WTM/AB/EFD1/EFD1-DRA3/7492/2020-21

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER

Under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 read with Regulation 65 of the SEBI (Collective Investment Schemes) Regulations, 1999 – In respect of and in the matter of, Arohan Trustee Company Private Limited.

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1. The present proceedings have emanated from order dated March 22, 2016 passed by the Hon'ble Securities Appellate Tribunal, Mumbai (hereinafter referred to as "**Hon'ble SAT**") in Appeal No. 335 of 2015 filed by Arohan Trustee Company Private Limited (hereinafter referred to as "**Noticee**" / "**Arohan**") against the final order dated April 21, 2015 passed by Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") against Noticee, whereby Hon'ble SAT directed as under:

   "……. ….
   2. It is not in dispute that the impugned order is an ex-parte order. Moreover, this Tribunal in the case of Osian's Connoisseurs of Art Pvt. Ltd. vs. Securities and Exchange Board of India (Appeal No. 62 of 2013 decided on October 13, 2015) has considered the issues similar to the issues raised in the present appeal and remanded the matter on certain issues for reconsideration. On appeal, the Apex Court by its order dated January 15, 2016 has held that the appellant therein is entitled to raise all contentions before SEBI.

   3. In these circumstances, the order impugned in the appeal is quashed and set aside and matter is restored to the file of WTM of SEBI for passing fresh order on merits and in accordance with law. All contentions of both parties are kept open.

   4. Appeal is disposed of in the above terms with no order as to costs."

2. Osian's Connoisseurs of Art Pvt. Ltd. had filed a ***Civil Appeal No. 54 of 2016 – Osian's Connoisseurs of Art Pvt. Ltd. Vs, SEBI & Anr.*** before Hon'ble Supreme

Court of India impugning the order dated October 13, 2015 passed by Hon'ble SAT in ***Appeal No. 62 of 2013 - Osian's Connoisseurs of Art Pvt. Ltd. Vs. Securities and Exchange Board of India***. The said Civil Appeal was disposed of, at notice stage, by the Hon'ble Supreme Court vide its order dated January 15, 2016 directing that the appellant therein is entitled to raise all contentions before SEBI. Thereafter, SEBI filed an Interlocutory Application No. 2 of 2016 (IA) in the aforesaid disposed of Civil Appeal, before Hon'ble Supreme Court, praying for recalling of order dated January 15, 2016 passed by the Hon'ble Supreme Court in Civil Appeal No. 54 of 2016. Hon'ble Supreme Court vide its order dated November 17, 2016 allowed the IA filed by SEBI, recalled its order dated January 15, 2016 and restored the Civil Appeal No. 54 of 2016 to its original number. Thus, since the aforesaid order dated March 22, 2016 passed by the Hon'ble SAT in ***Appeal No. 335 of 2015 – Arohan Trustee Company Pvt. Ltd. Vs. SEBI*** was mainly passed on the basis of the order dated January 15, 2016 passed by the Hon'ble Supreme Court in Civil Appeal No. 54 of 2015, which was recalled by the Hon'ble Supreme Court vide its order dated November 17, 2016, therefore, the present proceedings, as directed vide order dated March 22, 2016 were kept in abeyance by the decision of the then competent authority, awaiting the decision of the Hon'ble Supreme Court in the Osian matter. However, subsequently, it was found that since the decision of the Hon'ble Supreme Court in Osian matter may take time and that the present matter may be decided in accordance with the provisions of law, therefore, the present proceedings can be concluded, as directed by Hon'ble SAT vide its order dated March 22, 2016. I observe that in the meanwhile vide order dated February 12, 2020, Civil Appeal No. 54 of 2016 – Osian's Connoisseurs of Art Pvt. Ltd. Vs, SEBI & Anr. was allowed to be withdrawn by the Hon'ble Supreme Court as per the prayer made by the Appellant therein and therefore, the order dated October 13, 2015 passed by the Hon'ble SAT in Osian's matter is final.

3. Before, dealing with the present proceedings on merits, it would be appropriate to understand the background, in which Appeal No. 335 of 2015 - Arohan Trustee

Company Private Limited Vs. SEBI wherein order dated March 22, 2016 was passed by the Hon'ble SAT, was filed, which is narrated in brief hereunder:

(i) Upon examining certain media reports and newspaper articles regarding the mobilization of funds from investors under the scheme of 'art fund', observed that one Arohan had solicited investments in the 'art fund', SEBI started its examination of the matter.

(ii) On examination of the scheme of Arohan, it was *prima facie* observed that the character of 'art fund' is similar to that of a 'collective investment scheme' (hereinafter referred to as "**CIS**") as defined under Section 11AA of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act**"). It was found that Arohan was carrying out such activities without obtaining a certificate of registration in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as "**CIS Regulations**").

(iii) Accordingly, a show cause notice (hereinafter referred to as "**SCN**") dated April 17, 2008 was issued to Arohan advising it to show cause as to why it should not register with SEBI as a Collective Investment Management Company and why appropriate directions under Sections 11 and 11B of the SEBI Act should not be issued against it for the alleged violations of the provisions of Section 12(1B) read with Regulation 3 of the CIS Regulations, in case of failure to do so. Subsequently, an Order dated April 21, 2015 was passed against Arohan, and the following directions were issued against it:

a. *Arohan Trustee Company Private Limited shall abstain from collecting any money from the investors or launch or carry out any Collective Investment Schemes including the scheme which have been identified as a Collective Investment Scheme in this Order.*

b. *Arohan Trustee Company Private Limited is restrained from accessing the securities market and are prohibited from buying, selling or otherwise dealing in securities market for a period of four (4) years.*
c. *Arohan Trustee Company Private Limited is directed to refund the entire monies collected by it under its scheme to all the investors along with an interest at the rate of 10% per annum (from the date of investment till the date of part refunds) within a period of three months from the date of this Order and thereafter, within a period of fifteen days, submit a winding up and repayment report to SEBI in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999, including the trail of funds claimed to be refunded, bank account statements indicating refund to the investors and receipt from the investors acknowledging such refunds.*
d. *Arohan Trustee Company Private Limited is also directed to immediately submit the complete and detailed inventory of the assets owned by Arohan Trustee Company Private Limited.*
e. *In the event of failure by Arohan Trustee Company Private Limited to comply with the above directions, the following actions shall follow:*
    i. *Arohan Trustee Company Private Limited shall remain restrained from accessing the securities market and would further be prohibited from buying, selling or otherwise dealing in securities, even after the period of four (4) years of restraint imposed in Paragraph 20 (b) above, till all the monies mobilized through such schemes are refunded to its investors with interest, which are due to them.*
    ii. *SEBI would make a reference to the State Government/ Local Police to register a civil/ criminal case against Arohan Trustee Company Private Limited, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and*
    iii. *SEBI would make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the company, Arohan Trustee Company Private Limited.*
    iv. *SEBI shall also initiate attachment and recovery proceedings under the SEBI Act and rules and regulations framed thereunder.*

(iv) Aggrieved by the aforesaid order dated April 21, 2015 passed by SEBI, Arohan preferred an Appeal No. 335 of 2015 before Hon'ble SAT which was disposed of the Hon'ble SAT vide its order dated March 22, 2016 with the directions as quoted in paragraph 1 above, of this order.

4. Accordingly, in terms of order dated March 22, 2016 passed by Hon'ble SAT, for passing fresh order on merits and in accordance with law, the matter is placed before me.

5. In order to comply with the principles of natural justice, an opportunity of personal hearing was granted to Arohan on November 20, 2019. Since, the hearing notice could not be served, newspaper publication of the notice was undertaken and published in the Times of India (English), Maharashtra Times (Marathi) and Nav Bharat (hindi) in Mumbai edition on November 12, 2019. In the meantime Noticee, vide its letter dated December 10, 2019 filed its reply to the show cause notice. Another opportunity was granted to the Noticee on January 10, 2020. However, the Noticee vide letter dated January 07, 2020 sought an adjournment. Thereafter, another opportunity was granted to it on January 28, 2020 for which the Noticee again sought an adjournment vide its email dated January 27, 2020. A final opportunity was granted to the Noticee on February 18, 2020. The advocates for the Noticee appeared and made submissions and sought time to final their written submissions. Subsequently, the Noticee vide letter dated March 16, 2020, filed its written submissions.

6. In its reply dated December 10, 2019 and written submissions dated March 16, 2020, Arohan has *inter alia* submitted as under:

    a. IAF was a private trust, with the main object of owning and operating an art fund. The persons known to the directors of Arohan and to the advisors of IAF, after inquiring into the prospects and risks involved, made contributions to the IAF.

b. The total corpus of IAF was Rs. 24,50,00,000/- (Rupees Twenty-four crores and fifty lakhs only). The total number of contributors was 94 and the initial tenure in the trust deed was 4 years, which was then extended to 5 years.

c. Section 11AA of the SEBI Act defines a CIS to mean any scheme or arrangement made or offered 'by any company'. Therefore, it was not applicable to a private trust like IAF.

d. No security/ any unit/ other instrument under a CIS as defined under the SEBI Act were issued to the beneficiaries of IAF.

e. The rights and obligations of Arohan and the contributors were governed by the provisions of Trust Deed which constitutes the contractual framework between the parties. Therefore, the provisions of the SEBI Act relating to the CIS Regulations were inapplicable to it.

f. IAF does not fall within the ambit of what constitutes a CIS. Section 11AA of the SEBI Act, at the relevant time when IAF was constituted required that only schemes formulated by companies need to register as CIS and not by "any person" is amended subsequently. This is also apparent from Regulation 3 and Regulation 9 of the CIS Regulations that provide eligibility conditions for grant of the CIS Certificate. Regulation 3 of the CIS Regulations requires that no person other than a Collective Investment Management Company (hereinafter referred to as "**CIMC**") which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme. Regulation 2(1)(h) of the CIS Regulations requires a CIS to be a registered by a company incorporated under the Companies Act, 1956. Regulation 9 of the CIS Regulations requires, firstly, that the applicant should be set up and registered as a "company" under the Companies Act, 1956; and secondly, it should have its Memorandum of Association specifying the managing of CIS as of its

main objects. It is apparent that IAF is not a CIS given that it is not a company under the Companies Act.

g. In any case, assuming whilst denying that the amended provisions of Section 11AA(2) of the SEBI Act are sought to be applied in the present case, the same have only been applied retrospectively since July 18, 2013. Since IAF was setup much prior to that, the amended provisions of Section 11AA(2) of the SEBI Act cannot be applied in the present case.

h. The CIS Regulations are aimed at schemes which involve the "public" and do not apply to schemes which operate only on a private placement as in the present case. SEBI does not regulate private contracts/relationships. There was no invitation by IAF to public inviting investment. The subscription to the scheme is undertaken on a private placement basis and circulated to a select group of investors through a Presentation Material which was privately circulated and not advertised / published in the public domain. It had in-principle complied with section 67(3) of the Companies Act, 1956 as the presentation material was strictly circulated to specific investors and eligible to be accepted only by such investors.

i. SEBI has failed to appreciate the legislative intention behind Section 11AA of the SEBI Act which is to regulate schemes and arrangement promoted only by plantation companies. The CIS Regulations have been framed on the basis of the Dave Committee Report. By its very nature, CIS Regulations were never intended to, and cannot, in its present form, cover specialized fund such as art funds.

j. The trust and the beneficiaries are governed by the provisions of the Trust Deed which constitutes the contractual framework between the parties. It is not intended that SEBI Act should apply to a private trust of this nature or govern the relationship between the trustee of such private trusts and the

beneficiaries thereof. Neither the SEBI Act nor the CIS Regulations are applicable in the present case and only the Trust Deed provisions are applicable.

k. SEBI Order dated April 15, 2013 in the matter of *Osians-Connoisseurs of Art Private Limited*, recognized the concerned art fund as CIS and accordingly, violations under section 12(1B) of the SEBI Act and Regulation 3 of the CIS Regulations. But the principle evolved in the above case cannot be applied in the present case as the facts and circumstances of the two cases differ. The offer in the present case was a private offer as compared to the public offer made in Osian's case.

l. IAF has disposed off all the 76 Works of Art from time to time and presently it does not hold any Work of Art at all. IAF has also made 6 distributions to the beneficiaries of IAF between June 2012 and October 2013. IAF has so far distributed all the proceeds of the sale and disposal of all the Works of Art ever held by IAF and distributed all the proceeds to the beneficiaries. IAF has no Works of Art remaining in stock, and no funds pending distribution to the beneficiaries.

m. The scheme was started in the year 2006 and the winding up report was filed with SEBI on January 31, 2014. In any case, it is submitted that at the time of operation of the scheme, the widely held interpretation i.e. CIS Regulation applied only to 'company' was adopted by the Noticee too. SEBI too was of that view since it did not hold otherwise after the personal hearing held on June 27, 2008 by the erstwhile WTM. It was only thereafter, that the SAT ruled on the scope of CIS Regulation and interpreted it in such way as to include the 'Trusts' as well in the Osians Connoisseurs case decided on October 13, 2015. However, way before the said interpretation, the IAF was wound up, way back in 2013-14). It is submitted that any enlarged interpretation of law needs to be applied prospectively in order to prevent

administrative chaos. In any case, even if applied retrospectively, there is no reason to visit penal consequences on an entity who had diligently interpreted common law as it existed on said date.

CONSIDERATION OF ISSUES AND FINDINGS:

7. I have considered the SCN dated April 17, 2008 along with its annexures and the replies and written submissions filed by the Noticee, the submissions made before me during the course of hearing and the material available on record. I note that the main allegation against the Noticee is that the schemes operated by it are in the nature of CIS and that the Noticee was offering such schemes without obtaining registration from SEBI in contravention of the provisions of Section 12(1B) of the SEBI Act and the Regulation 3 of the CIS Regulations. The question to be determined in the present proceedings is whether the scheme operated by the Noticee was in the nature of an unregistered CIS?

8. Before dealing with the issue, it would be appropriate to refer to the relevant provisions of law which are alleged to have been violated by the Noticee and relevant extract whereof is reproduced hereunder:

Relevant extract of provisions of SEBI Act, 1992 (at relevant time):

*"**11AA. Collective investment scheme:-***

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

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

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

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

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

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

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

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

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

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

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

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

(vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under section 620A of the Companies Act, 1956 (1 of 1956); (vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982 (40 of 1982);

(viii) under which contributions made are in the nature of subscription to a mutual fund; shall not be a collective investment scheme.]

Relevant extract of provisions of CIS Regulations:

"No Person Other than Collective Investment Management Company to Launch Scheme

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.*

Directions by the Board

65. *The Board may, in the interests of the securities market and the investors and without prejudice to its right to initiate action under this Chapter, including initiation of criminal prosecution under section 24 of the Act, give such directions as it deems fit in order to ensure effective observance of these regulations, including directions:*

(a) requiring the person concerned not to collect any money from investors or to launch any scheme;

(b) prohibiting the person concerned from disposing of any of the properties of the 182[collective investment scheme] acquired in violation of these regulations;

(c) requiring the person concerned to dispose of the assets of the scheme in a manner as may be specified in the directions;

(d) requiring the person concerned to refund any money or the assets to the concerned investors along with the requisite interest or otherwise, collected under the scheme;

(e) prohibiting the person concerned from operating in the capital market or from accessing the capital market for a specified period."

9. CIS has been defined under Section 11AA of SEBI Act. As per Section 11AA(1), any scheme or arrangement can be termed as CIS if it satisfies all the four conditions mentioned in Section 11AA(2) of the SEBI Act. In the following sub-paras, the scheme of Arohan has been examined to determine whether it satisfies the four conditions laid down in Section 11AA(2).

   (i) The first condition, as specified under Section 11AA (1)(i) of the SEBI Act, is that the contributions or payments made by the investors, by whatever name called, are pooled and utilised solely for the purposes of the scheme/ arrangement. Arohan in its letter dated July 08, 2008, had submitted that *'IAF primarily deals with buying and selling of objects of art through contributions made by a select and clearly identifiable group of beneficiaries*'. It further submitted that *'IAF is truly a trust formed for the benefit of persons who have an artistic interest and would like to pool their resources in the field of art*'. It is noted that Arohan has collected Rs. 24.50 Crore, from 94 investors, which as per the submission of Arohan, has been used for purchasing art works. It shows that Arohan pooled the money collected from the investors and utilized it for buying the Art works which was the purpose of the scheme floated by it. Thus,

I find that scheme of Arahon satisfies the first condition, as stipulated in Section 11AA(2)(i) of the SEBI Act.

(ii) The second condition, as specified under Section 11AA(2)(ii) of SEBI Act, is 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, whether movable or immovable from such scheme or arrangement. Arohan has submitted that the investors/ contributors who were interested in the field of art had made investments with it. In this regard, I note that Arohan has submitted that it had not issued and information memorandum/brochure, however, it had furnished copy of the presentation material to SEBI on September 11, 2014 by an email. The relevant parts of the said presentation material are as under:

"***Investment Strategy***
... ...
• 50% of the corpus will be in important works of established artists ... . These will assure reasonable appreciation and downside protection.
• 50% of the corpus will be in works of artists ... These buys could result in multi baggers.
...
Exit Strategy
...
• Exit will be timed when Art Experts believe the market for particular works is peaking.
...
... ...
Terms
... ...
• Profit sharing: 80:20 beyond 10% p.a.
... ..."

Further, I note that the 'Indenture of Trust' of Arohan clearly states the 'Hurdle Rate' as 8% per annum. From the above, I find that the investors/ contributors had made contribution/ payment with a view to receive the profits/ income/ property/ return on their investments that may accrue to them as applicable. Thus, scheme floated by Arohan satisfies the second condition as stipulated in Section 11AA(2)(ii) of the SEBI Act.

(iii) The third condition, as specified under Section 11AA (2)(iii) of SEBI Act, is that the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors. It is observed from the Indenture of Trust submitted by Arohan that it is the Trustee with the recommendations of the Expert Panel that will take decisions relating to holding or dealing in Art and that the Trustee has the power to take whatever decision it deems fit in the best interests of the Trust. Further, from the powers of the Trustee laid down in the Indenture of Trust and the clauses thereof, it is apparent that the investor did not manage his investments in the scheme and the same were managed by Arohan. In view of this, I find that the works of art were not managed by the investors and the same were managed by the Arohan on behalf of the investors. Thus, scheme floated by the Arohan satisfies the third condition as stipulated in Section 11AA(2)(iii) of the SEBI Act.

(iv) The fourth condition, as specified under Section 11AA(2)(iv), is that investors do not have day to day control over the management and operation of the scheme or arrangement. As noted in the above para, it is evident from the Indenture of Trusts that it is the Trustee who was in control and that the investors never had any day to day control over the management and operation of the scheme. I note that clause 17(h) of the Indenture of Trust, states that "*the decisions taken and acts done by the Trustee in all matters arising under these presents and taken and done either in the exercise of the discretion vested in the Trustee or otherwise shall not be liable to be called into question or challenged in any manner whatsoever*." suggests that the investors did not have day to day control over the management and operation of the scheme. In this regard, Arohan has submitted that under clause 27 of the Indenture of Trust, the beneficiaries had a right to remove the trustee and appoint another suitable sole corporate trustee. That it was mandatory for the trustee to provide annual statement of account of IAF and annual statement showing the indicative value of the Art and an annual statement of the trustee regarding the state of affairs of IAF and its business along with a report of the Experts. Further, that a copy

of the audited annual accounts of IAF on demand in writing was also required to be provided to the beneficiaries. On the basis of all these factors, Arohan has contended that the contributories had some control over the management and operation of IAF. I note that all these factors merely try to ensure transparency and fair dealing in the operations of the scheme by Arohan on behalf of investors which might have been incorporated to lend credence to the scheme of Arohan. These factors do not confer any positive or effective control, over day to day management and operation of the scheme, on the investors. Therefore, the contention raised by Arohan in this regard is untenable. Thus, scheme floated by Arohan satisfies the fourth condition as stipulated in Section 11AA(2)(iv) of the SEBI Act.

10. Arohan has contended that Section 11AA of the SEBI Act deals with any scheme or arrangement offered by "any company" and not by any "private trust" like IAF. In this regard, I note that applicability of Section 11AA of the SEBI Act to "private trusts" is no more *res integra*. Hon'ble Supreme Court in its judgment dated February 12, 2020 in the matter of ***Civil Appeal No. 19936 of 2017 - Pravin Gandhi Vs. SEBI*** relating to schemes of Yatra Art Fund Pvt. Ltd. (hereinafter referred to as "**Yatra matter**") held as under:

"……..Based on the aforesaid, Shri Vishwanathan argued that it would not be possible for him to fall foul of the law considering that Section 11AA uses the word "company" and not "person", and as his client carried on this business in the form of a Trust, the provisions of SEBI Act would not be attracted at all.

This argument would fly in the face of both Section 12(1B) and the CIS Regulations, in particular, Regulation 2(h), which defined a "Collective Investment Management Company" as follows:

> *"(h) "Collective Investment Management Company" means a company incorporated under the Companies Act, 1956 and registered with the Board under*

these regulations, whose object is to organise, operate and manage a collective investment scheme;"

Regulation 3 of the CIS Regulations states:

"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."

The statutory scheme, therefore, is that, if a collective investment scheme, as defined, is to be floated by a person, it could only be done in the form of a collective investment management company and in no other form. This is the reason why Section 11AA uses the expression "company" in sub-Section (2) and not the word "person" (as the CIS Regulations of 1999 had come into force on 15.10.1999; Section 11AA being enacted and coming into force on 22.02.2000).

Once the statutory scheme becomes clear, it is clear that the collective investment scheme that was being carried on by the appellants in the form of a private Trust would be in the teeth of the Statute read with the CIS Regulations and would thus be illegal……."

11. Similarly, Hon'ble SAT in its order passed in the Osian matter (*supra)* observed as under:

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

13. Appellants however contend that since Section 11AA(2) begins with the words "any scheme or arrangement made or offered by any company", it must be held that the expression "Collective Investment Scheme" defined under Section 11AA(1) is restricted

only to a scheme or arrangement made or offered by any company which satisfy the conditions set out under Section 11AA(2). It is contended that in the present case the scheme is floated on behalf of a Trust and not by a company and therefore the scheme in question falls outside the purview of SEBI Act. There is no merit in the above contention because, as noted earlier, the expression 'Collective Investment Scheme' defined under Section 11AA(1) is wide enough to cover any scheme or arrangement made or offered by any entity and is not restricted to any scheme or arrangement made or offered by any company. The words 'any scheme' under Section 11AA(1) is wide enough to cover any scheme made or offered by any entity. Since SEBI is empowered under the SEBI Act to regulate CIS made or offered by any entity and SEBI has framed CIS Regulations in the year 1999 and in the said regulations it is provided that no person other than a collective investment management company which has obtained a certificate under CIS Regulations shall carry on CIS, Section 11AA inserted to SEBI Act with effect from 22.02.2000 reiterates that any scheme or arrangement made or offered by any entity which satisfies the conditions set out under Section 11AA(2) would be CIS, however, only a collective investment management company which satisfies the conditions set out under Section 11AA(2) shall be eligible to obtain registration from SEBI for operating CIS."

12. In addition to the law laid down by the Hon'ble Supreme Court in Yatra matter (*supra*), I find that Section 11AA (3) of the SEBI Act provides that certain schemes and arrangement shall not be considered as CIS as provided under Section 11AA (2). Section 11AA (3) enlists *inter alia* schemes or arrangements by cooperative societies, mutual funds, various pension schemes framed under Employees Provident Fund and Miscellaneous Provisions Act, 1952 and schemes falling with in the chit business as defined in Section 2(d) of the Chit Funds Act, 1982. It shows that definition given under Section 11AA(2) covered all these schemes also which are not floated by companies or by companies only and therefore, the legislature specifically carved out exception for such schemes. If the contention of Arohan that Section 11AA(2) applies only to schemes and arrangements by companies only then there was no need for specifically excluding the aforesaid schemes from the purview of Section 11AA(2). Thus, legislative scheme of Section 11AA of SEBI Act and the law laid down by the Hon'ble Supreme Court makes it clear that the provisions of Section 11AA of the SEBI Act

applies to private trusts also and the contention raised by Arohan in this regard is misplaced.

13. The Arohan has further contended that contribution to its IAF were made by the persons known to the directors of Arohan or to the advisors of IAF. I note that framework of regulation of CIS as laid down under the SEBI Act and the CIS Regulations applies irrespective of the fact that whether the contribution to the schemes are made by persons known to the sponsor of the CIS or by the public at large. Therefore, the contention raised by Arohan in this regard is untenable.

14. Arohan has further contended that no security/ any unit/ other instrument under a CIS as defined under the SEBI Act were issued to the beneficiaries of IAF. In this regard, I note that similar contention was raised before the Hon'ble SAT by the appellant in ***Appeal No. 252 of 2012 – NGHI Developers Pvt. Ltd. Vs. SEBI***, who was found to be running unregistered CIS by SEBI. Hon'ble SAT while dealing with said contention, in its order dated July 23, 2013 observed as under:

> *"……20. Next, the Appellants contend that PGF Ltd. had issued unit certificates which have not been issued by the Appellants in the present case. In this connection it is pertinent to reproduce Regulation 2(dd) of the CIS Regulations which defines the word "unit":-*
>
> *"2(dd)). "unit" includes any instrument issued under a scheme, by whatever name called, denoting the value of the subscription of a unit holder"*
>
> *21. On a perusal of the above mentioned provision, it seems clear to us that all other investments such as the agreements and allotment letters alongwith the registration letters issued under the scheme would be covered under the expression "units" under Regulation 2(dd) of the CIS Regulations. Moreover, the non-issuance of unit certificates claimed by the Appellants cannot take the business of the Appellants outside the purview of the concept of CIS. The CIS Regulations lay down certain conditions to be adhered to by companies floating CISs, one of which is Regulation 32 which provides that the company in question*

> *ought to issue unit certificates at the earliest. The failure to do so without in the first place seeking registration with SEBI cannot by any stretch of the imagination be considered a valid reason to bring the schemes launched by the Appellants out of the scope of CISs. If this ludicrous submission of the Appellants were to be given any credibility, it would lead to the absurd consequence of companies being able to hoodwink the law governing CIS by not following the provisions enshrined in the SEBI Act and the CIS Regulations……"*

I note that in the present case also Arohan was running a CIS without taking registration from SEBI as required under the provisions of SEBI Act and CIS Regulations and as such it did not comply with applicable provision of law including Regulation 32 of CIS Regulations which requires issue of unit certificates to investors. Now Arohan can not plead that since it did not issue any unit certificate which was a requirement under the CIS Regulations, therefore, its scheme was not CIS. I note that the aforesaid observations made by the Hon'ble SAT in NGHI case (Supra) applies to the contention raised by Arohan in this regard in the present case and hence, the contention raised by Arohan is untenable.

15. Arohan has further contended that in any case, assuming whilst denying that the amended provisions of Section 11AA(2) of the SEBI Act (whereby words "any company" were replaced with the words "any person") are sought to be applied in the present case, the same have only been applied retrospectively since July 18, 2013. Since, IAF was setup much prior to that, the amended provisions of Section 11AA(2) of the SEBI Act cannot be applied in the present case. In this regard, as discussed in paragraphs 11 to 13 above, I find that even the un-amended provision of Section 11AA of the SEBI Act applied to any scheme or arrangement floated by "any person". The amendment to Section 11AA (2) of the SEBI Act in this regard which has been made effective from July 18, 2013 merely made explicit what was already implicit in the provision. Therefore, I find that contention of Arohan in this regard is misplaced and hence, untenable.

16. Arohan has also submitted that the CIS Regulations are aimed at schemes which involve the "public" and do not apply to schemes which operate only on a private placement as in the present case. SEBI does not regulate private contracts/relationships. That there was no invitation by IAF to public inviting investment. That the subscription to the scheme was undertaken on a private placement basis and circulated to a select group of investors through a Presentation Material which was privately circulated and not advertised / published in the public domain. Further, that it had in-principle complied with Section 67(3) of the Companies Act, 1956 as the presentation material was strictly circulated to specific investors and eligible to be accepted only by such investors. In this regard, I note that similar contention was raised before Hon'ble SAT in the Osian matter (Supra) and Hon'ble SAT while dealing with the said contention in its order dated October 13, 2015, observed as under:

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

17. In this regard, I note that Section 67 of the Companies Act, 1956 applies in case of offer or invitation of shares and debentures only and accordingly, the concept of

private placement as provided under Section 67(3) is not applicable in case offer or invitation by CIS. Even if only principle regarding private placement from Section 67 is applied to the present case, then also in view of the aforesaid observation by Hon'ble SAT in Osian's matter (Supra), I find the submissions of Arohan that it was a private placement to be untenable as it is noted that Arohan admittedly had a total number of 94 contributors.

18. Arohan further contended that SEBI has failed to appreciate the legislative intention behind Section 11AA of the SEBI Act which is to regulate schemes and arrangement promoted only by plantation companies. That the CIS Regulations have been framed on the basis of the Dave Committee Report and by its very nature, CIS Regulations were never intended to, and cannot, in its present form, cover specialized fund such as art funds. In this regard, I note that while dealing with the similar contention raised before it in the Osian matter (Supra), Hon'ble SAT in its order dated October 13, 2015 observed as under:

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

19. In view of the aforesaid observations of Hon'ble SAT with which I concur, I find the contention of Arohan, that the legislative intention behind Section 11AA of the SEBI Act was to regulate schemes and arrangement promoted only by plantation companies, as misplaced and hence, untenable.

20. Arohan has also submitted that the trust and the beneficiaries are governed by the provisions of the Trust Deed which constitutes the contractual framework between the parties. That it is not intended that SEBI Act should apply to a private trust of this nature or govern the relationship between the trustee of such private trusts and the

beneficiaries thereof. Neither the SEBI Act nor the CIS Regulations are applicable in the present case and only the Trust Deed provisions are applicable. In this regard, I note that similar contention was also raised before Hon'ble SAT in Osian matter (Supra) and Hon'ble SAT while dealing with the said contention, in its order dated October 13, 2015, observed as under:

> "…….*24. Argument of the appellant that the Art Fund is launched by the appellant for and on behalf of the Trust which is governed by the provisions contained under the Indian Trusts Act, 1982 and therefore, neither the SEBI Act nor the CIS Regulations authorize SEBI to regulate the functioning of the private Trust is also without any merit. Section 11(1)/11(3)/11(4) and Section 32 of the SEBI Act unequivocally provide that notwithstanding anything contained in any other law for the time being in force, SEBI would have same powers as are vested in Civil Court in relation to the matters set out therein and in the interests of investors in securities market SEBI is empowered to take such measures as it deems fit. In the present case, appellant has collected money from the investors under a scheme floated on behalf of the Trust with a view to invest the pooled amount in art works and thereafter on sale of the said art works distribute the profits to the investors. In such a case, decision of SEBI in holding that the appellant was running CIS without obtaining registration from SEBI cannot be faulted*……..."

21. In view of the above observations of Hon'ble SAT with which I agree, I find the submissions of Arohan that the SEBI Act or the CIS Regulations are not applicable in the present case and only the Trust Deed provisions are applicable as untenable. I further find that Trust Deed is also an agreement between the author/settlor of the trust and trustees which agrees to discharge obligation imposed on them by trust. If a trust deed contains certain activities which are governed by the provisions of other law (in the present case, SEBI Act and CIS Regulations) then settlor and trustees are required to comply with the provisions of other laws and it is not open for such persons to contend that since the trust is governed by the Trust Deed and the Trust Act, therefore, the provisions of other laws shall not apply. Therefore, I find that the contention raised by Arohan in this regard is misplaced and hence, untenable.

22. I note that Arohan has also contended that the principles evolved in the Osian's matter (Supra) cannot be applied in the present case as the facts and circumstances of the two cases differ. In this regard, I note that order by Hon'ble SAT in Osian's matter (Supra) was rendered in the context of unregistered CIS scheme which involved collecting money from the investors for investing the same in the Art works. In the present case also, Arohan was running an unregistered CIS scheme which involved collecting money from the investors for investing the same in the Art works. The legal contentions made by Arohan in the present case are the similar which were raised before Hon'ble SAT in Osian matter (Supra). Therefore, the observations/findings of Hon'ble SAT on such pure legal contentions have persuasive value. Accordingly, contentions like Section 11AA of the SEBI Act applies only to schemes arrangement launched by "any company" and not by "trust", Arohan has not issued any unit to its investors and hence not CIS, Section 11AA of the SEBI Act is not applicable where contributions were made by the selected persons and not by public at large, schemes floated by a trust are governed only by the Trust Deed and the Indian Trust Act and not by the provisions of the SEBI Act and the CIS Regulations, Section 11AA of the SEBI Act is meant to deal with plantation schemes only, have been dealt in the foregoing paras of this order. As far as factual merits of the case are the present case are concerned, same have been duly examined in paragraph 9 above, in the light of four conditions laid in Section 11AA(2) of the SEBI Act. Therefore, the contention of the Arohan in this regard is misplaced and hence, untenable.

23. The Noticee has further submitted that the scheme was started in the year 2006 and the winding up report was filed with SEBI on January 31, 2014. That IAF has disposed off all the 76 Works of Art from time to time and presently it does not hold any Work of Art at all. IAF has also made 6 distributions to the beneficiaries of IAF between June 2012 and October 2013 and has no funds pending distribution to the beneficiaries. In any case, that at the time of operation of the scheme, the widely held interpretation i.e. CIS Regulation applied only to 'company' was adopted by the Noticee too. That even SEBI was of that view since it did not hold otherwise after the personal hearing held on June 27, 2008 by the erstwhile WTM. It was only thereafter, that the SAT ruled

on the scope of CIS Regulation and interpreted it in such way as to include the 'Trusts' as well in the Osians matter (Supra). However, way before the said interpretation, the IAF was wound up, way back in 2013-14. It is submitted that any enlarged interpretation of law needs to be applied prospectively in order to prevent administrative chaos. In any case, even if applied retrospectively, there is no reason to visit penal consequences on an entity who had diligently interpreted common law as it existed on said date.

24. In this regard, as already discussed, I note that provisions of SEBI Act and CIS Regulations, even prior to amendment of Section 11AA of SEBI Act which came into force from July 18, 2013 covered all schemes and arrangement launched by any person. Therefore, I find that in the present case, there is no retrospective operation of amended Section 11AA of SEBI Act, as sought to be canvassed by Arohan. In respect of the contention of Arohan that SEBI itself was not sure about the applicability of Section 11AA of SEBI Act to the schemes of Art Funds and because of this reason after giving the hearing on June 27, 2008, SEBI did not pass order till the passing of order in Osian matter (Supra) by Hon'ble SAT, I note that in the present matter, SCN was issued by SEBI to Arohan on April 17, 2008. Arohan vide its letter dated May 07, 2008, submitted its reply to the said SCN. An opportunity of personal hearing was granted to Arohan on June 27, 2008, before the then Whole Time Member. Pursuant to the personal hearing, Arohan submitted its written submission vide its letter dated July 08, 2008. Thereafter, due to change in the Competent Authority, another opportunity of personal hearing was afforded to Arohan on September 24, 2013 when *inter alia* Arohan submitted that the fund was for five years and the same has been closed in the year 2011. It was also submitted that all the contributors of the fund have been repaid. Considering such submission, Arohan was asked to submit the documents/ information to show that the money collected in the scheme has been repaid. The noticee was also advised to submit the documents relating to the winding up of the scheme filed with other authorities. Arohan vide its letter dated November 08, 2013, submitted a certificate from the Chartered Accountant (AM Bhatkal & Associates) dated November 07, 2013, stating that the fund had only acquired works

of art and such expenditure of resources was effected between 2006 and 2008. The certificate also stated that the fund has disposed off all the 76 works of art as on September 30, 2013 and it did not hold any work of art at all. The trust had distributed all the proceeds of the sale and disposed off all the works of art ever held by the fund and distributed all the proceeds to the beneficiaries. It had further stated that the fund had distributed the money to the beneficiaries in six parts between June 2012 and October 01, 2013 and as on the date of the certificate it had no works of art remaining in stock and no funds were pending distribution to the beneficiaries. As details submitted by Arohan were not complete, a reminder email was issued to it on November 18, 2013. In reply to such email Arohan vide email dated November 24, 2013, submitted that it was still working on the details as asked and requested for more time. Vide email dated December 07, 2013, Arohan submitted certain additional details. The details so filed were also found incomplete and an intimation regarding this was given to Arohan on December 11, 2013. As the details were not forthcoming from Arohan, a reminder letter was issued to Arohan on January 02, 2014, asking for the certified Winding up and Repayment Report and the following information regarding the schemes of 'India Art Funds':

a. details including bank details to show how much funds were collected and the source of such funds,
b. details including bank details to show how much funds were repaid and to whom along with proof for such repayments to investors,
c. Details as to movement of NAV of the fund, the process of valuation and by whom such valuation, if any, was done,
d. Details of investor complaints/ court matters, if any, and
e. Financial statements for the period from the year, the fund/ schemes was/ were initiated/commenced till the period of closure.

25. Arohan vide its letter dated February 01, 2014, submitted audited 'Winding up and Repayment Report' dated January 31, 2014. Vide another letter dated February 11, 2014, Arohan submitted further details like how much funds were collected and the

source of such funds, how much funds were repaid and to whom along with proof of payments, movement of NAV, investor complaints and financial statements, which were taken on record. SEBI vide its letter dated September 04, 2014, asked Arohan to submit the clarification/documents with regard to the following:

a. discrepancy regarding the number of investors as mentioned in the letter dated July 08, 2008 and the number of investors as mentioned in the 'Winding up and Repayment Report'.
b. Management fees calculation process and the workings of calculation of NAVs at different points of time.
c. Copy of the Confidential Information Memorandum circulated to the investors.
d. Indenture of Trust related to India Art Fund.

26. Arohan vide its email dated September 11, 2014 and letter dated September 22, 2014 submitted the clarification regarding the number of investors, it was confirmed that all the contributions were received by cheque and there was no Information Memorandum in respect of the fund. Arohan submitted the presentation material used for the discussions and which was said to be strictly for the 'private circulation' and the Indenture of Trust. As considerable time had elapsed from the date of earlier hearing, one more opportunity of personal hearing was granted to Arohan on January 15, 2015. On the date of personal hearing, Arohan failed to appear. Before proceeding further, in compliance with the principles of natural justice one more opportunity of personal hearing was granted to Arohan on February 18, 2015. However, the letter communicating the date of hearing was returned undelivered. As sufficient opportunities of personal hearing and filing of the submissions have already been granted to Arohan, SEBI passed an order dated April 21, 2015 whereas the Hon'ble SAT order in the Osian matter is dated October 13, 2015. Therefore, the contention of the Arohan that there was ambiguity in the law or in the understanding of SEBI regarding unregistered CIS in the form of Art Funds and the same got cleared after order dated October 13, 2015 is passed by Hon'ble SAT, is misplaced and not tenable.

27. Arohan has further submitted that IAF has disposed off all the Works of Art and has made 6 distributions to the beneficiaries between June 2012 and October 2013. Further, that there are no funds pending distribution to the beneficiaries and there are no complaints/claims against IAF. In view of this, Arohan has submitted that there is no need to issue any direction for refund. In this regard, I note that same contentions were earlier also raised by the Arohan after which SEBI order dated April 21, 2015 came to be passed which was set aside by the Hon'ble SAT vide its order dated October 13, 2015, only in view of the order dated January 15, 2016 passed by the Hon'ble Supreme Court in Civil Appeal No. 54 of 2016 in Osian matter (Supra) and remanded the matter to SEBI for deciding the matter afresh. I note that in the present remanded proceedings also, Arohan has reiterated the previous submissions made in this regard by it before SEBI. In this regard, I note that Hon'ble Supreme Court in its judgment and order dated February 12, 2020 rendered in the Yatra matter (Supra) while dealing with a case of Art Fund wherein SEBI vide its order dated November 06, 2015 had directed to refund the entire monies collected by Yatra Art Fund under its scheme to all the investors along with the returns at the rate of 10% per annum and an appeal against the said SEBI order was disposed of by the Hon'ble SAT in terms of order passed by it in the Osian matter (Supra), held as under:

"…….. However, we find that this litigation has been going on for an extremely long period of time and instead of remanding the matter to SEBI to decide the refund issue afresh, we order as follows:

The principal amount repayable to each investor of both the Schemes shall be paid back within a period of six months from today in the following manner:

We are informed that so far as the first Fund is concerned, 81.32 per cent of the total principal sum of Rs.10.95 crores has been repaid.

Insofar as Fund No. 2 is concerned, we have been informed that 50 per cent of the principal amount of Rs.21.92 crores has been repaid.

The balance owing to the 50 investors of Fund No. 1 and to the 132 investors of Fund No. 2 be therefore, repaid within six months from the date of this judgment.

So far as the interest at the rate of 10 per cent is concerned, this amount will be paid on the principal outstanding amount from the date on which it becomes due to each such member, till the date on which each Fund came to an end, i.e., insofar as Fund No. 1 is concerned till 15.09.2011 and so far as Fund No. 2 is concerned till 31.01.2012. The aforesaid interest shall be paid within nine months from the date of this judgment.

Once the amounts are actually paid within the time period specified, compliance report be filed with SEBI in this behalf……..”

28. From the documents submitted by Arohan, it is revealed that out of the total amount of Rs. 24.50 Crore collected by Arohan from the 94 investors only an amount of Rs. 8.43 Crore has been refunded to the investors. Thus, Arohan must return the amounts, in accordance with principle underlying the aforesaid directions issued by the Hon’ble Supreme Court in Yatra matter (Supra).

29. In view of the aforesaid discussions, I find that the scheme of Arohan was in the nature of a CIS as all the four conditions stipulated under Section 11AA (2) of the SEBI Act are satisfied. I, therefore, find that Arohan was engaged in the fund mobilising activity from the public by floating/ sponsoring/ launching CIS as defined in Section 11AA of the SEBI Act without taking registration from SEBI as required under Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations and that directions under Section 11 and 11B of the SEBI Act read with Regulation 65 of CIS Regulations are warranted in the present case.

DIRECTIONS:

30. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11 and 11B read with Section 19 of the Securities and Exchange Board of India Act,

1992 and Regulation 65 of the SEBI (Collective Investment Scheme) Regulation, 1999, hereby issue the following directions:

a. Arohan Trustee Company Private Limited shall refund the balance of the amount collected form the investors in its Indian Art Fund Scheme. Arohan Trustee Company Private Limited shall also pay on the total principal amount collected from each investor, an interest at the rate of 10% per annum, from the date when amount to such investors first became due and till the date of closure of its scheme. The aforesaid balance amount collected shall be refunded within a period of Six months from the date of this order and the aforesaid interest on total amount collected shall be paid within a period of Nine months from the date of coming into force of this order.

b. Arohan Trustee Company Private Limited shall file a winding up and repayment report to SEBI in the format provided under SEBI (Collective Investment Schemes) Regulations, 1999, alongwith the trail of funds claimed to be refunded, bank account statements indicating refund to the investors and receipt from the investors acknowledging such refunds, within a period of fifteen days after the expiry of aforesaid Six months and Nine months period, respectively, as referred in para 30(a) above.

c. Arohan Trustee Company Private Limited is restrained from accessing the securities market and are prohibited from buying, selling or otherwise dealing in securities market for a period of four (4) years or till the payment of amounts as directed in para 30(a) above whichever is later.

d. Arohan Trustee Company Private Limited shall not launch any Collective Investment Scheme or any activity in the securities market without obtaining a certificate of registration from SEBI as required under the securities laws after the expiry of period of debarment as mentioned above.

e. SEBI, on failure of Trustee Company Private Limited, to effect the refunds as directed in the para 30(a) and (b) above within the period provided thereunder, shall recover such amounts, in accordance with Section 28A of the SEBI Act.

31. This order shall come into force with immediate effect. However, in view of the exceptional circumstances emerging due to the outbreak of a COVID-19 and consequential lockdown in the country, the direction given in paragraph 30 (a) shall come into force on May 01, 2020.

32. A copy of this order shall also be sent to the Noticee, recognised Stock Exchanges, the relevant banks, Depositories and Registrar and Transfer Agents of Mutual Funds to ensure that the directions given above are strictly complied with.

Sd/-

Place: Mumbai **ANANTA BARUA**

Date: April 13, 2020 **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA