BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 24.11.2020

Date of Decision : 04.12.2020

Misc. Application No. 316 of 2020
(Delay Application)
And
Misc. Application No. 318 of 2020
(Exemption from filing duly affirmed affidavit)
And
Appeal No. 280 of 2020

1. Mr. Rakesh Kumar Gupta,
   J-272, Sarita Vihar,
   New Delhi – 110 076.

2. Mr. Sumit Bharana,
   House No. C-146, 1st Floor,
   Sarvodaya Enclave,
   New Delhi – 110 017.

3. Ms. Rashmi Bharana,
   House No. C-146, 1st Floor,
   Sarvodaya Enclave,
   New Delhi – 110 017.

4. Mr. Sanjay Chawla,
   1303, Amber Court-1,
   Essel Tower,
   M.G. Road, Gurgaon,
   Haryana-122 001.

5. Ms. Manisha Bharana,
   House No. C-146, 1st Floor,
   Sarvodaya Enclave,
   New Delhi – 110 017. …Appellants

Versus

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

2. Adel Landmarks Ltd.
   Represented through
   Mr. Udayraj Patwardhan,
   Interim Resolution Professional,
   C-703, Marathon Innova,
   Off Ganpatrao Kadam Marg,
   Lower Parel (West),
   Mumbai – 400 013. …Respondents

Mr. Salman Khurshid, Senior Advocate with Mr. Apoorv Agarwal, Advocate and Mr. Sumit Bharana, appellant no. 2 for Appellants.

Mr. Mustafa Doctor, Senior Advocate Ms. Nidhi Singh, Ms. Kinjal Bhatt and Mr. Hersh Choudhary, Advocates i/b Vidhii Partners for Respondent No. 1.

Mr. Sumit Nagpal, Advocate for Respondent No. 2

CORAM: Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per: Justice Tarun Agarwala, Presiding Officer

1. The appellants are the directors of Adel Landmarks Ltd. (‘Company’ for short) and have filed the present appeal against the order dated June 30, 2020 passed by the Adjudicating Officer (‘AO’ for short) of Securities and Exchange Board of

India (‘SEBI’ for short) imposing a penalty of Rs. 25 lakh upon the directors as well as upon the Company to be paid by them jointly and severally. The appellants have also challenged the order of the Whole Time Member dated 7.10 2015 and19.08.2019. A prayer was also made for a direction to SEBI to withdraw the proceedings in CC No. 24/17(new case No.CC/5/2018) before Patiala House Court New Delhi and further direct SEBI to file their claims before the Company as the said Company is under CIRP.

2. The facts leading to the filing of the present appeal is, that the Adel Landmarks Ltd. is a public limited company and is engaged in the business of real estate and infrastructure development. The appellants are its directors. On June 10, 2013 a complaint against the Company was received by SEBI stating therein that the Company was mobilizing money from investors under a Collective Investment Scheme (‘CIS’ for short). This triggered an investigation and ultimately on June 5, 2014 an interim order under Section 11 and 11B of the SEBI Act, 1992 read with Regulation 63 of the SEBI (Collective Investment Schemes) Regulations, 1999 (‘CIS Regulations’ for short) was issued restraining the Company and its directors from collecting any money from the investors / buyers under the garb of CIS.

Thereafter, the Whole Time Member ('WTM' for short) passed a final order dated October 7, 2015 holding that the scheme was a CIS which was being run without registration under the SEBI Act and therefore the said scheme was wholly illegal. The WTM accordingly restrained the Company and its directors from collecting any money under the CIS and further directed to wind up the scheme and refund the money to its investors. The WTM stated that the aforesaid directions are in addition to the rights of the SEBI to initiate prosecution proceedings under Section 24 and adjudication proceedings under Chapter VI A of the SEBI Act.

3. The Company and its directors filed Appeal No. 520 of 2015 against the order of the WTM dated October 7, 2015 wherein the appellants made a statement that they would refund the money collected from the buyers irrespective of the fact that the scheme was a CIS or not and whether the same was required to the registered or not. Based on the contention of the appellants this Tribunal disposed of the appeal by an order dated December 7, 2017 directing the appellant to make a representation giving details of the money so paid and the manner in which the balance money was required to be paid.

For facility, the order of this Tribunal dated December 7, 2017 is extracted hereunder:-

> *"1. The affidavit (dated 06.12.2017) tendered in the Court on behalf of appellants is taken on record and the appeal is heard on the footing that the contents of the said affidavit are denied by Securities and Exchange Board of India ('SEBI' for short).*
>
> *2. This appeal is filed to challenge the order passed by the Whole Time Member ('WTM' for short) of SEBI on October 7, 2015. By the said order, the appellants are, inter alia, directed to abstain from collecting any money from the investors under the schemes which are identified by SEBI as Collective Investment Schemes ('CIS') and restrained from accessing the securities market for the period as more particularly set out therein. Moreover, the appellants are also directed to wind up the schemes identified as CIS and refund the monies collected under those schemes.*
>
> *3. Counsel for the appellants submit that without prejudice to the contention of the appellants that the schemes floated by the appellant no. 1 company do not constitute CIS, the appellant no. 1 company has partly paid the amount to the investors collected under the scheme and the appellants are ready and willing to pay the balance amount to the investors as per the schemes floated by the appellants.*
>
> *4. Counsel for SEBI states that the refunds allegedly made by the appellants are yet to be verified by SEBI.*
>
> *5. Since appellants are willing to comply with the impugned order by refunding the entire amount collected, without going into the merits of the argument as to whether the schemes floated by the appellant no. 1 constituted CIS or not, we dispose of the appeal by permitting the appellants to make a representation to SEBI within a period of eight weeks from today setting in detail the name and the quantum of amount already refunded and the mode*

and the manner in which the balance amount would be refunded.

6. If the appellants make a representation within a period of 8 weeks from today, then, SEBI shall consider the said representation and pass appropriate order thereon. If the appellants fail to make representation within a period of 8 weeks from today, then SEBI is at liberty to implement the impugned order.

7. Appellants shall furnish list of their assets to SEBI within a period of 8 weeks from today. Appellants shall also furnish any other information / documents that may be demanded by SEBI.

8. Appeal is disposed of in the aforesaid terms with no order as to costs."

4. On the basis of the aforesaid order, the appellants and the Company made a representation and through various orders issued by WTM the amounts so refunded was verified. Eventually, the WTM issued an order dated August 19, 2019 directing the appellant to make a publication in the newspapers inviting claims from the buyers. It was also indicated in the order that in the event no further complaints were received, the directions of the WTM in its order of October 7, 2015 would stand disposed of. It is stated that based on the aforesaid directions, necessary publication were made on the basis of which certain claim applications were received which was disposed of by the Company and the amounts were paid to the

buyers. It has been asserted that now the order of the WTM dated October 7, 2015 has been fully complied with.

5. In the meanwhile, Edelweiss Asset Reconstruction Company Limited filed an application under the Insolvency & Bankruptcy Code, 2016 against the Company Adel Landmarks Ltd. before the National Company Law Tribunal (NCLT) New Delhi which petition was admitted and, by an order dated October 5, 2018, an Interim Resolution Professional was appointed and the management has been suspended and a moratorium was declared under Section 14 of the said Code. It has been asserted by the appellants that the resolution plan has been submitted which is pending consideration before NCLT.

6. Notwithstanding the aforesaid, the AO issued a show cause notice dated January 28, 2020 directing the Company and the appellants to show cause as to why penalty proceedings should not be initiated under Chapter VI A of the SEBI Act for violating the provisions of the SEBI Act and CIS Regulations. After considering the reply, the AO passed the impugned order dated June 30, 2020 directing the Company and the appellants to pay Rs. 25 lakh jointly and severally as the Company had launched a CIS without obtaining registration and had contravened Section 12(1B) of the SEBI Act and Regulation 3

of the CIS Regulations. The appellants, being aggrieved by the said order has filed the present appeal.

7. We have heard Shri Salman Khurshid, the learned senior counsel along with Shri Apoorv Agarwal, the learned counsel for the appellants, Shri Mustafa Doctor, the learned senior counsel along with Ms. Nidhi Singh, Ms. Kinjal Bhatt and Shri Hersh Choudhary, the learned counsel for respondent no. 1 and Shri Sumit Nagpal, the learned counsel for respondent no. 2 through video conference.

8. The learned senior counsel for appellants Shri Salman Khurshid contended that the appellants Company is in the business of real estate of buying and selling land and is not involved in a CIS. It was contended that the appellants are not required to register itself under Section 11AA of the SEBI Act read with CIS Regulations. It was contended that the impugned order imposing a penalty of Rs. 25 lakh and holding that the appellants and the Company were carrying on a CIS without registration was wholly illegal and was liable to be set aside.

9. It was contended that not only the order of the AO dated June 30, 2020 but also the earlier order of the WTM dated October 7, 2015 was also liable to be set aside. It was urged that

the appellants had clearly indicated before this Tribunal that without prejudice to their rights to question the veracity as to whether it was a CIS or not and whether the appellants were required to obtain registration under SEBI Act, the appellants would refund the money. It was, thus, contended that since a penalty order has been passed, the appellants are within their rights to question the findings of the WTM in these proceedings also.

10. The learned senior counsel Shri Salman Khurshid contended that the appellant had acquired 76.72 acres of land on its behalf by associates / subsidiaries / group companies of the appellants at Dwarka Expressway, Gurgaon. Agreements were executed with the buyers and that 108 buyers had paid Rs. 51 crore whereas the appellants had paid Rs. 220.43 crore for purchase of land before taking booking from the buyers. It was also contended that out of Rs. 220.43 crore, only Rs. 51 crore was paid by the buyers and rest of the funds was paid by the Company. In addition to the above, additional chunk of lands was to be purchased and developed for which purpose the appellants had applied for grant of license for a plotted colony measuring 108 acres in sector 103 through its associate company. The learned senior counsel contended that upon the

grant of the license, the appellants would develop the plots and thereafter would transfer it to the buyers. In this regard, agreements were executed with the buyers and formal allotment letters were only to be issued after the grant of the license. It was also stated that a clear stipulation was made in the agreement that in the event the license was not granted by the appropriate authority for development of the plots, the amount received from the buyers would be refunded along with appropriate compensation which amount was stipulated in the agreement itself. It was, thus, contended that a bare reading of the agreement would indicate that the Company was only engaged in sale and purchase of land and was not involved in the CIS. It was thus contended that the ingredients of Section 11AA(2) of the Act was lacking in as much as there was no pooling of funds nor the appellants or its Company had offered any assured returns. The learned senior counsel thus contended that the order of the AO was liable to be set aside.

11. On the other hand, the learned senior counsel Shri Mustafa Doctor of SEBI contended that the scheme launched by the appellants was nothing but a CIS and the ingredients of Section 11AA(2) of the Act have been carefully dealt with and considered in detail by the AO in the impugned order. The

learned senior counsel contended that the project launched by the appellants was nothing but a CIS and since admittedly no registration was taken, the appellants were penalized for violating the provisions of the Act and the CIS Regulations. The learned senior counsel contended that there is no error in the impugned order and the quantum of penalty was justified in the circumstances of the case.

12. The learned senior counsel for the parties cited certain judgments in support of their case which will be appropriately dealt with at the appropriate place. It may be stated here that no arguments were made by the appellants on the veracity of the order dated19.08.2019 passed by the WTM nor any arguments were made on the issue of directing SEBI to withdraw the proceedings pending before the Patiala Court New Delhi. Further no submissions were made on behalf of respondent no. 2.

13. Having heard the learned senior counsel for the parties at some length, we are of the opinion that, the relief claimed by the appellants for the quashing of the order of the WTM dated October 7, 2015 cannot be granted. In our view the order of the WTM dated October 7, 2015 has become final and binding on the parties. We are of the opinion that when the appeal of the

appellants was disposed of by the Tribunal by an order dated December 7, 2017 challenging the order of the WTM dated October 7, 2015, the said appellants did not take leave of the Tribunal or liberty to file a fresh appeal challenging the order of the WTM. In the absence of any leave being granted it is no longer open to the appellant to question the veracity or legality of the order dated October 7, 2015 passed by the WTM. This view of ours is supported by a decision of this Tribunal in ***Karmbhoomi Real Estate Ltd. & Ors. vs SEBI in Appeal No. 11 of 2019 decided on January 21, 202*** wherein the Tribunal held:-

> *"9. Having heard the learned counsel for the parties at some length, we are of the opinion that it is no longer open to the appellant to challenge the findings given by the WTM in its order dated 3rd December, 2015 holding that the business activity of the appellants falls within the ambit of a CIS. The order of 3rd December, 2015 was no doubt challenged by the appellant before this Tribunal but contention was made by the appellant that without going into the question as to whether the business activities of the appellant comes within the ambit of CIS or not, the appellants were willing to refund the entire amount to the investors. Based on this concession made by the appellant the appeal was disposed of without going into the contention as to whether the scheme of the appellant was a CIS under the SEBI laws or not. We are of the view that since no liberty was taken from the Tribunal reserving its rights to question the veracity of the finding of the WTM on the business activity of the appellant as a CIS, it is no longer open to the appellant at this stage to question the findings of the WTM in its*

> *order dated 3rd December, 2015. Even otherwise, we find that in the present appeal only the impugned order dated 22nd February, 2019 passed by the WTM has been questioned. No prayer has been made by the appellant for quashing of the order dated 3rd December, 2015. Thus, it is no longer open to the appellant to question the findings of the WTM which held that the business activity of the appellant came under the ambit of a CIS. The contention raised by the appellant on this aspect is rejected."*

14. The AO has given a finding that the scheme was a CIS. This finding can be challenged by the appellants in the instant appeal even though the WTM order has become final. The AO after considering the material evidence on record held that the plots are tentative in nature and have not as yet been identified. Even the allocation of the plots have not been given. The plots have also not been demarcated nor has any specific plot been given to a buyer. Further, the agreement executed between the Company and the buyer stipulates that those "desirous to contribute and invest fund for future purchase of land" indicates that the motive was profit based. The AO also came to a conclusion that the compensation given to the buyers in the event the appellants failed to get a license from the appropriate authority was a camouflage for payment of profits. The AO after considering the material evidence held that the pre-booking of the plot classifies as a CIS and since no registration was

obtained under the SEBI Act and CIS Regulations, the scheme floated by the appellants was totally illegal.

15. The findings of the AO are given in paragraph 27, 28, 29 and 30 which are extracted here under:-

> *"27. In the light of the above observations, it is to be tested whether the alleged Scheme by the Company of 'pre-booking of plots' qualify as a CIS in terms of Section 11AA(2) of the SEBI Act.*
>
> *Condition 1 -The contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement.*
>
> *28. The customers of Adel are required to execute an application registration form and an agreement. It is noted that none of these initial documents mention the exact plot no. or the location where the plot would be allotted by Adel. These documents only mention the area (in sq. yd.). In view of the same, it can be concluded that Adel does not identify the plot at the time of accepting the money from the customers for the plots. Further, the agreement executed by Adel with the customer states that the money contributed by the customers is to be used by Adel for purchase/acquisition of land in its name or in the name of its associates. The land so acquired would be used by Adel for development of a residential colony in which the developed plots on/near Dwarka Expressway will be allotted to the customers within a period of 12 months with a grace period of 6 months. The Company has produced a G.O. of the Haryana Govt. to state that by payment of a penalty it could regularize the alleged pre-booking of plots. However, in the light of the fact that the agreement contemplates a 'compensation' which is also shown in the list claimed to show the*

repayments made by the Company, it is Noted that the contributions or payments made by the investors in the Scheme of the Company has been pooled and utilized for the purposes of the scheme/ arrangement. Therefore, the first condition stipulated under section 11AA(2)(i) of the SEBI Act is satisfied.

Condition 2 –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.

29. In this scheme referred above, I note that the Investors have the option to get a plot of land which will be purchased and developed by the Adel by pooling the amounts collected from the investors. It is noted from Clause 13 of the agreement dated December 18, 2011 (entered into by one Mr. Sandeep Dhingra who had invested Rs.85,36,000/-) that in case Adel fails to allot the plot to him within 18 months the customer shall be eligible to receive Rs.14,79, 240.00/-along with the refund of existing investment. Further, the Company has also stated that it in case it was not able to get license for the proposed project, it had to refund the amounts received along with compensation. I also note from the list claimed to be the details of repayment made by the Company to its investors that for a customer Arun Singh Khokhar, it is stated that Rs.40,17,000/- is the 'Received Amount'. Along with the compensation amount of Rs.12,65,355/-, the Company claims to have paid Rs.51,55,819/(after deducting TDS of Rs. 1,26,536/). Similar is the case for all 108 customers mentioned in the said list. Therefore, I note that the Company has solicited investments with a promise of refund of investment amount along with return in the nature of compensation. Hence, the second condition, which stipulates that the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income,

produce or property as stipulated in Section 11AA (2) (ii) of the SEBI Act is also satisfied.

Condition 3 -The property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors.

Condition 4: The investors do not have day to day control over the management and operation of the scheme or arrangement.

30. As noted in the preceding paragraphs, Adel agrees to allot a future plot to the investor upon execution of the "Agreement". However, at the time of execution of agreement, the land or its location is not identified. It is further noted that the said execution of the agreement shall not be construed as an agreement to sell. From this, it is clear that the investor is making contribution or investment in an unidentified land/unit. The allotment of such plot/land to the investor is at Adel's discretion. Till the time, the plot of land is actually transferred in the name of investor, by executing a sale deed; the land to be purchased and developed will remain in the control of Adel on behalf of such investor(s). As has been observed in the preceding paragraph, I note that Adel, collect monies from investors for the scheme of "Purchase and development of plot" without identifying the land/plot, indicating return in the form of compensation. Further, the investors do not have any say in choosing a particular property or in the further development of the property. This indicates that the investors do not, at any stage, manage the property, contribution or investment forming part of the 'Scheme' and the contribution or investment is managed and utilized by Adel on behalf of the investor. In view of the above, I note that the third and fourth conditions stipulated in Section 11AA(2)(iii) and (iv) of the SEBI Act are satisfied."

16. Before dealing as to whether the scheme is a CIS or not, it would be appropriate to consider a few provisions of the Act. For facility, the Sections 2(ba), Section 11AA(2) of the SEBI Act and Regulation 3, 73 and 74 of the CIS Regulations are extracted hereunder:-

SEBI Act, 1992:-

Section 2(ba) ―collective investment scheme‖ means any scheme or arrangement which satisfies the conditions specified in section 11AA;

"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.

CIS Regulations :

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

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

(a) has failed to make an application for registration to the Board; or

(b) has not been granted provisional registration by the Board; or

(c) having obtained provisional registration fails to comply with the provisions of regulation 71;

shall wind up the existing scheme.

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

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

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

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

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

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

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

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

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

"74. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in regulation 73."

17. The Supreme Court while considering the object for introducing Section 11AA, held as under:-

"36. The correctness of the submission can also be examined in a different angle, namely, what is the paramount purpose for which the SEBI Act, 1992 came to be enacted? The object of the main Act itself came to be considered by this Court in a recent decision reported in Sahara India Real Estate Corporation Ltd. (supra) wherein this Court has stated as under:-

> *"65. Parliament has also enacted the SEBI Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. The SEBI was established in the year 1988 to promote orderly and healthy growth of the securities market and for investors' protection. SEBI Act, Rules and Regulations also oblige the public companies to provide high degree of protection to the investor's rights and interests through adequate, accurate and authentic information and disclosure of information on a continuous basis."*
>
> *(emphasis added)*

> *The object for introducing Section 11AA which came to be inserted by Act 31 of 1999 w.e.f 22.02.2000 is to the following effect: "2. Recently many companies especially plantation companies have been raising capital from investors through schemes which are in the form of collective investment schemes. However, there is not an adequate regulatory framework to allow an orderly development of this market. In order that the interests of investors are protected, it has been decided that the Securities and Exchange Board of India would frame regulations with regard to collective investment schemes. It is, therefore, proposed to amend the definition of "securities" so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such schemes."*

18. While interpreting the provision of Section 11AA, the Supreme Court held:

> *"35. A reading of the said provision discloses that it talks of any scheme or arrangement, which would fall within the definition of a collective investment scheme. Section 2 (ba) under the definition clause states that a collective investment scheme would*

mean any scheme or arrangement, which satisfies the conditions specified in Section 11 AA.

Under sub-Section (2) of Section 11AA, it is stipulated that any scheme or arrangement made or offered by any company by which the contribution, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of scheme or arrangement; contributions or payments are made by the investors with a view to receive profits, income, produce or property, whether movable or immovable, based on the scheme or arrangement, any property, contribution or investment which forms part of the scheme or arrangement is identifiable or not is managed by someone on behalf of the investors shall be collective investment scheme. Further the investors should not have day to day control over the management and operation of the scheme or arrangement. A detailed analysis of sub-section (2) of Section 11AA, which defines a collective investment scheme disclose that it is not restricted to any particular commercial activity such as in a shop or any other commercial establishment or even agricultural operation or transportation or shipping or entertainment industry etc. The definition only seeks to ascertain and identify any scheme or arrangement, irrespective of the nature of business, which attracts investors to invest their funds at the instance of someone else who comes forward to promote such scheme or arrangement in any field and such scheme or arrangement provides for the various consequences to result there from. As a matter of fact the provision does not make any reference to agricultural or any other specific activity and, therefore, at the very outset it will have to be held that the submission based on Entry 18 of List II, while challenging the vires of Section 11AA, is wholly misconceived. The fallacy in the submission of the PGF Limited is that it proceeds on the footing as though the said provision, namely, Section 11AA was also intended to cover an activity relating to agriculture and its development and, therefore, the provision conflicts with Entry 18 of List II of the State List to be struck

down on that score. Inasmuch as the said Section 11AA seeks to cover, in general, any scheme or arrangement providing for certain consequences specified therein vis-`-vis the investors and the promoters, there is no question of testing the validity of Section 11AA in the anvil of Entry 18 of List II. The said submission made on behalf of the appellants is, therefore, liable to be rejected on that sole ground."

19. In ***NGHI Developers India Ltd. & Ors. vs. SEBI (Appeal No. 225 of 2012 decided on July 23, 2013)*** this Tribunal explained the provisions of Section 11AA and the object of introducing the said provisions is as under:-

"11. We have heard the counsel for both the parties at length and perused a copy of the appeal alongwith documents annexed thereto.

12. At the outset, we find it necessary to discuss the evolution of the law regarding CISs. In the 1990s, it came to the notice of the Government of India that a large number of corporates engaged in plantation activities were issuing bonds in the nature of agro and plantation bonds, while offering exponentially high rates of return which were considered abnormal in such transactions. A large portion of the funds collected were received from the public with the promoters putting in small amounts of their own money. In order to regulate such entities and their businesses, the Government issued a press release dated November 18, 1997 identifying schemes which would be treated as Collective Investment Schemes under the SEBI Act, 1992. SEBI was tasked with formulating regulations to govern CISs which would lead to furtherance of licit investment in the securities market.

13. With this goal, a committee was formed under the deft chairmanship of Dr. S. A. Dave by SEBI. The preliminary report and regulations were released by

SEBI to the public on December 31, 1998. Subsequently, a number of suggestions were received from investors and corporates alike, these were sifted through by the Dave Committee and the ones found to be appropriate for the transparent working of CISs were incorporated in the Final Report dated April 5, 1999. Thus, on the basis of the recommendations of the Dave Committee, Section 11AA was added to the SEBI Act and the CIS Regulations were framed. CIS Regulations were framed primarily for the protection of investors in the schemes launched by various entities seeking to dupe bonafide investors into putting their life savings at risk by promising high returns. CISs, although initially conceived in the context of agro and plantation industries, were not confined to the same and given a wider definition by the legislature in all its wisdom when the law was finally spelt out in terms of the definition of CIS as provided for in Section 11AA when introduced to the SEBI Act, 1992 on January 30, 1992. It is, therefore, safe to conclude that Section 11AA of the SEBI Act was brought into existence with the object of ensuring that no chinks remained in the proverbial armour worn by hapless investors who predominantly turn out to be people belonging to low and middle level income groups or retired senior citizens putting their life savings at risk with the hope of reaping huge profits.

15. We see from the provisions reproduced above that Section 11AA lays down the conditions which need to be satisfied before any scheme or arrangement launched by a particular company can be called a CIS, viz., the money collected from investors should be pooled and then utilized for the purposes of the scheme; the investors should have contributed their money with the objective of deriving profits in any form, whether "income, produce or property"; the entire working and operation of the scheme is managed by the concerned company on behalf of the investors; and the investors have no modicum of control over daily activities with respect to the arrangement in

question. Section 12(1B) succinctly provides that all persons intending to float any scheme or arrangement in the nature of a CIS, shall do so only after obtaining a certificate of registration from SEBI. Further, Regulation 3 of the CIS Regulations, states that only a Collective Investment Management Company shall sponsor CISs. Regulation 73 provides for the winding up of an existing scheme in certain cases viz., failure to make an application for registration to SEBI; refusal of SEBI to grant provisional registration; or failure to comply with the provisions of Regulation 71 once provisional registration is obtained from SEBI. Finally, Regulation 74 provides that in case a company carrying on business in the nature of a CIS does not wish to obtain provisional registration with the SEBI, it may devise a scheme of repayment of money collected from investors in accordance with the CIS Regulations."

20. The Supreme Court after analyzing the scheme held in ***PGF Limited vs Union of India and Ors., (2013) SC 3702*** as under:-

"51. A conspectus consideration of the scheme of development of the land purchased by the customers at the instance of the PGF Limited and the promised development under the agreement disclose that there was wholesale uncertainty in the transactions to the disadvantage of the investor' concerned. The above factors and the factors, which weighed with the Division Bench in this respect definitely disclose that PGF Limited under the guise of sale and development of agricultural land in units of 150 sq. yrds. i.e. 1350 sq. ft. and its multiples offered to develop the land by planting plant, trees etc., and thereby the customers were assured of a high amount of appreciation in the value of the land after its development and attracted by such anticipated appreciation in land value, which is nothing but a return to be acquired by the customers after making the purchase of the land based on the development

assured by the PGF Limited, part with their monies in the fond hope that such a promise would be fulfilled after successful development of the bits of land purchased by them."

"52. The above conclusion of ours can be culled out from the sample documents placed by the appellants before the Court. The appellants, however, failed to supply any material till date to demonstrate as to how and in what manner any of the lands said to have been sold to its customers were developed and thereby any of the customer was or would be benefited by such development. It is imperative that the transaction of the PGF Limited vis-a-vis its customers has necessarily to be examined as to its genuineness by subjecting itself to the statutory requirement of registration with the second respondent followed by its monitoring under the regulations framed by the second respondent. All the above factors disclose that the activity of sale and development of agricultural land propounded by the PGF Limited based on the terms contained in the application and the agreement signed by the customers is nothing but a scheme/arrangement. Apart from the sale consideration, which is hardly 1/3rd of the amount collected from the customers, the remaining 2/3rd is pooled by the PGF Limited for the so called development/improvement of the land sold in multiples of units to different customers. Such pooled funds and the units of lands are part of such scheme/arrangement under the guise of development of land. It is quite apparent that the customers who were attracted by such schemes/arrangement invested their monies by way of contribution with the fond hope that the various promises of the PGF Limited that the development of the land pooled together would entail high amount of profits in the sense that the value of developed land would get appreciated to an enormous extent and thereby the customer would be greatly benefited monetarily at the time of its sale at a later point of time. It is needless to state that as per the agreement between the customer and the PGF Limited, it is the responsibility of the PGF Limited to carry out the

developmental activity in the land and thereby the PGF Limited undertook to manage the scheme/arrangement on behalf of the customers. Having regard to the location of the lands sold in units to the customers, which are located in different states while the customers are stated to be from different parts of the country it is well-neigh possible for the customers to have day to day control over the management and operation of the scheme/arrangement. In these circumstances, the conclusion of the Division Bench in holding that the nature of activity of the PGF Limited under the guise of sale and development of agricultural land did fall under the definition of collective investment scheme under Section 2(ba) read along with Section 11AA of the SEBI Act was perfectly justified and hence, we do not find any flaw in the said conclusion."

21. In the light of the aforesaid decisions and the findings given by the AO and after considering the documentary evidence on record we find that there are two essential ingredients under Section 12AA(2) of the Act which needs consideration, namely, pooling of the resources and payments being made with a view to get profits/income. In the instant case, we find that buyers have pooled in the resources for purchase of a prospective plot in future. In the absence of any allotment orders being issued and in the absence of any demarcation of the plot in question there is uncertainty in the sale and purchase of land. This pooling of the resources thus indicates that the money pooled in for purchase of land in future and development is essentially for a speculative gain. The

agreement indicates high amount of compensation in the event of failure to obtain a license. We find that a buyer who has paid Rs. 93 lakh for a plot would get a compensation of Rs. 17,57,700/- in 18 months. This amount of compensation indicates a high rate of return. We are thus quite satisfied that use of the word in the instant case, namely, 'compensation' is nothing else but profits and indicate assured returns on the investment made by the buyer. Thus, this ingredient of pooling in resources and profits/income are writ large. We, therefore, approve the findings given by the AO indicating that all the ingredients under Section 12AA(2) exists and are satisfied.

22. In the light of the aforesaid, we are of the opinion that the appellants were not engaged in real estate project but were running a CIS. In the absence of obtaining a registration the collection of money through this scheme was wholly illegal. The AO was justified in proceeding against the appellants for violation of SEBI Act and CIS Regulations.

23. In the light of the aforesaid, the decisions cited by the appellants in the case of ***Puravankara Projects dated 03.06.2014 decided by SEBI and PACL India Ltd. vs UOI (2004) 49 SCL 250*** are distinguishable on facts and are not applicable in the instant case.

24. A sum of Rs. 25 lakh has been imposed upon the Company and the appellants as penalty to be paid jointly and severally. We are of the opinion that the penalty imposed in the instant case is arbitrary and excessive. No doubt, the appellants have violated the provisions of the SEBI Act and CIS Regulations but the violation does not appear to be intentional. Further, before this Tribunal while challenging the order of the WTM the appellants come forward that they would refund the amount, based on which details were supplied to SEBI and over a period of time the amount has been refunded along with appropriate compensation / interest. As late as on August 2019. The WTM directed the appellants to make a publication inviting claims from the buyers, if any. In the order it was also indicated that in the event there were no further complaints, the direction of SEBI would stand disposed of. It has come on record that certain claims were filed which was disposed of and SEBI was duly informed about it. As on date, there is nothing to indicate non-compliance of the directions of the WTM. In this light, while considering the quantum of penalty this factor ought to have been taken into consideration under Section 15J of the SEBI Act which has been brushed aside by the AO. Admittedly, Rs. 51 crore was collected from the buyers and more than Rs. 70

crore have been refunded. Considering the aforesaid, we are of the opinion that the quantum of penalty imposed is excessive. We are of the opinion that a notional penalty of Rs. 2 lakh should be paid by each of the directors.

25. In view of the aforesaid, the order of the AO with regard to the finding on the issue of CIS is affirmed and only the quantum of penalty is reduced from Rs. 25 lakh to Rs. 2 lakh each to be paid by the appellants individually. By our interim order dated September 22, 2020 we had directed the appellants to deposit 50% of the penalty amount. We have been informed that the amount has been deposited. In view of the aforesaid, the excess amount alongwith accrued interest, if any, shall be refunded by the respondent to appellants within two weeks from the date of this order.

26. In view of the aforesaid, the appeal is partly allowed. In the circumstances of the case, there shall be no order as to costs. All the Misc. Applications are accordingly disposed of, if not disposed.

27. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be

digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

TARUN AGARWAL

Digitally signed by TARUN AGARWAL
DN: c=IN, o=PUBLIC WORKS DEPARTMENT UTTAR PRADESH, postalCode=221505, st=Uttar Pradesh, 2.5.4.20=30fcf68685192bbc53e6ff1608a83fb3881de7ac2ab7954d509c85ed6e0f7c41, serialNumber=095f8b286bb0b1cd07ff676611f4f5e7999727d404aa38ca422f9d3529bdb8a3, cn=TARUN AGARWAL
Date: 2020.12.04 11:22:31 +05'30'

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

04.12.2020
msb