BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Date of Decision : 12.08.2015

Misc. Application No. 88 of 2015
And
Misc Application No. 129 of 2015
And
Misc. Application No. 171 of 2015
And
Appeal No. 368 of 2014

PACL Ltd.
22, 3rd Floor, Amber Tower,
Sansar Chand Road,
Jaipur- 302 004,
Rajasthan …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. Rajiv Nayar, Senior Advocate, Mr. L. S. Shetty, Ms. N. L. Shetty, Mr. N. L. Sabhnani, Mr. Abhishek Amritanshu, Mr. Amit Pawan and Mr. Rudreshwar Singh, Advocates for the Appellant.

Mr. Darius Khambata, Senior Advocate with Mr. Mihir Mody, Mr. Rushin Kapadia, Ms. Shruti Chiniwar, Mr. Akshay Patil, Mr. Jayesh Ashar and Mr. Harekrishna Ashar, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Chirag Kamdar, Advocate with Mr. Samir Ali Khan, Advocate for Applicant in M.A. No. 88 of 2015.

Mr. Gaurav Pachnanda, Senior Advocate i/b Mr. Devanshu Desai, Advocate for Applicant in M.A. No. 129 of 2015.

Mr. Srikant D. Padhi, Advocate i/b Mohanty & Associates for Applicant in M.A. No. 171 of 2015.

WITH
Appeal No. 369 of 2014

Gurmeet Singh
22, 3rd Floor, Amber Tower,
Sansar Chand Road,
Jaipur- 302 004,
Rajasthan …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. Abhishek Amritanshu, Mr. L. S. Shetty and Ms. N. L. Shetty, Advocates for the Appellant.

Mr. Darius Khambata, Senior Advocate with Mr. Mihir Mody, Mr. Rushin Kapadia, Ms. Shruti Chiniwar, Mr. Akshay Patil, Mr. Jayesh Ashar and Mr. Harekrishna Ashar, Advocates i/b K. Ashar & Co. for the Respondent.

WITH
Appeal No. 370 of 2014

Subrata Bhattacharya
22, 3rd Floor, Amber Tower,
Sansar Chand Road,
Jaipur- 302 004,
Rajasthan …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. Rajiv Nayar, Senior Advocate, Mr. Abhishek Amritanshu, Advocate, Mr. Amit Pawan and Mr. Rudreshwar Singh, Advocates for the Appellant.

Mr. Darius Khambata, Senior Advocate with Mr. Mihir Mody, Mr. Rushin Kapadia, Ms. Shruti Chiniwar, Mr. Akshay Patil, Mr. Jayesh Ashar and Mr. Harekrishna Ashar, Advocates i/b K. Ashar & Co. for the Respondent.

AND
Appeal No. 95 of 2015

1. Mr. Sukhdev Singh
   22, 3rd Floor, Amber Tower,
   Sansar Chand Road,
   Jaipur- 302 004,
   Rajasthan

2. Mr. Tarlochan Singh
   22, 3rd Floor, Amber Tower,
   Sansar Chand Road,
   Jaipur- 302 004,
   Rajasthan …Appellants

Versus

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

Mr. T. R. Subramaniam, Senior Advocate with Mr. Sandeep Parekh, Mr. D. P. Mohanty, Mr. Shashank Prabhakar, and Mr. Shashank Patil, Advocates i/b Parekh & Co. for Appellants.

Mr. Darius Khambata, Senior Advocate with Mr. Mihir Mody, Mr. Rushin Kapadia, Ms. Shruti Chiniwar, Mr. Akshay Patil, Mr. Jayesh Ashar and Mr. Harekrishna Ashar, Advocates i/b K. Ashar & Co. for the Respondent.

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

Per: Justice J.P. Devadhar

1. Whether the Securities and Exchange Board of India ('SEBI' for short) by its order dated 22.08.2014 is justified in holding that the schemes floated by PACL Ltd. ("PACL" for short) constitute Collective Investment Schemes ('CIS' for short) under the Securities and Exchange Board of India Act, 1992 ('SEBI Act' for short) and assuming that the said schemes are CIS, whether SEBI is justified in holding that as a

natural consequence, PACL and its promoters and directors, are liable to wind up the said schemes and refund the monies collected from the investors as per the terms of offer, without giving an opportunity to the appellants to register the said schemes in accordance with the regulation framed by SEBI is the basic question raised in all these appeals.

2. Appeal No. 368 of 2014 is filed by PACL and all other appeals are filed by the promoter/directors of PACL to challenge impugned order of SEBI dated 22.08.2014. Since the challenge in all these appeals is to the order of SEBI dated 22.08.2014, all these appeals are heard together and disposed of by this common order.

3. For the sake of convenience, facts set out in Appeal no. 368 of 2014 to the extent relevant are set out herein below:-

a) PACL is a real estate company duly registered under the Companies Act, 1956 and is engaged in the business of sale and purchase of agricultural land and its development as per the scheme floated by PACL from time to time.

b) Section 12(1B) inserted to the SEBI Act with effect from 25.01.1995 provides that no person shall sponsor or carry on a CIS unless that person obtains a certificate of registration from SEBI in accordance with the Regulations framed by SEBI. Accordingly, the Central Government issued statutory directions

under Section 16 of the SEBI Act directing SEBI to formulate draft Regulations for "Collective Investment Scheme". On the basis of the said directions SEBI issued various press releases prohibiting companies from sponsoring or causing to be sponsored any new CIS till the Regulations were framed and notified by SEBI.

c) In the year 1998, a Public Interest Litigation ("PIL" for short) was filed before the Delhi High Court (CWP No. 3352 of 1998) wherein it was alleged that various companies including PACL were carrying on CIS without obtaining certificate of registration from SEBI.

d) By its order dated 07.10.1998 the Delhi High Court directed all the companies named in the PIL to get themselves Credit Rated from the Credit Rating Agency approved by SEBI and pending further orders all those companies and their directors were restrained from alienating or parting possession of their immovable properties.

e) On 08.12.1998 PACL moved an application before the Delhi High Court seeking deletion of its name from the list of the respondents in the PIL on the

ground that the business carried on by PACL did not fall within the scope of CIS.

f) On 15. 10. 1999 the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 ('CIS Regulations' for short) were framed and notified by SEBI. Thereafter by its communications/ orders dated 30.11.1999 and 10.12.1999 SEBI informed that the schemes floated by PACL were covered under CIS Regulations and called upon PACL to comply with and abide by the CIS Regulations, failing which consequential directions would be issued under Section 11B of SEBI Act and Regulation 65 of CIS Regulations.

g) By its reply dated 13.12.1999, PACL submitted that the activities carried on by it were not covered under CIS and hence, PACL was not required to comply with the CIS Regulations. Apart from filing the aforesaid reply, PACL filed a Writ Petition before the Rajasthan High Court seeking an order directing SEBI to withdraw the notices dated 30.11.1999 and dated 10.12.1999.

h) By an order dated 21.12.1999 Rajasthan High Court stayed the operation of the two notices dated 30.11.1999 and dated 10.12.1999. Thereafter, by its

final order dated 28.11.2003 the Rajasthan High Court held that none of the conditions set out under Section 11AA(2) were satisfied in the present case and accordingly quashed both the notices dated 30.11.1999 and 10.12.1999 issued by SEBI.

i) In the meantime, Delhi High Court passed an order on 16.11.2000 in the PIL filed before it whereby Justice K. Swami Durai (Retd.) was appointed to physically verify the genuineness of 14150 sale transactions entered into by PACL with various customers and also to supervise the registration of sale deeds executed in respect of those transactions.

j) On 20.09.2002 Justice K. Swami Durai (Retd.) submitted his final report inter alia recording that the land which PACL proposed to transfer to its customers were in existence and PACL was in possession of the said lands in question either as direct owner or owner by virtue of agreement for sale in their favour by the erstwhile owners or pursuant to the Power of Attorney executed in favour of the representative of PACL by the erstwhile owner and paying full amount of consideration to the erstwhile owner. It was also recorded in the said report that the development work on the lands in question was

found to be carried out by PACL and in some cases the development was complete and the customers had taken possession of the plots of land and constructed cottages and were carrying on their development work in addition to the development work being carried out by PACL.

k) In view of the aforesaid report submitted by Justice K. Swami Durai (Retd.) to the effect that the 14150 lac transactions entered into by PACL with its customers were genuine and in view of there being no objection from SEBI to the said report, Delhi High Court by its order dated 03.03.2003 deleted the name of PACL from the list of the respondents in the PIL and further directed that all future sale deeds be executed and registered by PACL in favour of its customers under the supervision of Justice K. Swami Durai (Retd).

l) Challenging the decision of the Rajasthan High Court dated 28.11.2003, wherein it was held that the sale and purchase transactions carried on by PACL are not covered under CIS, SEBI filed Civil Appeal before the Apex Court. By its order dated 26.02.2013, Apex Court set aside the decision of the Rajasthan High Court and directed that the notices

dated 30.11.1999 and 10.12.1999 be treated as show cause notices and permitted SEBI to issue supplementary show cause notice to PACL and its directors within the time stipulated therein and pass fresh orders in relation to the question as to whether the business activity carried on by PACL falls within the category of CIS or not and depending upon that, SEBI may proceed further in accordance with law. Apex Court further directed that before taking any future action SEBI shall give prior notice to PACL.

m) Accordingly, SEBI conducted further investigation and issued a supplementary show cause notice on 14.06.2013 to PACL and its directors/former directors, calling upon them to show cause as to why the schemes of PACL should not be declared as CIS and if found to be CIS why appropriate action including direction under Section 11 and 11B of the SEBI Act read with Regulation 65 of the CIS Regulations should not be issued against them for not complying with the provisions contained under the CIS Regulations. It is not in dispute that the delay in issuing the supplementary show cause notice has been condoned by the Apex Court by its order dated 27.09.2013.

n) PACL as also the promoters and directors of PACL denied the allegations made against them in the show cause notices. After hearing PACL and its promoters and directors SEBI passed the impugned order on 22.08.2014 holding that the schemes run by PACL constitute CIS and as a natural consequence directed PACL/its directors and promoters to wind up the existing CIS and refund the monies which have been collected from the customers in violation of SEBI Act and the CIS Regulations, with promised return within a period of three months from the date of the said order. Challenging the aforesaid order all these appeals are filed.

4. Mr. Dwarkadas, learned Senior Advocate appearing on behalf of PACL argued by his oral and written submissions as follows:-

a) Finding recorded in the impugned order that the appellant is running a CIS is factually incorrect. Assuming while denying that the appellant is running a CIS, WTM committed an error in holding that PACL must be wound up as a 'natural consequence' without offering second hearing after arriving at a conclusion that PACL is running a CIS.

b) The conclusion that PACL is running a CIS is primarily based on a reading of the judgement of the Apex Court in PGF Limited vs SEBI reported in AIR 2013 S.C. 3702. That decision is wholly distinguishable on facts, because, monies received by PACL were utilized towards purchase of distinct plot of land, each of which was identifiable vis-à-vis a particular investor as noticed in the report of Justice K. Swami Durai. There is no finding that the funds received by PACL have been misused. To imply that there is any irregularity in the conduct of its business, without any evidence in that regard is baseless. Monies were not collected from the investors with an intention of pooling of funds is established from the report of Justice K. Swami Durai and the finding recorded by WTM that PACL possess large land bank.

c) Inference drawn by SEBI that by pooling of funds PACL is running a CIS is based on some contractual documentation executed between PACL and some of its customers. Assuming that actual purchase of land was made by PACL some years after the monies were collected from the investors cannot by itself demonstrate any pooling of funds. In order to demonstrate pooling of funds, it is incumbent on

SEBI to show that once monies are invested with PACL, they completely lose their identity. In case of PACL, each investor is allotted an identifiable piece of land, albeit subject to certain contractual caveats at a date subsequent to when the amount was paid. It is not the case of SEBI that even in a single case, the land allotted to the investor does not actually exist. Therefore, fact that the land is allotted subsequent to payment cannot be a ground to infer that the funds are pooled.

d) Fact that insignificantly small number of sale deeds have been executed and verified by Justice K. Swami Durai cannot be a ground to infer that the business of PACL was essentially providing fixed return on investments. PACL is not providing any return to its customer and at best it facilitates the sale of land allotted to the customers if they wish to sell their land before getting the actual sale deed executed. Moreover, the land being sold are barren agricultural lands, PACL knows how and to what extent the land shall be developed and based on its expertise in the field, is able to advise an estimated realizable value. The number of sale deeds executed cannot be of much consequence, because, what was being tested was the business model of PACL. As long as PACL

was giving its customers option to get sale deeds executed and come into possession of their land, the fact that a significantly large number of customers chose not to do so and instead chose to sell their land and receive the monies, will not take anything away from the real nature of the transaction i.e. the real estate transaction.

e) Argument of SEBI that PACL instead of holding land in its name holds land in the names of related companies and that makes the availability of land for actual transfer to the investor seriously suspect has no basis, because, SEBI has not been able to point out a single investor grievance or complaint as regards the actual transfer of land when demanded. In fact in several cases, as verified by Justice K. Swami Durai, land was actually transferred to the investor, pursuant to duly registered sale deeds. In the absence of any specific case, where the related entities have refused to make the land held by them available for allotment/transfer to the investor, SEBI is not justified in contending that the availability of land for transfer is suspect. Since the business model involved purchase of mostly barren land and its proper treatment/development so as to make it arable and capable of beneficial use, PACL collected

money for purchase of land and also towards servicing the land.

f) Value of the land held by PACL as on date would be far more as compared to the value reflected in the books i.e. prior to the development/servicing the land. In the absence of ascertaining the market value of the land, WTM is not justified in concluding that there is disparity between the value of the available land and money collected from the customers. PACL is unable to provide full disclosure of all its available assets because relevant documents are in the custody of CBI.

g) Assuming that the business run by PACL constitutes CIS, WTM is no justified in passing the consequential directions specified in para 38 of the impugned order by ignoring the specific directions given by the Apex Court in its order dated 26.02.2013. When an issue is remitted/remanded for determination to a lower court with certain specific directions from the superior court, it is the bounden duty of such lower court to follow the directions of the superior court with specificity and in entirety. In support of the above contention reliance is placed on the decision of the Apex Court in the case of Tirupati

Balaji Developers (P) Ltd. Vs State of Bihar reported in (2004) 5 SCC 1.

h) By its order dated 26.02.2013 Apex Court gave directions to SEBI as follows:-

(i) pass fresh order as to whether the business activity of PACL falls under the category or CIS or not;

ii) depending on that order proceed further in accordance with law and;

iii) before taking any further action, give fresh notice to PACL.

Since fresh notice is not issued after declaring that PACL is running a CIS, impugned order is in direct violation of the Apex Court directions.

i) Supplementary show cause notice issued on June 14, 2013 to the effect that 'appropriate action including direction under Section 11 and 11B of SEBI Act read with regulation 65 of the CIS Regulations' would be taken in the event that the schemes of PACL were found to be CIS, cannot be said to be in full compliance with the directions given by the Apex Court, because, fresh notice was required to be given only after decision was taken on merits that PACL was running a CIS. Prior to the passing of the

impugned order it was brought to the notice of WTM that two tier procedure has to be followed, however, the WTM failed and neglected to follow the two tier procedure prescribed by the Apex Court. If there was any doubt regarding the two stage hearing prescribed by the Apex Court, SEBI ought to have sought clarification from the Apex Court.

j) By disobeying the directions of the Apex Court and fusing what was otherwise contemplated as two separate hearing, the WTM has effectively taken away the right of the appellant to file an appeal and thus the impugned order is in violation of the principles of the natural justice. Relying on a decision of the Apex Court in case of Institute of Chartered Accountants of India vs L. K. Ratna reported in (1986) 4 SCC 537 it is submitted that failure to comply with natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body. Above view of Apex Court is based on the observation of Megarry J in leary vs National Union of Vehicle Builders reported in (1971) Ch 34, 49, and the said view holds good till date. In case of Union Carbide Corporation vs Union of India reported in (1991) 4 SCC 584 the Apex Court while accepting the ratio of Leary's case has

held that the general rule in Leary's case will not apply to the area of domestic jurisdiction or private contractual matters but will clearly apply to a public law situation. The present case, being a matter between a citizen and the state, clearly falls within the public law doctrine and therefore failure on part of WTM to follow the principles of natural justice in giving two stage hearing cannot be cured by hearing the appellants before this Tribunal.

k) Impugned order passed by disregarding the directions given by the Apex Court has severally prejudiced PACL as its right to register as CIS is taken away. PACL commenced its activities in the year 1995. By orders dated 30.11.1999 and 10.12.1999 SEBI deemed the business of PACL as CIS which was stayed by Rajasthan High Court on 21.12.1999 and finally set aside on 28.11.2003. After the decision of Rajasthan High Court was set aside by the Apex Court on 26.02.2013, by the impugned order it is held for the first time on 22.08.2014 that the business carried on by PACL constitutes CIS and therefore it was imperative to provide an opportunity to comply with the provisions of law regulating the activities of CIS. Pertinently, CIS in not a prohibited activity, but a regulated activity. It is not per se

illegal and the public policy does not require that all CIS activity should be stopped. Therefore, without giving an opportunity to register, WTM could not have as a 'natural consequence' directed to wind up the CIS carried on by PACL. By taking away PACL's right to seek registration under CIS Regulations and by virtually directing PACL to shut down its business, the fundamental right of PACL to carry on business guaranteed under Article 19(1)(g) of the Constitution of India is infringed.

l) It is not in dispute that on registration PACL could carry on CIS business legally. Since the business of PACL commenced in 1995 and continued to be carried on legitimately from 1999 onwards pursuant to the orders passed by the Delhi High Court, Rajasthan High Court and thereafter by the Apex Court till the date of the impugned order, the WTM, after holding on 22.08.2014 that PACL is running a CIS, was duty bound to afford an opportunity to PACL to register its business and conduct CIS activity as per the provisions of law. During the course of hearing before this Tribunal, PACL had made without prejudice offer to seek registration under CIS Regulations, however, the same was turned down by SEBI on the ground that it is too late

in the day to do so. Although SEBI had right to reject application for registration, such rejection could be only after affording a hearing as mandated under Regulation 12 of the CIS Regulations. Therefore, ordering winding up of legitimate business carried on by PACL since 1999, without giving an opportunity to comply with the requirements of registration under the CIS Regulations is nothing but malafide exercise of power.

m) There is no dispute that PACL is legally entitled to challenge the impugned decision of SEBI before this Tribunal and if aggrieved by the decision of this Tribunal to challenge the same before the Apex Court and till the issue of CIS is finally determined by this Tribunal and thereafter the Apex Court, the business of PACL could not be directed to be wound up.

n) In partial compliance of the impugned order, PACL has halted the launch of any new schemes and halted collection of any further amounts from the subscribers to the already launched schemes as recorded in the affidavit dated 09.03.2015 filed by PACL before this Tribunal. This is done specifically to ensure that in the event that the SEBI order is

ultimately upheld by the Apex Court and PACL is conclusively held to be a CIS, the order of SEBI can be implemented with effect from the date on which it was passed. However, ordering winding up without giving an opportunity to agitate the issue as to whether or not the business of PACL constitutes CIS and further without giving a separate hearing to the appellants as regards the consequences of such determination amounts to clear violation i) of the procedure established in the CIS Regulations ii) of the order of Supreme Court dated 26.02.2013 iii) of the principles of natural justice.

o) Argument of SEBI that Chapter IX of the CIS Regulations is applicable only to the CIS existing on the date on which CIS Regulations came into force and would not apply to CIS launched after the CIS Regulations came into force is contrary to the decision of this Tribunal in the case of Alchemist Infra Realty Ltd. Vs SEBI (Appeal No. 124 of 2013 decided on 23.07.2013). Argument of SEBI that the aforesaid decision of this Tribunal in Alchemist is 'per incuriam' on account of it being contrary to regulation 68 of the CIS Regulations, is in correct, because the said decision is based on a holistic reading of the complete scheme of the regulations. A

holistic reading of the regulations would necessarily involve considering regulations 9,10 and 12 etc. Regulation 12 specifically provides for an opportunity of hearing even if registration is to be refused.

p) Argument of SEBI that PACL has been operating CIS prior to 1999 and continued to operate those CIS even after 1999 without availing the opportunity of registration under CIS Regulations and thereafter, launched new schemes without registering under CIS Regulations is without any merit because i) PACL has always contended that it is not a CIS ii) that stand of PACL was upheld by Rajasthan High Court which quashed the two orders issued by SEBI in 1999 iii) SEBI attempted on two occasions to obtain stay of the business of PACL which was refused by the Apex Court on both occasions iv) Apex Court directed SEBI to issue supplementary show cause notice and thereafter consider as to whether the activities of PACL were CIS; v) even while so remitting the matter to SEBI, the Apex Court permitted PACL to carry on its activities. Thus, for the first time by the impugned order it is held by SEBI that PACL is running a CIS and therefore, occasion for PACL to

seek registration arose only after the impugned order subject to right of appeal before this Tribunal.

q) Fact that the two orders dated 30.11.1999 and 10.12.1999 which were quashed by the Rajasthan High Court are liable to be treated as show cause notices pursuant to the order of the Apex Court would not mean that the decision of SEBI contained in the orders dated 30.11.1999 and 10.12.1999 that PACL is running CIS, stand revived. In fact, the Apex Court remanded the matter by specifically directing that the issue of CIS should be decided first and thereafter further step be taken after issuing fresh notice. Thus, it is only on 22.08.2014 when the impugned order came to be passed that PACL was running a CIS, the question of seeking registration arose. Since, PACL was functioning legitimately (having been declared not to be a CIS) as per the order of the Rajasthan High Court, right up to 2013 and further there being no determination against PACL that the business carried on by it was CIS till the date of impugned order, argument of SEBI that the right to register under CIS Regulations is no longer available on account of the fact that PACL did not avail that opportunity is wholly without merit.

r) Right to carry on business is a fundamental right and to deprive that right on account of not having registered as a CIS since 1999 would be wholly unjustified, especially when the finding that the business carried on by PACL was CIS is rendered for the first time by the impugned order. During the pendency of the appeal, assuming PACL were to apply for registration, then, it would be highly discriminatory and arbitrary on part of SEBI to reject such application for registration as it would amount to adopting a pick and chose policy based on whims and fancies of SEBI, thus violating Article 14 of the Constitution of India.

s) SEBI is labouring under an impression that PACL has been defying law since 1999, which is totally incorrect, because, the finding that PACL running CIS has been decided by the impugned order which is challenged in the present appeal. Since PACL has been carrying on business in a bonafide and legitimate manner duly permitted by orders of Rajasthan and Delhi High Courts. Right to seek registration in respect of CIS existing before the CIS Regulations came into force being an inherent right, SEBI is not justified in abrogating that right by the impugned order.

t) Argument of SEBI that regulation 65 of the CIS Regulations is a supervening power and overrides Chapter IX is without any merit. Regulation 68 of the CIS Regulations contains a deeming fiction. That deeming fiction created by statute must be taken to its logical end without allowing the imagination to boggle. To give full effect to that legal fiction, viz PACL is an existing CIS, all rights flowing from the CIS Regulations for existing CIS's must be observed. There has to be a determination as to whether or not PACL is entitled to register itself as a CIS, as provided in regulation 68 to 72 of the CIS Regulations, which is an obvious and necessary precursor, to determining eligibility of PACL to register itself as a CIS. Winding up under the circumstances set out under regulation 73 is subject to following the procedure prescribed under regulation 73(2) to 73(8). Since the WTM has overlooked the above procedure, impugned order is liable to be quashed and set aside. By disregarding the procedure prescribed under Chapter IX, prejudice is caused not only to PACL but also to the investors whose rights to decide for themselves has been arbitrarily taken away. It is trite law that if a stature provides for a thing to be done in a particular manner,

then, it has to be done in that manner and in no other manner. In this connection reliance is placed on a decision of the Apex Court in case of J. Jayalalithaa vs State of Karnataka reported in (2004) 2 SCC 401.

u) Argument of SEBI that the power to wind up the CIS dehors Chapter IX of CIS Regulations exist in regulations 65 and Section 11B of SEBI Act is untenable for two reasons. First, that is not the finding recorded in the impugned order. In the impugned order winding up is directed as a 'natural consequence' to the finding that PACL is running a CIS. Second reason is that if the contention of SEBI is accepted, it would have the effect of rending entire Chapter IX nugatory. It is a cardinal principle of interpretation that a statute has to be read in a manner that meaning could be given to all provisions and no provision is rendered otiose. In support of the above contention reliance is placed on Apex Court decision in case of Borosil Glass Work Ltd. Employees Union vs D. D. Bambode and Ors. Reported in (2001) 1 SCC 350.

v) Argument of SEBI that the order of the Apex Court must be assumed to have been delivered consistent with the provisions of law and therefore, it cannot be

contemplated that the powers of SEBI under regulation 65 and Section 11B remain unfettered by the decision the decision of the Apex Court, is without any merit, because, specific directions given by the Apex Court negate the above contentions raised by SEBI. The question of fact as to whether PACL is CIS or not is effectively decided for the first time by the impugned order, which gives PACL right to accept the order and seek registration or to challenge the decision that PACL is running CIS. Regulation 9, 9A, 10,11,12,68 and 70 of CIS Regulations set out separate and independent procedure where a party seeks to apply for registration. If PACL had refused to register or the application of PACL was rejected then winding up under regulation 73 could be ordered by following the mandatory procedure set out therein. Therefore, argument of SEBI that regulation 65 is a supervening power is incorrect.

w) Right of PACL to contend that it is not a CIS cannot be confiscated in the manner suggested by SEBI. If this Tribunal or ultimately the Apex Court holds that PACL is not running a CIS, then implementing the order of SEBI before such order being passed by this Tribunal or Apex Court would directly affect the

fundamental right guaranteed by the Constitution to PACL to carry on its business. PACL is entitled to equal protection of law and in this case the law laid down in the CIS Regulations provides for an opportunity of registration and that opportunity is taken away arbitrarily in violation of Article 14 of the Constitution.

x) Having rejected the without prejudice proposal submitted by PACL on 11.08.2014 by offering to repay the money to the eligible customers, the WTM could not have relied upon the said without prejudice proposal to support the conclusion arrived at namely, that the 'natural consequence' of the activities of the appellant being found to be a CIS "…was to immediately prevent the entity from continuing with such activity and to direct the entity to refund monies collected…". Since the proposal dated 11.08.2014 was made without prejudice to all rights and contentions of PACL, the proposal and admissions made therein cannot be the basis to deprive or take away the right of PACL to register under the CIS Regulations, assuming such a right exists.

y) Section 23 of the Evidence Act 1872 specifically provides that admissions will not be relevant where

they are given with an express condition that such admissions will not be given in evidence. Consequently, the proposal submitted by PACL being explicitly 'without prejudice', the admission contained therein could not be relied upon in the impugned order. In support of the above contention reliance is placed on a decision of the Calcutta High Court in case of Ajit Kumr Bose vs Snehalata Biswas reported in (1968) ILR 1 Cal 127.

z) Apart from the above, it would be wholly iniquitous to deprive PACL of its right under the CIS Regulations to register as a pre-existing CIS, only on account of the admissions contained in the without prejudice proposal. An admission must be accepted as a whole or not at all. In the present case, since the proposal was categorically rejected, it was impermissible in law to rely on the admissions made in the said without prejudice proposal. In support of the above contention reliance is placed on a decision of the Apex Court in case of Haji C.H. Mohammad Koya vs T.K.S.M.A. Mathukoya reported in (1979) 2 SCC 8.

aa) Assuming that the without prejudice proposal is liable to be treated as deemed proposal under

regulation 74, even then the procedure prescribed under regulation 73 cannot be given a go by as would appear from a plain reading of regulation 74.

Accordingly, counsel for PACL submitted that the impugned order being wholly unsustainable in law, deserves to be quashed and set aside by allowing the appeal.

5. Mr. Nayar learned Senior Advocate appearing on behalf of some of the appellants argued by his oral/written submissions as follows:-

a) The impugned judgment and order is passed in violation of the procedure prescribed by the Hon'ble Supreme Court of India in its order dated 26.02.2013 and hence fit to be set aside on this count only. Para 4 & 8 of the Apex Court order leave no manner of doubt that SEBI was required to follow a two stage procedure, first stage being determination of the question as to whether the business of PACL is covered under CIS and Second stage was to depend on the outcome of the first stage i.e. if PACL was running a CIS then to issue fresh notice and take fresh proceedings to determine the consequential action to be taken. Instead of following the two stage procedure prescribed by the Apex Court, the WTM has held that PACL is running a CIS without obtaining registration under CIS Regulations and as a

natural consequence ordered winding up which is directly in violation of the Apex Court order. Since, specific procedure prescribed by the Apex Court is not followed, the impugned order is liable to be set aside in its entirety and require the WTM to decide afresh both the issues independently.

b) There is no provision for determination by SEBI as to whether an entity is running a CIS or not. Therefore, the Apex Court devised the two stage procedure. In terms of the Apex Court order the WTM was bound to follow both the procedures. Since the WTM failed to follow the second procedure, impugned order is bad in law.

c) Neither the SEBI Act nor the CIS Regulations postulate that running CIS is ipso facto illegal. The only requirement under those provisions is that it must be registered with SEBI. Therefore, even if it is held that PACL is running a CIS, the procedure prescribed under Chapter IX of the CIS Regulations ought to have been followed by involving PACL and its investors. Failure on part of WTM to follow the second stage procedure is therefore contrary to the dictum laid down by the Apex Court as also the provisions contained in Chapter IX of the CIS

Regulations. Once the Apex Court has prescribed a procedure for doing a thing in a particular manner then, it has to be done in that matter alone and it is not open to SEBI to follow one part and ignore the other part.

d) SEBI is not justified in contending that PACL has raised the plea of two stage procedure belatedly, because, there was no occasion for the appellants to presume that the WTM would not follow the two stage procedure prescribed by the Apex Court. It is only when it became apparent that the WTM may bypass the special procedure, the WTM was reminded of his obligation to follow the two stage procedure. However, WTM failed to follow the two stage procedure in defiance of the Apex court order.

e) Argument of SEBI that by not following the two stage procedure, principles of natural justice have not been violated is untenable, because, by not following the two stage procedure, PACL is deprived of the opportunity to seek registration under the CIS Regulations. In fact the failure to follow the two stage procedure has prejudiced not only PACL but also its investors.

f) The business activities of PACL are akin to that of real estate construction companies, which purchase land, make their plans for constructing flats, sell those "planned to be constructed" flats to customers and thereafter construct the flats. At the beginning of the transaction, customers of these companies are issued allotment letters and only when construction is complete, the customers have the option of getting sale deeds executed in their favour or they have the option of selling the flats, which is merely allotted to them, at any prior stage. Moreover, at the time when the customer books a flat and is allotted the same, there is just barren land and no flats but allotment letters are still issued and over a period of time, flats are constructed. The business activities of PACL are identical to the aforesaid description and if it is held that PACL is running a CIS then every real estate company constructing flats would have to be held to be running a CIS, which can certainly not be the case.

g) The business activities of PACL do not satisfy the conditions prescribed under Section 11AA (2) of the SEBI Act, because, PACL admittedly has a huge land bank and therefore it is not as if the payment made by the investors is pooled for the purpose of

the scheme. There is no question of making payment under the scheme to receive profit from the scheme as the transaction is simpliciter that of sale and purchase of land and it is just that the payment of consideration by the customer is planned as per his needs. There is no scheme or arrangement as such but a straight forward real estate transaction with the various plans only being with respect to the mode of payment of the consideration amount. If the meaning which is being sought to be given by SEBI to Section 11AA(2)(ii) of the Act is to be accepted then every transaction of sale and purchase of property would amount to a CIS.

h) Once the transaction is complete and the sale deed is executed, PACL does not manage the property and it is the customer who is in charge. The example of a transaction of sale and purchase of a flat would again be relevant in this context as the builder constructs the flats and retains it in his possession till all payments are made by the customer and thereafter, the flat is transferred to the customer, and the customer comes in control and is free to manage the flat. Similar is the case with PACL. However, if the meaning which is being sought to be given by SEBI to Section 11AA(2) (iii) of the Act is to be accepted

then every transaction of sale and purchase of property would amount to a CIS. Similarly, Section 11AA(2)(iv) is clearly not attracted as once the land is sold, the investors have full day to day control over the land, which they have purchased. This fact is clearly proved by the report of Justice K. Swami Durai. Since the requirements of Section 11AA(2) of the SEBI Act are not met in the case of PACL, it could not have been held that PACL has been running a CIS.

i) The fact that PACL has not been running a CIS is clearly demonstrated by the reports submitted by Justice K. Swami Durai. A perusal of the said final report (pgs 122-132 of the appeal paperbook) indicates that all the objections of SEBI were found to be "unfounded and untenable". Justice K. Swami Durai visited the lands being sold by PACL to its customers and found that levelling and fencing had been done and irrigation facilities laid out. He also found that some customers of PACL, who were in possession of their agricultural land, had stationed their own manpower and were developing their land and even cottages etc. had been constructed. The conclusions of Justice K. Swami Durai in his final report at para 13, leave no manner of doubt that the

transactions being carried out by PACL were real estate transactions. Relying on this report, to which SEBI had no objection, the Hon'ble Delhi High Court, by its order dated 03.03.2003 (pg 133-134 of appeal paperbook) discharged the notice against PACL.

j) It has been admitted in no uncertain terms by SEBI that it is not challenging the correctness of Justice K. Swami Durai reports. If that is the case and the said reports clearly establish that activities of PACL are indeed genuine real estate transactions, then the WTM could not have held that PACL was running a CIS. If the findings recorded in Justice K. Swami Durai reports establish on a question of fact, that the transactions of PACL were indeed real estate transactions, then whatever was the scope of enquiry entrusted to him, does not make any difference. If findings are recorded on questions of fact, and these findings are not disputed, and these findings of fact lead to certain inferences/conclusions, then such inferences cannot be ignored only because it was not the scope of the enquiry to make such conclusions.

k) It has been argued on behalf of SEBI that even if Justice K. Swami Durai report were to be accepted, it

certifies the genuineness of only 0.03% of the cases and in the balance 99.97% cases, sale deeds have not been executed and therefore report of Justice K. Swami Durai does not held PACL. What the report shows is that PACL was the owner and in possession of land, it was executing sale deeds in favour of its customers after developing the agricultural lands and the customers were coming into physical possession of their lands and doing whatever they wanted, be it constructing cottages, planting trees etc. This report therefore proves the bonafides of the business model of PACL. What percentage of customers actually chose to get sale deeds executed or what percentage chose to opt out and sell the land before getting sale deeds executed is something which is not within the control of the company and is immaterial. As long as the customers of PACL have the option of getting sale deeds and coming into possession and they actually exercise this option and either get sale deeds executed in their favour or choose to opt out, no fault can be found with the business model of PACL per se. It is a real estate transaction simpliciter and cannot be held to be a CIS.

l) Much has been said by contending that the land being sold is indeterminate and can be changed by

PACL at any stage and therefore this is not a genuine real estate transaction. It is submitted that from the documents produced and relied by SEBI itself, which indeed were supplied to it by PACL, it is apparent that shortly after a customer approaches PACL, a specific plot is allotted to him or her and this is the plot, which is actually sold to that particular customer. Although there may be a clause in the agreement that PACL can change the location of the plot, this has never been done and the customers have been sold the plots, which they have allotted and there is no material to show otherwise.

m) It has further been argued on behalf of SEBI that the realizable value of plots is actually not the value of plots but some return promised on the investment made by the customer based on some formula. It is submitted that argument is not correct because there in no material to show that there was any mathematical formula. Further, it is not as if some flats or big tracts of land are being sold that the location will make much of a difference to the value. What is in issue are very small sized barren agricultural plots mostly in rural areas. Moreover, being in the real estate industry for a long time, PACL has the necessary expertise to assess the value

of a plot or type of plots that can fetch after a given period of time.

n) Without prejudice and in the alternative it is submitted that even if it is found and held that PACL is running a CIS even then, the natural consequence of such a finding can never be to order winding up and refund the monies of investors; and by doing so, the WTM has acted in breach of the Regulations, particularly Chapter IX thereof.

o) Running a CIS is ipso facto not illegal and only registration is required. The only requirement, in law, for running a CIS is registration with SEBI, and once that is done, there is no bar on running a CIS. When law provides that a CIS can seek registration and continue its activities then such a right cannot be taken away by the regulator. In the impugned judgment and order, the WTM has categorically held that natural consequence of his finding that PACL was running a CIS, would be to direct it to stop its activity and refund monies to is investors. When the Regulations provide that any person can run a CIS subject only to registration then even if the WTM found that PACL was running a CIS, he had to give the opportunity of registration to PACL. Even if

PACL was running a CIS, it could continue to do so, as long as it sought and obtained registration with SEBI. The impugned order is therefore completely in breach of the regulations and therefore fit to be set aside. A direction of winding up and refund of monies can never be the natural consequence of a finding that a person is running a CIS.

p) SEBI had also originally offered registration to PACL by notices dated 30.11.1999 followed by second notice dated 10.12.1999. It is therefore apparent that at least in 1999, the understanding of SEBI also was that running a CIS is not illegal per se and even if PACL was running a CIS, it was only required to register itself with SEBI. Now that the Hon'ble Supreme Court, by a consent order dated 26.02.2013, has revived these two notices dated 30.11.1999 and 10.12.1999, and in these two notices SEBI is requiring PACL to seek registration, SEBI cannot be allowed to say that PACL cannot now seek registration. The moment the Hon'ble Supreme Court revived the two notices and directed SEBI to proceed in terms thereof, the offer of registration given in the said two notices also got revived and SEBI cannot be permitted to back away. SEBI cannot be allowed to say that it would adjudicate on the two notices but

would not provide PACL the opportunity specifically provided in the two notices.

q) If at all SEBI was of the view that although the two notices had been revived but the opportunity of registration could still not be provided to PACL, despite the regulations and despite the order dated 26.02.2013, nothing prevented SEBI from seeking a clarification from the Hon'ble Supreme Court. Failure to do so and its subsequent conduct, indicates that SEBI had decided that it cared two hoots about the orders of the Hon'ble Supreme Court. The cavalier attitude of SEBI, in this regard can also be gauged from the supplementary show cause notice it sent to PACL on 14.06.2013 wherein there is no mention of registration or any advise to seek registration. Therefore, it can be safely inferred that SEBI had decided at that stage itself that it would not afford the opportunity of registration to PACL, the orders of the Hon'ble Supreme Court or the provisions of the regulations notwithstanding. The entire exercise undertaken by the WTM was therefore nothing more than a sham because SEBI had pre judged the issue.

r) PACL cannot be faulted for trusting that the regulator would act in terms of its own notices and not resile, particularly when it had been directed to do so by the Hon'ble Supreme Court. PACL could not have sought registration earlier because, on issuance of two notices/orders dated 30.11.1999 and 10.10.1999 which were stayed and ultimately set aside by the Rajasthan High Court. Till the Rajasthan High Court decision was set aside by the Apex Court on 26.02.2013 there was no occasion for PACL to seek registration as CIS. After the decision of the Apex Court, PACL could seek registration as CIS only when SEBI declared that PACL was running a CIS. Since, the WTM has failed to give an opportunity to register as CIS the impugned order is bad in law.

s) Argument of SEBI that PACL had two windows of opportunity under the regulations, once under regulation 5 in the year 1999 and the second time in 2014 under regulation 74A and since PACL did not avail this opportunity, it has missed the bus is without any merit. When there was a positive declaration that PACL is not running a CIS, then PACL was not expected to seek registration. Since the proceedings were pending before the WTM,

SEBI could very easily have conveyed to PACL that it had a two month opportunity for registration. However, the WTM merrily proceeded without even a whisper in this regard.

t) Regulations 68 to 72 provide for an existing CIS to seek registration and provide the procedure for making such application. Once the WTM held that PACL was running a CIS, the next step, as per the regulations, would have been for PACL to seek registration under regulation 68 read with regulation 5. This opportunity has been denied to PACL by the impugned judgment and order and therefore the same is fit to be set aside.

u) Even if PACL failed to make an application for registration or was denied registration by SEBI or failed to comply with conditions of provisional registration if granted, it had to be wound up in the specific manner provided by regulation 73. In such a case, regulation 73 provides for a detailed and specific procedure which has to be followed. As is evident, the entire procedure prescribed under Chapter IX, particularly regulation 73 has been given a complete go bye by the WTM in the impugned judgment and order. Regulation 73 had been placed

in the statute book with a particular object and this object was to create a situation where the investors could make an informed decision as to what they wanted to do with their investment, after all information was provided by the CIS, under the supervision of SEBI. The very object of the regulations is being sought to be defeated by the impugned directions, which are ex-facie in breach of the regulations.

v) Argument of SEBI that the without prejudice proposal sent by PACL would be deemed to be one under regulation 74 also is of no avail because even if that were the case, even then the procedure prescribed by regulation 73 cannot be given a go by.

w) Argument of SEBI that powers under regulation 65 read with Section 11B of the Act override Chapter IX and justify the impugned directions is completely untenable. Regulation 65 is part of chapter dealing with "Procedure in case of default". The invocation of powers under this chapter presuppose the existence of a default. In the present case, the question of any default would arise only after PACL is found to be a CIS. This determination takes place only on 22.08.2014 and therefore any default can

take place only thereafter. However, by the same order, power under regulation 65 is sought to be invoked and the impugned directions are sought to be justified on that basis. This is nothing but a fraud being played by the regulator. After holding PACL to be a CIS, it had to be given some opportunity, particularly that provided under Chapter IX, and without doing there could be no default and without default there would be no invocation of regulation 65.

x) In any event, there is nothing in the regulations, which indicates that regulation 65 would override the provisions of Chapter IX. There is no quarrel with the proposition that SEBI wields wide powers under regulation 65 as also under Section 11B but that does not mean that these powers can be used to frustrate the other provisions of the regulations. An interpretation whose effect is that one provision completely abrogates another provision can never be a correct interpretation.

y) Argument of SEBI that it has the power under regulation 9(d) not to consider an application for registration if the applicant is not a fit and proper person for grant of registration and this was such a

case is fallacious, because to invoke this power, there has to be first, an application by PACL seeking registration; and secondly, a consideration by SEBI of such application by PACL; and thirdly, an order giving reasons for invoking such power. Admittedly, none of above three grounds are available in the present case and thus it can be safely said that there was no invocation of regulation 9(d) by SEBI and SEBI could not have invoked the said regulations.

z) Argument of SEBI that PACL is not disclosing its assets despite directions by this Hon'ble Tribunal is completely incorrect. In the affidavit filed before this Tribunal on 07.03.2015 it was pointed out that much prior to the impugned order being passed, CBI had raided the corporate office of PACL as also the store/godown where title deeds of lands purchased by PACL and its associate companies were kept. CBI simply took away everything in sight. After doing so, CBI has been opening the huge tin boxes one by one and thereafter issuing seizer memos. Whatever seizure memos have been supplied by CBI so far, have been sent by PACL to SEBI and as and when the seizure memos are being provided, they are being sent to SEBI. Since the CBI team took away whatever was there, therefore PACL is handicapped

in providing the details of these assets on its own. What this entire exercise however shows is that the assets are substantial, that is why it is taking so long to prepare even seizure memos and they are safe, being in custody of the CBI.

Accordingly, Mr. Nayar submitted that the impugned order ought to be quashed and set aside.

6. Mr. Subramaniam learned Senior Advocate appearing on behalf of appellants in Appeal No. 95 of 2015 while adopting the argument of the counsel for other appellants submitted orally and by written submissions as follows:-

a) In the impugned order the Whole Time Member ("WTM") of SEBI has accepted the findings recorded in the report of Justice K. Swami Durai (Retd.) that the properties conveyed by PACL to its customers were genuine and excluded those properties from purview of the impugned order. Once part of the properties belonging to PACL are excluded from the purview of the impugned order it cannot be said that all conditions set out under Section 11AA (2)(i) to (iv) have been satisfied, because, the statute does not contemplate that only part of the contributions pooled for acquiring the property be treated as CIS. In other words, if some of

the properties conveyed to the customers on the basis of the contributions received from them are excluded, then, the requirement of Section 11AA(2)(i) cannot be said to have been complied with.

b) PACL holds large land bank and enters into agreement with the customers for the development of the plot of land only. The business model never involved a practice of collecting money from the customers and thereafter allocating land plots to the customers from the pool of land. Once contributions or payments received from the customers covered in the report of Justice K. Swami Durai (Retd.) are treated as separate and not part of the pool, it is apparent that all contributions or payments have not been pooled or utilized for the purposes of the scheme. In such a case Section 11AA 2(i) & (ii) would have no application at all because, the said Section applies only if the contributions are pooled as a whole and not in part.

c) Once the investments or property or contribution covered by Justice K. Swami Durai (Retd.) report are excluded, from the purview of CIS then it is apparent

that the ingredient of Section 11AA(2)(iii) are also not complied with or available so as to hold that rest of the investments or property or contribution are covered by CIS.

d) Report of Justice K. Swami Durai (Retd.) clearly shows that the customers have day to day control over the management and operation of the scheme. Since that report is accepted, it is apparent that the requirement of Section 11AA (2)(iv) are not complied and it could not be said that the scheme floated by PACL constituted CIS.

e) WTM of SEBI is not justified in approbating and/or reprobating by accepting the report of Justice K. Swami Durai (Retd.) and excluding the contributions or payments made by the customers from the purview of the impugned order on the one hand and holding that all the resources have been pooled, on the other hand, a finding which is unsustainable and impossible to arrive at.

f) Regulations 68 to 74 contained in Chapter IX of the CIS Regulations envisage that where any company/person believes that the scheme floated by it does not fall within the mischief of Section 11AA, then it is open to SEBI on consideration of material

facts to declare that the said scheme satisfies all the provisions of Section 11AA (2)(i) to (iv) and thereafter give an opportunity to obtain provisional registration under regulation 68. Therefore, unless there is a declaration that the scheme that is operated is a CIS, neither regulation 68 nor regulation 70 would come into play.

g) Regulation 69 is inapplicable in the instant case, as PACL has not launched any new CIS after the declaration of the schemes of PACL as CIS.

h) Winding up of any existing CIS under regulation 73 arises only if there is failure to apply for registration or if provisional registration is not granted or, having obtained provisional registration has failed to comply with the conditions set out in regulation 71. In the impugned order, WTM of SEBI has ignored the procedure prescribed under regulation 73.

i) In the impugned order PACL is denied an opportunity to repay to the existing investors in violation of regulation 74 read with regulation 73.

j) Failure to give an opportunity to PACL to register under CIS Regulations is in contravention of the

Apex Court order and also renders the provisions of regulation 74A otiose which is impermissible in law.

k) First show cause notice issued in the year 1999 was not addressed to appellants in Appeal no. 95 of 2015. Supplementary show cause notice issued to the appellants contains insufficient averments and therefore on the basis of supplementary show cause notice penalty could not be imposed on appellants in Appeal No. 95 of 2015 and hence the impugned order is liable to be quashed and set aside.

7. Mr. Kamdar learned Advocate appearing on behalf of PACL Customer Association (Misc. Application No. 88 of 2015 in Appeal No. 368 of 2014) while adopting the arguments advanced by counsel for appellants tendered an affidavit filed by Mr. B.S. Rajawat on behalf of the Association. In that affidavit it is stated that as on date the Association represents more than 4.5 lac customers of PACL. It is stated in the affidavit that the members of the Association are satisfied with the activities of PACL qua its customers, because, PACL has been allotting land to its customers faithfully. Customers have been investing in large numbers emboldened by the fact that the High Court as well as the Apex Court have permitted PACL to carry on its business activities. It is further stated in the affidavit that even if the business carried on by PACL is held to be CIS, the Association must be heard before deciding the future course of action. If PACL does not seek registration or

registration is refused then the procedure prescribed under regulation 73 of the CIS regulations must be followed by forwarding the information memorandum to the customers so that they can make an informed decision as to what they would want to do with their money. It is further stated in the affidavit that by that time the Association is confident that more than 25% of the customers of PACL would want to continue with the schemes.

8. Mr. Gaurav Pachnanda learned Senior Advocate appearing on behalf of Mr. Balkaran Singh (applicant in Misc. Application No. 129 of 2015 in Appeal No. 368 of 2014) submitted that the applicant be impleaded as party respondent in Appeal No. 368 of 2014 because pursuant to a Memorandum of Understanding ('MOU' for short) executed on 19th February 2015 by and between M/s. Pearl Group (i.e. PACL Ltd. and its subsidiaries/ associate companies including its directors Mr. Tarlochan Singh, Mr. Sukhdev Singh, Mr. Gurmeet Singh, Mr. Subrata Bhattacharya and Mr. Gurjant Singh Gill and Mr. Balkaran Singh, the said Mr. Balkaran Singh has been appointed as an Additional Director on the Board of PACL with effect from 5th February 2015 along with one Mr. Anil Choudhary Legha as Additional Director. Without allowing the application for impleadment, we permitted counsel for Mr. Balkaran Singh to make submissions as intervener. Accordingly, counsel for Mr. Balkaran Singh submitted that as per MOU dated 19th February 2015 Mr. Balkaran Singh was to hold 65% shareholding of PACL and the remaining 35% shareholding of PACL was to be with the

Pearl Group. Counsel further submitted that Mr. Balkaran Singh will be taking complete control of the management and the Board of Directors of PACL and is at present actively participating in the day to day affairs of PACL. He further submitted that steps are being taken to ensure that funds for repayment to the eligible investors are made available and for that purpose sought time. When asked as to how much time would be required to arrange funds for repaying to customers counsel, for Mr. Balkaran Singh had no answer.

9. Mr. Padhi, learned Advocate appearing on behalf of applicant in Misc. Application No. 171 of 2015 in Appeal No. 368 of 2014 Vakola Welfare Association (Regd.) adopted arguments advanced by counsel for SEBI.

10. Mr. Khambata learned Senior Advocate appearing on behalf of SEBI extensively argued in support of the impugned order and also gave written submissions. Since we agree with most of the submissions, instead of separately recording the said submissions, we propose to deal with the said submissions at appropriate places in the subsequent paragraphs of this Judgment.

11. We have carefully considered rival submissions.

12. First question that falls for consideration in these appeals is, whether SEBI is justified in holding that the schemes floated by PACL are CIS as contemplated under Section 11AA of the SEBI Act.

13. Before considering merits of rival contentions, we may quote Section 11(1), 11(2)(c) as amended by Act 9 of 1995, Section 12(1B) inserted by Act 9 of 1995 and 11AA (1) & (2) inserted to SEBI Act by Act 31 of 1999 which read thus:-

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-

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

Section12(1B) (with effect from 25.01.1995)

Section 12 (1B)No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment 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 causing to be sponsored, carrying or caused 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)

Section11AA(1)&(2)(with effect from 22.02.2000)

"Collective Investment Scheme

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

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

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

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

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

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

14. Prior to insertion of Section 11AA to the SEBI Act with effect from 22.02.2000, the expression 'Collective Investment Scheme' was defined under regulation 2(2) of the CIS Regulations which came into force with effect from 15.10.1999. On insertion of Section 11AA, regulation 2(2) of the CIS Regulations was substituted by providing that the expression 'Collective Investment Scheme' under the CIS Regulations shall have the same meaning assigned to it under Section 11AA of the SEBI Act.

15. Even before CIS Regulations were framed by SEBI, Section 12(1B) inserted with effect from 25.01.1995 barred any person to sponsor or carry on CIS after 25.01.1995 unless that person obtains a certificate of registration from SEBI. Proviso to Section 12(1B), however, permitted a person operating CIS prior to 25.01.1995 to continue with that CIS till such time regulations were made by SEBI. SEBI framed and notified CIS Regulations with effect from 15.10.1999. As per regulation 68 read with regulation 5 of CIS Regulations, a person operating a CIS on 15.10.1999 was obliged to make an application in the prescribed form seeking registration within a period of two months from 15.10.1999.

16. PACL incorporated on 13.02.1996 (i.e. after Section 12(1B) came into force) launched its first scheme on 30.05.1996 without obtaining registration from SEBI. Over the next 15 years PACL floated 67 schemes. Out of 67 schemes floated by PACL, schemes 1 to 9 commenced on 30.05.1996 were closed on 30.09.2002. Schemes 10 to 27 commenced on 30.05.1996 were closed on 15.12.1997. Remaining schemes floated after 01.10.2002 had varying tenure, some of which have already been closed.

17. Since some of the schemes floated by PACL were existing on the date on which CIS Regulations came into force on 15.10.1999, PACL was required to seek registration within two months of CIS Regulations coming into force, only if the schemes were covered under

CIS. When SEBI by its communications dated 30.11.1999 and 10.12.1999 informed that the schemes floated by PACL were covered under CIS and called upon PACL to comply with SEBI Act and CIS Regulations, by seeking registration within the stipulated time in terms of regulation 5 read with regulations 68 or wind up the schemes and repay the amount collected from the customers as stipulated under regulation 73/74 of the CIS Regulations, PACL contended that the schemes floated by it were not covered under CIS and challenged the communications of SEBI by filing Writ Petition before the Rajasthan High Court. The Rajasthan High Court initially stayed the said communications of SEBI dated 30.11.1999 and 10.12.1999 and ultimately by its order dated 28.11.2003, quashed the aforesaid communications of SEBI by holding that the schemes floated by PACL were not covered under CIS. In the meantime in a PIL filed before the Delhi High Court it was alleged that various companies including PACL were running CIS without obtaining certificate of registration from SEBI. On receiving report submitted by Justice Swami Durai (Retd.) to the effect that 14150 sale deeds executed by PACL in favour of its customers were genuine, the Delhi High Court dropped PACL from the list of respondents in the PIL filed before it. Delhi High Court has not considered the question as to whether the schemes floated by PACL were CIS or not.

18. Apex Court by its order dated 26.02.2013 set aside the aforesaid decision of the Rajasthan High Court and directed SEBI to treat the two communications dated 30.11.1999 and 10.12.1999 as show cause

notices and pass fresh order on the question as to whether the business carried on by PACL falls under the category of CIS or not and depending upon that decision to proceed further in accordance with law after giving prior notice to PACL. Thereupon, SEBI carried out further investigation and issued supplementary show cause notice on 14.06.2013 and after giving personal hearing to the appellants passed the impugned order on 22.08.2014.

19. In the impugned order, it is observed that as per the schemes floated by PACL, the corpus was to be invested in barren land which was to be developed into fertile agricultural land by PACL. The schemes of PACL were for various durations ranging from 6 years to 15 years. The schemes of PACL contemplated allotment of smaller unit of land out of large tract of land owned by either PACL or by the associates of PACL within 270 days or within 90 days as the case may be, from the date of investment. After the allotment, PACL claimed that it would develop and maintain the lands in consultation with agro consultants and experts by demarcating, fencing, clearing, cultivating, planting and raising crops, trees, plants, saplings etc., use of fertilizers and pesticides, irrigation, harvesting and other activities allied and incidental thereto. At the time of investment by the investor, PACL neither had ownership of the land nor was it identified. Investment was invited on the assurance that PACL would arrange the land for the investor. PACL offered the land units at a uniform price irrespective of the location and condition of the land. PACL offered profits by way of appreciation in the price of land unit, in certain cases earning from the produce of the land and at the

end of investments tenure, offered to buy-back the land at a value which was informed to the investor as an expected value at the time of investment.

20. As rightly contended by counsel for SEBI, following facts noticed in the impugned order establish that the contributions made by the investors were pooled and utilized for the purposes of the scheme as provided under Section 11AA(2)(i) of the SEBI Act:-

a) PACL collects money from customers/ investors against the purported sale of plot/land. The application form and the agreement are the primary documents taken by PACL from a customer for subscribing to its schemes. The documents such as application form and the agreement prepared by PACL contain a clause that the customer is applying for a plot of agricultural land and that the development and maintenance of the said plot shall be by PACL. Customer cannot enter into an agreement unless he/she enters into development agreement with PACL.

b) At the stage of submitting the application form and entering into agreement, PACL does not identify the land to be sold to an applicant. On the contrary the agreement records that PACL is in the process of 'making arrangement for purchasing/procuring the

land'. Thus, the documents on record reveal that on the date of application/agreement, PACL is only making arrangements for procuring the land. If the transaction of PACL were real estate transactions, then PACL would have disclosed the location of the land/land availability at the time of application itself. By not providing such details at the time of application and informing about the same after passage of substantial time indicates that PACL pools the money received from the customers for purchasing the land.

c) The registration letter also does not identify the land or even the specific State in which the land will be allotted. It only provides for the plot size. The registration letter also provides for the 'expected value' of the land which has not yet been allotted and as such the location of the plot/ land is undisclosed. The expected value is computed by a mathematical formula and is uniform. It is not computed on a plot by plot basis. Moreover, costs of all plots across India is also uniform regardless of location and quality. Thus, all plots are treated as a homogeneous commodity. While allotting the land to the customers by way of allotment letter, PACL reserves its right to change the location of the allotted of land.

d) Argument of PACL that under the Cash Down Payment Plan ('CDPP Plan') the land is allotted to the customers within a period generally not exceeding 270 days from the date of receipt of consideration and under the Investment Payment Plan ('IPP Plan') the land is allotted within a period generally not exceeding 90 days from the date of receipt of 50% of the consideration amount, clearly shows that PACL does not identify any specific land to the customer till the stage of allotment. While precise location of the land sold to a customer is indeterminate, expected value of land is mentioned in the registration letter, which indicates that PACL pools the money received from the customers.

e) In all documents pre-printed by PACL, namely Clause 7(g) of the Rule book, Condition No. 16 of the General Terms and conditions of the application form and clause 1 of the Agreement printed by PACL specifically provide that the land units offered to its investors being smaller in size and the land laws prohibit division of land into smaller units or division into smaller sizes may not be otherwise feasible or practical, the ownership of land will be transferred to the applicant/ land Unit Holder in joint holdings out

of the larger land units as may be permissible. Thus, the customers/ investors would have the requisite shares along with other allottees/ transferees in a particular piece of land.

f) Clause 14 of the Agreement stipulates that PACL shall keep accounts with reference to income expenditure incurred or to be incurred pertaining to the development and maintenance of the entire project site. This clause suggests that PACL pools the money and carries out the purported development on large scale.

g) The Agreement places an obligation on PACL to provide common facilities and services, such as, irrigation and drainage system, pipelines, electrical lines, motor pump sets, temporary sheds, structures etc. Admittedly, PACL is an aggregator of land. Thus, the terms and conditions of the agreement which PACL enters into with its investors clearly shows that PACL pools the money collected from the customers for the purpose of its scheme i.e. procuring large tracts of land and developing the same.

h) In the impugned order it is recorded that 64% of the total consideration is towards development and other

charges and 36% of the consideration is towards the cost of the plot. Thus, cost of development of the land is more than the cost of the land itself. Clause 14 of the agreement provides that PACL shall keep accounts with reference to the income and expenditure incurred or to be incurred pertaining to the development and maintenance of the entire project. Thus, it is evident that 64% of the total consideration is pooled in, purportedly for development of entire project site.

In these circumstances, decision of WTM that the schemes floated by PACL satisfy the conditions set out under Section 11AA(2)(i) cannot be faulted.

21. Similarly decision of the WTM that the schemes run by PACL satisfy the conditions set out under Section 11AA(2)(ii) deserves acceptance for the following reasons:-

a) Rule Book framed by PACL under the heading 'Aims & Objectives' specified under Rule 2(d) offers maximum return on investment and benefit to the unit holders. Rule 5 provides that investment in PACL is a sound proposition as the price of the land is increasing year after year, which in turn raises the value of the units automatically. Rule 6 provides that

investment in PACL are fully secured and give high returns and tax free Agricultural income. Rule 7 provides that the unique features of the schemes of PACL are that if one invests for a longer period one gets higher benefit from these schemes i.e. the income grows in higher proportion as every year passes. From the Rule Book it is evident that the investments were sought from the investors with a view to receive profits, income produce or property. PACL had contended before SEBI that the Rule Book is replaced by a book called 'Pearls National Network'. Neither before the WTM nor before this Tribunal the said book has been furnished. In these circumstances, in the absence of any material to contradict the contents of the Rule Book which is like a manual containing standard operating procedure, reliance placed on the said Rule Book cannot be faulted.

b) Clause 4(a) of the printed application form states that in case PACL commits breach of the agreement by not allotting the property in favour of the customer in the manner agreed to, customer shall be entitled to terminate the agreement, in which event PACL shall refund the amounts paid by customer together with

simple interest at the rate of 12.5% from the date of agreement.

c) Admittedly customers of PACL have the option to retain or sell the plot as they deem fit on expiry of the agreement. On execution of the sale deed, the sale deeds are held by the custodial services company and the customers only get a certified copy of the sale deed. Although PACL contended that the sale deeds are deposited with the custodial services company only in cases where the tenure of the agreement is continuing and further installments are yet to come, it is noticed in the impugned order that out of the 500 sample transactions provided by PACL, sale deeds of 334 customers who had opted for Cash Down Payment Plan, (where the entire consideration is paid in the beginning itself) were deposited with the custodial services company and those customers were given only a certified copy of the sale deed. It is noticed from sample transactions that at the end of the term PACL returned the amount to its customers which is equivalent to the estimated realizable value as mention in the ledger of the said customer, without deducting the land tax and other public dues incurred by PACL.

d) Criteria for fixing the 'expected value/estimated realizable value' is not specified by PACL. Assuming that PACL does not provide assured return, mere promise of expected value higher than the amount invested makes it clear that the contributions are made with a view to earning profit.

Since the customers of PACL make contributions/ payment with a view to receive the profits, income and returns on their initial investments, decision of the WTM that the second condition stipulated under Section 11AA(2)(ii) of the SEBI Act stands satisfied cannot be faulted.

22. Decision of the WTM that the schemes run by PACL satisfy the conditions set out under Section 11AA(2)(iii) deserves acceptance for the following reasons:-

a) It is admitted by PACL itself that the customers who invest their money with PACL are mandatorily required to give the right of development and maintenance in favour of PACL. The said authority is given to PACL by the customers as per the application form and the registration letter itself. The recitals of the agreement stipulates that PACL would arrange for purchasing/ procuring land. Clause 3 of the agreement gives PACL right to develop and

maintain the land. Clause 3 further stipulates that investors/customers shall not ordinarily interfere with the method and mode of development and maintenance of the land. The customer or investor merely has a right to tender suggestion. Clause 5 of the agreement stipulates that the land shall vest in the hands of PACL for development, cultivation or raising crops, planting trees etc.

b) PACL manages the sale of the produce from the land allotted to the customers. The records maintained by PACL regarding the net sale proceeds received by PACL from the sale of the said produce has to be accepted by the customer and no dispute can be raised in respect of the same. Clause 4(b) of the General Terms and Conditions in the application form stipulates that if PACL commits breach by not completing the development in the agreed manner the investor would be entitled to get refund together with 12.5% interest per annum from the date of agreement. The customer is not entitled to make any claim for any produce during the period of first six years. Thus, only customers who have opted for the plots beyond the period of six years have right to be credited with sale proceeds of the produce pertaining to the period beyond six years after deduction of

direct/indirect harvesting, marketing, transportation cost, market taxes and levies etc. and service charges amounting to 5% of the gross proceeds.

c) The customer has the option to retain or sell the plot on expiry of the agreement. Under Clause 13 of the agreement PACL pays the land tax and other public dues/levies payable in respect of the property for and on behalf of the customer and get the same reimbursed from the customer. Under Clause 21 of the agreement the facility of opting out is available to the customers under the cash down payment plans. The payments received under the said plan are refundable immediately to the customer after deducting 20% of the consideration comprising various cost and other incidental expenses. However, while repaying the customers who had preferred to opt out have been repaid almost exact amount of the expected value without making any deduction of 20% as stated in the agreement.

d) Thus, the three main elements of the scheme floated by PACL i.e. i) acquisition of land ii) development of land iii) sale of land, are managed by PACL on behalf of the investors.

e) Mr. Sukhdev Singh, Managing Director of PACL on 14th May, 2013 stated before SEBI that all business plans are inclusive of land cost and development charges and therefore there is no scope for the customer to opt for self development of the plot in the existing plans. PACL has not produced any document evidencing the alleged self development option being implemented.

f) PACL manages and provides the facilities and services such as irrigation and drainage system, pipelines, electrical lines, motor pump sets, temporary sheds, structures etc.

g) Even-though the customer is stated to be an absolute owner and in exclusive possession of the agricultural land sold to him, in fact the customer has no exclusive ownership rights over the aforesaid facilities and in fact, has been barred from interfering with the aforesaid facilities and services in any manner, by the terms and conditions recorded in the sample agreements to sell and the sample sale deeds furnished by PACL.

h) In all the 500 sample documents examined by SEBI, PACL had acquired special Power of Attorney in its favour from the purchasers to do various acts and

things on behalf of the purchaser. Accordingly, the WTM has concluded that the customer does not manage his investments in the scheme rather his investments are managed and utilized of PACL.

For all the aforesaid reasons decision of the WTM that PACL is managing the property, contribution or investment forming part of the scheme, on behalf of the investors and hence condition set out under Section 11AA(2)(iii) are satisfied cannot be faulted.

23. Decision of the WTM that the schemes run by PACL satisfy the condition set out under Section 11AA (2)(iv) deserves acceptance for the following reasons:-

a) Clause 11 of the General Terms and Conditions of the application form stipulates that the possession of the land if allotted to the customer/investor would remain with PACL. Clause 13 stipulates that customers shall have right to retain or sell the land on expiry of the tenure of the agreement. Clause 14 stipulates that PACL shall have first charge on the said property on account of its unpaid installments for services and development charges and other incidental expenses. Clause 15 stipulates that PACL has right to discontinue/ change/ amend/ modify or alter prospectively any of the Rules/Regulations and plans with or without notice to the investors. Clause

16 stipulates that in case of joint sale deed, the title deeds of the land shall be kept in the safe custody of the trustees appointed by PACL. These conditions contained in the General Terms and Conditions of the application form are also incorporated in the agreement which the investor executes with PACL.

b) Clause 1 of the agreement stipulates that only symbolic possession of the plot shall be handed over to the investors or customers immediately after the registration. Clause 3 of the agreement gives absolute discretion to PACL to manage development of the property including survey, demarcation, fencing, clearing, cultivation, planting and raising of crops, etc., use of fertilizers, irrigations, harvesting, etc. The customers have no control or say in the aforesaid aspect of the scheme. The customer has mere right to tender suggestion.

c) PACL has absolute discretion to allot any piece of land and/or change the location of the land at any point of time. Even otherwise since large number of customers approximately 5.85 crore in number, own small pieces of lands ranging from 150 square yards to 3000 square yards, it is not feasible for any

investor to have control over the land of PACL or the development activities carried on by PACL.

d) In all 500 random sample documents examined by SEBI, PACL had acquired special Power of Attorney in its favour from the purchaser. In the absence of any document produced by PACL evidencing implementation of the alleged self development option, the WTM has drawn adverse interference that PACL used to take special Power of Attorney from all the customers with a view to keep the transactions within its control.

e) PACL obtains the authority from its customers for development and maintenance of the plots of land. The land remains in the possession of PACL and only a symbolic possession of the plots are handed over to the customer, on the ground that the fragmentation of the plot into smaller sizes may not be practical or permissible under the applicable revenue laws.

f) On execution of the sale deed PACL has stated t hat, the sale deeds are held with its custodial services company and that the customers only gets a certified copy of the sale deed for the reason that the tenure of the agreement being continuing and further installments are yet to be received.

g) Clauses contained in the agreement to the effect that PACL shall have the right to develop and maintain the property and the customer shall not ordinarily interfere, clearly shows that the contribution/investment made by customers as well as plot of land are managed by PACL on behalf of its customers.

Thus, in the facts of present case since all conditions set out under Section 11AA(2) are satisfied the WTM of SEBI was justified in holding that the schemes operated by PACL constituted CIS.

24. As rightly contended by the counsel for SEBI, facts narrated above, are comparable with the facts in case of PGF Ltd. particularly facts set out in para 45 and 47 of the Apex Court order. As held in para 40 of the Apex Court order, object of Section 11AA is not intended to affect sale and development of agricultural land, but to protect the interest of investors by regulating the schemes so that gullible investors reap the promised benefits and are not defrauded. Therefore, reliance placed by the WTM on decision of the Apex Court in case of PGF Ltd. cannot be faulted.

25. Strong reliance was placed by counsel for appellants on the report submitted by Justice K. Swami Durai (Retd.) to Delhi High Court on the basis of which the Delhi High Court had deleted the name of PACL from the list of respondents in the PIL filed before the Delhi High Court.

The task assigned to Justice K. Swami Durai (Retd.) by the Delhi High Court was to ascertain genuineness of 14150 sale transactions entered into by PACL with its customers. Fact that 14150 sale transactions were found to be genuine by Justice K. Swami Durai does not affect the merits of the impugned order because, whether the schemes floated by PACL were covered under CIS or not, was neither an issue raised nor considered by Justice K. Swami Durai. Only issue considered therein was, whether, the 14150 sale deeds executed by PACL were genuine or not. In fact pursuant to the subsequent order passed by Delhi High Court, Justice K. Swami Durai has verified and held that in all 19284 sale deeds executed by PACL in favour of its customers were genuine. Thus, neither Justice K. Swami Durai nor the Delhi High Court have considered the question as to whether the schemes floated by PACL constitute CIS or not. Therefore, reliance placed on the report submitted by Justice K. Swami Durai is totally misplaced.

26. It is relevant to note that Justice K. Swami Durai in his several reports had directed PACL to apply for and obtain the requisite encumbrance certificate from the concerned Sub-Registrar which would reflect that the names of investors have been duly entered in the land records. There is no indication that even one such certificate was obtained by PACL in respect of 19284 sale deeds registered. Therefore, fact that 19284 sale deeds verified by Justice K. Swami Durai have been excluded from the purview of the impugned order would not in any affect the decision of SEBI in holding that the schemes floated by PACL constitute CIS.

27. It was strenuously argued by counsel for appellants that once part of the properties belonging to PACL are excluded from the purview of the impugned order (by accepting report of Justice K. Swami Durai) it cannot be said all conditions set out under Section 11AA (2) have been satisfied. There is no merit in the above contention, because, firstly, customers who were excluded from the purview of the impugned order represented 0.03% whereas, the customers who are victims of investing in the schemes of PACL represent 99.97%. If the contention of the appellants is accepted it would mean that under the schemes floated by PACL if Section 11AA(2) is violated in case of 99.97% investors, then on account of 0.03% investors being excluded, PACL cannot be declared as CIS under Section 11AA of SEBI Act. Accepting such an argument would defeat the object with which the provisions are enacted and would amount to promoting dishonesty. Secondly, 0.03% cases are left out not on the ground that those cases fall outside the purview of Section 11AA. Thirdly, even in respect of those cases, PACL has not obtained the encumbrance certificate as directed by Justice K. Swami Durai which would have established the status of the land holders after the sale deeds were registered. Therefore, merely because, 0.03% sale transactions covered by the Justice K. Swami Durai's report have been excluded in the impugned order, appellants are not justified in contending that 99.97% sale transactions cannot be declared to be covered under CIS.

28. Reliance placed on the decision of the Rajasthan High Court dated 28.11.2003 holding that the schemes of PACL are not covered under CIS is misplaced. That decision was rendered while considering the prima facie view of SEBI in the year 1999 that the schemes of PACL are covered under CIS. Much water has flown thereafter. Various factors noticed in the impugned order passed after detailed investigation on 22.08.2014 were not before the Rajasthan High Court. Therefore, reliance placed on the Rajasthan High Court decision which is set aside by the Apex Court is totally misplaced.

29. Finding of fact recorded in the impugned order is that in t he guise of selling agricultural lands, PACL has collected ₹ 49,100 crore from 5.85 crore customers over a period of 15 years and so far PACL has issued sale deeds in respect of 19284 investors. According to PACL, value of the total lands held by PACL in the form of stock in trade as on 31.03.2014 was ₹ 11,706.96 crore. Lands held by PACL are situate in different parts of the country. However, all those lands are allegedly sold to the customers at a uniform price by treating all lands alike irrespective of the State in which it is situated. Apart from the above, under the schemes, PACL is unilaterally entitled to change the location of the plot allotted to a customer. Thus, a person to whom a plot of land is allotted in Tamil Nadu may be unilaterally altered by PACL and allotted a plot of land situate either at Orissa or Rajasthan. Since the agreement contained a buy-back option at a predetermined price, the

WTM arrived at a conclusion that the alleged land transactions are nothing but sham CIS transactions.

30. SEBI was duty bound to protect the interest of investors by ensuring that the investors get back their money with promised returns. Since the disparity between the amounts collected from the customers by promising fertile agricultural lands with high returns and the lands actually held PACL was abnormal and inspite of colleting ₹ 49,100 crore from 5.85 crore customers over the past 15 years since PACL had executed only 19284 sale deeds, the WTM was justified in directing PACL to stop collecting money from the investors so that no more gullible investors become victims of the schemes operated by PACL. The WTM was also justified in directing PACL to wind up the existing schemes and refund money to the customers with promised return.

31. The without prejudice proposal put up by PACL during the course of hearing before SEBI was merely an eye-wash, because in the said proposal nothing was disclosed as to how the claim of 5.85 crore customers from whom ₹ 49,100 crore was collected would be met in the next five years, especially when the value of the lands held by PACL was only ₹ 11,706.96 crore. In fact, even before us, counsel for Mr. Balkaran Singh appointed as additional director of PACL, pursuant to Memorandum of Understanding dated 19.02.2015 submitted that Mr. Balkaran Singh would be taking over the management of PACL by acquiring 65% shareholding and that he would require time to make arrangements to pay the amounts due to the customers. When asked as

to how the amounts would be arranged and how much time Mr. Balkaran Singh would require to arrange funds, counsel had no answer. In these circumstances, in our opinion, the WTM was justified in rejecting the without prejudice proposal made by PACL.

32. For all the aforesaid reasons the decision of SEBI in holding that PACL is not engaged in genuine sale of agricultural land but is engaged in running sham CIS and accordingly directing PACL to wind up its existing schemes and refund money to the customers with the promised returns cannot be faulted.

33. Appellants however strongly contend that assuming the schemes operated by PACL constitute CIS, then, as per the Apex Court order, SEBI could initiate proceedings and pass consequential order, only after the decision of SEBI holding that the schemes operated by PACL constitute CIS is upheld ultimately by the Apex Court.

34. Para 4 & 8 of the Apex Court order dated 26.02.2013 on which considerable arguments were advanced by counsel on both sides read thus:-

> *"4. After hearing the respective counsel and after noticing the orders dated 30.11.1999 and 10.12.1999 impugned in the writ petition filed before the High Court, which were set aside by the order impugned in these appeals, as well as, the order dated 24.06.2002 which order also got merged in the order impugned in these appeals, it was suggested to the learned counsel whether the impugned orders of the*

appellant dated 30.11.1999 and 10.12.1999, themselves can be treated as show cause notices and an opportunity to be extended afresh to the first respondent company before passing final orders on the question as to whether or not the business of the first respondent company will fall within the category of Collective Investment Scheme (hereinafter being referred to as "CIS"). Further, depending upon the outcome of any such fresh orders to be passed by the appellant, further proceedings can be initiated by the appellant in accordance with law.

8. We also make it clear that the appellant shall pass fresh orders as regards the business activity of the first respondent Company as to whether it falls under the category of CIS or not and depending upon the ultimate order to be passed it may proceed further in accordance with law. The appellant shall before taking any further action give prior notice to the first respondent Company."

35. From the aforesaid order it is clear that the Apex Court required SEBI, first to hear PACL on the issue as to whether the schemes of PACL fall within the category of CIS or not and thereafter depending upon that decision proceed to take further course of action after giving prior notice to PACL.

36. In the ordinary course, further course of action that could be taken after holding that the schemes of PACL constitute CIS were, either to direct PACL to comply with CIS Regulations by seeking registration under regulation 68 read with regulation 5 or to direct winding up by

following the procedure prescribed under regulation 74 read with regulation 73 of the CIS Regulations. Apex Court decision, however, did not preclude SEBI from exercising power under Section 11/11B in exceptional cases like the present one, if the transactions were found to be sham transactions and were detrimental to the interests of investors. In other words, while directing SEBI to follow the procedure prescribed under the CIS Regulations, Apex Court did not bar SEBI from exercising power under Section 11/11B of the SEBI Act, in the interest of investors if the situation so demands.

37. Where a person carries on business under a bonafide belief that such business is not covered under CIS and hence does not seek registration, then, such person on being found to be carrying on CIS may be permitted to seek registration under the CIS Regulations. However, where a person in the guise of carrying on real estate business is found to be carrying CIS which is sham and detrimental to the interests of investors, then, permitting such person to seek registration or permitting that person to wind up the scheme by following the procedure prescribed under the CIS Regulations would be travesty of justice and wholly prejudicial to the interests of investors.

38. Argument of the appellants is that the Apex Court order contemplated two stage hearing i.e. in the first stage to pass an order on the question as to whether the schemes of PACL constitute CIS or not and if held to be CIS, then initiate second stage proceedings for passing consequential order, only if the decision of SEBI holding that the

schemes of PACL are covered under CIS is finally upheld by the Apex Court. There is no merit in the above contention, because, protection of investor interest is the paramount consideration under the SEBI Act and once it is found that the CIS operated is detrimental to the interest of investors, then SEBI instead of following the procedure prescribed under CIS Regulations, is duty bound to take immediate steps to protect the interest of investors by issuing appropriate direction under Section 11/11B of SEBI Act. It is only in respect of those schemes covered under CIS which are operated in a manner not detrimental to the interest of investors, the question of following the procedure prescribed under the CIS Regulations arises. Even in such cases, consequential order like provisional registration has to be passed immediately after holding that the schemes are covered under CIS and SEBI cannot wait till the issue relating to CIS is finally determined by the Apex Court. Any scheme once held to be covered under CIS has to be regulated forthwith by SEBI and it is not open to SEBI to wait till its decision holding that the schemes are covered under CIS is upheld by this Tribunal or ultimately by the Apex Court.

39. In the present case, facts on record demanded immediate action under Section 11/11B of the SEBI Act and if immediate action was not taken interests of crores of investors would have been jeopardy. Therefore, in the facts of present case, decision of SEBI in invoking jurisdiction under Section 11/11B of SEBI Act read with regulation 65 of CIS Regulations immediately after concluding that the schemes floated by PACL are covered under CIS, cannot be faulted.

Consequently, question of permitting registration under regulation 68 read with regulation 5 or to direct winding up under regulation 73/74 of the CIS Regulations did not arise in the present case.

40. It is contended on behalf of the appellants that in para 38 of the impugned order the WTM has erroneously held that the schemes operated by PACL are liable to be wound up as a natural consequence of holding that the schemes are covered under CIS. On first blush, the argument looks attractive. However, on a deeper consideration it is seen that winding up is not ordered simply on account of the schemes being covered under CIS, but winding up is ordered mainly on arriving at a conclusion that PACL is operating nothing but a money mobilizing scheme and the claim of PACL that it is running real estate business is a facade and sham to camouflage their activity as CIS (Page 311 & 322 of the Memorandum of Appeal). Since we concur with the view of SEBI that PACL in the guise of running real estate business was running CIS which was detrimental to the interest of investors, decision of SEBI in directing PACL to wind up its schemes and repay the money collected from the investors with promised return cannot be faulted.

41. It is contended on behalf of the appellants that the value of the total lands held by PACL as disclosed in the without prejudice offer made during the course of hearing before the WTM was based on book value and not based on market value. When asked as to what would be the market value of the lands held by PACL, counsel for the appellants stated that they are not in a position to state the market value of the

lands, because, the land documents are in the custody of CBI. Although the land documents are in the custody of CBI, admittedly the lands are in the custody of PACL and if appellants are unable to state the value of the lands in their custody, it is reasonable to hold that the barren lands acquired by PACL continues to be barren land. Thus, it is apparent that as against the amount of ₹ 49,100 crore collected from 5.85 crore investors promising them agricultural land, the value of the land held by PACL as on 31.03.2014 only is ₹ 11,706.96 crore. Since the lands held by PACL are wholly disproportionate to the amounts collected from the customers and there is nothing on record to suggest that PACL has any other assets, the WTM was justified in rejecting the without prejudice proposal and in the interest of investors directing PACL to wind up its schemes in exercise of the powers conferred under Section 11/11B of SEBI Act read with regulation 65 of CIS Regulations.

42. Strong reliance was placed by counsel for appellants on decision of this Tribunal in case of Alchemist Infra Reality Ltd. (supra). In that case, the scheme floated by Alchemist, after the CIS Regulations came into force was held to be CIS and since the said CIS was carried on without obtaining registration from SEBI, the CIS was ordered to be wound up under Section 11,11B of SEBI Act read with regulation 65 and 73 of CIS Regulations. While upholding the order of SEBI and rejecting the argument of Alchemist that regulation 73 cannot be applied to a CIS floated after the CIS Regulations came into force, this Tribunal in para 17 held that the provisions for winding up contained in regulation 73 is applicable to CIS existing at the time when the CIS

Regulations were introduced as also to the CIS which may have been launched at any point of time thereafter. Whether a CIS floated and operated after the CIS Regulations came into force without obtaining registration from SEBI was entitled to seek registration under regulation 73 read with regulation 68 was neither an issue raised by Alchemist nor decided by this Tribunal. Only issue raised and decided by SEBI as also by this Tribunal in Alchemist was that a CIS floated after the CIS Regulations came into force without obtaining certificate of registration from SEBI is liable to be wound up under the regulation 65 read with regulation 73 of the CIS Regulations. Therefore, the argument that in view of the decision of this Tribunal in case of Alchemist Infra Realty Ltd. (supra) PACL has a right to seek registration under CIS Regulations cannot be accepted.

43. Argument of SEBI that the decision of this Tribunal in case of Alchemist Infra Realty Ltd. (supra) is 'per incuriam' is wholly unjustified to say the least. Since the decision of SEBI that a CIS floated and operated after the CIS Regulations came into force without obtaining registration from SEBI is liable to be wound up under Regulation 65 read with Regulation 73 was upheld by this Tribunal, SEBI is not justified in finding fault with the decision of this Tribunal in Alchemist. If on hindsight SEBI considers that in case of Alchemist winding up could be ordered only under regulation 65 and not under regulation 73, then, in the first instance SEBI must have the audacity to state that its decision in case of Alchemist Infra Realty Ltd. (supra) to

the extent it ordered winding under regulation 73 was per incuriam. SEBI cannot merely state that it has now altered its view and continue to contend that the decision of this Tribunal in case of Alchemist (supra) is per incuriam. In other words, without admitting that its decision in case of Alchemist directing winding up under Regulation 73 was per incuriam i.e. the said decision was rendered in ignorance or forgetfulness of regulation 68, SEBI is not justified in alleging that the decision of this Tribunal in case of Alchemist is per incuriam.

44. Argument of the appellants that they have a fundamental right to carry on CIS under the Article 19(1)(g) of the Constitution of India by seeking registration of CIS operated by them under CIS Regulations is without any merit because right to carry on business is subject to carrying on business in accordance with law and in the present case, once it was found that the land transactions under the schemes operated by PACL were sham transactions and were detrimental to the interest of the investors, then it was the bounden duty of SEBI to direct winding up such schemes and direct PACL to refund the amount collected from the customers with promised return within the stipulated time.

45. In support of the contention that SEBI was bound to follow the directions contained in the Apex Court order in entirely, reliance was placed on a decision of the Apex Court in the case of Tirupati Balaji Developers (P) Ltd. (supra). That decision has no relevance to the facts of the present case, because of the overriding power conferred on SEBI under Section 11/11B of SEBI Act to take appropriate steps to protect

the interest of investors. By no stretch of imagination it can be said that the Apex court directed SEBI to consider granting registration or winding up the schemes of PACL under the CIS Regulations, even if the schemes were operated in a manner which were prejudicial to the interest of investors. Therefore, the directions given by the Apex Court in relation to the consequential order being subject to the powers of SEBI to take remedial measures in the interest of investors under Section 11/11B, in the facts of present case, no fault can be found with the decision impugned in these appeals.

46. Similarly, decision of the Apex Court in case of L.K. Ratna (supra) is distinguishable on facts. Admittedly, by show cause notices dated 30.11.1999, 10.12.1999 and supplementary show cause notice dated 14.06.2013, appellants were called upon to show cause as to why PACL should not be directed to comply with the CIS Regulations and appropriate directions should not be issued, if necessary, under Section 11/11B of SEBI read with regulation 65 of CIS Regulations. After considering the cause shown and after hearing the appellants it was deemed fit to pass consequential order under Section 11/11B of SEBI Act. Hence, the above decision has no relevance in the facts of present case.

47. Argument that once the schemes of PACL were held to be covered under CIS, regulation 74A was attracted and therefore PACL was entitled to seek registration within two months of CIS Regulations coming into force is also without any merit. Regulation 74A inserted to

CIS Regulations with effect from 09.01.2014 is applicable only to deemed CIS covered under the proviso to Section 11AA(1) inserted with retrospective effect from 18.07.2013. As per the proviso to Section 11AA(1), pooling of funds under any scheme involving corpus amount of ₹100 crore or more which are not registered and not covered under Section 11AA(3) are deemed to be an existing CIS. Regulation 74A provides that such deemed CIS shall comply with Chapter IX of CIS Regulations by seeking registration under regulation 5 within two months of regulation 74A coming into force. Obviously, pooling of funds under any scheme involving corpus amount of ₹100 crore or more which satisfy the conditions set out under Section 11AA(2) would be outside the purview of deeming fiction introduced under the proviso to Section 11AA(1). Regulation 74A is restricted to CIS which are deemed to be CIS under the proviso to Section 11AA(1) and 74A is not intended to offer amnesty to the CIS which were covered under Section 11AA(1) prior to the insertion of proviso to Section 11AA(1) of SEBI Act. Since the schemes operated by PACL satisfy the conditions set out under Section 11AA(2) the said schemes would be CIS covered under Section 11AA(1) and therefore appellants are not justified in contending that the schemes of PACL fall under the category of deemed CIS covered under the proviso to Section 11AA(1) and consequently, appellants are not justified seeking registration under regulation 74A of CIS Regulations.

48. An affidavit was filed on behalf of PACL Customer Association stating therein that at present the Association represents more than 4.5 lac customers of PACL and the said customers are satisfied with the activities of PACL qua its customers. It is also stated that PACL has been allotting land to its customers faithfully. When questioned as to whether the members of the Association have got sale deeds executed in their favour even though the period specified in the schemes have expired, counsel for the Association had no answer. Since, all the sale deeds executed by PACL have been verified by Justice K. Swami Durai and have been excluded in the impugned order, it is apparent that the claims made by the members of the Association is without any merit. In these circumstances, contention put forth by the Association cannot be sustained. Thus, in the facts of present case, decision of SEBI in holding that in the guise of running real estate business PACL is running sham CIS which are detrimental to the interest of investors and accordingly directing PACL and its directors to wind up the existing CIS and refund the money collected from the customers with promised return cannot be faulted.

49. To sum up:-

a) By inserting Section 12(1B) to SEBI Act legislature has made it mandatory for any person to obtain a certificate of registration for operating CIS with effect from 25.01.1995. In respect of CIS operating prior to insertion of Section 12(1B) for which no certificate of registration was required,

proviso to Section 12(1B) provides that such CIS may continue to operate till such time regulations are made by SEBI. Regulation 5 of the CIS Regulations framed by SEBI which came into force with effect from 15.10.1999 mandatorily provide that any person operating a CIS prior to the commencement of CIS Regulations shall subject to the provisions of Chapter IX of CIS Regulations make an application to SEBI for grant of a certificate within a period of two months from 15.10.1999. Thus, operating CIS without obtaining a certificate of registration from SEBI is illegal after the CIS Regulations came into force.

b) Where a person is found to be operating a CIS after the CIS Regulations came into force, without obtaining a certificate of registration, then, in the interest of investors, SEBI may under Section 11/11B of SEBI Act direct that person either to wind up the CIS or comply with the CIS Regulations by seeking certificate of registration from SEBI.

c) Admittedly, some of the schemes floated by PACL were existing on 15.10.1999. In respect of those schemes, PACL was required to make an application seeking certificate of registration under regulation 5, only if the schemes floated by PACL constituted CIS under the SEBI Act.

d) By two communications dated 30th November, 1999 and 10th December, 1999 SEBI informed PACL that the schemes floated by PACL were CIS and called upon PACL to comply with SEBI Act and CIS Regulations by seeking registration in terms of regulations 5 read with regulation 68 or wind up the schemes and repay to the customers as stipulated under regulation 73/74 of the CIS Regulations.

e) Since the aforesaid communications were stayed and ultimately set aside by the Rajasthan High Court on 28th November, 2003 on ground that the schemes floated by PACL were not CIS, PACL was not required to obtain certificate of registration from SEBI for operating the schemes floated by it.

f) Apex Court on 26th February 2013 set aside the decision of the Rajasthan High Court dated 28th November, 2003 and directed SEBI to treat the communications dated 30th November, 1999 and 10th December, 1999 as show cause notices and permitted SEBI to issue supplementary show cause notice to PACL after carrying out necessary inspection, investigation, inquiry and verification of the accounts and other records of PACL. Apex Court further directed SEBI to pass fresh orders on the question as to whether the schemes floated by PACL were covered under the category of CIS or not and depending upon that

decision proceed further in accordance with law and before taking any future action SEBI was directed to give prior notice to PACL. Accordingly, on completion of investigation, SEBI issued supplementary show cause notice on 14th June, 2013 and after hearing the appellants impugned order was passed on 22.08.2014.

g) For the reasons stated in the impugned order, decision of SEBI that in the guise of running real estate business, PACL is running sham CIS which are detrimental to the interest of investors and consequently directing PACL to wind up the existing CIS and refund the money collected from the investors with promised return cannot be faulted.

h) Argument of the appellants that the decision of the Apex Court dated 26th February 2013 contemplated two tier procedure is not correct. Apex Court order required SEBI to hear the appellants on the issue as to whether PACL was covered under CIS and also on the issue as to what future course of action should be taken if PACL is held to be running CIS. Thus the Apex Court order emphasised on issuing notice of hearing on both issues and did not curtail the powers of SEBI to issue appropriate directions in the interest of investors under Section 11/11B of SEBI Act.

i) Argument of the appellants that in view of the two tier procedure prescribed by the Apex Court, after holding that

the schemes of PACL constitute CIS, SEBI could not have passed consequential order till the decision of SEBI holding PACL to be covered under CIS is finally upheld by the Apex Court is without any merit. If that contention is accepted, it would mean that till the SEBI order on CIS attains finality, Apex Court has prohibited SEBI from taking action against PACL, even if, the CIS run by PACL are sham and detrimental to the interest of investors. We do not agree with the aforesaid interpretation of the Apex Court order put forth by the appellants.

j) In the present case, in the guise of selling agricultural land, PACL has collected ₹ 49,100 crore from 5.85 crore customers by promising them that the investments in the schemes of PACL are highly profitable. Admittedly, value of the total lands held by PACL in the form of stock in trade as on 31.03.2014 was ₹ 11,706.96 crore. In such a case, permitting PACL to operate CIS by seeking registration under CIS Regulations would have be travesty of justice. Accordingly, no fault can be found with the decision of SEBI in directing PACL to wind up all existing schemes and refund the monies collected from the investors with the return which are due to its investors.

k) Appellants are directed to comply with the directions contained in the impugned order of SEBI dated 22.08.2014 within a period of three months from today.

50. For all the aforesaid reasons Appeal Nos. 368 of 2014, 369 of 2014, 370 of 2014 and 95 of 2015 as well as the Miscellaneous Application Nos. 88 of 2015, 129 0f 2015 and 171 of 2015 are dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

12.08.2015
Prepared & Compared By: PK