BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 225 of 2012

Date of decision: 23.07.2013

1. NGHI Developers India Limited,
   F-117, 1st Floor, City Star Centre,
   Central Spine, Vidhyadhar Nagar,
   Jaipur, Rajasthan – 302 001.

2. Mr. Pipal Singh
   Sardar Colony,
   Near Gupta Petrol Pump,
   Firozpur, Punjab.

3. Mr. Bakshish Singh
   Village Chack Somian Wala,
   P.O. Guru Har Sahai,
   Firozpur, Punjab.

4. Avtar Singh
   Village Alfoo Ke P.O. Hamad
   Firozpur, Punjab. …… 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. R. S. Loona, Advocate with Mr. O. P. Singal, Mr. Abhishek Borgikar, Ms. Abhaya Gurumurthy, Advocates for the Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Yogesh Chande, Advocate for the Respondent.

CORAM : Jog Singh, Member
A. S. Lamba, Member

Per : Jog Singh

1. The instant appeal is preferred by NGHI Developers India Limited ("Appellant No. 1"), Mr. Pipal Singh ("Appellant No. 2") and "Bakshish Singh" ("Appellant No. 3") against the order dated November 6, 2012 ("Impugned Order") passed by the Securities and Exchange Board of India ("Respondent") holding that the Appellants have been carrying on Collective Investment Scheme (CISs) and directing them to refund all the money collected from investors along with the returns due as provided for in the letter of offer within one month from the date of passing the Impugned Order, failing which appropriate action shall be initiated against them.

2. Brief facts leading to the dispute are that Appellant No. 1 is a public limited company incorporated under the Companies Act, 1956 and claims to be engaged in the business of sale and purchase of real estate and its development. It has an authorized share capital of Rs. 2 crore as on March 31, 2011 along with a paid up capital of Rs. 50 lac. On receiving complaints regarding the Appellants' activities of collecting money from the public, the Respondent conducted an investigation into Appellant No. 1's affairs calling for certain documents and details from the Appellants. On the basis of the information provided by the Appellants, the Respondent inferred that the former were engaged in fund mobilizing activity from public, by floating/ sponsoring/ launching CIS as defined in Section 11AA of the Securities and Exchange Board of India Act, 1992 ("SEBI Act"). Subsequently, the Respondent passed an ad-interim ex-parte order dated July 9, 2012 forbidding the Appellants from further launching any CIS and directing them to stop collection of money in any form from the public. The order stated that it was to be treated as a Show Cause Notice and called upon the Appellants to explain as to why the schemes floated by them should not be held to be CISs under Section 11AA of the SEBI

Act and the SEBI (Collective Investment Schemes) Regulations, 1999 ("CIS Regulations"), and why appropriate action should not be taken against them.

3. The Appellants approached the Rajasthan High Court praying for the ad-interim ex-parte order to be quashed and a writ of certiorari or any other appropriate writ be issued against SEBI. The Hon'ble High Court disposed off the petition on August 7, 2012 directing the Respondent to pass a final order in the matter within 10 days of Appellant No. 1 submitting a reply to the SCN. The Respondent sought extension of the aforesaid time period from the Rajasthan High Court to be able to pass a well reasoned order in the matter. An opportunity of personal hearing was also granted to the Appellant by the Respondent on October 23, 2012 when Appellant No. 2 along with other representatives appeared before the Respondent and made their submissions. During the hearing copies of the complaints, relying on which the Respondent had initiated an inquiry into the Appellants' working, were handed over to the Appellants. The Respondent asked for copies of registered sale deeds executed between Appellant No. 1 and the investors to be produced within 2 days of the date of the personal hearing. Appellant No. 1 thereafter filed its written submissions dated October 29, 2012. Finally, after considering all submissions made by the Appellants and documents brought on record, the Impugned Order came to be passed on November 6, 2012.

4. The Appellants submit that they are engaged in the business of real estate. Any person who wishes to buy land can avail of either one of the two payment options, viz., Cash Down Payment Plan and Installment Payment Plan. In case the customer opts for Cash Down Payment, land is allotted to him within 279 days of the date of the agreement and in case of the Installment Payment Plan, land is allotted within 90 days of the receipt of 50% of the

plot's cost including developmental charges. Once the money is received an allotment letter is issued in terms of the provisions of the agreement between the parties. The Appellant submits that no pooling of monies is envisaged and no bond or certificate representing the investors' interest in the nature of 'Securities' is issued by the Appellants. It is submitted that the standard agreement to be executed between the Appellants and their customers does not refer to any 'scheme'. It is also submitted the Appellants develop the land by undertaking plantation activities, providing irrigation etc. as required under the agreement.

5. Further, the Appellants state that the documents submitted to the Respondent such as the agreement and the allotment letter clearly show that the intention of the parties was to enter into a contract of sale and purchase of land, and the fact that no sale deed has been executed does not mean allotment letters are not binding or valid. It is submitted that the agreement provides for execution of a sale deed "only on the expiry of minimum stipulated period" which the company claims to have not yet expired. The Appellant submits that the Respondent has erroneously concluded that land is acquired by the Appellants after pooling their customers' contributions solely on the basis of a recital clause in the standard agreement which reads as under :-

> *"The Company has made arrangements for purchasing/procuring the land with clear and marketable title."*

6. The Appellant denies receiving contributions from the public and then issuing bonds/certificates as evidence of their investment. It first buys land and then sells it to its customers issuing a letter of registration to confirm the

booking of a particular piece of land. This letter cannot be construed as any certificate signifying investment.

7. It is also submitted by Appellants that there is no allocation of profits among purchasers of land flowing from the alleged scheme. Nor does Appellant No. 1 guarantee any returns to its customers. Regarding the Respondent's allegation that Appellant No. 1 has the right to "discontinue, change, amend, and modify the plan", the Appellants submit that such right was reserved only with the intention of ensuring that its buyers do not default on payments. The Appellants further submit that the reliance on the judgment passed by the Hon'ble Supreme Court in PGF Ltd. vs Union of India is totally misplaced since the activities carried on by Appellant No. 1 are absolutely different from those of PGF Limited. It is submitted that the Respondent has ignored the intention behind execution of the agreements between Appellant No. 1 and various customers of merely selling and purchasing land.

8. We now deal with the submissions of the Respondent in brief. The Respondent submits that the standard agreement discusses the schemes of the Appellants regarding development of land through plantation and irrigation which signifies that the land shall clearly remain in use of the Appellants. The Appellants also take responsibility for sales of produce from the land the proceeds of which shall be given to the customers. Therefore, the scheme does not contemplate any role to be played by the customers themselves. Further, the Respondent submits that no registered sale deeds have been provided by the Appellants. In keeping with the two methods of payment, Cash Down Payment Plan and the Installment Payment Plan, in the last two and half years, allotments should have been made but Appellant no. 1 did not do so because it is not engaged in any sort of real estate business in actuality.

9. The Respondent further submits that before the sale proceeds accrue to the customers, the Appellants deduct a certain amount as wastage of produce during harvesting/handling before delivery or sale as the case may be. This evidences the sharing of income. The Respondent submits that the plots of land developed by the Appellants are not sold at different prices, rather it appears from the scheme carried on by the Appellants that the land is sold as *"a homogeneous commodity at a fixed price, which is feasible only if the land transactions are veil for running a CIS and not a genuine sale of agricultural land"*. The Respondent goes on to deal with the judgment dated March 12, 2013 of the Hon'ble Supreme Court in the matter of PGF Limited vs. Union of India in which, according to Respondent, the Hon'ble Supreme Court in facts and circumstances similar to the case in hand held that the business of PGF Ltd. was in the nature of CISs. On the basis of the aforesaid the Respondent has concluded that the Appellants have indeed launched CISs to collect money from the public.

10. Finally, the Respondent submits that the Appellants have carried on CISs without first getting registered with SEBI and obtaining a Certificate of registration under Section 12 (1B) of the SEBI Act and the CIS Regulations. It is, therefore, the Respondent's submission that the Appellants have carried on business in the nature of CISs while deliberately violating the law.

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

12. At the outset, we find it necessary to discuss the evolution of the law regarding CISs. In the 1990s, it came to the notice of the Government of India that a large number of corporates engaged in plantation activities were issuing bonds in the nature of agro and plantation bonds, while offering exponentially

high rates of return which were considered abnormal in such transactions. A large portion of the funds collected were received from the public with the promoters putting in small amounts of their own money. In order to regulate such entities and their businesses, the Government issued a press release dated November 18, 1997 identifying schemes which would be treated as Collective Investment Schemes under the SEBI Act, 1992. SEBI was tasked with formulating regulations to govern CISs which would lead to furtherance of licit investment in the securities market.

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

groups or retired senior citizens putting their life savings at risk with the hope of reaping huge profits.

14. Sections 11AA and 12(1B) of the SEBI Act alongwith Regulations 3, 73 and 74 of the CIS Regulations being pertinent to the case in hand are reproduced hereinbelow :-

Securities and Exchange Board of India Act, 1992 :-

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

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

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

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

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

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

(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."

"12(1B) No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment 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 the 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.]

(2) Every application for registration shall be in such manner and on payment of such fees as may be determined by regulations.

(3) The Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations :

***Provided** that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard."*

CIS Regulations :

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

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

- *(a) has failed to make an application for registration to the Board; or*
- *(b) has not been granted provisional registration by the Board; or*
- *(c) having obtained provisional registration fails to comply with the provisions of regulation 71;*

shall wind up the existing scheme.

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

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

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

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

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

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

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

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

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

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

15. We see from the provisions reproduced above that Section 11AA lays down the conditions which need to be satisfied before any scheme or arrangement launched by a particular company can be called a CIS, viz., the money collected from investors should be pooled and then utilized for the purposes of the scheme; the investors should have contributed their money with the objective of deriving profits in any form, whether "income, produce or property"; the entire working and operation of the scheme is managed by the concerned company on behalf of the investors; and the investors have no modicum of control over daily activities with respect to the arrangement in question. Section 12(1B) succinctly provides that all persons intending to float any scheme or arrangement in the nature of a CIS, shall do so only after obtaining a certificate of registration from SEBI. Further, Regulation 3 of the CIS Regulations, states that only a Collective Investment Management Company shall sponsor CISs. Regulation 73 provides for the winding up of an existing scheme in certain cases viz., failure to make an application for registration to SEBI; refusal of SEBI to grant provisional registration; or failure to comply with the provisions of Regulation 71 once provisional registration is obtained from SEBI. Finally, Regulation 74 provides that in case a company carrying on business in the nature of a CIS does not wish to obtain provisional registration with the SEBI, it may devise a scheme of

repayment of money collected from investors in accordance with the CIS Regulations.

16. Now, the issue before us, i.e., whether or not the business carried on by the Appellants is in the nature of CIS is not res-integra anymore in the light of the Hon'ble Supreme Court's judgment in the case of PGF Ltd. vs. Union of India and Ors. reported in **[(2013) AIR SCW 2420].** At this stage, it is pertinent to reproduce certain paragraphs of the Hon'ble Supreme Court's judgment which expertly deal with the basic ingredients of a CIS :-

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

> *"52. The above conclusion of ours can be culled out from the sample documents placed by the appellants before the Court. The appellants, however, failed to supply any material till date to demonstrate as to how and in what manner any of the lands said to have been sold to its customers were developed and thereby any of the customer was or would be benefited by such development. It is imperative that the transaction of the PGF Limited vis-a-vis its customers has necessarily to be examined as to its genuineness by subjecting itself to the statutory requirement of registration with the second respondent followed by its monitoring under the regulations framed by the second respondent. All the above factors disclose that the activity of sale and development of agricultural land propounded by the PGF Limited based on the terms contained in the application and the agreement signed by the customers is nothing but a scheme/arrangement. Apart from the sale consideration, which is hardly 1/3rd of the amount collected from*

the customers, the remaining 2/3rd is pooled by the PGF Limited for the so called development/improvement of the land sold in multiples of units to different customers. Such pooled funds and the units of lands are part of such scheme/arrangement under the guise of development of land. It is quite apparent that the customers who were attracted by such schemes/arrangement invested their monies by way of contribution with the fond hope that the various promises of the PGF Limited that the development of the land pooled together would entail high amount of profits in the sense that the value of developed land would get appreciated to an enormous extent and thereby the customer would be greatly benefited monetarily at the time of its sale at a later point of time. It is needless to state that as per the agreement between the customer and the PGF Limited, it is the responsibility of the PGF Limited to carry out the developmental activity in the land and thereby the PGF Limited undertook to manage the scheme/arrangement on behalf of the customers. Having regard to the location of the lands sold in units to the customers, which are located in different states while the customers are stated to be from different parts of the country it is well-neigh possible for the customers to have day to day control over the management and operation of the scheme/arrangement. In these circumstances, the conclusion of the Division Bench in holding that the nature of activity of the PGF Limited under the guise of sale and development of agricultural land did fall under the definition of collective investment scheme under Section 2(ba) read along with Section 11AA of the SEBI Act was perfectly justified and hence, we do not find any flaw in the said conclusion."

"53. We, therefore, hold that Section 11AA of the SEBI Act is constitutionally valid. We also hold that the activity of the PGF Limited, namely, the sale and development of agricultural land squarely falls within the definition of collective investment scheme under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act and consequently the order of the second respondent dated 06.12.2002 is perfectly justified and there is no scope to interfere with the same. In the light of our above conclusions, the PGF Limited has to comply with the directions contained in last paragraph of the order of the second respondent dated 06.12.2002. We also hold that while ensuring compliance of the order dated 06.12.2002, the second respondent shall also examine the claim of the PGF Limited that it had stopped its joint venture scheme as from 01.02.2000 is correct or not by holding necessary inspection, enquiry and investigation of the premises of the PGF Limited in its registered office or any of its other offices wherever located and also examine the account books other records and based on such inspection, enquiry and investigation issue any further directions in accordance with law. Whatever amount deposited by the PGF Limited pursuant to the interim orders of this Court relating to joint venture scheme shall be kept in deposit by the second respondent in an Interest Bearing Escrow Account of a Nationalized Bank. The second respondent shall also verify the records of the PGF Limited

relating to the refund of deposits of the customers who invested in the joint venture schemes and ascertain the correctness of such claim and based on such verification in the event of any default noted, appropriate further action shall be taken against the PGF Limited for settlement of the monies payable to such of those investors who participated in any such joint venture schemes operated by the PGF Limited. It will also be open to the second respondent while carrying out the above said exercise to claim for any further payment to be made by the PGF Limited towards settlement of such claims of the participants of the joint venture schemes and charge interest for any delayed/defaulted payments. As far as the deposit made by the PGF Limited with the second respondent on the ground that the such amount could not be disbursed to any of the investors for any reason whatsoever the second respondent, based on the verification of the records of the PGF Limited, arrange for refund/disbursement of such amount back to the participants of the joint venture schemes with proportionate interest payable on that amount. The above directions are in addition to the directions made by the Division Bench of the High Court."

"54. Having noted the conduct of the PGF Limited in having perpetrated this litigation which we have found to be frivolous and vexatious in every respect, right from its initiation in the High Court by challenging the vires of Section 11AA of the SEBI Act without any substantive grounds and in that process prolonged this litigation for more than a decade and thereby provided scope for defrauding its customers who invested their hard earned money in the scheme of sale of land and its development and since we have found that the appellants had not approached the Court with clean hands and there being very many incongruities in its documents placed before the Court as well as suppression of various factors in respect of the so called development of agricultural land, we are of the view that even while dismissing the Civil Appeal, the PGF Limited should be mulcted with the exemplary costs. We also feel it appropriate to quote what Mahatma Gandhi and the great poet Rabindranath Tagore mentioned about the greediness of human being which are as under:

"Earth provides enough to satisfy every man's need, but not every man's greed.

-Mahatma Gandhi-

The greed of gain has no time or limit to its capaciousness. Its one object is to produce and consume. It has pity neither for beautiful nature nor for living human beings. It is ruthlessly ready without a moment's hesitation to crush beauty and life out of them, molding them into money."

-Rabindranath Tagore-

"55. In this respect, it will be worthwhile to note what the PGF Limited disclosed before the second respondent in its letter dated 15.01.1998 alongwith the covering letter dated 20.05.2002. The details mentioned therein disclose that the total amount received by the PGF Limited under different schemes from 01.01.1997 to 31.12.1997 was approximately Rs.186.84 crores. Its paid up capital was stated to be Rs.94,90,000/-and it mobilized Rs.815.23 crores under joint venture schemes from 01.04.1996 to 30.06.2002. The future liabilities towards joint venture schemes was projected in a sum of Rs.655.41 crores. Total outstanding liabilities payable to investors under the old closed schemes as on 30.06.2002 was stated to be Rs.497 crores. As against the above, till 31.10.2002, the PGF Limited stated to have made a net payment of Rs.115.93 crores leaving the balance due in a sum of Rs.393.69 crores approximately. The above details have been noted by the second respondent while mentioning the submission of the PGF Limited in its order dated 06.12.2002. Thus, we are convinced that the PGF Limited deliberately did not furnish the amounts till this date what was collected from the customers who made their investments in the so-called venture of sale and development of agricultural lands. Therefore, it is explicit that the PGF Limited was playing a hide and seek not only before the second respondent, but was also taking the Courts for a ride. We have noted in more than one place in our order that inspite of our repeated asking the appellants did not come forward to disclose the details of any development it made in respect of the lands alleged to have been sold to its customers. There is also no valid reason for not disclosing the details before the court. As in one of its activities, namely, joint venture scheme alone, it had mobilized Rs.815.23 crores, it can be easily visualized that in its activities of sale and development of land such mobilization would have far exceeded several thousand crores. In such circumstances, the appeal is liable to be dismissed which may have costs."

17. After a minute perusal of the verdict delivered by the Hon'ble Supreme Court in the above-mentioned case, we note that in situations where high returns are promised to investors in any form, a CIS may be said to be in place, subject to fulfillment of other conditions as per law. In the case of PGF Ltd., the company had indeed assured its customers of high returns by developing the land purchased by them, thereby appreciating the value of such parcel of land. At the same time, PGF did not offer any documents which evidenced any part of development of land as promised to its customers. On perusing copies of agreements entered into between PGF Limited and its customers, and

applications made for purposes of investing in the business, it was held that the business of PGF Ltd. was undeniably in the nature of a scheme or arrangement. It was also stated that funds were pooled under the pretext of land development while giving customers the impression that once the land is developed by the company, the customers will be in a position to sell it at a significantly higher price as compared to the amount that was put in by them initially.

18. Moreover, it was stated that pieces of land sold to various customers, were spread over such diverse locations, all over India, as to make the idea of the customers having any control over the management of the land inconceivable, rather impractical. The Hon'ble Supreme Court also noted that the company had not repaid a large amount of money under the closed schemes, which led to the inference that the PGF Ltd. was deliberately holding on to the hard earned money of the investors with the intent to defraud such bonafide investors. The judgment stressed upon the fact that inspite of repeatedly being asked for documents providing details of development being undertaken by the company, no information was put forth by the representatives of PGF Ltd. nor was any acceptable reason provided regarding such inability.

19. Applying the reasoning which emanates from the order of Hon'ble Justice Fakkir Mohamed Ibrahim Khalifulla and Hon'ble Justice B. S. Chauhan to the facts of the instant case, it is clear to us that the business of the Appellants is indeed in the nature of a CIS falling squarely within the parameters defined by the judgment of the Hon'ble Supreme Court as dealt with above. The appellants have sought to distinguish the judgment with respect to PGF Ltd. on the basis of certain reasons which are dealt with hereinbelow. 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.

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.

22. The other three contentions on the basis of which the Appellants have sought to distinguish the judgment passed in the PGF Ltd. matter are that PGF Ltd. continued to remain in possession of the land sold to its customers while using it for other projects; that in the case of PGF Ltd., the sale deeds executed did not contain particulars of land sold to the buyers; and finally, that the agreements provided for transfer by joint sale deed. As far as these three contentions are concerned, we find that all of these can be rejected on the simple ground that not a single registered sale deed has been provided even to this Tribunal by the Appellants which would evidence a genuine transfer of land in case of even a single investor out of the alleged 30,785 investors. In the agreement provided for our perusal, it is categorically mentioned that “that land ownership alongwith its possession will ordinarily be transferred by the Company in name of Customers by means of registered sale deed within a reasonable period after allotment.” Admittedly, this has not been done in a single case. To supplement this finding, we note that in the letters of allotment provided for our perusal the Appellants clearly state that the right to change the location of the plot of land allotted to the alleged buyer would continue to vest

in the Appellants. If the right to transfer a particular plot of land does not change hands from the Appellants to its customers, we fail to see how it can be deemed to be a bonafide transfer of land. Further, in PGF Ltd., as is noted above, the Hon'ble Supreme Court reached the finding that the company itself was managing the daily operations regarding the land with no control vested in the buyers. Similarly, in the case before us, we note that the day to day management and operation of the land is completely in the hands of the Appellants and the investors have absolutely no role to play in any capacity whatsoever. Therefore, in view of the discussion above, we note that the attempt of the Appellants to distinguish the verdict in the case of PGF Ltd. fails.

23. Before parting with this matter, it is pertinent to note that in the interpretation of such regulatory measures, like the CIS Regulations in hand, the most important task is to determine the 'pith and substance' i.e. their essential and true character. The whole scheme of CIS as enshrined in the SEBI Act, 1992 and the CIS Regulations, 1999 as already discussed hereinabove is the welfare of millions of innocent investors by duly protecting their interests therein. The legislative intent and idea of the Parliament as well as SEBI seem to bring more transparency in the affairs of various CISs by duly regulating the same and not to wipe them out. Closing or winding up such CISs is an extreme measure to be resorted in rare cases of adamant companies who do not wish to abide by the CIS Regulations in the matter of registration and other conditionalities laid in the said Regulations.

24. Accordingly, the logical conclusion which follows is that the Appellants should have applied for registration with SEBI under the CIS Regulations and gone ahead with their schemes only after the required certificate had been

issued by SEBI. The Appellants have, therefore, violated Section 12(1B) of the SEBI Act and Regulation 3 of the CIS Regulations. This Tribunal has no hesitation in upholding the Impugned Order as passed by SEBI finding no legal infirmity with the same. However, keeping in view the arduous process involved in executing the scheme of repayment to about thirty thousand investors, we feel it would be in the interest of justice to grant the Appellants six months' time in which to make the payments concerned to their investors, with a rider that the Appellants will submit a report to SEBI giving accurate details of the payments so tendered to the investors while implementing the impugned order at the end of the time period of six months granted to the Appellants from the date of receipt of a certified copy of this order. The impugned order, is to this extent modified. In case any eventuality arises in future for the appellants to seek further extension of time to implement SEBI's order in question, the appellants may approach SEBI for extension of time and SEBI will consider the same and pass appropriate order depending upon progress made by appellants in respect of implementation of impugned order.

With the abovesaid directions the appeal, accordingly, stands dismissed. No costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

23.07.2013
Prepared & Compared by
ptm/pmk