BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of hearing : 08.03.2017
Date of Decision : 12.05.2017

Misc. Application No. 251 of 2016
And
Misc. Application No. 276 of 2016
And
Misc. Application No. 312 of 2016
And
Misc. Application No. 335 of 2016
And
Appeal No. 52 of 2016

Pancard Clubs Ltd.
111/113, Kalyandas Udyog Bhawan,
Near Century Bhavan, Prabhadevi,
Mumbai – 400 025. ….. Appellant

Versus

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

Mr. Pradeep Sancheti, Senior Advocate with Mr. Aayush Singhvi, Ms. Nikita Panhalkar, Advocates i/b Vaish Associates for the Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Vivek Rana, Advocates i/b K. Ashar & Co. for the Respondent.

Mr. Rabindra Hazari, Advocate with Mr. Niket Mehta, Advocate for the Interveners. (for Misc. Application Nos. 251, 276 and 312, 335 of 2016).

With
Appeal No. 53 of 2016

1. Mr. Sudhir Shankar Moravekar
2. Ms. Shobha Ratnakar Barde
3. Ms. Usha Arun Tari
4. Mr. Manish Kalidas Gandhi
5. Mr. Chandrasen Ganpatrao Bhise
6. Mr. Ramachandran Ramakrishnan

111/113, Kalyandas Udyog Bhawan,
Near Century Bhavan, Prabhadevi,
Mumbai – 400 025. ….. Appellants

Versus

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

Mr. Pradeep Sancheti, Senior Advocate with Mr. Aayush Singhvi, Ms. Nikita Panhalkar, Advocates i/b Vaish Associates for the Appellants.
Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Vivek Rana, Advocates i/b K. Ashar & Co. for the Respondent.

With
Appeal No. 51 of 2017

Pancard Clubs Ltd.
111/113, Kalyandas Udyog Bhawan,
Near Century Bhavan, Prabhadevi,
Mumbai – 400 025. ….. Appellant

Versus

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

Mr. Pradeep Sancheti, Senior Advocate with Mr. Aayush Singhvi, Ms. Nikita Panhalkar, Advocates i/b Vaish Associates for the Appellant.
Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Saurabh Bachhawat, Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent

CORAM : Justice J. P. Devadhar, Presiding Officer
Jog Singh, Member
Dr. C. K. G. Nair, Member

Per : Jog Singh

1. Since common question of law and fact are involved in all these appeals, as such, with the consent of the parties, have been heard together and are being disposed of by this common order. For the sake of convenience, Pancard Clubs Ltd. i.e. Appeal No. 52 of 2016 is taken as the lead case.

2. Pancard Clubs Limited ('**Appellant**'), a group company of the Panoramic Group of companies, is an unlisted public company, which is engaged in the business of owning, developing and operating hotels, clubs and resorts across India and offering different holiday options and six of its directors, namely, Mr. Sudhir Shankar Moravekar, Ms. Shobha Ratnakar Barde, Ms. Usha Arun Tari, Mr. Manish Kalidas Gandhi, Mr. Chandrasen Ganpatrao Bhise, Mr. Ramachandran Ramakrishnan, (collectively referred to as the '**Appellants**'), have approached this Tribunal against the order dated February 29, 2016 ('**Impugned Order**') passed by Securities and Exchange Board of India ('**SEBI**') directing the Appellants to *inter-alia*, refund the monies to the tune of ₹ 7,035 crore, collected from the investors within three months from the passing of the impugned order, and further directing the Appellants to wind up the Collective Investment Scheme ('**CIS**') operated by them under the guise of a time sharing business under Section 11(1), 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 ('SEBI Act') read with Regulation 65 of the SEBI (Collective Investment Schemes) Regulations, 1999 ('**CIS Regulations**') mainly for violating Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations.

3. Briefly stated, the facts of the case are that the Respondent had passed an ex-parte interim order dated July 31, 2014 alleging that the schemes launched and operated by the Appellants were in the nature of CIS as per Section 11AA of the SEBI Act and that the Appellants were operating such CIS without appropriate registration as required under Section 12 (1B) of the SEBI Act and Regulation 3 of the CIS Regulations. The Appellants challenged the interim order before this Tribunal vide

Appeal No. 254/2014 with Misc. Application no. 104/2014 and Appeal No. 255/2014 with Misc. Application no. 105/2014 respectively. Vide a common order dated September 17, 2014, the Tribunal set aside the interim order directing SEBI to pass an appropriate order on merit, preferably within eight weeks of the Appellants submitting all documents/particulars to SEBI and after giving the Appellants an opportunity of a personal hearing. This Tribunal further directed the Appellants to maintain a separate account of amounts, which the Appellants may receive in respect of existing schemes in the meanwhile and to cooperate with SEBI in the matter of tendering all particulars/documents called for by SEBI as the Appellants had previously taken more than a year to furnish the requisite particulars in the aforementioned appeals.

4. On an examination of the Appellants' submissions and an inquiry conducted by SEBI, a Show Cause Notice ('SCN') dated August 24, 2015 was issued to the Appellants alleging that they had violated Section 12 (1B) of the SEBI Act read with Regulation 3 of the CIS Regulations. The Respondent alleged that the Company had launched a CIS without registering itself as a Collective Investment Management Company ('**CIMC**'), thereby violating Regulation 3 of the CIS Regulations and asked the Appellants to show cause as to why the schemes of the Company should not be declared as CIS and if such schemes are found to be CIS then why appropriate action including directions under Sections 11, 11(4) and 11B of the SEBI Act read with regulation 65 of the CIS Regulations should not be issued against them for the said violations. The Appellants were granted an opportunity to inspect certain documents on February 08, 2016 that the Respondent had referred to before issuing the SCN and in the spirit of natural justice, a personal hearing was scheduled on February 10, 2016.

Subsequently, on a careful scrutiny of the facts and circumstances of the matter, the Respondent issued the impugned order on February 29, 2016.

5. The Appellants challenged the impugned order alleging that the holiday plans/schemes offered to its clients was indeed not a CIS, on the grounds that such plans/schemes did not satisfy the criteria required to be classified as a CIS.

6. With reference to Section 11AA of the SEBI act, the Appellants contend that first and foremost, the holiday plans offered to its customers entitle them to the utilization of room nights and/or other services, thereby, making the contract between the Company and the customers purely a contract for services. As a result, selling holiday plans/schemes for consideration cannot be termed as 'pooling of funds' within the meaning of section 11AA of the SEBI Act and, therefore, such holiday plans/schemes cannot be termed as 'schemes or arrangements'. Secondly, the Appellants submit that monies received from its customers were not treated as forming part of a fund intended for investments. Further, the right conferred upon the customer to utilize the hospitality and leisure activities offered by the Company at its hotels must not be construed as a return on his investment, rather, a promise of performance of a service. Additionally, the 'surrender value' i.e. the amount received by the customer in case he redeems the room nights credited to his name at the end of the maturity period of his plan, although higher than the initial price of the plan, does not represent sharing of income/profits/produce or property arising out of the holiday plan/schemes within the meaning of clause (ii) of sub-section 2 of section 11AA of the SEBI Act. The definition of the term 'surrender value' as given in the Company's terms and conditions is as under:

> *"**Surrender Value**: shall mean the estimated value of a room night as computed by the Company at various intervals of time as the company may in its absolute discretion, decide on with reference to the prevailing demand/supply conditions in the market price as well as the competition in the hotel industry. Surrender value payment is net off all the administration charges that shall be applicable from time to time. The decision of the company with respect to the surrender value shall be final."*

7. Thirdly, with regard to clause (iii) of subsection 2 of Section 11AA of the SEBI Act, the Appellants argue that the customers have complete autonomy with respect to the time, mode or manner of utilizing the holiday plans/schemes. Further, the title to the properties associated with these plans/schemes resides with the Appellant and its associate companies, thereby, implying that the properties are managed for the Company's business and not on behalf of its customers. Fourthly, the Appellants submit that the customer has the liberty to interchange the room nights made available to him by virtue of the holiday plans/schemes offered by the Company, across various other associated properties and with other services offered by the Company such as picnics, restaurants, adventure trips, conferences, short excursions, banquets, tour packages including travel ticketing, etc. The customer may exercise the option of gifting such services to friends or family too. According to the Appellants, these factors support their submission that the customers who have invested in the holiday plans/schemes are in control of the day-to-day management or operation of the schemes they choose within the meaning of clause (iv) of subsection 2 of section 11AA of the SEBI Act.

8. The Appellants refer to the Explanation to Section 12 (1B) of the SEBI Act, which reads as follows:

> *".... a collective investment scheme or mutual fund shall not include any unit linked insurance policy or scrips or any such*

> *instrument or unit, by whatever name called, which provides a component of investment besides the component of insurance issued by an insurer".*

As per the provisions of this explanation, the Appellants argue that since the holiday plans/schemes provided to its customers contained the element of insurance, the entire plan/scheme cannot be considered to be within the meaning of a CIS, thereby, falling outside the jurisdiction of SEBI altogether.

9. Lastly, the Appellant submits that in the event SEBI concludes that the Company's holiday schemes are CIS, the Company should be permitted, under Regulation 73 of the CIS Regulations, to submit a draft information memorandum for approval of SEBI and to seek the consent/approval of its members.

10. Per Contra, the Respondent has placed reliance on the financial statements of the Company to establish the 'pooling of funds'. It is submitted by the Respondent that the share capital of the Company is only ₹ 50,12,000/- and the borrowings constitute a miniscule amount, whereas, the amount mobilized by the Appellants from their holiday plans/schemes is ₹ 7035 crore. Furthermore, according to the submissions of the Appellants, the 'surrender value' forms an integral part of the holiday plans/schemes. It is a matter of fact that 97% customers opted for surrendering their room nights in return for consideration. The Respondent has, therefore, inferred that the business activities of the Company i.e. buying, developing and operating hotels, are run with the help of monies received from customers paying for the holiday plans/schemes and the Appellants pool in such monies for the purposes of the scheme itself. The Respondent further submits that 'surrender value' was in fact, offered and

availed of by 97% of the customers along with certain other insurance benefits. It can, therefore, be construed that customers have made contributions or payments to the schemes of the Company with a view to receiving benefits/profits/income, from such scheme or arrangement.

11. It is the Respondent's submission that as regards the contributions received from customers of the holiday plans/schemes floated by the Company, the Appellants have stated that such money received is treated as 'advance against room nights' and is used for the Company's business including purchasing of hotels, resorts and clubs and general business. Therefore, according to the Respondent, contribution once paid is solely managed by the Company and not by its customers. The Respondent further submits that the ability to control the time, mode and manner of utilizing the holiday plans/schemes by the customer is merely an entitlement available to the customer and does not give him any right to control his contribution. The Respondent has further relied on clause 16 of the brochure/offer document of the schemes of the Company wherein the Company has reserved the right to modify/ alter/ amend/ revoke the benefits/privileges and/or the terms and conditions contained in whole or in part at its sole discretion or according to the prevailing market conditions/cost factors. As a result, the Respondent submits that the Appellants have complete control over the contributions and the scheme i.e. the management and operation of the scheme is in the hands of the Appellants and not the customer/investor.

12. As far as the jurisdiction of SEBI with respect to the Explanation to Section 12 (1B) of the SEBI Act is concerned, the Respondent submits that the Appellants obtained the insurance cover by payment of premium to the respective insurance companies and then offered it to its customers.

Further, the Respondent submits that if the construction offered by the Appellants were to be considered, a bank could start offering accident insurance along with a deposit and claim that RBI could not regulate it.

13. With respect to the applicability of Regulation 73 of the CIS Regulations in favour of the Appellant, the Respondent submits that only existing CISs can resort to the provisions of the aforesaid Regulation.

14. We have heard both the learned counsel for the parties at length and minutely perused a copy of the appeal along with documents annexed thereto.

15. Before analysing the submissions made before us, we find it necessary to reproduce the provisions of law involved in the present Appeal.

Section 11AA of the SEBI Act

> *"11AA. (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2)[or sub-section (2A)] shall be a collective investment scheme:*
>
> *[**Provided** that any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under sub-section (3), involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme.]*
>
> *(2) Any scheme or arrangement made or offered by any [person] 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.

[(2A)] Any scheme or arrangement made or offered by any person satisfying the conditions as may be specified in accordance with the regulations made under this Act.]

(3) Notwithstanding anything contained in sub-section (2) [or sub-section (2A)], 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;

[(ix) such other scheme or arrangement which the Central Government may, in consultation with the Board, notify,□shall not be a collective investment scheme.]"

Section 12 1(B) of the SEBI Act

"No person shall sponsor or cause to be sponsored or carry on or caused to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations:

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

[Explanation- For the removal of doubts, it is hereby declared that, for purposes of this section, a collective investment scheme or mutual fund shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a component of investment besides the component of insurance issued by an insurer.]"

Regulation 3 of the CIS Regulations

"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."

Regulation 73 of the CIS Regulations

"(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 collective investment 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 collective investment schemes, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the collective investment scheme, the amount repayable to each investor and the manner in which such amount is determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the collective investment 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 collective investment scheme shall have to give a positive consent within one month from the date of the information memorandum to continue with the collective investment scheme.

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

Provided that if the positive consent to continue with the collective investment scheme, is received from only twenty-five per cent or less of the total number of existing investors, the collective investment 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."

16. The concept of CIS was envisaged at a time when innocent investors were getting lured into investing their life savings in schemes floated by various entities, assuring such investors of huge profits. The Dave Committee was formulated to draft a report that propounded the regulation of such entities in order to safeguard the interests of investors and based on the recommendations of this committee, the CIS Regulations, 1999 were implemented. Although, initially, the CIS Regulations were restricted to the agricultural and plantation industry, the legislature found it imperative to enlarge the scope of these Regulations and bring all other schemes launched by corporates in any field under its fold, as long as such schemes

fell within the four corners of the definition of CIS as provided by Section 11AA of the SEBI Act.

17. A reading of Section 11AA of the SEBI Act shows us the conditions which need to be fulfilled before any scheme launched by an entity is classified as a CIS viz. first, monies collected by investors are pooled and utilized for the purposes of the scheme; second, the investors contribute to a scheme with the intention of receiving profits in the form of money, produce or property; third, the contributions from investors are being managed on their behalf and lastly; and fourth, the investors have no control over the day to day management and operations of the scheme. Section 12(1B) pithily states that in order to launch a CIS, a certificate of registration is required. Further, the proviso to Section 12(1B) allows a CIS, in existence before the incorporation of Section 12(1B) vide the Securities Law (Amendment) Act, 2015, to continue its operation till the advent of CIS Regulations in 1999. Regulation 3 prohibits any entity other than a collective investment management company from floating or sponsoring a CIS. Regulation 73 provides for the manner of repayment and winding up of existing collective investment schemes in certain cases viz. failure to make an application to SEBI regarding registration, refusal of SEBI to grant provisional registration or failure to comply with provisions of Regulation 71 after obtaining a provisional registration from SEBI.

18. Now, we shall examine the question of whether or not the holiday scheme/plan floated by the Appellants falls under the category of CIS by analyzing the four conditions that classify a scheme as a CIS. It is pertinent to note that these conditions, when looked at individually, might seem to be fulfilled by a number of entities. However, in order to classify a scheme as a CIS, the aforementioned conditions need to be fulfilled collectively by a

particular scheme. Therefore, any scheme that satisfies all four conditions under Section 11AA(2)(ii) comes under the definition of a CIS. Now, applying this to the facts of the present case, first and foremost, as regards the contributions made by investors being pooled and used for the scheme, the Appellants argue that since the contract between the Company and the investors is purely for service (construed on the basis of the entitlement conferred on the investors to utilize room nights), selling holiday plans/schemes for consideration cannot be termed as 'pooling of funds' and therefore, would not classify as a scheme or arrangement either. They further argue that owing to the agreement being a service agreement, they are free to utilize the money received from the scheme in any form or fashion. In our considered view, the argument put forth by the Appellants fails to take away from the fact that the share capital of the Company stands at a meagre INR 50 lakh, while the money mobilized under their holiday scheme is over INR 7,000 crore. Further, investments to the tune of over INR 1000 crore have been made towards acquiring hotels and resorts, thereby expanding their inventory of properties on offer in the holiday scheme by utilizing the proceeds of the impugned scheme. Needless to say that the corpus of money accumulated by the Appellants by way of contributions to the holiday scheme is well above the limit of INR 100 crore set under the proviso of clause 1 of subsection 2 of Section 11AA of the SEBI Act, crossing which, a scheme is deemed to be a CIS. At this point, extracts from two precedents being relevant are reproduced hereinbelow:

> ***The judgment of the Hon'ble Supreme Court in the case of PGF Ltd. vs. Union of India and Ors. decided on March 12, 2013***

"52……. 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….

…. 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. "

***The judgment of this Tribunal in NGHI Developers India Limited* decided on July 23, 2013**

"19.....The Appellants submit that in the present case the land is first purchased by the Appellants with its own funds. With respect to this submission, we state that the concept of CIS as envisaged by the legislature does not take into account any such variable. The fact stands that the money collected from the customers of the Appellants ostensibly for the purpose of purchase of land is pooled together and then utilized for the purposes of the scheme, whether to buy more land or to develop the land already in possession of the Appellants. In this regard, it is noteworthy that the Appellants first seek contributions from members of the public based on the standard agreement and the application form. On receiving contributions, they issue certificates confirming the receipt of the amount of money paid by the customers to the Appellants. This money, in turn, is utilized by the Appellants to further buy land after pooling the investments of all customers. This leads to the conclusion that there is in fact a scheme in place which involves pooling of the investments of the Appellants".

19. In the matter of PGF Ltd. vs Union of India and Others, a scheme to purchase and develop pockets of land was floated by inviting investors to invest their money in the scheme. Subject to the fulfilment of other

conditions as per law, the Apex court declared the scheme operated by PGF to be a CIS under the guise of sale and development of land. In the matter of NGHI Developers, the Tribunal stated that irrespective of whether the money collected is utilized for the purpose of buying land or developing land that has already been purchased, the fact still remains that money collected from investors is pooled to buy/develop land, thereby, establishing the existence of a scheme.

20. Applying the ratio delivered in the matters mentioned above, we find that the collection of monies from applicants of the holiday scheme floated by the Appellants and further utilizing a portion of that contribution towards expanding the scheme in question satisfies the first criterion under Section 11AA (2).

21. Coming to the second condition that defines a scheme as a CIS, we observe in the instant matter that the schemes launched by the Appellants contained a feature viz. 'surrender value', which basically conferred upon the investor the right to surrender unutilized 'room nights' credited to his name on the expiry of the tenure of the scheme in exchange for an amount which would be higher in value than his initial investment. In the case of ***Rose Valley Hotels & Entertainments Ltd and Ors. ("Rose Valley Hotels"),*** the following was held by the Hon'ble High Court of Gauhati**:**

> *"19) There is no credible material placed by the petitioner to convince the court that all the members who have subscribed had the dominant intention of enjoying the stay at the hotels. Only on the basis of the format of an application for subscription of membership it cannot be conclusively held that the scheme is only for enjoying the stay in the hotels. It could have been held so if there was no alternative term of refund of deposit with a lucrative rate of 17.6 percent per annum. This aspect of the matter requires a detailed enquiry about the names and identities of all the subscribers, their social status, their annual income, etc to find out how many persons have genuinely subscribed for membership for availing the benefit of stay in the hotel. On the basis of*

> *incoherent material produced by the petitioner like format of membership it is not possible to agree with the contention that the scheme is only a holiday management scheme and does not come under the purview of the collective investment scheme more so because of the fact that there is a term in the contract of refund of money with a lucrative rates of interest. If the interest on deposit was the alluring factor on the part of the investors then the case would squarely fall under sub-clause (ii) of sub-section 11AA of the SEBI Act...."*.

22. In the matter of Rose Valley Hotels, the Hon'ble High Court of Gauhati observed that had there not been a term of refund of deposit with a lucrative rate of interest, it would have been possible to accept that the scheme floated by Rose Valley Hotels was only for the purpose of enjoyment and leisure. The High Court could not reach a conclusion owing to a lack of material information, however, it stated that had the interest on deposit appeared profitable and attractive to the investors, then the scheme would have fallen squarely under sub-clause (ii) of sub-section 11AA of the SEBI Act.

23. In the instant matter, the surrender value offered to investors harbours the terms of refund of deposit along with an interest component. Additionally, based on the statistics provided by the Appellants on the schemes floated by them, we see that a whopping 97% of investors availed the benefits of the surrender value as opposed to the services offered under the scheme. In our considered opinion, we find that a large chunk of investors established a pecuniary interest in the holiday scheme with the intention of exercising the option of 'surrender value' and receiving a profit on their investment, however small. Therefore, we hold that the condition mentioned under Section 11AA(2)(ii) of the SEBI Act is fulfilled by the scheme in question viz. the customers/investors in the CIS invested their money in the scheme with the intention to draw profits from the scheme.

24. With respect to the third criterion defining a CIS under Section 11 AA (2) of the SEBI act viz. that the investments are managed by the company in question on behalf of the investors, the Appellants contend that the contributions made by customers are not managed by the Appellants in as much as the customers have complete autonomy with respect to the time, mode or manner of utilizing the holiday plans/schemes. It is a matter of record that the Appellants manage the contributions by way of investments in other properties, payment of the surrender value amount and other expenses. Nowhere does the customer actually manage or have the right to control his investment. This Tribunal observes a similarity between the matter of Alchemist vs SEBI and the present case. Alchemist launched a scheme attracting investors to purchase property. An agreement between Alchemist and its customers conferred upon its customers the right to inspect the land they had contributed towards, during its development. However, there were certain caveats which were attached the this right, viz., due notice to be given to the Appellants before such inspection; investors not to interfere as regards the working, management, control and supervision of the land in question etc. These restrictions imposed on the supposed entitlement of the investors to inspect the land were enough for this Tribunal to ascertain that the control over management activities and operation of the scheme lay in the hands of Alchemist. Coming to the present matter, it is evident from the facts before us that the investors' contributions are managed by the Appellants on behalf of the customers and not by the customers themselves because no instance has been brought before us of customers managing their investments on their own without the company's supervision. Further, as pointed out above, the money collected from investors is used by the Appellant Company to maintain

accommodation and holiday facilities in various locations. Therefore, the investors do not use their investments for their purposes of their own supposed property, but the Appellant actually applies and manages the investors money in manner it deems fit.

25. Coming to the fourth and final ingredient of Section 11AA of the SEBI Act viz. the day-to-day control over the management and operation of the scheme, the submissions made by the Appellant are limited to the extent of elucidating the benefits available to the customer under a particular scheme viz. the option of gifting a holiday package, option to exchange or barter services offered by the Appellant, ability to utilize a holiday option at any time or location etc. However, a perusal of the brochure made available to investors brings out the true nature of the scheme in question. Clause 16 of the said document categorically states that the Appellant reserves the right to modify/ alter/ amend/ revoke the benefits/privileges and or the terms and conditions contained in whole or in part at its sole discretion or according to the prevailing market conditions/cost factors. It is, therefore, clearly borne out that the Company has complete control over activities pertaining to the scheme as is rightly brought forth by the Respondent in its submission with reference to clause 16 of the brochure/offer document of the scheme. The underlying philosophy of the fourth ingredient is that the day to day management of the money pooled under the scheme and the scheme's working in general is at the company's discretion, and not the investors. The investors, in this case, have no say in the day to day control of the scheme or over their investments. Once the contributions are made to the Company, those contributions are completely under the Appellant's control and management. In our considered opinion, clause 16 proves beyond any doubt that complete control is conferred over the day to day

management and operation of the scheme on the Appellant-Company and not the investors.

26. From an analysis of the facts and circumstances of the instant matter and the provisions of Section 11AA of the SEBI Act, we find that the holiday schemes launched by the Appellants fall squarely within the definition of a CIS as set out in Section 11AA(2) of the SEBI Act. We, therefore, have no hesitation in upholding the said finding of the Respondent in the Impugned Order.

27. We have given our thoughtful consideration to the last submission of both parties regarding the applicability of Regulation 73 of the CIS Regulations with respect to the scheme floated by the Appellants. To support their submissions both parties have cited matters decided by this tribunal. The Appellants have relied on ***Alchemist vs SEBI*** and the relevant portion of the judgement is reproduced herinbelow:

> *"17. At this stage it would be pertinent to note a submission, regarding the interpretation of said Regulation 73, by Mr. Kapur, the learned senior counsel appearing for the Appellants, that it applies 'only' to CISs which were in existence in the year 1999 when the CIS Regulations were legally enforced by publication in the Official Gazette. We have thoroughly pondered over this submission and even revisited the CIS Regulations to unearth their true import. And we note that the CIS Regulations in question were promulgated by the Government of India to protect the interests of lakhs of gullible investors who are prompted to invest in such schemes by advertisement, publicity etc. Therefore, we are of the considered opinion that a wider interpretation, which is in tune with the underlying purpose envisaged by the said Regulations, has to be adopted. We, therefore, hold that Regulation 73 is applicable to all the CISs which were existing at the time when the CIS Regulations were introduced, as also to the CISs which may have been launched at any point in time thereafter. The tentacles and reach of Regulations 73, thus, cover a vast expanse of the corporate world and SEBI has jurisdiction over all such CISs which do or do not conform to the requirements of registration etc. laid down in the said Regulations irrespective of the date of launch of a scheme which according to SEBI has all the trappings of a CIS, and*

this conclusion has been reached by the Respondent in accordance with law and in the facts and circumstances of the case."

28. The Respondent on the other hand has relied on the matter of **PACL Ltd vs SEBI**, an extract of which is reproduced herein:

"42. Strong reliance was placed by counsel for appellants on decision of this Tribunal in case of Alchemist Infra Reality Ltd. (supra). In that case, the scheme floated by Alchemist, after the CIS Regulations came into force was held to be CIS and since the said CIS was carried on without obtaining registration from SEBI, the CIS was ordered to be wound up under Section 11,11B of SEBI Act read with regulation 65 and 73 of CIS Regulations. While upholding the order of SEBI and rejecting the argument of Alchemist that regulation 73 cannot be applied to a CIS floated after the CIS Regulations came into force, this Tribunal in para 17 held that the provisions for winding up contained in regulation 73 is applicable to CIS existing at the time when the CIS Regulations were introduced as also to the CIS which may have been launched at any point of time thereafter. Whether a CIS floated and operated after the CIS Regulations came into force without obtaining registration from SEBI was entitled to seek registration under regulation 73 read with regulation 68 was neither an issue raised by Alchemist nor decided by this Tribunal. Only issue raised and decided by SEBI as also by this Tribunal in Alchemist was that a CIS floated after the CIS Regulations came into force without obtaining certificate of registration from SEBI is liable to be wound up under the regulation 65 read with regulation 73 of the CIS Regulations. Therefore, the argument that in view of the decision of this Tribunal in case of Alchemist Infra Realty Ltd. (supra) PACL has a right to seek registration under CIS Regulations cannot be accepted".

29. In the matter of Alchemist vs SEBI, the appellant therein was a public limited company developing high quality infrastructure and real estate within India as well as abroad. SEBI held that Alchemist was actually carrying on an unregistered CIS in contravention of provisions of section 12(1B) of the SEBI Act, 1992 and Regulation 3 of the CIS Regulations. Alchemist submitted that its business had nothing to do with the securities market and was under the supervision of the Ministry of Corporate Affairs. Therefore, no CIS certification from SEBI was required.

SEBI rejected this submission of Alchemist and argued that all the criteria required for a scheme to be declared as a CIS were being fulfilled by the so-called real estate business of Alchemist. SAT upheld SEBI's Order stating that the business of Alchemist was indeed covered by the definition of a CIS as provided in the SEBI Act.

30. In the matter of PACL Ltd vs SEBI, under the guise of selling agricultural land, PACL collected INR 49,100 crore from 5.85 crore customers by promising them that their investments in the schemes of PACL would be highly profitable. PACL was executing sale deeds in favour of the customers and getting these verified through Justice K. Swamidurai. However, PACL did not take any steps to ensure that the subject land was in the real owner's name as required by Justice K. Swamidurai. PACL was unable to bring on record a single instance where the mutation had happened in the favour of any of the customers of the schemes. In light of these findings, this Tribunal held that the transactions entered into by PACL with its customers were sham transactions and in the interest of protecting gullible investors, the procedure laid out in Regulation 73 for winding up and Regulation 68 for seeking registration should not be followed. The relevant portion of the judgement is reproduced herein:

> *"37…….. However, where a person in the guise of carrying on real estate business is found to be carrying CIS which is sham and detrimental to the interests of investors, then, permitting such person to seek registration or permitting that person to wind up the scheme by following the procedure prescribed under the CIS Regulations would be travesty of justice and wholly prejudicial to the interests of investors."*

31. From an analysis of the facts of both matters viz. Alchemist and PACL, it is evident that the two are in stark contrast to each other. The CISs under PACL were declared to be sham transactions and detrimental to the interest of its investors, and thus, ordered to be wound up and money

returned to investors, without directing the procedure provided in Regulation 73 and Regulation 68 of the CIS Regulations be followed. On the other hand, the CISs launched under Alchemist did not threaten the interest of its investors as sham transactions in any manner. In the case of Alchemist, this Tribunal saw the transactions between Alchemist and its investors as genuine transfers under a non-registered CIS Scheme. The matter in Alchemist revolved solely around whether or not the schemes floated by Alchemist came under the definition of a CIS under Section 11AA of the SEBI Act. At this point, it is noteworthy to highlight an extract from the case of PACL Ltd vs SEBI.

> *"38….. There is no merit in the above contention, because, protection of investor interest is the paramount consideration under the SEBI Act and once it is found that the CIS operated is detrimental to the interest of investors, then SEBI instead of following the procedure prescribed under CIS Regulations, is duty bound to take immediate steps to protect the interest of investors by issuing appropriate direction under Section 11/11B of SEBI Act. It is only in respect of those schemes covered under CIS, which are operated in a manner not detrimental to the interest of investors, the question of following the procedure prescribed under the CIS Regulations arises."*

32. Before we look at the applicability of Regulation 73 to the present matter, we find it necessary to turn our attention to the case of **SEBI vs Gaurav Varshney** decided on July 15, 2016. In the said case, the Hon'ble Supreme Court quashed criminal proceedings against the appellants therein because SEBI itself had considered the company in which the appellants were directors was an 'existing CIS' and since the appellants therein had ceased to be connected with the company before the CIS Regulations came into force, the appellants therein could not be said to have violated the CIS Regulations and accordingly the criminal proceedings initiated against the appellants were quashed. Paras 23 and 68 of the judgment being relevant are reproduced below:

> *"23. We have no hesitation in accepting the contention advanced by learned counsel for 'the Board', that the bar created under Section 12(1B), forbidding persons who had not engaged themselves, in an activity of collective investment before 25.1.1995, continued till the concerned persons/entities successfully obtained the required certificate of registration, under the Collective Investment Regulations. Our conclusion hereinabove emerges from, inter alia, the following salient features. Firstly because, the Statement of Objects and Reasons of the Securities Laws (Amendment) Act, 1995, which resulted in the insertion of sub-Section (1B) in Section 12 of the SEBI Act, reveals that the same was brought in, on account of past experience of 'the Board', and the dire need to protect the interests of investors. Secondly because, the language of sub-Section (1B) of Section 12 of the SEBI Act is clear and unambiguous – it allowed existing collective investment scheme(s) entrepreneurs, to continue with the same by creating an exception in their favour, through the proviso under Section 12(1B). And it barred new operators from commencing collective investment scheme(s), till after they had obtained a certificate of registration. Thirdly because, of the use of negative words in sub-Section (1B) – "No person shall…", denotes mandatory intent, with reference to those not already engaged in collective investment operations. Fourthly because, of the use of negative words in conjunction with the word "shall", further makes the legislative intent absolutely clear, and also, mandatory, with reference to those not already engaged in collective investment operations. And fifthly because, contravention of Section 12(1B) entails penal consequences, and therefore, cannot be construed as directory."*
>
> *"68. In view of the conclusions recorded hereinabove we are satisfied, that the proceedings initiated against the appellant were wholly misconceived, as it has not been established, that the appellant either violated Regulation 5 read with Regulations 68 to 72, or Regulations 73 and 74 of the Collective Investment Regulations*."

33. While interpreting section 12(1B) of the SEBI Act, the court drew a clear distinction between "existing schemes" i.e., schemes which came into existence prior to 1995 and new schemes i.e., schemes which came into existence after 1995 and stated that that "*the bar created under Section 12(1B), forbidding persons who had not engaged themselves, in an activity of collective investment before 25.1.1995, continued till the concerned persons/entities successfully obtained the required certificate of*

registration, under the Collective Investment Regulations". Therefore, in the case of Gaurav Varshney, the Apex Court held that Regulation 73 would apply only to an 'existing CIS' and since SEBI had considered the company in which the appellants were directors was an 'existing CIS' and the appellants therein had dissociated themselves before the CIS Regulations came into force, appellants could not be said to have violated the CIS Regulations. In the present case, appellants are not considered as an 'existing CIS'. The decision in case of Gaurav Varshney, therefore, does not help the Appellant in any manner.

34. As per the Hon'ble Supreme Court's order, an "existing" CIS means a CIS which is in operation as on January 25, 1995. In the case of the Appellants in the instant matter the company was incorporated only in 1997 and the 'schemes' under question were started around 2001-2002. As such the appellant is clearly not an "existing" CIS and cannot derive any benefits from the same. Therefore, in the facts and circumstances of the present matter wherein the CIS, in violation of the Regulations, collected a rather enormous amount of approx 7000 crores, we find that the investors' interest will not be served by making Regulation 73 applicable. The Impugned Order, therefore, deserves to be upheld.

35. Before parting with this matter, we may take note of the four miscellaneous applications filed for intervention, preferred by some affected investors in the various schemes of the appellants. Since these interveners who claimed that they were adversely affected by the issue involved in the matter have never been party before SEBI and they have never produced the necessary documents before SEBI, they were not impleaded as a formal party but have been given a right of hearing by us. Learned counsel Shri Rabindra Hazari argued on behalf of the investors

stating that he had ample material to prove that the appellants had diverted huge funds to other entities owned and controlled by the appellants themselves and that the investors had been left in the lurch. The interveners submitted that they were doubtful of whether the Appellant company would be able to repay all its investors the amount of approx ₹ 7035 crores. The Appellant has disposed of its assets to repay investors disregarding several conditions that were to be complied with as put forth by SEBI before such disposal. Our attention is also drawn towards the fact that the appellants transferred these investments to other schemes but have given a false affidavit that investors have voluntarily switched over to the non refundable schemes. This seems to be an afterthought manoeuvring by the appellants with a view to deprive the investors of benefits which were originally promised by the appellants under the earlier schemes which in fact govern the relationships / obligations and entitlements.

36. It is further argued that the appellants failed to submit details of their property etc. to SEBI in time and it is on persistence by SEBI that they belatedly supplied truncated details casting doubt upon the genuineness of the appellants' intentions. The Interveners through their misc. applications have brought on record, though belatedly before this Tribunal, instances where the original receipts and the other documents of the investors were collected by the appellant company leaving the investors high and dry even without the documents. Shri Hazari has shown us many documents to bring home his points. The additional documents which the interveners wanted to bring on record were not produced before SEBI while the proceedings were going on for many years. However, Shri Hazari has fairly submitted that he would fully support the SEBI order so that the interest of all investors in the appellants' various schemes could be protected effectively and since we are

going to dismiss the appeals by upholding the order of SEBI, all these intervention applications shall, accordingly, stand disposed of.

37. The Impugned Order is, accordingly, upheld and the appeals are hereby dismissed. No order as to costs.

38. After pronouncement of this order, an oral request has been made to stay the operation of this order. We find no good reason to do so and, as such, the oral request stands rejected.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
Dr. C. K. G. Nair
Member

12.05.2017
Prepared & Compared by
PTM