

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: DR. K.M. ABRAHAM, WHOLE TIME MEMBER**

ORDER

DIRECTIONS UNDER SECTION 11B AND 12(1B) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATIONS 65 AND 73 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (COLLECTIVE INVESTMENT SCHEMES) REGULATIONS, 1999 IN THE MATTER OF NICER GREEN FORESTS LIMITED

1. It was brought to the notice of Securities and Exchange Board of India (hereinafter referred to as SEBI) that Nicer Green Forests Limited (hereinafter referred to as the company) had been operating Collective Investment Schemes (hereinafter referred to as CIS) and mobilizing funds from the investors/public under the said CIS. SEBI had also received complaints from the public stating that the company was not redressing their grievances with regard to their dues. In view of the above, SEBI issued a notice dated February 6, 2004 asking it to show cause as to why appropriate action in terms of provisions of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as SEBI Act) and Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as the CIS Regulations) should not be taken against it and its promoters/directors/persons in charge of the schemes and repay the same in terms of the said Regulations. Thereafter, vide letter dated nil (received by SEBI on March 18, 2004), the company *inter alia* stated that they do not fall within the ambit of Section 11AA of the SEBI Act, as none of their schemes satisfy the conditions laid down

therein. The company contended that it had not carried on, sponsored, or launched any CIS without obtaining a certificate of registration under the CIS Regulations. It further requested for required documents for the purpose of the grant of certificate of registration, if required. Subsequently, SEBI, vide letter dated April 22, 2004, while referring to the sample registration letter issued by the company under its schemes, informed the company that:

- i. the said sample registration letter revealed that the investors were allotted a plot, against the monies collected from them, on which a development is carried out by the company;
- ii. investors were promised estimated realizable value at the end of the term, which denotes the composite value of land, plants, trees, allied items thereon.

The company was further informed that the said features of the schemes indicate that they are in the nature of CISs. The company was further advised to submit copies of the following documents:

- a. sample brochure,
- b. Rule book,
- c. agreement entered into and the registration letter issued by it in connection with its CISs

2. The company was also advised to confirm the scheme wise amounts mobilized by it. The company was required to furnish the aforesaid details/documents by April 30, 2004 and was also advised to consider applying for the grant of certificate of registration under the CIS Regulations for which it was informed to obtain information/documents from the SEBI Website (www.sebi.gov.in). As no reply was received from the company by the aforesaid date, a reminder dated May 14, 2004 was sent by SEBI. In response to the

above mentioned letters, the company vide letter dated nil (received by SEBI on July 5, 2004) reiterated the submissions made vide its earlier letter dated March 18, 2004. It also forwarded specimen copies of the registration letter and certificate. A document containing details of its various schemes was also annexed.

3. The aforesaid documents were examined by SEBI and said examination indicated that the activities of the company were prima facie in the nature of CIS and the same were communicated to the company vide letter dated August 11, 2004. The company was also advised to submit copies of memorandum of association and other documents issued in connection with its scheme. The company was also advised to submit details of scheme wise and year wise funds mobilized under its various schemes. SEBI had also forwarded the copy of the application form for grant of certificate of registration under the CIS Regulations, as requested by the company. As the company failed to provide the aforesaid documents, SEBI requested the Registrar of Companies (Punjab, Himachal Pradesh and Chandigarh) to provide certain information/documents. Subsequently, an opportunity of personal hearing was granted to the company on November 26, 2009. The company vide letter dated November 23, 2009 requested for an adjournment of the said hearing and accordingly, another opportunity was granted to the company on January 8, 2010. The hearing was again postponed to February 19, 2010, as requested by its authorized representative of the company, Vinayak Associates (Advocates & Attorneys). On February 19, 2010, Mr. Amit Vinayak, Advocate appeared on behalf of the company and requested time to make complete submissions. Accordingly, another opportunity was provided to the company on March 19, 2010. Due to the inability of the advocate (representing the company) on March 19, 2010, the hearing was again adjourned to April 16, 2010. In the meanwhile, the company filed its submissions dated April 14, 2010. On April 16, 2010, Mr. Amit Vinayak,

Advocate, appeared on behalf of the company and made submissions on the lines of the aforesaid submissions and requested SEBI to drop the present proceedings.

4. I have perused the show cause notice issued to the company, the oral as well as the written submissions made on behalf of the company and other material available on record. I note that in the present facts and circumstances, the issue for consideration is whether the schemes operated by the company are in the nature of CIS, and if so, whether it had complied with the relevant provisions of the SEBI Act and the CIS Regulations. The term “collective investment scheme” is defined in Section 11AA of the SEBI Act and the same is reproduced herein below:

“Collective Investment Scheme.

11AA (1) Any scheme or arrangement which satisfies the conditions referred to in subsection 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 solely 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.”*

The contention of the company is that its activities do not fall within the conditions laid down in Section 11AA. It further made the following submissions:

- a. The company is engaged in the business of sale and purchase of plots under various schemes whereby customers are offered plots, owned by the company, to be bought on installment basis.
- b. The intent of the company was clear that it was offering owned plots for sale and not collecting any money to pool resources and utilization of the same for the purpose of the scheme and therefore the transaction undertaken by the company is outside the criteria of Section 11AA(2)(i) of the SEBI Act.
- c. The company's offer to customers to buy a plot of land on installment basis was purely a commercial transaction not a CIS. The buyer of a plot is given a fair option at the end of the term of agreement, either to own a plot or forego the right in lieu of determined sum of money. The company does not offer to share or pay any amount as profits, income, produce or property in lieu of agreement with its customer or a buyer of a plot. However, offering bonus or accidental benefits to the customers were promotional schemes that formed part of a prudent business practice to attract more customers for the purpose of raise or gain in business of the company. Therefore, it does not satisfy the eligibility criteria as laid down under Section 11AA(2)(ii) of the SEBI Act.
- d. It cannot be alleged that the company was managing on behalf of the investors. The plots were owned by the company and it reserves the right to develop and maintain the same till the term of agreement entered into with its customers. The development and allotment of plot to customers are reserved with the company as part of management policy and for fair distribution purposes therefore it cannot be alleged to have been managed on behalf of investors and therefore Section 11AA(2)(iv) of the SEBI Act is not attracted.

It was further submitted *"...the terms "investors" and "unit certificates" in the brochure submitted with your good self have been used inadvertently and without any*

bad intention. The company undertakes to make suitable modifications/alterations in its stationery in this respect.”

5. I note from the brochure of the company that its main objective is to purchase large tracts of land at low cost to develop the same and sell the land/produce to the investors at low price. As per the said brochure, only those investors, who agree to buy the plots for commercial and residential purpose at a low cost would be eligible to subscribe in the scheme. The brochure further guarantees the assured profit (return) in the scheme of the company. In view of the aforesaid provision read with the company's brochure, I note that the company aims at purchasing large tracts of land at low cost to develop the same and sell the land/produce to the investors at low price. This particular feature is indicative of pooling resources collected from the investors, satisfying the eligibility criteria for being classified as collective investment scheme as laid down under section 11AA(2)(i) of the SEBI Act. In view of the above, I am unable to accept the contention of the company that it is only offering owned plots to the investors and not pooling resources for the purpose of the scheme. Further, no documents were produced to show that the lands were owned by the company. Even otherwise, the said submission would not benefit the company as one of the requirements specified under Section 11AA of the SEBI Act is pooling of resources and its utilization for the purpose of the scheme or arrangement. There is no dispute to the fact that the company had mobilized funds from the public. In the brochure of the company, it is clearly indicated that the purpose was to develop the land. The same would establish that the company had fulfilled the requirement of pooling of resources for the development of the land which was the objective of the scheme. Further, it is evident from the brochure that the investors were given estimated realizable value against their investments at the end of the term and they are also given an option to take the land or a fixed payment as per the terms of the scheme.

Further, a bonus payment had also been indicated to be made to the investors if they pay their installments on time. The investor was further entitled to accidental benefit under the schemes. Therefore, in accordance with the scheme, the investors made payment, and were entitled to receive profits, income, produce or property from such scheme or arrangement, satisfying the requirements of Section 11AA(2)(ii) of SEBI Act. In view of the above, I find it unable to accept the company's contention that it does not offer to share or pay any amount as profits, income, produce or property in lieu of agreement with its customer or a buyer of a plot but were promotional schemes to attract more customers for the purpose of increasing its business. I further note from the brochure that the company has a right of development and maintenance of the land of the investor. Further, the company reserves the right on the unit of land for the services incurred on the development of the land. The company also has a right to distribute the land to any other investor. This indicates that the property, contribution or investment forming part of the scheme is being managed by the company on behalf its investors. Further, the investors do not have any control over the management and operation of the scheme. The same would satisfy the requirements of Section 11AA(2)(iii)&(iv) of the SEBI Act. I note that the company in its reply has also accepted that the development and allotment of plot are reserved with the company as part of management policy. The company submitted that “...the terms “investors” and “unit certificates” in the brochure submitted with your good self have been used inadvertently and without any bad intention. The company undertakes to make suitable modifications/alterations in its stationery in this respect.” Thus, admittedly, the company publicized the scheme and issued brochures for this purpose. They also mobilized money on the basis of such brochures. It cannot now plead that such terms were used in the brochures inadvertently. Even if, the said terms were deleted from the brochures, the nature of the scheme would not give it a different colour. In view of the above, I do not

have any hesitation to say that company has been operating a collective investment scheme as defined under Section 11AA of the SEBI Act.

6. By way of background, it is to be stated that it came to the notice of Government of India that there were entities which were issuing instruments against investments such as agro bonds, plantation bonds, etc. by offering very high rates of return which were inconsistent with the normal rate of returns in such schemes. Such entities mobilized huge amounts from the public and then misutilised these funds, for purposes not disclosed at the time of inviting investment, thereby not only causing loss to the investors who lost their lives' savings dealing with such unscrupulous entities, but also eroding the confidence of the general public. Considering the high element of risk associated with such schemes, the Central Government felt that it was necessary to set up an appropriate Regulatory framework to regulate such entities. Hence, in order to protect the interest of the investors and to ensure that only legitimate investment activities are carried on, vide Press Release dated November 18, 1997, the Central Government communicated its decision that schemes through which instruments such as agro bonds, plantation bonds, etc. are issued by the entities would be treated as Schemes under the provisions of the SEBI Act and directed SEBI to formulate Regulations for the purpose of regulating these CISs. It was in pursuance of the above developments, Section 11AA of the SEBI Act and the CIS Regulation came to be framed. Several press releases and newspaper advertisements/notices were issued by SEBI from time to time in the leading newspapers of India bringing to the notice of the investors and the persons concerned, the various instructions issued by SEBI/Central Government from time to time in respect of the functioning of the collective investment schemes, However, the company had failed to comply with the said instructions and the statutory requirements specified in the SEBI Act and the CIS Regulations. In terms of Section 12(1B) of

the SEBI Act, no person shall sponsor or caused to be sponsored or carry on or caused to be carried on any CISs unless he obtain a certificate of registration from SEBI in accordance with the CIS Regulations. The company failed to do so. It neither applied for registration nor wound up the schemes in terms of the provisions of the CIS Regulations. In terms of Regulation 73 of the CIS Regulations, an existing CIS which has failed to make an application for registration to SEBI shall wind up the schemes and repay in the manner specified in the said Regulations. The company had failed to obtain registration from SEBI to operate such CISs and further failed to wind up its schemes and repay its investors and continued with the schemes. Further, in terms of Regulation 68 of the CIS Regulations, any person who has been operating a CIS at the time of commencement of the said Regulation shall be deemed to be an existing CIS and shall make an application to SEBI in the manner specified in Regulation 5 thereof. In terms of Regulation 74 of the CIS Regulations, an existing CIS which is not desirous of obtaining provisional registration from SEBI shall formulate a scheme of repayment and make such repayments to the existing investors in the manner specified in Regulation 73 thereof. Therefore, it is established that the company has not complied with the provisions of Section 12(1B) of the SEBI Act and Regulations 73 & 74 of the CIS Regulations.

7. In the context of the present case, I would also like to note the following observation of the Hon'ble Punjab and Haryana High Court in the matter of PGF Limited vs. Union of India and others *"It is not a matter of dispute that each customer/investor (insofar as the business activity carried out by the PGFL) is a recipient of agricultural land i.e. "property". It is, therefore apparent that each customer/investor of the PGFL is admittedly a recipient of one of the benefits contemplated under Clause (ii) (supra), namely, "property".*" The Hon'ble Court further observed *"It is clear also from the reasons recorded while drawing the aforestated conclusions, that a customer/investor has practically no accessibility to the*

agricultural land purchased by him; it is practically impossible for him to carry on agricultural/or developmental activities on the land purchased by him; the life line/blood stream of agricultural activity which include irrigational and drainage facilities along with ancillary inputs are to remain perpetually, under the control of the PGFL; it is also practically impossible for any customer/investor to have a day to day control over the agricultural land purchased by him. Day to day control with the customer/investor is one of the most important tests delineated by the Dave Committee for arriving at a final determination, whether or not, a scheme/arrangement is a "collective investment scheme". In view of the totality of circumstances noticed above, it is not possible for us to accept the contention of the learned counsel for the petitioner, that the customer/investor, has day to day control over the agricultural land purchased by him or that he himself manages the agricultural land purchased by him. The aforesaid fact situation, therefore, leads to the only other conclusion possible, namely, the agricultural land purchased by a customer/investor is managed on his behalf. In view of the above, we are satisfied that PGFL satisfies the third ingredient/characteristic expressed in Section 11AA(2)(iii) of the SEBI Act."

8. In view of the foregoing, I, in exercise of powers conferred upon me under Section 11 B and 19 of the Securities and Exchange Board of India Act, 1992 read with Regulation 65 read with 73 of Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999, hereby direct Nicer Green Forests Limited to wind up its existing collective investment scheme(s) and refund the money collected by it under the scheme(s) with returns which are due to the investors as per the terms of offer within a period of one month from the date of this order, failing which the following actions would follow:

- (i) Initiation of prosecution proceedings, under Section 24 of the Securities and Exchange Board of India Act, 1992, against the company/its promoters/directors/managers/persons in charge of the business of its scheme(s),

- (ii) Debarring the company/its promoters/directors/managers/ persons in charge of the business of its schemes (s) from operating in the capital market and accessing the capital market for a period of five years,
- (iii) Making a reference to the State Government/local police to register civil /criminal cases against the company and its promoters/ directors for apparent offences of fraud, cheating, criminal breach of trust and misappropriation of public funds, and
- (iv) Making a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the company.

9. This order shall come into force with immediate effect.

DR. K. M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

PLACE: MUMBAI
DATE: NOVEMBER 9, 2010