IN THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.153 of 2003

Fortuna Agro Plantations Ltd.
Bijay Kumar Agarwal
Damodar Prasad Toshniwal
Yashwant Chaudhury
Anup Kumar Agarwal
Madhu Agarwal
Anju Agarwal
Ganesh Gopal
Ashok Chatterjee
S.N. Ghoshal
Nirmalendu Guha **..... Appellants**

Versus

Securities and Exchange Board of India **..…Respondent**

Shri Zubin Behramkaurdin, Advocate for the Appellant

Shri Subhash Jha, Advocate for the Respondent

CORAM

Justice N.K. Sodhi, Presiding Officer
R.N. Bhardwaj, Member

Per: Justice N.K. Sodhi, Presiding Officer (Oral)

The appellant has been operating a collective investment scheme prior to the coming into force of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (for short "the Regulations"). Regulation 5 of the Regulations requires that any person who immediately prior to the commencement of the Regulations was operating a scheme, shall make an application to the Securities and Exchange Board of India (hereinafter called "the Board") for the grant of a certificate within a period of two months from the date of notification of the Regulations. An existing scheme which satisfies the Board

that the requirements specified in Regulation 9 and the conditions specified under Regulation 71 had been fulfilled could be granted a certificate of registration under Regulation 10 and it is only thereafter that an existing scheme could be allowed to float new scheme on such terms and conditions as the Board may specify. Regulation 73 of the Regulations provides that an existing collective scheme which fails to make an application for registration or has not been grated provisional registration or having obtained provisional registration fails to comply with the provisions of Regulation 71 shall be wound up. The Regulation provides for the mode and manner in which an existing scheme has then to be wound up. Such a scheme which is to be wound up is required to send an information memorandum to the investors who have subscribed to the scheme(s) within two months from the date of receipt of intimation from the Board detailing the state of affairs of the scheme, the amount repayable to each investors and the manner in which such amount is determined. The information memorandum has then to be send to the investors within one week from the date of its preparation and it must explicitly state that investors desirous of continuing with the scheme shall have to give a positive consent within one month from the date of the information memorandum and continue with the scheme and the investors who give their positive consent shall continue with the scheme at their own risk and responsibility. If the positive consent to continue with the scheme is received from only twenty five percent or less of the total number of existing investors the scheme shall be wound up. The Regulations then provide that payment shall be made to the investors within three months of the date the information memorandum. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board has to formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73.

Appellant no. 1 which is a company incorporated under the Companies Act had been operating an existing scheme and it applied for the grant of provisional registration to the Board on 14.12.1999. It appears that the details submitted by the appellant were found to be inadequate and that certain further information/clarifications were sought by the Board and several other informations were also sought in order to process the said application. Despite several opportunity been granted to the appellant including an opportunity of personal hearing before the then chairman the appellant did not submit the required document/information and failed to submit the clarifications sought by the Board. The Board by its order dated July 24, 2002 rejected the application for registration and communicated the said order on the following day i.e. on July 24, 2002. The appellant felt aggrieved by this order and has challenged the same in the present appeal. However, at the time of arguments the learned counsel for the appellant did not press the challenge to this order and therefore it is not necessary for us to deal with the objections raised in the grounds of appeal. Since the request of the appellant for grant of provisional registration of the exiting collective investment scheme had been turned down, the scheme had to be wound up in terms of Regulation 73 of the Regulations. The intimation regarding the rejection of its request for registration was received by the appellant on July 25, 2002. It was required to send an information memorandum to the investors within two months from this date requiring them to explicitly state that those who were desirous of continuing with the scheme should give a positive consent within one month from the date of information memorandum so that they could continue with the scheme. Instead of sending this information memorandum within two months the same is alleged to have been sent on April 1, 2003. The learned counsel for the appellant informs us that in pursuance to this memorandum 43.76% of the investors had given their positive consent to continue with the scheme whereas 40.38% wanted to convert their investment

into equity of the appellant company. Another 16.55% of the investors did not respond. The memorandum contained a clause that in case any investors did not respond, his consent would be presumed. This clause obviously runs counter to the Regulation 73 of the Regulations but, nevertheless, some of the investors may not have responded on the assumption that the appellant company will presume their consent to continue with the scheme which could not be sought in the light of the Regulations. The Board noticed this plea of the appellant in the impugned order but did not comment on the same nor did it go into the validity of the information memorandum presumably because by its order dated April 2, 2003 it had already directed the appellant to refund the money collected under the scheme to the investors within a period of one month from the date of the order following which some action was to be initiated against it (the appellant). The appellant did not refund the amount as directed by the Board and the latter by its order dated August 28, 2003 debarred the appellant company, its promoters, directors and others associated with it from operating in the capital market and from accessing the same for a period of five years from the date of this order. It is against the orders dated 24.7.2002, 2.4.2003, and 28.8.2003 that the present appeal has been filed under section 15T of the Securities and Exchange Board of India (for short "the Act").

We have heard the learned counsel for the parties and find that on receipt of the intimation from the Board that its application for grant of provisional registration had been rejected the appellant did not prepare and send an information memorandum to its investors within two months from the date of receipt of intimation from the Board as required by Regulation 73. The explanation furnished for this is that the business premises had been sealed by the Calcutta Police in connection with some criminal case and that all its records had been seized on 7.12.2001. It is common case of the parties that the premises were unlocked and the keys were handed over to its representatives on 30.12.2002 but

according to the appellant the records which had already been seized had not been handed over. These records were given back to the appellant thereafter and it is for this reason that the information memorandum was prepared on 1st April, 2003 and then sent to the investors. It is true that there is a delay on the part of the appellant in sending this information memorandum and its investors but the delay has been satisfactorily explained by the appellant for reasons which were beyond its control. Had it been only for the delay we would have directed the Board to allow the appellant to proceed in accordance with the wishes of the investors after verifying the facts in this regard. But we cannot issue such a direction because the validity of the information memorandum had at no stage been examined by the Board. Admittedly, the appellant did not furnish the draft of the information memorandum after 25th July, 2002 to the Board for vetting and therefore the question of the Board requiring the appellant to make adequate disclosures in the said information memorandum did not arise. We are at this stage more concerned with the rights and interest of the investors who are more than 4000 in number. If the appellant is right that in pursuance of its information memorandum 43.76% of its investors had given their positive concern then to require the appellant to windup the scheme would be unfair to them. 40.38 % of the investors, according to the appellant have already converted their investment in the equity of the company if that is so, then they have been repaid their amounts because conversion of their investment into equity was a mode of repayment. These facts are now being stated before us and they had also been pleaded before the Board but as already observed the Board has not commented at the correctness of these assertions. Having regard to the facts and circumstances of the case and keeping in view the interest of the large number of investors of the appellant we direct that the appellant shall now furnish a fresh information memorandum and submit a draft thereof to the Board in terms of the Regulation 73 and the Board may require the appellant to make such other disclosures as it may deem necessary

where upon the further procedure for winding up the scheme as contemplated by Regulation 73 shall be followed. Needless to mention that each investor shall be given a fresh option to be exercised in terms of these Regulations. Since the process of allowing the investor to exercise the option is to start afresh the impugned orders dated 2.4.2003 and 28.8.2003 are set aside. Regulation 73 of the Regulations shall now operate.

The appeal stands disposed of as above with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
R.N. Bhardwaj
Member

RRN
23.2.07