behalf of the appellant. Subsequently, personal hearing was also granted. On February 13, 2008 SEBI issued a press release stating therein that the investments made in Art Funds constitute CIS and are governed by the CIS Regulations framed by SEBI.
- h) In the meantime, the Respondent No. 2 filed a complaint before SEBI in relation to his investment of Rs. 25 lac in the scheme managed by the appellant. SEBI by its letter dated January 31, 2011 informed the Respondent No. 2 that the said

complaint did not fall within the purview of SEBI. Thereupon, Respondent No. 2 filed a writ petition before the Madras High Court which was dismissed on April 16, 2012 with liberty to the Respondent No. 2 to challenge SEBI's letter dated January 31, 2011 by filing an appeal before this Tribunal. Accordingly, the Respondent No. 2 filed an appeal before this Tribunal. By an order dated November 29, 2012 this Tribunal allowed the appeal by setting aside the SEBI's letter dated January 31, 2011 and directed SEBI to re-examine the matter and pass appropriate order after hearing both the parties. Accordingly, the matter was reheard and by a common order dated April 15, 2013, SEBI has disposed of the show cause notice issued to the appellant on October 12, 2007 as also the complaint filed by Respondent No. 2 against the appellant before SEBI. Appellant has filed the present appeal to challenge the said order dated April 15, 2013.

3. Mr. Dwarkadas, learned Senior Advocate appearing on behalf of the appellant submitted as follows:-

- a) When the Art Fund was sponsored and launched by the appellant as AMC of the Trust in the year 2006, there was no legal regime existing to govern the

functioning of the Art Fund and hence SEBI is not justified in passing the impugned order against the appellant.

- b) Section 11AA of the SEBI Act inserted with effect from 22.02.2000 defines CIS as any scheme or arrangement made or offered by any company under which the contributions or payments by the investors are pooled or utilized for the purposes of the scheme or arrangement. Expression 'Company' is not defined under the SEBI Act, 1992. In view of Section 2(2) of SEBI Act read with Section 2A of the Securities Contracts (Regulation) Act, 1956, the expression 'Company' under Section 11AA of SEBI Act, 1992 would have to be construed as a company registered under the Companies Act, 1956. Thus, jurisdiction of SEBI under Section 11AA of SEBI Act is in relation to schemes made or offered by any company registered under the Companies Act, 1956. In the present case, the CIS is made/offered by the Trust and hence the same would fall outside the purview of SEBI Act.
- c) Apex Court in case of Harbhajan Singh v. Press Council of India and Ors. (AIR 2002 SC 1351), Dadi Jagannadham vs. Jammulu Ramulu and Ors. [(2001)

7 SCC 71], Grasim Industries Ltd. v. Collector of Customs, Bombay (AIR 2002 SC 1706), and Assessing Authority-cum-excise and Taxation Officer, Gurgaon and Anr. V. East India Cotton Mfg. Co. Ltd., Faridabad [(1981) 3SCC 531] has held that a statute must be construed according to its plain language and neither should anything be added nor subtracted unless there are adequate grounds to justify the inference that the legislature clearly so intended. Since the expression ‘Collective Investment Scheme’ under Section 11AA of the SEBI Act is restricted to any scheme or arrangement made or offered by any company, SEBI is not justified in holding that Section 11AA is applicable to a scheme made or offered by a Trust.

- d) It is not in dispute that Mutual Funds established by any Trust fall within the regulatory power of SEBI and therefore, in respect of Mutual Funds, Venture Capital Funds or Alternative Investments Funds established by a Trust or a company, SEBI has framed SEBI (Mutual Funds) Regulations, 1996, SEBI (Venture Capital Funds) Regulations, 1996, SEBI (Alternate Investment Companies) Regulations, 2012 respectively. Since Art Fund does

not fall within the regulatory power of SEBI, no regulation has been framed in that behalf. Therefore, SEBI is not justified in applying the CIS Regulations to the Art Fund made or offered by the Trust.

- e) In the present case, the Art Fund is launched by the appellant for and on behalf of the Trust which is governed by the provisions contained under the Indian Trusts Act, 1882. Neither the SEBI Act nor the CIS Regulations authorize SEBI to regulate the functioning of a private Trust and, therefore, the impugned order passed by SEBI in relation to a scheme offered by a Trust is without jurisdiction.
- f) CIS Regulations have been framed by SEBI on the basis of Dave Committee report which was meant to govern plantation and agro schemes only, which envisage investment features' such as high returns, distribution channels, tax implication etc. for investments in plantation schemes and does not refer to the Art Funds.
- g) As an AMC of the Trust, the appellant was only entrusted with the duty to manage the funds of the Art Fund and was not responsible for making payments. Since the corpus of the Art Fund belonged

to the Trust, SEBI is not justified in passing the impugned order against the appellant.

- h) Mr. Neville Tuli currently owns about 34.66% shares of the appellant company and Mrs. Swaraj Tuli owns 99% shares of the Trustee Company. Both the appellant company and the Trustee Company are distinct legal entities and there is neither interse shareholding nor the two entities have common promoters/shareholders. Therefore, in the impugned order the WTM of SEBI has gravely erred in making observation with respect to the shareholding pattern and control of the appellant company.
- i) The Trust is set up for the benefit of the beneficiaries (more than 650 investors) who have invested in the Art Fund for the purpose of acquiring artworks. There is no dispute that the units of the Art Fund have been validly created under the Indian Trusts Act, 1882. As per the Indian Trust Act, the Trustees are under an obligation to transfer the subject matter of the Trust to the beneficiaries upon the dissolution of the Trust. Moreover, as per the Indian Trust Act and as per the Deed of Trust, the Trustees are obliged to act in accordance with the Deed of Trust and discharge their obligations towards the Beneficiaries.

SEBI which is not otherwise empowered to regulate the functioning of a Trust would not become entitled to regulate a Trust merely because, the beneficiaries of the Trust are more than 50 in number.

- j) It is not the case of SEBI that the scheme managed by the appellant on behalf of the Trust is a bogus scheme or intended to defraud the investors. In fact at all times, the appellant has declared the NAV (Net Asset Value) and repaid amounts to the investors to the extent possible depending on the returns. Some of the investors have approached the Civil Courts/ Consumer Forums and initiated criminal proceedings to recover their amounts and such Courts/Forums have entertained the claims of such investors. Therefore, the liability to pay to the investors under the scheme being a Civil liability, in case of dispute, such dispute could be adjudicated only by a Civil Court and not by SEBI. Therefore the impugned order passed by SEBI against the appellant is without jurisdiction.
- k) Provisions of SEBI Act are not intended to override the provisions of the Indian Trusts Act. Neither the CIS Regulations nor Section 11AA of SEBI Act seek to regulate the manner in which unincorporated

entities raise funds. The Art Fund settled by a private Trust does not fall within the ambit of SEBI Act or the CIS Regulations.

- l) CIS Regulations read with Section 11AA of SEBI Act clearly provide that the applicability of the CIS Regulations is restricted to issuance of units to the general public and do not envisage an offer made to a select set of investors under a private placement. In the present case, the scheme was launched only to select set of investors (high net worth investors) by way of private placement with a minimum investment of ₹ 25 lac and therefore the scheme offered to select set of investors cannot be treated as CIS.
- m) Reliance placed by SEBI on the decision of the Apex Court in case of PGF Ltd. vs. Union of India (AIR 2013 S.C. 3702) and Sahara Indian Real Estate Corporations Ltd. & Ors vs. SEBI (2013) 1 SCC page 1 is misplaced. The Apex Court decision in case of PGF Ltd. (Supra) has no relevance to the present case, as in that case, there was a guaranteed return to be provided by PGF, whereas, in the present case, the confidential information memorandum issued by the appellant clearly states that there would be no

guaranteed return. Similarly, in case of Sahara India (Supra) the Apex Court has held that the purpose of SEBI Act is to protect the rights of public investors in the securities market. In the present case the offer is made to a select set of investors under a private placement and therefore, decision of Apex Court in case of Sahara India (Supra) would have no application to the present case.

n) The Art Fund sponsored by the appellant is distinguishable from CIS for the following reasons:-

i) The schemes sponsored by the appellant do not prescribe a maximum subscription level and allotment is not undertaken on a proportionate basis, whereas, under CIS, maximum subscription level is specified and allotment is required to be undertaken on a proportionate basis.

ii) CIS Regulations do not necessitate calculation of NAV and there is no underlying requirement to value investments or the units by calculating NAV on on-going basis, whereas, NAV is the fundamental characteristic of the

valuation of the units issued by the Art Funds.

- iii) Regulation 2(1)(y) (as it then stood) read with Regulation 24(2) of the CIS Regulations mandate that a scheme floated in accordance with the CIS Regulations must necessarily be rated by a Credit Rating Agency and appraised by an Appraising Agency. Currently in India there are no Appraising Agencies or Credit rating agencies approved by SEBI to appraise or rate the assets of the Art Funds. In the absence of any known mechanism for rating art based schemes by credit rating agencies, the imposition of the CIS Regulations upon the operation of such schemes would be incongruous and impracticable.
- iv) The Art Fund sponsored by the appellant as AMC of the Trust cannot be considered as CIS, because, firstly, Section 11AA and CIS Regulations apply only to a scheme launched or

sponsored by a company. Secondly, those provisions apply only to plantations and agro industries. Thirdly, those provisions apply only in case of solicitation, mobilization of investments from public and not in case of investment through private placement and fourthly, the units offered by the Art Fund are not securities as contemplated under the SEBI Act and hence SEBI has no jurisdiction to pass an order against the appellant.

- o) Although Section 11AA(2) is amended by substituting the word ‘company’ with the word ‘person’ with retrospective effect from 18.07.2013 and a proviso is added to Section 11AA(1) with retrospective effect from 18.07.2013, the said amendments would have no relevance to the facts of present case, because, the scheme offered by the appellant as AMC of the Trust in the year 2006 came to an end in the year 2009, that is, much prior to the Amendment of Section 11AA with effect from 18.07.2013. Since the legislature has specifically brought into force the above amendments with effect from 18.07.2013, it is not open to the SEBI to

contend that the said amendments must be applied retrospectively even for the period prior to 18.07.2013.

- p) The SEBI (Venture Capital Funds) Regulations, 1996 and SEBI (Alternate Investment Companies) Regulations, 2012 framed by SEBI do not contemplate guaranteed payment of either the principle amount of investment or interest or both. Where a company registered under the SEBI (Alternate Investment Companies) Regulations, 2012 is unable to liquidate its assets and return the money to the investors, the trustee is permitted to make in-specie distribution of the assets of the fund amongst the investors pro-rata to their investment in the fund, subject to approval of the 75% of the contributors. In the absence of any regulation framed by SEBI, in respect of Art Fund, the impugned order passed by the WTM of SEBI is highly prejudicial to the appellant as the appellant is ordered to make payment to the investors based on either the NAV or the principle amount with 10% interest thereon from the date of investment till the date of refund whichever is higher.

Accordingly, it is submitted that in the facts of present case, since the Art Fund sponsored and managed by the appellant is not covered under CIS Regulations and in any event, since no scheme sponsored by the appellant is operating as on date, the impugned order be quashed and set aside. For the inordinate delay on part of SEBI in arriving at a conclusion that the scheme managed by the appellant falls under CIS Regulations, the appellant cannot be made to suffer by directing the appellant to pay to the investors on the basis of NAV or on the basis of principle amount with 10% interest, especially when the art market has crashed and as per the information memorandum, the investors were not entitled to guaranteed return. It is further submitted that as and when the market improves, the balance artworks lying with the appellant would be sold and the sale proceeds would be distributed amongst the investors whose claims are not yet settled.

4. Mr. Rustomjee, learned Senior Advocate appearing on behalf of the Respondent No. 1 on the other hand submitted as follows:-

- a) Under Section 11(2)(c) of the SEBI Act enacted with effect from 30.01.1992, it is the duty of SEBI to protect the interests of investors in securities and to promote the development of, and to regulate the securities market as well as the working of Collective Investment Schemes by taking such measures as it deems fit. Sub-Section (1B) inserted to Section 12 of the SEBI Act by the Securities Laws (Amendment)

Act, 1995 with effect from 25.01.1995 provides that no person shall sponsor or cause to be sponsored or carry on or cause to be carried on a Collective Investment Scheme unless that person holds a certificate of registration from SEBI in accordance with the regulations framed by SEBI. From the aforesaid provisions it is clear that SEBI is the regulatory authority for CIS.

- b) On the basis of Dave Committee Report, SEBI has framed and notified the CIS Regulations with effect from 15.10.1999. As per Regulation 3 of CIS Regulation no person other than a Collective Investment Management Company which has obtained a certificate under the CIS Regulations can carry on or sponsor or launch a CIS Regulations. Since appellant is operating a CIS without obtaining certificate from SEBI, appellant is guilty of violating SEBI Act and CIS Regulations.
- c) Expression ‘Collective Investment Scheme’ is defined under Section 11AA of SEBI Act which is inserted with effect from 22.02.2000. Reference to a ‘company’ in the opening words of Section 11AA(2) is intended to reiterate the position that it is only a Collective Investment Management company which

is entitled to obtain a certificate for carrying on a CIS. Section 11AA(2) cannot be construed to mean that the CIS carried on by an entity other than a company falls outside the purview of SEBI Act and the CIS Regulations. To construe that Section 11 AA restricts the power of SEBI to regulate CIS made or offered by a company alone would render Section 12(1B) of the SEBI Act and Regulations 3 and 4 of the CIS Regulations otiose and would also run counter to the intent and the object of the SEBI Act and the CIS Regulations.

- d) On 13.02.2008 SEBI had issued a press release, inter alia stating therein that Art Funds/Schemes were CIS and that floating such schemes without obtaining registration from SEBI would be in violation of Section 12 of SEBI Act read with Section 11 and Section AA of SEBI Act. In spite of the said press release the appellant has failed to apply for and obtain registration under CIS Regulations.
- e) By Securities Laws (Amendment) Act 2014, Section 11AA has been amended inter alia, by replacing the word 'company' with the word 'person' in Section 11AA(2) with retrospective effect from 18.07.2013. By the said Amendment Act, Section 11AA of SEBI

Act has also been amended by inserting, inter alia, a proviso to Section 11AA (1) to the effect that any pooling of funds under any scheme or arrangement which is not registered with the Board or is not covered under sub-section (3) of Section 11AA, involving a corpus amount of one hundred crore rupees or more shall be deemed to be a Collective Investment Scheme. Replacing the word ‘company’ with the word ‘person’ by the above Amendment Act, is clarificatory in nature and the said Amendment clarifies the position that the CIS schemes sponsored or launched by any person would fall within the purview of the SEBI Act and the CIS Regulations.

- f) The scheme floated by the appellant fulfils all the conditions set out under Section 11AA(2) of SEBI Act and therefore, the decision of SEBI in holding that the scheme floated by SEBI falls within the scope of CIS cannot be faulted.

Accordingly, counsel for SEBI submitted that there is no infirmity in the impugned order and hence, the appeal be dismissed with costs.

5. Mr. K. Mahadevan Iyer, learned Advocate appearing on behalf of Respondent No.2 while adopting the arguments advanced by counsel for

SEBI, submitted that under Section 11AA of SEBI Act, CIS can only be made or offered by a company and therefore, in the present case, the CIS made or offered by the Trust is unlawful. He submits that taking a narrow view that under Section 11AA(2) jurisdiction of SEBI is limited to the scheme or arrangement made or offered by a company would amount to defeating the object with which SEBI Act is enacted. Under the SEBI Act it is the duty of SEBI to protect the interest of investors as a whole. Section 11(2)(c) read with Section 12(1B) of SEBI Act as also the statement of objects and reasons for inserting Section 11AA clearly provide that a scheme or arrangement made or offered by a company alone would be eligible to obtain a certificate of registration from SEBI & no other entity would be eligible to obtain certificate of registration. Moreover Section 11AA(2) has been amended with retrospective effect from 18.7.2013 by deleting the word ‘company’ and substituting the word ‘person’. Therefore, reading Section 11AA(2) with regulation 3 of CIS Regulations it becomes clear that any scheme or arrangement made or offered by any company which fulfils the conditions set out under Section 11AA(2) would be eligible for registration from SEBI.

6. Advocate for Respondent no.2 further submitted that as held by the Apex Court in case of Sahara India Ltd. (supra), SEBI Act is a Special Act and a complete code in itself containing elaborate provisions to protect interest of investors, which has to be read in harmony with the provisions of any other law for the time being in force. Therefore, even if the Trust is governed by the Indian Trust Act, functions of the Trust

relating to the payments to the beneficiaries would be governed by the SEBI Act. Similarly in view of the decision of the Apex Court in case of Sahara India Ltd. (supra), collecting funds from 656 investors would be a public issue falling within the scope of SEBI Act and CIS Regulations. Accordingly, it is submitted by counsel for respondent no.2 that the appeal is without any merit and hence be dismissed with cost and SEBI be directed to implement the impugned order forthwith.

7. We have carefully considered rival submissions.

8. Before dealing with the merits of rival contentions it would be appropriate to quote some of the relevant provisions contained in the SEBI Act and CIS Regulations which read thus:

Section 11(1) and 11(2)(c) (w.e.f. 30.1.1992)

“11. Functions of Board:-

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

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

(a).....

(b).....

(c) registering and regulating the working of collective investment schemes including mutual funds;”

(emphasis supplied)

Section 12(1B) (w.e.f. 25.1.1995)

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

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

(emphasis supplied)

Section 11AA inserted to SEBI Act by Securities Laws (Amendment) Act 1999 (w.e.f. 22.2.2000)**“11AA. Collective investment scheme:-**

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

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

- (i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;
- (ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;
- (iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

- (iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement
- (3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement—
 - (i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;
 - (ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
 - (iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;
 - (iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);
 - (v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 1956);
 - (vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under section 620A of the Companies Act, 1956 (1 of 1956);
 - (vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982 (40 of 1982);
 - (viii) under which contributions made are in the nature of subscription to a mutual fund; shall not be a collective investment scheme.”

(emphasis supplied)

9. Before defining the expression ‘Collective Investment Scheme’ by inserting Section 11AA to SEBI Act with effect from 22.2.2000, that

expression was defined under the CIS Regulations which came into force with effect from 15.10.1999. Regulation 2(1)(i), 2(2) and regulation 3 of the CIS Regulations read thus:-

Regulation 2(1)(i), 2(2) & 2(3) of CIS Regulations 1999

(as originally framed)

“2. (1) In these regulations, unless the context otherwise requires:-

(a) to (h)

(i) “collective investment scheme” has the meaning assigned to it by sub-regulation (2) of this regulation;”

(2) In these regulations, unless the context otherwise requires “collective investment scheme” means any scheme or arrangement with respect to property of any description-

(a) the purpose of which is to enable the investors to participate in the scheme or arrangements by way of subscriptions and to receive profits or income or produce arising from the management of such property or the investments made thereof; and

(b) in which the subscriptions of the investors by whatever name called, are pooled, and are utilized for the purposes of the schemes or the arrangements; and

(c) in which the property or such subscriptions are managed on behalf of the investors, who do not have day to day control over the management or operation of the scheme,

whether or not such properties or subscriptions and the investments made thereof are evidenced by identifiable properties or otherwise;

Provided that following shall not be deemed to be a collective investment scheme:

(a) acceptance of deposits by companies under section 58A of the Companies Act, 1956 (1 of 1956) or by Non-Banking

Financial Companies as defined in section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

b) acceptance of funds by Chit Funds in terms of the Chit Funds Act, 1982 (40 of 1982);

(c) acceptance of funds by companies declared as Nidhi companies under section 620A of the Companies Act, 1956, (1 of 1956), as per directions issued under, section 637A of the said Act;

(d) contracts of insurance under the Insurance Act, 1938 (4 of 1938);

(e) any scheme of the employer as per Employees' Provident Fund and Miscellaneous Provisions Act, 1952, (19 of 1952); or any other recognized Provident Fund under the Income Tax Act, 1961;

(f) arrangements of cooperative societies under the Cooperative Societies Act, 1912 (2 of 1912) including Cooperative Societies registered under any Provincial Act or State Act for the time being in force;

(g) any scheme under Securities and Exchange Board of India (Mutual Funds) Regulations, 1996; or

(h) any other scheme or arrangement specifically exempted by the Board, from the operation of these regulations.”

3. No Person Other than Collective Investment Management Company to Launch Scheme - No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme.”

10. After the insertion of Section 11AA by Securities Laws (Amendment) Act, 1999 (31 of 1999), regulation 2(2) of the CIS Regulations has been substituted by SEBI (Collective Investment Schemes) (Amendment) Regulations, 2000 as follows:-

Regulation 2(2) of CIS Regulations 1999 as substituted with effect from 14.02.2000

“2.2 In these regulations the expression ‘collective investment scheme’ shall have the same meaning as assigned to it under Section 11AA of the Act.”

Thus, the expression ‘collective investment scheme’ was initially defined under the CIS Regulations, 1999 thereafter, by inserting Section 11AA the expression ‘Collective Investment Scheme was defined under the SEBI Act’ with effect from 22.02.2000.

11. With this background, we may now consider the first question raised in this appeal, namely, whether SEBI is justified in holding that the Art Fund sponsored by the appellant as AMC of the Trust constitutes CIS under Section 11AA of SEBI Act 1992.

12. Section 11AA (1) inserted to SEBI Act with effect from 22.2.2000 provides that any scheme or arrangement which satisfy the conditions set out under Section 11AA(2) would be a CIS. Section 11AA(1) does not specify that the scheme or arrangement made or offered by any particular entity which satisfy the conditions set out under Section 11AA(2) would be a CIS. Thus, as per Section 11AA(1), the expression ‘Collective Investment Scheme’ would mean any scheme or arrangement made or offered by any entity which satisfies the conditions set out under Section 11AA(2). Section 11AA(2) sets out four conditions in relation to any scheme or arrangement made or

offered by any company. Fact that Section 11AA(2) refers to any scheme or arrangement made or offered by any ‘company’ would not mean that the jurisdiction of SEBI to regulate CIS is restricted to any scheme or arrangement made or offered by any company, because, Section 11AA(2) merely sets out the conditions applicable to any scheme or arrangement made or offered by an entity to which SEBI, under CIS Regulations would grant registration for running a CIS. Section 11AA(2) merely enumerates the conditions applicable to a CIS in consonance with the provisions that were contained under the CIS Regulations.

13. Appellants however contend that since Section 11AA(2) begins with the words “any scheme or arrangement made or offered by any company”, it must be held that the expression “Collective Investment Scheme” defined under Section 11AA(1) is restricted only to a scheme or arrangement made or offered by any company which satisfy the conditions set out under Section 11AA(2). It is contended that in the present case the scheme is floated on behalf of a Trust and not by a company and therefore the scheme in question falls outside the purview of SEBI Act. There is no merit in the above contention because, as noted earlier, the expression ‘Collective Investment Scheme’ defined under Section 11AA(1) is wide enough to cover any scheme or arrangement made or offered by any entity and is not restricted to any scheme or arrangement made or offered by any company. The words ‘any scheme’ under Section 11AA(1) is wide enough to cover any

scheme made or offered by any entity. Since SEBI is empowered under the SEBI Act to regulate CIS made or offered by any entity and SEBI has framed CIS Regulations in the year 1999 and in the said regulations it is provided that no person other than a collective investment management company which has obtained a certificate under CIS Regulations shall carry on CIS, Section 11AA inserted to SEBI Act with effect from 22.02.2000 reiterates that any scheme or arrangement made or offered by any entity which satisfies the conditions set out under Section 11AA(2) would be CIS, however, only a collective investment management company which satisfies the conditions set out under Section 11AA(2) shall be eligible to obtain registration from SEBI for operating CIS.

14. Above reasoning is further fortified from Section 11(1) and Section 11(2)(c) of SEBI Act which provide that it shall be the duty of SEBI to protect the interests of all investors in 'securities' by regulating the securities market including the investors in the collective investment schemes. Expression 'securities' as per Section 2(i) of the SEBI Act, shall have the meaning assigned to it in Section 2 of the Securities Contracts (Regulation) Act, 1956 ('SCRA' for short). As per Section 2(h) (ib) of SCRA, the expression 'securities' include, inter alia, units or any other instrument issued by any collective investment scheme to the investors in such schemes. Thus, under the SEBI Act, SEBI is duty bound to protect the interest of all investors who invest in Collective Investment Schemes and not merely the interest of investors who invest

in any scheme or arrangement made or offered by any company. Therefore, when the legislature under Section 11(1) read with Section 11(2)(c) has expressly conferred power on SEBI to regulate CIS made or offered by any entity and even Section 11AA(1) defines the expression 'CIS' to mean any scheme or arrangement made or offered by any entity which satisfy the conditions set out under Section 11AA(2), it would be improper to hold that Section 11AA(2) restricts the power of SEBI to regulate CIS made or offered by any company. If the argument of the appellant is accepted it would mean that the provisions of SEBI Act are mutually contradictory i.e. on one hand Section 11(1) read with Section 11(2)(c) confer power on SEBI to regulate CIS made or offered by any entity, whereas, on the other hand, Section 11AA(2) restricts the power of SEBI to regulate any CIS made or offered by any company. Such an argument of the appellant which renders the provisions of the SEBI Act mutually contradictory and runs counter to the object with which SEBI Act is enacted, cannot be accepted.

15. Apart from the above, Section 12(1B) inserted to the SEBI Act with effect from 25.1.1995 provides that no person shall sponsor/carry on any CIS unless he obtains a certificate of registration from SEBI in accordance with the regulations framed by SEBI. Proviso to Section 12(1B) provides that any person sponsoring/carrying on any CIS prior to the insertion of Section 12(1B) may continue to operate the CIS till such time regulations are framed by SEBI. Accordingly SEBI has framed the CIS Regulations 1999 which came into force with effect from

15.10.1999. Under the CIS Regulations, the expression ‘Collective Investment Scheme’ was defined under regulation 2(2). Regulation 3 of CIS Regulations provides that no person other than a Collective Investment Management Company which has obtained a certificate under the CIS Regulations shall carry on or sponsor or launch a CIS. Thus, reading section 12(1B) together with the CIS Regulations, it is apparent that under the SEBI Act any CIS made or offered by any entity could be carried on only till 14.10.1999 and on the CIS Regulations coming into force from 15.10.1999 only a Collective Investment Management Company which has obtained a certificate under the CIS Regulations could carry on a CIS. In other words, prior to the CIS Regulations were notified, any entity could carry on CIS and after CIS Regulations came into force it is only a Collective Investment Management Company which has obtained a certificate from SEBI under the CIS Regulations is entitled to carry on or sponsor or launch a CIS.

16. Object of inserting Section 11AA to SEBI Act with effect from 22.2.2000 was to define the expression ‘Collective Investment Scheme’ under the SEBI Act, which was till then defined only under the CIS Regulations. On insertion of Section 11AA by Securities Laws (Amendment) Act, 1999, regulation 2(2) of the CIS Regulations has been substituted by the SEBI (Collective Investment Schemes) (Amendment) Regulations, 2000 with effect from 14.2.2000. As per the substituted regulation 2(2), the expression ‘Collective Investment

Scheme' under the CIS Regulations shall have the same meaning as assigned to it under Section 11AA of the SEBI Act. Regulation 3 of CIS Regulations stipulates that no person other than Collective Investment Management Company shall carry on or sponsor or launch a CIS continues to be in force. Thus reading Section 11AA(1) with Section 11(1), 11(2)(c) and Section 12(1B) of the SEBI Act along with the CIS Regulations it becomes abundantly clear that SEBI is empowered to regulate CIS made or offered by any entity and under the regulatory mechanism, only the scheme or arrangement of a collective investment management company which satisfy the conditions set out under Section 11AA(2) would be entitled to carry on CIS by obtaining registration from SEBI. Therefore, after the CIS Regulations coming into force and after insertion of Section 11AA, running CIS by any entity other than a collective investment management company without obtaining registration from SEBI would be in violation of SEBI Act. Consequently, argument of the appellant that the scheme sponsored by the appellant as AMC of the Trust which satisfies the conditions set out under Section 11AA(2) falls outside the purview of SEBI cannot be accepted.

17. It is relevant to note that section 11AA(3) inter alia provides that notwithstanding anything contained in Section 11AA(2), any scheme or arrangement made or offered by a cooperative society registered under the Cooperative Societies Act, 1912 or under any law relating to cooperative societies for the time being in force in any state and any

scheme or arrangement made by any of the entities specified therein shall not be a Collective Investment Scheme. Thus, Section 11AA(3) carves out exception and provides that notwithstanding the provisions contained under Section 11AA(2), any scheme or arrangement made or offered by the entities specified therein shall not be treated as CIS. Very fact that Section 11AA(3) carves out exception, clearly shows that but for the exception, the scheme or arrangement made or offered by those entities being in contravention of CIS Regulations would be illegal. The exception carved out under Section 11AA(3) is restricted to a scheme or arrangement made or offered by any co-operative society and does not extend to any scheme or arrangement made or offered on behalf of a Trust. Therefore argument of the appellant that the scheme floated by the appellant as AMC of the Trust falls outside the purview of SEBI cannot be accepted.

18. Fact that the word ‘company’ appearing in Section 11AA(2) has been substituted with the word ‘person’ with retrospective effect from 18.07.2013 does not in any way enhance the case of the appellant. That amendment was necessitated in view of insertion of a proviso to Section 11AA(1) with retrospective effect from 18.07.2013. As per the said proviso, any pooling of funds under any scheme or arrangement which is not registered with the Board, or is not covered under Section 11AA(3) involving a corpus amount of one hundred crore rupees or more is deemed to be CIS. The entity covered under the proviso to Section 11AA(1) has to be an entity other than a company, because a company pooling funds under any scheme or arrangement having corpus

of less than ₹ 100 crore or more than ₹ 100 crore would be covered under Section 11AA even prior to insertion of the proviso to Section 11AA(1). Since the proviso to Section 11AA(1) by a deeming fiction provided that pooling of funds under any scheme or arrangement involving corpus amount of ₹ 100 crore or more by an entity other than a company would be a CIS, it became necessary to substitute the word ‘company’ in Section 11AA(2) with the word ‘person’ so that there is no inconsistency in the provisions under the SEBI Act.

19. Argument of the appellant that the Art Fund made and offered by the appellant on behalf of the Trust do not fulfill the conditions set out under Section 11AA(2) is also without any merit. Clauses 1, 2.1 & 5.1 of the Trust Deed specifically provide that the Trust property shall be held by the Trustee Company for the benefit of the Unit Holders (other than the settler) for the purpose of pooling of capital from the public for collective investment by way of acquisition, holding, management, trading or disposal of Indian as well as foreign art or any other property including antiquities whatsoever, for the purpose of having the effect of providing facilities for the participation by persons as beneficiaries in such properties or investments and in the profits of income arising therefrom. In the Confidential Information Memorandum (‘CIM’ for short) under the head ‘Summary’ it is stated that the scheme, plans to collect money from eligible investors and plans to invest the same in art works. Admittedly ₹ 102.40 crores collected from the investors have been pooled and utilized for the purpose of purchasing art works which

is the purpose of the scheme. The CIM speaks of the Fund having the objective of generating significant medium and long term income and capital growth from its portfolio. Paragraph A.2 of Chapter V of the CIM speaks of the Fund striving to ‘create significant wealth’ and intending to ‘gauge financial return for its investors’. These facts on record clearly establish that the first two conditions set out under Section 11AA(2) are satisfied in the present case.

20. Apart from the above, paragraph C-II of the CIM records that the Trustee Company has exclusive ownership of the Trust property and the Trustee Company holds the same in trust and for the benefit of the Unit Holders. From the Trust Deed and the CIM it is evident that the Trust Property is managed and administered by the appellant and the investors never had any day to day control over the same. No case is made out by the appellant to demonstrate that condition number (iii)&(iv) set out in Section 11AA(2) are not satisfied in the present case. Thus, the facts on record demonstrate beyond shadow of doubt that all the conditions set out under Section 11AA(2) are satisfied in the present case and hence no fault can be found with the decision of SEBI that the scheme floated by the appellant constitutes CIS.

21. Argument of the appellant that in the year 2006 when Art Fund was launched there was no legal regime existing to govern the functioning of the Art Fund is without any merit, because, Section 11(1) read with Section 11(2)(c) of SEBI Act which are in existence from 1992 confer power on SEBI to regulate CIS made or offered by any

entity. Section 11AA inserted with effect from 22.02.2000 read with the CIS Regulations further provide that any scheme or arrangement made or offered by any company which satisfy the conditions set out under Section 11AA(2) would be a CIS and only to such a company registration would be granted by SEBI under Section 12(1B) of SEBI Act for running CIS. Therefore, the appellant is not justified in contending that there was no legal regime existing when the scheme was launched by the appellant in the year 2006.

22. Various decisions were relied upon by the appellant in support of its contention that on a plain reading of Section 11AA(2) it must be held that jurisdiction of SEBI to regulate CIS is restricted to any scheme or arrangement made or offered by any company. There is no merit in the above contention. As noted earlier, powers conferred on SEBI to regulate CIS under extends to CIS made or offered by any entity. SEBI as a regulatory measure has provided in the CIS Regulations that registration for running CIS would be granted only to a collective investment management company which satisfies the conditions set out therein. Even Section 11AA inserted to SEBI Act with effect from 22.02.2000 reiterates the same position. Therefore, fact that Section 11AA(2) sets out the conditions applicable to a company, it cannot be inferred that the powers of SEBI is restricted only to regulate CIS made or offered by a company, especially when the provisions contained in Section 11(1) & 11(2)(c) specially empower SEBI to regulate CIS run by any entity. In these circumstances, accepting the contention of the

appellant that the powers conferred on SEBI is restricted to regulate CIS made or offered by any company, would be contrary to the express provisions contained in Section 11(1), 11(2)(c) & 11AA(1) of SEBI Act and the CIS Regulations and hence, the argument of the appellant cannot be accepted.

23. Fact that SEBI has framed separate regulations in relation to Mutual Funds, Venture Capital Funds or Alternative Investment Funds and the fact that no independent regulations have been framed in respect of Art Fund, cannot be a ground to infer that the Art Fund falls outside the purview of SEBI. In the absence of any independent regulations framed in respect of Art Funds, it is obvious that the Art Funds which satisfy the conditions set out under Section 11AA(2) would be governed by the CIS Regulations.

24. Argument of the appellant that the Art Fund is launched by the appellant for and on behalf of the Trust which is governed by the provisions contained under the Indian Trusts Act, 1982 and therefore, neither the SEBI Act nor the CIS Regulations authorize SEBI to regulate the functioning of the private Trust is also without any merit. Section 11(1)/11(3)/11(4) and Section 32 of the SEBI Act unequivocally provide that notwithstanding anything contained in any other law for the time being in force, SEBI would have same powers as are vested in Civil Court in relation to the matters set out therein and in the interests of investors in securities market SEBI is empowered to take such measures as it deems fit. In the present case, appellant has collected money from

the investors under a scheme floated on behalf of the Trust with a view to invest the pooled amount in art works and thereafter on sale of the said art works distribute the profits to the investors. In such a case, decision of SEBI in holding that the appellant was running CIS without obtaining registration from SEBI cannot be faulted.

25. Fact that CIS Regulations were framed by SEBI on the basis of Dave Committee Report which related to plantation and agro schemes cannot be a ground to assume that the CIS Regulations are applicable only to plantation and agro industries. Neither the provisions contained under the SEBI Act nor the provisions contained under the CIS Regulations even remotely suggest that the provisions contained under the SEBI Act and the CIS Regulations are intended to apply only to plantation and agro schemes.

26. Argument of the appellant that as AMC of the Trust the appellant was only entrusted with the duty to manage the funds of the Art Fund and was not responsible for making payments is without any merit. Admittedly, the Trust was created by the appellant. Mr. Neville Tuli (Founder and Chairman of the appellant) holds about 34.66% shares of the appellant company. The appellant has appointed Oseta Investments Trustee Company Private Limited as Trustee of the Trust. Mrs. Swaraj Tuli, Mother of Mr. Neville Tuli (Founder and Chairman of the appellant) holds 99% shares of Oseta Investments Trustee Company Private Limited. Moreover, Oseta (Trustee) has appointed the appellant as AMC. Thus, the appellant is the sponsor and AMC of the Trust. In the

year 2006 as AMC of the Trust, appellant had launched the Art Fund by inviting subscriptions from various privately placed investors to enable the appellant to pool the funds received and invest the same in art works. In view of the close proximity between the appellant and the Trustee of the Trust and in view of the fact that Mr. Neville Tuli, Founder and Chairman of the appellant is also the Chief Advisor of the Art Fund, it is held in the impugned order that the Art Fund is sponsored by the appellant as an arrangement to launch its scheme which involves investment contracts in the nature of CIS, while de-facto management and control of the scheme remains with the appellant. It is further held that the appellant has sponsored and caused to sponsor/ caused to carry on a CIS through arrangement of a private Trust without obtaining the certification of registration from SEBI as contemplated under the CIS Regulations. In view of the close proximity between the appellant and the Trustee as also the AMC (appellant itself) no fault can be found with the decision of SEBI in holding that the appellant had adopted a modus operandi of operating CIS through the medium of a Trust. It appears that the appellant was under the erroneous belief that if the CIS operated through a Trust, it would be outside the purview of SEBI and under that erroneous belief the appellant adopted the modus operandi of running CIS through the arrangement of a private Trust. Therefore, in the facts of present case, since the appellant has been running CIS through the arrangement of a private Trust without obtaining registration from SEBI, no fault can be found with the decision of SEBI that the appellant is

guilty of operating CIS in violating of SEBI Act and the CIS Regulations.

27. Fact that the scheme was launched by the appellant only to select set of investors (high net worth investors) by way of private placement, does not in the facts of present case, absolve the appellant of its obligation to comply with the provisions of SEBI Act and the regulations made thereunder. As held by the Apex Court in case of Sahara India Real Estate Corporation Limited (*supra*) if offer is made to more than 49 persons, then it will automatically be deemed to be a public offer and not a private placement. In the present case, investments from more than 650 investors have been received in violation of SEBI Act and CIS Regulations and therefore SEBI is justified in passing the impugned order with a view to protect the interests of investors. Similarly, decision of the Apex Court in case of PGF Limited would also be squarely applicable to the facts of present case because amounts have been collected from the investors for the purpose of pooling the funds and investing the same in art works so that the profits arising therefrom could be passed on to the investors. Under the CIS Regulations it is not mandatory that there must be guaranteed return and it would be enough even if the funds collected are pooled and invested with a view to earn profit and distributing that profit to the investors.

28. Argument of the appellant that since the scheme sponsored by the appellant does prescribe maximum subscription limit and since the CIS Regulations do not necessitate calculation of NAV and there is no

underlying requirement to value investments or the units by calculating NAV on ongoing basis, the scheme in question falls outside the purview of CIS is also without any merit. Once the scheme or arrangement satisfies the four conditions set out under Section 11AA(2) then, the scheme or arrangement would be covered under CIS and the provisions of SEBI Act and CIS Regulations would apply accordingly. Similarly, fact that there are no Appraising Agencies or Credit Rating Agencies approved by SEBI to appraise or rate the assets of the Art Funds would have no relevance because, having operated CIS without following the provisions contained in the SEBI Act and the regulations made thereunder, appellant cannot escape liability by alleging that the CIS Regulations are unworkable in case of Art Funds. Any scheme or arrangement made or offered by any company which satisfy the conditions set out under Section 11AA(2) must follow the procedure prescribed under CIS Regulations. For all the aforesaid reasons, in the facts of present case, decision of SEBI in holding that the scheme floated by the appellant constitutes CIS and since the said scheme was operated without obtaining registration from SEBI, appellant has contravened the provisions of the SEBI Act and CIS Regulations cannot be faulted.

29. Question then to be considered is, by the impugned order dated April 15, 2013, apart from restraining the appellant from accessing the capital market whether SEBI is justified in directing the appellant to wind up its existing CIS and refund the monies collected by it under its scheme but remaining unpaid, to all the investors and further directing

the appellant to pay the amount of profits/ income earned, if any, that is due to the investors as per the terms of its offer or pay interest at the rate of 10% per annum from the date of investment till the date of refund, whichever is higher.

30. Admittedly, the scheme floated by the appellant in the year 2006 has come to an end in January 2010. SEBI had issued a show cause notice to the appellant on October 12, 2007 calling upon the appellant to show cause as to why the scheme in question should not be held to be covered under CIS. During the pendency of the said show cause notice SEBI, issued a press note on February 13, 2008 to the effect that the investments made in Art Funds constitute CIS and are governed by the CIS Regulations framed by SEBI. In spite of above press release, the show cause notice issued to the appellant on October 12, 2007 was not adjudicated and in the meantime the scheme in question came to an end in January 2010.

31. Thereafter, the Art Fund declared the final NAV of ₹ 111.72 (cum-income) per unit on 24.03.2010. Based on the said NAV of ₹ 111.72 (cum-income) per unit, the total amount payable to the investors comes to ₹ 114,40,12,800/-. It is the case of the appellant that on sale of art works the amount received is ₹ 53,26,00,000/-, whereas the Art Fund has paid ₹ 70,76,91,971/- to the investors as of 30.06.2013 and the outstanding amount as of 30.06.2013 is ₹ 43,63,20,829/-. It is the case of the appellant that 16.72% of the total investors have been paid entire amount payable as per the final NAV, 36% of the total

investors have been repaid more than 50% of the total amount payable and the balance 47% of the total investors have been repaid less than 50% of the total amount payable.

32. From the impugned order it is seen, that none of the above factors have been considered and only on the basis of NAV communicated 09.05.2009 at ₹ 117.10 per unit, the appellant is directed to refund the monies collected by it under its scheme but remaining unpaid, to all the investors. In addition to the above appellant is also directed to pay amount of profit/income earned, if any, that is due to the investors as per the terms of offer or pay interest at the rate of 10% per annum from the date of investment till the date of refund, whichever is higher.

33. Except finding fault with the appellant in not seeking registration before operating the scheme, no fault is found in the scheme operated by the appellant. In other words, SEBI does not find fault with the scheme of the appellant which neither offered guaranteed return nor offered interest on the amount invested. In such a case, on what basis appellant is directed to refund the amount invested with interest at the rate of 10% per annum is not set out in the impugned order.

34. It is relevant to note that even after issuing a press note on February 13, 2008, SEBI itself was not sure till 2013 as to whether the scheme in question is covered under CIS or not. In fact when respondent no. 2 who had invested in the scheme had complained against the appellant, SEBI by its communication dated 31.01.2011 informed the respondent no. 2 that the scheme was not covered under CIS and

therefore the investors who have invested in the scheme of the appellant cannot seek redressal of their grievances from SEBI. It is only when this Tribunal on 29.11.2012 set aside the said communication dated 31.01.2011 and directed SEBI to reexamine the issue afresh in accordance with law, SEBI has passed the impugned order on April 15, 2013 holding that the scheme floated by the appellant is covered under CIS.

35. Thus, it is evident that even after issuing show cause notice in the year 2007, SEBI did not adjudicate the same, because even according to SEBI the scheme was not covered under CIS. Thus decision of SEBI that the scheme in question does not fall within the purview of SEBI held the field till SEBI changed its stand and passed the impugned order on April 15, 2013. In such a case, for the error committed by SEBI in misconstruing its own regulations and for the inordinate delay on part of SEBI in arriving at correct conclusion whether the appellant can be penalized by directing to refund the amount with interest at the rate of 10% from the date of investment needs consideration, especially when the scheme has come to an end in the year 2010 and the terms of the said scheme neither offered guaranteed return nor offered interest on the amount invested. Although regulation 65 of CIS Regulations empower SEBI to direct refund with interest in appropriate cases, how in the facts of present case, directing refund of the amount invested with interest is justified, is not set out in the impugned order. Explanation given by the appellant that due to recession in the market the art works could not be sold at a profit is not doubted in the impugned order. In such a case, it is

not known as to on what basis direction to pay amount of profits/income to the investors is given. Even counsel for respondent no. 2 finds fault with the impugned order, and submits that the WTM has not done the work of ascertaining the profits if any, at the time when the scheme ended and further submits that NAV (ex-income) ought to have been taken into consideration by the WTM while passing the impugned order.

36. In these circumstances, while upholding the impugned order of SEBI to the extent it holds that the scheme operated by the appellant during the period from 2006 to 2010 constituted CIS, we set aside the directions contained in the impugned order to the extent it directs the appellant to refund the monies collected by it under the said scheme but remaining unpaid to all the investors and also set aside the direction given by SEBI to the appellant to pay profits/income due to the investors or pay interest at the rate of 10% per annum from the date of investment till the date of refund, whichever is higher and direct SEBI to decide those issues afresh after affording an opportunity of hearing to the appellant and the respondent no. 2.

37. Appeal is partly allowed in the aforesaid terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

13.10.2015
Prepared & Compared By: PK