BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved On: 08.03.2018
Date of Decision : 11.04.2018

Misc. Application No. 53 of 2016
And
Appeal No. 126 of 2015

1. KIM Infrastructure & Developers Ltd.

2. Mr. Ravinder Singh Sidhu

3. Mr. Rajesh Kumar

4. Mr. Sukhpal Singh Barar

5. Mr. Sanjib Sikdar

6. Mr. Palwinder Singh

7. Mr. Rana Raminder

8. Mr. Satnam Singh

Address for Appellant Nos. 1 to 8
1311-A, Hemkunt House,
6, Rajendra Place,
New Delhi- 110 008 …Appellants

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai -400 051 …Respondent

Mr. Gaurav Joshi, Senior Advocate with Mr. Kazan Shroff, Advocate i/b Mr. Keshav Borhade, Advocate for Appellants.

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

None for the Intervener in Misc. Application No. 53 of 2016.

WITH
Misc. Application No. 54 of 2016
And
Appeal No. 314 of 2015

M/s KIM Infrastructure and Developers Ltd.
1311-A, Hemkunt House,
6, Rajendra Place,
New Delhi- 110 008 …Appellant

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai -400 051 …Respondent

Mr. Gaurav Joshi, Senior Advocate with Mr. Kazan Shroff, Advocate i/b Mr. Keshav Borhade, Advocate for the Appellant.

Mr. Rafique Dada, Senior Advocate with Mr. Pulkit Sukhramani and Ms. Vidhi Jhawar, Advocates i/b The Law Point for the Respondent.

None for the Intervener in Misc. Application No. 54 of 2016.

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

Per: Justice J.P. Devadhar

1. Appeal No. 126 of 2015 is filed to challenge the order passed by the Whole Time Member ("WTM" for short) of Securities and Exchange Board of India ("SEBI" for short) on 08.12.2014. By the said order the appellants therein are directed to wind up the plans (schemes) floated by them which are in the nature of Collective Investment Scheme ("CIS" for short) and refund the money collected under the said schemes with returns which are due to the investors as per the terms of offer.

2. Appeal No. 314 of 2015 is filed to challenge the order passed by the Chairman of SEBI on 17.04.2015. By the said order application made by the appellants on 24.06.2013 seeking registration of the schemes floated by the appellants under the SEBI (Collective Investment Scheme) Regulations, 1999 ("CIS Regulations" for short) has been rejected.

3. Since these two appeals arise from facts which are common, both these appeals are heard together and disposed of by this common decision.

4. Facts relevant for deciding these two appeals are as follows:-

a) KIM Infrastructure and Developers Limited ("Company" for short) was incorporated on 14.09.2005 for carrying on the real estate business i.e. purchase/ sale of land and construction activities on the said land.

b) In the year 2006 the appellants floated two schemes namely; Lump Sum Plan or onetime payment plan and Regular Investment Plan or deferred payment plan. Under the Lump Sum Plan the investors were required to pay upfront entire cost of the plot which the investors seek to purchase. In case of Regular Investment Plant, the investors were entitled to pay the cost of the plot in installments. Under both the schemes floated by the appellants the land was

allotted by the company after a period of three years and allotment of land was at the sole discretion of the company. Moreover, in both the schemes the investors could opt to quit from the scheme after the specified period and seek refund of the amount invested with promised returns.

c) *In a Public Interest Litigation, the Madhya Pradesh High Court, based on a CBI report passed an order on 13.07.2012 directing various authorities including SEBI to take appropriate action against the companies mentioned therein in accordance with law. In that list name of the company (KIM Infrastructure) was also included.*

d) *Accordingly, SEBI commenced investigation into the schemes floated by the company.*

e) *While the investigation conducted by SEBI was in progress, appellants made an application to SEBI on 24.06.2013 seeking registration of the schemes floated by the company under the CIS Regulations.*

f) *During the pendency of the above application made by the appellants, an ex-parte ad-interim order was passed by the Whole Time Member of SEBI on 05.12.2013 holding that the schemes floated by the*

appellants are, prima facie, in the nature of CIS and accordingly directed the appellants inter alia not to collect money from the investors under the existing schemes and also directed them not to launch any new schemes.

g) *Appellants in their reply and also during the course of personal hearing reiterated that the schemes floated by them do not constitute CIS. After considering the reply and the submissions made by the appellants, the WTM of SEBI passed the impugned order dated 08.12.2014, thereby directing the appellants to wind up the existing schemes and refund the money collected from the investors with promised returns. Challenging the said order dated 08.12.2014, appellants have filed Appeal No. 126 of 2015.*

h) *In the meantime, by a communication dated 14.02.2014 the application made by the company seeking registration of the schemes floated by the company under the CIS Regulations was rejected.*

i) *On the company filing an appeal, this Tribunal vide order dated 23.01.2015 set aside the communication of SEBI dated 14.02.2014 and restored the matter for fresh decision on merits.*

j) Thereupon, the matter was heard afresh and by the impugned order dated 17.04.2015 Chairman, SEBI rejected the application filed by the company, inter alia on ground that the company is not a fit and proper person to run CIS under the CIS Regulations. Challenging the said order dated 17.04.2015, company has filed Appeal No. 314 of 2015.

5. Mr. Joshi, Learned Senior Advocate appearing on behalf of the appellants submitted that the schemes floated by the appellants are basically similar to the schemes floated by PACL Limited and therefore, the appellants would adopt the arguments advanced by PACL Limited in their appeal to contend that the schemes floated by the appellants do not constitute CIS. Apart from the above, it is submitted by the counsel for the appellants that the schemes floated by the company are distinguishable from the case of PACL Ltd., for the following reasons:-

a) At the time of investment by investors the company had land bank for sale of land, whereas in case of PACL Limited land was purchased after pooling the amounts collected from the investors.

b) Value of the land bank available with the appellants is much more than the amounts refundable to the investors, whereas in case of PACL Ltd., land

available was much less and was insufficient to pay the amounts due to the investors.

c) *Under the schemes floated by the company the price of the plot included the development charges and there was no separate charge for development of the land.*

d) *Location of the land was known at the time of investment as the schemes were project wise.*

e) *Allotment of land took place generally after 3 years of investment as per the terms and conditions*

f) *Development charges were to be deducted whilst refunding amounts only in case of breach by the investors or premature opting out of the scheme in terms of clause 17 and 18 of the terms and conditions. Even in such cases, the development charges were not separately taken as in the case of PACL Ltd.*

g) *The schemes floated by the appellants do not contain any clause for increase in the land price from year to year, whereas in case of PACL Ltd., there was a clause for increase in the land price.*

h) *Unlike in the case of PACL Ltd., the Sale Deeds executed by the company in favour of investors were*

handed over to them and there was no custodian to whom the sale deeds were to be handed over. Only in case of joint ownership, sale deeds were to be held by mutually approved trustees (as per clause 23 of Terms and Conditions).

In view of the aforesaid distinguishing features, Mr. Joshi submitted that schemes floated by the company could not be said to be CIS. Accordingly, Mr. Joshi submitted that Appeal No. 126 of 2015 be allowed by quashing the impugned order passed by the WTM of SEBI on 08.12.2014.

6. With reference to Appeal No. 314 of 2015, Mr. Joshi submitted that the Chairman of SEBI is not justified in rejecting the application made by the company seeking registration of its schemes under the CIS Regulations. Chairman of SEBI has rejected the application of the company solely on ground that the company is not a 'fit and proper person' to carry on CIS, because the WTM of SEBI vide order dated 08.12.2014 has held that the appellants have carried on CIS without obtaining registration under the CIS Regulations.

7. Counsel for the appellant company submitted that the WTM of SEBI in his order dated 08.12.2014 has merely determined the question as to whether the schemes floated by the appellants were CIS or not. The WTM of SEBI has not considered the question as to whether the appellants were 'fit and proper person' to run the CIS or not. Even the Chairman of SEBI has not given any independent reason as to why the

appellants are not fit and proper persons to run CIS under the CIS Regulations.

8. It is further submitted that the company had filed application dated 24.06.2013 seeking registration under CIS Regulations much prior to the order passed by the WTM of SEBI on 08.12.2014. The application was filed on the assumption that the company was running a business akin to CIS and that the company was ready and willing to comply with rules and regulations framed by SEBI in that regard. In such a case, it is submitted that the Chairman of SEBI is not justified in rejecting the bonafide application filed by the company.

9. Relying on decisions of this Tribunal in case of Alchemist Infra Realty Limited V/s SEBI (Appeal No. 124 of 2013 decided on 23.07.2013), PACL Ltd. V/s SEBI (Appeal No. 368 of 2014 decided on 12.08.2015), Citrus Check Inns Ltd. V/s SEBI (Appeal No. 416 of 2015 decided on 03.02.2016) and Pancard Clubs Ltd. V/s SEBI (Appeal No. 52 of 2016 decided on 12.05.2017), counsel for the appellants submitted that where a person carried on business under the bonafide belief that the schemes are not covered under CIS and thereafter if SEBI considers such schemes to be covered under CIS, then it is open to that person to continue to carry on the business under the existing schemes by seeking registration under the CIS Regulations. In view of aforesaid decisions, it is submitted that regulation 73 of the CIS Regulations would be applicable to the schemes launched without obtaining registration prior to or even after the CIS Regulations came into force.

10. It is further submitted that even if this Tribunal upholds the decision of SEBI that registration cannot be granted to the company, in the facts of present case, investors interest would be substantially protected if the company is allowed to follow the procedure prescribed under regulation 73 of the CIS Regulations, especially for the reason that the investors have filed intervention applications seeking continuation of the schemes and further the value of land bank available with the appellants is more that the amounts due to the investors.

11. Counsel for the company further submitted that the following admitted facts clearly establish that the schemes floated by the company are in the interest of investors:-

a) *As on the date of receipt of SEBI's ex-parte interim order dated 05.12.2013 the total number of investors in the company were 73,358. Out of the said investors, 27,401 investors have been given letters of allotment in exchange for their investments.*

b) *From the said 27,401 investors, the company at the time of issuance of the letter of allotment had received a sum of ₹ 113,32,76,358 and the current market value of the land allotted to the said 27,401 investors is ₹321,28,11,560.*

c) *Out of the 73,358 investors, 4,435 investors had sought refund of their investment. The 4,435 investors*

had invested ₹ 8,69,71,837 and the company has refunded a sum of ₹ 9,91,58,403 to the said 4,435 investors.

d) *Out of the 73,358 investors, the company has not issued letters of allotment or made any refund to 41,522 investors (as the time for issuance of letters allotment had not arisen). The company had received a sum of ₹ 38,90,23,630/- from the said 41,522 investors.*

e) *As per the audited balance sheet of the company for the year ended 31 March 2015, the company had assets in a sum of ₹ 48,60,87,026/- and as on 30.09.2015, the company had assets in a sum of ₹ 44,09,60,589.*

12. Counsel for the appellants further submitted that as on 31.12.2017 the number of outstanding investors has been reduced from 41,522 to 33,394 and the outstanding amount stands reduced to ₹ 31,78,79,600/. It is submitted that it would be detrimental to the interests of investors if the investors are not allowed to take benefits of the appreciated value of their investments in land. It is submitted that if the appellants are allowed to follow regulation 73 of the CIS Regulations, the appellants would issue information memorandum to the investors seeking their positive consent to continue the schemes. It is further submitted that even if it is held that regulation 73 is not applicable to the present case, principles analogous to

regulation 73 ought to have been applied to the present case, in the interest of investors.

13. It is further submitted that regulation 9(d) of CIS Regulations read with Schedule 2 of SEBI (Intermediaries) Regulations set out the criteria for determining a person to be a 'fit and proper person'. Impugned order does not set out the reasons as to why the company does not fulfill the criteria set out in the above regulations and therefore, the impugned order passed by the Chairman of SEBI is clearly without application of mind. Even the networth criteria have not been considered by the Chairman of SEBI in the proper perspective. The submissions made by the company in that behalf has been rejected by simply recording that the 'networth requirement' in the case of 'existing CIS' are not applicable for the reasons set out therein. As the impugned order does not contain any reason for holding that the company is not a fit and proper person to carry on CIS, it is submitted that the impugned order passed by the Chairman of SEBI deserves to be quashed and set aside.

14. Assuming that this Tribunal finds it difficult to accept the contentions of the appellants, then and in that event, it is submitted that without prejudice to the right of the appellants (including right to file appeal before the Apex Court) the appellants be granted further time of one year to comply with the impugned orders (subject to any order that may be passed by the Apex Court in the appeals that may be filed by the appellants).

15. Mr. Mehta and Mr. Dada, Learned Senior Advocates appearing on behalf of SEBI in the respective appeals took us thorough the relevant facts and events and submitted that for the reasons recorded in the impugned orders both the appeals are liable to be dismissed.

16. We have carefully considered the rival submissions.

Appeal No. 126 of 2015

17. It is not in dispute that the schemes floated by the appellants are basically similar to the schemes floated by PACL Ltd. Hence, for the reasons stated in our order passed in case of PACL Limited (Supra) we uphold the decision of WTM of SEBI that the schemes floated by the appellants constitute CIS under the CIS Regulations and since the appellants have operated the said schemes without seeking prior registration from SEBI, the appellants are bound and liable to wind up the schemes and refund the money collected with promised returns.

18. Fact that there are some distinguishing features in the schemes floated by the appellants do not affect the ultimate conclusion drawn by the WTM, because, none of the distinguishing features go to the root of the matter so as to hold that the schemes floated by the appellants do not fall in the category of CIS. Assuming that the appellants had certain lands before receiving funds from the investors and assuming that value of the land available with the appellants is more than the amounts refundable to the investors, those factors would not make the schemes floated by the company fall outside the purview of CIS, because, as per

the schemes, investors even after making lump sum payment are liable to wait for three years to obtain letters of allotment, which clearly shows that the amounts collected from the investors are pooled and utilized to acquire lands for a new project under the scheme. Apart from the above, it is relevant to note that although the two schemes (lump sum scheme and deferred payment scheme) were launched in the year 2006 till date the company has executed only 14 sale deeds and in fact large number of investors have opted for refunds with promised returns which clearly shows that the schemes floated by the company are schemes floated not for sale of lands but only to receive profits covered under Section 11AA of SEBI Act. In these circumstances, decision of the WTM of SEBI that the schemes floated by the appellants are covered under Section 11AA of SEBI Act and thus constitute CIS cannot be faulted. Similarly, decision of the WTM of SEBI that the appellants who operated CIS without obtaining registration from SEBI are liable to wind up the CIS and refund the amounts to the investors with promised returns cannot be faulted. Accordingly, we see no merit in Appeal No. 126 of 2015 filed by the appellants.

Appeal No. 314 of 2015

19. At the outset, it must be noted that the findings recorded by the Chairman of SEBI in the impugned order dated 17.04.2015 that an 'existing CIS' under the CIS Regulations would apply to CIS schemes that are operating on 15.10.1999, i.e. the date on which the CIS Regulations came into force is unsustainable in view of the decision of

the Apex Court in case of SEBI v/s Gaurav Varshney reported in (2016) 14 SCC 430.

20. In case of Gaurav Varshney (Supra) the Apex Court has held that the expression 'existing' in the CIS Regulations is relatable to the CIS commenced prior to 25.01.1995 i.e. prior to insertion of Section 12(1B) to SEBI Act with effect from 25.01.1995. Section 12(1B) provides that no person shall sponsor or carry on CIS without obtaining registration from SEBI. Admittedly, the company has floated the schemes after 25.01.1995 without obtaining registration from SEBI and therefore the schemes floated by the appellants cannot be said to be an existing CIS under the CIS Regulations. Consequently, the provisions contained in the CIS Regulations relating to existing CIS cannot be applied to the schemes floated by the appellants.

21. It is relevant to note that the appellants on one hand contend that their schemes do not constitute CIS and on the other hand seek registration on the footing that their schemes constitute CIS. Very fact that the appellants are taking mutually contradictory stand clearly shows that the application was not a bonafide application made by the appellants seeking registration of the schemes.

22. Assuming for the sake of argument that the application made by the company seeking registration of the schemes was a bonafide application, question to be considered is, whether the Chairman of SEBI was justified in rejecting the application filed by the company.

23. Relying on various decisions of this Tribunal it was contended that the appellants as a matter of right are entitled to seek registration of the schemes under the CIS Regulations. Although, in case of Alchemist Infra Realty Limited and Ors. (Supra) this Tribunal took the view that CIS Regulations and particularly regulation 73 thereof are applicable to all the CIS which were existing at the time when the CIS Regulations came into force, with effect from 15.10.1999 but also would apply to the CIS launched thereafter, in view of the subsequent decision of the Apex Court in case of Gaurav Varshney (Supra) it must be held that the expression 'existing CIS' under the CIS Regulations would apply only to the CIS existing on 25.01.1995 that is the date on which Section 12(1B) was inserted to SEBI Act.

24. In case of PACL Ltd. relying on the decision of this Tribunal in case of Alchemist (Supra) PACL Ltd. sought registration of the schemes whereas, SEBI contended that the decision in Alchemist was per incuriam. This Tribunal noticed that in case of Alchemist (Supra) SEBI had held that the CIS floated by Alchemist after the CIS Regulations came into force without obtaining certificate of registration from SEBI were liable to be wound up under regulation 65 read with regulation 73 of the CIS Regulations and this Tribunal had merely upheld that decision of SEBI. When the Tribunal had upheld the decision of SEBI it was not open to SEBI to contend that the decision of this Tribunal in case of Alchemist was per incuriam. In that context, this Tribunal held that SEBI is not justified in contending that the decision of this Tribunal in case of Alchemist was per incuriam, without first admitting that its decision in

case of Alchemist directing winding up under regulation 73 was per incuriam. Thus, it can be seen that in case of PACL Ltd. this Tribunal had not endorsed the view taken in case of Alchemist.

25. In the case of Pancard Clubs Ltd. (Supra) this Tribunal specifically recorded a finding that the issue in case of Alchemist solely revolved on the question as to whether the schemes floated by Alchemist were CIS under Section 11AA of SEBI Act or not. Thus, even in case of Pancard Clubs Ltd. it cannot be said that this Tribunal had approved the view taken in the case of Alchemist (Supra) in relation to applicability of regulation 73 to the CIS launched after the CIS Regulation came into force.

26. No doubt that in the case of Citrus (Supra) this Tribunal took the view that where a person operated a scheme under the bonafide belief that the said scheme is not covered under CIS, but on SEBI considering such scheme to be CIS applies for registration on principles analogous to the provisions contained in the CIS Regulations, then if SEBI finds that winding up of that scheme would be detrimental to the interests of investors may grant registration to that person. However, the said decision has been set aside by the Apex Court not on merits but by consent of both parties.

27. Question, therefore, to be considered herein is, whether the schemes floated by the company which are in the nature of CIS deserve to be continued in the interest of investors on principles analogous to the principles contained in the CIS Regulations. In our opinion, the schemes

floated by the company are not in the interests of the investors and hence do not deserve to be continued under the supervision of SEBI on principles analogous to the principles contained in the CIS Regulations for the following reasons:-

a) *Lands under the schemes floated by the appellants are sold to the investors unit wise and each unit represents one sq. ft. land at a price fixed by the appellants which includes the development charges. This fact of selling land unit wise and each unit consisting of one sq. ft. alone is sufficient to hold that the schemes floated by the appellants are not bonafide schemes floated for sale of lands but are intended to lure the investors to invest in the schemes to avail the promised returns.*

b) *Very fact that the investor who has paid entire amount under the lump sum scheme is allotted land after a period of 3 years (not conveyance but only letter of allotment) and that the investor cannot quit the lump sum scheme before the expiry of 3 years clearly shows that the object of the scheme is not to sell the land to an investor who has paid entire consideration at the threshold, but only to avail the promised return after 3 years.*

c) *The schemes floated by the appellants provide that if fragmentation is not possible and sale deed cannot be executed to an investor for the land he has agreed to purchase, then joint sale deed would be executed along with other unknown investors and if an investor does not want to hold the land jointly he may request for refund. This fact also unequivocally establishes that the schemes floated by the appellants are not at all intended to carry on the business of selling lands but are only intended to mobilize funds from the investors with promised returns.*

d) *It is interesting to note that in the order passed by the WTM of SEBI on 08.12.2014, it is specifically recorded that the company had provided only 14 sale deeds and 246 allotment letters were issued which are miniscule when compared to the total number of customers i.e. 3,06,633 it had as on 31.03.2012. During the course of argument before us, the company has not placed any material on record to show that subsequent to 31.03.2012 any further sale deeds have been executed.*

e) *Although it is contended on behalf of the company that location of the land was known to the investor at the time of investment on account of the company*

selling the lands project wise, it is an admitted fact that as per the terms and conditions of the scheme, irrespective of any land chosen by an investor, the company had the sole discretion in allotting the land to that investor.

f) In these circumstances, irrespective of the fact that the company has sufficient land bank, has issued letter of allotment to several investors, has refunded amounts to several investors and the value of the land available with the company is much more than the amounts refundable to the remaining investors, in the facts of present case, it is impossible to hold that the schemes floated by the company are in the interest of investors so as to grant registration on principles analogous to the principles contained in the CIS Regulations.

28. In our opinion, in the guise of running a business of selling lands, the company has indulged in mobilizing funds from the investors with promised returns. Since, the schemes floated by the company are not intended for sale of lands and the schemes floated by the company are only intended to camouflage the real scheme, the company cannot be said to be a fit and proper person to seek registration of the schemes from SEBI. Therefore, in the facts of present case, decision of the Chairman of SEBI that the appellants are not fit and proper persons to seek registration of the schemes in question cannot be faulted.

29. It is relevant to note that regulation 9A of the CIS Regulations read with Schedule II of the SEBI (Intermediaries) Regulations, 2008 do not define the expression 'fit and proper person' to run CIS. In fact the said regulations specifically provides that the Board may take account of any consideration as it deems fit, including but not limited to the criteria set out therein for determining a person to be a fit and proper person or not. Therefore, in the facts of present case, the schemes floated by the appellants being not intended for sale of lands, decision of the Chairman of SEBI in rejecting the application filed by the company seeking registration of the schemes on ground that the company is not a 'fit and proper person' to operate the schemes as CIS cannot be faulted. Although some interveners have filed an application seeking continuation of the schemes, in our opinion, the schemes floated by the company are not really intended to sell the lands but only intended to give to the investors promised returns. Argument of the company, that if the schemes are wound up, the investors would be deprived of the appreciation in value of the land is without any merit, because, SEBI cannot object if amounts higher than the promised returns are paid to the investors on account of alleged appreciation in the land value. Similarly, fact that this Tribunal, during the pendency of the appeal has extended the time for compliance of the impugned order, cannot be a ground to grant any further extension of time, because the appellants have already availed much more time than they deserved. Accordingly, while holding that there is no merit in Appeal No. 314 of 2015 we reject the plea of the appellants seeking extension of time to implement the order dated 08.12.2014.

30. In the result, Appeal No. 126 of 2015 as also Appeal No. 314 of 2015 are dismissed with no order as to costs. In view of dismissal of the Appeals, the Miscellaneous Application Nos. 53 of 2016 and 54 of 2016 filed in these two Appeals also become infructuous and are disposed of accordingly with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

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

11.04.2018
Prepared & Compared By: PK