

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Order Reserved On: 18.06.2018**

**Date of Decision : 29.06.2018**

**Misc. Application No. 292 of 2015**

**And**

**Appeal No. 423 of 2015**

1. Alchemist Holdings Limited
2. Mr. Chandra Shekhar Chauhan

405, Jyoti Shikhar Tower,  
Janakpuri Distt. Centre,  
New Delhi

...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. Rajiv Nayyar, Senior Advocate with Mr. Darpan Wadhwa, Advocate, Mr. Prateek Jalan, Mr. Saurabh Seth, Mr. Surendra Dube, Ms. Sonia Dube, Mr. Shatadru Chakraborty and Mr. Anurag Singh, Advocates i/b Legal Options for Appellants.

Mr. Fredun DeVitre, Senior Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**

**Misc. Application No. 276 of 2015**

**And**

**Appeal No. 406 of 2015**

1. Alchemist Capital Limited
2. Mr. Mansoor Ahmd
3. Mr. Hariharan Veeraraghavan

SCO 52-53, Sector 9-D,  
Chandigarh- 160 009

...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. Rajiv Nayyar, Senior Advocate with Mr. Darpan Wadhwa, Advocate, Mr. Prateek Jalan, Mr. Saurabh Seth, Mr. Surendra Dube, Ms. Sonia Dube, Mr. Shatadru Chakraborty and Mr. Anurag Singh, Advocates i/b Legal Options for Appellants.

Mr. Fredun DeVitre, Senior Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**  
**Misc. Application No. 291 of 2015**  
**And**  
**Misc. Application No. 66 of 2016**  
**And**  
**Appeal No. 422 of 2015**

Mr. R. P. Chhabra  
House Number 5844, MHC,  
Manimajra, Chandigarh ...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. Mayur Khandeparkar, Advocate with Mr. Ishwar Nankani, Ms. Gauri Memon, Advocates i/b M/s. Nankani & Associates, for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

**WITH**  
**Appeal No. 444 of 2015**

Mr. Kanwar Deep Singh  
# 1685, Sector 33D,  
Chandigarh- 160 020 ...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. Prateek Seksaria, Advocate with Mr. Anurag Singh, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocate i/b K. Ashar & Co. for the Respondent.

**WITH**  
**Appeal No. 445 of 2015**

Mr. Harjit Singh  
House Number 450, Phase 3A,  
Sahibzada Ajit Singh Nagar,  
Mohali (Punjab)- 160 059 ...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. Prateek Seksaria, Advocate with Mr. Anurag Singh, Advocate for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Nishant Upadhyay, Advocate i/b K. Ashar & Co. for the Respondent.

**WITH**  
**Appeal No. 446 of 2015**

Mr. B. M. Mahajan  
194, Sector-18A,  
Chandigarh- 160 018 ...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. Prateek Seksaria, Advocate with Mr. Anurag Singh, Advocate for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Nishant Upadhyay, Advocate i/b K. Ashar & Co. for the Respondent.

**WITH**  
**Appeal No. 465 of 2015**

Mr. Sandeep Sethi  
R/o H. No. 97, Sector 21-A,  
Chandigarh (U.T.)

...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. Prateek Seksaria, Advocate with Mr. Anurag Singh, Advocate for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Nishant Upadhyay, Advocate i/b K. Ashar & Co. for the Respondent.

**AND**  
**Appeal No. 466 of 2015**

Mr. Virendra Singh  
N-1/26; CH-1B; Nagwa,  
Lanka, Varanasi- 221 005

...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. Prateek Seksaria, Advocate with Mr. Anurag Singh, Advocate for the Appellant.

Mr. Mihir Mody, Advocate with Mr. Nishant Upadhyay, Advocate i/b K. Ashar & Co. for the Respondent.

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

Per: Justice J.P. Devadhar

1. All these appeals are filed to challenge the orders passed by the Whole Time Member (“WTM” for short) of Securities and Exchange Board of India (“SEBI” for short) on 14.08.2015 and 03.08.2015 respectively.

2. By order dated 14.08.2015 Alchemist Holdings Limited and its Directors including Chandra Shekhar Chauhan are held to have violated Sections 56, 60, 69 and 73 of the Companies Act, 1956 (“1956 Act”) and accordingly directed to refund jointly and severally the money collected by the company through issuance of Redeemable Preference Shares (“RPS”) to the investors with interest at 15% per annum compounded at half yearly intervals from the date when the repayments became due in terms of Section 73(2) of the 1956 Act till the date of actual payment.

3. Similarly, by order dated 03.08.2015 Alchemist Capital Limited and its Directors are held to have violated inter alia Sections 56, 60 read with Section 2(36) and Section 73 of 1956 Act and accordingly directed to refund jointly and severally the money collected by the said company through the issuance of RPS to the investors with interest at 15% per annum compounded at half yearly intervals from the date when the repayments became due in terms of Section 73(2) of the 1956 Act till the date of payment.

4. Appeal No. 423 of 2015 is filed by Alchemist Holdings Limited and its Director Mr. Chandra Shekhar Chauhan to challenge the order of WTM dated 14.08.2015. Appeal No. 406 of 2015 is filed by Alchemist

Capital Limited and all other appeals are filed by the Directors of Alchemist Capital Limited to challenge the decision of WTM dated 03.08.2015. Since the issues raised in all these appeals are common, all these appeals are heard together and disposed of by this common decision.

5. It is not in dispute that Alchemist Holdings Limited, duly registered as a Non-Banking Financial Company ('NBFC') had raised funds by issuance of RPS during the period from 25.03.2006 to 28.02.2009, whereas, Alchemist Capital Limited had raised funds through issuance of RPS even before it was registered as NBFC with RBI and also after it was registered as NBFC with RBI.

6. Counsel for the parties state that Appeal No. 423 of 2015 may be treated as lead matter and that the decision in Appeal No. 423 of 2015 would also apply to all other appeals.

7. Facts relating to Appeal No. 423 of 2015 to the extent relevant for deciding the issues raised in the appeal are as follows:-

- a) By a letter dated 08.10.2010 SEBI informed Alchemist Holding Limited ('Company') that it has come to the notice of SEBI that the company had raised funds in the year 2006 through issuance of RPS and accordingly called upon the company to furnish particulars in that behalf as more particularly set out therein.

- b) By a letter dated 11.11.2010 company informed SEBI that issue of preference shares was on private placement basis under Section 67 of 1956 Act and as per Section 67(3) of 1956 Act issue of preference shares by an NBFC cannot be deemed to have been made to the public and consequently Section 56 and Section 60 of 1956 Act relating to filing of prospectus with SEBI would not apply. Accordingly, it was stated in the said letter that the issue of preference shares by the company did not fall within the purview of SEBI Act and the Rules & Regulations made thereunder.
- c) However, SEBI insisted on receiving details from the company in relation to issuance of preference shares. After exchange of several letters, company by its letter dated 28.01.2011 while reiterating its stand that SEBI had no jurisdiction to investigate the issue, informed SEBI that it had raised Rs. 444.67 crore from 4,26,673 allottees in different phases.
- d) Thereafter, on 17.01.2013, the Registrar of Companies (“ROC”) Delhi issued two letters/ orders thereby calling upon the company to furnish certain documents and also show cause as to why action should not be taken against the company and its

Directors for violating Section 67(3) read with Section 73 of 1956 Act for raising funds through issuance of preferential shares from the public without following the provisions contained in the 1956 Act.

- e) Challenging the said letters/ orders, company filed Writ Petition No. 2099 of 2013 which was disposed of by the Delhi High Court on 03.04.2013 by directing that the issue of jurisdiction be decided first, since it is the case of the company that being an NBFC it is exempted from the rigour of Section 67 by virtue of the second proviso to Section 67(3) of the 1956 Act. Accordingly, the company has filed its reply, but till date ROC Delhi has not passed any order on the notices issued to the company.
  
- f) Similar notices issued by the ROC, Punjab & Chandigarh to Alchemist Capital Limited were challenged by filing Civil Writ Petition No. 3090 of 2013 before the Punjab & Haryana High Court. By an order dated 31.10.2014, said Writ Petition was disposed of by recording that no orders are necessary in view of the reply filed by the State that they are not taking any action pursuant to the impugned notices since Alchemist Capital Limited is an NBFC to which



the provisions of the 1956 Act set out in the show cause notices are not applicable.

- g) In the meantime, by an ex-parte interim order dated 20.09.2013 the WTM of SEBI had restrained the company and its Directors from collecting any money from the investors until further orders. Although, Writ Petition (C) No. 7470 of 2013 was filed before Delhi High Court to challenge the interim order dated 20.09.2013, the said Writ Petition was withdrawn on 02.05.2014 on ground that the company has responded to the said order/ show cause notice dated 20.09.2013.
- h) Thereafter, an opportunity of hearing was offered to the company and its Directors and by the impugned order dated 14.08.2015 the company and its Directors are directed to refund the money collected by the company through the issuance of RPS to the investors with interest of 15% per annum compounded at half yearly intervals from the date when the repayments became due (in terms of Section 73(2) of the 1956 Act) to the investors till the date of actual payment.

8. Arguments advanced by Mr. Nayyar, Learned Senior Advocate, on behalf of the appellants that the impugned order is liable to be quashed and set aside, may be summarized thus:-

- a) By the impugned order, WTM of SEBI has held that company and its Directors have violated Section 67 of the 1956 Act, because shares of the company have been allotted to more than fifty person without following the provisions relating to 'public offer' prescribed under the 1956 Act. Above decision of the WTM is erroneous, because, at the relevant time the company was registered as an NBFC under the Reserve Bank of India Act 1934 to which Section 67 of the 1956 Act was not applicable.
- b) Section 67 (3A) read with the second proviso to Section 67(3) indicate that regulation of public issues by Public Financial Institutions ("PFIs") and NBFCs is vested in RBI/SEBI and is outside the regime of the 1956 Act. While the second proviso to Section 67(3) excludes NBFCs from the scope of provisions contained in the first proviso to Section 67(3), Section 67(3A) provides that notwithstanding anything contained in Section 67(3), SEBI shall in consultation with the RBI, by notification in the Official Gazettes, specify the guidelines in respect of offer or invitation

to the public by a PFI or NBFC. WTM has failed to consider the effect of Section 67 (3A) of 1956 Act. At the relevant time there were no restrictions or regulations issued by RBI/ SEBI regarding the issue of securities by NBFCs. Even though the 2000 Amendment Act envisaged such regulations being made by SEBI in consultation with RBI, RBI has issued guidelines in that behalf only on 27.06.2013 and 02.07.2013 respectively.

- c) In the ‘Financial Stability Report’ of RBI issued in December 2010 it is stated in para 5.62 as follows:-

“5.62 NBFCs are exempt from the provisions of Section 67 of the Companies Act, 1956, in terms of which issuance of shares/ debentures to more than 49 investors needs to be through public issuance. This means that NBFCs particularly those not regulated by the Reserve Bank, could issue debt or quasi- debt instruments to a large number of retail/ institutional investors on a private placement basis. This would be tantamount to raising public deposits outside the extant regulatory framework.”

(Emphasis supplied)

In fact exempting the NBFCs from the provisions of Section 67 of the 1956 is identified as a regulatory

gap and it is stated that RBI is taking steps to plug the said regulatory gap.

- d) In an advertisement issued by SEBI on 15.11.2013 it was inter alia stated that deposits accepted by an NBFCs are outside the purview of SEBI's jurisdiction. Reading the advertisement as a whole would suggest that it was intended to warn the general public regarding mobilization of funds by various companies/ entities and the said advertisement also referred to 'issuance of securities including preference shares'. This is evident from the order passed by RBI on 27.10.2017 while cancelling company's registration as NBFC, wherein it is held that the very same transactions of the appellant are in the nature of deposits.
- e) Dispute relating to issuance of RPS raised in the present proceedings were also raised by the ROC, Delhi by issuing a notice to the company on 17.01.2013 under Section 67(3) read with Section 73 of the 1956 Act. Writ Petition filed by the company to challenge the said show cause notice was disposed by the Delhi High Court with a direction to first decide the issue of jurisdiction in view of company's contention that it was exempted from the rigour of

Section 67 of the 1956 Act. However, till date no order has been passed by ROC/ Central Government in that behalf.

- f) Similar show cause notice issued by ROC, Chandigarh to Alchemist Capital Limited was challenged before the Punjab and Haryana High Court. The said Writ Petition was disposed of by an order dated 31.10.2014 by recording the submissions made by the respondents therein that they are not taking any action against Alchemist Capital Limited for violation of Section 60 and 67(3) read with Section 73 of the 1956 Act, since Alchemist Capital Limited was an NBFC to which the said provisions were inapplicable.
- g) Reliance placed by the WTM of SEBI on Section 55A of 1956 Act is misplaced. The said provision only gives SEBI jurisdiction to administer the provisions set out therein in respect of a certain class of companies. However, SEBI cannot ignore the interpretation of Section 67 of 1956 given by the ROC, Chandigarh which has been accepted by the Punjab and Haryana High Court. In support of the above contention reliance is placed on decisions of the Apex Court in case of K.P. Verghese V/s ITO

reported in (1981) 4 SCC 173 and State of Tamil Nadu V/s Mahi Traders reported in (1989) 1 SCC 724.

- h) WTM of SEBI has failed to appreciate that in para 95 of the order passed by the Apex Court in case of Sahara India Real Estate Corporation Limited and Ors. V/s SEBI reported in (2013) 1 SCC 1 (Sahara India) wherein it is held that rigour of Section 67 do not apply to an NBFCs on account of Section 67(3A) of the 1956 Act.
- i) Construction of Section 67 (3) put forth by the WTM in the impugned order also does not justify any reliance upon the number of investors in order to determine whether an offer or invitation by NBFC constitutes 'a public offer'. Even if, Section 67(3) is interpreted narrowly, the number of investors would be irrelevant to the issue of whether an offer is public offer or not, in case of an NBFC.
- j) In para 16 of the impugned order the WTM has held that the first proviso to Section 67(3) does not apply to NBFC in view of second proviso thereto. However, in para 21 of the impugned order it is held that the issue of shares by the company was a public

issue in terms of the first proviso. Thus, findings recorded in para 16 and 21 of the impugned order are mutually contradictory.

- k) Section 55A (c) of the 1956 Act clearly provides that Section 67 of the 1956 Act will be administered by SEBI only in two cases. Namely in case of listed companies and in case of companies which intend to get their securities listed on a recognized stock exchange. Since, the appellant company does not fall in either category, WTM of SEBI is not justified in invoking Section 55A of the 1956 Act.
  
- l) Reliance placed by WTM of SEBI on the Apex Court decision in case of Sahara India (Supra) is misplaced, because Sahara India admittedly intended to get its securities listed on a recognized stock exchange and had filed Red Herring Prospectus (RHP) in that behalf and was a public company, whereas the appellant never did so, nor intended to do so. Moreover, judgement in Sahara was neither in the context of an NBFCs nor in the context of Redeemable Preference Shares (RPS) and Sahara was not registered as an NBFC.
  
- m) Section 55A clearly postulates that jurisdiction under certain provisions of the Companies Act may be

exercised by SEBI in respect of the classes of companies mentioned in Section 55A (a) and (b) whereas, in respect of the other companies, the said provisions were to be administered by the Central Government. It is submitted that Section 55A does not contemplate administration of the provisions enumerated therein by both the authorities in any case. In the present case, ROC had issued notice to the company on 17.01.2013, whereas subsequent thereto SEBI has passed the interim order on 20.09.2013 and the impugned order on 14.08.2015 which is after the ROC has invoked jurisdiction. It is submitted that once the ROC has invoked jurisdiction, SEBI is not justified in invoking its jurisdiction on the very same issue.

- n) While administering the provisions of the companies Act, SEBI acts as a delegatee of power under the statute and therefore SEBI must act within four corners of the statute in question. Since, WTM of SEBI has issued far-reaching directions which are not contemplated under the provisions of the 1956 Act impugned order cannot be sustained. In support of the above contentions reliance is placed on the decisions of the Apex Court in case of LIC of India V/s Retired LIC Officers Association reported in (2008) 3 SCC



321, State of U.P. V/s Daulat Ram Gupta reported in (2002) 4 SCC 98, SEBI V/s Sterlite Industries (India) Limited reported in (2003) 113 Comp Cas 273 and the decision of the Bombay High Court in case of Ikisan Limited reported in 2015 SCC online Bom 6358.

- o) Relying on a decision of this Tribunal in case of Toubro Infotech and Industries Limited and Anr. V/s SEBI reported in (2005) 3 Comp Law Journal 305 (SAT) dated 19.07.2004, it is submitted that the onus was on SEBI to prove that the placement was not private placement. However, SEBI has failed to discharge that burden. Since the company has neither issued prospectus nor issued any advertisement, no general invitation was issued for subscribing to the shares of the company and the offer letter issued by the company itself stated that it is not a public issue, the WTM was not justified in holding that the offer made by the company was a public offer.
- p) By the impugned order WTM of SEBI has held that in view of the violations committed, company and its Directors are liable to refund the amount in terms of Section 73(2) of the 1956 Act, with interest at 15% per annum compounded at half yearly intervals which is not even contemplated under Section 73. Thus, the

impugned order which exceeds powers conferred under Section 73(2) of the 1956 Act is liable to be quashed and set aside.

q) Pursuant to the orders passed by the Calcutta High Court on 21.11.2017, 21.12.2017, 29.01.2018 and 06.02.2018 in Writ Petition No. 1389 of 2017 (Ajoy Kumar Das & Ors. V/s Union of India & Ors.) refund of the amounts by the Company and its Directors is monitored by a committee headed by a retired Judge of the Calcutta High Court. SEBI is also a party to the said litigation and reference to the committee was pursuant to the joint submission made by the parties. Since the Calcutta High Court has passed an order setting out the mode and the manner of making repayment and since the appellant is acting in compliance of the said directions, it is not open to SEBI to implement the impugned order independently.

r) On 27.10.2017 RBI has passed an order cancelling the registration given to the company as an NBFC and in that order it is held that the company had raised monies from the investors which are in the nature of deposits repayable after expiry of the respective redemption periods. Moreover, RBI Circular dated

01.01.2002 provides that where a Certificate of Registration granted to an NBFC is cancelled the company should continue to repay their deposits on due dates and dispose of their financial assets within three years from the date of cancellation. In these circumstances, it is submitted that SEBI is not justified in seeking to implement the directions contained in the impugned order.

9. Counsel for SEBI, on the other hand, supported the order passed by the WTM of SEBI and submitted that since the appellants are guilty of raising funds from the public without following the procedure prescribed under the 1956 Act must refund the amounts collected with interest and face other directions issued by the WTM of SEBI.

10. Before considering merits of rival submissions it would be appropriate to quote relevant provisions of 1956 Act which read thus:-

**“Powers of Securities and Exchange Board of India**

**55A** The provisions contained in sections 55 to 58, 59 to 81 (including Sections 68A, 77A and 80A), 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall -

- (a) in case of listed public companies;
- (b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India, be

administered by the Securities and Exchange Board of India; and

- (c) in any other case, be administered by the Central Government.

*Explanation* - For removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, [Tribunal] or the Registrar of Companies, as the case may be.

#### **67. Construction of references to offering shares or debentures to the public, etc.**

(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all circumstances-

- (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation ; or

- (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation:

**Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

**Provided** further that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).

(3A) Notwithstanding anything contained in sub-section (3), the Securities and Exchange Board of India shall, in consultation with the Reserve Bank of India, by notification in the Official Gazette, specify the guidelines in respect of offer or invitation made to the public by a public financial institution specified under section 4A or non-banking financial company's referred to in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934).

(4) Without prejudice to the generality of sub-section (3), a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded in the manner set forth in that sub-section.

(5) The provisions of this Act relating to private companies shall be construed in accordance with the provisions contained in sub-sections (1) to (4).

### **73. Allotment of shares and debentures to be dealt in on stock exchange**

(1) Every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) .....

**Provided** that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock

exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) Where the permission has not been applied under sub-section (1) or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer-in-default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.”

11. Under the 1956 Act every company intending to offer shares or debentures to the public for subscription by issue of prospectus is required before such issue to make an application to one or more recognized stock exchanges seeking permissions for the said shares or debentures to be listed with the stock exchanges. Obviously when the shares or debentures are offered on private placement basis, the question of issuing prospectus or making an application to the stock exchange does not arise.

12. However, Section 67 of 1956 Act extends the aforesaid provisions to cases where the offer or invitation to subscribe to the shares or debentures is made to a Section of the public. Since the offer/ invitation of the appellant company allegedly made on private placement basis is held to fall within the scope of Section 67, it is necessary to analyze the scope and ambit of Section 67 of 1956 Act.

13. Scope and ambit of Section 67 of 1956 Act may be summarized thus:-

- a) Section 67(1) provides that subject to the provisions contained in Section 67(3) & 67(4), the provisions contained in the 1956 Act relating to a company offering shares or debentures to the public shall be construed to be applicable to cases where the offer is made to any Section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.
- b) Similarly, Section 67(2) provides that the provisions contained in the 1956 Act relating to the invitations to the public to subscribe to the shares or debentures shall be construed to be applicable to cases when the invitation to subscribe to the shares or debentures is extended to any Section of the public, whether selected members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.
- c) Cumulative effect of Section 67(1) and 67(2) of 1956 Act is that any offer or invitation extended to a Section of the public to subscribe to the shares or debentures of the company shall be construed to be an

offer or invitation to the public and accordingly the provisions applicable to the offer or invitation to the public would be applicable to such offer or invitation extended to a Section of the public.

- d) Section 67(3) however provides that no offer or invitation shall be treated to have been made to the public by virtue of Section 67(1) or Section 67(2), if the offer or invitation can be properly regarded, in all the circumstances to have been made available only to a person receiving the offer/ invitation or the offer/invitation is made to a domestic concern of the persons making and receiving the offer or invitation. Thus, Section 67(3) inter alia provides that no offer or invitation shall be treated to have been made to the public if the offer/ invitation is restricted only to the persons receiving the offer or invitation.
- e) First proviso to Section 67(3) inserted with effect from 13.12.2000 provides that nothing contained in Section 67(3) shall apply to cases where the offer or invitation to subscribe shares or debentures is made to fifty persons or more. As a result of the first proviso to Section 67(3) where an offer or invitation is made to fifty or more persons receiving the offer or invitation then that offer or invitation shall be treated



as an offer made to the public. In other words, as per the first proviso, where an offer or invitation to subscribe to the shares or debentures of the company is made to more than 49 persons receiving the offer or invitation, then, that offer or invitation shall be treated to have been made to the public.

- f) Second proviso to Section 67(3) inserted with effect from 13.12.2000 provides that nothing contained in the first proviso to Section 67(3) shall apply to the NBFC or Public Financial Institutions (PFI) specified in Section 4A of the 1956 Act. Thus, as per the second proviso to Section 67(3) an offer or invitation made by an NBFC to fifty persons or more than fifty persons receiving offer or invitation shall not be treated to have been made to the public. In other words, as per the second proviso to Section 67(3) any offer or invitation by an NBFC to more than 49 persons receiving the offer or invitation shall not be treated as an offer made to the public.
- g) Cumulative effect of the first proviso and the second proviso to Section 67(3) is that, except in case of NBFCs any offer or invitation by a company to subscribe to its shares or debentures to more than 49 persons receiving the offer or invitation shall be treated to have been made to the public. In other

words, any offer or invitation by an NBFC to more than 49 persons to subscribe to its shares or debentures shall not be treated as an offer or invitation made to the public.

14. In the present case, offer/ invitation of the company for subscribing to the issue of RPS was not restricted to the persons receiving the offer/ invitation, but was generally available to “Individuals, Trusts, Corporate bodies, Minors (through Guardians), Financial Institutions, Mutual Funds, HUFs and Cooperative bodies”. Since the offer/ invitation was not restricted to the persons receiving the invitation, proceedings were initiated and by the impugned order appellants are directed to refund jointly and severally, the money collected by the company through issuance of RPS to the investors with interest at 15% per annum compounded at half yearly intervals.

15. Basic argument of the appellants that Section 67 of 1956 Act is not applicable to NBFCs is without any merit, because, there is no provision in the 1956 Act which excludes NBFCs from the provisions contained in the 1956 Act. Even the second proviso to Section 67(3) does not exempt NBFCs from the provisions contained in the 1956 Act. In fact the second proviso to Section 67(3) simply provides that the first proviso which provides that an offer or invitation of a company to fifty persons or more persons receiving the offer/ invitation shall be treated to be an offer/ invitation made to public shall not be applicable to NBFCs. It obviously means that the offer/invitation made by NBFCs to more than 49 persons

shall not be treated to have been made to the public, provided, the offer/ invitation is only to the persons receiving the offer/ invitations.

16. Reliance placed by counsel for the appellants on the decision of the Punjab & Haryana High Court is misplaced. That decision merely records the statement made by ROC, Chandigarh/ State Government that they are not proceeding with the notices issued, because, Alchemist Capital Limited is an NBFC to which Section 67 of the 1956 Act does not apply. Fact that the Writ Petition was disposed of by recording the statement made by ROC/ State Government cannot be a ground to hold that the Punjab and Haryana High Court has decided on merits that Section 67 is not applicable to NBFCs. It is relevant to note that the above statement made by ROC, Chandigarh/ State Government was in case of Alchemist Capital Limited, which had raised funds as NBFC and also raised funds before it was registered as an NBFC. Therefore, the Writ Petition was allowed to be withdrawn on the basis of partly incorrect statement made by ROC Chandigarh. In these circumstances, reliance placed by the appellants on the decision of the Punjab & Haryana High Court is wholly misplaced.

17. Fact that the notices issued by the ROC Delhi against the company are still pending before the ROC Delhi would not come in the way of SEBI to initiate action for violating Section 67 read with Section 73 of 1956 Act, because, there is no provision in the 1956 Act which prohibits SEBI from initiating action for violating Section 67 if ROC has already issued to notice to the company for allegedly violating Section 67 of

1956 Act. For any reason ROC is unable to proceed to decide the notice issued to the company or if the decision of ROC is ex-facie erroneous, then, it would be open to SEBI to initiate proceedings against the company for violating Section 67 of 1956 Act. In the present case, admittedly ROC, Delhi has not proceeded to decide the notices issued to the company despite the direction given to that effect by the Delhi High Court and in case of Alchemist Capital Limited ROC, Chandigarh has decided not to proceed in the matter on an erroneous assumption that Section 67 of 1956 Act is not applicable to NBFCs. In such a case, SEBI was justified in initiating the proceedings and determine the issue on merits.

18. Fact that Section 67 (3A) provides that notwithstanding anything contained in Section 67(3), SEBI shall in consultation with RBI frame guidelines in respect of the offer/ invitation made to the public by a PFI/ NBFC cannot be a ground to hold that Section 67 is not applicable to PFIs/ NBFCs. What Section 67(3A) contemplates is that irrespective of the fact that under Section 67(3) permits NBFCs/ PFIs to send offer/ invitation to more than 49 persons to whom the offer/ invitation is addressed without issuing prospectus, SEBI in consultation with RBI shall frame guidelines in that behalf. In other words, Section 67(3A) requires SEBI to frame guidelines in consultation with RBI in relation to the offer/ invitation made by NBFCs /PFIs. There can be no dispute that the guidelines framed by SEBI have to be in consonance with Section 67 of the 1956 Act. Fact that the guidelines were not framed by SEBI at the relevant time would not mean that Section 67 were also not applicable to

NBFCs. Thus, the argument of the appellants based on Section 67(3A) of 1956 Act that Section 67 is not applicable to NBFCs cannot be accepted.

19. In our opinion, propositions that emerge from the Apex Court decision in the case of Sahara India (Supra) may be summarized thus:-

- a) For an issue of securities not to be a public issue, the twin requirements namely (one) Section 67 (3)(a) and (b) and (two) first proviso to Section 67 (3) must be satisfied. However, in case of NBFCs the second of the 'twin requirements' was not required to be met viz. the number of persons to whom the offer or invitation was made need not be less than 50. It means that first of the 'twin requirements', viz. satisfaction of the conditions of Section 67(3)(a) and (b) would be applicable to all companies, including NBFCs.
- b) Observation made by the Apex Court in para 95 of the judgement that the rigour of Section 67 do not apply to an NBFC is in the context of first proviso to Section 67(3). Therefore, based on para 95 of the Apex Court decision in case of Sahara (Supra) appellants are not justified in contending that the rigour of Section 67(3) (a) and (b) are not applicable to NBFCs.

- c) Powers conferred on SEBI under Section 55A of 1956 Act is in addition to the powers already vested in SEBI under Section 11, 11A and 11B of SEBI Act and the said power stood extended to unlisted companies as well in respect of matters relating to issue of capital, transfer of securities and other matters incidental thereto.

20. Reliance placed by the appellants on the 'Financial Stability Report' of RBI is equally misplaced. What is stated in that report is that permitting NBFCs to offer shares/ debentures to more than 49 investors named in the offer without following the procedure prescribed for public issue needs to be reviewed. That does not mean that RBI has construed that NBFCs are outside the purview of Section 67 of 1956 Act. On the contrary, the above report of RBI suggests that permitting NBFCs to offer shares/ debentures to more than 49 retail/ institutional investors set out in the offer without following the public issue procedure needs to be reviewed.

21. Similarly, reliance placed by the appellants on the advertisement issued by SEBI on 15.11.2013 and the order of RBI dated 27.10.2017 is also without any merit. The advertisement issued by SEBI specifically clarified that the deposits accepted by the NBFCs/ by companies declared as Nidhi or a mutual benefit society etc. are outside the purview of the SEBI's jurisdiction. Therefore, the appellants are not justified in contending that even according to SEBI advertisement, NBFCs are

outside the purview of Section 67. Similarly, language used in the order passed by RBI on 27.10.2017 while cancelling the NBFC registration cannot be construed to mean that RBI has held that offer/ invitation made by NBFCs amounts to receiving deposits. In our opinion, plain and unambiguous language used in Section 67 of 1956 Act clearly show that NBFCs are also required to follow the provisions contained in Section 67 and 73 of the 1956 Act.

22. Argument of the appellants that they had no ‘intention’ to offer shares to the public and, therefore, SEBI could not invoke jurisdiction under Section 55A of 1956 Act is without any merit, because, firstly, the offer made by the company was not a private placement restricted to the persons to whom the offer was addressed but was open to the public namely “individual, trusts, corporate bodies, minors (through guardians), trusts, corporate bodies, minors (through guardians), financial institutions, mutual funds HUFs and cooperative bodies”. Secondly, reading Section 67 of 1956 Act as a whole makes it abundantly clear that when an NBFC offers shares to the general public and not to the persons to whom the offer/ invitation is made, then all the provisions applicable to a public offer would apply. In the present case, since the offer/ invitation of the company was not restricted to the persons to whom the offer/ invitation was made, the WTM of SEBI was justified in holding that the company had made the offer to the public without following the provisions applicable to public offer under the 1956 Act.

23. Once it is held that the offer/ invitation made by the company was liable to be construed as an offer/ invitation made to public, then it was obligatory for the company to issue prospectus and also seek prior permission under Section 73(1) of 1956 Act from the recognized stock exchanges for the shares intended to be offered to be dealt with in the stock exchange. Since, such permission was not sought by the company, as per Section 73(2), it was obligatory for the company to forthwith repay the amount received without interest within 8 days failing which the company and every director of the company who is an officer in default were on and from the expiry of the eighth day, jointly and severally liable to repay the money with interest not less than 4% and not more than 15% as may be prescribed.

24. In the present case, since the company had offered preferential shares not to persons to whom the offer was addressed but was made generally to 'Individuals, Trusts, Corporate Bodies,' Minors (through Guardians) Financial Institutions, Mutual Funds, HUFs and Cooperative Bodies and therefore, the allotment made by the company was liable to be construed as an offer made to the public and since the company had failed to issue prospects and seek prior permission from the stock exchanges as provided under Section 73(1), the WTM of SEBI was justified in holding that the company and its directors violated Section 73(2) of 1956 Act, and accordingly direct the appellants to refund the amount collected with 15% interest from the date when the repayments became due in terms of Section 73(2) to the investors till the date of actual payment.



25. However, as rightly contended by counsel for appellants, since Section 73(2) does not contemplate refund with interest compounded at half yearly intervals, while passing order by invoking Section 73 of 1956 Act the WTM of SEBI could not have ordered compounded interest at half yearly intervals. Therefore, decision of the WTM of SEBI to the extent of directing payment of interest 'compounded at half yearly intervals' cannot be sustained.

26. In case of Alchemist Capital Limited, it is not in dispute that registration as NBFC was granted only on 26.12.2005. Therefore, in respect of the funds raised by Alchemist Capital Limited prior to 26.12.2005, it was obligatory to follow the procedure prescribed under the 1956 Act relating to the public issue, however, the said procedure was not followed. Therefore, no fault can be found with the decision of the WTM of SEBI in directing Alchemist Capital Limited and its directors to refund the amount with interest.

27. In view of the clear and unambiguous provisions contained in Section 67 of the 1956 Act, it is not necessary to deal with various decisions relied upon by counsel for appellants which are all distinguishable on facts.

28. It is brought to our notice that at the instance of the investors in the scrip of the companies, Calcutta High Court, pursuant to the joint submission made by the parties, has appointed a committee headed by a retired Judge of the Calcutta High Court to monitor the mode and the manner of repayment and the appellants are cooperating in that behalf. It

is not the case of the appellants that the Calcutta High Court has set aside or modified the order passed by SEBI. Therefore, fact that the Calcutta High Court in substance has also ordered implementation of the order passed by SEBI, would not come in the way of SEBI in seeking implementation of the directions contained in the impugned orders.

29. In the result, while upholding the impugned orders passed by the WTM of SEBI on 14.08.2015 and 03.08.2015 we delete the direction given by the WTM of SEBI to pay interest 'compounded at half yearly intervals'.

30. All the 8 appeals are disposed of in the aforesaid terms with no order as to costs. In view of the disposal of the appeals, Miscellaneous Applications filed in some of the appeals do not survive. Accordingly, the said Misc. Applications are also disposed of with no order as to costs.

Sd/-  
Justice J.P. Devadhar  
Presiding Officer

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