REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9813 OF 2011

Sahara India Real Estate Corporation Limited & Ors. .. Appellants

Versus

Securities and Exchange Board of India & Anr. .. Respondents

WITH

CIVIL APPEAL NO. 9833 OF 2011

J U D G M E N T

K. S. RADHAKRISHNAN, J.

1. We are, in these appeals, primarily concerned with the powers of the Securities and Exchange Board of India (for short 'SEBI') under Section 55A(b) of the Companies Act, 1956 to administer various provisions relating to issue and transfer of securities to the public by listed companies or companies which intend to get their securities listed on any recognized stock exchange in India and also the question whether Optionally Fully Convertible Debentures (for short 'OFCDs') offered by the appellants should have been listed on any recognized stock

exchange in India, being Public Issue under Section 73 read with Section 60B and allied provisions of the Companies Act and whether they had violated the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 [for short 'DIP Guidelines'] and various regulations of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 [for short 'ICDR 2009'], and also whether OFCDs issued are securities under the Securities Contracts (Regulation) Act, 1956 [for short 'SCR Act'].

2. Sahara India Real Estate Corporation Limited (for short 'SIRECL') and Sahara Housing Investment Corporation Limited (for short 'SHICL"), appellants herein (conveniently called Saharas), are the companies controlled by Sahara Group. Saharas have raised almost identical issues on facts as well as on questions of law before us and hence we are disposing off both the appeals by way of a common judgment.

3. SIRECL was originally incorporated as Sahara India "C" Junxion Corporation Limited on 28.10.2005 as a public limited company under the Companies Act and it changed its name to

SIRECL on 7.3.2008. As per the Balance Sheet of the company as on 31.12.2007, its cash and bank balances were Rs.6,71,882 and its net current assets worth Rs.6,54,660. Company had no fixed assets nor any investment as on that date. SIRECL's operational and other expenses for the three quarters ending 31.12.2007 were Rs.9,292 and the loss carried forward to the Balance Sheet as on that date was Rs.3,28,345.

4. SIRECL, in its Extraordinary General Meeting held on 3.3.2008, resolved through a special resolution passed in terms of Section 81(1A) of the Companies Act to raise funds through unsecured OFCDs by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara Group of Companies (for short 'Sahara Group') without giving any advertisement to general public. Company authorized its Board of Directors to decide the terms and conditions and revision thereof, namely, face value of each OFCD, minimum application size, tenure, conversion and interest rate. Board of Directors, consequently, held a meeting on 10.3.2008 and resolved to issue unsecured OFCDs by way of private placement, the details

of which were mentioned in the Red Herring Prospectus (for short 'RHP') filed with the Registrar of Companies (for short "RoC"), Kanpur. SIRECL had specifically indicated in the RHP that they did not intend to get their securities listed on any recognized stock exchange. Further, it was also stated in the RHP that only those persons to whom the Information Memorandum (for short 'IM') was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply. Further, it was also stated in the RHP that the funds raised by the company would be utilized for the purpose of financing the acquisition of townships, residential apartments, shopping complexes etc. and construction activities would be undertaken by the company in major cities of the country and also would finance other commercial activities/projects taken up by the company within or apart from the above projects. RHP also indicated that the intention of the company was to carry out infrastructural activities and the amount collected from the issue would be utilized in financing the completion of projects, namely, establishing/constructing the bridges, modernizing or setting up of airports, rail system or any other projects which might be alloted to the company from time to time in future. RHP also highlighted

the intention of the company to engage in the business of electric power generation and transmission and that the proceeds of the current issue or debentures would be utilized for power projects which would be alloted to the company and that the money, not required immediately, might be parked/invested, inter alia, by way of circulating capital with partnership firms or joint ventures, or in any other manner, as per the decision of the Board of Directors from time to time. SIRECL, under Section 60B of the Companies Act, filed the RHP before the RoC, Uttar Pradesh on 13.3.2008, which was registered on 18.3.2008. SIRECL then in April 2008, circulated IM along with the application forms to its so called friends, associated group companies, workers/employees and other individuals associated with Sahara Group for subscribing to the OFCDs by way of private placement. Then IM carried a recital that it was private and confidential and not for circulation. A brief reference to the IM may be useful, hence given below:

"PRIVATE & CONFIDENTIAL

(NOT FOR CIRCULATION)

INFORMATION MEMORANDUM FOR PRIVATE PLACEMENT OF OPTIONALLY FULLY

CONVERTIBLE UNSECURED DEBENTURES (OFCD)

This Memorandum of Information is being made by Sahara India Real Estate Corporation Limited (formerly Sahara India 'C' Junxion Corporation Limited) which is an unlisted Company and neither its equity shares nor any of the bonds/debentures are listed or proposed to be listed. This issue is purely on the private placement basis and the company does not intend to get these OFCD's listed on any of the Stock Exchanges in India or Abroad. This Memorandum for Private Placement is neither a Prospectus nor a Statement in Lieu of prospectus. It does not constitute an offer for an invitation to subscribe to OFCD's issued by Sahara India Real Estate Corporation Limited. The Memorandum for Private Placement is intended to form the basis of evaluation for the investors to whom it is addressed and who are willing and eligible to subscribe to these OFCD's. Investors are required to make their own independent evaluation and judgment before making the investment. The contents of this Memorandum for Private Placement are intended to be used by the investors to whom it is addressed and distributed. This Memorandum for Private Placement is not intended for distribution and is for the consideration of the person to whom it is addressed and should not be reproduced by the recipient. The OFCD's

mentioned herein are being issued on a private placement basis and this offer does not constitute a public offer/invitation." (emphasis added)

5. The RHP, which was issued prior to the IM, had also given the details and particulars of the three OFCDs issued by SIRECL appended as Annexure-I, which would give a brief idea of the Tenure of the Bonds issued, its face value, redemption value etc., a projection of which is given below:

Particulars	Nature of OFCDs		
	Abode Bond	Real Estate Bond	Nirmaan Bond
Tenure	120 months	60 months	48 months
Face Value	Rs.5,000/-	Rs.12,000/-	Rs.5,000/-
Redemption Value	Rs.15,530/-	Rs.15,254/-	Rs.7,728/-
Early Redemption	After 60 months	NIL	After 18 months
Conversion	On completion of 120 months	On completion of 60 months	On completion of 48 months
Minimum Application Size	Rs.5,000/-	Rs.12,000/-	Rs.5,000/-
Nominee System	Double Nominee	Double Nominee	Double Nominee
Transfer	Yes	Yes	Yes

6. I may also indicate that all the bonds stipulated that bond holders could avail of loan facility as per the terms and conditions

of the application forms. Nirmaan and Real Estate Bonds prescribed an additional feature of death risk cover as well. Clause 13 of RHP imposed no restriction on the transfer of the OFCDs.

7. SIRCEL, therefore, floated the issue of the OFCDs as an open ended scheme and collected an amount of Rs.19400,86,64,200 (Nineteen thousand four hundred crores, eighty six lacs, sixty four thousand and two hundred only) from 25.4.2008 to 13.4.2011. Company had a total collection of Rs.17656,53,22,500 (Seventeen thousand six hundred and fifty six crores, fifty three lacs, twenty two thousand and five hundred only) as on 31.8.2011, after meeting the demand for premature redemption. The above mentioned amounts were collected from 2,21,07,271 investors.

8. SHICL, a member of Sahara Group companies, also convened an Annual General Meeting on 16.9.2009 to raise funds by issue of OFCDs, by way of private placement, to friends, associated group companies, workers/employees and other individuals associated/affiliated or connected in any manner with the Sahara Group companies. Consequently, a RHP was filed on

6.10.2009 under Section 60B of the Companies Act with the RoC, Mumbai, Maharashtra, which was registered on 15.10.2009. Later, SHICL issued OFCDs of the nature of Housing Bond; conversion price of Rs.5,000/- for each five bonds, Income Bond, conversion price of Rs.6,000/- for six bonds; Multiple Bond, conversion price of Rs.24,000/- for two bonds. Interest accrued on each of the three types of bonds was to be refunded to the bond holders.

9. SEBI, as already indicated, had come to know of the large scale collection of money from the public by Saharas through OFCDs, while processing the RHP submitted by Sahara Prime City Limited, another Company of the Sahara Group, on 12.1.2010 for its initial public offer. SEBI then addressed a letter dated 12.1.2010 to Enam Securities Private Limited, merchant bankers of Sahara Prime City Limited about the complaint received from one Roshan Lal alleging that Sahara Group was issuing Housing bonds without complying with Rules/Regulations/Guidelines issued by RBI/MCA/NHB. Merchant Banker sent a reply dated 29.1.2010 stating that SIRECL and SHICL were not registered with any stock exchange and were not subjected to any rule / regulation / guidelines / notification / directions framed thereunder and the

issuance of OFCDs were in compliance with the applicable laws. Following the above, another letter dated 26.2.2010 was also sent by the Merchant Banker to SEBI stating that SIRECL and SHICL had issued the OFCDs pursuant to a special resolution under Section 81(1A) of the Companies Act, 1956 passed on 3.3.2008 and 16.9.2009 respectively. Further, it was also pointed out that they had issued and circulated an IM prior to the opening of the offer and that RHP issued by SIRECL dated 13.3.2008 was filed with RoC, U.P. and Uttarakhand and RHP issued by SIHCL dated 6.10.2009 was filed with RoC, Maharashtra.

10. SEBI on 21.4.2010 addressed a letter to the Regional Director, Northern and Western Regions of Ministry of Corporate Affairs (for short 'MCA') enclosing the complaint received in respect of OFCDs issued by Saharas. SEBI had stated that those companies had solicited and issued OFCDs violating statutory requirements and that they were not listed companies and had not filed the RHP with SEBI. SEBI sent a communication dated 12.5.2010 to Saharas calling for various details including the details regarding the number of application forms circulated after filing of RHP with RoC, details regarding the number of applications

received and subscription amount received, date of opening and closing of subscription list of OFCDs, number and list of allotees etc.

11. SIRECL on 31.5.2010 addressed a letter to MCA for guidance/advice as to whether it was SEBI or MCA who had *locus standi* in the matter of unlisted companies in view of the provisions of Section 55A(c) of the Act. MCA, it is seen, had sent a letter dated 17.6.2010 to SIRECL stating that the matter was being examined under the relevant provisions of the Companies Act, 1956. SIRECL informed SEBI of the reply they had received from the MCA and that they would address SEBI after a decision was taken by MCA. Having not received the details called for from Saharas, SEBI had *prima facie* felt that SIRECL was carrying out various transactions in securities in a manner detrimental to the interests of the investors or to the securities market and, therefore, issued summons dated 30.8.2010, under Section 11C of the SEBI Act, directing the company to furnish the requisite information by 15.9.2010. Detailed reply dated 13.9.2010 was sent by SIRECL to SEBI, wherein it was stated that the company had followed the procedure prescribed under Section 60B of the Companies Act

pursuant to the special resolution passed under Section 81(1A) in its meeting held on 3.3.2008 and filed its RHPs under Section 60B with the concerned RoC. Further, it was pointed out that SIRECL was not a listed company, nor did it intend to get its securities listed on any recognized stock exchange in India and that OFCDs issued by the company would not fall under Sections 55A(a) and/or (b) and hence the issue and/or transfer of securities and/or non-payment of dividend or administration of either the company or its issuance of OFCDs, were not to be administered by SEBI and all matters pertaining to the unlisted company would fall under the administration of the Central Government or RoC. Further, it was urged that Regulations 3 and 6 of ICDR 2009 would not apply, since there was no public issue either in the nature of an initial public offer or further public offer as defined by Regulation 2(zc), 2(p) and/or 2(n) of ICDR 2009. OFCDs, it was pointed out, were restricted to a select group (as distinguished from general public), however large they might be and hence the issuance of OFCDs was not a public offer to attract the provisions of Regulations 3 and/or 6 of ICDR 2009. Company had stated that issuance of OFCDs of 2008 was also not covered by the SEBI (Issue and Listing Securities) Regulations, 2008, since it would apply to non-

convertible debt securities, whereas the OFCDs issued by SIRECL were convertible securities. SIRECL, therefore, requested SEBI to withdraw the summons issued under Section 11C of the SEBI Act. Summons dated 23.9.2010 was also issued to SHICL, for which also an identical reply was sent to SEBI.

12. MCA, in the meanwhile, sent a letter dated 21.9.2010 to SIRECL under Section 234(1) of the Companies Act calling for various details including the amount collected through private placement, details regarding the number of investors to whom the allotment had been made, their names, addresses, utilization of the funds collected, its purpose, class or classes of persons to whom the allotment had been made and whether allotments were completed and various other details. SIRECL was directed to furnish the information within 15 days from the date of receipt of notice, failing which it was informed that penal action would be initiated against the company and its directors under Section 234(4)(a) of the Companies Act.

13. SEBI, in the meanwhile, sent a letter dated 23.9.2010 to SIRECL reminding that it had not provided information/documents

on the issue of OFCDs. Proceeding issued for appointing the investigating agency was also forwarded to the company. SIRECL again replied by its letter dated 30.9.2010 raising the issue of jurisdiction of SEBI in investigating the affairs of SIRECL. SIRECL, however, replied to the letter of MCA dated 21.9.2010 on 4.10.2010, stating inter alia that it would be filing the prospectus on the closure of the issue in compliance with the provisions of Section 60B(9) of the Companies Act, stating therein the total capital raised by way of OFCDs and the related information by filing the prospectus. Further, it was also pointed out that allotment had been made to persons who were connected with the Sahara Group and that investors had given a declaration to the company to that effect in terms of the RHP. MCA then sent a reply dated 14.10.2010 stating that the points 1 to 3, 5 to 10, 12 to 16, 18 to 22 had been examined and appeared to be satisfactory. With regard to points 4, 11 and 17, the company was directed to effect compliance on closure of issue by filing of prospectus as required under Section 60B(9) of the Companies Act.

14. SEBI, in the meanwhile, issued a notice dated 24.11.2010 informing both SIRECL and SHICL that the issuance of OFCDs was

a public issue and, therefore, securities were liable to be listed on a recognized stock exchange under Section 73 of the Companies Act. From the preliminary analysis, it was pointed out that the issuance of OFCDs by Saharas was *prima facie* in violation of Sections 56 and 73 of the Act and also various clauses of DIP Guidelines and SHICL had also *prima facie* violated Regulations 4(2), 5(1), 6, 7, 16(1), 20(1), 25, 26, 36, 37, 46 and 57 of ICDR 2009. Both the companies were, therefore, directed to show cause why action should not be initiated against them including issuance of direction to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, since they had violated the provisions of the Companies Act, SEBI Act, erstwhile DIP Guidelines and ICDR 2009.

15. SIRECL had challenged the show-cause-notice dated 24.11.1010 before the Allahabad High Court, Lucknow Bench in W. P. No. 11702 of 2010, which the Court had stayed on 13.12.2010. SEBI took up the matter before this Court in S.L.P. (Civil) No. 36445 of 2010 and this Court did not interfere with the interim order, but ordered early disposal of the writ petition.

16. MCA, following its earlier letter dated 21.9.2010 issued

another notice dated 14.2.2011 directing SIRECL to furnish details on four specific points, including the details of the number of persons who had applied in pursuance to the OFCDs issued, the mode of receipt of payment (Application Register), the name, address, number of persons to whom OFCDs were allotted (Allotment Register) and also whether the number of allottees to whom OFCDs were allotted etc. exceeded fifty. SIRECL replied to the notice on 26.2.2011. SIRECL, it was stated, had sent a password protected CD along with two separate sheets containing the procedure and the password to SEBI; the CD contained of investors' names, serial numbers and amounts invested in OFCDs. SEBI, however, could not open the CD due to non furnishing of the password. SEBI pointed out this fact before the High Court and the Court vacated the interim order dated 13.12.2010. SIRECL took up the matter before this Court in S.L.P. (Civil) No. 11023 of 2011.

17. SIRECL, in the meanwhile, claimed that it had furnished a separate CD along with the password vide letter dated 19.4.2011 to SEBI stating that due to the enormity of the work and time taken in collating and compiling the data relating to the names and

addresses and the amount invested, the company could only provide the partial information relating to names, numbers and amount invested by the investors through the covering letter dated 18.3.2011 in a CD. SIRECL then moved the High Court on 29.4.2011 to recall the order dated 7.4.2011 on the plea that the details called for by SEBI had been furnished. The High Court dismissed the application, which led SIRECL filing SLP (Civil) No. 13204 of 2011 before this Court. This Court on 12.5.2011 passed the following order in SLP (Civil) No. 11023 of 2011 and SLP (Civil) No. 13204 of 2011:

> "In this matter the questions as to what is OFCD and the manner in which investments are called for are very important questions. SEBI, being the custodian of the Investor's and as an expert body, should examine these questions apart from other issues. Before we pass further orders, we want SEBI to decide the application(s) pending before it so that we could obtain the requisite input for deciding these petitions. We request SEBI to expeditiously hear and decide this case so that this Court can pass suitable orders on re-opening. However, effect to the order of SEBI will not be given. We are taking this route as we want to protect the interest of the Investor. In the meantime, the High Court may proceed, if it so chooses, to dispose of the case at the earliest."

18. SEBI then issued a fresh notice dated 20.5.2011 stating that Saharas had not provided any information to SEBI regarding details of its investors to show that the offer of OFCDs was made to less than fifty persons. Further, it was pointed out that Saharas though claimed, that the offer/issue was made on private placement basis, any offer/issue to fifty or more persons would be treated as public issue/offer in terms of the first proviso to Sub-section (3) of Section 67 of the Companies Act and the provisions of the Companies Act governing public issues and the provisions of DIP Guidelines and ICDR 2009 would consequently apply. Further, it was also pointed out in the notice that the RHP provided along with the letter of SIRCEL dated 15.1.2011 contained untrue statements which attracted the provisions of Sections 62 and 63 of the Act and hence the offer of OFCDs to public through the RHP was illegal. Further, it was stated that none of the disclosure requirements specified by SEBI or the investors protection measures prescribed for public issues under DIP Guidelines and ICDR 2009 had been complied with and hence there was *prima facie* violation of Section 56 of the Companies Act and hence offer

of OFCDs of Saharas to the public was illegal. Notice also indicated that Saharas had violated the provisions of Section 73 of the Companies Act, by non-listing of their debentures in a recognized stock exchange. Further, it was also pointed out that Saharas had not executed any Debenture Trust Deed for their OFCDs, not appointed any Debenture Trustee and not created any Debenture Redemption Reserve, which would amount to violation of Sections 117A, 117B and 117C of the Companies Act. Non-compliance of furnishing details in Form No. 2A, as required under Rule 4CC of the Companies (Central Government's) General Rules and Forms, 1956 read with DIP Guidelines and ICDR 2009, it was pointed out, had violated Section 56(3) of the Companies Act.

19. SEBI notice dated 20.5.2011 also highlighted that the CD was secured in such a manner that no analysis was possible and the addresses of the OFCDs holders were incomplete or ambiguous. Serious doubts were also raised with regard to the identity and genuineness of the investors and the intention of the companies to repay the debenture holders upon redemption. Notice, therefore, stated that the companies had *prima facie* violated the provisions of the Companies Act, SEBI Act, 1992, DIP

Guidelines and ICDR 2009 and hence the offer/issue of OFCDs to public was illegal, and imperiled the interest of investors in such OFCDs and was detrimental to the interest of the securities market. Saharas were, therefore, called upon to show cause why directions contained in the interim order of SEBI dated 24.11.2010 be not issued under Sections 11(1), 11(4)(B), 11A(1)(b) and 11B of SEBI Act read with Regulation 107 of ICDR 2009.

20. Saharas then sent a detailed reply dated 30.5.2011 pointing out that the appellants had made private placement of OFCDs to persons who were associated with Sahara Group and those issues were not public issues. Further, it was also urged that OFCDs issued were in the nature of "hybrid" as defined under the Companies Act and SEBI did not have jurisdiction to administer those securities since Hybrid securities were not included in the definition of 'securities' under the SEBI Act, SCR Act etc. Further, it was also urged that such hybrids were issued in terms of Section 60B of the Companies Act and, therefore, only the Central Government had the jurisdiction under Section 55A(c) of the Companies Act. Further, it was also pointed out that Sections 67 and 73 of the Companies Act could not be made applicable to

Hybrid securities, so also the DIP Guidelines and ICDR 2009. Further, it was reiterated that the company had raised funds by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/affiliated with Sahara Group, without giving any advertisement to the public. Further, it was also pointed out that RoC, Kanpur and Maharashtra had registered those RHPs without any demur and, therefore, it was unnecessary to send it to SEBI.

21. SEBI passed its final order through its whole-time member (WTM) on 23.6.2011. SEBI examined the nature of OFCDs issued by Saharas and came to the conclusion that OFCDs issued would come within the definition of "securities" as defined under Section 2(h) of SCR Act. SEBI also found that those OFCDs issued to the public were in the nature of Hybrid securities, marketable and would not fall outside the genus of debentures. SEBI also found that the OFCDs issued, by definition, design and characteristics intrinsically and essentially, were debentures and the Saharas had designed the OFCDs to invite subscription from the public at large through their agents, private offices and information memorandum. SEBI concluded that OFCDs issued were in fact

public issues and the Saharas were bound to comply with Section 73 of the Companies Act, in compliance with the parameters provided by the first proviso to Section 67(3) of the Companies Act. SEBI took the view that OFCDs issued by Saharas should have been listed on a recognized stock exchange and ought to have followed the disclosure requirement and other investors' protection norms.

22. SEBI also held that the Parliament has conferred powers on it under Section 55A(b) of the Companies Act to administer such issues of securities and Saharas were not justified in raising crores and crores of rupees on the premise that that OFCDs issued by them, were by way of private placement. SEBI, therefore, found that the Saharas had contravened the provisions of Sections 56, 73, 117A, 117B and 117C of the Companies Act and also various clauses of DIP Guidelines. SEBI also held that SHICL had not complied with the provisions of Regulations 4(2), 5(1), 5(7), 6, 7, 16(1), 20(1), 25, 26, 36, 37, 46 and 57 of ICDR Regulations. Having found so, SEBI directed Saharas to refund the money collected under the Prospectus dated 13.3.2008 and 6.10.2009 to all such investors who had subscribed to their OFCDs, with

interest.

23. Appellants, aggrieved by the above mentioned order of SEBI, filed Appeal Nos. 131 of 2011 and 132 of 2011 before the Tribunal and the Tribunal passed a common order on 18.10.2011. Before the Tribunal, Union of India, represented through the Ministry of Company Affairs, was impleaded. The Tribunal took the view that OFCDs issued were securities within the meaning of Clause (h) of Section 2 of SCR Act, so also under SEBI Act. Tribunal also noticed that RHP issued by SIRECL was registered by the RoC on 18.3.2008, though information memorandum (IM) was issued later in April 2008 in clear violation of Section 60B of the Companies Act. Further, it was also noticed that IM was issued through 10 lac agents and more than 2900 branch offices to more than 30 million persons inviting them to subscribe to the OFCDs which amounted to invitation to public. Tribunal also found fault with the RoC as it had failed to forward the draft RHP to SEBI since it was a public issue and hence violated Circular dated 1.3.1991 issued by the Department of Company Affairs, Government of India.

24. Tribunal also recorded a finding that Saharas, having made a

public issue, cannot escape from complying with the requirements of Section 73(1) of the Companies Act on the ground that the companies had not intended to get the OFCDs listed on any stock exchange. Tribunal also examined the scope and ambit of Sections 55A of Companies Act read with Sections 11, 11A and 11B of SEBI Act and took the view that a plain reading of those provisions would indicate that SEBI has jurisdiction over the Saharas since OFCDs issued were in the nature of securities and hence should have been listed on any of the recognized exchanges of India. SEBI also took the view that the explanation to Section 55A has to be read harmoniously, and if so read, clearly spells out the powers of SEBI and the Central Government. Tribunal also considered the scope of Section 28(1)(b) of the SCR Act and held that the exclusion in the said Act is not available to OFCDs issued by the appellants. Tribunal concluded that SEBI has jurisdiction under Section 55A(b) and the Saharas had flouted the mandatory provisions of Section 73(1) of the Companies Act and the consequences provided under Sub-section (2) of Section 73 would, therefore, follow and SEBI had ample powers under Sections 11, 11A and 11B of the SEBI Act to issue directions to refund the amounts to the investors with interest. Aggrieved by the said

order, SIRECL filed C.A. No. 9813 of 2011 and SHICL filed C.A. No. 9833 of 2011 before this Court under Section 15Z of the SEBI Act which came up for admission on 28.11.2011 and the direction issued to refund sum of Rs.17,400 crores, on or before 28.11.2011, was extended. This Court also passed the following order:

> "By the impugned order, the appellants have been asked by SAT to refund a sum of Rs.17,400/- crores approximately on or before 28th November, 2011. We extend that period upto 9th January, 2012.
>
> In the meantime, we are directing the appellants to put on affidavit, before the next date of hearing, the following information:
>
> (a) Application of the funds, which they have collected from the Depositors;
>
> (b) Networth of the Companies which have received these deposits;
>
> (c) Particulars of assets of the said Companies against which the liability has been created. For that purpose, the appellants will produce the requisite financial statements consisting of the Balance Sheet and Profit and Loss Account of the year ending 31st March, 2011 and the Statement of Account upto 30th November, 2011;
>
> (d) The Affidavit will indicate how the said Compnies seek to secure the liabilities which the

Companies have incurred and how they will protect the debenture holders;

(e) If returns have been filed under Income Tax Act, 1961, the same may be annexed to the Affidavit to be filed."

25. Civil Appeals later came for admission on 9.1.2012 and the interim order granted was extended. As directed, Additional Affidavit with certain documents were filed by both the appellants on 20.6.2012, wherein specific reference was made to the affidavit dated 14.9.2011 filed by Saharas before the SAT, the details of which were given in a chart form, which is as follows:

SIRECL			SHICL		
Date of commencement of issue	25.4.2008		Date of commencement of issue	20.11.2009	
Total amount collected till April 13, 2011	Rs.19,400.87 Crs		Total amount collected till April 13, 2011	Rs.6,380.50 Crs	
Total				**Rs.25,781.37 Crs**	
Less: Premature redemption	Rs.1,744.34 Crs (11.78 lakh investors)		Less: Premature redemption	Rs.7.30 Crs (5,306 investors)	
Total				Rs.1,751.64 (11.78 Lakh investors)	
Balance on August 31, 2011	Rs.17,656.53 Crs		Balance on August 31, 2011	Rs.6,373.20 Crs	
Total				**Rs.24,029.73 Crs.**	
Total no. of investors					
	Total till April 13,	Balance as on		Total till April 13,	Balance as on August

	2011 (in lakhs)	August 31, 2011 (in Lakhs)		2011 (in Lakhs)	31, 2011 (in Lakhs)
Abode Bond	70.94	70.65	Income Bond	1.45	1.44
Nirman Bond	25.44	14.12	Multiple Bond	30.46	30.45
Real Estate Bond	136.47	136.3	Housing Bond	43.23	43.19
Total	**232.85**	**221.07**	**Total**	**75.14**	**75.08**
				Total till April 13, 2011 (in Lakhs)	Balance as on August 31, 2011 (in Lakhs)
Total				**307.99**	**296.15**

26. Shri Fali S. Nariman, learned senior counsel appearing for SIRECL formulated several questions of law which, according to the senior counsel, arise out of the order passed by the Tribunal. Learned senior counsel submitted that Section 55A of Companies Act confers no power on SEBI to administer the provisions of Sections 56, 62, 63 and 73 of the Companies Act of an unlisted company or to adjudicate upon the alleged violation of those provisions, that too without framing any regulations under Section 642(4) of the Companies Act. Learned senior counsel also pointed out that Sections 11, 11A and 11B of the SEBI Act empower SEBI to protect the interest of investors but not to administer the provisions of the Companies Act so far as an unlisted public company is concerned, consequently, when exercising powers

under SEBI Act and/or SEBI Regulations, SEBI is not empowered to administer the provisions of the Companies Act relating to the issue and transfer of securities and non-payment of dividends, so far as an unlisted public company is concerned.

27. Learned senior counsel also submitted that the powers of SEBI to administer the aforesaid provisions are limited to the listed companies and public companies which intend to get their securities listed on any recognized stock exchange in India and, in any other case, the power of administration of Sections 56, 62, 63 and 73 with respect to OFCDs is vested only with the Central Government and not with SEBI. Reference was also placed on the explanation to Section 55A and submitted that all powers relating to "all other matters" i.e. matters other than those relating to the issue and transfer of securities and non-payment of dividends, including the matter relating to prospectus would be exercised by the Central Government or the RoC and not SEBI.

28. Learned senior counsel also highlighted the conspicuous omission of Section 60B in Section 55A which, according to the senior counsel, indicates that SEBI cannot administer in case of any violation of Section 60B. Even otherwise, learned senior

counsel submitted that, as a matter of legislative drafting, Section 60B could not have been intended to be included in the parenthetical clause and, therefore, could not be said to be covered by Section 55A. Learned senior counsel also submitted that even if Section 60B falls in between under Sections 59 to 81, Saharas either through their conduct or action depicted no intention to have their securities listed on any stock exchange in India so as to fall under Section 55A(b) of the Act. Learned senior counsel also referred to Section 60B(9) of the Act and submitted that the same would apply only in the case of listed company.

29. Learned counsel also referred to the Unlisted Public Companies (Preferential Allotment) Rules, 2003 (for short '2003 Rules') and submitted that unlisted public companies, for the first time, could make preferential allotment through private placement pursuant to a special resolution passed under Sub-section (1A) of Section 81 of the Companies Act, if authorized by its Article of Association. Section 60B, it was pointed out, contemplated an unlisted company filing a RHP even though OFCDs were not offered or to be offered to the public. Further, it was also pointed out that, at best, the present case falls under Section 55A(c) and it is

amenable only to the jurisdiction of the Central Government and that SEBI has no jurisdiction to administer, inter alia, the provisions of Sections 56, 62, 63 and 73 of the Companies Act, so far as unlisted public companies are concerned.

30. Shri Nariman also submitted that SEBI has committed a serious error in holding that the SIRECL had contravened the provisions of SEBI Act, DIP Guidelines read with ICDR 2009. Learned senior counsel pointed out that DIP Guidelines were expressly repealed by ICDR 2009 and even if the DIP Guidelines apply, the same would not cover the preferential issue of OFCDs by Saharas under 2003 Rules read with Section 81(1A) of the Companies Act. Learned counsel also pointed that ICDR 2009 would apply to the OFCDs issued by SIRECL by private placement and when it comes to regulating preferential allotment by private placement by unlisted public companies, the same is governed by 2003 Rules and only in case of preferential allotment by listed public companies, ICDR 2009 would apply.

31. Shri Nariman also contended that there was no statutory

requirement for SIRECL to list OFCDs on any recognized stock exchange under the provisions of 2003 Rules. Further, it is also contended that the above rules do not have any deeming provisions for treating any issue as a public issue on the basis of number of persons to whom offers were made or on the basis of any other criteria. Learned senior counsel also submitted that the proviso of Section 67(3) of the Companies Act, added by the Companies Amendment Act, 2000 (w.e.f. 13.12.2000), was also not attracted to 2003 Rules, hence it was urged that, in view of the statutory rules of 2003, preferential allotment by unlisted public companies by private placement was provided for and permitted without any restriction on numbers as per the proviso to Section 67(3) and without requiring listing of OFCDs on any recognized stock exchange. Shri Nariman also pointed out that it is only from 14.12.2011, the 2003 Rules were amended, whereby the definition of preferential allotment was substituted, without disturbing or amending Rule 2 of 2003 Rules. Learned senior counsel submitted that by the amended definition of Preferential Allotment by the Unlisted Public Companies (Preferential Allotment) Rules, 2011 (for short '2011 Rules'), hybrid instrument stands specifically included. Consequently, the first proviso to Section 67 of the Companies Act

was specifically made applicable.

32. Learned senior counsel also contended that after the insertion of the definition of "securities" in Section 2(45AA) as including hybrid and the definition of "hybrid" in Section 2(19A) of the Companies Act, the provisions of Section 67 were not applicable to OFCDs which have been held to be "hybrid". Various bonds issued by Saharas, learned senior counsel submitted, were never shares or debentures but hybrids, a separate and distinct class of securities. Section 67, it was submitted, speaks only of shares and debentures and not hybrids and, therefore, Section 67 would not apply to OFCDs issued by SIRECL.

33. Learned counsel also referred to various terms and conditions of the Abode Bond, Nirmaan Bond and Real Estate Bond and submitted that they are convertible bonds falling with the scope of Section 28(1)(b) of the SCR Act, in view of Section 9(1) and Section 9(2)(m) of that Act and are not listable securities within the meaning of Section 2(h) of the SCR Act and hence there is no question of making applications for listing under Section 73(1) of the Companies Act. Learned senior counsel also

submitted that three Registrars of Companies – West Bengal, Kanpur, and Mumbai – had, at different point of time, registered the RHPs at different places over a period of nine years. Registrars of Companies could have refused registration under Section 60(3) of the Companies Act as well, if there was non-compliance of the provisions of the Companies Act. Learned counsel pointed out that having not done so, it is to be presumed that private placement under Section 60B of the Companies Act was permissible and hence no punitive action including refund of the amounts is called for and the order to that effect be declared illegal.

34. Shri Gopal Subramanium, learned senior counsel appearing on behalf of SHICL submitted that any act of compulsion on Saharas to list their shares or debentures on a stock exchange would make serious inroad into their corporate autonomy. Learned senior counsel submits that the concept of autonomy involves the rights of shareholders, their free speech, their decision making and all other factors. To highlight the concept of corporate autonomy, learned senior counsel placed reliance on the Constitution Bench judgment of this Court in ***Life Insurance Corporation of India v. Escorts Ltd. & Ors.*** (1986) 1 SCC 264. Learned senior

counsel submitted that SEBI's insistence that Saharas ought to have listed their shares or debentures on a recognized stock exchange in accordance with Section 73 of the Companies Act would necessarily expose shareholders and debenture holders to the risks of trading in shares and would also compel unlisted companies to seek financial help from investment bankers. Learned senior counsel placed reliance on the judgment of this Court in ***Union of India v. Allied International Products Ltd. & Anr.*** (1970) 3 SCC 594 and submitted that Section 73(1) was enacted with the object that the subscribers would be ensured the facility of easy convertibility of their holdings when they have subscribed to the shares on the representation in the prospectus that an application for quotation of shares had been or would be made. Learned senior counsel also made reference to the Cohen Committee Report (U.K.) and submitted that the same would bring about the true purport of Section 73, that it is the obligation on the company which has promised the members of the public that their shares would be marketable or capable of being dealt with in the stock exchange. Learned senior counsel made reference to Section 51 of the Companies Act, 1948 (U.K.) and the judgment in ***In re. Nanwa Gold Mines Ltd.*** (1955) 1 WLR 1080 and submitted that

the object of Section 51 was to protect those persons who had paid money on the faith or the promise that their shares would be listed. Learned senior counsel pointed out that Sub-section (1) of Section 73 is qualified by the term "intending", which means Section 73(1) deals with companies that want to issue new shares or debentures to be listed, and which have declared to the investors that they intend to have those shares or debentures dealt with on the stock exchange. In such a case, Section 73(1) obliges those companies to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be dealt with on the stock exchange or each such stock exchange, before the issue of a prospectus. Learned senior counsel submitted that the role of Section 73(1) is, therefore, narrow and limited and those companies which do not intend to list their securities on a stock exchange are not covered by this provision. Learned senior counsel submitted that the expression "to be dealt in on stock exchange" occurring in the heading of Section 73 must be read in the text of that Section, to reach the understanding that it is not merely the invitation of shares or debentures to the public which warrants the application of Section 73, but it is only when such companies intend to have their shares or debentures listed on

the stock exchange that the prescription under Section 73 shall apply. Learned senior counsel submitted that the company's freedom to contract under the Constitution as well as the Law of Contracts needs to be safeguarded and that persons who belong to the lower echelons of society, while it is necessary that they must never be duped, ought not be prevented from investing in measures which would add to their savings. Learned senior counsel pointed out that to deprive them of such an opportunity would be a serious infraction.

35. Learned senior counsel referring to Section 64 of the Companies Act submitted that the expression "deemed to be prospectus" indicates that whenever shares or debentures which are allotted can be offered for sale to the public, such a document is deemed to be a prospectus and has legal consequences. Section 73, according to the learned senior counsel, operationalizes the intention of a company which is allotment of shares with a view to sell to the public as contemplated in Section 64 of the Act. So, while Section 64 refers to the documents containing such an offer as a prospectus, Section 73 requires the company to make an application before the issue of the prospectus. Learned senior

counsel also submitted that mere filing of prospectus is not reflective of the intention to make a public offer. The purpose of issue of prospectus is to disclose true and correct statements and it cannot be characterized as an invitation to the public for subscription of shares or debentures. Learned senior counsel also pointed out that the filing of the prospectus or the administration of Section 62 on account of misstatement in a prospectus will be undertaken by the Central Government on account of explanation to Section 55A of the Companies Act. Learned senior counsel submitted that the manner in which a listed public company will offer its shares would be determined under the SEBI Act as well as the SEBI Regulations. Learned senior counsel submitted that Section 60B of the Companies Act, as such, does not presuppose or prescribes an intention to list. Section 60B enables a prospectus to be filed where a company is not a listed public company. Learned senior counsel pointed out that IM or RHPs can be filed although an offer of shares may be made by way of private placement or to a section of the public or even to the public, but yet without intending it to be listed. Learned senior counsel, therefore, pointed out that the stand of SEBI that where there is an offer of shares or debentures by way of prospectus, it amounts to

an offer of shares to the general public and, therefore, to be dealt with on a stock exchange, is completely flawed and that Section 73 cannot be interpreted to impinge upon the corporate autonomy of the company.

36. Shri Subramanium also submitted that Section 67 of the Companies Act does not imply that a company's offer of shares or debentures to fifty or more persons would *ipso facto* become a 'public issue' or a 'private offer'. Learned senior counsel submitted that in order to determine whether an offer is meant for the public at large or by way of private placement, what is relevant is the intention of the offeror. In other words, the numbers are irrelevant, submits the counsel, it is only the intention to offer to a select or identified group which will make the offer a private placement. Learned senior counsel also submitted that the proviso to sub-section (3) of Section 67 of the Companies Act would be appreciated in that background. Learned senior counsel also submitted that private placement is not authorized by interpretative provision in Section 67(3) but is in fact the will of the company reflected in a Special Resolution under Section 81(1A) of the Companies Act which deals with "preferential allotment".

Learned senior counsel submitted that when there is a private placement, irrespective of the number, then the offer of shares need not take place through a prospectus but can even take place through a letter or a memorandum.

37. Learned senior counsel submitted that the Central Government correctly understood the position while framing the 2003 Rules. Learned senior counsel also submitted that SAT has no jurisdiction over unlisted public companies either under Section 55A of the Companies Act or under the SEBI Act. Learned senior counsel referred to the various provisions conferring powers on SEBI under the SEBI Act as well as the limited powers conferred on SEBI under the Companies Act. Learned senior counsel pointed out that SEBI is not concerned with the securities of all the companies, nor is it responsible for overseeing the sources of capital in the country, except that which is in the securities market. Learned senior counsel also pointed out that compulsory listing of scrips is 'unheard of' in any jurisdiction. It was further submitted that it is impossible to conceive that a regulator or State or Parliament could actually intend that there would be a mandatory exposure of business to vicissitudes of fortune being swept by waves in the

stock market.

38. Learned senior counsel elaborately referred to the various provisions of the SEBI Act in that context. Learned senior counsel also submitted that the Central Government and SEBI cannot approbate or reprobate regarding their jurisdiction over the unlisted public companies. Learned senior counsel pointed out that SEBI has categorically stated on oath before various Forums that an unlisted public company was not within its jurisdiction if that company did not intend to list their shares on the stock exchange. Later, SEBI has unfairly changed its stand before the other Forums. Learned senior counsel referred to the stand taken by SEBI before the Bombay High Court in ***Kalpana Bhandari v. Securities and Exchange Board of India*** (2005) 125 Comp. Cases 804 (Bom.) as well as Delhi High Court judgment in ***Society for Consumers and Investment*** *v.* ***Union of India and others*** passed in Writ Petition No. 15467 of 2006. Reference was also made to the judgment of the Kerala High Court in Writ Petition (C) No. 19192 of 2003 [***Kunamkulam Paper Mills Ltd. & Ors. V. Securities and Exchange Board of India & Others***] learned senior counsel pointed out that SEBI has taken contradictory stand in various

forums rather than properly appreciating and applying the provisions of SEBI Act and the Companies Act.

39. Learned senior counsel also submitted that OFCDs issued by the Saharas are outside the purview of the SCR Act as well as the SEBI Act. Learned senior counsel referred to Section 2(19A) of the Companies Act defining the term "hybrid" and also the definition of "securities" under Section 2(45AA) and submitted that the legislative intent was to treat "hybrids" differently from either shares or debentures and thus exclude from the purview of Section 67, the offer of hybrids. Learned senior counsel submitted that OFCDs issued by Saharas which are convertible debentures would fall within the meaning of "any convertible bond" under Section 28(1)(b) of SCR Act and, therefore, would stand excluded from the purview of SCR Act.

40. Learned senior counsel also submitted that SEBI has exceeded its jurisdiction by acting contrary to and beyond this Court's order dated 12.5.2011 passed in SLP(C) No.11023 of 2011 and SLP(C) No.13024 of 2011 and has conducted itself in a manner prejudicial to Saharas. Learned counsel pointed out that the conduct of the regulator in the manner in which proceedings have

been conducted raises serious doubts about SEBI functions. Learned senior counsel pointed out that, apart from asserting jurisdiction in an erroneous manner, SEBI has no evidence of credible nature to show that Saharas had attempted to deceive or collect money from fictitious sources. Further, it was pointed out that there was no complaint from any investor and it originated on a complaint by a person who has no interest in Saharas. Learned senior counsel also submitted that SAT's direction of refund, in exercise of its powers under Section 73(2) of the Companies Act, is erroneous. Learned senior counsel, therefore, submitted that such a direction to refund the amount with interest is bad in law and liable to be quashed.

41. Shri Arvind P. Dattar, learned senior counsel appearing on behalf of SEBI, submitted that SEBI as well as SAT were fully justified in holding that SEBI has jurisdiction to administer the provisions contained under Section 55A, so far as they relate to the issue and transfer of securities by Saharas. Learned senior counsel pointed out that Saharas had paid up share capital of just Rs.10 lakhs and virtually no assets and the companies had collected about Rs. 27,000 crores from about 3 crore subscribers, through

unsecured OFCDs. Learned senior counsel pointed out that Sections 55A, proviso to Section 67(3), Section 73 and other related provisions clearly bring out the intention of the Parliament, i.e. after 13.12.2000, even if an unlisted public company makes an offer of shares or debentures to fifty or more persons, it was mandatory to follow all the statutory provisions that would culminate in the listing of those securities. Learned senior counsel pointed out that once the number reaches fifty, proviso to Section 67(3) applies and it is an issue to the public, attracting Section 73(1) and an application for listing becomes mandatory and, thereafter the jurisdiction vests with SEBI.

42. Learned senior counsel elaborately argued on the structure of Section 55A and the purpose and object of the parenthetical clause and the brackets employed in the sub-section. Learned senior counsel referred to the word "including" in Section 55A and submitted that the word has been used to emphasize and to make it abundantly clear that Sections 68A, 77A and 80A will be administered by SEBI even though they do not primarily deal with the issue and transfer of securities and non-payment of dividend. Learned senior counsel pointed out that if Section 60B is excluded

from the main part of Section 55A, it will stand excluded for listed companies as well which is a consequence never envisaged or intended by the Legislature. Learned senior counsel also submitted on a reference to Sections 59 to 81 that Parliament intended to include all sections in that range. Learned senior counsel pointed out that Section 55A also applies to companies which "intend to" get their securities listed and that on a combined reading of the proviso to Section 67(3) and Section 73(1), since Saharas had made an offer of OFCDs to more than forty nine persons, the requirement to make application for listing became mandatory and SEBI has the necessary jurisdiction even though Saharas had not got their securities listed on a stock exchange. Learned senior counsel also stated that, the plea, that Saharas never wanted or intended to list their securities, hence escaped from the rigor of Sections 55A, 60B, 73 etc. of the Companies Act, cannot be sustained. Learned senior counsel submitted that Saharas should be judged by what they did, not what they intended. Reference was placed on a Privy Counsel judgment in ***Young v. Bristol Aeroplane Company Ltd.*** [1945 PC 163 (HL)]. Learned senior counsel also made elaborate arguments on the explanation to Section 55A as well.

43. Shri Dattar also submitted that DIP Guidelines have statutory force since they are made specifically under the powers granted to SEBI under Section 11 of the SEBI Act. Learned senior counsel pointed out that DIP Guidelines were implemented by SEBI with regard to all listed companies and unlisted companies which made a public offer, until it was replaced by ICDR 2009. Learned senior counsel submitted that the issue of OFCDs was in contradiction of Section 73(1) and the applicable DIP Guidelines/ICDR 2009, consequently, SEBI was obliged to pass orders for refunding the amount that was collected by Saharas.

44. Learned senior counsel submitted that under Section 11(1) of the SEBI Act, SEBI is duty bound to protect the interest of investors in securities either listed or which are required by law to be listed, and under Section 11B, SEBI has the power to issue appropriate directions, in the interests of investors in securities and the securities market, to any person who is associated with securities market. Learned senior counsel pointed out that 2003 Rules are not applicable after 2003, to any offer or shares or debentures to more than forty nine persons and the rules were amended in the year 2011 to make explicit what was already

implicit, but the statutory mandate in this regard was made clear w.e.f. 13.12.2000, and that the 2003 Rules will be subject to the statutory provisions of the proviso to Sections 67(3) and 73(1).

45. Learned senior counsel also submitted that Saharas' basic assumption that they are covered by 2003 Rules is erroneous. Learned counsel pointed out that a public issue would not become a preferential allotment by merely labeling it as such and the facts on record show that the issue could not be termed as a preferential allotment. Preferential allotment, learned counsel submits, is made by passing a special resolution under Section 81(1A) and is an exception to the rule of rights issue that requires new shares or debentures to be offered to the existing members/holders on a *pro rata* basis. Learned senior counsel pointed out that once the offer is made to more than forty nine persons, then apart from compliance with Section 81(1A), other requirements regarding public issues have to be complied with.

46. Shri Dattar further submitted that after insertion of the proviso to Section 67(3) in December, 2000, private placement as allowed under Section 67(3) was restricted up to forty nine persons only and 2003 Rules were framed keeping this statutory provision

in mind and were never intended for private placement/preferential issue to more than forty nine persons and the amendments to these rules made in the year 2011 merely made the said legal position under the 2003 Rules, explicit. Shri Dattar also submitted that OFCDs are debentures by name and the nature and the definition of 'debenture' as given under Section 2(12) of the Companies Act includes any other securities. Learned senior counsel submitted that the securities as defined in Section 2(45AA) of the Companies Act includes hybrids and, therefore, hybrids fall in the definition of debentures and are amenable to the provisions of Sections 67 and 73 of the Companies Act.

47. Shri Dattar also submitted that Section 28(1)(b) of SCR Act does not apply to convertible debentures and the plea raised by Saharas is also untenable because the interpretation placed on Section 28(1)(b) would be in contradiction to the mandatory provisions of Section 73(1) and the proviso to Section 67(3) of the Companies Act. It was next submitted that if the convertible debentures are excluded from SCR Act, it would lead to a paradoxical situation because these debentures are required to be listed under Section 73(1) but they cannot be listed in view of

Section 28(1)(b). Learned senior counsel submitted that SEBI has rightly claimed jurisdiction to administer the OFCDs, as it was obligatory on the part of Saharas to comply with the statutory requirements of the Companies Act, SEBI Act and SCR Act. Saharas, learned senior counsel submits, had no right to collect Rs.27,000 crores from three crore investors without complying with any regulatory provisions, except filing of RHP with RoCs at Kanpur and Mumbai and that SEBI was justified in directing refunding of amount with 15% interest.

48. Shri Harin P. Rawal, Additional Solicitor General appearing on behalf of Union of India placed detailed written submissions, supporting the stand taken by SEBI. Powers conferred on SEBI under the SEBI Act as well as the Companies Act have been elaborately dealt with in the written submissions filed by him, pointing out that there is no conflict of jurisdiction of SEBI or RoC/MCA while enforcing the provisions of SEBI Act and the Companies Act. It was pointed out that there is no overlap, much less any repugnancy or conflict between provisions of SEBI Act and those of Section 55A of the Companies Act and the Sections enumerated thereunder. It was pointed out that Sections 11A and

11B of SEBI Act should be read as provisions additional to Section 55A. Reference was also made to Section 32 of the SEBI Act and it was submitted that the provisions of SEBI Act are "in addition to" and "not in derogation of" the provisions of any other law, unless the provisions of SEBI Act are wholly inconsistent with the Companies Act, the provisions of both the SEBI Act and the Companies Act should be harmonized and both sets of provisions given operation. Further, it was pointed out that Sections 11, 11A, 11B of SEBI Act are special law and Section 55A and the enumerated sections of the Companies Act are general law. It was further pointed out that Sections 11(2A), 11(4) and 11A of SEBI Act were enacted (or amended) in 2002 and those provisions did not limit SEBI's powers to only regulating listed companies. Moreover, those provisions were predicated upon the continued operation of Sections 11 and 11B even to unlisted companies and, consequently, it cannot be said that the Parliament intended Section 55A of the Companies Act to impliedly repeal the powers of SEBI in relation to unlisted companies under Sections 11 and 11B of SEBI Act.

Supreme Court as a court of appeal

49. Saharas have filed these appeals, under Section 15Z of the

SEBI Act, raising various questions of law which they claim arise out of the order of the Tribunal. Section 15Z reads as follow:

> **Appeal to Supreme Court:**
> **"15Z.** Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order:
>
> **Provided** that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period allow it to be filed within a further period not exceeding sixty days."

50. The Securities Appellate Tribunal (for short 'SAT') which exercises powers under Section 15T, it is well settled, is the final adjudicator of facts. Under Sub-section (3) of Section 15U of SEBI Act, every proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 IPC. Under Section 15U, the Tribunal, in exercise of its powers and in discharge of its functions, shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice. The Tribunal has, for the purpose of discharging its functions, the same powers as are vested in a Civil Court under the

Code of Civil Procedure. Broadly speaking, the Tribunal has trappings of a court in the sense that it has to determine the appeal placed before it judicially and give a fair hearing to the parties, to accept evidence and also order for inspection and discovery of documents, compel attendance of witnesses and to pass a reasoned order which gives finality to the dispute, subject to the appeal to Supreme Court under Section 15Z of the Act. Findings of fact generally fall in the domain of the Tribunal provided it stays within its jurisdiction. Situations may also be there, where the evidence taken as a whole is not reasonably capable of supporting the findings recorded by the Tribunal or the Tribunal could have reasonably recorded that conclusion. Questions repeatedly posed in this case before SEBI as well as before SAT, were with regard to the nature of OFCDs issued by Saharas. RHPs produced had disclosed that Saharas did not intend the proposed securities to be listed on any stock exchange and that the issues consisted of unsecured OFCDs with an option to convert the same to equity shares. Saharas had also disclosed that the issue was made on a private placement basis and that OFCDs would be offered also to such persons to whom IM would be circulated. But the fact remains that it was circulated to more than

three crore people inviting them to subscribe. The same was circulated through ten lac agents and more than 2900 branch offices and Saharas had a capital base of only 10 lakhs with no other assets or reserves and was a loss making company and had collected nearly 27,000 crores by way of private placement through unsecured OFCDs redeemable/convertible after 48/60/120 months. Fact finding authorities repeatedly asked for information regarding the names, addresses of investors in OFCDs and the amounts subscribed by them. SIRECL claimed that it had furnished to SEBI a separate CD giving the details of names of investors, the amount invested etc. along with the password and keys, along with its letter dated 19.4.2011 which, according to SIRECL, was never opened or checked. SEBI, as already indicated, has been vested with the powers of a Civil Court under CPC, as per Sub-section (3) of Section 11 of the SEBI Act. Under Section 11C, the Board has also been vested with the powers to order investigation to examine whether any person associated with securities market has violated any provision of the Act or the rules or the regulations made or direction issued by the Board.

51. Saharas, along with Vol III (additional documents), filed

before this Court, gave certain details of the persons who have invested. Documents produced before us and before the fact finding authorities do not show the relationship Sahara Group had with the investors. Claim of Saharas was that the investors were their friends, associated group companies, workers/employees and other individuals who were associated/affiliated or connected with Sahara Group. Saharas, in the bonds, sought for a declaration from the applicants that they had been associated with Sahara Group. No details had been furnished to show what types of association the investors had with Sahara Group. Bonds also required to name an introducer, whose job evidently was to introduce the company to the prospective investor. If the offer was made to those persons related or associated with Sahara Group, there was no necessity of an introducer and an introduction. Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have not discharged. Fact finding authorities have clearly held that Saharas had not discharged their burden which is purely a question of fact. Facts are elaborately discussed by SEBI (WTM) and SAT, hence we do not want to burden this judgment with those factual details. I find no

perversity or illegality in those findings which call for interference by this Court sitting under Section 15Z of the SEBI Act. I, therefore, fully concur with the Tribunal that the money collected by Saharas through their RHPs dated 13.3.2008 and 6.10.2009, through the OFCDs, were from the public at large and the same would amount to collection of money by way of issue of securities to the public, a finding which calls for no interference by this Court sitting under Section 15Z of the SEBI Act.

52. I will now examine various questions of laws raised before us. Following are some of the cardinal issues that have come up for consideration, apart from other incidental issues and ancillary issues, which also I may deal with:

QUESTIONS OF LAW FRAMED

(a) Whether SEBI has jurisdiction or power to administer the provisions of Sections 56, 62, 63, 67, 73 and the related provisions of the Companies Act, after the insertion of Section 55A(b) w.e.f. 13.12.2000, by the Companies (Amendment) Act, 2000, so far as it relates to issue and transfer of securities by listed public companies, which intend to get their securities listed on a recognized stock exchange and public companies which have issued securities to fifty persons or more without listing their securities on a recognized stock exchange;

(b) Whether the public companies referred in question no. (a) is legally obliged to file the final prospectus under Section 60B(9) with SEBI and whether Section 60B, as it is, falls under Section 55A of the Companies Act;

(c) Whether Section 67 of the Companies Act implies that the company's offer of shares or debentures to fifty or more persons would *ipso facto* become a public issue, subject to certain exceptions provided therein and the scope and ambit of the first proviso to Section 67(3) of the Act, which was inserted w.e.f. 13.12.2000 by the Companies (Amendment) Act, 2000;

(d) What is the scope and ambit of Section 73 of the Companies Act and whether it casts an obligation on a public company intending to offer its shares or debentures to the public, to apply for listing of its securities on a recognized stock exchange once it invites subscription from fifty or more persons and what legal consequences would follow, if permission under sub-section (1) of Section 73 is not applied for listing of securities;

(e) What is the scope and ambit of DIP (Guidelines) and ICDR 2009 and whether Sahara had violated the various provisions of the DIP (Guidelines) and ICDR 2009, by not complying with the disclosure requirements or investor protection measures prescribed for public issue under DIP (Guidelines) and ICDR 2009, thereby violating Section 56 of the Companies Act;

(f) Whether Rules 2003 framed by the Central Government under Section 81(1A) of the Companies Act read with Section 642 of

the Act are applicable to any offer of shares or debentures to fifty or more as per the first proviso to sub-section (3) of Section 67 of the Companies Act and what is the effect of UPC (PA) Amendment Rules 2011 and whether it would operate only prospectively making it permissible for Saharas to issue OFCDs to fifty or more persons prior to 14.12.2011;

(g) Whether after the insertion of the definition of 'securities' in Section 2(45AA) as "including hybrids" and after insertion of the separate definition of the term "hybrid" in Section 2(19A) of the Act, the provision of Section 67 would apply to OFCDs issued by Saharas and what is the effect of the definition clause 2(h) of SCR Act on it;

(h) Whether OFCDs issued by Saharas are convertible bonds falling within the scope of Section 28(1)(b) of the SCR Act, therefore, not 'securities' or, at any rate, not listable under the provisions of SCR Act;

(i) Whether SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of the SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but have not complied with the provision of Section 73(1) by not listing its securities on a recognized stock exchange.

(j) Scope of Section 73(2) of the Companies Act regarding refund of the money collected from the Public;

(k) Civil and Criminal liability under the various provisions of the Companies Act.

53. Much of the arguments on either side centered round the scope and interpretation of various provisions of the Companies Act, SEBI Act and the rules and regulations framed thereunder, relating to matters concerning the issue of securities, powers of SEBI, Central Government (MCA), RoC, which are being discussed hereunder. Powers conferred on SEBI, Central Government, (MCA), RoC etc. under the Companies Act, SEBI Act also call for consideration.

Powers of SEBI, Central Government, (MCA), Registrar of Companies under the companies Act and SEBI Act:

54. The Companies Act, 1956 is a consolidation of the then existing laws, statutory rules and certain judgments laid down by the Courts in India and England. This Court in ***Commissioner of Income Tax, Gujarat v. Girdhardas and Co. Private Ltd.*** AIR 1967 SC 795, noticed that the Companies Act, 1956 substantially incorporated the provisions of the English Companies Act, 1948. However, there has been considerable shift of principles and concepts after the formation of 1948 English Companies Act and those principles and concepts find a place in the later English

Companies Act, 1985, followed by 1989 Act. Indian Companies Act, 1956 still remains static on various issues. No efforts have been made to incorporate universally accepted principles and concepts into our company law, hitherto. Of late, however, some efforts have been made to carry on few amendments to the Companies Act, 1956, so also in the SEBI Act, 1992 and also by framing rules and regulations like SEBI Rules, Regulations, so as to keep pace with the English Companies Act and related legislations. Instances are many where securities market have collapsed in England, USA, India etc. due to high-profile corporate fraud cases, leading to legislative intervention in various countries including India. For example, England faced a flood of speculative and fraudulent schemes of company flotation, a classic example is scheme formulated by the South Sea Company, which collapsed in 1720, which heralded the start of Security Law in England. Great Crash of New York in 1929 also contributed in equal measure apart from other high-profile corporate fraud cases in U.S.A. Various ventures, undertakings by the companies registered under England Companies Act have their own impact on Securities Law as well. Prior to 1985, in England, the procedure to be followed by the companies for the issue of securities were mainly contained in the

Companies Act 1948, the Companies Act 1980 and the Prevention of Fraud in Investment Act 1958. Later, in England, the Companies Act 2006 was enacted making detailed and important changes to the legal treatment of shares. Securities markets now stand controlled by the Financial Services and Market Act, 2000 (FSMA) in England, which has created the Financial Service Authority (FSA). Historical facts also show that fraudulent accounting and non-disclosure of information was root cause for collapse of Enron, Barings, World Com, BCCI etc. which put the reforms of corporate governance on the agenda in the United States.

55. India is also not an exception. Harshad Mehta, a Broker, was charged for diverting funds from the Bank to the tune of Rs.4000 crores to stock brokers between 1991-92; Ketan Parekh Securities Scam in the year 2001 in which investors, it was reported, had lost heavily; so also the Banks in the UTI scam 2001, where it was reported that heavy funds were collected from small investors and money was used to fund large business houses and huge amounts were invested in junk bonds; Satyam Computers Scam of 2008, where it was reported that, over a number of years, Satyam Computer account was manipulated and money was raised

through shares.

56. Both in England and India, it is well established, that the range of functions that may be performed by a company incorporated under the Companies Act is extremely wide. Public companies and private companies, functioning under the Companies Act 2006 in England, the Companies Act 1956 in India, have considerable social and economic importance, but public companies are more highly regulated than private companies. Private companies are not authorized to offer any securities to the public. FSMA in England generally deals with issue of securities to the public, including listing Rules, the Prospectus Rules, and continuing obligation contained in the Disclosure and Transparency Rules etc. The Companies Act 1956 in India was enacted with the object to protect the interests of a large number of shareholders, safeguard the interests of the creditors to attain the ultimate ends of social and economic policy of the Government. Provisions have also been incorporated making provisions for prospectus, allotment and other matters relating to issue of shares and debentures etc. Parliament has also enacted the SEBI Act to provide for the establishment of a Board to protect the interests of investors in

securities and to promote the development of, and to regulate the securities market. SEBI was established in the year 1988 to promote orderly and healthy growth of the securities market and for investors' protection. SEBI Act, Rules and Regulations also oblige the public companies to provide high degree of protection to the investor's rights and interests through adequate, accurate and authentic information and disclosure of information on a continuous basis.

57. SEBI Act is a special law, a complete code in itself containing elaborate provisions to protect interests of the investors. Section 32 of the Act says that the provisions of that Act shall be in addition to and not in derogation of the provisions of any other law.

58. SEBI Act is a special Act dealing with specific subject, which has to be read in harmony with the provisions of the Companies Act 1956. In fact, 2002 Amendment of the SEBI Act further re-emphasize the fact that some of the provisions of the Act will continue to operate without prejudice to the provisions of the Companies Act, qua few provisions say that notwithstanding the regulation and order made by SEBI, the provisions of the

Companies Act dealing with the same issues will remain unaffected. I only want to highlight the fact that both the Acts will have to work in tandem, in the interest of investors, especially when public money is raised by the issue of securities from the people at large.

59. Powers and functions of SEBI are dealt with in Chapter IV of the SEBI Act. Section 11 states that, subject to the provisions of the Act, it shall be the duty of SEBI to protect the interests of investors in securities and to promote the development of and to regulate the securities market. SEBI is also duty bound to prohibit fraudulent and unfair trade practices relating to securities markets, prohibiting insider trading in securities etc. Section 11A authorizes SEBI to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities which read as follows:

> "11A (1) Without prejudice to the provisions of the Companies Act, 1956(1 of 1956), the Board may, for the protection of investors, -
>
> (a) specify, by regulations –
>
> (i) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and

(ii) the manner in which such matters shall be disclosed by the companies;

(b) by general or special orders –

(i) prohibit any company from issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;

(ii) specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.

(2) Without prejudice to the provisions of section 21 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Board may specify the requirements for listing and transfer of securities and other matters incidental thereto."

Section 11B empowers the Board to issue directions which reads as follows:

"11B. Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,-

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person,

it may issue such directions,-

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market."

60. I find all the above quoted provisions are inter-related and inter-connected and the main focus is on Investor Protection. Power is also conferred on SEBI under Section 11C to conduct investigation if the transactions are being dealt with in a manner detrimental to the investors or securities market. Mandatory listing of securities in case of offer to public would cast an obligation on the issuers to ensure the transparency of information and other continuing obligations to provide information by means of prospectus and to follow disclosure provisions.

61. I may, in the above background, examine the various provisions of the Companies Act which cast a legal obligation on the public companies which offer securities to the public and the

SEBI's power or jurisdiction to administer those companies and the legal requirement to be followed while making offer of securities to the public. When we interpret and deal with the provisions like Section 55A, 60B, 67, 73 etc. of Companies Act, we have to always bear in mind the various provisions of the SEBI Act, especially Sections 11, 11A, 11B, 11C, 32 etc. because as we have already indicated, those provisions shall be in addition to and not in derogation of the provisions of the Companies Act.

62. I may straightway deal with the first question posed on the jurisdiction of SEBI over various provisions of the companies Act in the case of public companies, whether listed or unlisted, when they issue and transfer securities.

63. Section 55A, the scope of which has been extensively argued, is given below for easy reference:

> "**55A. Powers of Securities and Exchange Board of India**.— 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 the 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 ir-redeemable preference shares shall be exercised by the Central Government, Tribunal or the Registrar of Companies, as the case may be."

64. Section 55A was inserted in the Act by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000. Clauses (v) to (x) of the Statement of Objects and Reasons give an indication of the intention of the Legislature. Clauses (v) and (x) read as follows:

"Clause (v) - to provide that the Securities and Exchange Board of India be entrusted with powers with regard to all matters relating to public issues and transfers including power to prosecute defaulting companies and their directors.

(x) to provide that any offer of shares or debentures to more than 50 persons shall be treated as a public issue with suitable modification in the case of public financial institutions and non-banking financial companies."

(emphasis supplied)

65. Legislative intention to entrust the powers with SEBI, with

regard to all matters relating to public issues and transfers including power to prosecute default companies and their directors, is based on information derived from past and present experiences. Powers have been specifically conferred on SEBI because it was established under the SEBI Act, 1992, in order to protect the interest of investors in securities and to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto. When we look at Section 55A it is clear that it deals with the following three categories:

(a) Listed public companies

(b) Public companies which intend to get their securities listed on any recognized stock exchange in India; and

(c) "in any other case" that is, all other unlisted public companies, which do not make a public offer of securities and private companies.

66. Public companies which fall under categories (a) and (b) are to be administered by SEBI and with regard to various provisions mentioned in the first part of Section 55A, so far they relate to

issue and transfer of securities and non-payment of dividend and rest of the matter be administered by the Central Government. Power of administration of Sections 56, 62, 63 and 73 with respect to issue of OFCDs lies with SEBI and not with the Central Government since they relate to issue of securities.

67. We shall now examine the structure of Section 55A and when we do that, we have to necessarily keep in mind the object and purpose of that section, the intention of the Legislature and the role and function to be performed by the specialized forum, SEBI, created by the SEBI Act. Powers conferred on SEBI under Section 11A to protect the interest of investors that too without prejudice to the provisions of the Companies Act, may also be borne in mind when we interpret Section 55A, as already indicated. Provisions which relate to issue and transfer of securities and non-payment of dividend have to be administered by SEBI, a legal obligation cast on SEBI. Section 55A specifically refers to Sections 55 to 58 and Sections 59 to 81 with an emphasis to Sections 68A, 77A and 80A within brackets. Specific reference has been made to Sections 108, 109, 110 and Sections 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207. The Original Companies (Second

Amendment) Bill of 1999 [Bill No. 139 of 1999] did not have the parenthetical clause in Section 55A (i.e. including Sections 68A, 77A and 80A) which was introduced as corrigendum before the leave was sought and granted to introduce the Bill in the Lok Sabha and with this corrigendum the bill was passed in the Lok Sabha on 27.11.2000 and then on 30.11.2000 by the Rajya Sabha and later assented by the President. Contention was, therefore, raised that when the Bill was introduced it was provided that Sections 59 to 81 were to be administered by SEBI, in respect of listed public companies and companies intended to get their securities listed in a stock exchange. But, it was pointed out, that Sections in between Sections 59 to 81, which had letters 'A' or 'B' as a suffix, were not all intended to be covered by Section 55A, hence the necessity for the parenthetical clause added by a corrigendum, i.e. (including Sections 68A, 77A and 80A). Further, it was also contended that where provisions ending with the suffix 'A', 'AA' or 'B' were intended to be included in Sections 59 to 81, it was specifically so provided. Reference was made to Section 206A which finds a place in Section 55A. For the above, it was submitted by Saharas that Section 60B could not have been intended to be included in the parenthetical portions and could not

be said to have covered by Section 55A.

68. All sections falling within Sections 55 to 58 of the Companies Act will fall under those sections. So far as Section 55A is concerned, it is the very Section which deals with powers of SEBI, Central Government, Tribunal, Company Law Board, Registrar of Companies etc. Reference to Sections 59 to 81 indicated that Parliament intended to include all sections in that range which takes in Sections 60B, 62, 63, 67, 73 etc. of the Companies Act. Section 67 is also a section of considerable importance because the expression "offer of shares or debentures to the public" finds a place in various sections of the Act, as well as the articles of a company. Further, the first proviso added to Section 67(3) vide the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000 is also of considerable bearing in determining whether a public company offering shares or debentures to the public has to list its securities on a recognized stock exchange. Expression 'to' clearly has a meaning i.e. <u>everything in between</u> or destination of an action. The meaning of the expression 'to' came up for consideration before this Court in ***Hindustan Lever Ltd. v. Ashok Vishnu Kate and Ors.*** (1995) 6 SCC 326. Further, the specific inclusion of

Sections 68A, 77A and 80A in a bracket, would not mean the exclusion of all sections between in Sections 59 to 81 with suffix 'A' or 'AA' or 'B'. The word 'including' used in the parenthetical clause is only to give emphasis to those sections. Lord Watson in ***Dilworth v. Commissioner of Stamps*** (1999) AC 99 said that the word 'include' is very generally used in interpretation clause in order to enlarge the meaning of words or phrases occurring in the body of the Statute and, when it is so used, these words and phrases must be construed as comprehending, not only things they signify according to their natural import, but also those things which the interpretation clause declares that they shall include." In ***Delhi Judicial Services Association v. State of Gujarat*** AIR 1991 SC 2176, the expression used in Article 129 of the Constitution i.e. including the power to punish for contempt of itself which was interpreted by the Court stating that the expression 'including' has been interpreted by Courts to extend and widen the scope of power. Giving emphasis to Sections 68A, 77A and 80A does not mean the exclusion of all such similar sections.

69. Legislature, in its wisdom, thought some emphasis has to be

given to Sections 68A, 77A and 80A because all those sections provide certain offences to be punishable with imprisonment. Further clue for that reasoning, we may get, if we examine the manner in which the Legislature has used succeeding sections. In Section 55A there is a specific reference to Section 108, not Sections 108A to I. So also Section 55A specifically refers to Section 109, not Sections 109A and B. Legislature wanted inclusion of Sections 108A to I, Section 109A etc., then it would have said Sections 108 to 110. Further, the Legislature never wanted the inclusion of Sections 117A to C, hence it used Section 117 alone, not Sections 116 to 122. If it has used so, then Sections 117A to C also would have been included. Legislature in that sequence wanted inclusion of Sections 206 and 206A, hence both the sections have been included. Hence, when the legislature has used the expression Sections 59 to 81, 60B which falls in between, stands included. Further, the entrustment of powers on SEBI, under Section 55A, is in addition to the then existing powers of SEBI under SEBI Act, 1992, which takes Sections 11, 11A and 11B as well.

70. Explanation has been added to Section 55A to harmonize

and to clear up doubts and allay groundless apprehensions. In ***S. Sundaram Pillai & Ors. v. V.R. Pattabiraman & Ors.*** (1985) 1 SCC 591, this Court has ruled that the purpose of the explanation is to clarify where there is any obscurity or vagueness in the main enactment and to make it consistent with the dominant object which it seems to serve. The main part of Section 55A confers jurisdiction on SEBI with regard to three categories i.e. issue of securities, transfer of securities and non-payment of dividend. The expression "all other matters" mentioned in the explanation would refer to powers other than the above mentioned categories. Further, it may also be remembered that the explanation does not take away the powers conferred on SEBI by other sections of the Companies Act. At the same time, matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares be exercised by the Central Government, Tribunal, Company Law Board, Registrars of Companies, as the case may be. Further, Section 60B(9) clearly indicates that upon closing of the offer of securities, a final 'prospectus' has to be filed in the case of listed company with SEBI and Registrar, hence the explanation to Section 55A can never be constructed or interpreted to mean that SEBI has no power in

relation to the prospectus and the issue of securities by an unlisted public company, if the securities are offered to more than forty nine persons.

71. I am, therefore, of the view that the mere fact that emphasis has been given to Sections 68A, 77A and 80A, does not mean the exclusion of Section 60B from Section 59 to 81. We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India. In any other case, i.e. rest of the matters, that is excluding matters relating to issue and transfer of securities and non-payment of dividend be administered by the Central Government in the case of listed public companies and those companies which intend to get their securities listed on any recognized stock exchange in India. Explanation to that section further clarifies the position so as to remove doubts, saying all powers relating to 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, should be exercised by the Central Government, Tribunal or the Registrar of Companies, as the case may be. Section 55A, therefore, makes it clear that SEBI has the power to administer the above mentioned select provisions of the Companies Act relating to matters specified therein. Contention raised by Saharas that without regulations being framed under Section 642(4) of the companies Act, SEBI cannot exercise powers of administration, is totally unfounded and is rejected.

PROSPECTUS AND IM

72. Prospectus is the principal medium through which the investors get information of the strength and weakness of the company, its creditworthiness, credence and confidence of promoters and the company's prospects. Section 55 of the Act provides that a prospectus issued by or on behalf of a company or in relation to an intended company shall be dated and that date shall be taken as the date of its publication. The matters to be stipulated and reports to be set out are provided under Section 56

of the Act, read with Part 1 of Schedule 11 of the Companies Act, which also calls for the details of the stock exchange where application was made for listing of issue of securities. Section 60 of the Act deals with registration of the prospectus. Section 60(3) specifically states that the Registrar shall not register a prospectus unless the requirements of Sections 55, 56, 57 and 58 and sub-sections (1) & (2) of that section have been complied with. Securities can be listed on a recognized stock only after the prospectus is prepared and approved by the RoC, SEBI, as the case may be. Section 62 imposes civil liability for mis-statements in prospectus and Section 63 criminal liability. Section 68 provides imprisonment for a term which may extend to five years, or with fine which may extend to one lakh rupees, or with both, for fraudulently inducing persons to invest money. In other words, either to offer transferrable securities for sale to the public or to request the admission of securities for trading on a regulated market without prospectus, or to offer transferrable securities for sale to the public, by way of shares and debentures, in violation of the first proviso to Section 67(3) may attract civil and criminal liability. Saharas, in this case, published RHPs with the approval of RoC, but did not get them approved by SEBI or their securities

listed on a recognized stock exchange.

73. Section 60B which was included in the Act by the Companies Amendment Act, 2000 (Act 53 of 2000) w.e.f. 13.12.2000. 60B(1) reads as follows:

> "**60B. Information memorandum.**
> (1) A public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus."

74. Section 60B(1) is an enabling provision which enables a public company making an issue of securities to circulate information memorandum (IM) to the public before filing the prospectus. Purpose of that sub-section is for assessing the demand and the price which the public would be willing to offer, which is not a mandatory requirement. Note on Clause 52 of the 1997 Bill explains the object and purpose of that Section as follows:

> "This Section provides for the concepts of 'book building' and 'information memorandum'. This is an international practice and refers to collecting orders from investment bankers and large investors based on an indicative price range. This is essentially a pre-issue exercise which will facilitate the issuers to get better idea of demand and the final offer price. The directors of the company, however, will not be permitted to resort to underwriting on book building."

75. Section 60B(1), therefore, was introduced to facilitate a pre-issue exercise to get a better insight of demand and final offer price. Section 60B(2) of the Act refers to the stage at which the RHPs has to be filed by the company. The provision clearly states that the company inviting subscription by an IM shall be bound to file a prospectus prior to the opening of the subscription lists and the offer as a RHP, at least three days before the opening of the offer. Section 60B(3) stipulates that IM and RHPs shall carry the same obligations as are applicable in the case of prospectus. Explanation clause states, "for the purpose of Sub-sections (2), (3) and (4), "Red Herring Prospectus" means a prospectus which does not have complete particulars on the price of the securities offered and the quantum of securities offered". The expression "prospectus" is also defined in the Act vide Section 2(36) of the Companies Act as follows:

> "2(36) "Prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. (emphasis supplied)"

Section 60B(9) deals with the final prospectus, which reads as

follows:

> "60B (9) Upon the closing of the offer of securities, a final prospectus stating therein the total capital raised, whether by way of debt or share capital and the closing price of the securities and any other details as were not complete in the red-herring prospectus shall be filed in a case of a listed public company with the Securities and Exchange Board and Registrar, and in any other case with the Registrar only."

76. Section 60B(9) deals with two categories of companies i.e. "listed public company" under one category and the rest of the companies falling under "any other case" under another category. A company inviting subscription from public by an IM is bound to file a prospectus prior to the opening of the subscription lists. That is the moment a company decides to issue securities to the public, a duty is cast on it to get its securities listed on a recognized stock exchange. Section 60B, as already indicated, refers to IM. Section 2(19B) was inserted by the Companies (Second Amendment) Act, 2002, w.e.f. 1.4.2003, which reads as follows:

> "**2(19B)** "information memorandum" means a process undertaken prior to the filing of a prospectus by which a demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed, by means of a notice, circular, advertisement or document."

77. The initiation of the process of offering securities to the public by a company, therefore, starts with IM, but it is bound to file a prospectus prior to the opening of subscription lists and the offer as RHPs and then reaches its final intimation, that is after closing of the offer of securities with a final prospectus, with the requisite details and any other details as were not completed in the RHP by filing the same with SEBI and Registrar of Companies. Therefore, a company which has made on offer of securities to the public and, therefore, has applied for listing on a stock exchange, will fall under the category of listed companies and not in 'any other case' under Section 60B(9) of the Act. Therefore, a reading of Sections 60B(1), (2) and (3) reveals the stage when IM and RHPs are filed and Section 60B(9) the stage of culmination on closing of the offer of securities and filing of the prospectus of a listed company with SEBI and RoC and in any other case with only the RoC. Registration of prospectus is dealt with in Section 60 of the Act which says, no prospectus shall be issued by or on behalf of a company or in relation to an intended company, unless on or before the date of its publication, there has been delivered to the RoC for Registration a copy thereof, duly signed and complying with statutory requirements. Registrar shall not register a

prospectus unless the requirements of Sections 55, 56, 57 and 58 and Sub-sections (1) and (2) of Section 60 have been complied with. Section 56 refers to the matter to be stated and reports to be set out in the prospectus, and states that every prospectus issued shall state the matter specified in Part I of Schedule II and set out reports as specified in Part II of the Schedule, which will have effect subject to the provisions contained in Part III of that schedule. General information clause (c) of Part I of Schedule II calls for the names of recognized stock exchange and other stock exchanges where application is made for listing. Section 60B(3), as I have already indicated, says IM and RHPs shall carry same obligations as are applicable in the case of a prospectus.

78. SEBI, under Section 60B(9), however, as a Regulator is legally obliged to examine whether, upon the closing of the offer of securities, a final prospectus giving the details of the total capital raised, whether by way of debt or share capital and the closing of the securities and other details as were not complete in RHPs, have been filed in a case of listed public company with SEBI. This duty is cast on the Registrar alongwith SEBI in the case of a listed public company and in any other case only the Registrar.

79. Saharas have taken up the stand that they have only circulated the IM, by way of private placement, to their associates, group companies, workers/employees etc. Section 60B(1) , as I have already indicated, casts no obligation to issue an IM. It is open to a public company making an issue of securities to circulate the IM to public before filing a prospectus for assessing the demand and price which public would be willing to offer. If Saharas were going for a private placement, then I fail to see why they had elicited all those details through an IM, since Section 60B(1) deals with issue of IM to the public alone. But from Saharas' conduct and action, it is clear, that their intention was to issue securities to the public under the garb of private placement. RHPs issued by Saharas indicated that they did not intend the proposed issue of securities to be listed on a stock exchange, even though in reality the securities were issued to the public. Every company which intends to offer shares or debentures to the public for subscription by way of a prospectus is legally obliged to make an application on a recognized stock exchange. Let us examine whether Saharas practiced what they have preached. First, they have breached the very statutory declaration prescribed in Part 1 of Schedule II.

Statutory declaration reads as follows:

> "**Declaration:** That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules made thereunder or guidelines issued, as the case may be.:

80. RHP issued by Saharas (SIRECL) contains not the declaration mentioned above, but states as follows:

> "All the relevant provision of the Companies Act, 1956 and the guidelines issued by the Government have been complied with and no statement made in the prospectus is contrary to the provisions of the Companies Act, 1956 and the Rules thereunder."

In the Bond (OFCDs) of Saharas, there is a head "Declaration" which, inter alia, reads as follows:

> "….I confirm that I am/applicant associated with Sahara India Group. I have been explained everything in the language known to me and I have given my full consent on terms and conditions mentioned above."

Further, at the end of the page containing the terms and conditions of bond, the following is also given as a declaration, which reads as follows:

> "I have explained everything in the language known to the applicant/Representative of applicant and he/she has

> given his/her full consent on terms and conditions mentioned above. I, hereby further declare that all declaration made by the Bond Holder/Representative of Bond Holder and all the information/personal particulars given above by the Bond Holder/Representative of Bond Holder are correct and true to the best of my knowledge and belief. Signature of the Introducer."

81. I fail to see, if the investors were associated with Sahara Group, as declared, then where was the necessity of an Introducer and Introduction. If the offer was made only to persons associated, related or known to Sahara Group, then they could have furnished those details before the fact finding authorities. Further, in the IM, Saharas had stated that if the number of interested parties to the issue exceeds fifty they should approach the RoC to file RHPs as per Section 67(3) of the Companies Act, which clearly indicates that Saharas knew, by virtue of the first proviso to Section 67, if the number of persons exceeds fifty, then the same would be a public issue. Facts indicate that, through this dubious method, that SIRECL had approached more than thirty million investors, out of which 22.1 million have invested in the OFCDs and it had raised nearly 20,000 crores, for which it had utilized the services of its staff in 2900 branches/service centers and utilized the services of more than one million

agents/representatives. Court can, in such circumstances, lift the veil to examine the conduct and method adopted by Saharas to defeat the various provisions of the Companies Act, already discussed, read with the provisions of the SEBI Act.

82. I, in the above facts and circumstances, fully endorse the findings recorded by SEBI (WTM) and SAT that the placement of OFCDs by Saharas was nothing but issue of debentures to the public, resultantly, those securities should have been listed on a recognized stock exchange.

AID FOR THE CONSTRUCTION

83. Section 67 provides an aid for the construction of the phrase "offering shares or debentures to the Public". Section 67 of the Act gives an indication of the differences between private placement and public issue. The expression "offer of shares or debentures to public", i.e. issue of securities finds a place in several sections of the Act, like Sections 60B, 73 and those expressions are to be construed bearing in mind Section 67 as well. For our purpose, it is useful to reproduce the entire section, which reads as follows:

"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 the 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 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).”

84. Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions

are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of Sub-sections (1) and (2), that is to any section of the public, if the offer or invitation is 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 otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

85. The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Resultantly, after 13.12.2000, any offer of securities by a public

company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation. A public company can escape from the rigor of provisions, if the offer is made by companies mentioned under Section 67(3A), i.e. by public financial institutions specified under Section 4A or by non-banking financial companies referred to in Section 45I(f) of the Reserve Bank of India Act, 1934.

Following situations, it is generally regarded, as not an offer made to public.

- Offer of securities made to less than 50 persons;
- Offer made only to the existing shareholders of the company (Right Issue);
- Offer made to a particular addressee and be accepted only persons to whom it is addressed;
- Offer or invitation being made and it is the domestic concern of those making and receiving the offer.

86. Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of

domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation.

87. I may, in this connection, point out that the position in England is almost the same. The Companies Act, 2006 in England also says that it is unlawful for transferring securities to others, certain listed securities, such other transferable securities, as may be specified in prospectus rules, to be offered to the public, unless approved prospectus has been made available to the public before the offer is made. For the purpose of the Companies Act, 2006 (Sections 755-760), 'offer to the public' includes an offer to any section of the public, however, selected. An offer is not regarded as an offer to the public if (1) it can properly be regarded in all circumstances as not being calculated to result, directly or individually, in securities of the company becoming available to persons other than those receiving the offer; or (2) otherwise being a private concern of the person receiving it and the person making it: s 756(3). An offer is to be regarded (unless the contrary is proved) as being a private concern of the person receiving it and the person making it if (a) it is made to a person

already connected with the company and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of another person already connected with the company; or (b) it is an offer to subscribe for securities to be held under an employees' share scheme and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of (i) another person entitled to hold securities under the scheme; or (ii) a person already connected with the company: s756(4). For these purposes 'person already connected with the company' means (A) an existing member or employee of the company; (B) a member of the family of a person who is or was a member or employee of the company; (C) the widow or widower, or surviving civil partner, of a person who was a member or employee of the company; (D) an existing debenture holder of the company; or (E) a trustee (acting in his capacity as such) of a trust of which the principal beneficiary is a person within any of heads (A) to (D) above: s756(5). For the purpose of head (B) above, the members of a person's family are the person's spouse or civil partner and children (including step-children) and their descendants: s 756(6). Fur the purposes of Pt 20Ch 1 'securities' means shares or debentures: s. 755(5).

88. Companies Act, 2006, FSMA 2000, Prospectus Regulations, 2005 etc. applicable in England, if read together we get a complete picture of the securities laws in that country. Indian Companies Act, as I have already indicated has its foundation on the English Companies Act.

89. Alastair Hudson in his book 'Securities Law' First Edition (Sweet & Maxwell), 2008 at page 342, refers to 'Restricted Offers' and noticed that there is no contravention of Section 85 of FSMA 2000, if: "(b) the offer is made to or directed at fewer than 100 persons, other than qualified investors, per EEA State". The purpose underlying that exemption, the author says, is mainly the fact that the offer is not being made to an appreciable section of "the public" such that the policy of the prospectus rules generally is not affected. Further, the author says that "Self-evidently, while an offer to 99 ordinary members of the public would be within the literal terms of the exemption, it would not be the sort of activity anticipated by the legislation. Moreover, if a marketing campaign were arranged such that ordinary members of the people were approached in groups of 99 people at a time in an effort to avoid

the prospectus rules, then that would not appear to be within the spirit of the regulations and might be held to contravene the core principle that a regulated person must act with integrity."

90. I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. Facts clearly reveal that Saharas have issued securities to the public more than the threshold limit statutorily fixed under the first proviso to Section 67(3) and hence violated the listing provisions which may attract civil and criminal liabilities.

LISTING OF SECURITIES – LEGAL OBLIGATIONS

91. Principles of listing, which I may later on discuss, is intended to assist public companies in identifying their obligations and responsibilities, which are continuing in nature, transparent in content and call for high degree of integrity. Obligations are imposed on the issuer on an ongoing basis. Public companies who

are legally obliged to list their securities are deemed to accept the continuing obligations, by virtue of their application, prospectus and the subsequent maintenance of listing on a recognized stock exchange. Disclosure is the rule, there is no exception. Misleading public is a serious crime, which may attract civil and criminal liability. Listing of securities depends not upon one's volition, but on statutory mandate.

92. Section 73, the listing provision, which deals with the allotment of shares and debentures of which Sub-sections (1), (1A) and (2) are relevant for our purpose and hence given below:

> **"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 recognised 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) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be

void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

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. (emphasis supplied)"

93. Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company

expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act.

94. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons. In view of the clear statutory mandate, the contention raised, based on Rule 19 of the SCR Rules framed under the SCR Act, has no basis. Legal obligation flows the moment the company issues the prospectus expressing the intention to offer shares or debentures to the public, that is to make an application to the recognized stock exchange, so that it can deal with the securities. A company cannot be heard to contend that it has no such intention or idea to make an application to the stock

exchange. Company's option, choice, election, interest or design does not matter, it is the conduct and action that matters and that is what the law demands. Law judges not what is in their minds but what they have said or written or done. Lord Diplock in ***Gissing v. Gissing*** (1971) 1 AC 886, has said, "As in so many branches of English Law, in which legal rights and obligations depend upon the intention of each party, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party." Lord Simon in ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*** [1942] AC 435, opined that in some branches of law, 'intention' may be understood to cover results which may reasonably flow from <u>what is deliberately done</u>, the principle being that a man is to be treated intending the reasonable consequences of his acts.

95. The maxim *'acta exterior indicant interiora secreta'* (external action reveals inner secrets) applies with all force in the case of Saharas, which I have already demonstrated on facts as well as on

law. Conduct and actions of Saharas indicate their intention, we have to judge their so called intention from their subsequent conduct. Subsequent illegality shows that Saharas contemplated illegality. A person's inner intentions are to be read and understood from his acts and omissions. Whenever, in the application of an enactment, a person's state of mind is relevant, the above maxim comes into play. ***(Ref. Bennion on Statutory Interpretation, 5th Edn., p. 1104)***

96. We have to apply the various provisions of the Companies Act and SEBI Act and the rules and regulations framed thereunder to Saharas' conduct and their inner intentions are to be understood from their acts and omissions, by applying the above maxim. Saharas' acts and omissions have clearly violated the provisions of Section 73, their failure to list the securities offer to the public was, therefore, intentional and the plea that they did not want their securities listed, is not an answer, since they were legally bound to do so. The duty of listing flows from the act of issuing securities to the pubic, provided such offer is made to fifty or more than fifty persons. Any offering of securities to fifty or more is a public offering by virtue of Section 67(3) of the Companies Act, which the

Saharas very well knew, their subsequent actions and conducts unquestionably reveal so.

97. The scope of Section 73 came up for consideration before this Court in ***Raymonds Synthetics Ltd. & Ors. v. Union of India & Ors.*** (1992) 2 SCC 255 and this Court held through Dr. Justice T. K. Thommen as follows:

> "9. A public limited company has no obligation to have its shares listed on a recognised stock exchange. But if the company intends to offer its shares or debentures to the public for subscription by the issue of a prospectus, it must, before issuing such prospectus, apply to one or more recognised stock exchanges for permission to have the shares or debentures intended to be so offered to the public to be dealt with in each such stock exchange in terms of Section 73.."

98. The above discussion clearly indicates that from the years 1988 to 2000, private placement of preferential allotment could be made to fifty or more persons if the requirements of Clauses (a) and (b) of Section 67(3) are satisfied. However, after the amendment to the Companies Act, 1956 on 13.12.2000, every private placement made to fifty or more persons becomes an offer intended for the public and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a)

and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange.

99. Saharas, in my view, have not followed any of those statutory requirements. On a combined reading of the proviso to Section 67(3) and Section 73(1), it is clear that the Saharas had made an offer of OFCDs to fifty persons or more, consequently, the requirement to make an application for listing became obligatory leading to a statutory mandate which they did not follow.

Unlisted Public Companies (Preferential Allotment) Rules, 2003 and the Unlisted Public Companies (Preferential Allotment) Amendment Rules 2011

100. Considerable arguments were advanced by Saharas on the applicability of the provisions of 2003 Rules which, according to them, did not require the OFCDs to be first listed on a recognized

stock exchange, especially in the light of the promulgation of Unlisted Public Companies (Preferential Allotment) Amendment Rules 2011 (for short '2011 Rules'). Contention was raised that, in view of 2003 Rules, preferential allotment by unlisted public companies on private placement was provided for and permitted without any restriction on numbers as per the proviso to Section 67(3) of the Companies Act and without requiring listing of such OFCDs on a recognized stock exchange. Further, it was pointed out that only on and from 14.12.2011, 2003 Rules were amended, whereby the definition of "preferential allotment" was substituted without in any way disturbing or amending Rule 2 of 2003 Rules. After 14.12.2011, it was pointed out, the definition of 'preferential allotment" was amended prospectively. Further, it was pointed out that the first proviso to Section 67(3) of the Companies Act, added by the Companies Amendment Act 53 of 2000 w.e.f. 13.12.2000 (which was earlier not applicable to the 2003 Rules) has now been expressly made applicable w.e.f. 14.12.2011, so as to limit/restrict the number of persons to whom the offer on private placement is made, to only 49 persons, and hence the restriction imposed by the amendment made in December 2011 to issue of OFCDs by unlisted companies pursuant to the special resolution under

Section 81(1A) is also prospective. Law, therefore, it was urged, permitted the unlisted companies like Saharas to issue OFCDs to more than 49 persons prior to December 2011, on a private placement basis, without requiring the same to be first listed.

101. I find that no such contention was seen urged either before SEBI or SAT, nor do I find any substance in that contention. 2003 Rules are not applicable to any offer of shares or debentures to more than 49 persons. 2003 Rules was framed by the Central Government in exercise of the powers conferred under Section 81(1A) read with Section 642 of the Companies Act to provide for rules applicable to the unlisted public companies. Section 81 of the Companies Act deals with further issue of securities and only gives pre-emptive rights to the existing shareholders of the company, so that subsequent offer of securities have to be offered to them as their "rights". Section 81(1A), it may be noted, is only an exception to the said rule, that the further shares may be offered to any persons subject to passing a special resolution by the company in their general meeting. Section 81(1A) cannot, in any view, have an overriding effect on the provisions relating to public issue. Even if armed with a special resolution for any further issue

of capital to person other than shareholders, it can only be subjected to the provisions of Section 67 of the Company Act, that is if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. A public issue of securities will not become a preferential allotment on description of label. Proviso to Section 67(3) does not make any distinction between listed and unlisted public companies or between preferential or ordinary allotment. Even prior to the introduction of the proviso to Section 67(3), any issue of securities to the public required mandatory applications for listing to one or more stock exchanges. After insertion of the proviso to Section 67(3) in December 2000, private placement allowed under Section 67(3) was also restricted up to 49 persons. 2003 Rules apply only in the context of preferential allotment of unlisted companies, however, if the preferential allotment is a public issue, then 2003 Rules would not apply. 2003 Rules are only meant to regulate the issue of the shares and debentures by unlisted public companies and prevent the misuse of the private placement. Section 81(1A), as I have already indicated, says that a preferential allotment can be made by passing a special resolution which is an exception to the rules of rights issue, since that requires new shares or

debentures to be offered to the existing members/holders on a pro rata basis. But when offer is made to more than 49 persons, then apart from compliance with Section 81(1A), other requirements regarding public issue have to be complied with. 2003 Rules, in my view, cannot override the provisions of Section 67(3) and Section 73. The definition of "preferential allotment" in 2011 Rules only made what was implicit in 2003, more explicit. In my view, both 2003 Rules and 2011 Rules are subordinate regulations and are to be read subject to the proviso to Section 67(3) and 73(1) and other related provisions.

DIP GUIDELINES & ICDR 2009

102. Senior counsels appearing for Saharas also raised a contention that DIP Guidelines were only departmental instructions, not having the sanction of law and, therefore, would not apply to the OFCDs issued. This argument, in my view, has no basis. DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the

issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by ICDR 2009. Contention was raised by Saharas that they had issued OFCDs in the year 2008 and no action was taken under DIP Guidelines and hence ICDR 2009, which came into force only on 26.8.2009, would not apply and have no retrospective operation. In my view, this contention has no force, especially when Saharas had not complied with the statutory requirements provided in the DIP Guidelines.

103. Repeal and Saving Clause under ICDR 2009 would clearly indicate that the violation under DIP Guidelines was a continuing one. Regulation 111 of ICDR reads as follows:

> "**Repeal and Savings**
>
> 111. (1) On and from the commencement of these regulations, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 shall stand rescinded.

(2) Notwithstanding such rescission;

(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b) any offer documents, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

104. Regulation 111(1) of ICDR 2009 rescinded the DIP Guidelines from 26.8.2009 and clause (2) of Regulation 111 contains the saving clause. The expression "anything done" or "any action taken" under Regulation 111(1) are of wide import and would take anything done by the company omitted to be done which they legally ought to have done. Non-performance of statutory obligations purposely or otherwise may also fall within the above mentioned expressions. Failure to take any action by SEBI under DIP Guidelines, in spite of the fact that Saharas did not

discharge their statutory obligation, would not be a ground to contend that 2009 Regulations would not apply as also the saving clause. 2009 Regulations, in my view, will apply to all companies whether listed or unlisted. Further, in the instant case, SEBI was not informed of the issuance of securities by the Saharas while the DIP Guidelines were in force and Saharas continued to mobilize funds from the public which was nothing but continued violation which started when the DIP Guidelines were in force and also when they were replaced by 2009 Regulations. Further, it may also be recalled that any solicitation for subscription from public can be regulated only after complying with the requirements stipulated by SEBI, in fact, an amendment was made to Schedule II of the Companies Act vide notification No. GSR 650(3) dated 17.9.2002 by inserting a declaration which has to be signed by the directors of the company filing the prospectus, which reads as under:

> "That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under Section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act, 1956 or the securities and Exchange Board of India Act, 1992 or rules made there-under or guidelines issued, as the case may be."

105. I find that Saharas conveniently omitted the reference to SEBI in the declaration given in the prospectus. OFCDs were, therefore, issued by Saharas in contravention of the DIP Guidelines, ICDR 2009, notification dated 17.9.2002 and also overlooking the statutory requirements stipulated in Section 73(1) of the Companies Act.

Hybrids – SCR Act

106. Saharas also raised a contention that after the insertion of the definition of "securities" in Section 2(45AA) as "including hybrid" and after insertion of the separate definition of "hybrid" in Section 2(19A) of the Act, the provisions of Section 67 are not at all applicable to OFCDs, which have been held to be "hybrid". Further, it was also contended that OFCDs issued were convertible bonds falling within the scope of Section 28(1)(b) of SCR Act and they were not "securities" or at any rate the provisions of SEBI Act and Section 67 were not at all applicable to OFCDs, which have been found to be "hybrid".

107. Saharas mainly canvassed the position that OFCDs issued were hybrid securities covered by the term securities in the Companies Act and they do not come under the definition of "securities" under the SCR Act, hence under the SEBI Act. Further, it was also urged that when the definition of "securities" was amended to include hybrids in the Companies Act, no corresponding amendment was made in the SCR Act and SEBI Act and hence it was contended that SEBI has no jurisdiction or control over the hybrid securities. Further, it was also pointed out that hybrid securities at best can come under the regulatory control of MCA, Government of India. Saharas also contended that even Section 67 speaks only of shares and debentures and does not reflect the change brought about by the definition Clause 2(19A) 'hybrid' or by the insertion of the definition of "securities" in Section 2(45AA) as including hybrid even though Section 67(3) of the Act was amended, by the Amendment Act 53 of 2000, by which the definitions of 'securities' and 'hybrid' were introduced. It was also pointed out that non-substitution/non-amendment of Section 67(1) and (2), by not including the word 'hybrid' after the words 'shares' and 'debentures', is significant.

108. OFCDs issued by Saharas undoubtedly were unsecured debentures by name and nature. Section 2(12) of the Companies Act deals with the definition of the word "debentures" and includes any "other securities". The same reads as follows:

> "2(12). "Debenture' includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not."

The definition of the word "securities' under Section 2(45AA) of the Companies Act, reads as follows:

> "2(45AA). "Securities" means securities as defined in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and includes hybrids."

Section 2(h) of the SCR Act, 1956 reads as follows:

> "2(h) "securities" include—
>
> (i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
>
> (ia) derivative;
> (ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;
>
> (ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
> (id) units or any other such instrument issued to the

investors under any mutual fund scheme;

Explanation.- For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938);

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities."

109. The word "hybrid" under Section 2(19A) was inserted in the Companies Act, vide the Companies (Amendment) Act, 2002 w.e.f. 13.12.2000 and reads as follows:

"2(19A). "hybrid" means any security which has the character of more than one type of security, including their derivatives."

110. Hybrid securities, therefore, generally means securities,

which have some of the attributes of both debt securities and equity securities, means a security which, in the term of a debenture, encompassing the element of indebtness and element of equity stock as well. The scope of the definition of Section 2(h) of SCR Act came up for consideration before this Court in **Sudhir *Shantilal Mehta v. Central Bureau of Investigation*** (2009) 8 SCC 1 and the Court stated that the definition of securities under the SCR Act is an inclusive definition and not exhaustive. The Court held that it takes within its purview not only the matters specified therein, but also all other types of securities, thus it should be given an expansive meaning. In ***Naresh K. Aggarwala & Co. v. Canbank Financial Services Ltd. and Anr.*** (2010) 6 SCC 178, while referring to the definition of the term "securities" defined under SCR Act and the applicability of a Circular issued by the Delhi Stock Exchange, the Court endorsed the view of the Special Court and noted that the perusal of the above quoted definition showed that they did not make any distinction between listed securities and unlisted securities and, therefore, it was clear that the circular would apply to the securities which were not listed on the stock exchange.

111. Section 2(h) of the SCR Act gives emphasis to the words "other marketable securities of a like nature", which gives a clear indication of the marketability of the securities and gives an expansive meaning to the word securities. Any security which is capable of being freely transferrable is marketable. The definition clause in Section 2(h) of SCR Act is a wide definition, an inclusive one, which takes in hybrid also, which I have already indicated, defined vide Section 2(19A) of the Companies Act.

112. OFCDs issued have the characteristics of shares and debentures and fall within the definition of Section 2(h) of SCR Act, which continue to remain debentures till they are converted. In other words, OFCDs issued by Saharas are debentures *in presenti* and become shares *in futuro*. Even if OFCDs are hybrid securities, as defined in Section 2(19A) of the Companies Act, they shall remain within the purview of the definition of "securities" in Section 2(h) of SCR Act. Further, it may be noted that Saharas have treated OFCDs only as debentures in the IM, RHP, application forms and also in their balance sheet. The terms "Securities" defined in the Companies Act has the same meaning as defined in the SCR Act, which would also cover the species of "hybrid"

defined under Section 2(19A) of the Companies Act. Since the definition of "securities" under Section 2(45AA) of the Companies Act includes "hybrids", SEBI has jurisdiction over hybrids like OFCDs issued by Saharas, since the expression "securities" has been specifically dealt with under Section 55A of the Companies Act.

OFCDs whether Convertible Bonds – SCR Act

113. Saharas raised yet another contention that OFCDs issued by them are convertible bonds issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of SCR Act are not applicable in view of Section 28(1)(b) thereof. Further, it was also contended that convertible bonds having been issued at a price agreed upon at the time of issue are not listable in view of the exception granted under Section 28(1) of the SCR Act.

114. Section 28 was inserted by the SCR Act. The object of the amendment as stated in the Bill was to exempt convertible bonds by foreign financial institutions that had an option to obtain shares at a later date. Preamble of SCR Act provided "prohibition on

options in securities" as a mode "to prevent the undesirable transactions in securities". Resultantly, Section 28 had to be amended to make so inapplicable to such options in the bonds and to delete the words "by prohibiting options in securities" to facilitate such options. Parliament never intended to take away convertible debentures from the purview of SCR Act. For easy reference, I may refer to Section 28, which reads as follows:

> "**28**. **Act not to be apply in certain cases.**
>
> (1) The provisions of this Act shall not apply to-
>
> (a) the Government, the Reserve Bank of India, any local authority or any corporation set-up by a special law or any person who has effected any transaction with or through the agency of any such authority as is referred to in this clause;
>
> (b) any convertible bond or share warrant or any option or right in relation thereto, in so far as it entitles the person in whose favour any of the foregoing has been issued to obtain at his option from the company or other body corporate, issuing the same or from, any of its shareholders or duly appointed agents shares of the company or other body corporate, whether by conversion of the bond or warrant or otherwise, on the basis of the price agreed upon when the same was issued.
>
> (2) Without prejudice to the provisions contained in sub- section (1) if the Central Government is satisfied that in the interests of trade and commerce or the economic development of the country it is necessary or

> expedient so to do, it may, by notification in the Official Gazette, specify any class of contracts as contracts to which this Act or any provision contained therein shall not apply, and also the conditions, limitations or restrictions, if any, subject to which it shall not so apply."

Section 28(1)(b) makes it clear that the Act will not apply to the 'entitlement' of the buyer, inherent in the convertible bond. Entitlement may be severable, but does not itself qualify as a security that can be administered by the SCR Act, unless it is issued in a detachable format. Therefore, the inapplicability of SCR Act, as contemplated in Section 28(1)(b), is not to the convertible bonds, but to the entitlement of a person to whom such share, warrant or convertible bond has been issued, to have shares at his option. The Act is, therefore, inapplicable only to the options or rights or entitlement that are attached to the bond/warrant and not to the bond/warrant itself. The expression "insofar as it entitles the person" clearly indicates that it was not intended to exclude convertible bonds as a class. Section 28(1)(b), therefore, clearly indicates that it is only the convertible bonds and share/warrant of the type referred to therein that are excluded from the applicability of the SCR Act and not debentures which are separate category of securities in the definition contained in Section 2(h) of SCR Act.

Section 20 of SCR Act, which was omitted, by Securities Laws (Amendment) Act, 1995, with effect from 25.1.1995, stated that all options entered into after the commencement of the Act would be illegal. The introduction of Sections 28(1)(b) and 28(2) became necessary because of the provisions of Sections 13, 16 and 20. Section 20 was deleted in the year 1995, but SEBI notification No. 184 dated 1.3.2000 continued to prohibit options. Consequently, OFCDs issued by Saharas to the public cannot be excluded from the purview of listing requirements, any interpretation to the contrary would contravene the mandatory requirements contained in Section 73(1) and proviso to Section 67(3) of the Companies Act.

REFUND OF THE MONEY COLLECTED

115. I have found that Saharas having failed to make application for listing on any of the recognized stock exchange, as provided under Section 73(1) of the Companies Act, become legally liable to refund the amount collected from the subscribers in pursuance to their RHPs, along with interest as provided under Section 73(2) of the Act. Rule 4D of the Companies (Central Government) General

Rules and Forms 1956 prescribes the rates of interest for the purposes of sub-sections (2) and (2A) of Section 73, which shall be fifteen per cent per annum. Section 73(2) says that every company and every director of the company who is an officer in default, shall 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. The scope of the above mentioned provisions came up for consideration before this Court in ***Raymond Synthetics Ltd. & Ors. V. Union of India*** (supra), wherein the Court held that in a case where the company has not applied for listing on a stock exchange, the consequences will flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus. I am, therefore, of the view that since Saharas had violated the listing provisions and collected huge amounts from the public in disobedience of law, SEBI is justified in directing refund of the amount with interest.

CIVIL AND CRIMINAL LIABILITY

116. I have found, in this case, that Saharas had not complied

with the legal requirements of Section 56 and hence the second proviso to Section 56(3) may apply and it is also stated in sub-section (6) of Section 56 that the liability under the General Law has been excluded. Section 62 casts civil liability for mis-statement in prospectus and Section 63(1) speaks of criminal liability. Section 68 speaks of penalty for fraudulently inducing persons to invite, which also leads to imprisonment and fine. Section 68A prescribes punishment for violation of what is provided under Sections 68A(1)(a) and (b), with imprisonment for a term of five years. Section 73(3) also speaks of imposition of fine. Over and above the penal provisions, Section 628 of the Companies Act also proposes imprisonment and fine, for making false statements. Further, furnishing false evidence may also attract punishment with imprisonment for a term which may extend to seven years and also fine under Section 629 of the Companies Act. The provisions for imposing civil and criminal liability and refund of the amount with interest would indicate that, of late, economic offences in India like the one committed by Saharas be treated with an iron hand, or else we may land in another security market pandemonium.

I, therefore, answer the questions of law raised as follows:

(a) SEBI has the powers to administer the provisions referred to

in the opening part of Section 55A which relates to issue and transfer of securities and non-payment of dividend by public companies like Saharas, which have issued securities to fifty persons or more, though not listed on a recognized stock exchange, whether they intended to list their securities or not.

(b) Saharas were legally obliged to file the final prospectus under Section 60B(9) with SEBI, failure to do so attracts criminal liability.

(c) First proviso to Section 67(3) casts a legal obligation to list the securities on a recognized stock exchange, if the offer is made to fifty or more persons, which Saharas have violated which may attract the penal provisions contained in Section 68 of the Act.

(d) Section 73 of the Act casts an obligation on a public company to apply for listing of its securities on a recognized stock exchange, once it invites subscription from fifty or more persons, which Saharas have violated and they have to refund the money collected to the investors with interest.

(e) Saharas have violated the DIP Guidelines and ICDR 2009 and by not complying with the disclosure requirements and investor protection measures for public, and also violated Section 56 of the Companies Act which may attract penal provisions.

(f) 2003 Rules or the 2011 Rules cannot override the provisions of Section 67(3) and Section 73, being subordinate legislations, 2003 Rules are also not applilcable to any offer of shares or debentures to more than forty nine persons and are to be read subject to the proviso to Section 67(3) and Section 73(1) of the Companies Act.

(g) OFCDs issued by Saharas have the characteristics of shares and debentures and fall within the definition of Section 2(h) of SCR Act. The definition of 'securities' under Section 2(45AA) of the Companies Act includes 'hybrids' and SEBI has jurisdiction over hybrids like OFCDs issued by Saharas, since the expression 'securities' has been specifically dealt with under Section 55A of the Companies Act.

(h) Section 28(1)(b) of the SCR Act indicates that it is only convertible bonds and share/warrant of the type referred to therein, which are excluded from the applicability of the SCR Act and not debentures, which are separate category of securities in the definition contained in Section 2(h) of SCR Act. Contention of Saharas that OFCDs issued by them are convertible bonds issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of SCR Act, would not apply, in view of Section 28(1)(b) cannot be sustained.

(i) SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange.

(j) Saharas are legally bound to refund the money collected to the investors, as provided under Section 73(2) of the Companies Act read with Rule 4D of the Companies (Central Government's) General Rules and Forms, 1956 and the SEBI

has the power to enforce those provisions.

(k) Saharas' conduct invites civil and criminal liability under various provisions like Sections 56(3), 62, 68, 68A, 73(3), 628, 629 and so on.

CONCLUSION

117. The above discussion will clearly indicate that OFCDs issued by Saharas were public issue of debentures, hence securities. Once there is an intention to issue shares or debentures to the public, it is/was obligatory to make an application to one or more recognized stock exchanges, prior to such issue. Registration of RHPs by the Office of the Registrar does not mean that the mandatory provisions of Sections 67(3), 73(1) and DIP Guidelines be not followed. Saharas could not have filed RHP or any prospectus with RoC, without submitting the same to SEBI under Clauses 1.4, 2.1.1. and 2.1.4 of DIP Guidelines. Unlisted companies like Saharas when made an offer of shares or debentures to fifty or more persons, it was mandatory to follow the legal requirements of listing their securities. Once the number forty nine is crossed, the proviso to Section 67(3) kicks in and it is an issue to the public, which attracts Section 73(1) and an

application for listing becomes mandatory which fall under the administration of SEBI under Section 55A(1)(b) of the Companies Act.

118. SEBI, I have already indicated, has a duty under Section 11A of the SEBI Act to protect the interests of investors in securities either listed or which are required to be listed under the law or intended to be listed. Under Section 11B, SEBI has the power to issue appropriate directions in the interests of investors in securities and securities market to any person who is associated with securities market.

119. I have already referred to the power of SEBI under the SEBI Act in the earlier part of this judgment. SEBI Act, it may be noted, is a special law, distinct in form, but related to the Company Law, 1956. Purpose and object behind establishing a body like SEBI under the SEBI Act has also been highlighted by us. The impugned orders, as already stated, were issued by SEBI in exercise of its powers conferred under Sections 11, 11A and 11B of SEBI Act and Regulations 107 of ICDR 2009. DIP Guidelines, as already indicated, did apply to both listed and unlisted companies. Clause 2.1.1 of DIP Guidelines had made it mandatory to file draft

prospectus only before SEBI, not before the Central Government. Obligation was also cast on initial public offerings by unlisted companies and the issue of OFCDs was a public issue under Regulation 1.2.1 (xxiii) which also indicated that DIP Guidelines would apply to Saharas as well. Issuing of convertible debentures in violation of those guidelines gives ample powers on SEBI to pass orders under Sections 11A and 11B of the SEBI Act as well as Regulation 107 of ICDR 2009 and direct refund of the money to investors.

120. SEBI, in the facts and circumstances of the case, has rightly claimed jurisdiction over the OFCDs issued by Saharas. Saharas have no right to collect Rs.27,000 crores from three million (3 crore investors) without complying with any regulatory provisions contained in the Companies Act, SEBI Act, Rules and Regulations already discussed. MCA, it is well known, does not have the machinery to deal with such a large public issue of securities, its powers are limited to deal with unlisted companies with limited number of share holders or debenture holders and the legislature, in its wisdom, has conferred powers on SEBI. I, therefore, find on facts as well as on law, no illegality in the proceedings initiated by

SEBI and the order passed by SEBI (WTM) dated 23.6.2011 and SAT dated 18.10.2011 are accordingly upheld.

.....J.
(K.S. Radhakrishnan)

JAGDISH SINGH KHEHAR, J.

1. I have carefully read the order of my learned brother Radhakrishnan, J. I am however inclined to record my own reasons while dealing with the propositions canvassed before us. Before examining the issues canvassed, it is necessary to record some further facts, which constitute the foundational basis of my order. During the course of hearing learned counsel had mainly relied on the pleadings in Civil Appeal no.9813 of 2011, accordingly, reference shall be made mainly to the facts narrated therein. Facts referred to in Civil Appeal no.9833 of 2011 have also been adverted to when necessary.

2. Sahara India Real Estate Corporation Limited (hereinafter referred to as "SIRECL") and Sahara Housing Investment Corporation Limited (hereinafter referred to as "SHICL") are a part of Sahara India Group of Companies. Another company, namely, Sahara Prime City Limited (hereinafter referred to as "SPCL") which is also connected to the Sahara India Group of Companies, filed a Draft Red Herring Prospectus (for short "DRHP") with the Securities and Exchange Board of India (hereinafter referred to as "SEBI") in respect of its proposed Initial Public Offer (for short "IPO") dated 30.9.2009. While the aforesaid DRHP dated 30.9.2009 was under scrutiny, SEBI received complaints relating to disclosures

made in the DHRP. One of the aforesaid complaints was made by "Professional Group for Investors Protection". In the aforesaid complaint of the "Professional Group for Investors Protection" dated 25.12.2009, it was alleged that SIRECL was issuing convertible bonds to the public throughout the country for the past several months. It was alleged that issuing of convertible bonds by SIRECL had not been disclosed in the DRHP dated 30.9.2009 (filed by SPCL). On similar lines SEBI received a complaint from one Roshan Lal dated 4.1.2010.

3. In order to probe the authenticity of the allegations levelled in the aforementioned complaints, SEBI sought information from Enam Securities Private Limited – the merchant banker for SPCL. Enam Securities Private Limited responded to the communication received from the SEBI on 21.2.2010. Enam Securities Private Limited, in its response, asserted on the basis of an inquiry conducted and legal opinion sought, that it had arrived at the conclusion, that the optionally fully convertible debentures (for short OFCDs) issued by SIRECL and SHICL had been issued in conformity with all applicable laws.

4. On 26.2.2010 lead managers of the two companies (SIRECL and SHICL) informed SEBI, that both the companies had issued debentures on "tap basis" i.e., by way of private placement. It was confirmed, that the two companies had issued an "information memorandum" under section 60B of the Companies Act, 1956 (hereinafter referred to as the Companies Act), prior to opening of the offer. It was acknowledged, that SIRECL had also issued a red herring prospectus (for short "RHP") with the Registrar of Companies (Uttar Pradesh and Uttarakhand). Likewise, SHICL had issued a RHP with the Registrar of Companies, Maharashtra.

5. In the RHPs issued by the two companies it was mentioned, that the companies did not intend the proposed issue to be listed in any stock exchange. The RHPs also stated, that only those persons were eligible to apply, to whom the information memorandum was being circulated. The RHPs also expressed, that the appellant ought to be associated/affiliated or connected with the Sahara Group of Companies. The RHP noted, that the invitation to apply was being extended privately, without issuing any advertisement to the general public. What had been indicated in the RHPs was, what had been determined by the SIRECL in its special resolution dated 3.3.2003 i.e., that the OFCDs would be issued by way of private placement to "friends, associates, group companies, workers/employees and other individuals, who are associated/affiliated or connected, in any manner with Sahara India Group of Companies".

6. Copies of the terms and conditions of the OFCDs issued by the two companies reveal, that the appellant-companies issued "bonds" (named as, Abode Bonds, Nirman Bonds and Real Estate Bonds - by SIRECL; and as, Multiple Bonds, Income Bonds and Housing Bonds - by the SHICL) of different face values (varying from Rs.5000 to Rs.24000) and different maturity periods (varying from 48 months to 180 months). The OFCDs issued by the two companies contemplated different redemption values and conversion options.

7. Vide letter dated 22.4.2010, SEBI sought further details from Enam Securities Private Limited. The details were sought in respect of OFCD's issued by SIRECL and SHICL. The particulars on which information was sought, is being extracted hereunder:

"2. a. details regarding the filing of RHP of the said

companies with the concerned RoC.

b. date of opening and closing of the subscription list.
c. details regarding the number of application forms circulated after the filing of the RHP with RoC.
d. details regarding the number of applications received.
e. the number of allottees
f. list of allottees.
g. the date of allotment.
h. date of dispatch of debenture certificates etc.
i. copies of application forms, RHP, pamphlets and other promotional material circulated."

The aforesaid information sought by SEBI from Enam Securities Private Limited was never furnished.

8. Thereupon, the same information was sought by SEBI directly from SIRECL and SHICL, through separate letters dated 12.5.2010. The two companies responded to the letters dated 12.5.2010 through separate replies dated 19.5.2010. Instead of furnishing details of the information sought by SEBI, the two companies required SEBI to furnish them with the complaints which had prompted it, to seek the information. SEBI again addressed separate communications to the two companies dated 21.5.2010 yet again seeking the same information, by making it clear to the two companies, that non compliance would result in appropriate action under the Companies Act, the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "SEBI Act"), as also, the regulations framed thereunder. Both the companies, without furnishing details sought by SEBI, responded through separate letters, dated 24.5.2010 and 26.5.2010. In their response it was asserted, that since a large number of their staff members were on summer vacation, the information could not be made available immediately. In the aforesaid communications, the companies also informed SEBI, that the OFCDs had been issued by them in compliance with the

provisions of the enactments referred to by the SEBI. Besides the foresaid, the two companies informed SEBI, that neither of them were listed public companies, and that, their securities were not being traded through any exchange in India or abroad. The aforesaid factual position was pointed out by the two companies to SEBI, with the clear intent to inform SEBI, that it had no jurisdiction to inquire into the OFCDs issued by them. Despite the aforesaid response, SEBI addressed separate communications dated 28.5.2010 to the two companies requiring them to furnish the same information. Yet again, the companies replied on the lines adopted earlier. SEBI again repeated its request for information through further separate communications dated 11.6.2010.

9. In the meantime SIRECL addressed a letter dated 31.5.2010 to the Union Minister of Corporate Affairs, to inform him of the correspondence exchanged with the SEBI. Being an unlisted entity, and also there being no intention to list the companies securities on any stock exchange, it was pleaded before the Union Minister, that under section 55A of the Companies Act the company could only be regulated and administered by the Ministry of Corporate Affairs and not by the SEBI. In the aforesaid view of the matter SIRECL requested the Union Minister of Corporate Affairs to advise it on its locus standi, "vis-à-vis our regulatory authority whether the company is governed by Ministry of Corporate Affairs, or SEBI, in view of the provisions of section 55A(c) of the Companies Act, 1956".

10. Through separate letters dated 16.6.2010 the two companies informed SEBI that they had already sought a clarification on the subject from the Government. Yet again, vide separate letters dated 28.6.2010 both companies informed SEBI, that they had received a communication from the office of the

Union Minister of State for Corporate Affairs to the effect that the matter was being examined by the Ministry. Accordingly, the companies adopted the stance, that they would file their replies to the letters addressed to them by SEBI only on receipt of a response from the Government.

11. It is apparent from the factual position depicted hereinabove, that SEBI was seeking information from the two companies since May, 2010. Since the information was not being supplied, SEBI initiated an investigation into the OFCDs issued by SIRECL and SHICL. Accordingly, summons dated 30.8.2010 and 23.9.2010 were issued to the two companies under section 11C of the SEBI Act, to provide the following information:

> "3. 1. Details regarding filing of prospectus/Red-herring Prospectus with ROC for issuance of OFCDs.
> 2. Copies of the application forms, Red-Herring Prospectus, Pamphlets, advertisements and other promotional materials circulated for issuance of OFCDs.
> 3. Details regarding number of application forms circulated, inviting subscription for OFCDs.
> 4. Details regarding number of applications and subscription amount received for OFCDs.
> 5. Date of opening and closing of the subscription list for the said OFCDs.
> 6. Number and list of allottees for the said OFCDs and the number of OFCDs allotted and value of such allotment against each allottee's name;
> 7. Date of allotment of OFCDs;
> 8. Copies of the minutes of Board/committee meeting in which the resolution has been passed for allotment;
> 9 Copy of Form 2 (along with annexures) filed with ROC, if any, regarding issuance of OFCDs or equity shares arising out of conversion of such OFCDs.
> 10. Copies of the Annual Reports filed with Registrar of Companies for the immediately preceding two financial years.
> 11. Date of dispatch of debenture certificate etc."

12. On receipt of the aforesaid summons, SIRECL and SHICL raised a number of legal objections to stall the proposed investigation. In respect of the

information sought, their response dated 13.9.2010, interalia expressed as under:

> "17. SIRECL is an unlisted company. The OFCDs of March 2008 were neither intended to be issued to the public nor were the OFCDs actually issued to the public, hence, do not come within the purview of section 55A(a)/(b) of the Companies Act, 1956 conferring administrative jurisdiction of SEBI. SIRECL had represented to the Central Government in the Ministry of Corporate Affairs on May 31, 2010 and on June 17, 2010, on which the Ministry, while acknowledging SIRECL's representation of May 31, 2010, informed SIRECL that the matter was being examined in the Ministry under the relevant provisions of the Companies Act, 1956.
> 18. In the light of above submission, the company requests you to kind withdraw the summons dated 30th August, 2010."

Based on the aforesaid response, the two companies requested SEBI to withdraw the orders dated 30.8.2010 and 23.9.2010. On 30.9.2010, through separate letters issued by SIRECL and SHICL, they adopted the stance, that they did not have complete information sought by the SEBI.

13. It would be relevant to notice, that at the request of the Chief Financial Officer of the Sahara India Group of Companies, an opportunity of hearing was granted to him on 3.11.2010, by the SEBI (FTM). During the course of the aforesaid hearing it was again impressed upon the Chief Financial Officer, that he should furnish information sought by the SEBI fully and accurately without any delay. Despite the aforesaid, the Chief Financial Officer during the course of the said hearing, did not make any firm commitment to furnish the information sought. It is essential to note, that the Chief Financial Officer, did not furnish the information sought.

14. Despite the fact that the companies chose not to provide the information, SEBI was able to collect some shreds of information, from details which had been furnished by the companies themselves, to the concerned Registrar of Companies. This information was obtained by SEBI, from MCA-21 portal

maintained by the Ministry of Corporate Affairs. In other words, the information which eventually became available with the SEBI, was not the information furnished by the companies to the SEBI, but the information furnished by SIRECL to the Registrar of Companies, Uttar Pradesh and Uttarakhand, and the information furnished by SHICL to the Registrar of Companies, Maharashtra. The information which became available to SEBI in respect of SIRECL through the aforesaid source is being extracted hereinunder:

> "9. i. Shareholders Resolution:
> Vide resolution passed at the Extraordinary General meeting held on March 3, 2008 (and filed with RoC), consent of the members of SIRECL was obtained for issuance of OFCD by way of private placement basis to friends, associates, group companies, workers/employees and other individual who are associated/affiliated or connected in any manner with Sahara India Group of Companies and RHP of SIRECL was filed with RoC, Uttar Pradesh and Uttrakhand on March 13, 2008.
> ii. Promoters as per the RHP:
> SIRECL is a company belonging to the Sahara India Group and is promoted by Mr.Subrata Roy Sahara, the founder of Sahara India Group.
> iii. Directors as per the RHP:
> Mrs.Vandana Bharrgava, Mr.Ravi Shankar Dubey and Mr.Ashok Roy Choudhary have given consent to include their names as directors and have signed the RHP as the directors of SIRECL.
> iv. Date of opening and closing of the issue:
> RHP merely states that date of opening and closing would be as decided by the Board of Directors.
> v. Details of the issue as per the RHP:
> The issue consists of OFCDs with option to the holders to convert the same into Equity Share of Rs.10 each at a premium to be decided at the time of issue equal to the face value of the Optionally Fully Convertible Rs.***. Since it is a RHP, the quantum and the price is to be determined at a future date. (It is pertinent to note that in the RHP, the total cost of the project, in which the proceeds of the said issue would be utilized is mentioned as Rs.20,000 crores).
> vi. Objects of the issue as per RHP:
> The funds raised shall be utilized for the purpose of financing the acquisition of lands for the purpose of development of townships, residential apartments, shopping complexes, etc. The proceeds

shall also be utilized for construction activities which shall be undertaken by the company in major cities of the country and also to finance other commercial activities/projects taken up by the company within or apart from the above projects. The company also proposes to carry out infrastructure activities and the amount collected from the current issue shall be utilized in financing the completion of projects viz., establishment/ constructing the bridges, modernization or setting up of airports, rail system or any other projects which may be allotted to the company, from time to time future. The company also proposes to engage into the business of electric power generation and transmission and the proceeds of the current issue shall also be used for the power projects which shall be allotted to the company. The money not required immediately by the company may be parked/invested inter-alia by way of circulating capital with partnership firms or joint ventures or in any other manner as per the decision of the Board of Directors, from time to time.

vii. Annual results:

As per the recently filed balance sheet of SIRECL (as at June 30, 2009), proceeds from the issuance of OFCDs is shown as Rs.4843.37 crores.

viii. Eligibility to apply:

It is mentioned in the RHP that only those persons are eligible to apply to whom the information Memorandum was circulated and/or approached privately, who are associated/affiliated or connected in any manner with Sahara Group of Companies, without giving any advertisement in general public."

Likewise the information which became available to SEBI in respect of SHICL is also being extracted hereunder:

"9. i. Shareholders Resolution:

As per the RHP, it is observed that the OFCD issuance by SHICL was approved by shareholders, vide the resolution (which is more or less similar to the resolution passed by SIRECL), passed in the AGM held on September 16, 2009. The RHP was filed with RoC, Maharashtra on October 6, 2009.

ii. Promoters as per the RHP:

SHICL is a company promoted by Mr.Subrata Roy Sahara, the founder of Sahara India Group.

iii. Directors as per the RHP:

Mrs.Vandana Bhargava, Mr.Ravi Shankar Dubey and Mr.Ashok Roy Choudhary have given consent to include their name as directors and have signed the RHP as directors of SHICL.

iv. Date of opening and closing of the issue:

RHP merely states that date of opening and closing would be as

decided by the Board of Directors.

v. Details of the issue:

The issue consists of Optionally Fully Convertible Unsecured Debentures with option to the holders to convert the same into Equity Share of Rs.10 each at a premium of to be decided at the time of issue equal to the face value of the Optionally Fully Convertible Unsecured Debentures to be privately placed aggregating to Rs.*** (since it is a Red Herring Prospectus the quantum and the price is to be determined at a future date). (It is pertinent to note that in the RHP, the total cost of the project, in which the proceeds of the said issue would be utilized is mentioned as Rs.20,000 crores).

vi. Objects of the issue as per RHP:

The object stated in short is "…. Financing the acquisition of lands for the purpose of development of townships, residential apartments, shopping complexes, etc.…" The objects mentioned therein is more or less similar to the "objects of the issue" mentioned in the RHP of SIRECL.

vii. Annual Report:

Since the Annual Report of SHICL for the concerned period has not yet been filed with RoC, the amount of the issue proceeds is not known.

viii. Eligibility to apply:

RHP mentions that only those persons are eligible to apply to whom the information Memorandum was circulated and/or approached privately, who are associated/affiliated or connected in any manner with Sahara Group of Companies, without giving any advertisement in general public.

ix. Explanatory note to the shareholders resolution:

The explanatory note to the shareholders resolution filed by SHICL with RoC (Extraordinary General Meeting resolution dated November 11, 2009 by SHICL) mentions: "The company further keeping in view that the number of persons to whom the offer of OFCDs shall be issued might exceed the limits as specified under Section 67 of the Companies Act, 1956 made an application for approval of Red herring Prospectus."

15. On the failure of the two companies to furnish information to SEBI, its Full Time Member – for short, SEBI (FTM), drew the following conclusions in his order dated 24.11.2010.

Firstly, neither SIRECL nor SHICL had denied their having issued OFCDs.

Secondly, SIRECL as also SHICL acknowledged having filed RHPs in respect of

the OFCDs issued by them with the concerned Registrar of Companies.

Thirdly, besides the dates of filing the RHPs with the respective Registrar of Companies, neither of the companies had furnished any other information/document sought from the companies by SEBI.

Fourthly, the companies had adopted a stance, that they did not have complete details relating to the securities issued by them. This stance adopted by the two companies, according to the SEBI, was preposterous.

Fifthly, SEBI had sought details of the number of application forms circulated, the number of application forms received, the amount of subscription deposited, the number and list of allottees, the number of OFCDs allotted, the value of allotment, the date of allotment, the date of dispatch of debenture certificates, copies of board/committee meetings, minutes of meetings during which the said allotment was approved. According to SEBI, since the information sought was merely basic, the denial of the same by the companies amounted to a calculated and deliberate denial of information.

Sixthly, information sought by the SEBI depicted at serial number fifthly hereinabove, was solicited to determine the authenticity of the assertion made by the companies, that the OFCDs had been issued by way of private placement. Whereas, it was believed by the SEBI that the companies had issued the OFCDs to the public.

Seventhly, since the companies had adopted the position, that the OFCDs were issued by way of private placement to friends, associate group companies, workers/employees and other individuals who were associated/affiliated/connected to the Sahara Group of Companies, according to

SEBI it was highly improbable, that the details and particulars of such friends, associate group companies, workers/employees and other individuals which were associated/affiliated/connected to the Sahara India Group of companies, was not available with them (for being passed over to SEBI).

16. Based on the aforesaid, the SEBI (FTM) passed an order dated 24.11.2010. In the aforesaid order various issues were separately examined. Issue no.1 was framed to determine whether the OFCDs invited by SIRECL and SHICL had been issued "to the public". On the instant subject the SEBI (FTM) expressed the view, that the proviso under section 67(3) of the Companies Act made the position clear, that any offer/invitation made by a public company to 50 or more persons was bound to be considered as having been made "to the public". Since the OFCDs were issued to persons far in excess of 50, it was sought to be concluded that the stance adopted by SIRECL and SHICL to the effect, that the offer of OFCDs was by way of private placement was not acceptable. The SEBI (FTM) also adopted another reasoning to determine the issue. According to the information made available, the subscribed amount as on 30.6.2009 was Rs.4843.37 crores. To remain out of the purview of the proviso under sub-section (3) of section 67 of the Companies Act, the subscribed amount should have been drawn from less than 50 persons (i.e., at the most 49 persons). If (according to the SEBI), the subscribers are assumed to be 49 (which is the maximum permissible for private placement), then the average subscription would have been in the range of Rs.98.84 crores (Rs.4843.37 ÷ 49 = 98.8442 crores). According to the SEBI (FTM) since the unit face value of the OFCDs issued by SIRECL and SHICL varied from Rs.5000/- to Rs.24000/-, it was unlikely that such

an offer was made by less than 50 persons. This inference was drawn on account of the fact that even high net-worth investors are not seen to make such huge investments in a single company.

17. The SEBI (FTM) then examined the plea advanced by the companies, that in view of the resolution passed by the companies under section 81 (1A) of the Companies Act, they could offer shares to any person, in any manner. And therefore, their offer to a select set of persons should not be construed as a public offer. The SEBI (FTM) rejected the aforesaid submission on the premise, that section 81(1A) of the Companies Act, did not have an overriding effect over the provisions relating to public issue under the Companies Act. It was sought to be explained, that further issue of securities, extended only to existing shareholders of a company. According to the SEBI (FTM) section 81(1A) was only an exception to the said rule, subject to the procedural requirements enumerated therein. It was pointed out, that under the Companies Act further issue of capital, even pursuant to a resolution made under section 81(1A) of the Companies Act was subject to the provisions of Part III of the Companies Act, when an offer was to be made to 50 or more persons. The legal submissions, advanced on behalf of the companies based on section 81(1A) was, accordingly rejected.

18. The SEBI (FTM) also examined the issue with reference to section 2(36) of the Companies Act, which defines the term “prospectus” to mean any document described or issued as a prospectus and includes any notice, circular, advertisement or other document “inviting, deposits from the public or inviting offers from the public” for the subscription or purchase of any shares in, or

debentures of a body corporate. Based on the definition of term "prospectus" and the conduct of the companies in filing their respective prospectus for their OFCDs, with the concerned Registrar of Companies, according to SEBI (FTM), would lead to the inference that the companies intended to mobilize funds through a subscription "to the public".

19. Based on the factual and legal aspects of the matter considered by SEBI (FTM) noticed above, the following summary of inferences were recorded in the order dated 24.11.2010:

> "18. i. The issue of OFCDs by the companies have been made to a base of investors that are fifty or more in number.
> ii. The companies themselves tacitly admit the same as they have no case that funds have been mobilized from a group smaller than fifty.
> iii. A resolution under section 81(1A) of the Act does not take away the 'public' nature of the issue.
> iv. The filing of a prospectus under the Act signifies the intention of the issuer to raise funds from the public.
>
> Therefore, for the aforesaid reasons, the submission of the companies that their OFCD issues are made on private placement and do not fall under the definition of a public issue, is not tenable. The instances discussed above would prima facie suggest that the offer of OFCDs made by the companies is "public" in nature ."

20. According to SEBI (FTM) since the offer was made to the public, as per the mandate of section 73(1) of the Companies Act, it was obligatory for the companies issuing shares/debentures through a prospectus, to compulsorily seek approval for listing in a recognized stock exchange. It was, therefore, sought to be concluded, that non-compliance of the mandatory provisions contained in section 73 of the Companies Act, could not result in drawing a favourable inference. In other wods, because the companies had wrongfully not sought approval for listing in a recognized stock exchange, it could not be presumed that

the offer made by them was by way of private placement. With the aforesaid observations, the SEBI (FTM) concluded its determination on issue no.1, i.e., both SIRECL and SHICL had sought subscription to the OFCDs, by way of an invitation "to the public".

21. Issue no.2 was framed to determine whether section 60B of the Companies Act provided an alternative route, for raising capital without complying with the procedure contemplated under section 73 of the Companies Act. For dealing with the second issue, reference was made to section 60 of the Companies Act which postulates the requirement of a company issuing a prospectus to deliver the same to the Registrar of Companies for registration. Reference was also made to section 60B(1) of the Companies Act which permits a company to issue an information memorandum to the public before filing a prospectus. It was observed, that the object of issuing an information memorandum, is to elicit the public demand for the securities proposed to be issued. The information collected, it was observed, is to enable the concerned company to assess the price and the terms of the proposed securities. Also taken into consideration was section 60B(2) of the Companies Act, which it was observed, imposes a mandatory condition on a public company to file a prospectus "prior to the opening of the subscription list" after it had issued an information prospectus. The requirement of filing prospectus, as indicated hereinabove, it was observed, is preceded with the words "bound" depicting the mandatory character thereof. The SEBI (FTM) also made a reference to section 60B(3) of the Companies Act which, it was observed, contemplates that the "information memorandum" and the "RHP" would carry the same obligation as are

applicable in case of a prospectus.

22. Learned counsel for the appellant-companies had canvassed before the SEBI (FTM), that necessary particulars had only to be furnished to the Registrar of Companies and not to SEBI. In so far as the instant aspect of the matter is concerned, the contention advanced on behalf of the appellant-companies was sought to be rejected by concluding that the term "any other case" used in section 60B(9) was bound to be given the same meaning and effect as was assignable to the said term under section 53A(c) of the Companies Act. Based on the aforesaid consideration, the SEBI (FTM) concluded as under:

> "24. From the above reasons, section 60B of the Act cannot be read in isolation, but has to be harmoniously construed with the other provisions of the Act governing public issues. Therefore, section 60B of the Act does not prescribe an alternative procedure to provisions of Sections 67(3) and 73(1) of the Act, as contended by the companies. Further, vide their letter dated September 30, 2010, the companies have mentioned that the issue is not yet closed. A prospectus cannot be kept open perpetually. It is prima facie inferred from such conduct of the companies that they have taken recourse to the argument that their issues are covered under section 60B to circumvent the applicable legal framework laid out elaborately for public issues. Once an offer is made to fifty or more persons, compliance with section 60B(filing with RoC) alone cannot be treated as compliance. The moment the company offers to fifty or more persons, it has to comply with all the provisions applicable for public issues (Part III of the Act). Hence, the legal opinion submitted by the companies that they can issue to fifty or more persons without making an application to a stock exchange under section 73 of the Act, by following the procedure under section 60B thereof, seems to be a narrower and a convenient interpretation. If such an interpretation is accepted it will pave the way for companies to raise money from the general public, without following various procedures intended to protect the interest of investors, in respect of the public issues, prescribed under the Act and the ICDR Regulations including the requirements for due diligence, disclosures, credit-rating, etc."

23. Based on the DIP Guidelines and the ICDR Regulations, the SEBI (FTM) found that the companies had committed the following violations:

> "29 a) failure to file the draft offer document with SEBI;

b) failure to mention the risk factors and provide the adequate disclosures that is stipulated, to enable the investors to take a well-informed decision.
c) denied the exit opportunity to the investors.
d) failure to lock-in the minimum promoters contribution.
e) failure to grade their issue.
f) failure to open and close the issue within the stipulated time limit.
g) failure to obtain the credit rating from the recognized credit rating agency for their instruments.
h) failure to appoint a debenture trustee
i) failure to create a charge on the assets of the company.
j) failure to create debenture redemption reserve, etc."

24. Having recorded the aforesaid deliberations and conclusions, the SEBI (FTM) issued the following directions in its order dated 24.11.2010:

"Therefore, in view of the foregoing reasons, in order to protect the interest of investors and the integrity of the securities market, I, in exercise of the powers conferred upon me under section 19 the Securities and Exchange Board of India Act, 1992 and Sections 11(1), 11(4)(b), 11A and 11B thereof, read with Regulation 107 of the Securities and Exchange Board of India (issue of Capital and Disclosure Requirements) Regulations, 2009, pending investigation, hereby issue the following directions, by way of this ad interim ex-parte order:

a. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited are restrained from mobilizing funds under the Red Herring Prospectus dated March 13, 2008 and October 6, 2009, respectively, filed with the concerned Registrar of Companies, till further directions. The said companies are further directed not to offer their equity shares/OFCDs or any other securities, to the public and invite subscription, in any manner whatsoever, either directly or indirectly till further directions.

b. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited and are persons who are named as promoters and directors of the said companies in the Red-Herring Prospectus filed with the concerned Registrar of Companies, namely, Mr.Subrata Roy Sahara, Ms.Vandana Bharrgava, Mr.Ravi Shankar Dubey and Mr.Ashok Roy Choudhary, are prohibited from issuing prospectus, or any offer document, or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further directions.

40. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited are directed to show cause as to why action should not be initiated against them including issuance of directions

to refund the money solicited and mobilized through the prospectus issued with respect to the impugned OFCDs, done prima facie in violation of the provisions of the Companies Act, 1956, the Securities and Exchange Board of India Act, 1992, the erstwhile Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 and the Securities and Exchange Board of India (issue of Capital and Disclosure Requirement) Regulations, 2009, as observed in this order.

41. The entities/persons against whom this order is issued may file their objections, if any, to this order within thirty days from the date of this order and, if they so desire, avail of an opportunity of personal hearing at the Securities and Exchange Board of India, Head Office, SEBI Bhavan, C-4A, G, Block, Bandra Kurla Complex, Bandra (East) Mumbai-400051. They may also inspect the relevant documents, if they so desire, on any working day prior to the hearing, during office hours at the above mentioned address.

42. Copy of this order is also forwarded to the Ministry of Corporate Affairs to enable them to take appropriate action as deemed fit by them, for any violation of the applicable provisions of the Companies Act, 1956 administered by them.

43. This order is without prejudice to any other action that may be initiated against the said violations.

44. This order shall come into force with immediate effect."

Through the aforesaid order of the SEBI (FTM) dated 24.11.2010 SIRECL and SHICL were also directed to show cause as to why action should not be initiated against them, including issuance of directions to refund the money solicited and mobilized through the prospectus issued with respect to the impugned OFCDs. The instant show cause notice issued by the SEBI (FTM) dated 24.11.2010 shall hereinafter be referred to as "the first show cause notice issued by the SEBI."

25.. SEBI's order dated 24.11.2010 (the first show cause notice issued by the SEBI) was challenged before the Lucknow Bench of the High Court of Judicature at Allahabad (hereafter referred to as the "the High Court") through Writ Petition No.11702 (M/B) of 2010 on 29.11.2010. On 13.12.2010, the High Court stayed the operation of the order dated 24.11.2010 (the first show cause notice issued by the SEBI). Despite the aforesaid injunction granted by the High Court, it

permitted SEBI to proceed with its inquiry against both the companies, but restrained SEBI from passing any final order. SEBI assailed the order dated 13.12.2010 by filing Special Leave Petition (C) No.36445 of 2010. SEBI's challenged was declined by this Court on 4.1.2011.

26. Even though the High Court, in the first instance, was pleased to stay the operation of the order dated 24.11.2011 (vide an order dated 13.12.2010), yet the High Court vacated the aforesaid interim order dated 13.12.2010 by an order dated 7.4.2011, in furtherance of an application filed by the SEBI. While vacating the interim order the High Court observed, that the appellant-companies were expected to cooperate with the inquiry being conducted by the SEBI. Since the appellant-companies were found remiss in the matter, the High Court was constrained to vacate the interim order passed earlier (on 13.12.2010). The appellant-companies (petitioners before the High Court) then filed an application before the High Court seeking a restoration of the order passed on 13.12.2010. The said application was dismissed on 29.11.2011. While dismissing the aforesaid application, the High Court observed, that those who come to court were supposed to come with clean hands and bona fide intentions, and have to abide by orders passed by the court, if assurances given to the court are not honoured, the court cannot come to the rescue of the party concerned. It is apparent, that the High Court had denied relief to the appellant-companies because they had not approached the High Court with clean hands and because their intentions were not found bona fide.

27. The order passed by the High Court vacating the interim order (passed on 13.12.2010) dated 7.4.2011 came to be assailed by SIRECL before this Court

through Special Leave Petition (C) No.11023 of 2011. Having entertained the aforesaid petition filed by SIRECL, this Court on 12.5.2011 passed the following order:

> "1. …..In this matter the questions as to what is OFCD and the manner in which investments are called for are very important questions. SEBI, being the custodian of the investor's interest and as an expert body, should examine these questions apart from other issues. Before we pass further orders, we want SEBI to decide the application(s) pending before it so that we could obtain the requisite input for deciding these petitions. We request SEBI to expeditiously hear and decide this case so that this Court can pass suitable orders on re-opening. However, effect to the order of SEBI will not be given. We are taking this route as we want to protect the interest of the investor. In the meantime, the High Court may proceed, if it so chooses, to dispose of the case at the earliest. The Special Leave Petitions shall stand over to July, 2011."

28. In compliance with the order extracted hereinabove, SEBI issued separate show cause notices to the companies on 20.5.2011. For facility of segregation, the instant show cause notices dated 20.5.2011 shall hereinafter be referred to as "the second show cause notice issued by the SEBI". Through the second show cause notice, the two companies were required to satisfy the SEBI why the directions contained in the order dated 24.11.2010 should not be reaffirmed. In response to the second show cause notice, detailed replies dated 30.5.2011 were filed by the companies so as to enable the companies to effectively project their respective claims. An opportunity of hearing was also afforded to the companies on 6.6.2011. During the course of hearing on 6.6.2011 (as well as on the adjourned dated i.e., 6.8.2011) detailed submissions were advanced through counsel.

29. In the interregnum SIRECL changed its name to Sahara Commodities Services Corporation Limited. Be that as it may, while adjudicating upon the

present controversy, to the said company will be referred to as SIRECL.

30. Having issued the second show cause notice dated 20.5.2011 and having received detailed replies from SIRECL as also from SHICL, and thereupon, having heard detailed submissions advanced by counsel representing the two companies, SEBI (FTM) summarized the pleas raised on behalf of the companies in response to the second show cause notice as under:

> "6. …..A. The two companies have made 'private placements' of Optionally Fully Convertible Debentures (OFCDs) to persons related or associated with the Sahara India Group, and therefore these issuances are not 'public' issues.
> B. OFCDs are neither shares nor debentures in its strict sense and are in the nature of 'hybrid' as defined in the Companies Act, 1956 (hereinafter referred to as the Companies Act).
> C. SEBI does not have any jurisdiction on such hybrid issues as the term 'hybrid' is not included in the definition of 'securities', under the SEBI Act, or in the Securities Contract (Regulation) Act, 1956 (hereinafter referred to as the SCR Act).
> D. Such hybrid securities were issued by the two companies (both unlisted), in terms of section 60B of the Companies Act and therefore, the jurisdiction in respect of such issues lies with the Central Government in terms of Section 55A(c) thereof and not with SEBI.
> E. Sections 67 and 73 of the Companies Act are not applicable to such hybrid securities issued by the two companies.
> F. The DIP Guidelines and the ICDR Regulations would not be applicable to the hybrid securities as neither the SEBI Act nor SCRA confer jurisdiction on SEBI in respect of such securities."

31. On the issue whether the SEBI had jurisdiction to deal with the matter under reference it was imperative for SEBI (FTM) to first ascertain, whether OFCDs issued by SIRECL and SHICL were "hybrid securities". If so, whether "hybrid securities" were covered by the definition of the term "securities" under the SEBI Act and/or the Securities Contract (Regulations) Act, 1956 (hereinafter referred to as "the SC(R) Act). The contention advanced at the behest of the companies on the instant issue was based on an amendment to the Companies

Act in 2000. By the aforesaid amendment, the term "hybrid" was included in the definition of the term "securities" in section 45AA of the Companies Act (with effect from 13.12.2000). Since the term "hybrid" was not similarly included within the definition of term "securities" under the SEBI Act and/or SC(R) Act, the contention advanced on behalf of the appellant-companies was that SEBI had no jurisdiction in respect of "hybrid securities".

32. The SEBI (FTM), on analyzing section 2(k) of the SC(R) Act arrived at a conclusion that the term "securities" in the SEBI Act as also SC(R) Act included "other marketable securities of a like nature", SEBI, according to the SEBI (FTM), would therefore, have jurisdiction to deal with the matter under reference.

33. While evaluating the terms and conditions of the bonds issued in response to the OFCDs (floated by the two companies), it was found that holders of all the six different kinds of bonds issued by SIRECL and SHICL, had the liberty to transfer the same to any other person subject to the terms and conditions incorporated therein and the approval of the respective company. It was therefore held:

> "14.5.6 …I find that firstly, marketability of a security denotes the ease with which it can be sold, secondly what is freely transferable is marketable and thirdly what is saleable is also marketable. Clearly, OFCDs issued by the two companies to such a wide base of investors who can sell these securities among themselves, if not to others are evidently 'marketable'. I have to therefore regard the OFCDs issued by the two companies as marketable securities."

34. On the issue whether the OFCDs which are the subject matter of contention in the present controversy, fell within the definition of term "debentures", the decision of the SEBI (FTM) was as under:

> "14.6.1 From the nomenclature itself, 'Optionally Fully Convertible

> Debentures' are 'Debentures', as they indeed are named so….. A succinct eludication of what the test for a "security" under securities laws may be found in A Ramaiya (XVII Ed. 2010 – Guide to the Companies Act – page 100). The acid test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others so that whenever an investor relinquishes control over her funds and submits their control to another for the purpose and hopeful expectation of deriving profits thereof, she is in fact investing her funds in a security….. Such test contains three elements: the investment of money; a common enterprise; and profits or returns solely derived from the efforts of others.
>
> 14.6.2 …..In this case, the investor purchasing the OFCD makes an investment. Both the two companies issuing the OFCDs are common enterprises, being public limited companies. The investor herself has absolutely no part in generating profits on her investment – and therefore, as such, the profits or returns are solely derived from the efforts of others. Therefore, on the basis of this test, it is amply evident that OFCDs come well within the scope of securities as defined in Section 2(h) of the SCR Act."

In conjunction with the aforesaid, the issue in hand was further evaluated by the SEBI (FTM) on the following lines:

> "14.6.8 In Narendra Kumar Maheshwari vs. Union of India [1990 (Suppl.) SCC 440], the Hon'ble Supreme Court, observed that in the various guidelines applicable to such instruments, compulsorily convertible debentures are regarded as 'equity' and not as a loan or debt." One of the critical considerations adopted by the Hon'ble Supreme Court of India in concluding so, is that "A compulsorily convertible debenture does not postulate any repayment of the principal." The thinking of the Hon'ble Supreme Court revealed in this Judgment, not only clarifies the issue, but also provides me with a touchstone to determine whether the OFCDs issued by the two companies are more in the nature of shares or debentures. SIRECL has issued three bonds viz., Abode Bond, Real Estate Bond and Nirmaan Bond. SHICL has also issued three bonds, viz., Multiple Bond, Income Bond and Housing Bond. From a plain reading of the summary of their descriptions at paragraph 9.2 and 9.3 above, it is evident that all these six bonds postulate a repayment of the principal. The repayment of the principal will be at the option of the investor. The investor holds the option, which gives her a right to determine whether she would like to get her principal back in cash or as equity shares. Hence, Optionally Fully Convertible Debentures unlike their counterpart category of Compulsorily Convertible Debentures do not share the characteristic pointed out by the Hon'ble Supreme Court in arriving at the conclusion that Compulsorily Convertible Debentures are more of equity than of

debentures. Thus, all the six financial instruments issued by the two companies share the defining feature of debentures in that a payment of interest to the investor and a repayment of the principal, albeit at the option of the investor, is postulated."

Based on the aforesaid analysis SEBI (FTM) summarized its conclusions as under:

"14.10 The following summarises the discussions above:

1. As laid down in the judgment in the matter of Sudhir Shantilal Mehta vs. CBI (quoted supra), the definition of 'securities' in Section 2(h) of the SCR Act is an inclusive one and not exhaustive, with adequate latitude to accommodate OFCDs.
2. OFCDs issued by the two companies are marketable scurities.
3. These instruments satisfy all the characteristic features that identify a security based on clear tests used to identify what a security under section 2(h) of the SCR Act is.
4. Debenture is a genus and not a species of financial instruments. This genus includes OFCDs.
5. OFCDs contemplate the repayment of principal, and hence using the yardstick adopted by the Hon'ble Supreme Court of India in Narendra Kumar Maheshwari vs. Union of India (quoted supra), these instruments indeed are debentures.
6. The Companies Act recognizes OFCDs as a composite financial instrument where an option is attached to a debenture.
7. Design and valuation characteristics of OFCDs, show that it is the sum of the valuation of the two parts, viz., debenture and option, where the option is valued as a 'sweetener' to improve the pricing and risk characteristics of the debenture.
8. OFCDs are issued as debentures (Palmer's Company Law – XXIV Ed. Page 676).

14.11 From the foregoing discussions, it therefore becomes abundantly clear that OFCDs belong to the family of debentures covered by the definition of the term 'securities' in section 2(h) of the SCR Act. That an OFCD is a hybrid therefore does not detract from the fact that an OFCD is by definition, design and its characteristics, intrinsically and essentially a 'debenture'."

35. Thereupon SEBI (FTM) ventured to make a comparison of the definition of the term "securities" as under the Companies Act and with reference to its definition under the SC(R) Act. This comparison was made so as to determine the veracity of the submissions advanced on behalf of the appellant-companies

that the term "securities", as defined under SC(R) Act which had been adopted by the SEBI Act could not be given the same meaning and effect as the definition of the term "securities" under the Companies Act for the simple reason that the Companies Act expressly included "hybrids" within the definition of the term "securities" (in section 2(45AA) of the Companies Act in 2000) whereas no such or similar inclusion was made in the SC(R) Act. The aforesaid submissions had been advanced in order to press the plea of the appellant-companies, that OFCDs issued by SIRECL and SHICL were "hybrids", and as such were not within the purview of SEBI Act. The relevant observations recorded by SEBI (FTM) on the instant subject are being placed below:

> "15.1 To reiterate, Section 2(19A) of the Companies Act defines 'hybrid' to mean "any security which has the character of more than one type of security, including their derivatives". Black's Law Dictionary (VIII Ed.) defines hybrid security as: "A security with features of a debt instrument (such as a bond) and an equity interest (such as share or stock)." While the Companies Act contemplates that a hybrid can be any combination of securities – and makes it an omnibus definition, the more precise definition in Black's Law Dictionary is that it is a combination of a debt instrument and an equity interest….. Section 2(h)(i) of the SCR Act, which specifies that "securities" includes "shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or any incorporated company or other body corporate". In this list of instruments, the last three viz., bonds, debentures and debenture stock are debt instruments, and the first three viz., shares, scrips and stocks are equity instruments. Under the definition, any marketable security of 'a like nature' automatically falls under section 2(h)(i) of the SCR Act. A hybrid, as long as it is marketable, regardless of the strength or proportion in which the debt and equity components are assembled together, bears an unmistakable likeness to one more of these six instruments. So clearly, any marketable hybrid, in the way we understand hybrids in India today, is a marketable security of a 'like' nature….
>
> 15.2 This is not to say that all hybrids invariably have to combine debt and equity. Many issuers have sold debt instruments where the amount of principal payable at maturity is tied to the performance of a stock or bond index, or a commodity or foreign currency or even the rate of inflation. Whether in the future, financial engineering will create newer hybrids as combinations of other securities that become popular in India is

hard to predict – but today, it is unequivocally true that all marketable hybrids available in the market neatly fall into the categories "marketable securities of a like nature".

On the second issue while dealing with the factual and legal connotations involved, SEBI (FTM) recorded the following conclusions:

> "15.12 Five definite conclusions emerge from the above discussions.
>
> 1. OFCD as a hybrid is a 'debenture' under Section 2(h)(i) of the SCR and is also a marketable security.
>
> 2. The import of the expression "and includes" as used in Section 2(45AA) of the Companies Act has to be appreciated against the maxim of noscitur a sociis. The term 'securities' itself has a very extensive scope. There are no exceptional circumstances that suggest the need for any deviation from a normal and common interpretation of such expression. Therefore, the definition of the term 'securities' in section 2(h) of SCR Act encompasses 'hybrid' also and is therefore equivalent to the definition in section 2(45AA) in the Companies Act.
>
> 3. The powers conferred on SEBI under section 55A of the Companies Act, relate to 'securities' defined under that Act, and not under the SCR Act. So even if one were to assume that there are differences between the two definitions (even though there are none) SEBI can regulate all securities (whether hybrid or not) under Section 55A of the Companies Act.
>
> 4. Any assumption, even for argument's sake, that hybrids are not covered under the SCR Act, would lead to an untenable position, with a regulatory vacuum in so far as regulation of transactions in such hybrids are concerned, once they are issued.
>
> 5. Finally, were "hybrid", as defined in the Companies Act, to be treated as distinct from, and falling outside "securities" under the SCR Act, then this would give rise to an incurable defect in the very definition of the term "hybrid" itself."

36. In order to return a finding on the issue whether OFCDs offered by the two companies were by way of private placement or by way of an offer to the public", reliance was placed by the SEBI (FTM) on a series of factual circumstances, including assertions made in the information memorandum, the terms and conditions incorporated in the bonds issued by the two companies, the assertions made in the extraordinary general body meeting of the equity-holders (accepting

the legal position in the eventuality of the subscribers number exceeded 50), the declaration required to be made by the applicants, the letters written by the companies seeking assistance from professional accounting firms for collection and compilation of data, the non availability of the data with the companies, and such like factual pointers, to conclude as under:

> "17.16 These facts drive home one rather straightforward inference viz., the issue was marketed to and subscribed by the general public and it was not a private placement by any stretch of imagination. Therefore, the OFCD issues by the two companies cannot be held, even for a moment, to be of a "domestic concern" or "that it was not subscribed to by others to whom such offer was not made" (as referred to in Section 67(3) of the Companies Act). Further, it is the case of SIRECL that they have 6.6 million subscribers. Given the above circumstances, I do not hesitate in being a tad dismissive of the argument advanced by the learned counsel, when I say that 6.6 million subscribers is too colossal a pool of persons associated to the companies, to be labeled 'private', particularly in the absence of any definition of what such an association or relationship is. What seems to be very obvious is that the two companies are obtaining subscriptions into its OFCD schemes through mass subscription solicitation through service centres sprawled across the country. I have no hesitation in concluding that placements of OFCDs made by the two companies were indeed made to the public. In fact, unless there is a database of investors already available with an issuer, the offer letters under a 'private placement' simply cannot be mailed out. The very absence of a 'database', readily available with the two companies itself is the best indicator that these not by any means 'private placements'.

The SEBI (FTM), based on the analysis briefly noticed above, summarized its findings and conclusions on the issue in hand as under:

> "17.20 The above findings are summarized below:
>
> 1. The OFCDs in question here constitute an offer to the public as they have been made to over fifty persons.
> 2. The manner and the features of fund raising under the bond issues by the two companies discussed above, suggest these issues are by no means 'private'. What seems evident is that the two companies have been running a mass subscription solicitation from the public.
> 3. The two companies do not fall under the entities specified in the second proviso to section 67(3) which is the only exemption granted to the 'Rule of 50', that defines offer to the public, under the

Companies Act.

I would therefore conclude that the OFCDs issued by the two companies are public issues, without any ambiguity."

37. The SEBI (FTM), thereupon, examined the applicability of section 73 of the Companies Act to the controversy in hand. Taking into consideration the fact that the two companies had issued OFCDs which were debentures offered to the public through a prospectus, it was held, that compliance with the requirements expressed in Section 73 of the Companies Act was imperative. The aforesaid conclusion was sought to be drawn by recording the following observations:

> "18.7 To sum up, for a public issue, whose parameters are set by the first proviso to Section 67(3) of the Companies Act, the issuer is bound to proceed to Section 73, and comply with the requirements stipulated there. In fact, there does not seem to have been any doubts in the minds of the two companies that they were bound to comply with Sections 67 and 73 of the Companies Act, as seen from their statement to the Registrar itself. I also suspect that there has been a reprehensible attempt to conceal this applicability of the provisions of laws and the jurisdiction of SEBI on the issue itself, by making changes in the form and structure of the statutory declaration filed by the Directors of the two companies."
>
> xxx xxx xxx
>
> "19.7 Therefore, the intention to list, contemplated in the Companies Act does not originate from the benevolence and large-heartedness of the issuer or from a voluntary desire to subject itself to greater regulatory discipline. It arises because Parliament, in its wisdom, as explained in the aforesaid observations of the Hon'ble Apex Court, had decided that listing the shares or debentures of a public company that issues shares or debentures to the public, on a stock exchange should be an integral part of the measures for investor protection in our country. In other words, where the expression "intend to" is used in the Companies Act, in the matter of listing, the law does not offer a choice to the issuer, but mandates the same."

38. The SEBI (FTM), then examined the submission put forward by the two companies, that section 60B of the Companies Act was the only route available to the companies to raise capital by way of hybrid securities. In this behalf, the

assertion on behalf of the companies was, that sections 67 and 73 of the Companies Act could not be relied upon to determine the present controversy because the said provisions were applicable only to "shares and debentures" and not to "hybrid securities". Thus viewed, the contention on behalf of the companies was that SIRECL, as well as, SHICL were only obliged to file their final prospectus with the Registrar of Companies under section 60B(9) of the Companies Act. This issue was dealt with by the SEBI (FTM) by expressing the following logic and analysis:

> "20.6 …in the spirit of the Companies Act, an issuer that has made an offer of securities to the public, and therefore has applied for listing as legally required, undoubtedly has to sit in the category of 'listed public companies' and not 'others' in section 60B(9) of the Companies Act – and would indeed therefore be under the regulatory umbrella of SEBI, as provided in this sub-section itself. In other words, had the two companies abided by the requirements set by law, under section 67(3) and section 73, and applied for listing, they legitimately should have been dealt with, for the purposes of Section 60B(9), on par with any listed company. So, even the argument of the two companies, that they belong to the category of 'others' under section 60B(9) is ultra vires of the law, because it is premised on a violation of two important provisions of the Companies Act – viz., section 67(3) and 73.

The analysis of the SEBI (FTM) of the process contemplated under section 60B of the Companies Act, was dealt with in the following manner:

> "20.9 Thus there are three distinct 'gates' that have to be crossed in the process of raising capital through the 'information memorandum' route – firstly, the issue of the information memorandum itself [section 60B(1)], secondly the filing of the red-herring prospectus [Section 60B(2)] and lastly the filing of the final prospectus [Section 60B(9)]. Evidently, the 'final prospectus' is the last post to be reached. A careful reading of Section 60B(1), (2) and (3) clearly shows that at the stage, when the information memorandum and prospectus (red-herring) are filed, the Companies Act directs the process in the regulatory sense to Section 55 (on the dating of prospectus) and Section 56 where the matter to be stated and set out in the prospectus are defined.
> 20.10 Section 60B of the Companies Act, from a plain reading of the Act itself, and as also argued by learned counsel, applies to all

> securities, and therefore it would apply to 'shares' and 'debentures' as well. It offers a route to 'listed public companies' and 'public companies which intend to get their securities listed' as well. Any issuer company has to cross the first two gates in the process – circulation of an information memorandum and a RHP under section 60B(1) and 60B(2). Section 60B(3) places all these documents on par with a prospectus. Evidently therefore these provisions in the Companies Act imply that Section 55 and 56 of the same apply in toto. Parliament, in its wisdom, under section 55A, has decided that SEBI should administer sections 55 and 56, insofar as it relates to 'listed public companies' and 'public companies which intend to get their securities listed'. Therefore, it goes without saying, that as far as 'listed public companies' and 'public companies which intend to get their securities listed' are concerned, SEBI is the regulatory gatekeeper, posted at Sections 60B(1) and 60B(2) of the Companies Act. In fact this indeed is precisely what happens now, when 'listed public companies' and 'public companies which intend to get their securities listed' file their DRHP and RHP before SEBI."

Having evaluated the controversy in the aforesaid manner, the SEBI (FTM) recorded a decision on the issue canvassed, by relying upon section 60B(9) of the Companies Act, in the manner set out below:

> "20.19 To sum up the discussion in this section, the following conclusions emerge:
> *If the offer of OFCDs are 'private' in nature, as claimed by the two companies, then section 60B is not the correct route to traverse for issuing OFCDs, given that section 60B deals with issue of information memorandum to the public alone. The two companies cannot, in one breath, claim that their issues are private placements and at the same time proceed to use a route, exclusively designed for public issues.
> *At the stage of taking recourse to section 60B under the Companies Act, a public company that proposes to issue securities to the public should already have applied, as is required under law, for listing on a stock exchange, and as such can only be treated on par with a "listed public company" and not in the category of the other group "and in any other case with the Registrar only" under section 60B(9) of the Companies Act.
> *The argument that they are in the latter category is built on the presumption that the two companies need not have complied with section 67(3) and section 73. The two companies are required under law to conform to these applicable legal provisions. Therefore, the framework for issue of capital under the Companies Act, the SEBI Act and its Regulations would apply in toto to the OFCD issues of the two companies.
> *Section 60B should not be aligned solely with the expression "and in any other case with the Registrar only", but has to be read progressively, in its context, going from section 60B(1) all the way to Section 60B(9).

*Section 60B – whether for listed public companies or other companies – was introduced in the Companies Act, for a specific purpose under the Companies (Second Amendment) Act, 2002. It was never designed to create an island of regulatory standards that are distinct from and contrary to the spirit of various other provisions in the Companies Act itself, in so far as mobilization of capital from the public or their investor protection is concerned.

*There are no valid grounds to infer that the expression "and in any other case with the Registrar only" that appears section 60B(9) was intended in law to curtail the powers of SEBI conferred on it under section 55A of the Companies Act. Hence, I am of the considered opinion that the two companies have violated the legal provisions under Section 67(3) and 73 of the Companies Act, and have acted ultra vires of the law, in using section 60B(9) for their OFCDs to bypass the regulatory framework applicable to them, relying solely on the expression "and in any other case with the Registrar only" that occurs in this sub-section."

39. It was also contended on behalf of the two Companies before the SEBI (FTM), that the Companies had wrongly been proceeded against by the SEBI under the SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as the "DIP Guidelines") during the period the same were not in force. It was further contended, that presently the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "the ICDR Regulations") govern the subject under consideration, as the DIP Guidelines had been repealed by the ICDR Regulations. Insofar as the ICDR Regulations are concerned, it was pointed out, that the same being prospective in nature could not be taken into consideration to determine the validity of the Companies activities, which had taken place well before the ICDR Regulations came into force (with effect from 26.8.2009). The instant contention of the companies was rejected by the SEBI (FTM) by ruling, that the two companies had continued to mobilize funds from the public under the information memorandum and the RHP, till they were restrained from doing so by the SEBI (vide its order

dated 24.11.2010). Having considered the aforesaid contention raised on behalf of the appellant-companies the SEBI (FTM) also expressed the view, that the ICDR Regulations would be applicable because the violations committed by the two companies was of a continuing nature, more so, because the violations had continued even after the enforcement of the ICDR Regulations (with effect from 26.8.2009). Accordingly, the SEBI (FTM) expressed the view, that action could be taken against SIRECL, as well as, SHICL if their activities after 26.8.2009 were found to be in violation of the ICDR Regulations.

40. Having dealt with the issues raised by the appellant-companies as have been noticed hereinabove, as well as, certain other trivial matters not requiring an express mention in the instant order, the SEBI (FTM) ventured to examine the action of the two Companies on the touchstone of investor protection in securities, and the responsibilities assigned to SEBI to regulate the securities marked. Some of the aspects highlighted by the SEBI (FTM) which demonstrate absolute lack of investor's safeguards at the hands of the two companies are being extracted hereunder :

> "24.1 The two Companies, as stated in the interim order as well as in the additional Show Cause Notice, are without doubt, clearly in gross violation of the provisions of the laws applicable to public companies making offers of securities to the public. I have referred earlier to how the two Companies, seem to be unable to furnish even basic data on the identity of its own investors. The letters sent by SIRECL to various accounting firms in January 2011, seeking professional services seem to suggest a woeful lack of compiled and authenticated data on their investors and the funds. If the identity of the investors and addresses themselves are not readily available with the firm – and the compilation and authentication of the data across the thousands of service centres will have to, as admitted by SIRECL, require the support of professional accounting firms at this stage, then I wonder what real safeguards can possibly be there in place for investor protection.

24.2 I observe here that only one company viz. SIRECL has furnished information about its investors. SHICL has not, despite reminders from SEBI, cared to furnish the requisite information. Despite instructions from the Hon'ble Supreme Court of India and the Hon'ble High Court of Lucknow directing SIRECL to be forthcoming on the data on its investors, there still is little clarity in the statements furnished by it. This is seen particularly in the absence of details on the actual quantum of funds that has been mobilized. All that has been declared clearly in the RHP is that both the companies together need `40000 cr. for their projects. Additionally, I also observe that the data furnished by SIRECL in the Compact Disk, are in the form of scanned images, which are not amenable to easy analysis on a Computer. SIRECL has not supplied the data in standard spreadsheet form or as regular documents for word processing. Thus, based on what has been furnished by the Companies, SEBI has little means to find out cumulative totals of funds mobilized or do further useful analysis on the data itself, as part of its investigation, should any such future requirements arise. The Hon'ble High Court of Allahabad, as quoted supra above, had expressed its displeasure at the rather blatant unwillingness of SIRECL to comply with its directions and cooperate with the investigations. There seems to be an unstated resolve on the part of the two Companies not to part with data in any meaningful manner. The thrust seems to be on concealment and obfuscation rather than openness and transparency.

24.3 The Learned Counsel, at one point in the submissions before me, mentioned the fact that there are no investor complaints at all, from any investor in the OFCDs raised by the two Companies. Going by the history of scams in financial markets across the globe, the number of investor complaints has never been a good measure or indicator of the risk to which the investors are exposed. Most major `Ponzi' schemes in the financial markets, which have finally blown up in the face of millions of unsuspecting investors, have historically never been accompanied by a gradual build up of investor complaints. But when financial catastrophes have indeed finally erupted, they do so with little warning and lead to major collapses in the financial markets with disastrous consequences to investors.

24.4 I have examined the copies of the RHPs filed by the two Companies. Against all the major investor protection measures contemplated (for e.g. appointment of debenture trustee, credit rating, underwriting, utilization of funds collected), I see the entry "Not applicable". Some of them, as stated therein, are declared inapplicable because the issue will not be listed. Others are declared inapplicable, because the issue is not of debentures. If such vital regulatory requirements themselves have all been declared superfluous or unnecessary, and have not been complied with on one pretext or the other, what then exactly are the protective measures that the two Companies can

possibly have in place for its investors? The records furnished to SEBI shed little light on this. Neither have the two Companies come forward to allay the legitimate concern of SEBI as a regulator in this regard, duly reflected in the show cause notices issued to the two Companies and their promoters and directors.

24.5 SIRECL did not have any distributable profit for the financial year ending 31st March, 2008. SIRECL had a negative net worth at the time of the offer and the net worth of SHICL was around `11 lakh. The subscribed capital of the two Companies is very small in comparison to the liabilities on their balance sheets. OFCDs raised are of the order of at least a few thousand crore of rupees, with the requirements for funds indicated at `40000 cr. To compound these concerns, all the OFCDs are unsecured – there is no charge on either the assets of the companies or on the revenue streams from the various projects undertaken by the two Companies. Given the large scale of fund raising that has been resorted to by the two Companies, and the fact that particulars about these funds and their utilization are not available with SEBI, at this stage one can, for the sake of the investors, merely fervently hope that the two Companies have taken some other reasonable measures, albeit not very evident to me, for protecting its investors."

41. The SEBI (FTM) then went on to record the investor protection measures violated by the two Companies. The measures found to have been violated in the aforesaid order are being extracted hereunder :

"24.7 In this case, the salient investor protection measures that two Companies have not conformed with are listed below. A cursory reading of the RHP filed by the two Companies, contrasted against the elaborate investor protection measures outlined below, vividly exposes the huge information gaps in them. As the issues have been kept open for several years now, even the scanty and sketchy information in these documents might have lost all its currency and utility to investors.

1. Filing of draft offer document with SEBI:
Every issuer making public issue of securities has to file a draft offer document with SEBI through SEBI registered Merchant Banker. The draft offer document will be put-up for public comments for at least 21 days. SEBI examines the draft offer document with an objective for ensuring compliance with the investor protection measures prescribed by SEBI and for enhancing disclosures based on understanding of the matter contained in the prospectus or based on comments/complaints, if any, received from public, on the document. The Merchant Banker then incorporates necessary changes in the offer document.

2. Eligibility requirements for making a public issue:

An unlisted issuer to become eligible for making a public issue should have : net tangible assets of at least `3 crore in each of the preceding three full years, distributable profits in at least three of the immediately preceding five years, net worth of at least `1 crore in each of the preceding three full years, issue size should not exceed 5 times the pre-issue net worth as per the audited balance sheet of the last financial year etc. If the issuer is unable to comply with any of these conditions, it can make a public issue, provided if at least 50% of the issue is allotted to the Qualified Institutional Buyers or if project is appraised and participated to the extent of 15% by Financial Institutions/Scheduled Commercial Banks of which at least 10% comes from the appraiser(s). This helps a retail investor subscribing in this issue, to derive the benefit of the more informed investment decisions that would be typically be made by institutional investors.

3. Minimum Promoters' Contribution and lock-in:

In a public issue by an unlisted issuer, the promoters should contribute not less than 20% of the post issue capital, which should be locked in for a period of 3 years. "Lock-in" indicates a freeze on the shares. In case of an initial public offer of convertible debt instruments without a prior public issue of equity shares, the promoters should bring in a contribution of at least 20% of the project cost in the form of equity shares, subject to contributing at least 20% of the issue size from their own funds in the form of equity shares. Promoters' contribution shall be computed on the basis of the post-issue expanded capital assuming full proposed conversion of convertible securities into equity shares. The remaining pre-issue capital should also be locked in for a period of one year from the date of listing.

4. Credit Rating:

Companies making public issue of convertible debt instruments or non-convertible debt instruments, should obtain a credit rating from at least one credit rating agency (CRA) registered with the SEBI and disclose the rating in the offer document. A credit rating is a professional opinion regarding the issuer's ability to make timely payment of interest and principal on a debt instrument, given after studying all available information at a particular point of time. It is reviewed periodically during the tenure of the debt instrument. CRAs are specialized independent bodies registered and regulated by SEBI. SEBI specifies the eligibility criteria for their registration, monitoring and review of ratings, requirements for a proper rating process, avoidance of conflict of interest, code of conduct and inspection of rating agencies by SEBI.

5. IPO Grading:

Under the SEBI Guidelines/Regulations, no issuer shall make an initial public offer, unless as on the date of registering prospectus (or RHP) with the Registrar of Companies, the issuer has obtained grading for the initial

public offer from at least one CRA registered with SEBI. IPO grading was made mandatory by SEBI as an endeavour to make additional information available to the investors to facilitate their assessment of the security on offer. It is intended to provide the investor with an informed and objective opinion expressed by a professional rating agency, after analyzing factors like business and financial prospects, management quality and corporate governance practices etc.

6. Creation of debenture trust and appointment of Debenture Trustee:
Under Section 117B of the Companies Act, 1956 and SEBI Guidelines/Regulations, no company can issue a prospectus to the public for subscription of its debentures, unless the company has, before such issue, has appointed one or more debenture trustees and the company has, on the face of the prospectus, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. Debenture trustee are registered and regulated by SEBI. Only scheduled banks/public financial institutions/insurance companies etc. can act as debenture trustees. A Debenture trustee is obligated under the provisions of the Companies Act, 1956 and Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993 inter alia to exercise due diligence to ensure compliance by the company issuing debentures with the provisions of the Companies Act, the listing agreement of the stock exchange or the trust deed and to take appropriate measures for protecting the interest of the debenture holders as soon as any breach of the trust deed or law comes to his notice. A debenture trustee should ensure that SEBI is promptly informed about any material breach or non-compliance by the company of any law, rules, regulations and directions of the SEBI or of any other regulatory body. Further, every debenture trustee should ensure that the trust deed executed between a body corporate and debenture trustee, amongst other things, contains the information required under the Regulations.

7. Creation of debenture redemption reserve:
Under Section 117C of the Companies Act, 1956 and SEBI Guidelines/Regulations, where a company issues debentures, it should create a debenture redemption reserve for the redemption of such debentures, into which adequate amounts should be credited, from out of its profits every year, until such debentures are redeemed.

8. Appointment of Monitoring Agency:
The SEBI Guidelines/Regulations stipulates, that if the issue size exceeds 500 cr., the issuer should appoint one public financial institution or scheduled commercial banks, named in the offer document as bankers of the issuer, as a monitoring agency, to monitor the use of proceeds of the issue. The monitoring agency should submit its report to the issuer in the specified format on a half yearly basis, till the proceeds of the issue have been fully utilized. Such monitoring report should be placed before the

Audit Committee. This mechanism is in built-in to avoid siphoning of the funds by the Promoters by diverting the proceeds of the issue later-on to some other objects, other than what is disclosed in the offer document.

9. Appointment of SEBI registered Merchant banker and Registrar to the issue for the issue:
In case of public issue, issuing company should appoint one or more merchant bankers to carry out the obligations relating to the issue. Merchant bankers should independently exercise due diligence and satisfy himself about all the aspects of the issue including the veracity and adequacy of disclosure in the offer documents and to ensure the interest of the investors are protected. The merchant banker should call upon the issuer, its promoters or directors to fulfill their obligations as required in terms of these Regulations and continue to be responsible for post issue activities till the subscribers have received the securities certificates, credit to their demat account or refund of application moneys and listing/trading permission is obtained. Merchant banker should submit a due diligence certificate to SEBI at the various stages of the issue inter alia stating that they have exercised due diligence including examination of various documents of the company and have satisfied themselves about the compliance with all the legal requirements relating to the issue, that disclosures which are fair and adequate to enable the investor to make a well informed decision and all applicable disclosures mandated by SEBI have been duly made. Further, in case of Public offers, an issuer is required to appoint a Registrar to the issue, which has connectivity with all the depositories. Both Merchant bankers and Registrars to the issue are intermediaries under Section 12 of SEBI Act, registered and regulated by SEBI. They are required to comply with the code of conduct and other obligations as prescribed by SEBI.

10. Violation of disclosure requirements:
The present legal and regulatory framework is primarily based on disclosures. The offer document is required to contain all disclosures and undertakings specified in the Schedule II of the Companies Act read with the erstwhile DIP Guidelines and the ICDR Regulations and also additional disclosures as deemed fit, by Merchant Banker to enable investors to make an informed investment decision. Such disclosures include internal and external risks envisaged by the company including risk factors which are specific to the project and internal to the issuer company and those which are external and beyond the control of the issuer company, offering details, details of capital structure, promoters build-up, details of shares to be locked-in, details of business of the company, basis of issue price, accounting ratios, comparison with peer group, history and corporate structure, management and board of directors, direct or indirect interest of promoters, directors, key managerial personnel in the company or in the issue, financial information, details of the promoters, their photographs, Permanent Account Number (PAN),

details regarding their driving license, passport etc. their background, Management Discussion and Analysis of Financial Statements, details of group companies, pending approvals, outstanding litigations etc. Further, the offer document should also contain elaborate disclosures pertaining to the object of the issue, details of the projects in which the investment is to be made, funding plan for the project, schedule of implementation etc.
Further, as per Section 56(3) of the Companies Act, no one should issue any form of application for shares in or debentures of a company, unless the form is accompanied by an abridged prospectus, containing details specified in Form 2A. Additional disclosure requirements for abridged prospectus are specified in SEBI Guidelines/Regulations.

11. Opening and Closing of the issue:
Regulation 46(1) of the ICDR Regulations (Clause 8.8.1 of the erstwhile DIP Guidelines) mentions that a public issue should be kept open for at least three working days but not more than ten working days. In the case of the two Companies and another of its Group Companies, the issue has been kept open for years on end.

12. Firm arrangements for finance:
An issuer cannot make a public issue, unless firm arrangements of finance through verifiable means towards 75% of the stated means of finance (excluding the amount to be raised through the proposed public issue or rights issue or through existing identifiable internal accruals) have been made.

13. In-principle approval for listing from recognized stock exchanges:
Issuers are required to obtain in-principle listing permission from the stock exchange, before making a public issue, as per SEBI Guidelines/Regulations. The requirement of listing in respect of a public issue is to ensure that the subscribers to the shares or debentures have a facility to approach a stock exchange for having their holdings converted into cash, whenever they desire and to provide liquidity and exit opportunity to the investors, especially in case, when the offer is made to large number of investors (50 or more). Further once listed, the Companies need to comply with the stringent provisions of the Debt Listing Agreement, including provisions relating to disclosure of periodical information to Debenture trustee, maintenance of maintain 100% asset cover sufficient to discharge the principal amount of the debt, periodical disclosure of financials, disclosure of statement of deviations in use of issue proceeds, timely disclosure of price sensitive information.

14. Scrutiny by Regulated intermediaries at all stages:
ICDR regulations in addition to various other regulations framed by SEBI ensures that in the process of public issue starting from drafting prospectus till allotment/refund and listing, all specified tasks are performed only by registered intermediaries. These intermediaries are

bound by rules and regulations framed for them by SEBI as well as the code of conduct prescribed for each.

15. Post issue transparency, marketability, corporate governance and listing requirements. Equally important is the elaborate protection measures that are available to the investor after the issue is closed and listed on a Stock Exchange. Transactions in the securities carried out on stock exchange are transparent with a well settled price discovery process. Information including quarterly results, shareholder details, and annual report are periodically made available to shareholders. All price sensitive information is disseminated through Stock Exchanges. Transactions carried out on stock exchanges are guaranteed by Stock Exchanges and these are under the vigilant surveillance of concerned stock exchange and SEBI. Stock Exchanges have Investors Protection funds which protects investor against default by brokers and there are well laid out mechanisms for the redressing investors grievance.

16. Other miscellaneous requirements:

-Issuer should, after registering the red herring prospectus, with the Registrar of Companies, make a pre-issue advertisement in one English national daily newspaper with wide circulation, Hindi national daily newspaper with wide circulation and one regional language newspaper with wide circulation at the place where the registered office of the issuer is situated. (Regulation 47 of the ICDR Regulations/Clause 5.6A of the DIP Guidelines)

-The issuer should appoint a compliance officer who shall be responsible for monitoring the compliance of the securities laws and for redressal of investors' grievances. (Regulation 63 of the ICDR Regulations/Clause 5.12 of the DIP Guidelines)

-The issuer and lead merchant bankers should ensure that the contents of offer documents hosted on the websites as required in these regulations are the same as that of their printed versions as filed with the Registrar of Companies, Board and the stock exchanges. (Regulation 61(1) of the ICDR Regulations/Clause 5.6 of the DIP Guidelines)

-Issuer should enter into an agreement with a depository for dematerialization of specified securities already issued or proposed to be issued. (Regulation 4(2)(e) of the ICDR Regulations/Clause 2.1.5 of the DIP Guidelines)"

42. Besides all that has been noticed above, the SEBI (FTM) felt, that investors who had been issued a variety of bonds by the two companies were

absolutely insecure. For the aforesaid inference the SEBI (FTM) mentioned the following reasons :

> "24.8 I also note that in the RHPs filed by the two Companies, it is stated that "The money not required immediately by the company may be parked/invested inter alia by way of circulating capital with partnership firms of Joint Ventures or in the fixed deposits of various Banks." This means that such funds mobilized beyond the pale of law, could be potentially diverted into various activities of the group companies, without any significant accountability or reporting requirements. Such diversion, in the case of debentures would not have been permissible under the ICDR Regulations. In the entry in the RHP for "Means of Financing", where the total project cost is indicated at `20000 cr. for each of the two Companies, it is stated that "The projects are being financed partly by this issue as well as with the Capital, Reserves and other sources of the Company." From an examination of the financial statements of the two Companies, it seems that the Capital and Reserves of the two Companies are miniscule in proportion to the funds required for the projects."

43. In addition to the sorry state of affairs painted by the SEBI (FTM) certain other unpalatable facts which had emerged during investigation were also highlighted by the SEBI (FTM). These are also being extracted hereunder :

> "…..During investigations into the same, SEBI had prima facie found that
>
> a. SIRECL had issued OFCDs to more than 6.6 million investors and that SHICL had not provided any information about the number of investors of the OFCDs issued by it.
>
> b. The RHPs of SIRECL and SHICL contained untrue statement and mis-statements.
>
> c. SIRECL and SHICL have not executed debenture trust deed; not appointed debenture trustee and have not created any debenture redemption reserve.
>
> d. The forms issued by the two companies did not enclose an abridged prospectus.
>
> e. The two companies continued to solicit subscriptions to their OFCDs in violation of the Court's order in vacating the stay imposed on the SEBI Order.
>
> f. The balance sheets and profit and loss accounts (for the relevant

period) of the companies were not filed with the concerned RoC.

g. The sums subscribed in the OFCDs varied from `200/-, 300/-, 400/- etc. whereas the minimum application size for the bonds issued by SIRECL were 5000/- (for Abode and Nirmaan Bonds) and `12,000/- for the Real Estate Bond.

h. From the list of accredited agents through whom subscriptions for OFCDs was sought and the proforma of application forms from which subscription for OFCDs were sought, it was observed that subscription was sought from the general public across the country, without adequately informing them of the risk factors involved in such a complex financial product."

44. Based on the aforesaid extensive factual and legal examination of the matter, the SEBI (FTM) summarized its salient conclusions as under :

"1. OFCDs are hybrid instruments, and are `debentures'.

2. The definition of `securities' under Section 2(h) of the SCR Act is an inclusive one, and can accommodate a wide class of financial instruments. The OFCDs issued by the two Companies fall well within this definition.

3. The issue of OFCDs by the two Companies is public in nature, as they have been offered and issued to more than fifty persons, being covered under the first proviso to Section 67(3) of the Companies Act. The manner and the features of fund raising under the OFCDs issued by the two Companies further show that they cannot be regarded to be of a domestic concern or that only invitees have accepted the offer.

4. Section 60B deals with the issue of information memorandum to the public alone. Therefore the same cannot be used for raising capital through private placements as the said provision is exclusively designed for public book built issues. When a company files an information memorandum under Section 60B, it should apply for listing and therefore has to be treated as a listed public company for the purposes of Section 60B(9) of the Companies Act. Further, Section 60B has to be read together with all other applicable provisions of the Companies Act and cannot be adopted as a separate code by itself for raising funds, without due regard to the scheme and purpose of the Act itself. The same evidently has never been the intention of the Parliament.

5. The two companies, in raising money from the public, in violation of the legal framework applicable to them, have not complied with the elaborate investor protection measures, explained in paragraph 25 above. This, inter alia, also means that the rigorous scrutiny carried out by SEBI

Registered intermediaries on any public issue by a public company have been subverted in the mobilization of huge sums of money from the public, by the two Companies.

6. The two Companies have not executed debenture trust deeds for securing the issue of debenture; failed to appoint a debenture trustee; and failed to create a debenture redemption reserve for the redemption of such debentures.

7. The two Companies have failed to appoint a monitoring agency (a public financial institution or a scheduled commercial bank) when their issue size exceeded `500 cr., for the purposes of monitoring the use of proceeds of the issue. This mechanism is put in place to avoid siphoning of the funds by the promoters by diverting the proceeds of the issue.

8. The two companies failed to enclose an abridged prospectus, containing details as specified, along with their forms.

9. The companies have kept their issues open for more than three years/two years, as the case may be, in contravention of the prescribed time limit of ten working days under the regulations.

10. The two companies have failed to apply for and obtain listing permission from recognized stock exchanges."

45. Based on the aforesaid salient conclusions the SEBI (FTM) arrived at the determination, that both SIRECL and SHICL had violated various provisions of the Companies Act, the requirements of the DIP Guidelines, as well as, the provisions of the ICDR Regulations. Having so concluded the SEBI (FTM) vide an order dated 23.6.2011issued the following directions :

"1. The two Companies, Sahara Commodity Services Corporation Limited (earlier known as Sahara India Real Estate Corporation Limited) and Sahara Housing Investment Corporation Limited and its promoter, Mr. Subrata Roy Sahara, and the directors of the said companies, namely, Ms. Vandana Bhargava, Mr. Ravi Shankar Dubey and Mr. Ashok Roy Choudhary, jointly and severally, shall forthwith refund the money collected by the aforesaid companies through the Red Herring Prospectus dated March 13, 2008 and October 6, 2009, issued respectively, to the subscribers of such Optionally Fully Convertible Debentures with interest of 15% per annum from the date of receipt of money till the date of such repayment.

2. Such repayment shall be effected only in cash through Demand Draft or Pay Order.

3. Sahara Commodity Services Corporation Limited (earlier known as Sahara India Real Estate Corporation Limited) and Sahara Housing Investment Corporation Limited shall issue public notice, in all editions of two National Dailies (one English and one Hindi) with wide circulation, detailing the modalities for refund, including details on contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.

4. Sahara Commodity Services Corporation Limited (earlier known as Sahara India Real Estate Corporation Limited) and Sahara Housing Investment Corporation Limited are restrained from accessing the securities market for raising funds, till the time the aforesaid payments are made to the satisfaction of the Securities and Exchange Board of India.

5. Further, Mr. Subrata Roy Sahara, Ms. Vandana Bhargava, Mr. Ravi Shankar Dubey and Mr. Ashok Roy Choudhary are restrained from associating themselves, with any listed public company and any public company which intends to raise money from the public, till such time the aforesaid payments are made to the satisfaction of the Securities and Exchange Board of India."

46. Consequent upon the passing of the aforesaid order by the SEBI (FTM) dated 23.6.2011, Special Leave Petition (Civil) no.11023 of 2011 filed by the appellant-companies, was disposed of on 15.7.2011 by permitting the appellant-companies to assail the SEBI order dated 23.6.2011 by preferring an appeal under section 15T of the SEBI Act. While disposing of the aforesaid special leave petition, this Court recorded the statement of the learned counsel for the appellant-companies (herein), that they would not invite any further deposits pending the hearing and final disposal of the proposed appeals. In view of the aforesaid statement, this Court restrained SEBI from giving effect to the order dated 23.6.2011 till the disposal of the appeal. Pursuant to the order passed by this Court on 15.7.2011 the appellant-companiess herein withdrew Writ Petition no.11702 (M/B) of 2010 from the High Court and preferred Appeal no.131 of 2011

(by SIRECL) and Appeal no.132 of 2011 (by SHICL) before the Securities Appellate Tribunal (for short "SAT").

47. After having narrated the facts relevant to the controversy, the SAT while adjudicating upon the appeals preferred by the two companies first dealt with the issue whether the appellant-companies had made full and complete disclosure of facts in the RHP. Learned counsel representing the appellant-companies before the SAT, placed reliance on the resolutions passed by the company and the projections made in the RHPs, so as to contend that a full and faithful disclosure had been made by both companies in their respective RHPs. It was contended on behalf of the appellant-companies, that the Registrars of Companies had registered their RHPs, only after being satisfied with the correct disclosure of facts. The RHPs under reference were then registered by the respective Registrars of Companies. The aforestated submissions advanced by the learned counsel for the appellant-companies did not find favour with the SAT. The SAT was of the view that the appellant-companies had not disclosed in the information memorandum, that the same was being issued to 3 crore persons (expressed as 30 million persons, by the SAT), through 10 lakh agents, stationed in more than 2900 branch offices; inviting them to subscribe to the OFCDs. The aforesaid figures, according to the SAT, amounted to approaching the public through an advertisement. The SAT was of the view, that if SIRECL had indicated, that the invitation to subscribe OFCDs was being extended to 50 or more persons, the provisions of law relating to a public issue would have been found to be applicable. Non-disclosure of the aforesaid information, according to the SAT, could not be considered as innocent. The SAT felt, that the assertion at the

hands of the appellant-companies, that the invitation to subscribe to OFCDs was by way of private placement, and further that, the appellant-companies did not intend to extend the invitation to subscribe through stock exchange(s), fell foul of the provisions which would have come into play, had the two companies disclosed that their invitation to subscribe was being extended to 50 or more persons. The SAT also noticed, that both the companies had stated in their respective RHPs, that there would be no restriction on transfer of the OFCDs, but in the terms and conditions mentioned in the application forms, it was mentioned, that transfer of OFCDs would be subject to the approval by the respective company. This, according to the SAT was also not legitimate. The SAT expressed the view, that the respective Registrars of Companies came to be mislead by the aforesaid information furnished in the RHPs. The SAT also expressed the view, that the Registrars of Companies had registered the RHPs simply because the appellant-companies had not made full and complete disclosure of facts in their RHPs. Accordingly the SAT observed, that the intention of the companies and its promoters from the very beginning, was not bonafide; that the companies concealed vital facts from its shareholders, from its investors and from the respective Registrars of Companies. As such, the SAT felt, that it would be improper to infer legitimacy in the actions of the two companies, merely from the fact that their RHPs had been registered by the Registrars of Companies.

48. While dealing with the registration of RHPs by the Registrars of Companies, the SAT also expressed the view, that the conduct of the respective Registrars of Companies was also inappropriate, inasmuch as, the Registrars of

Companies on examination of the facts disclosed by the appellant-companies, ought to have made further enquiries. Such additional enquiries would have disclosed, that the companies were actually making a public issue. Whenever a company desires to make a public issue, a copy of the RHP is to be submitted to the SEBI. Appropriate handling of the matter at the hands of the Registrar of Companies would have resulted in requiring both companies to furnish copies of their RHPs to the SEBI. If that had been done, SEBI would have scrutinized the matter, and would have ensured that the companies adopted appropriate measures for investors' protection, as well as, for disciplined regulation of their securities. SAT, therefore, found the Registrar of Companies guilty of having registered the RHP with undue haste, and for having acted in dereliction of duty.

49. The first legal issue examined by the SAT was, whether the OFCDs under reference were securities, and whether, SEBI had the jurisdiction to regulate them. Having analyzed the issue, SAT placed reliance on sections 2(1) and 2(2) of the SEBI Act. It expressed the view, that a reference could not be made, for interpreting the provisions of the SEBI Act, to terms defined by the Companies Act. Accordingly, the SAT rejected the contention of the learned counsel representing the appellant-companies to assign a meaning to the term "securities" with reference to the definition thereof, under the Companies Act. According to the SAT, OFCDs were not new instruments, as they were widely known to the securities market. In the securities market, securities were understood as a form of debentures. The SAT was of the view, that OFCDs in the present controversy, were "hybrids", covered by the definition of the term "securities" under the SEBI Act read with the SC(R) Act. The SAT also turned

down the argument, that OFCDs issued by the two companies would not fall within the definition of the term "securities" under the SEBI Act, as they were not marketable. The assertion, that the OFCDs in this case were not marketable, was turned down by referring to clause 13 of the RHP issued by the SIRECL, wherein it was expressed, that there was no restriction on their transfer. It would be pertinent to notice, that SAT highlighted in its order, that the issue of marketability of the OFCDs had been raised during the course of oral submissions, but had not been pressed in the written submissions, as no mention thereof was made in the written submissions filed by the appellant-companies.

50. The SAT also expressed the view, that SEBI had all the powers to take whatever steps it considered appropriate, to safeguard the interests of investors in securities, and also,to regulate the securities market. The aforesaid power was found by the SAT as traceable to sections 11, 11A and 11B of the SEBI Act. The SAT also concluded, that the SEBI Act did not make any distinction between listed and unlisted companies, and, therefore, measures for regulating securities in section 11, 11A and 11B of the SEBI Act, were applicable to listed, as well as, unlisted companies. Based on the aforesaid, the SAT held that the two companies would fall within the regulatory jurisdiction of SEBI *de hors* the provisions of any other law. The SAT, therefore, rejected the submission of the learned counsel for the appellant-companies, that since the two companies were unlisted, their securities could not be regulated by the SEBI. The SAT also expressed the view, that on the subject of protecting investors' interest in securities, as well as, on the subject of regulating the securities market, the SEBI Act was a "stand alone" enactment. The SAT also concluded, that SEBI's powers

under the SEBI Act were not fettered by any other law including the Companies Act. According to the SAT, the SEBI Act, the SC(R) Act and the Depositories Act, 1996, were cognate statutes, as they dealt with different aspects of securities and the securities market, and they alone governed the capital market.

51. The SAT thereafter examined the question whether the invitation of OFCDs by the two companies was by way of private placement (as claimed by the appellant-companies) or by way of an issue to the public (as counter-claimed by the SEBI). Having interpreted section 66 of the Companies Act and having placed reliance on the first proviso under section 67(3) of the Companies Act, the SAT held, that the two companies had admittedly offered its OFCDs to more than 50 persons. In the aforesaid view of the matter, according to the SAT, there could not be any other conclusion, but that, the OFCDs floated by the two companies were by way of an invitation to the public. Besides the reasoning summarized above, the SAT also examined the same issue on the basis of the definition of the term "information memorandum" as has been expressed in section 2(19B) of the Companies Act, with reference to the procedure contemplated in section 60(B) of the Companies Act, and concluded, that the invitation of OFCDs by the two companies was not by way of private placement, but was by way of an issue to the public.

52. Having concluded that the two companies had made a public issue, the SAT summarized the obligations of a public company before bringing out a public issue. It was pointed out, that a public company was required to file a draft offer document with the SEBI through a registered merchant banker, which neither of the companies had done. Such a public company was also obliged to appoint a

Registrar to the issue, who has a separate role assigned to him. Both companies had not complied with this obligation as well. A public company bringing out a public issue is also required to issue a draft offer document for public comment, which is also required to be examined by the SEBI to make sure, that all the investors' protection measures have been complied with. Whereupon, all directions issued by the SEBI have to be incorporated in the offer document. An unlisted public company (like the two appellant-companies SIRECL and SHICL) would acquire eligibility to make a public issue, only they had net tangible assets worth more than Rs.3 crores in each of the preceding three full years. Another pre-requisite is, that such a company must have distributable profits in at least three of the immediately preceding five years. Such a public company, must also have a net worth of at least Rs.1 crore in each of the preceding three years. Neither SIRECL nor SHICL, according to the SAT, had either the prescribed tangible assets or the stipulated distributable assets or even the prescribed net worth. It was pointed out (by the SAT), that for bringing out a public issue, an unlisted company's promoters should contribute not less than 20% of the post-issue capital, which is required to be locked-in for a period of three years. Public companies making a public issue, were also required to obtain their credit rating from at least one credit rating agency registered with the SEBI. Such credit rating agency, is required to rate the public issue proposed to be brought by the concerned company. In case the public issue is debentures, the concerned company is precluded from issuing a prospectus till it appoints a debenture trustee, and it creates a debenture redemption reserve. Additionally, a public company, according to the SAT, is required to obtain pre-approval, for listing of its

securities, from one or more recognized stock exchange(s). According to the SAT, none of the aforestated requirements were complied with, by either of the companies. The SAT therefore felt, that it was appropriate and justified for the SEBI to have taken action against both the companies.

53. The SAT then examined the question whether the OFCDs issued by SIRECL and SHICL required mandatory listing. For its answer, the SAT placed reliance on sub-sections (1) and (2) of section 73 of the Companies Act, and thereupon concluded, that a public company which proposes to offer shares or debentures to the public, has to mandatorily issue a prospectus. Even before issuing the prospectus, the concerned company must make an application to one or more recognized stock exchange(s), for their permission to deal with the shares or debentures proposed to be issued. The SAT therefore concluded, that both SIRECL and SHICL were required to be listed on one or more recognized stock exchange(s), and that, both companies willfully defaulted, by not complying with the aforesaid mandatory provisions of section 73 of the Companies Act.

54. The SAT then examined the issue of jurisdiction, raised by the appellant-companies, on the basis of section 55A of the Companies Act. The submission of the appellant-companies before the SAT was, that neither SIRECL nor SHICL had any intention to list their respective OFCDs on any stock exchange. In fact, it was contended, that both companies had clearly expressed their intention, that they would not list their OFCDs on any stock exchange(s). In the aforesaid view of the matter, since the SIRECL and SHICL would not be governed by clauses (a) and (b) of section 55A of the Companies Act, it was submitted on behalf of the appellant-companies, that they would fall in the ambit of the residuary clause (c)

of section 55A of the Companies Act. Thus viewed, the claim of the appellant-companies was, that SEBI had no power to administer the two companies. The appellant-companies asserted, that SIRECL and SHICL could only be administered by the Central Government (or the Tribunal, or the Registrar of Companies).

55. The SAT rejected the aforesaid submission, by concluding, that the entrustment of powers to SEBI under clauses (a) and (b) of section 55A of the Companies Act was in addition to the power already vested in the SEBI under sections 11, 11A and 11B of the SEBI Act. The aforesaid power, according to the SAT, extended to unlisted companies as well, in respect to matters relating to issue of capital, transfer of securities and other matters incidental thereto. The SAT also noticed, that SEBI had been regulating companies in matters of issue of capital and ensuring capital protection, right from its inception in 1988. According to the SAT, the insertion of section 55A in the Companies Act did not in any way affect the powers of SEBI under the SEBI Act. All the same, the SAT concluded, that both SIRECL and SHICL actually intended to get their OFCDs listed, although they professed to the contrary. The SAT held, that the companies having gone to the public by circulating an information memorandum could not be heard to say, that they did not intend to get their securities listed. The SAT, therefore, was of the view, that both companies had the intention in law, to get their securities listed, and therefore, would fall within clause (b) of section 55A of the Companies Act, so as to be administered by the SEBI. The instant issue was examined by the SAT from various other angles as well, whereupon the contention advanced at the hands of the appellant-companies that SEBI did not

have jurisdiction on the subject matter under consideration, was rejected.

56. The SAT then considered the submission of the appellant-companies based on the DIP Guidelines and ICDR Regulations. The submission on behalf of the appellant-companies, was that the contraventions alleged against the appellant-companies were committed when the DIP Guidelines were in force, but SEBI had not taken any action against the appellant-companies under the DIP Guidelines. It was pointed out, that for the first time, action was initiated against the appellant-companies through the first show cause notice issued by the SEBI on 24.11.2010. The argument raised was, that the DIP Guidelines were repealed by the ICDR Regulations (with effect from 26.8.2009), and as such, it was not open to the SEBI to take action against the appellant-companies under the repealed DIP Guidelines. Insofar as the ICDR Regulations are concerned, the argument raised was, that the same would only have prospective effect. Therefore, the submission was, that the ICDR Regulations would not be applicable to actions and activities which had taken place prior to the coming into force of the ICDR Regulations (with effect from 26.8.2009). The SAT rejected the instant contention of the appellant-companies by placing reliance on Regulation 111 of the ICDR Regulations. The SAT concluded by holding, that the SEBI (FTM) was justified in holding both companies guilty of violating the DIP Guidelines read with the ICDR Regulations.

57. Having concluded its determination on the issue canvassed before it, the SAT, by its order dated 18.10.2011, upheld the order passed by the SEBI (FTM) dated 26.8.2011. The SAT having so held, directed the appellant-companies to repay within six months (from its order dated 18.10.2011), the amount collected

from the investors, on the terms as set out by the order of the SEBI (FTM) dated 23.6.2011.

58. When this Court disposed of Special Leave Petition (Civil) no. 11023 of 2011 on 15.7.2011 (soon after the SEBI (FTM) order dated 23.6.2011), it permitted the appellant-companies to assail the SEBI's order dated 23.6.2011 by preferring an appeal under section 15T of the SEBI Act. While disposing of the aforesaid special leave petition, this Court recorded the statements of the learned counsel for the appellant-companies (herein), that they would not invite any further deposits pending the hearing and disposal of the proposed appeals (before the SAT). Keeping in mind the aforesaid statements, this Court restrained SEBI (vide its order dated 15.7.2011) from giving effect to the order dated 23.6.2011 till the disposal of the appeals by the SAT. As noticed above, the appeals preferred before the SAT by SIRECL and SHICL came to be dismissed on 18.10.2011. The common order passed by the SAT dated 18.10.2011 was separately assailed by SIRECL (through Civil Appeal no. 9813 of 2011) and by SHICL (through Civil Appeal no. 9833 of 2011). While entertaining the aforesaid appeals on 28.11.2011, this Court interalia passed the following interim order:-

> "By the impugned order, the appellants have been asked by SAT to refund a sum of Rs.17,400 crores approximately on or before 28.11.2011. We extend the period upto 9.1.2012".

On the following date of hearing, i.e. on 9.1.2012, this Court extended the interim order passed on 28.11.2011 by observing as under:-

> "Interim order granted by this Court on 28.11.2011 shall continue to be operative".

In the aforesaid view of the matter, the order passed by the SEBI (FTM) on

23.6.2011, which on the dismissal of the appeals (preferred by SIRECL and SHICL) before the SAT on 18.10.2011, was required to be given effect to within a period of six months, has remained unimplemented in view of the interim order passed by this Court awaiting this Court's decision in the present set of appeals. I shall now endeavour to adjudicate upon the issues canvassed before us.

59. The foundational facts essential for the determination of the twin appeals have already been narrated above. In the aforesaid narration it was essential to demonstrate the position adopted by the appellant-companies prior to the issuance of the first show cause notice by the SEBI (FTM) dated 24.11.2010. It was also essential to trace the proceedings initiated in the High Court of Judicature at Allahabad, before its Lucknow Bench, for setting out the reasons recorded by the High Court; first, in vacating the interim order originally granted; and thereafter, for not reviving the original interim order. It was also essential to record the appellant-companies legal responses and submissions before the SEBI (FTM) and the SAT. It was essential, also to notice exactly what was canvassed on behalf of the appellant-companies, so as to visualize, that even though the main plank of the appellant-companies submission rested on a factual foundation, namely, whether the OFCDs issued by the appellant-companies was by way of "private placement", or by way of "a public issue"; the appellant-companies did not base any of their submissions on any concrete factual data, to establish the aforesaid issue. I shall now venture to examine the submissions advanced before us, by dealing with the controversy issue-wise.

Was the invitation to subscribe to OFCDs, by SIRECL and SHICL, by way of private placement (as claimed by the appellant-companies), or by way

of an invitation to the public (as counter-claimed by the SEBI)?

The first perspective:

60. During the course of hearing there was extensive debate between rival parties on the subject whether the OFCDs under reference, were issued by way of "private placement" or by way of an invitation "to the public". Apparently, the answer to the aforesaid query would emerge from an analysis of the correct factual position. SEBI, in order to determine an answer to the aforesaid query, in the first instance, sought information from Enam Securities Private Limited – the merchant banker for SPCL. The reason which prompted the SEBI to ascertain the correct factual position was, that it had received complaints from "Professional Group of Investors Protection", as also, from one Roshan Lal. The former's complaint was dated 25.12.2009, whereas the latter's complaint to the SEBI was dated 4.1.2010. During the course of examining the DRHP of SPCL in respect of its proposed IPO dated 30.9.2009, SEBI suspected that SPCL had not made a complete and full disclosure. Enam Securities Private Limited responded to the queries raised by the SEBI, both in respect of SIRECL and SHICL, by asserting that on legal opinion sought, as well as, on having conducted an inquiry, it was in a position to confirm that the OFCDs issued by SIRECL and SHICL were in conformity with all applicable laws. The reply of Enam Securities Private Limited did not incorporate any response to the express queries raised by SEBI. On 26.2.2010 Lead Managers of SIRECL and SHICL informed SEBI, that both the companies had issued debentures on "tap" basis, thus asserting, that the OFCDs under consideration had been issued by way of "private placement". The Lead Managers, however, could not deny the issuance of an information

memorandum, as well as, RHPs by the two companies. Despite the aforesaid acknowledgement, the details sought by the SEBI were not furnished by the Lead Managers of the appellant-companies. On 22.4.2010 SEBI sought further details from Enam Securities Private Limited. SEBI, however, never received any response thereto. Finding itself in the aforesaid predicament, SEBI had no other alternative, but to seek factual details directly from SIRECL and SHICL. SEBI accordingly addressed a large number of communications to both the companies. The letters issued by SEBI and the responses furnished by the two companies have been narrated in paras 2 to 12 of the instant order. SEBI under the provisions of the SEBI Act, has a mandate to shoulder extremely serious and onerous responsibilities. These responsibilities include the task of protecting the interest of investors in securities, and the development and regulation of the securities market. When the first communication was addressed by SEBI to Enam Securities Private Limited – the merchant banker for SPCL, the reply furnished by Enam Securities Private Limited referred to the fact, that the same was based on legal opinion. It is therefore apparent, that right from the beginning, legal opinion came to be sought before replies were furnished, on behalf of the two companies to SEBI. Even the tenor of the letters addressed by the two appellant-companies available on record depict, that they had furnished their replies after seeking legal guidance. It is in the aforesaid background, that one needs to evaluate the responses of the two companies, to the queries raised by SEBI.

61. Now, about the replies of the appellant-companies. At one juncture both companies adopted a defiant posture by asserting, that they should first be

furnished with the copies of the complaints received by SEBI. Meaning thereby, that they would consider furnishing the desired information only after they had been furnished with the copies of the complaints. Failing which, it is essential to infer, that they would not supply the information. On another occasion, the companies were brazen enough to inform SEBI, that SEBI had no jurisdiction in the matter. At a later stage, they informed SEBI, that for a clarification of the jurisdictional aspect, the companies had addressed a communication to the Union Minister incharge of the Department of Corporate Affairs. Accordingly, the companies commended to SEBI, that it should not probe into the matter further, till the Department of Corporate Affairs, clarified the legal position. An astounding reply was submitted by the companies in May, 2010. One would like to extract herein a relevant portion of the communication in question, as it is difficult to believe, that the companies could have made such an inconsiderate excuse, to avoid furnishing the particulars sought by SEBI. An extract of the reply is being reproduced hereunder:

> "In the months of May and June, in the year, most of the staff remains on long holidays with their children due to summer holidays of schools/colleges. In our case also concerned officials are on vacation and gone out of station with their children."

One wonders whether the appellant-companies were running a kindergarten, where their staff were expected to be unavailable during the summer. The impression which the aforesaid communication project is, that the two companies had no respect whatsoever for SEBI. Inspite of the fact that SEBI was responsible for the development and regulation of the securities market, the appellant-companies could brush aside the SEBI's demand for information in

such a brash and audacious manner, is quite frankly difficult to comprehend. In response to one of the SEBI's communications, the two companies adopted the stance, that they did not have complete details of the securities issued by them. The companies responded by stating, that the information would be disclosed after the same is collected. This position adopted by the companies was described as preposterous by the SEBI (FTM). It can certainly be concluded, that the same was outrageously ridiculous, keeping in mind that both companies proclaim to be a part of the Sahara India Group of Companies. It is difficult to swallow, that the two companies had not even maintained records, pertaining to investments in the range of close to Rs.40,000 crores.

62. On 11.6.2010 SEBI informed the two companies, that their responses indicated, that they intended to protract the correspondence, to delay the matter. Relevant extract, of the letter dated 11.6.2010, is being reproduced hereunder:

> "Considering that, we are surprised your received letter. It seems that the intention behind the letter is only to protract the correspondence. In this regard you are advised to provide the information sought vide our letter dated May 12, 2010 by June 15, 2010, as agreed vide your aforesaid letter. We, once again, reiterate that failure to provide the information or applying any other delaying tactics may result in initiating appropriate action in terms of the SEBI Act and Regulations made thereunder and also under relevant sections of the Companies Act which are delegated to SEBI."

The wielded threat contained in the communication extracted hereinabove, had hardly any effect on the two companies. A sterner and direct threat was contained in a subsequent communication addressed by the SEBI, wherein the SEBI, inter alia asserted:

> "Please take notice that without prejudice to the provisions of any other law for the time being in force, if you fail to produce the books of accounts and/or documents as required, SEBI will initiate adjudication proceedings

> against you under which you could be levied a penalty of one lakh rupees for each day during which such failure continues, or one crore rupees, whichever is less, as provided under Section 15A of Securities and Exchange Board of India Act, 1992. Further, criminal prosecution may also be launched against you under Section 11C(6) of Securities and Exchange Board of India Act, 1992. Section 11C(6) provides for a punishment with imprisonment for a term which may extend to one year or with fine which may extend to rupees one crore, or with both, and also with a further fine which may extend to five lakh rupees for each day after the first, during which the failure or refusal continues."

63. It is interesting to note, from the narration of facts recorded hereinabove, that SEBI was seeking information from the appellant-companies since May, 2010. Since the information sought by SEBI was not being supplied, SEBI eventually took upon itself the task of investigation into the issuance of OFCDs by SIRECL and SHICL. For this, summons dated 30.8.2010 and 23.9.2010 were issued to the two companies requiring them to furnish various factual details in respect of the OFCDs issued by them. Interestingly, in response to the aforesaid summons both companies filed detailed replies, raising a large number of legal objections. Importantly, none of the particulars sought by SEBI, were furnished by either of the companies. Even at this late stage, the Chief Financial Officer of the Sahara India Group of Companies was afforded an opportunity of hearing, when a request was made by him (on 3.11.2010). It was impressed on him, during the course of hearing, that complete and correct information sought by the SEBI, should be furnished. The Chief Financial Officer, astoundingly did not make any commitment to furnish the information sought. This fact was duly highlighted in the order of the SEBI (FTM) dated 24.11.2010. Factually, no information was ever furnished by the Chief Financial Officer.

64. Consequent upon the receipt of the responses from the appellant-

companies, and their failure to furnish information to SEBI, a show cause notice dated 24.11.2010 came to be issued to both the companies. Pending a response to the show cause notices, the SEBI (FTM) vide an order dated 24.11.2010 issued a number of directions to the appellant-companies, including an order restraining the two companies from mobilizing funds under the respective RHPs issued by them, till further directions. The companies were also, inter alia, directed not to offer their equity shares/OFCDs or any other securities to the public or to invite subscription in any manner whatsoever, either directly or indirectly, till further orders.

65. The SEBI (FTM's) order dated 24.11.2010 was assailed before the Lucknow Bench of the High Court of Judicature at Allahabad. On 13.12.2010, the High Court stayed the operation of the order (dated 24.11.2010). On an application filed by the SEBI, the High Court vacated the aforesaid interim order on 7.4.2011. While vacating the interim directions, the High Court observed interalia:

> "4. …..The petitioners were supposed to cooperate in the inquiry and their interest was protected by restraining the SEBI from passing any final orders. The matter was being heard finally under the expectation that the assurances given by the learned counsel for the petitioners would be honoured by the petitioners and the matter would be finished at the earliest. But the petitioners appear to have thought otherwise. The court's order cannot be allowed to be violated or circumvented by any means.
> We, therefore, do not find any ground to continue with the interim order, which is hereby vacated for the own conduct of the petitioners and for which they have to thank their own stars."

A perusal of the extract of the order of the High Court reveals, that the High Court felt, that the appellant-companies were expected to cooperate with the inquiry being conducted by the SEBI. Since the appellant-companies were found remiss

in the matter, the High Court was constrained to vacate the interim order passed on 13.12.2010. The appellant-companies then filed an application before the High Court, praying for the restoration of the order dated 13.12.2010. The instant application also came to be dismissed on 29.11.2011. While dismissing the aforesaid application, the High Court observed:

> ""5. .....A person, who comes to the court, is supposed to come with clean hands and bona fide intentions, and has to abide by the orders passed by the court, more so in a case where the parties' counsel agree for certain actions to be undertaken. If some assurance is given by any person to the Court, as has been done in the present case, and the said assurance/understanding is not honoured, the court would not come to his rescue. The application is, therefore, rejected."

A perusal of the aforesaid extract of the order of the High Court reveals, that the High Court expressed the view, that those who seek relief from a court must come with clean hands and with bona fide intentions, they must also abide by the orders passed by the concerned court. If assurances given to the court are not honoured, the court cannot come to the rescue of the party. Since the application filed by the appellant-companies was dismissed with the aforesaid observations, it is apparent, that the High Court denied relief to the appellant-companies because they had not approached the High Court with clean hands, and because, their intentions were not found bona fide.

66. Eventually, the entire controversy came to be shifted back to SEBI (consequent upon this Court's order dated 12.5.2011). The writ petition filed by the appellant-companies before the High Court, therefore, came to be withdrawn. At that juncture, the SEBI issued its second show cause notice dated 20.5.2011, principally on the same facts and grounds, as its first show cause notice (dated 24.11.2010). Both SIRECL and SHICL filed detailed responses to the same,

again asserting that the OFCDs had been issued to friends, associates, group companies, workers/ employees and other individuals associated/affiliated or connected in any manner with Sahara India Group of Companies, without depicting the details of each of the subscribers to show which of them were friends or associates of group companies or workers/employees and/or other individuals associated/affiliated or connected in any manner with Sahara India Group of Companies. The battle lines were, accordingly, again drawn on legal issues rather than on factual details.

67. Having received replies to the show cause notices dated 20.5.2011, and having heard learned counsel representing the appellant-companies, it was held that the appellant-companies were in violation of law. It was emphatically concluded by the SEBI (FTM) on 23.6.2011, that neither SIRECL nor SHICL had invited subscriptions to their OFCDs by way of "private placement". It was held, that the two companies had issued OFCDs by way of an invitation "to the public".

68. The order of the SEBI (FTM) dated 23.6.2011 came to be assailed by the appellant-companies before the SAT, by preferring appeals under section 15T of the SEBI Act. Even during the course of appellate proceedings before the SAT, neither of the companies disclosed the factual position, so as to enable the SAT to determine factually, one way or the other, whether the OFCDs issued by SIRECL and SHICL, were by way of "private placement" or by way of an invitation "to the public". The controversy was canvassed before the SAT, at the behest of the appellant-companies, on the same legal parameters, as were adopted before the SEBI (FTM). The SAT by its order dated 18.10.2011, upheld the order passed by SEBI (FTM) dated 26.8.2011.

69. The order passed by the SAT is now subject matter of challenge before us. Even before this Court, the position remains unaltered. During the course of hearing we were informed by learned counsel representing the SIRECL, that a compact disc with a key had been furnished to the SEBI (FTM) with complete particulars. What was placed before the SEBI (FTM) in the said compact disc, we were informed, has now been made available to this Court as a hard copy. During the course of an examination of the hard copy, it was not possible to persuade oneself to travel beyond the first page of the voluminous compilation. The reason therefor is being expressed hereinafter. For facility of reference extracted hereunder are details of "Kalawati", one of the investor's disclosed in the hard copy:

S.No.	Investor's name	Investor's particulars	Amount	Introducer's Agent name	Introducer's Agent Code	Investor's/ agent's address
6603675	Kalawati	Uchahara S.K. Nagar, U.P	1600	Haridwar	107511425	Bani Road, Semeriyawa Sant Kabir Nagar

First and foremost, the data furnished by the appellant-companies does not indicate the basis of the alleged "private placement". It is impossible to determine whether "Kalawati", referred to hereinabove, whose name figured at Sl.No.6603675, was invited to subscribe for the OFCDs, as a friend or associate of group companies or worker/employee and/or other individual associated/affiliated or connected in any manner with Sahara India Group of Companies. Besides the aforesaid, "Kalawati" is a very common name, and there could certainly be more than a couple of Kalwatis, at the investor's address

indicated in the compilation. Neither her parentage nor her husband's name has been disclosed, so that the identity of "Kalawati" could be exclusively determined to the individual who had subscribed to the OFCDs. The address of "Kalawati", indicated is of a general description, as it does not incorporate a particular door number, or street, or locality. The name of the introducer/agent, leads to a different impression altogether. "Haridwar", as a name of a person of Indian origin, is quite uncomprehendable. In India names of cities do not ever constitute the basis of individual names. One will never find Allahabad, Agra, Bangalore, Chennai or Tirupati, as individual names. The address of the introducer/agent, depicted in the compilation is as intriguing as the address of the investor (for exactly the same reason recorded above, for the subscribers name). One would not like to make any unrealistic remark, but there is no other option but to record, that the impression emerging from the analysis of the single entry extracted above is, that the same seems totally unrealistic, and may well be, fictitious, concocted and made up.

70. At this juncture it would be necessary to extract certain observations made by the SEBI (FTM) in the order dated 23.6.2011:

> "17.15 I have also examined copies of the letters written by SIRECL in January 2011, to a few professional accounting firms, submitted among the documents filed by SIRECL before me. The letter to these firms notes that "the Company has from time to time issued Optionally Fully convertible Debentures (OFCD) which have been subscribed by various people all over the country". The letter seeking professional services "by way of deputation of professional staff to collect data and to the necessary compilation by putting the data together in a consistent format and doing the necessary authentication of the same, given the fact that the data is voluminous and is spread across thousands of service centre." (emphasis supplied) Clearly, the OFCDs are issued, admittedly to various people all over the country. The compilation of the data is not available with the firm. The data is unauthenticated and the fund mobilization is spread across

thousands of service centres…."

It seems the two companies collected money from investors, without any sense of responsibility to maintain records, pertaining to funds received. It is not easy to overlook, that the financial transactions under reference are not akin to transactions of a street hawker or a cigarette retail made from a wooden cabin. The present controversy involves contributions which approximate Rs.40,000/- crores, allegedly collected from the poor rural inhabitants of India. Despite restraint, one is compelled to record, that the whole affair seems to be doubtful, dubious and questionable. Money transactions are not expected to be casual, certainly not in the manner expressed by the two companies.

71. The consequence of the foregoing discussion, if correct, is alarming, shocking and distressing. When the appellant-companies are a part of the Sahara India Group of Companies, recognized in India with awe and admiration, their apparent attempt to withhold the disclosure of the factual position solicited by SEBI, cannot be brushed aside lightly. After all both companies were proceeding on legal guidance right from the beginning. What the two companies chose to collect through their OFCDs was a contribution to the tune of of Rs.40,000 crores. Surely, while dealing with such an enormous amount of money, the information available in the records of the appellant-companies is expected to be of the highest order of precision.

72. SEBI is statutorily empowered under sections 11(2)(i) and (ia), as well as, 11 (2A) of the SEBI Act, to call for information. The appellant-companies were, therefore, statutorily obliged to furnish the information sought. The information sought by SEBI from the appellant-companies, would have led to a firm and clear

factual conclusion, whether the OFCDs issued by SIRECL and SHICL were by way of "private placement", or by way of an invitation "to the public". The best legal minds in this country have guided and represented the appellant-companies at all stages, right from the beginning. There can therefore be no doubt, that the particulars sought by the SEBI, were not furnished by the appellant-companies, on the basis of considered legal advice. But then, there are legal consequences, for such considered withholding of information. It is imperative for us to resurrect the legal position, not kept in mind by the appellant-companies. For this, reference needs to be made to section 114 of the Indian Evidence Act, as also, Illustrations (g) and (h) thereunder. The same are extracted below:

> "114. **Court may presume existence of certain facts –**
>
> The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> **Illustrations**
>
> The Court may presume -
>
> xxx xxx xxx
>
> (g) That evidence which could be and is not produced would, if produced be unfavorable to the person who withholds it;
>
> (h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavorable to him;
>
> xxx xxx xxx
>
> But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it -
>
> As to illustration (g) - A man refuses to produce a document which would

> bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;
>
> As to illustration (h) - A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;
> xxx xxx xxx"

Based on section 114 of the Indian Evidence Act, and more particularly the illustrations extracted above, SEBI ought to have drawn the obvious presumption against the appellant-companies. The material sought by the SEBI from the appellant-companies, thought available with them, must be deemed to have been consciously withheld, as the same if disclosed, would have been unfavourable to the appellant-companies. Details sought by the SEBI from the appellant-companies included particulars of the application forms circulated, the number of application forms received, the amount of subscription deposited, the number and list of allottees, the number of OFCDs issued, the value of their allotment, the date of dispatch of debenture certificates, copies of board/committee meetings, minutes of the meetings during which allotment was approved. According to SEBI the information sought was merely basic, and the denial of the same amounted to a calculated and deliberated denial of the same. There can be no quarrel with the aforesaid conclusion. Why would anyone not furnish such basic information? The aforesaid information had been sought, to determine whether the OFCDs issued by SIRECL and SHICL were by way of "private placement" (as claimed by the appellant-companies), or by way of an invitation "to the public" (as counter claimed by the SEBI). Since the appellant-companies willfully avoided to furnish the aforesaid information (which ought to have been readily available with them) to the SEBI, one is constrained to conclude, that if the appellant-

companies had furnished the said information, SEBI would have been able to conclude the issue against the appellant-companies, i.e., that the OFCDs issued by the SIRECL and SHICL, were by way of an invitation "to the public". I am therefore, persuaded to conclude accordingly.

The second perspective:

73. The same conclusion as has been drawn hereinabove, can be legally drawn from another angle as well. For the instant aspect of the matter it is essential to refer to section 67 of the Companies Act. The same is accordingly being extracted hereunder:

> "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-section (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 the circumstances –
>
> (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchased 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 order 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 (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 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)."

The aforesaid provision, pointedly brings out the construction of references to an invitation/offer of shares or debentures "to the public". Sub-section (1) of section 67 reproduced above, pertains to an act of "offering" of shares and debentures, whereas, sub-section (2) thereof deals with a similar act by way of "invitation". The construction of section 67 of the Companies Act, determines, when the "invitation or offer" is to be accepted as having a reference "to the public". As a matter of clarification, the aforestated two sub-sections, while accepting the generic meaning of the term "to the public", proposition a special construction for the same whereby a limited/restricted meaning has been extended to the same. Sub-sections (1) and (2) of section 67 of the Companies Act clearly provide, that an offer or invitation which is limited/restricted to a section of the public, including members or debenture-holders of a company, clients of the company concerned, and even to a class of persons distinguished "by any other means", would nonetheless be deemed to be an invitation/offer, "to the public". Section 67(3) of the Companies Act provides for an exception to the meaning assigned to the phrase "to the public" (under sub-sections (1) and (2) of section 67 aforesaid). In

this behalf section 67(3) delineates two categories of invitations/offers which would not be treated as invitations/offers, "to the public". Clause (a) of section 67(3) mandates, that an offer/invitation which forbids a right of renunciation in favour of others would "not" be treated as an invitation or offer "to the public". And clause (b) of section 67(3) similarly provides, that an invitation/offer made as a matter of a domestic arrangement, between the persons making and receiving the invitation/offer, would also "not" be considered as an invitation/offer "to the public". The first proviso under section 67(3) of the Companies Act, limits the instant exceptions, contemplated under clauses (a) and (b) of section 67(3) only to situations where the invitation/offer is made to less than 50 person. Even though, clauses (a) and (b) of sub-section (3) of section 67 of the Companies Act, are an exception to sub-sections (1) and (2) of section 67 thereof, yet it must be clearly understood, that a mere fulfillment of the yardstick defining the exception (under clauses (a) and (b), aforesaid) would not bring the issue under reference out of the scope of the term "to the public". For that, it is essential to also satisfy the requirement of the proviso under section 67(3) i.e., the number of subscribers should not exceed 49. Only on the satisfaction of the twin requirements, delineated above, the issue/offer will "not" be treated as having been made "to the public".

74. Having examined the provisions of the Companies Act, it is clear that the term "private placement" has not been defined therein. In fact the term "private placement" has not been used in the Companies Act. Presumably, it is coined and conceived at the hands of the appellant-companies, on the basis of the designated meaning of the term in the capital market. At best, what the

appellant-companies have referred to as “private placement”, can be only that which would be an exception to invitations/offers contemplated under sub-sections (1) and (2) of section 67, namely, only such invitations/offers as would be covered by sub-section (3) of section 67 of the Companies Act. The category of persons falling within the scope of sub-section (3) of section 67 only, can be treated as falling in sphere of “private placement”. Therefore, at best “private placement” within the meaning of the assertions made on behalf of the appellant-companies, would essentially fall in the two categories expressed in clauses (a) and (b) of sub-section (3) of section 67 of the Companies Act. Clearly, since the first proviso under section 67(3) limits the upper limit thereunder to less than 50, an invitation/offer by way of “private placement” under the Companies Act, can under no circumstances exceed 49. Applying the legal parameters emerging from section 67 of the Companies Act, an endeavour shall now be made, to determine whether the invitation/offer made by SIRECL and SHICL was by way of “private placement” or by way of an invitation “to the public”.

75. The appellant-companies have stated, that the invitation/offer of the OFCDs were made to friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with the Sahara India Group of Companies. This description cannot lead to the inference, that the invitation/offer made by SIRECL or SHICL had been made as a matter of domestic arrangement between the persons making/receiving the invitation/offer. As such, the OFCDs in question do not satisfy the requirement under clause (b) of section 67(3). It is also relevant to notice, that the appellant-companies had invited subscription for their OFCDs through their respective RHPs. On the

receipt of subscriptions, the appellant-companies had issued bonds (named as Abode Bonds, Nirman Bonds and Real Estate Bonds, in case of SIRECL; and Multiple Bonds, Income Bonds and Housing Bonds, in case of SHICL). The RHPs issued by the two companies clearly expressed, that the subscribers could transfer the same to any other person, subject to the terms and conditions and the approval of the concerned company. In sum and substance, therefore, the OFCDs/bonds under reference were transferable, whereas, to satisfy the requirement under clause (a) of section 67(3) the shares/debentures should be non-transferable. Clearly, the OFCDs/bonds issued by the appellant-companies did not fall within the scope of clauses (a) or (b) of section 67(3) of the Companies Act. Therefore, per-se the contention of the appellant-companies, that invitation to subscribers to the OFCDs was by way of "private placement" is unacceptable. Even if for arguments sake, it is assumed that the OFCDs in question fall in one or the other exempted categories, defined through clauses (a) or (b) of section 67(3), still in so far as the present controversy is concerned, the same would not constitute an exception to sub-sections (1) and (2) of section 67 of the Companies Act, because the invitation/offer of OFCDs, in the present controversy, was admittedly made to approximately 3 crore persons (expressed as 30 million persons by the SAT in the impugned order dated 18.10.2011) and was subscribed to by 66 lakh persons (mentioned as 6.6 million persons in the SEBI (FTM) order dated 23.6.2011), in the case of OFCDs issued by the SIRECL. And it may be presumed, that a similar number had subscribed to the OFCDs issued by SHICL. In case of both the appellant-companies therefore, the number of subscribers exceeded manifolds, the upper limit of 49, expressed in

the first proviso under section 67(3) of the Companies Act. Consequently, even as a matter of law, it is not possible to find favour with the contention advanced at the behest of the appellant-companies, that the OFCDs issued by the SIRECL and SHICL were by of "private placement". It is inevitable therefore, to accept the contention of the SEBI, that the OFCDs issued by the SIRECL and SHICL were by way of an invitation "to the public".

The third perspective:

76. The instant issue was examined by the SAT from yet another viewpoint. SAT expressed the opinion, that the appellant-companies did not disclose in their information memorandum, that the invitation/offer to subscribe to the OFCDs was being issued to 3 crore persons (expressed as 30 million persons by the SAT), through 10 lakh agents, stationed in more than 2900 branch offices. And therefore, the real intent of the appellant-companies remained unnoticed. The aforesaid figures, according to the SAT, were by themselves sufficient to conclude, that the appellant-companies had approached the public through an advertisement, i.e., by way of an invitation "to the public", and not on "tap" basis (i.e., by way of "private placement") as was being suggested by the appellant-companies.

77. It is necessary to notice, that in order to controvert the factual position relied upon by the SEBI, the appellant-companies placed reliance on a couple of factual instances, which when clubbed together, according to the learned counsel for the appellant-companies, would lead to the inference, that the OFCD's under reference were issued by way of "private placement". Firstly, reliance was placed on similar actions of Sahara India Commercial Corporation Limited (hereinafter

referred to as SICCL), also a member of the Sahara Indian Group of Companies, having its registered office in West Bengal. SICCL had also, according to learned counsel, similarly issued OFCDs in 1998 by way of "private placement" (and continued to issue the OFCDs till 30.6.2008). SICCL an unlisted public company, according to learned counsel, had filed its RHP on 29.6.2001, indicating that SICCL had no intention to list its OFCDs on a recognized stock exchange. According to learned counsel, the aforesaid RHP, as in the instant case, was duly approved and registered by the concerned Registrar of Companies, despite the fact that subscribers exceeded 50 (total subscribers indicated as 1,98,39,939). It was submitted, that in furtherance of the OFCDs issued by the SICCL, a subscription sum in excess of Rs.14,106 crores was collected. It was then contended, that no action whatsoever was initiated by the SEBI against the SICCL. It was submitted, that inspite of the fact that the appellant-companies are similarly situated as SICCL, they have been picked up arbitrarily, for unfair and discriminatory treatment. Secondly, SIRECL filed its special resolution dated 30.3.2008 with the Registrar of Companies, Uttar Pradesh and Uttarkhand. SIRECL then filed its RHP on 13.3.2008 before the Registrar of Companies. In the said RHP, SIRECL clearly expressed, that it did not intend to list its OFCDs with any recognised stock exchange. In the said RHP it was inter alia stated as under:

I-General Information	
(a)……..	
(b)……..	
(c) Names of regional stock exchange and other stock exchanges where application made for listing	We do not intend the proposed issue to be listed in any stock exchange(s)

of present issue	
II – Capital structure of the company	
(a)……..	
(b) Size of present issue giving separately reservation for preferential allotment to promoters and others.	The present issue consists of Unsecured Optionally Fully Convertible Unsecured Debentures with option to the holders to convert the same into Equity Share of Rs.10 each at a premium of to b e decided at the time of issue equal to the face value of the Optionally Fully Convertible Unsecured Debentures to be privately placed aggregating to Rs.**

Finding no legal infirmity in the aforesaid RHP, it was submitted, that the same was duly registered by the Registrar of Companies on 18.3.2008. It was also pointed out, that SIRECL had also circulated an information memorandum on 25.4.2008, indicating the same position. Based on the aforesaid factual position, it was contended that the appellant-companies having expressed, that they "do not intend the proposed issue to be listed in any stock exchange(s)", it is wholly arbitrary to presume just the opposite. Based on the aforesaid sequence of facts (and logic), it was contended, that it was not appropriate to presume against the appellant-companies, something contrary to what the appellant-companies had clearly expressed.

78. All that one would state in response to the submissions advanced on behalf of the appellant-companies (as have been recorded in the foregoing paragraph) is, that the appellant-companies are not placing reliance on the actual facts pertaining to the present controversy, but are relying on allied materials to draw inferences. Since the appellant-companies are custodians of the factual

material it is imperative to outrightly and straightaway reject the basis adopted by the appellant-companies to canvass the merits of the instant issue. The illustrative reference to SICCL, would not make any difference to the determination of the present controversy, because the first proviso under section 67(3) of the Companies Act was inserted with effect from 13.12.2000. The aforesaid proviso introduced the limit of less than 50 subscribers, in case of "private placement", whereas SICCL (according to the appellant-companies own showing) had commenced its OFCD issue in 1988, i.e., well before the aforesaid proviso, introducing the outer limit of less than 50 persons, came into existence. The first of the two submissions is therefore clearly unsustainable. In so far as the second contention is concerned, abundance of material was gathered by SEBI to show, that the specifications/conditions/terms indicated in the documents relied upon by the appellant-companies were clearly fallacious and misleading. Therefore, on the basis of the factual position recorded above (in the opening paragraph, under the third perspective), there can be no doubt, that SAT was fully justified in drawing its conclusions, by taking into consideration the number of persons to whom the invitation/offer to subscribe to the OFCDs was extended, the number of agents associated by the appellant-companies to solicit subscriptions and the number of branch offices established for the purpose. If one were to add to the aforesaid consideration, the number of subscribers and the amount of subscription collected (all of these numbers have been delineated during the deliberations on the instant issue), the submissions advanced on behalf of the appellant-companies can be visualized as not only unrealistic, but also preposterous.

Whether the SAT was justified in ignoring the factual conclusions drawn by the SEBI (FTM) on the basis of the inquiries made by the Investigating Authority, on the ground of violation of the rules of natural justice?

79. The issue incorporated in the query posed above, was not canvassed before us during the course of hearing. Since the issue aforesaid had been adjudicated upon in favour of the appellant-companies by the SAT, the appellant-companies were not expected to assail the same. Since no appeal was preferred at the hands of SEBI (as it had succeeded on other issues before the SAT), it could not even be agitated on behalf of SEBI. During the course of preparing the instant judgment one had the occasion to ponder over the determination rendered by the SAT, whereby certain factual conclusions drawn by the SEBI (FTM) were omitted from consideration by the SAT, on the basis of the determination by the SAT, that the same had been drawn in violation of the rules of natural justice. The SAT held, that the facts ascertained on an inquiry made by the Investigating Authority appointed by the SEBI, were liable to be ignored, because the appellant-companies had neither been put to notice, nor their response thereon had been sought. In order to bring out the determination of the SEBI (FTM), as also the decision thereon by the SAT (based on the plea of violation of the rules of natural justice), one paragraph of the order of the SAT, relevant to the issue, is being set out below:

> "We shall now deal with the argument of the learned senior counsel for the appellants that the whole time member violated the principles of natural justice. He argued that during the course of the proceedings, the whole time member directed the investigating officer to make enquiries in regard to certain facts and basing himself on his conclusions he found that the issue of OFCDs was a public issue but the findings of the investigating officer had not been furnished to the appellants. It is contended that the

appellants had no opportunity to counter the findings of the investigating authority. Reference in this regard was made to paras 17.9 and 26.7 of the impugned order where the whole time member has placed reliance on the facts collected by the investigating authority behind the back of the appellants. This is what the whole time member has observed in these paragraphs:

> "17.9 I note that the Investigating Authority had, as directed by me, made enquiries with two of the subscribers (who are residing in Mumbai) to such OFCDs made by the companies. These investors had stated that their investments in such instruments were made on the basis of the representations made by the local agents (employed by the companies) and that they had no connection, whatsoever, with the two companies themselves or to the Sahara India Parivar….. For the purpose of my own understanding, I had directed the Investigating Authority to do a snap verification of any four addresses from a randomly selected locality in Mumbai itself (as the learned counsel had submitted that complete addresses are given in respect of investors in urban areas). Out of four investors, the Investigating team tried to identify, even after strenuous efforts with the Post Office, two of them were simply not traceable. As to the two investors who were identified, both of them invested in the OFCDs, just because they were approached by the Agents in their locality. They had no prior association with the issuer or the Sahara Group. Evidently, on the face of it, the OFCDs are subscribed to, not by persons belonging to the Sahara India Parivar as claimed, but by the public, and such subscriptions are solicited through the usual marketing efforts that are typically needed to canvass deposit business from the general public. Both of them had hardly any awareness of the convertibility in these instruments."

There is merit in the contention of the appellants. As already observed, one of the primary questions that arose before the whole time member was whether the issue of OFCDs was a public issue, or one by way of private placement. The appellants have been contending throughout that it was a private issue and that they had not approached the public and that the OFCDs were being offered only to their friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected with Sahara Group of companies. In order to find out whether this fact was true, the whole time member directed the investigating authority to find out on a random check whether the company had approached members to the public or their own associates as claimed. The investigating authority appears to have recorded the statements of some persons to whom OFCDs have been offered and concluded that they were not the associates of the company. The whole time member relied upon these conclusions to hold that the issue was a public issue. We agree with the learned senior counsel for the appellants that the whole

> time member could not rely upon the conclusions arrived at by the investigating authority without furnishing his report to the appellants which they were entitled to controvert. We are, therefore, satisfied that the principles of natural justice to this extent had been violated. We are also of the view that this violation by itself will not vitiate the impugned order. Independently of the observations made in paragraph 17.9 and 26.7 of the impugned order there is enough material on the record to hold that the issue of OFCDs was a public issue. From the affidavit filed on behalf of the company, it is clear that the OFCDs were offered to millions of investors. This fact by itself makes the issue a public issue and it was not necessary for the whole time member to look into the findings of the investigating officer which were recorded behind the back of the appellants. Moreover, on the facts of this case, it is a legal issue based upon the interpretation of the provisions of the Companies Act. We have ignored the observations made in the two paras of the impugned order while recording our findings in the earlier part of the order that the issue was a public issue. In view of our findings, the observations made in the aforesaid two paragraphs of the impugned order are of no consequences."
>
> (emphasis is mine)

80. What needs to be kept in mind while applying the rules of natural justice is, that the same are founded on principles of fairness. Two cardinal principles of fairness are incorporated in the rules of natural justice. Firstly, the person against whom action is contemplated, is liable to be informed of the basis on which the proposed action is to be taken (i.e., the affected party is required to be put to notice). And secondly, before taking any adverse action, the affected party is liable to be afforded an opportunity to present his defence (i.e., an opportunity to be heard, under the tenent "audi alterm partem").

81. The rules of natural justice being founded on principles of fairness can be available only to a party which has itself been fair, and therefore, deserves to be treated fairly. The first determination rendered hereinabove (on the issue whether the invitation to subscribe to OFCDs by SIRECL and SHICL were by way of "private placement" or by way of an issue "to the public"), reveals that inspite of best efforts made by SEBI, neither of the two companies furnished the

information solicited from them. Information was obtained by SEBI directly from MCA-21 portal maintained by the Ministry of Corporate Affairs. Added to this, SEBI inter alia relied on facts collected through its Investigating Authority. Based on the aforesaid material SEBI (FTM) ventured to determine the controversy before it. Whether or not the two companies herein, could be permitted to agitate against the factual determination rendered by the SEBI (FTM), based on inquiries made at the behest of the SEBI (through its Investigating Authority), would depend upon their fairness in furnishing the materials sought by SEBI. It is apparent, that both SIRECL and SHICL, based on one excuse or another, did not provide the factual details sought by the SEBI, though the same were available with them. On some occasions, the excuses for not furnishing the information, were outrageously absurd (as discussed in an earlier part of the order). Having declined to furnish facts sought by SEBI, the SEBI was left with no other alternative but to garner shreds of information from one or the other source. Every time SEBI sought details from the appellant-companies, SEBI was affording the two companies an opportunity to substantiate their claim (that the invitation to subscribe to OFCDs was by way of "private placement"). In this way several opportunities were afforded to the appellant-companies to substantiate their stance. Having gathered information on its own (based on its own inquiries, as well as, through its Investigating Authority), SEBI arrived at certain factual conclusions. Must the appellant-companies be again called upon for their comments, before the SEBI can proceed further with the matter, is the important question. If the material, gathered by the SEBI (FTM) must be first provided to the concerned companies, and their responses sought under the rules of natural

justice, would it not amount to putting a premium on their non-cooperative and unfair stance? Do the rules of natural justice have any limitations? Whether fair or not, must the concerned party always enjoy the advantage of procedural prescriptions under the rules of natural justice? It is in respect of these propositions, that an answer is being attempted. In so far as the present controversy is concerned, opportunities were repeatedly provided by SEBI, to the appellant-companies, but they remained adamant and obstinate. Based on one excuse or the other, they declined to furnish the information sought. What needs to be noticed in the present controversy is, that the appellant-companies did not dispute the factual position (recorded by the SEBI (FTM) from the details furnished by the Investigating Authority) before the SAT. The two companies could have easily done so by providing the details available with them. Even before the SAT, they did not come out with the correct factual position. The material sought by SEBI from the two companies, would have constituted a valid basis to decipher and unravel the true factual position. Interestingly, to get over the crisis, emerging from the facts discovered by the Investigating Authority, the appellant-companies relied on technicalities of law, by canvassing their claim under the rules of natural justice. What the appellant-companies overlook is, that in actuality numerous opportunities were afforded to them to disclose information available with them, but they choose to shun the liberty. The data available with the appellant-companies was preserved as a closely guarded secret. That position has remained unaltered throughout. A person who has repulsed earlier opportunities (as the appellant-companies have), has no right to demand any further opportunity under the rules of natural justice. The appellant-

companies cannot be heard to say, that though they had consciously kept all the facts secret, they should have all the same been given an opportunity under the rules of natural justice to disclose the secrets? One would therefore, have no hesitation in concluding, that a party which has not been fair, cannot demand a right based on a rule founded on fairness. Inspite of the aforesaid conclusion, it would be wrong to assume that the appellant-companies were remediless. That remedy was, to place the correct factual data, supported by documents in their custody before the adjudicating authorities. That would have certainly enabled SAT, in its appellate jurisdiction, to determine whether the SEBI (FTM) was justified in drawing the factual inferences. The SAT was therefore, wholly unjustified in ignoring the conclusions drawn by the SEBI (FTM), on the basis of inquiries which were got conducted by it, through its Investigating Authority. That is so, specially because there are no allegations of bias, prejudice or malice against either the SEBI or the Investigating Authority. To that extent, the order passed by the SAT cannot be legally sustained.

82. As already noticed hereinabove, the issue being adjudicated under the instant query, was not canvassed before us during the course of hearing. One shall also not (just like the SAT) take into consideration, the factual conclusions drawn by the SEBI on the basis of inquiries conducted by its Investigating Authority, for recording a final determination, in the present controversy. It was only as a matter of placing the contours of the rules of natural justice in the right perspective, that the instant determination on the scope of applicability of the rules of natural justice has been recorded, in the background of the facts of the present controversy.

Whether OFCDs issued by SIRECL and SHICL which are admittedly "hybrids", are securities? If not so, whether they would be amenable to the jurisdiction of the SEBI?

The first perspective:

83. The submissions advanced at the hands of the learned counsel for the appellant-companies to support their contention, that the SEBI has no jurisdiction over "hybrids" is rather simple. To canvass the aforesaid claim, our attention was first invited to the definition of the term "securities" in section 2(1)(i) of the SEBI Act. The same is being extracted hereunder:

> "2(1) (i) "securities" has the meaning assigned to it in section 2 of the Securities Contracts (Regulation) Act, 1956."

For a complete and effective understanding of section 2(1)(i) extracted above, reference is liable to be made to section 2(h) of the SC(R) Act. The same is therefore being reproduced hereunder:

> "2(h) "securities" include –
> i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
> ia) derivative;
> ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;
> ic) security receipt as fined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [54 of 2002];
> id) units or any other such instrument issued to the investors under any mutual fund scheme;
> 'Explanation. – For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938."
> ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct

> entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable including mortgage debt, as the case may be;"
> ii) Government securities;
> iia) such other instruments as may be declared by the Central Government to be securities; and
> iii) rights or interests in securities;"

A collective perusal of section 2(1)(i) of the SEBI Act and section 2(h) of the SC(R) Act completely and effectively defines the term "securities" for the purpose of the SEBI.

84. As against the aforesaid, the term "securities" has been defined in section 2(45AA) of the Companies Act (consequent upon an amendment made in 2000 with effect from 13.12.2000). Section 2(45AA) of the Companies Act, is being extracted hereunder:

> "2(45AA) "securities" means securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and includes hybrids;"

The aforesaid provisions has also necessarily to be read in conjunction with section 2(h) of the SC(R) Act. The only difference in the definition of the term "securities" under the SEBI Act and the Companies Act is, that whilst the SEBI Act fully adopts the definition of term "securities" as is contained in section 2(h) of SC(R) Act; the Companies Act while adopting the definition of the term "securities" as in section 2(h) of the SC(R) Act, makes an express amendment thereto by adding the words "…and includes hybrids".

85. Based on the legal position recorded in the foregoing two paras, it is the contention of the learned counsel for the appellant-companies, that the definition of the term "securities" under the Companies Act includes "hybrids" (consequent

upon the amendment made in 2000), whereas, an identical definition of the term "securities" under the SEBI Act, does not provide for such inclusion. Based on the aforesaid provisions, it is the submission of the learned counsel for the appellant-companies, that "hybrids" would be treated as "securities" within the meaning of the Companies Act, but cannot be treated as "securities" within the meaning of the SEBI Act. Founded on the aforesaid statutory interpretation, it is the contention of the learned counsel for the appellant-companies, that SEBI has no jurisdiction, either in matters of administration or in matters of regulation, over "hybrids". It is important to keep in mind, that the aforesaid submission was canvassed to overcome, the contention of SEBI, that it had a clearly defined administrative role on the subject of "securities" under section 55A of the Companies Act.

86. The submission advanced at the hands of the learned counsel for the appellant-companies, as has been noticed in the foregoing paragraphs, was extremely impressive. The matter was expressed so simply, that it would be difficult to find any flaw therein. A closer examination of the controversy in hand, however, would persuade one to conclude, that the aforesaid submission is fallacious. It is not a matter of dispute between the rival parties, that consequent upon an amendment made in 2000 (with effect from 13.12.2000) section 55A was added to the Companies Act. The aforesaid addition demarcated between SEBI on the one hand, and the Central Government (as also, the Tribunal and the Registrars of Companies) on the other, spheres of administrative control over "different provisions" and "subjects" of the Companies Act. Even out of the expressly demarcated provisions assigned to SEBI, the administrative authority

vested in the SEBI was limited "…to issue and transfer of securities and non payment of dividend…". Thus viewed, the subject of "securities" and matters connected thereto were, generally to be administered by the SEBI (after the addition of section 55A to the Companies Act), whereas, all the remaining provisions on subjects other than "securities" and matters connected thereto, were generally to be administered by the Central Government (as also, the Tribunal and the Registrar of Companies). There can be no doubt, that the administrative authority of SEBI pertaining to the provisions of Companies Act, could only be determined on the basis of the definitions, as are contained in the Companies Act. Since the definition of term "securities" contained in section 2(45AA) of the Companies Act, expressly includes "hybrids", it is inevitable to conclude, that while interpreting the provisions of Companies Act (including the administrative role assigned to SEBI under section 55A), "hybrids" would be treated as a component of the term "securities". This is so, because the term "securities" defined in section 2(45AA) expressly includes "hybrids". In the aforesaid view of the matter, irrespective of whether "hybrids" are included in the term "securities" under the SEBI Act, while interpreting the provisions of the Companies Act, even with reference to SEBI, "securities" will include "hybrids". Therefore, the term "securities" in section 55A of the Companies Act, even while being examined with reference to the administrative powers assigned to SEBI thereunder, would include "hybrids". The aforesaid conclusion constitutes a clear answer to the query posed above, with reference to section 55A of the Companies Act.

The second perspective:

87. An attempt shall now be made to determine whether "hybrids" can also be included in the definition of the term "securities" for the purposes of the SEBI Act. For the aforesaid analysis reference may first be made to section 2(19A) of the Companies Act which is being extracted hereunder:

> "2(19A) "hybrid" means any security which has the character of more than one type of security, including their derivatives;"

The term "hybrid" is not defined under the SEBI Act, and consequently it may be appropriate to accept the same, as it has been defined in the Companies Act, specially with reference to an issue arising in respect of a public company. Ofcourse, it would not have been apt to rely on section 2(19A) of the Companies Act, if the term "hybrid" had also been defined in the SEBI Act or had even been defined in the SC(R) Act on the Depositories Act, 1996, because section 2(2) of the SEBI Act postulates, that words and expressions used but not defined under the SEBI Act, but defined in the SC(R) Act or in the Depositories Act, 1996 would be attributed the meaning given to them in the said Acts. But the term "hybrid" has also not been defined in either of the aforesaid enactments. The term "hybrid" as defined in the Companies Act means "any security" having "the character of more than one type of security" and "includes their derivatives". For the purposes of the SEBI Act, the term "securities" is accepted as it is defined in section 2(h) of the SC(R) Act. Section 2(h) of the SC(R) Act does not define the term "securities" exhaustively, because clauses (i) to (iia) thereof, only demonstrate what may be treated as included in the definition of the term "securities". And, clause (i) of section 2(h) of the SC(R) Act, includes within the definition of the term "securities" inter alia, "bonds", "debentures" and "other

marketable securities of a like nature". For the present controversy it is sufficient to notice, that the appellant-companies through their respective RHPs had invited subscription to, Optionally Fully Convertible "Debentures" (OFCDs). On receipt of subscription amounts from investors, the appellant-companies had issued different kinds of "bonds" (described as Abode Bonds, Nirman Bonds and Real Estate Bonds, by SIRECL; and Multiple Bonds, Income Bonds and Housing Bonds, by SHICL). Since the term "hybrid" has been expressed as "…means any security…" there can be no doubt that a "hybrid" is per-se a security. Moreover, the term "security" in its definition includes "…other marketable securities of a like nature…". Therefore, even if for one or the other reason, the OFCDs issued by the appellant-companies may not strictly fall within the terms "debentures" or "bonds" (referred to in the definition of the term "securities") they would nonetheless fall within the ambit of the expression "securities of a like nature". For this, the reasons are as follows. The definition of the term "hybrid" also explains that a "hybrid" has the character of more than one kind of "security" or their "derivatives". The term "securities" also includes "derivatives". Therefore, even if the definition of the term "hybrid" is construed strictly, it would fall in the realm of "securities of a like nature". And if, "securities of a like nature" are "marketable", they would clearly fall within the expanse of the term "securities" defined in section 2(h) of the SC(R) Act (and therefore also, section 2(1)(i) of the SEBI Act). The OFCDs/bonds issued by appellant-companies were also clearly marketable, because the RHPs issued by the two companies provided, that the subscribers would be at liberty to transfer the OFCDs/bonds, to any other person. Although, the transfer of OFCDs/bonds was to be subject to the terms and

conditions prescribed, and the approval of the appellant-companies. In the absence of any prescribed terms and conditions barring transfer, the OFCDs/bonds were clearly transferable, and therefore, "marketable". The term "marketable" simply means, that which is capable of being sold. Allowing the liberty to subscribers to transfer the OFCDs/bonds made them "marketable". There is therefore, no room for any doubt, that the term "hybrid", as defined in the Companies Act, would squarely fall within the term "securities" as defined under section 2(1) (i) of the SEBI Act (i.e., Section 2(h) of the SC(R) Act).

88. In view of the above it is clear, that "hybrids" are included within the term "securities" not only for the purposes of Companies Act, but also, under the SEBI Act. SEBI therefore, would have jurisdiction even over "hybrids", even under the provisions of the SEBI Act.

Whether it is optional for a public company, intending to offer shares or debentures to the public, to have the same listed on a recognized stock exchange (as is claimed by the appellant-companies) or is it mandatory (as is being asserted by the SEBI)?

89. According to the learned counsel for the appellant-companies, it was not imperative for either the SIRECL or SHICL to make an offer of the OFCDs through one or more recognized stock exchange(s). This has been the firm position adopted by the appellant-companies, before the SEBI, the SAT and even before us. According to learned counsel, even before the opening of the offer, in furtherance of the RHPs issued by the two companies, they had made their position clear by expressing, that they did not intend to be listed on any

recognized stock exchange(s). The aforesaid position expressed by the two companies in their respective RHPs, was accepted and approved by the respective Registrars of Companies. According to learned counsel, registration of the aforesaid RHPs itself implies the fulfillment of all legal norms and formalities.

90. In so far as the instant aspect of the matter is concerned, learned counsel for the appellant-companies also placed reliance on section 60B of the Companies Act, which is reproduced hereunder:

> "60B. **Information Memorandum** (1) A public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus.
> (2) A company inviting subscription by an information memorandum shall be bound to file a prospectus prior to the opening of the subscription lists and the offer as a red-herring prospectus, at least three days before the opening of the offer.
> (3) The information memorandum and red herring prospectus shall carry same obligations as are applicable in the case of a prospectus.
> (4) Any variation between the information memorandum and the red-herring prospectus shall be highlighted as a variations by the issuing company.
> *Explanation*. – For the purposes of sub-sections (2), (3) and (4), "red-herring prospectus" means a prospectus which does not have any complete particulars on the price of the securities offered and the quantum of securities offered.
> (5) Every variation as made and highlighted in accordance with sub-section (4) above shall be individually intimated to the persons invited to subscribe to the issue of securities.
> (6) In the event of the issuing company or the underwriters to the issue have invited or received advance subscription by way of cash or post-dated cheques or stock-invest, the company or such underwriters or bankers to the issue shall not encash such subscription moneys or post-dated cheques or stock-invest before the date of opening of the issue, without having individually intimated the prospective subscribers of the variation and without having offered an opportunity to such prospective subscribers to withdraw their application and cancel their post-dated cheques or stock-invest or return of subscription paid.
> (7) The applicant or proposed subscriber shall exercise his right to withdraw from the application on any intimation of variation within seven days from the date of such intimation and shall indicate such withdrawal in

writing to the company and the underwriters.

(8) Any application for subscription which is acted upon by the company or underwriters or bankers to the issue without having given enough information of any variations, or the particulars of withdrawing the offer or opportunity for canceling the post-dated cheques or stock-invest or stop payments for such payments shall be void and the applicants shall be entitled to receive a refund or return of its post-dated cheques or stock-invest or subscription moneys or cancellation of its application, as if the said application had never been made and the applicants are entitled to receive back their original application and interest at the rate of fifteen per cent from the date of encashment till payment of realization.

(9) Upon the closing of the offer of securities, a final prospectus stating therein the total capital raised, whether by way of debt or share capital and the closing price of the securities and any other details as were not complete in the red-herring prospectus shall be filed in a case of a listed public company with the Securities and Exchange Board and Registrar, and in any other case with the Registrar only."

It was submitted that section 60B is applicable to listed public companies, as well as, to unlisted public companies. It was pointed out, that the only obligation contemplated under section 60B, which distinguishes listed public companies from unlisted public companies, is provided for under sub-section (9), thereof. According to the learned counsel for the appellant-companies, the process of issue of securities by a public company, can be initiated by circulation of an "information memorandum" to the public. The procedure contemplated under section 60B aforementioned, contemplates the issuance of a RHP, and thereafter a final prospectus. At the time of submission of the "final prospectus", in terms of sub-section (9) of section 60B of the Companies Act, different authorities are contemplated before whom the final prospectus has to be submitted. For listed public companies the final prospectus has to be filed with the SEBI, whereas in all other cases, the final prospectus is to be filed with the concerned Registrar of Companies. According to the learned counsel for the appellant-companies, both the companies abided by procedure contemplated under section 60B of the

Companies Act. It was submitted, that since neither of the two companies were listed on a recognized stock exchange, their RHPs were submitted by SIRECL, as also, SHICL to the Registrar of Companies. It was also asserted that neither of the companies could be faulted for having made any false or incorrect disclosure, or for having not complied with the procedure prescribed in section 60B of the Companies Act. Since both the companies categorically adopted the stance, that they did not intend to be listed on any recognized stock exchange(s), according to learned counsel, there was no express or implied requirement for the appellant-companies, to approach the SEBI, in respect of the issue in hand. It was also submitted, that the registration of the respective RHPs issued by the two companies, by the respective Registrars of Companies, substantiates due compliance of the prescribed procedure. It was also contended, that having chosen to remain unlisted, the appellant-companies even during the course of proceedings before the SEBI and SAT respectively, were not accused of having contravened any of the substantive or procedural requirements of section 60B of the Companies Act. It is therefore sought to be canvassed, that the appellant-companies having chosen the section 60B option, could not be compelled/persuaded to have their OFCDs listed in one or more recognized stock exchange(s).

91. In order to counter the contentions advanced at the hands of the learned counsel for the appellant-companies, reliance on behalf of the SEBI was placed on section 73 of the Companies Act. Section 73 aforementioned, is being extracted hereunder:

> "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 exchange 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 Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the names of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void if the permission has not been granted by the stock exchange or each such stock exchange as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

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.

2A. Where permission has been granted by the recognized stock exchange or stock exchanges for dealing in any shares or debentures in such stock exchange or each such stock exchange and the moneys received from applicants for shares or debentures are in excess of the aggregate of the application moneys relating to the shares or debentures in respect of which allotments have been made, the company shall repay the moneys to the extent of such

excess forthwith without interest, and if such money is not repaid within eight days, from the day the company becomes liable to pay 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.

2B. If default is made in complying with the provisions of sub-section (2A), the company and every officer of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees, and where repayment is not made within six months from the expiry of the eighth day, also with imprisonment for a term which may extend to one year.

3. All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has seen granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2); and if default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.

3A. Moneys standing to the credit of the separate bank account referred to in sub-section (3) shall not be utilized for any purpose other than the following purposes namely:—

(a) adjustment against allotment of shares, where the shares have been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus; or

(b) repayment of moneys received from applicants in pursuance of the prospectus, where shares have not been permitted to be dealt in on the stock exchange or each stock exchange specified in the prospectus, as the case may be, or, where the company is for any other reason unable to make the allotment of share.

4. Any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of this section shall be void.

5. For the purposes of this section, it shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in sub-section (1).

6. This section shall have effect—

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus, as if he had applied therefor in pursuance of the prospectus; and

(b) in relation to a prospectus offering shares for sale, with the following modifications, namely:—

(i) references to sale shall be substituted for references to allotment;

(ii) the persons by whom the offer is made, and not the company, shall be liable under sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly; and

(iii) for the reference in sub-section (3) to the company and every officer of the company who is in default, there shall be substituted a reference to any person by or through whom the offer is made and who is knowingly guilty of, or willfully authorizes or permits, the default.

7. No prospectus shall start that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognized stock exchange."

According to the learned counsel presenting SEBI, a perusal of sub-section (1) of section 73 reveals, that a company intending to offer shares/debentures "to the public" by issue of a prospectus, must apply to one or more recognized stock exchange(s) for permission, that its shares or debentures be dealt with by such recognized stock exchange(s). With reference to the term "prospectus" depicted in sub-section (1) of section 73 of the companies Act, our attention was invited to sub-sections (2) and (3) of section 60B of the Companies Act, which requires a

company inviting subscription by way of an "information memorandum" to file a "prospectus" prior to the opening of the subscription lists and the offer as a RHP, at least three days before the opening of the offer. Sub-section (3) of section 60B of the Companies Act leaves no room for any doubt, that an "information memorandum" and an RHP are to carry the same obligations as are applicable in the case of a "prospectus" under the Companies Act. Accordingly, the position adopted by the SEBI was, that the appellant-companies having circulated an "information memorandum" and having expressly issued their respective RHPs, must be deemed to have accepted the obligation imposed by sub-section (3) of section 60B of the Companies Act, namely, the "information memorandum" and the RHP would carry the same obligations as are applicable in the case of a "prospectus". Sub-sections (4) to (8) of section 60B of the Companies Act, according to the learned counsel for the SEBI, allows an investor to withdraw any deposits made, if the position disclosed in the "information memorandum" or the RHP is varied in any manner. In case an investor exercises the said option because of any such variation, it was submitted, the deposits received from such investor, must mandatorily be returned with interest at the rate of 15%. Not only that, according to the SEBI, even if an application made by a public company to one or more recognized stock exchanges, for permission to be dealt with through one or more recognized stock exchange(s) is eventually not accepted by any recognized stock exchange, the concerned public company must forthwith repay the deposits received. If the concerned company fails to refund the amount within the stipulated time, it is also obliged to pay interest for delayed payments. Learned counsel for the SEBI also placed reliance on section 73 of the SEBI Act,

to contend, that in case a public company wishes to make an offer of debentures "to the public", it can do so only through one or more recognized stock exchange(s). And therefore, according to learned counsel, it is mandatory for a public company, intending to offer debenture "to the public", to have the same listed in one or more recognized stock exchange(s).

92. On having given a thoughtful consideration to the submissions advanced at the hands of the rival parties, it needs to be clarified, that section 60B (relied on by the appellant-companies) and section 73 of the Companies (relied upon by SEBI) have to be read harmoniously. This is so, because the Companies Act does not postulate and overriding effect of one over the other. The contentions advanced on behalf of the rival parties will have to be examined in a manner, that the purpose and meaning assigned by the legislature to both provisions, is not lost.

93. Section 60B has been provided with heading "information memorandum". The term "information memorandum" stands defined in section 2(19B) of the Companies Act as under:

> "2(19B) "information memorandum" means a process undertaking prior to the filing of a prospectus by which a demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed, by means of a notice, circular, advertisement or document;"

In terms of the aforesaid definition, an "information memorandum" is a means/process adopted by a company, to elicit a demand for the securities proposed to be issued, as also, to determine the price at which they could be offered. Stated differently, through an "information memorandum" a company assesses a demand for the proposed securities in the market, and the price

which the public would be willing to offer for the same. This response solicited from the public presupposes, that the securities are to be collected by way of an offer "to the public". Such an offer in terms of section 60B is made either through a "prospectus" or a RHP.

94. It is also necessary to lay down the import of sub-section (2) of section 60B of the Companies Act, in so far as the present controversy is concerned. It is with the use of the words "shall be bound" that sub-section (2) aforesaid, requires every public company which has issued an "information memorandum" to follow it up with a "prospectus"/RHP. In other words, after issuing an "information memorandum" the concerned public company is commanded to issue a prospectus/RHP. A "prospectus" or the RHP, depicts the terms and conditions of the offer. The binding effect thereof has been noticed in the submissions advanced on behalf of the SEBI which I hereby accept, as the true import of section 60B of the Companies Act. Any alteration in the terms and conditions depicted in the "prospectus" or RHP entitles the applicant/investor to withdraw the entire amount deposited. The depositor is also is entitled to a refund of the entire amount along with interest.

95. The situation emerges thus. The appellant-companies are admittedly public companies. Having issued an "information memorandum" it was binding on them to issue a prospectus/RHP. Both companies have actually issued RHPs. The purpose whereof was to invite subscriptions to their OFCDs. It has already been concluded above, that the appellant-companies invited subscriptions, by making an offer "to the public". Since the invitation/offer was made "to the public", the same could only have been through one or more recognized stock

exchange(s). Once a public company adopts that course, which is actually a mandate of law emerging from section 73 of the Companies Act, the concerned companies portfolio changes that to a "listed" public company. So listing in the present controversy was an inevitable consequence of inviting subscriptions from the public. There can therefore be no hesitation to conclude, that the procedure contemplated in section 73 of the Companies Act, whenever a public company wishes to issue debentures "to the public", is not optional but mandatory. The result of the present deliberations based on a collective reading of section 60B and section 73 of the Companies Act is, that a public company making an invitation/offer "to the public" can do so only by a process of listing in one or more recognized stock exchange(s). The aforesaid mandate of law is imperative and cannot be relaxed at the discretion of the concerned public company.

96. Having recorded the aforesaid conclusion, it is also essential to notice, that the aforesaid determination has a bearing on the query being dealt with immediately hereinafter. That is so, because learned counsel representing the rival parties are agreed, that the requirement of "listing" automatically brings in the jurisdiction of the SEBI, as it transforms a "public company" into a "listed public company".

Whether SEBI had the jurisdiction to regulate the OFCDs issued by SIRECL and SHICL (as is the case of the SEBI), or is it that SEBI has no jurisdiction over the OFCDs issued by the two companies (as is the case of appellant-companies)?

The first perspective

97. It is the vehement contention of the learned counsel for the appellant-

companies that the jurisdiction of SEBI is limited to administration of listed public companies, as also such public companies which "intend" to get their securities listed on a recognized stock exchange. Not only that, administration of SEBI over such companies, it is contended, is also limited to the subject of "issue and transfer of securities and non payment of dividend". For a complete and effective understanding of the submission advanced at the hands of the learned counsel for the appellant-companies, section 55A of the Companies Act is set out below:

> "55A. **Powers of Securities and Exchange Board of India** – The provisions contained in Sections 55 to 58, 59 to 81 (including sections 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 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 the 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."

According to the learned counsel for the appellant-companies, it is not a matter of dispute that SIRECL and SHICL are not "listed" companies. Therefore, according to the learned counsel, clause (a) of section 55A of the Companies Act cannot be invoked to determine the jurisdiction of the SEBI. According to learned counsel, SEBI may possibly justify its jurisdiction through the route of clause (b) of section 55A by asserting, that SIRECL as also SHICL "intended" to have their OFCDs listed on a recognized stock exchange. In so far as clause (b) of section 55A of the Companies Act is concerned, it has been the emphatic and repeated contention of the learned counsel for the appellant-companies, that the

appellant-companies made it clear in writing, not only in their respective RHPs, but also whenever called upon, that they did not "intend" to be listed on any recognized stock exchange. It was pointed out, that this factual position was officially affirmed when the respective Registrars of Companies registered their RHPs. Therefore, the vehement submission before us also has been, that it is futile to assume to the contrary, what the appellant-companies have repeatedly expressed in writing. Thus viewed, the contention of the learned counsel for the appellant-companies was, that SEBI had no jurisdiction to administer the affairs of the appellant-companies even in matters relating to "issue and transfer of securities and non payment of dividends".

98. On a thoughtful consideration to the submissions advanced on behalf of the appellant-companies on the subject of jurisdiction, based on the interpretation of section 55A of the Companies Act, it emerges that clause (b) of section 55A of the Companies Act uses the term "intend". And what is "intended" is a matter of the mind. Therefore, unless actions speak for themselves, no presumption can be drawn on the "intent" of a party. "Intent" as one commonly understands is something aimed at or wished as a goal; it is something that one resolves to do; it is a will to achieve as an end; it is a direction as one's course; it is planning towards something to be brought about; it is something that an individual fixes the mind upon; it is a design for a particular purpose. When a party expresses its design repeatedly in writing, as it is the case of the appellant-companies, no contrary assumption should normally be drawn. But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, "intent" has its

limitations also, confining it within the confines of lawfulness. It has already been concluded above, that SIRECL and SHICL had not invited subscriptions to their respective OFCDs by "private placement". It has been held, not only inferentially, but also as a matter of law (on an interpretation of section 67 of the Companies Act), as also, as a matter of fact, that the SIRECL and SHICL had called for subscription to their respective OFCDs by way of an invitation "to the public". It has also been deduced (by relying on sections 67 and 73 of the Companies Act) above, that an invitation for subscription from the public, could have been made only by way of listing, through one or more recognized stock exchange(s). It has also been concluded, that the purpose sought to be achieved by the two companies (relying on section 60B of the Companies Act) by merely complying with the requirements of the procedure contemplated in section 60B of the Companies Act, is not acceptable in law, as section 60B is not a stand alone provision. Section 60B of the Companies Act has to be harmoniously read along with other provisions of the Companies Act (as for instance section 67). The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant-companies could have "intended", what was contrary to the mandatory requirement of law. It may be reiterated, that learned counsel representing the rival parties agreed, while advancing their submissions on the preceding issue, that if it came to be concluded by this Court that "listing" with a recognized stock exchange was a mandatory requirement for the appellant-companies (for inviting subscription to their OFCDs), it would

automatically bring in the jurisdiction of the SEBI. There can therefore, be no hesitation in concluding, that inspite of the observations recorded by the appellant-companies in writing, including in the RHPs issued by them, as also the registration of the said RHPs by the respective Registrars of Companies, the said companies must be deemed to satisfy the requirements of clause (b) of section 55A of the Companies Act. The obvious consequence thereof would be, that the power of administration in the present set of circumstances lies in the hands of the SEBI.

99. It would be relevant to notice, for the benefit of the learned counsel representing the appellant-companies, that certain ancillary submissions were also advanced on the basis of section 55A of the Companies Act. As for instance, a reference was made to the sections specifically incorporated in section 55A of the Companies Act. It was submitted, that SEBI could have jurisdiction only on matters arising out of provisions expressly mentioned in the said section, and under no other provision of the Companies Act. It was canvassed, that provision which were relied upon by the appellant-companies to canvass their claims before us, particularly section 60B, does not fall within the administrative control of SEBI, as the same is not expressly mentioned therein. To advance the aforesaid contention, learned counsel placed reliance on the provisions placed within brackets in section 55A of the Companies Act, namely, "(including sections 66A, 77A and 80A)". It was contended, that since section 60B was not expressly included along with other provisions, noticed in the brackets, it would be natural to infer that the SEBI would have no role over issues arising out of section 60B of the Companies Act. It is not necessary to record any

express finding on the aforesaid submission, advanced at the hands of the learned counsel for the appellant-companies, since independently of section 55A of the Companies Act, it has already been concluded hereinabove, that the SEBI would have jurisdiction over matters emerging out of section 60B in view of the express and clear depiction in sub-section (9) of section 60B itself, specially in a situation as the one presented in the present case, wherein subscription towards the OFCDs under reference could only have been legal, if it was sought through a process of listing, in one or more recognized stock exchange(s). It is therefore, that one feels, that the other submissions advanced at the hands of the learned counsel for the appellant-companies by placing reliance on section 55A of the Companies Act, do not arise for adjudication, in the present controversy.

The second perspective

100. It is not possible for one to lose sight of the fact, that the SAT in the impugned order dated 18.10.2011 had recorded its conclusions on jurisdiction without even placing reliance on the provisions of the Companies Act. According to the SAT, under sections 11, 11A, 11B etc., of the SEBI Act, SEBI has the power of regulating all kinds of companies dealing with securities. The aforesaid determination at the hands of SAT, was not assailed by the appellant-companies during the course of hearing. Be that as it may, it is essential to independently examine the issue, so as to determine the authenticity of the conclusion drawn by the SAT, hereinafter.

101. The Securities and Exchange Board of India (SEBI) was established in 1988 by way of a Government resolution to promote orderly and healthy growth of the securities market and for investors' protection. On account of tremendous

growth of the capital market characterized particularly by increasing participation of the public, to sustain confidence in the capital market it was considered essential to ensure investors' protection. Accordingly, it was decided to vest SEBI with statutory powers, so as to enable it to deal effectively with all matters relating to the capital market. In the first instance, as Parliament was not in session, keeping in view the urgency of the matter, the President promulgated the Securities and Exchange Board of India Ordinance, 1992 on 30.1.1992. The same was substituted by the Securities and Exchange Board of India Act, 1992 and the Securities Contracts (Regulation) Act, 1956. After the aforesaid legislative enactments remained in force for a few years, experience revealed, a need to amend the original enactments in respect of certain categories of intermediaries, persons associates with the securities markets and companies; on matters relating to issue of capital and transfer of securities. The original SEBI Act was accordingly amended in 1995. A relevant extract of the statement of objects and reasons recorded for the aforesaid amendment is being extracted hereunder:

> "xxx xxx xxx
> 2. On the basis of past experience of the Board, a need has been felt to amend the said Acts in respect of certain categories of intermediaries, persons associated with the securities market and companies on matters relating to the issue of capital and the transfer of securities.
> 3. In order to enable the Board to function more effectively, it has become essential to amend the aforesaid Acts to provide, inter alia, the following –
>
> (a) regulate the companies on matters relating to issue of capital, transfer of securities and other matters incidental thereto;
>
> (b) bring intermediaries like depositories, custodians for securities and some other categories of persons associated with the securities market like foreign institutional investors, credit rating

agencies and venture capital funds which play a major role in the development of the capital market which were outside the purview of the Board;

(c) impose monetary penalties also in addition to or other than penalties of suspension or cancellation of certificate of registration which may not be appropriate in all case of default;

(d) provide for appointment of adjudicating officer for imposition of penalties and for establishment of Securities Appellate Tribunal to hear appeals from the orders or decisions of adjudicating officer;

(e) issue regulations without the approval of the Central Government;

(f) allow directors of companies to be appointed as members of the Board so that the Board benefits from the expertise of people familiar with the capital market;

(g) facilitate the issuance and trading of options in securities;

(h) allow the existing stock exchanges to establish additional trading floors outside their area of operation;

(i) make violation of the listing agreement as an offence.

xxx xxxx xxxx".

The SEBI Act was again amended in 1999, but in so far as the present controversy is concerned, the amendment of the SEBI Act in 2002 is of utmost relevance. The relevant part of the statement of objects and reasons of the amendment of the SEBI Act in 2002 is being reproduced below:

"xxx xxxxx xxx

2. Recently many shortcomings in the legal provisions of the Securities and Exchange Board of India Act, 1992 have been noticed, particularly with respect to inspection, investigation and enforcement. Currently, the SEBI can call for information, undertake inspections, conduct enquiries and audits of stock exchanges, mutual funds, intermediaries, issue directions, initiate prosecution, order suspension or cancellation of registration. Penalties can also be imposed in case of violation of the provisions of the Act or the rules or the regulations. However, the SEBI has no jurisdiction to prohibit issue of securities or preventing siphoning of funds or assets stripping by any company. While the SEBI can call for information from intermediaries, it cannot call for information from any bank and other authority or board or corporation established or constituted by or under any Central, State or Provincial Act. The SEBI cannot retain books of accounts, documents, etc., in its custody. Under the existing provisions contained in the Securities and Exchange Board of India Act, 1992, the SEBI cannot issue commissions for the examination of

witnesses or documents. Further, the SEBI has pointed out that existing penalties are too low and do not serve as effective deterrents. At present, under section 209-A of the Companies Act, 1956, the SEBI can conduct inspection of listed companies only for violations of the provisions contained in sections referred to in section 55-A of that Act but it cannot conduct inspection of any listed public company for violation of the SEBI Act or rules or regulations made thereunder.

3. In addition, growing importance of the securities markets in the economy has placed new demands upon the SEBI in terms of organization structure and institutional capacity. A need was therefore felt to remove these shortcomings by strengthening the mechanisms available to the SEBI for investigation and enforcement so that it is better equipped to investigate and enforce against market malpractices.

4. In view of the above, the Securities and Exchange Board of India (Amendment) Ordinance, 2002 (6 of 2002) was promulgated on the 29th October, 2002 to amend the Securities and Exchange Board of India Act, 1992.

5. It is now proposed to replace the Ordinance by a Bill, with, inter alia, the following features-

(a) increasing the number of members of the SEBI from six (including Chairman) to nine (including Chairman);
(b) conferring power upon the Board, for,-

(i) calling for information and record from any bank or other authority or Board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which are under investigation or inquiry by the Board;
(ii) passing an order for reasons to be recorded in writing, in the interest of investors or securities market, either pending investigation or enquiry or on completion of such investigation or inquiry for taking any of the following measures, namely, to-

(A) suspend the trading of any security in a recognized stock exchange;
(B) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

(C) suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;

(D) impound and retain the proceeds or securities in respect of any transaction which is under investigation;

(E) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder;

(F) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation;

(iii) regulating or prohibiting for the protection of investors, issue of prospectus, offer document or advertisement soliciting money for issue of securities;

(iv) directing any person to investigate the affairs of intermediary or person associated with the securities market and to search and seize books, registers, other documents and records considered necessary for the purposes of the investigation, with the prior approval of a Magistrate of the first class.

(v) passing an order requiring any person who has violated or is likely to violate, any provision of the SEBI Act or any rules or regulations made thereunder to cease and desist for committing any causing such violation;

(c) prohibiting manipulative and deceptive devices, insider trading, fraudulent and manipulative trade practices, market manipulation and substantial acquisition of securities and control;

(d) crediting sums realized by way of penalties to the Consolidated Fund of India;

(e) amending the composition of the Securities Appellate Tribunal from one person to three persons;

(f) changing the qualifications for appointment as Presiding Officer and members of the Securities Appellate Tribunal;

(g) composition of certain offences by the Securities Appellate

Tribunal;

(h) conferring power upon the Central Government to grant immunity;

(i) appeal to the Supreme Court from the orders of the Securities Appellate Tribunal;

(j) enhancing the penalties specified in the SEBI Act."

It is not necessary to delineate individually the amendments made from time to time. Suffice it to state that besides amendments to the existing provisions. sections 11AA, 11AB, 11C and 11B came to be added into Chapter IV of the SEBI Act. Provisions contained in Chapter IV deal with the powers and functions of the Board. It is essential to refer to some of the relevant amended provisions, for the determination of the issue in hand. The said reference shall be limited to the extent of powers vested in the SEBI, to carry out its primary functions i.e., investors' protection and promotion of development and regulation of the securities market.

102. Section 11 which is the heart and soul of the SEBI Act is being extracted hereunder:

"11. **Functions of Board**:-

(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for -

(a) regulating the business in stock exchanges and any other securities markets;

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with

securities markets in any manner;

(ba) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf;

(c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;

(d) promoting and regulating self-regulatory organizations;

(e) prohibiting fraudulent and unfair trade practices relating to securities markets;

(f) promoting investors' education and training of intermediaries of securities markets;

(g) prohibiting insider trading in securities;

(h) regulating substantial acquisition of shares and take-over of companies;

(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market intermediaries and self-regulatory organizations in the securities market;

(ia) calling for information and record from any bank or any other authority or board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which is under investigation or inquiry by the Board;"

(j) performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956(42 of 1956), as may be delegated to it by the Central Government;

(k) levying fees or other charges for carrying out the purposes of this section;

(l) conducting research for the above purposes;

(la) calling from or furnishing to any such agencies, as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions;"

(m) performing such other functions as may be prescribed.

"(2A) Without prejudice to the provisions contained in sub-section (2), the Board may take measures to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognized stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent

and unfair trade practices relating to securities market."

(3) Notwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) or clause (ia) of sub-section (2) or subsection (2A), the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908),while trying a suit, in respect of the following matters, namely :

(i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;
(ii) summoning and enforcing the attendance of persons and examining them on oath;
(iii) inspection of any books, registers and other documents of any person referred to in section 12, at any place;
(iv) inspection of any book, or register, or other document or record of the company referred to in sub-section (2A);
(v) issuing commissions for the examination of witnesses or documents.

(4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-

(a) suspend the trading of any security in a recognized stock exchange;
(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
(c) suspend any office-bearer of any stock exchange or self-regulatory
organization from holding such position;
(d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;
(e) attach, after passing of an order on an application made for approval, by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that only the bank account or accounts or

any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation:

Provided that the Board may, without prejudice to the provisions contained in subsection (2) or sub-section (2A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

103. The first step would be to venture an understanding of section 11 of the SEBI Act, so as to grasp the effect and reach thereof. Sub-section (1) of section 11 of the SEBI Act casts an obligation on the SEBI, to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is, therefore, apparent that the measures to be adopted by the SEBI in carrying out its obligations are couched in open-ended terms, having no pre-arranged limits. In other words the extent of the nature and the manner of measures which can be adopted by the SEBI for giving effect to the functions assigned to the SEBI, have been left to the discretion and wisdom of the SEBI. It is necessary to record here, that the aforesaid power to adopt "such measures as it thinks fit" to promote investors' interest, to promote the development of the securities market and to

regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over sub-section (1) of section 11 of the SEBI Act. Coupled with the clear vesting of the power with SEBI referred to above, sub-section (2) of section 11 of the SEBI Act illustratively records the measures which can be adopted by the SEBI. For the present controversy reference may be made to clause (i) and (ia) of sub-section (2) which ordain, that the SEBI would be at liberty to call for information from, or undertake inspections of, or conduct inquiries, or audits into "stock exchanges", "mutual funds", and "other persons associated with the securities market", "intermediaries", and "self regulated organisation in the securities market". The power to call for information was expressly extended to "banks", "any other authority or board or corporation", in respect of any transaction in securities which is under investigation or inquiry (at the hands of the SEBI) by adding clause (ia) to sub-section (2). Sub-section (2A) of section 11 of the SEBI Act, extends to the SEBI, the power to inspect (in addition to power already delineated in sub-section (2) of section 11 referred to above) books, registers or other documents or records "of any listed public company or a public company… which intends to get its securities listed on any recognized stock exchange". Sub-section (3) of section 11 of the SEBI Act, vests with the SEBI, the same powers as are conferred with a civil court, in the matter of discovery and production of books of accounts and other documents, summoning and enforcing the attendance of persons and examining them on oath, inspection of any books, registers or other documents. The power aforementioned specifically governs matters relating to calling for information

already referred to hereinabove (under clauses (i) and (ia) of sub-section (2), and sub-section (2A) of section 11). In the interest of investors' protection or the securities market, sub-section (4) of section 11 of the SEBI's Act vests the SEBI with powers to pass interim directions in the nature of suspending the trading of any security in a recognized stock exchange, restraining persons from accessing the securities market and prohibiting persons associated with the securities market from buying, selling or dealing with securities, impound or restrain proceeds or securities in respect of any transaction which is under investigation, prohibit an intermediary or any other person associated with the securities market from disposing of or alienating any asset forming part of any investigation etc.. The first proviso under sub-section (4) aforementioned expressly extends the aforesaid power "to impound and retain the proceeds of securities…", "to attach …one or more bank account or accounts of any intermediary or any person associated with the securities market…". SEBI, can also "direct any intermediary or any person associated with the securities market …not to dispose of or alienate any asset…" in respect of "any listed public company or a public company…which intends to get its securities listed on any recognized stock exchange", if there are reasonable grounds to believe, that such company has been indulging in insider trading or fraudulent and unfair trade practices, relating to the securities market.

104. It is imperative to notice the expression "of any listed public company or a public company…which intends to get its securities listed on any recognized stock exchange" incorporated in sub-section (2A) and (4) of section 11 of the SEBI Act, and to determine the purport thereof. The aforesaid inclusion, cannot

be deemed to limit the power of the SEBI, so as to confine its jurisdiction only to companies which are listed or which intend to be listed. The reason for the instant inference is, that sub-section (2) does not curtail the powers and functions vested with the SEBI under sub-section (1) of section 11 of the SEBI Act as sub-section (2) aforementioned commences with the words "Without prejudice to the generality of the foregoing provisions…". This expression obviously preserves, the power vested in the SEBI under sub-section (1) of section 11 of the SEBI Act, to protect the interest of investors in securities and to promote the development and to regulate the securities market "by such measures as it thinks fit". Furthermore, sub-section (2) of section 11 of the SEBI Act, after making a reference to the measures generally referred to in sub-section (1) empowers/authorizes that SEBI "may provide for" a series of measures, which are delineated in clauses (a) to (m) thereof (of sub-section (2) of section 11 of the SEBI Act). The use of the words "may provide for" besides indicating the discretion vested in the SEBI, demonstrates that, the measures depicted in clauses (a) to (m) are illustrative and not exhaustive, more so, because sub-clause (2) of section 11 of the SEBI Act does not dilute the power vested in the SEBI under sub-section (1) thereof. While interpreting sub-section (1) of section 11 of the SEBI Act, it has already been concluded hereinabove, that the measures to be adopted by the SEBI in carrying out its obligations are couched in open-ended terms having no pre-arranged limits, to the discretion of the SEBI. Likewise, sub-sections (2A) and (4) of section 11 of the SEBI Act, commence with the words "without prejudice to the provisions contained in sub-section (2)". This establishes the legislative intent i.e., that sub-section (2A) and (4) are

subservient to sub-section (2) of section 11. But it has already been concluded above, that sub-section (2) is subservient to sub-section (1) of section 11. Therefore both sub-sections (2A) and (4) will inferentially be subservient to sub-section (1) of section 11 of the SEBI Act. Therefore, the obligation cast on SEBI, to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market "by such measure as it thinks fit", remains undiluted even by sub-sections (2A) and (4) of section 11 of the SEBI Act. An obvious question that may be posed is, that if the legislative desire was to extend the measures contemplated under section 11 of the SEBI Act to all kinds of companies, it was unnecessary to limit the scope of inspection contemplated under section 11(2A) of the SEBI Act, only to listed public companies or such public companies which intend to get their securities listed on any recognized stock exchange. Most definitely, the query would seem justified on a superficial reading of sub-sections (2A) and (4) of section 11. The aforesaid query would however not arise, if all the sub-sections of section 11 of the SEBI Act are harmoniously construed. The legislative intent emerging from sub-section (3) of section 11 of the SEBI Act, was to extend powers as are vested in a civil court under the Code of Civil Procedure, to only two of the clauses (i.e., clauses (i) and (ia)) of sub-section (2) of section 11 of the SEBI Act, even though, sub-section (2) aforesaid has 16 clauses. Likewise, the legislative intent emerging from sub-section (3) of section 11 of the SEBI Act was, to extend powers as are vested in a civil court under the Code of Civil Procedure, only to listed public companies or public companies which intend to get their securities listed on a recognized stock exchange. It is therefore, that an express mention

had to be made, to the sphere/area over which the SEBI would have the same powers which are vested in a civil court. Having so defined the scope of authority under section 11 (2A) of the SEBI Act, the legislature extended the power as is vested in a civil court (in the matter of discovery and production of books of accounts and other documents, summoning and enforcing the attendance of persons and examining them on oath, inspection of any books, registers or other documents), only to such of the companies which would fall within the expanse/field expressed. For exactly the same reason, so as to specify the area/expanse of powers vested with the SEBI under sub-section (4) of section 11 of the SEBI Act (with reference to clauses (d), (e) and (f) of sub-section (4), the legislature likewise limited the authority of SEBI, to listed companies or public companies which intend to get their securities listed on a recognized stock exchange. Therefore, in complete agreement with the determination by the SAT, it is concluded, that sub-section (2A) and sub-section (4) of section 11 of the SEBI's Act should not be misunderstood, as having limited the power of SEBI, so as to enable it to regulate only listed public company or such public companies which intend to get its securities listed on a recognized stock exchange. Accordingly, it is clear, that the limitation expressed in sub-sections (2A) and (4) of section 11 of the SEBI Act, would extend to the area/field of authority referred to above. Therefore, but for the aforesaid limited area/expanse, referred to above, SEBI's power would extend to all kinds of companies dealing with securities. The said power, as already noticed above, clearly emerges from the words "by such measures as it thinks fit" expressed in sub-section (1) of section 11 of the SEBI Act. For the reasons recorded above, the SAT was fully justified in

concluding, that the functions and the powers under section 11 of the SEBI Act, in so far as protecting the interest of the investors in securities market, as also, for promotion, development and regulation of the securities market, would be applicable to "listed" as well as "unlisted" companies. The said conclusion is expressed endorsed.

105. From Chapter IV of the SEBI Act reference must necessarily be made also to section 11A, which has direct implications, in so far as the present controversy is concerned. Section 11A of the SEBI Act is being reproduced hereunder:

> **11A. Board to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities.**
>
> (1) Without prejudice to the provisions of the Companies Act, 1956 (1 of 1956), the Board may, for the protection of investors-
>
> (a) specify, by regulations –
> (i) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and
> (ii) the manner in which such matters shall be disclosed by the companies;
> (b) by general or special orders –
> (i) prohibit any company from issuing prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;
> (ii) specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.
>
> (2) Without prejudice to the provisions of section 21 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Board may specify the requirements for listing and transfer of securities and other matters incidental thereto."

A perusal of section 11A extracted above, leaves no room for any doubt, that the authority of SEBI extends to issue of prospectuses, offer documents, including advertisements, soliciting money for the issue of securities etc. For the exercise

of such power SEBI has been vested with the authority to make regulations. In addition to the aforesaid authority SEBI has been vested with the power to issue general or special orders prohibiting any company from issuing a prospectus, any offer document or an advertisement soliciting money from the public, for the issue of securities. It has also been vested with the power to issue, general or special directions, and to specify conditions subject to which a prospectus, offer document or advertisement, may be issued. It is, therefore, futile for a company dealing with the securities to contend, that SEBI does not have the jurisdiction or the authority in respect to the subject of "issue of prospectus, offer document or advertisement" soliciting money for securities.

106. The importance and relevance of section 11 and 11A of the SEBI Act in the foregoing paras, has been highlighted above. Of equal importance are sections 11B and 11C of the SEBI Act. The same are being extracted hereinunder:

> "11B. **Power to issue directions-**
>
> Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,-
>
> (i) in the interest of investors, or orderly development of securities market; or
> (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
> (iii) to secure the proper management of any such intermediary or person,
>
> it may issue such directions,-
>
> (a) to any person or class of persons referred to in section 12, or associated with the securities market; or
> (b) to any company in respect of matters specified in section 11A,
>
> as may be appropriate in the interests of investors in securities and the

securities market

"11C. **Investigation**

(1) Where the Board has reasonable ground to believe that –

(a) the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market; or

(b) any intermediary or any person associated with the securities market has violated any of the provisions of this Act or the rules or the regulations made or directions issued by the Board thereunder,

It may, at any time by order in writing, direct any person (hereafter in this section referred to as the Investigating Authority) specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

(2) Without prejudice to the provisions of sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorized by it in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

(3) The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before it or any person authorized by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

(4) The Investigating Authority may keep in its custody any books, registers, other documents and record produced under sub-section (2) or sub-section (3) for six months and thereafter shall return the same to any intermediary or any person associated with securities market by whom or on whose behalf the books, registers, other documents and record are produced:

Provided that the Investigating Authority may call for any book,

register, other document and record if they are needed again:

Provided further that if the person on whose behalf the books, registers, other documents and record are produced requires certified copies of the books, registers, other documents and record produced before the Investigating Authority, it shall give certified copies of such books, registers, other documents and record to such person or on whose behalf the books, registers, other documents and records were produced.

(5) Any person, directed to make an investigation under sub-section (1), may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before him personally.

(6) If any person fails without reasonable cause or refuses –

(a) to produce to the Investigating Authority or any person authorized by it in this behalf any book, register, other document and record which is his duty under sub-section (2) or sub-section (3) to produce; or
(b) to furnish any information which is his duty under sub-section (3) to furnish; or
(c) to appear before the Investigating Authority personally when required to do so under sub-section (5) or to answer any question which is put to him by the Investigating Authority in pursuance of that sub-section; or
(d) to sign the notes of any examination referred to in sub-section (7),

he shall be punishable with imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

(7) Notes of any examination under sub-section (5) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) Where in the course of investigation, the Investigating Authority has reasonable ground to believe that the books, registers, other documents and record of, or relating to, any intermediary or any person associated with securities market in any manner, may be

destroyed, mutilated, altered, falsified or secreted, the Investigating Authority may make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of such books, registers, other documents and record.

(9) After considering the application and hearing the Investigating Authority, if necessary, the Magistrate may, by order, authorize the Investigating Authority –

(a) to enter, with such assistance, as may be required, the place or places where such books, registers, other documents and record are kept;
(b) to search that place or those places in the manner specified in the order; and
(c) to seize books, registers, other documents and record, it considers necessary for the purposes of the investigation:

Provided that the Magistrate shall not authorize seizure of books, registers, other documents and record, of any listed public company or a public company (not being the intermediaries specified under section 12) which intends to get its securities listed on any recognized stock exchange unless such company indulges in insider trading or market manipulation.

(10) The Investigating Authority shall keep in its custody the books, registers, other documents and record seized under this section for such period not later than the conclusion of the investigation as it considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person, from whose custody or power they were seized and inform the Magistrate of such return:

Provided that the Investigating Authority may, before returning such books, registers, other documents and record as aforesaid, place identification marks on them or any part thereof.

(11) Save as otherwise provided in this section, every search or seizure made under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches or seizures made under that Code."

Neither of the aforesaid provisions need a detailed analysis. A bare perusal of the aforesaid provisions brings to the fore, the extensive powers vested with the SEBI to issue directions and to make investigations. The power vested with SEBI,

is not limited in any manner, and shall therefore, be deemed to extend to both "listed" and "unlisted" public companies.

107. From a collective perusal of sections 11, 11A, 11B and 11C of the SEBI Act, the conclusions drawn by the SAT, that on the subject of regulating the securities market and protecting interest of investors in securities, the SEBI Act is a stand alone enactment, and the SEBI's powers thereunder are not fettered by any other law including the Companies Act, is fully justified. In fact the aforesaid justification was rendered absolute, by the addition of section 55A in the Companies Act, whereby, administrative authority on the subjects relating to "issue and transfer of securities and non payment of dividend" which was earlier vested in the Central Government (Tribunal or Registrar of Companies), came to be exclusively transferred to the SEBI.

108. In answering the question posed above, there seems no ambiguity that the SEBI has the jurisdiction to regulate and administer SIRECL and SHICL.

Whether it was a pre-planned attempt of SIRECL and SHICL, to bypass the regulatory (and administrative) authority of SEBI in respect of OFCDs/ bonds issued by them?

109. The issues dealt with hitherto-before were canvassed at the behest of the appellant-companies. The instant issue, is being dealt with at the behest of SEBI. During the course of hearing it was the vehement contention on behalf of the learned counsel representing SEBI, that SIRECL and SHICL had pre-planned to avoid the involvement of SEBI in the activities of the two companies. This, according to the learned counsel representing SEBI, was with the sole purpose of having a free hand in their endeavours. The instances pointed out by the learned

counsel for the SEBI can safely be discussed under three heads which are being dealt with hereinafter.

The first perspective:

110. The first contention advanced by the learned counsel representing SEBI, was based on section 56 of the Companies Act. Section 56 aforementioned, is extracted hereunder:

> "**56. Matters to be stated and reports to be set out in prospectus**
>
> (1) Every prospectus issued—
>
> (a) by or on behalf of a company, or
>
> (b) by or on behalf of any person who is or has been engaged or interested in the formation of a company,
>
> shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.
>
> (2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any of the requirements of this section, or purporting to affect him with notice for any contract, document or matter not specifically referred to in the prospectus, shall be void.
>
> (3) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a memorandum containing such salient features of a prospectus as may be prescribed which complies with the requirements of this section:
>
> Provided that a copy of the prospectus shall, on a request being made by any person before the closing of the subscription list be furnished to him:
>
> Provided further that this sub-section shall not apply if it is shown that the form of application was issued either—
>
> (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be punishable with fine which may extend to fifty thousand rupees.

(4) A director or other person responsible for the prospectus shall not incur any liability by reason of any non-compliance with, or contravention of, any of the requirements of this section, if—

(a) as regards any matter not disclosed, he proves that he had no knowledge thereof; or

(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or

(c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case were immaterial or was otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of Schedule II, unless it is proved that he had knowledge of the matters not disclosed.

(5) This section shall not apply—

(a) to the issue to existing members or debenture-holders of a company of a prospectus or form of application relating to shares in or debentures of the company whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons; or

(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange,

but, subject as aforesaid, this section shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

(6) Nothing in this section shall limit or diminish any liability which any

> person may incur under the general law or under this Act apart from this section."

Based on the aforesaid provision, it is the submission of learned counsel, that every company issuing a prospectus has to express all the details in terms of matters specified in Part-I (of Schedule 2) and set out the reports as specified in Part II (of Schedule 2). It is also the submission of the learned counsel, that Parts I and II can be given effect to, subject to the provisions contained in Part III (of Schedule 2). It is accordingly submitted, that in order to ensure, that an invitation for subscription from the public is made in consonance with the requirements stipulated by the SEBI, an amendment was made in Schedule 2 of the Companies Act in 2002, requiring the company issuing a prospectus, to make a declaration. The declaration contemplated by the aforesaid amendment is being extracted hereunder:

> "That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules made thereunder or guidelines issued, as the case may be."
>
> (emphasis is mine)

It is pointed out by the learned counsel representing SEBI, that in the RHPs filed by SIRECL and SHICL, the declaration introduced in 2002 was not filed. Instead, the two companies filed the following declaration:

> "All the relevant provisions of the Companies Act, 1956 and the guidelines issued by the Government have been complied with and no statement made in the prospectus is contrary to the provisions of the Companies Act, 1956 and rules thereunder."

It is apparent from the declaration filed by the appellant-companies that reference to the SEBI Act, as also, to the rules made thereunder, as also, the guidelines issued (by the SEBI) as contained in the amended declaration were omitted. It was therefore, the contention of the learned counsel for the SEBI, that the statutorily prescribed declaration, was unilaterally and deliberately not adhered to, by the two companies. This, according to the learned counsel, was done so that, the appellant-companies could avoid attention of the SEBI, as well as, to wriggle out of the statutory requirements of the SEBI Act, the rules made thereunder, as also, the guidelines issued by SEBI from time to time. It was submitted, that the most significant violation/omission of the provisions of the SEBI Act, was committed by asserting, that invitation to the OFCDs was made by way of "private placement", even though the aforesaid invitation was addressed to approximately 3 crore persons, and was actually subscribed by about 66 lakh people. It was pointed out, that in case of an invitation to 50 or more persons, the invitation is deemed to have been issued "to the public" (under the mandate of section 67 of the Companies Act). In case of an offer/invitation "to the public" an allotment of debentures can only be made through one or more recognized stock exchange(s) (under the mandate of section 73 of the Companies Act). Similar other violations, as have been mentioned in the body of the instant judgment, were also highlighted. More importantly, it was submitted by learned counsel, that any allotment made in violation of the statutory provisions, as for instance, inviting subscription in case of an issue "to the public", without reference to a recognized stock exchange, is void. In such a situation section 73 of the Companies Act itself provides, that the concerned company shall make a total

refund of the monies received by way of subscription. It is pointed out, that the subscription collected by the appellant-companies, which were admittedly to the tune of Rs.40,000 crores, is in complete violation of law. According to learned counsel, avoiding SEBI permitted the appellant-companies to commit all the irregularities/illegalities without having to face adverse action.

111. Having considered the aforesaid contention advanced at the hands of the learned counsel for the SEBI, there can be no denial about the unilateral and arbitrary violation of the declaration referred to by the learned counsel representing the SEBI. It is also apparent, that in the declaration made by the two companies, they had clearly avoided references to the SEBI and accordingly circumvented adherence to the provisions of the SEBI Act, rules and guidelines. The appellant-companies have likewise avoided, the provisions of the Companies Act (which are under the administrative control of the SEBI), as is apparent from the deliberations recorded above. There is, therefore, merit in the contention advanced by the learned counsel representing SEBI. Even though it is not possible for one to record a clear finding, whether or not the declaration under reference was altered with a pre-planned intention to bypass the regulatory and administrative authority of SEBI, there can be no hesitation to recording, that it certainly seems so.

The second perspective

112. Learned counsel representing the SEBI invited our my attention to an allegedly arbitrary procedure adopted by the appellant-companies. For this reference was made to the factual position pertaining to SIRECL. In this behalf it was submitted, that SIRECL issued its RHP pertaining to the OFCDs under

reference on 13.3.2008. SIRECL, however, circulated its "information memorandum" subsequent to the issuance of the RHP on 25.4.2008. It was submitted, that an "information memorandum" is a means/process adopted by a company, to elicit a demand for the securities proposed to be issued, as also, the price at which they could be offered. It is accordingly contended that through an information memorandum, a company assesses a demand for the proposed securities in the market, and the price which the public will be willing to offer for the same. It is therefore apparent, that the response solicited from the public (by way of an "information memorandum") presupposes that an offer would be made thereafter, through a formal prospectus (or RHP). Thus viewed, according to learned counsel, the "information memorandum" would inevitably precede the issuance of a prospectus (or RHP). Herein, however, the information memorandum was circulated well after the issuance of the RHP, which clearly indicates that the "information memorandum" had been circulated by the SIRECL, not for the purposes for which it is meant, but for some extraneous consideration. It is submitted, that the appellant-companies had apparently taken upon themselves to tread a path different from the one stipulated under the Companies Act.

113. On considering the submission advanced at the hands of the learned counsel representing SEBI, as has been noticed in the foregoing paragraph, it is clear that an "information memorandum" must inevitably precede the issuance of a prospectus (including a RHP). One must agree with the contention of the learned counsel, that there was no justification whatsoever for circulating an "information memorandum" after SIRECL had already issued a RHP. The

procedure adopted by the appellant-companies is obviously topsy turvy and contrary to the recognized norms in company affairs. All this makes the entire approach of the appellant-companies calculated and crafty. It is clearly apparent, that the appellant-companies had clearly taken upon themselves to tread a path different from the mandate of law delineated under the Companies Act. There can, therefore, be no doubt about the inferences drawn by the learned counsel representing the SEBI even in so far as the second perspective is concerned.

The third perspective:

114. Learned counsel representing SEBI also invited our attention to the attempt at the hands of the appellant-companies in withholding information from the SEBI. Details in this behalf have already been recorded under the first perspective, while debating the issue whether the invitation to subscribe to the OFCDs issued by SIRECL and SHICL was by way of "private placement". The aforesaid details are accordingly not being narrated again for reasons of brevity. I shall therefore, merely summarise the sequence of facts relevant for determining the willingness of the appellant-companies to disclose information sought by the SEBI. In this behalf, it is clear that the appellant-companies did not disclose information to SEBI despite its repeated requests. Not even, in the response to the summons (dated 30.8.2010 and 23.9.2010) issued by the SEBI containing threats of taking penal action and initiation of criminal prosecution. All this, failed to prompt the appellant-companies to divulge the facts solicited. Thereafter on 24.11.2010 the SEBI (FTM) passed far reaching directions against the appellant-companies. The Lucknow Bench of the High Court of Judicature at Allahabad on 13.12.2010 first stayed (whereby the SEBI (FTM) order dated

24.11.2010 was stayed) and thereafter, vacated the interim order passed in favour of the appellant-companies. While vacating the aforesaid order the High Court took express note of the fact, that the appellant-companies were not cooperating with the inquiry being conducted by the SEBI. The High Court felt, that the appellant-companies had thereby violated the assurance given to the High Court. The effort made by the appellant-companies to resurrect the earlier interim order (dated 13.12.2010) through an application filed before the High Court was rejected (on 29.11.2011), because the High Court was of the considered view, that the appellant-companies had not approached the High Court with clean hands, and the intention of the appellant-companies was not bona fide. Consequent upon directions issued by this Court, SEBI issued a second show cause notice (on 20.5.2011). The appellant-companies adopted the same stubborn position. They contested the show cause notice on legal pleas, and calculatingly did not disclose the information sought. The SEBI (FTM) by an order dated 23.6.2011 held, that the appellant-companies were in violation of law. The said order dated 23.6.2011 was assailed by the appellant-companies before the SAT. In the appeals preferred before the SAT, the appellant-companies remained steadfast in their approach by adopting the same course, as they had chosen before the SEBI (FTM). For the first time before this Court, in their challenge to the SAT order dated 26.8.2011 (whereby the SEBI (FTM) order dated 23.6.2011 was upheld), some details were disclosed by SIRECL. On an analysis the material placed before this Court, I have recorded hereinabove, that the same seemed to be unrealistic, and may well be, fictitious, concocted and made up. Independently of the interaction of the appellant-companies with SEBI,

from letters written by SIRECL in January, 2011, it was concluded by the SEBI (FTM), that the company was seeking professional services to collect and compile data pertaining to the OFCDs issued by it. Since the subscription to the OFCDs under reference commenced in March, 2008, the same raised suspicious about the genuineness and the bonafides of the appellant-companies. Surely the suspicion was well placed. This itself is sufficient to conclude, that the whole affair was doubtful, dubious and questionable. The consequence thereof, if correct, would be shocking.

115. There can therefore be no hesitation in accepting, that on all three perspectives raised at the behest of the SEBI, to demonstrate that there was a pre-planned attempt at the hands of the SIRECL and SHICL, to bypass the regulatory and administrative authority of the SEBI, does seem to be real. One can only hope, it is not so. But having so concluded, it is essential to express, that there may be no real subscribers for the OFCDs issued by the SIRECL or SHICL. Or alternatively, there may be an intermix of real and fictitious subscribers. The issue that would emerge in the aforesaid situation (which one can only hope, is untrue) would be, how the subscription amount collected, should be dealt with, specially when the impugned orders passed by the SEBI, SAT are to be affirmed. Even though I hope that all the subscribers are genuine, and so also, the subscription amount, it would be necessary to modify the operative part of the order issued by the SEBI which came to be endorsed by the SAT, so that the purpose of law is not only satisfied but is also enforced.

.....J.
(Jagdish Singh Khehar)

O R D E R

We, therefore, find, on facts as well as on law, no illegality in the proceedings initiated by SEBI as well as in the order passed by SEBI (WTM) dated 23.6.2011 and SAT dated 18.10.2011 and they are accordingly upheld. The order passed by this Court in C.A. No.9813 of 2011 filed by SIREC and in C.A. No.9833 of 2011 filed by SHICL, praying for extending the time for refund of the amount of Rs.17,400 crores, as ordered by SAT, stands vacated and consequently the entire amount, including the amount mentioned above will have to be refunded by Saharas with 15% interest. We have gone through each other's judgment and fully concur with the reasoning and the views expressed therein and issue the following directions in modification of the directions issued by SEBI (WTM) which was endorsed by SAT:

1. Saharas (SIRECL & SHICL) would refund the amounts collected through RHPs dated 13.3.2008 and 16.10.2009 along with interest @ 15% per annum to SEBI from the date of receipt of the subscription amount till the date of repayment, within a

period of three months from today, which shall be deposited in a Nationalized Bank bearing maximum rate of interest.

2. Saharas are also directed to furnish the details with supporting documents to establish whether they had refunded any amount to the persons who had subscribed through RHPs dated 13.3.2008 and 16.10.2009 within a period of 10 (ten) days from the pronouncement of this order and it is for the SEBI (WTM) to examine the correctness of the details furnished.

3. We make it clear that if the documents produced by Saharas are not found genuine or acceptable, then the SEBI (WTM) would proceed as if the Saharas had not refunded any amount to the real and genuine subscribers who had invested money through RHPs dated 13.3.2008 and 16.10.2009.

4. Saharas are directed to furnish all documents in their custody, particularly, the application forms submitted by subscribers, the approval and allotment of bonds and all other documents to SEBI so as to enable it to ascertain the genuineness of the subscribers as well as the amounts deposited, within a period of 10 (ten) days from the date of pronouncement of this

order.

5. SEBI (WTM) shall have the liberty to engage Investigating Officers, experts in Finance and Accounts and other supporting staff to carry out directions and the expenses for the same will be borne by Saharas and be paid to SEBI.

6. SEBI (WTM) shall take steps with the aid and assistance of Investigating Authorities/Experts in Finance and Accounts and other supporting staff to examine the documents produced by Saharas so as to ascertain their genuineness and after having ascertained the same, they shall identify subscribers who had invested the money on the basis of RHPs dated 13.3.2008 and 16.10.2009 and refund the amount to them with interest on their production of relevant documents evidencing payments and after counter checking the records produced by Saharas.

7. SEBI (WTM), in the event of finding that the genuineness of the subscribers is doubtful, an opportunity shall be afforded to Saharas to satisfactorily establish the same as being legitimate and valid. It shall be open to the Saharas, in such an eventuality to associate the concerned subscribers to establish their claims.

The decision of SEBI (WTM) in this behalf will be final and binding on Saharas as well as the subscribers.

8. SEBI (WTM) if, after the verification of the details furnished, is unable to find out the whereabouts of all or any of the subscribers, then the amount collected from such subscribers will be appropriated to the Government of India.

9. We also appoint Mr. Justice B.N. Agrawal, a retired Judge of this Court to oversee whether directions issued by this Court are properly and effectively complied with by the SEBI (WTM) from the date of this order. Mr. Justice B.N. Agrawal would also oversee the entire steps adopted by SEBI (WTM) and other officials for the effective and proper implementation of the directions issued by this Court. We fix an amount of Rs.5 lakhs towards the monthly remuneration payable to Mr. Justice B.N. Agrawal, this will be in addition to travelling, accommodation and other expenses, commensurate with the status of the office held by Justice B.N. Agrawal, which shall be borne by SEBI and recoverable from Saharas. Mr. Justice B.N. Agrawal is requested to take up this assignment without affecting his other engagements. We also order that all administrative expenses

including the payment to the additional staff and experts, etc. would be borne by Saharas.

10. We also make it clear that if Saharas fail to comply with these directions and do not effect refund of money as directed, SEBI can take recourse to all legal remedies, including attachment and sale of properties, freezing of bank accounts etc. for realizations of the amounts.

11. We also direct SEBI(WTM) to submit a status report, duly approved by Mr. Justice B.N. Agrawal, as expeditiously as possible, and also permit SEBI (WTM) to seek further directions from this Court, as and when, found necessary.

Appeals are accordingly dismissed subject to the above directions. However, there will be no order as to costs. We record our deep appreciation for the valuable assistance rendered by learned senior counsel appearing on either side for resolving the very intricate and interesting questions of law which arose for our consideration in these appeals.

.....J.

(K.S. Radhakrishnan)

.....J.
(Jagdish Singh Khehar)

New Delhi,
August 31, 2012