Seminar

on

Sahara India Real Estate Corporation Ltd.
v/s.
Securities and Exchange Board of India (SEBI)

22nd September, 2012

JUDGMENT OF THE HONOURABLE

SUPREME COURT OF INDIA

(31st August, 2012)

Justice K. S. Radhakrishnan

and

Justice Jadgish Singh Khehar

A REPORT ON THE SEMINAR

1) The seminar started as per schedule and got initiated through an opening remark by the compere, Ms. Shailaja Yadav, Assistant Professor, DR VN BRIMS who welcomed the dignitaries. She said "This judgment is of social importance and also of great concern to students and teachers of management. The MBA course has papers on Accounting, Finance, Business Law, Companies Act, Business Ethics and Corporate Governance and so on, hence, the relevance of this judgment."

2) Dr. K. Suryanarayanan gave his welcome address and Dr. P. M. Kelkar presented the background, rationale and context of such seminars including one held earlier in case of Vodafone judgement. Both of them raised very pertinent issues viz.

   a. What was Securities and Exchange Board of India (SEBI) doing when the process of raising the optionally fully convertible debentures (OFCD) were announced by Saharas?
   b. Is it not a case of the sleeping watchdog (SEBI) who was caught unaware and that too by a chance factor and by sheer mistake of Sahara filing a draft Red Herring prospectus for yet another company called Sahara Prime city Ltd.?
   c. What was the Ministry of Corporate Affairs and Registrar of Companies (ROC) doing when the OFCDs were raised under the pretext of private placement by the twin companies under Sahara?
   d. In spite of RBI ban on Sahara of taking deposits from public in 2012, why there was no coordination between RBI, SEBI and ROC?
   e. In spite of so much noise on "inclusive banking" is it not a case of RBI's failure of not anticipating the need for much more banking services in the country , so that the poor do not go to such private investments?
   f. How many such "Saharas" of similar or lower or higher magnitude remain to be detected?
   g. What will be the impact of such scams on society and the common man?
   h. Why the media which is so news hungry remaining silent on the case after an initial outburst of news items?
   i. Can anyone really estimate the efforts required from SEBI's side to the massive logistical exercise in trying to return Rs. 27,000 Crores (including interest) to 30 million investors in a short span of time ?
   j. How and from where Sahara will mobilise such a huge amount even if it liquidates its real estate assets?
   k. What is the preparedness of Indian banking Industry to provide loan to Sahara to tide over its liability?
   l. What made U. K. Sinha the SEBI chairman not to act upon the trouble shooting by his immediate colleague K. M. Mathew?
   m. What made SEBI to return a truck load of documents, which SEBI had asked for, submitted by SAH. on due date viz. 10th September, 2012 saying that – 'it has arrived after the office hours'?
   n. What will be the social implications of the Sahara scam?

o. Will there be a social unrest?
p. What happens to the case if Sahara is able to furnish full list of investors?
q. Which other NBFC's other than Sahara have raised money from market and have they followed SEBI procedures?
r. Has payment by cash, practices prevalent in India, anything to do with such scams?

3) Dr. Murthy presented an overview on the SAH. case which included the following:

a. The chronology of the events since 28th October, 2005 when SAH. India was incorporated as a Public Ltd. company since 16th September, 2009.
b. The SEBI-SAH.-MCA correspondence between 12th January, 2010 till SAH. appeal to the Supreme Court on 28th November, 2011.
c. The Supreme Court room drama in terms of the following:

☞Arguments of the Defense Counsel of Mr. Fali Nariman and Mr. Gopal Subramanium.

☞Arguments of Mr. Arvind Datar, Counsel for SEBI.

☞Judgment as enunciated by Justice K. S. Radhakrishanan and Jagdish Singh Khehar.

☞The post-judgement response of the press for a rather limited period of time.

d. Dr. Murthy's presentation highlighted the following principles:

☞Throughout the period (28th October, 2005 till 28th November, 2011) SAH. deployed dilatory tactics and shunned disclosure of information requested for and eventually demanded by competent authorities. This behaviour of SAH. went against the company in the judgment.

☞The Defense Counsel M/s. FN and GS argued eloquently but in vain, because as per the judgement the appellant company had come to the court with unclean hands and a track record, relating to the matter, which was crafty, calculative and pre-planned to defeat the purpose of law. The Defense Counsel tried their best to invoke the provisions of the Constitution and convince the Court that the fundamental rights of the appellant company were affected. However, the arguments did not hold water before the judges.

☞The Defense Counsel of SEBI, Mr. AD pointed out that SAH. obstructed the functioning of SEBI and precluded SEBI from performing its duties u/s. 11 of SEBI's Act.

☞The judges were unanimous on the following counts:

- ❖ Fraudulent accounting and non-disclosure of information – root cause of collapse – ENRON, BARINGS, World Com, BCCI and also the Harshad Mehta and Ketan Parekh scams.
- ❖ SEBI Act is not subsidiary to any other legislation. Of course, all the laws will work in tandem.
- ❖ SAH. did not approach the court with clean hands.
- ❖ There may be no real subscribers to OFCDs issued by SAH. or may be intermix of real and fictitious subscribers.
- ❖ Action that matters: that is what the law demands (Gissing v/s. Gissing).
- ❖ External actions reveal secrets.
- ❖ The corporate veil shall be lifted in this case.
  (*Dr. Murthy adds: in Vodafone case the Court just pierced the veil without actually lifting it. This is a landmark judgment to that extent*).

e. Dr. Murthy also highlighted the post-judgment response of the press through a collage of newspapers' headlines and ended his presentation with a diagram given below:

4) Dr. Vishnu Kanhere made a presentation on the post-judgment implication. He started by narrating the growth of Mr. Subroto Roy who started his career through sale of financial products on a lambretta and then rose to dizzy heights. He also presented the contributions of SAH. to various walks of social, economic and political life. He identified certain flaws in the functioning of SEBI in terms of their approach to the matter. SEBI, he said had not done enough homework in coming to the conclusion that the contributors to OFCDs were in fact, fictitious. They had studied a very, very, minor fraction of the stipulated 3 crore investors. Further, he also said the functioning of ROC, like a post office, cannot meet the expectations of an effective watchdog which would bark and bite at the right time. Dr. Kanhere presented the practical difficulties in tracking and tracing the long list of investors and also the modus operandi of establishing the veracity and authenticity of the individual investors within stipulated time. Though SEBI may have the intellectual wherewithal, the machinery required to be deployed for the task on hand is indeed difficult to mobilise. He illustrated the practical difficulties in identifying the names, addresses and other details to perform the task of verification for refund. He also identified two important issues viz.

☞Where is the legislative backing for SEBI to collect the money refunded by SAH. and the eventual appropriation to the Government of India. He quoted the order of the judgment para. 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."

☞OFCDs are transferable securities vide para. 6 of the case which says "Clause 13 of RHP imposed no restriction on the transfer of the OFCDs." If the original investors have already transferred the securities and the transferees are not known to SAH. the issue of identification and assessee veracity of the investors / holders of the instrument in 3 months period is magnified –well nigh impossible.

☞Dr. Kanhere commented on substance v/s form and identified certain inherent contradictions in the approach to this context. Dr. Kanhere also raised the issue of justification for charging 15% interest.

5) The next speaker was Ms. Anita Gharge. Her topic was SEBI's role. Of course, Dr. Vishnu had already highlighted certain aspects of SEBI's function. She went into the details of the provision of the SEBI's Act as well as the related rules such as Disclosure and Investor Protection (DIP) Guidelines, 2000 and Issues of Capital and Disclosure Requirements Regulation 2009 (ICDR) guidelines and how SAH. has not complied with disclosure required vis-à-vis the SEBI request / instructions. She highlighted the magic figure of 49 persons, the size relating to number of persons to decide whether an issue is public or private. If the number of investors is 50 or more the issue becomes public and hence the contention of SAH. that 3 crore investors are part of a private placement cannot be accepted. She further highlighted the fact that this judgment made SEBI a powerful and all important body in managing the affairs of investors under the SEBI Act. Thus, the actions of companies like SAH. are bound to attract the provision of law to the detriment of the companies in the broader interest of the investors.

6) Advocate Mr. Sandesh Patil highlighted various aspects of the judgment. He spoke on the provisions of company law and the relevant sections which made it mandatory for companies to adhere to the rules governing public issues. He once again touched upon the number of persons viz. 49 as the cut off point to distinguish between public and private financial issues. The SAH. OFCDs cannot by any stretch of imagination be regarded as private placement. Therefore, SAH. flouted the provision of company law, he said. He also highlighted the provisions of SEBI Act. Crores of investors are affected and hence SAH. OFCDs. mobilisation of more than Rs. 20,000 crores through 3 crore investors is undoubtedly a scam. He complemented the authorities of the SEBI and the judiciary for lifting the corporate veil and defusing a bomb which would otherwise have burst in due course of time. This would have had a chain reaction on the public, banking system, the economy with serious social implications too alongwith the general mood of gloom in the markets. He of course appreciated the arguments of the Defense Counsel for SAH. Nevertheless, since SAH. had come to the court with unclean hands they had to pay the price and face the

strictures passed by the learned judges. He advised the students to read the case in detail because there are many learning's from it.

7) Advocate and Solicitor Mr. Sandesh Shukla addressed the issue of Investor Protection. He said that SEBI was born in 1992 in accordance with the provisions of the SEBI Act 1992. This was a new proposition for India following the Harshad Mehta scam and also the intent of the Government to liberalise the economy. He further said that SEBI had to systematically tackle several issues like insider trading, takeover code, listing requirements, governance aspects et al. He drew attention to the fact that the main purpose of SEBI is investor protection and any information called for by SEBI with this motive cannot be denied. In the context of SAH. drawing attention to the cut-off figure of 49 persons, he said that SEBI OFCD was indeed a public issue and therefore SAH. had violated the provisions of law. He drew attention to the various provisions under the SEBI Act which provides a mandate to SEBI to direct companies to respond to its call for information and disclosure. He also highlighted the DIP and ICDR guidelines of 2000-2009 respectively. He said that investors should not be misled by schemes like the OFCD and there is a need for greater investor protection following the SAH. episode of mobilising thousands of crore rupees from 3 crore investors. He highlighted another important point, namely the question of transfer of refunded amounts by SAH. to SEBI and then to the Government of India vide para. 8 of the order. This was a point which was already mentioned by Dr. Vishnu Kanhere. He drew a parallel with the legislation concerning investor protection fund as mentioned in s.205C of the Companies Act which reads as follows: "(1) The Central Government shall establish a fund to be called the Investor Education and Protection Fund (hereafter in this section referred to as the "Fund")". Of course, Dr. Kanhere's argument was the items listed in the s. 205C may not cover the refund of deposits on account of the court order with respect to the OFCDs mobilised by the SAH. and declared illegal.

8) The above presentations were followed by panel discussion.

Q. 1 – Mrs. Smita Jape, Assistant Professor, DR VN BRIMS: what is the specific role of ROC and why did the ROC did not respond though it had the information?

A. 1 – ROC functions like a post office and very rarely the papers submitted are actually read. Hence, the question of action becomes a remote possibility. Dr. Vishnu Kanhere narrated his experience in this behalf with respect to the documents he submits periodically regarding accounting matters to the ROC. In general the ROC which functions like a saddled bureaucracy is a silent spectator. Even the newspapers had highlighted the innocuous role of the ROC through a news item title "the dog that didn't bark".

Q.2 – Dr. P. M. Kelkar: will there be a social unrest on account of the SAH. episode.

A.2 - The panel was unanimous on this issue and opined that there would be no social unrest.

(Courtesy: Dr. Murthy). Since the media has been literally gagged, the question of the matter being in the minds of people just does not arise. Public memory is very short. People who have invested would be worried more of the consequences of identification rather than loss of money.

The seminar closed with a vote of thanks proposed by Ms. Shailaja Yadav, Assistant Professor, DR VN BRIMS.

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