BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.55/2001

In the matter of:

Varindhaban Forests Ltd., **Appellant**

Vs.

The Securities and Exchange Board of India **Respondent No.1**
Union of India (Through Secretary Finance) **Respondent No.2**
Government of Punjab (Through Chief Secretary) **Respondent No.3**

Appeal No.56/2001

Green Vindraban Farms Ltd., **Appellant**

Vs.

The Securities and Exchange Board of India **Respondent No.1**
Union of India (Through Secretary Finance) **Respondent No.2**
Government of Punjab (Through Chief Secretary) **Respondent No.3**

Appearance:

Shri H. D. Birdi,
Advocate **For Appellants**

Shri Praveen Trivedi
Asst. Legal Adviser. SEBI **Respondent No.1**

(In the matter of appeal arising out of the order dated 2.7.2001 made by the Securities and Exchange Board of India)

ORDER

These two appeals are directed against the common order dated 2.7.2001 made by Respondent No.1 (SEBI) debarring the Appellants / their promoters / directors / managers / persons in charge of the schemes, from operating in the capital market for a period of 5 years from the date of the order. The Appellants have inter alia prayed for quashing the impugned order. Though an interim order staying the operation of the impugned order during the pendancy of the appeals has also been sought, the prayer was not pressed. Since both the appeals are against one and the same order and facts and circumstances applicable also being substantially comparable in both the appeals, with the consent of the parties, it was decided to hear the appeals together and make a common order.

The Appellants are public limited companies, registered with the Registrar of Companies, Punjab, H P and Chandigarh. They are stated to be operating collective investment schemes, attracting the regulatory provisions of the Securities and Exchange Board of India and (Collective Investment Schemes) Regulations, 1999 (the 1999 Regulations).

SEBI is a statutory Board established under the Securities and Exchange Board of India Act, 1992 (the Act). The object of the Act is to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. Section 11 of the Act enumerates the functions of SEBI. The section mandates SEBI to protect the interests of investors by such measures as it thinks fit.

Registering and regulating collective investment schemes is one of the measures which SEBI is empowered to take. SEBI, in exercise of the powers vested in it, has notified the 1999 Regulations, which came into force from 15.10.1999. The said Regulations in Chapter IX provide for registration of the existing collective investment schemes and also the new schemes. Existing collective investment scheme means those collective investment schemes which were operating immediately prior to the commencement of the 1999 Regulations. The Appellants were found to be existing collective investment schemes, as they were operating on the date on which the 1999 Regulations came into force. They were therefore, required to comply with the requirements set out under chapter IX of the 1999 Regulations. However, since the Appellants failed to comply with the said requirements, SEBI issued the impugned order. The impugned order appears to be a standard common order directed to all those existing collective investment schemes, which according to SEBI had failed to comply with the requirements of the Regulations. The order is directed to 490 entities including the Appellants. Full text of the short order which is under challenge is as under:

> "DIRECTIONS UNDER SECTION 11B OF THE SEBI ACT 1992 READ WITH REGULATIONS 65, 73 AND 74 OF SEBI (COLLECTIVE INVESTMENT SCHEMES) REGULATIONS, 1999 ISSUED TO THE ENTITIES WHOSE NAMES ARE MENTIONED HEREINBELOW:
>
> Vide Order dated December 7, 2000, directions under Section 11B of the SEBI Act, 1992 read with Regulations 65 and 73 of SEBI (Collective Investment Schemes) Regulations, 1999 were issued to you as you, having failed to make an application for grant of registration, had failed to wind up your existing collective investment schemes and make repayments to your investors in accordance with the provisions of the SEBI (Collective Investment Schemes) Regulations, 1999. As per the said Order, you were directed to refund the money collected under the scheme(s) with returns which is due to the investors as per the terms of the offer within a period of one month from the date of the said Order.
>
> As you have failed to comply with the directions of the said Order, you have violated the provisions of Regulation 5 read with Regulations 68(1), 68(2), 73 and 74 of the SEBI (Collective Investment Schemes) Regulations, 1999.
>
> Now, therefore, in exercise of the powers conferred under Section 11B of the SEBI Act, 1992, I hereby debar you/your promoters / your directors / your managers / persons in charge of the business of your schemes from operating in the capital market for a period of 5 years from the date of this Order."

The Appellants claiming to be aggrieved by the order, filed the present appeals on 3.12.2001. In terms of section 15T of the Act, appeal is to be filed within 45 days of the receipt of the order by the aggrieved person. The Tribunal is empowered to entertain an appeal filed beyond the prescribed time limit if it is satisfied that there was sufficient cause for not filing it within that period. The Appellants have explained the reasons for the belated filing of the appeals that they filed a C.W.P. in the Hon'ble High Court of Punjab and Haryana on or around 23.8.2001, that they subsequently decided to withdraw the same and approached the Hon'ble Court seeking permission to withdraw the CWP with liberty to file a statutory appeal as provided under the Act. While granting the said prayer, the Hon'ble Court had observed that

> "we have no doubt in our mind that the competent authority would appropriately consider the prayer to exclude period spent by the petitioners in pursuing the present writ petition before this court. It would be desirable to do so especially when the High Court is relegating the petition to alternative statutory remedy."

The explanation given by the Appellants in their application seeking condonation of the delay is found satisfactory. The delay was not intentional and deserves to be condoned. Accordingly the delay involved in filing the appeals is condoned.

Shri H. D. Birdi, learned counsel appearing for the Appellants reiterated the grounds stated in the appeal memorandum assailing the order. He has also filed a "note of arguments". The Appellants have attacked the order on the following grounds:

The impugned order has been passed without giving any opportunity to the Appellants to explain their position, aims objects etc. and have been denied opportunity of being heard before being penalised. The Appellants are not plantation companies and as such SEBI's classification of them as plantation companies in the press release dated 23.12.1997 need be corrected. Though this was brought to the SEBI's notice, no opportunity was afforded to the Appellants to explain their position, and the classification was not redecided There was no intention on the part of the Appellants to defy any

direction of SEBI and whatever information was available with them were supplied. As per SEBI's direction, the Appellants got the schemes credit rated by engaging a credit rating company after depositing fee of Rs.1, 00, 000/- and their report was obtained and transmitted to SEBI that the Appellants continued to mobilize funds as per the directions issued by SEBI vide the letter dated 8.3.1999, that as per the said letter funds could be mobilized under only those schemes for which credit rating has been assigned. This enabled contracting contractual obligations with the investors and the same cannot be avoided by the Appellants. The Appellants have been allowed by SEBI to mobilize funds in schemes like, Lump sum Unit Investment, Daily Recurring Unit Investment, Recurring Deposits Scheme and Periodical Scheme as has been reflected in the report of the DCR India, Duff & Phelps Credit Rating India Pvt. Ltd., New Delhi and the investors were not kept in the dark by the Appellants in any manner whatsoever.

The investors who invested their small savings in the aforesaid schemes of the Appellants, have not suffered any loss and their confidence has not been eroded in any manner except the air of uncertainty created by the impugned order. The Appellants have not issued any attractive advertisement to lure the investors on any false promise with high returns, they have restricted their activities mainly to the aforesaid schemes of recurring and fixed deposits.

The Appellants are located in the backward area of Punjab, District Hoshiarpur, and have been able to motivate the poor investors to save Rs.100/- or Rs.200/- per month with a view to inculcate in them the habit of savings for the benefit of their families in the future and not to spend these small savings extravagantly on drinking, gambling and other social functions where they spend more than their financial capacity and fall in debt trap.

The Appellants have returned substantial amount to the investors during the period 1993-94 to 2001-2002 that this amount includes 15% payments which have been made to investors before maturity dates, as they insisted for the same. After the publication of various public notices by SEBI, the air of uncertainty created in the minds of small investors has resulted in a disastrous situation where the investors started all types of harassments including filing of criminal cases against the executive members of the Appellants and also filed number of cases before the Consumer Forum thereby coercing the members of the Appellants to agree to their unreasonable demands, even to sell away properties owned by members of the families of the executive members. The impugned order which has been issued mechanically and blindly without application of mind cannot be justified in the name of legal provisions contained in the Act or the 1999 Regulations.

The Registrar of Companies had permitted the Appellants to carry out their activities as contained in the Memorandum of Association approved by him. Even SEBI had permitted the Appellants to carry out the activities of fixed and recurring deposit schemes after receipt of the report from the credit rating company and the Appellants had followed the same strictly and as such has contracted liability to repay the deposited amount extended to the period up to 2005 and 2006. Since the Appellants have already paid substantial amount to the investors, they could have paid the remaining amount also to the investors as per the agreement and the amount against future maturity was only very small. In case protection is given by the Tribunal and allowed to make repayment during the extended period, the Appellants undertake to clear the entire liability accordingly.

The Appellants enjoy right to carry on business or any trade as a fundamental right as guaranteed under Article 19 (1) (g) of the Constitution of India and Government can put reasonable restriction on this freedom of profession, trade or business, if it is established that the entities have in any way acted against the public policy or public order. Nothing of this sort has been proved against the Appellants and it was not reasonable and justifiable on the part of SEBI to put restrictions on the Appellants without affording reasonable opportunity to them to explain their activities. Nothing of this sort has been done and a blanket mechanical order dated 2.7.2001 has been passed against a large number of companies including the Appellants blindly without appreciating the fact that the Appellants were engaged in the activities for which permission has been given by the Registrar of Companies, Jalandhar and further that SEBI itself had permitted them to carry out restricted mobilization of public funds under the schemes for which rating was assigned by the rating company. The activities of the Appellants are confined only to the aims and objects as given in the Memorandum of Association and the Appellants have not in any way transgressed the same and have entered into a field which may be termed against the public policy and public order and have carried out with a view to deprive the investors of their investments by luring them by giving false promises with high returns. Since nothing of this sort has been established against the Appellants, the order dated 2.7.2001 is liable to be set aside.

The account of the Appellants has been audited by the Chartered Accountant from 1992-93 to 1997-98 and the audit was in progress for the remaining years when SEBI issued various public notices sowing an air of uncertainty in the minds of investors and, created confusion which has done more harm to the

small investors than any good. The local police has started registering cases for cheating etc., against the executive members of the Appellants, when case of cheating is not made out at all against the Appellants, that even the investors whose maturity date has not reached have started demanding back their money simply because SEBI has issued directions to return back the entire invested amount to the investors ignoring the basic fact that there is contractual obligation on the investors as well as on the Appellants to adhere to the payment schedule as agreed upon.

After issuance of the impugned order on 2.7.2001 the investors including those whose maturity date has not reached, have become violent and have started harassing the members of the executive body and employees of the Appellants and are not allowing them to sit in their office thereby bringing the entire activities of the Appellants to a halt, which is detrimental not only to the interest of small investors, but also to the employees of the Appellants who have become jobless bringing their families to the point of starvation. The Government should have analyzed the situation in all these aspects before issuance of impugned order or the Government should have come out with a scheme to rehabilitate the employees of such companies, who were to become unemployed by the order issued by SEBI.

Learned counsel cited the Tribunals' decision in Sterlite Industries v. Securities and Exchange Board of India (2001) 34 SCL 485) canvassing the proposition that SEBI has no power to issue the impugned order.

Shri Praveen Trivedi, learned representative of SEBI reiterated the stand taken in the reply filed in the proceedings and also in the written submissions filed, as follows:

A large number of companies in the past had promised attractive returns and mobilised huge amounts from the public on the pretext of high returns and misutilised the funds collected, causing loss to the public and erosion of the confidence of the investors in the capital market. The Government of India vide its press release dated November 18, 1997 decided to treat the schemes which issue instruments such as agro bonds, plantation bonds, etc as collective investment schemes coming under the purview of the Act.

Pursuant to the above press release SEBI vide its press release dated November 26, 1997 and public notice dated December 18, 1997 informed that the Regulations governing collective investment schemes are under preparation and will be notified in due course, and that in terms of Sec 12 (1B) of the Act that no person could sponsor or cause to be sponsored any new scheme and raise funds till the Regulations are notified. SEBI in its press release cited above further stated that in terms of the proviso to section 12 (1B), till the Regulations are notified, the collective investment schemes which are in existence can continue their activities and directed them to file the details of their schemes with SEBI, within 21 days from the date of the Press Release in order to obtain the benefit of the proviso to Sec 12 (1B)

Section 11 of the Act, 1992 deals with the powers and functions of SEBI. The section inter alia provides:

> "(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) …
> b) …
> c) registering and regulating the working of venture capital funds and collective investment schemes including mutual funds."

In order to regulate collective investment schemes and for ensuring that only legitimate investment activities are carried on, SEBI notified on October 15, 1999 the 1999 Regulations. Continuation of any collective investment scheme without its registration with SEBI in terms of the Regulations is prohibited and the regulations also provided consequences for non observance of the requirements.

There is no absolute fundamental right to carry on trade, occupation or business of any choice and the legal requirement such as getting registration under the Act etc. as in the present case, is a reasonable restriction which can be imposed in the interest of general public as per the provisions of Article 19 (6) of the Constitution of India. It is obligatory on the part of every person carrying on business in the securities market to comply with the requirements of the legislation which regulates its activities.

Admittedly, plantation activities of the Appellants fall under the category of collective investment schemes as defined under Sec 11AA of the Act and therefore, it is obligatory on the part of the Appellants to either seek registration from SEBI to continue their activities or wind up the scheme(s) and repay the investors in terms of regulation 73 of the 1999 Regulations. The contention of the Appellants that they have done a good deal of social service and also enjoy the confidence of their investors, is of no consequence. The Appellants themselves have admitted in the appeals that they are facing harassment and kidnapping threats, etc. from the investors which is against their own claims that they enjoins investors confidence.

Pursuant to the public notice dated December 18, 1997 whereby the existing entities were directed to file the details of their schemes with SEBI in order to obtain the benefit of proviso to Sec 12(1B) of the Act, the Appellants firstly vide their letter dated 5.1.98 informed SEBI that they had not issued any agro/planation bond. A show cause notice dated 15.5.98 was issued to the Appellants. In response to the same they filed some information with respect to their collective investment schemes. However, the said information was incomplete and sketchy. They did not file the complete information till date, inspite of reminders.

In terms of regulation 5 read with Chapter IX of the 1999Regulations, which deals with the existing collective investment schemes, the Appellants were required to make an application to SEBI for the grant of certificate of registration within a period of 2 months from the date of notification of the Regulations. Thus, all the existing collective investment schemes entities including the Appellants were required to apply for registration by December 14, 1999, or if they were not desirous of obtaining registration were required to repay the money to the investors in the manner specified in regulation 73. The last date for filing application for registration was extended to March 31, 2000. In the light of this, SEBI sent notices under Regd. Post, calling for details, from all the collective investment schemes entities, including the Appellants, who had filed information with SEBI in response to its public notice dated 18.12.98. As the notices issued in several cases were returning undelivered by postal authorities with remarks "Left/Not known", SEBI issued public notice in the press also calling upon the entities to comply with the provisions of regulation 5(1) 73 & 74 of the Regulations and warned that failing to comply with the aforesaid provisions, penal action under the provisions of the Act, Regulations and other actions as mentioned in the aforesaid press notification would be initiated. Further, by way of another press notification attention of the entities was drawn again to the legal requirements and the investors were also forewarned against dealing with unregistered entities.

Having regard to the interests of investors in the collective investment schemes and also taking into consideration the requests from some entities, SEBI decided to grant an opportunity to the entities operating collective investment schemes to get registered by extending the last date for filing of application for registration till March, 31, 2000. The existing collective investment schemes were informed that in case they do not make application for grant of registration by March 31, 2000 or if they are not desirous of obtaining provisional registration from SEBI, they have to compulsorily wind up the schemes and repay the money to the investors. The last date for making such payment pursuant to the winding up of the scheme was May 28, 2000.

As the Appellants had failed to either apply for registration within the extended period or repay the amounts, a show cause notice dated May 12, 2000 was issued through Regd. AD asking them to state as to why one or more or all the actions mentioned in the said notice should not be initiated against them. As the notice was directed to all similarly placed collective investment schemes entities who had failed to comply with the statutory requirement, the same was published by way of press notification also. However, neither any reply nor any compliance report was received in this regard from the Appellants.

Further, SEBI vide its letter dated July 31, 2000 while reminding the Appellants of their non compliance of the legal requirement and providing the copy of the format of the report titled "Winding up & Repayment Report" specified by SEBI, advised them to immediately file with SEBI the aforesaid report duly completed. However, there was no response.

As the Appellants did not pay any heed to the requests made from time to time, Chairman, SEBI vide his order dated December 7, 2000 directed the existing collective investment schemes including the Appellants inter alia to refund the money collected under the scheme(s) with returns due to the investors as per the terms of the offer within a period of one month from the date of the order, failing which threatened of the action mentioned in the aforesaid order such as debarring them and their promoters / directors / managers / persons in-charge from operating in the capital market for a period of 5 years. The said order was forwarded to the Appellants by Regd. A. D. vide letter dated December 18, 2000. The aforesaid directions were published by way of public notification also wherein the text of the aforesaid order issued under Section 11B with the names of all 523 entities including the Appellants to whom the directions were issued was mentioned. The Appellants did not respond to this order as well.

The aforesaid facts and circumstances show that the impugned order was made as a last resort by SEBI after giving the entities like the Appellants number of opportunities to either obtain registration or wind up and repay the investors in terms of the Regulations. Further, the order intends to keep the entities like the Appellants, who did not comply with the legal provisions, away from the securities market in the interest of the investors. The purpose of regulating the entities running collective investment schemes is to protect the interests of investors therein who have lost their money by the misdeeds of unscrupulous elements, that the impugned order is not arbitrary or illegal and was passed after giving the Appellants sufficient opportunity to comply with the statutory requirements. The impugned order has been passed in strict compliance of the statutory requirements, as the Appellants have undoubtedly failed to make an application for registration and also in winding up and repaying the investors within the time as prescribed under the Regulations that the financial position or their intention to repay in future, is of no consequence. It is the Appellants' own case that investors are threatening their directors because of their failure to honour the commitments. In terms of regulation 73, it is always open for the Appellants to obtain the positive consent from 25% or more investors to continue with their scheme at their own risk and responsibility without SEBI registration. In such a case, the Appellants can continue with their scheme with those investors giving positive consent after refunding the amount due to the investors who did not give such a consent.

Every person is required to follow and comply with the law of the land and if a particular activity is being regulated pursuant to a Law made by a competent legislature, the same has to be followed by all concerned to whom the said law is applicable without any exception. In case of time bound statutory compliance, as in the present case, the Appellants, on facing the consequence of non-compliance, cannot plead ignorance of the legal obligation and also can not take the plea that no opportunity was accorded to them before taking action under the provisions of Law. In any case the submission that opportunity was not given to the Appellants to explain their case is baseless in view of the notices / correspondence forwarded by SEBI to the registered office of the Appellants through Regd. Post and Press Notices issued in all major National Newspapers from time to time.

The Appellants vide letters dated 5.1.98 and 28.4.98 had stated that in their opinion they were not plantation companies. They had, however, enclosed a copy of the application form-cum-agreement (Unit-booking application form) entered with various unit holders and sought clarification as to whether they came under the purview of SEBI's public notice dated 18.12.97. Perusal of the said form revealed that the activities of the Appellants were in the nature of collective investment schemes as the nature of the scheme satisfied all the ingredients of "collective investment schemes" as defined under Section 11AA of the Act. In terms of Government of India Press Release dated 26.11.1997 SEBI was assigned the work of framing of Regulations for the entities running plantation / agro based schemes. It was clarified in the aforesaid Press Release that such schemes would be treated as "collective investment schemes". In the light of this, while referring to the aforesaid Press Release, the Appellants were asked vide SEBI letter dated 15.5.98 to show cause explaining the reasons for failing to file the information within the stipulated time. In response thereto vide letter dated 30.5.98 the Appellants acknowledged receipt of relevant documents sent to them by SEBI, apologized for delay in correspondence, furnished some information and sought 30 days time for furnishing balance information. No where did the Appellants raise their earlier averment that they were not plantation companies. While submitting the required information to SEBI vide its letter dated 30.05.19998 the Appellants had submitted itself to the jurisdiction of SEBI and did not protest SEBI's identification of them as collective investment schemes. Even in their subsequent correspondence, this issue was never raised again, that the present contention of the Appellants is an after thought. Further the Appellants did not also raise this issue either in their appeals before the Tribunal or during the arguments on 19.04.2002. Therefore, the Appellants cannot be allowed to raise this new ground / issue at this belated stage of the proceedings.

The argument that further mobilisation of investment by the Appellants was only in pursuance to the directions issued by SEBI vide letter dated 8-3-99 is not correct as those directions were interim in nature pending notification of the Regulations. After the notification of the 1999 Regulations, no funds could be mobilised even under the existing schemes without obtaining registration. This regulatory provision was given wide publicity through various press releases, public notices and individual letters to the parties including the Appellants.

Respondent No.2 has informed the Tribunal in response to the notice, that the present appeals are against the order of SEBI, issued in accordance with the 1999 Regulations, that the Act has not been challenged in the appeals, that Union of India has been made only a proforma party in the appeals and therefore, a reply by Union of India is not considered necessary.

Respondent No.3 has not responded to the notice issued.

I have carefully considered the material on record and the arguments, both oral and written, advanced on behalf of the parties and my views are as follows:

It is an admitted fact that the Appellants were operating collective investment schemes at the commencement of the 1999 Regulations. The Regulations came into force with effect from 15.10.1999. The submission that the Appellants in the context of SEBI's press release dated 23.12.1997 had informed them that the Appellants are not plantation companies as described in the press release and that they were not heard in the matter is of no relevance. It is on record that the Appellants had not questioned their identification as a collective investment schemes at any time after the 1999 Regulation came into force. On the contrary they had admitted by their conduct that they are covered by the 1999 Regulations. Their grievance is that they were finding it difficult to comply with the requirements of the said Regulations because of various reasons. In fact in the appeal memorandum the Appellants have admitted that "in compliance with the instructions issued by the SEBI, the Appellant company has been furnishing necessary information as and when required. The Appellant company could not comply with the directions such as registration on payment of heavy registration fee, to wind up companies' existing collective investment schemes and make repayment to the investors within one month." (emphasis supplied). It is also seen from the application made in 1998, copy found annexed to the appeals, for the purpose of credit rating, that the request was for rating of their collective investment schemes. In these circumstances the Appellants' grievance that they have been wrongly classified as collective investment schemes without hearing them does not sustain.

The Appellants' submission that the impugned order has been passed without giving them adequate opportunity to present their case and as such is in violation of the rules of natural justice is also seen unfounded from the facts on record. It is seen that on 10.12.1999, the SEBI had written to the Appellants asking them to comply with the requirements of the 1999 Regulations. Show cause notice was issued to them on 12.5.2000 detailing the violations and the consequences attendant to the same. On 31.7.2000 Appellants were advised to file the winding up report. Vide letter dated 18.12.2000 the Appellants were sent copy of the SEBI Chairman's order dated 7.12.2000 issuing directions under section 11B of the Act read with Regulations 65 and 73 enjoining the Appellants to refund the money collected under the schemes with returns due to the investors as per terms of offer within a period of one month. It is seen that the SEBI had issued press releases also asking the collective investment schemes to comply with the requirements of the regulations. The Appellants opted not to respond. In these circumstances it can not be said that the impugned order was passed without affording any opportunity to the Appellants to present their case. The fact is that the Appellants did not make use of the opportunities provided to them by SEBI.

In terms of section 11(2)of the Act registering and regulating the working of collective investment schemes is one of the functions of SEBI.

It is an admitted fact that the Appellants were operating collective investment schemes even before the 1999 Regulations came in to force on 15.10.1999. They are therefore amenable to the Regulations governing the schemes. The requirements of registration, as provided in the Act, could not be enforced prior to 15.10.1999 as the requisite regulation was not in position till then. Statutory requirement in this regard is clear from the provisions of section 12(1B) of the Act, as extracted below:

> "No person shall sponsor or cause to be sponsored or carry on or caused to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations:
>
> Provided that any person sponsoring or causing to be sponsored, carrying or causing to be carried on any venture capital funds or collective investment schemes operating in the securities market immediately before the commencement of the Securities Laws (Amendment) Act, 1995, for which no certificate of registration was required prior to such commencement, may continue to operate till such time regulations are made under clause (d) of sub-section (2) of section 30."

Collective investment scheme has been defined in section 11AA of the Act. Since the Appellants have virtually admitted that they are operating collective investment schemes, no further examination about the applicability of the Regulations to the Appellants is felt necessary.

The Regulations provide for regulating the new entrant collective investment schemes and also the existing collective investment schemes. As per regulation 5 "any person who immediately prior to the commencement of the Regulations was operating a scheme, shall subject to the provision of chapter IX of the Regulations make an application to the Board for the grant of certificate within a period of 2 months from such date". Chapter IX prescribes the requirements to be followed by collective investment

schemes which were operating on the date of notification of the Regulations (i.e. 15.10.1999). Since the provisions under Chapter IX have a bearing on the issues involved in the appeals, the same are extracted below:

"Existing schemes to obtain provisional registration -

68. (1) Any person who has been operating a collective investment scheme at the time of commencement of these regulations shall be deemed to be an existing collective investment scheme and shall also comply with the provisions of this Chapter.

Explanation- The expression 'operating a collective investment scheme' shall include carrying out the obligations undertaken in the various documents entered into with the investors who have subscribed to the scheme.

(2) An existing collective investment scheme shall make an application to the Board in the manner specified in regulation 5.

(3) The application made under sub-regulation (2) shall be dealt with in any of the following manner:-

(a) by grant of provisional registration by the Board under sub-regulation (1) of regulation 71;

(b) by grant of a certificate of registration by the Board under regulation 10;

(c) by rejection of the application for registration by the Board under regulation 12.

No scheme to be launched until grant of registration -

69. (1) No existing collective investment scheme shall launch any new scheme or raise money from the investors even under the existing scheme, unless a certificate of registration is granted to it by the Board under regulation 10.

Consideration of application for grant of provisional registration -

70. (1) The applicant for the purpose of being considered eligible for the grant of provisional registration shall satisfy the Board that-

(a) the scheme of the applicant are in the nature of collective investment schemes;

(b) the affairs of the applicant are not being conducted in a manner detrimental to the interest of existing investors;

(c) the applicant has at least 50% independent directors at the time of making the application.

Explanation -"Independent directors" shall mean directors who are not associates of the persons operating the existing collective investment scheme;

(d) any person, directly or indirectly connected with it has not been granted registration by the Board under the Act.

(2) The Board for the purposes of grant of provisional registration may, inter alia, inspect the schemes, books of accounts, records and documents of the applicant.

(3) The Board shall recover from the applicant such expenses including fees paid to the auditor, appraising agency as may be incurred by it for the purposes of inspecting the schemes, books of accounts, records and documents of the applicant.

(4) The Board on being satisfied that the requirements specified in sub-regulation (1) are not fulfilled may reject the applications and the applicant thereupon shall wind up its existing scheme(s) in the manner specified in regulation 73.

Grant of provisional registration -

71. (1) The Board after being satisfied that the conditions specified in regulation 70 are fulfilled may grant provisional registration to the applicant subject to the following conditions, namely:-

(a) the applicant shall get the existing schemes rated by a credit rating agency within one year from the date of grant of provisional registration.

(b) the applicant shall get the existing schemes audited by an auditor within a period of one year from the date of grant of provisional registration;

(c) the applicant shall get existing schemes appraised by an appraising agency within a period of one year from the date of grant of provisional registration;

(d) the applicant shall create a trust and appoint trustee in the manner specified in Chapter IV of these regulations within a period of one year from the date of grant of provisional registration;

(e) the applicant shall comply with accounting and valuation norms in respect of schemes floated before the commencement of these regulations as specified in Part II of the Ninth Schedule within a period of one year from the date of provisional registration;

(f) the applicant shall meet the minimum net worth of Rupees one crore within one year from the date of grant of provisional registration which shall be increased by Rupees one crore each within two years, three years, four years, and five years from the date of grant of provisional registration;

(g) the applicant shall not dispose of the scheme property except for meeting obligations arising under the offer document of the scheme;

(h) the applicant shall comply with the conditions specified in regulation 11;

(i) such other conditions which the Board may impose.

(2) The applicant shall give a written undertaking to the Board to comply with the conditions specified in sub-regulation (1).

(3) The applicant who has been considered eligible for the grant of provisional registration by the Board, shall pay provisional registration fee as per the Second Schedule.

(4) An applicant who after grant of provisional registration fails to comply with the conditions as specified in sub-regulation (1) and regulation 9 shall not be considered eligible for the grant of certificate of registration under regulation 10 and shall wind up the scheme in the manner specified in regulation 73.

Registration to existing scheme -

72. (1) An existing collective investment scheme which satisfies the Board that the requirements specified in regulation 9 and the conditions specified under regulation 71 have been fulfilled, shall be granted a certificate of registration under regulation 10 upon payment of registration fees as specified in paragraph 2 of the Second Schedule and on such terms and conditions as may be specified by the Board.

(2) An existing collective investment scheme which has been granted certificate of registration under sub-regulation (1) may be allowed to float new schemes on such terms and conditions as may be specified by the Board.

Manner of repayment and winding up -

73. (1) An existing collective investment scheme which,-

(a) has failed to make an application for registration to the Board; or

(b) has not been granted provisional registration by the Board; or

(c) having obtained provisional registration fails to comply with the provisions of regulation 71;

shall wind up the existing scheme.

(2) The existing collective investment scheme to be wound up under sub-regulation (1) shall send an information memorandum to the investors who have subscribed to the schemes, 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 investor and the manner in which such amount is determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the scheme.

(4) The Board may specify such other disclosures to be made in the information memorandum, as it deems fit.

(5) The information memorandum shall be sent to the investors within one week from the date of the information memorandum.

(6) The information memorandum shall 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 to continue with the scheme.

(7) The investors who give positive consent under sub-regulation (6), shall continue with the scheme at their risk and responsibility:

Provided that if the positive consent to continue with the scheme, is received from only twenty-five per cent or less of the total number of existing investors, the scheme shall be wound up.

(8) The payment to the investors, shall be made within three months of the date of the information memorandum.

(9) On completion of the winding up, the existing collective investment scheme shall file with the Board such reports, as may be specified by the Board.

Existing scheme not desirous of obtaining registration to repay -
74. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in regulation 73."

On a perusal of the above cited regulations, it is clear that a collective investment scheme which was in operation on the appointed day i.e. 15.10.1999 has three options i.e. (a) get registered with the SEBI or (b) wind up the schemes or (c) formulate a scheme of repayment and make such repayment to the investors in the manner specified in regulation 73.

In terms of regulation 65, SEBI is empowered, in the interest of securities market and the investors, to give such directions, including directions:

(a) requiring the person concerned not to collect any money from investors or to launch any schemes.

(b) prohibiting the person concerned from disposing of any of the properties of the scheme

acquired in violation of the regulations.

(c) requiring the person concerned to dispose of the assets of the scheme in a manner as may be specified in the directions.

(d) requiring person concerned to refund any money or the assets to the concerned investors along with the requisite interest or otherwise, collected under the scheme.

(e) prohibiting the person concerned from operating in the capital market or from accessing the capital market for a specific period.

The Appellants' submission that they are carrying on business as provided in their Memorandum of Association approved by the Registrar of companies and not doing any illegal business, is not an argument to support their case for not complying with the requirements of the specific requirements applicable to the collective investment schemes, as per the 1999 Regulations. It is not anybody's case that the Appellants should not do business. The requirement is to comply with the requirements of law regulating the collective investment schemes being operated by the Appellants. The Appellants' argument that the impugned order takes away their fundamental right to practice any profession or to carry on any occupation, trade or business provided under article 19(1) (g) is baseless. The said right is subject to the limitation provided in clause (6) of article 19 and the Regulation regulating the business of operating collective investment scheme made to protect the interests of investors springs out of a valid legislation.

The Appellants argument that the schemes operated by them are small schemes, meant to help the poor and illiterate people of the backward areas, that nobody has been lured to invest by manipulative advertisements etc., even if accepted, does not absolve them from the obligation to comply with the statutory requirements. The Appellants' submission that they cannot fulfil the capital requirement (net worth) as provided in the regulations and that they also cannot afford to pay huge application fee and registration fee to get them registered, does not in any way help them to carry on business without obtaining registration. Precisely it is for such entities which are not desirous of registering or capable of getting registered, the Regulation has provided exit-route in regulation 73/74. Since the Appellants have stated that "investors who invested their small savings in the schemes of the Appellants have not suffered any loss and their confidence has not been eroded in any manner", they could easily comply with the requirements of regulation 73/74 which for reasons best known to them have not been done. As the Appellants have stated that substantial refund has already been effected that balance amount payable to investors is comparatively very small, it would have been all the more easy for the Appellants to frame the scheme and get the approval of the unit holders as per regulation 74. The Appellants submission that the impugned order is coming in the way of making refund is baseless. The order in no way prohibits refund of money to the investors. In fact one of the directions in the order dated 7.12.2000 preceding the impugned order was to make repayment to the investors as per the Regulations.

The Appellants being existing collective investment schemes have to comply with the requirements of Chapter IX. It is an admitted fact that they have failed to do so. In the said circumstances, SEBI under regulation 65 is empowered to issue proper directions. In terms of regulation 65(e) SEBI, in the interests of the securities market and the investors, is empowered to give such directions as it deems fit in order to ensure effective observance of the regulations including a direction "prohibiting the person concerned from operating in the capital market or from accessing the capital market for a specific period." The impugned order debarring the Appellants etc. from operating in the capital market for a period of five years is thus well within the powers vested in SEBI by regulation 65(e). Since the source of power to issue such a direction is clearly there in regulation 65(e) I do not consider it necessary to look for the powers in section 11B or elsewhere in the Act or in the Regulations. In the light of the clear legal provision enabling SEBI to issue such a ban order and that explicit power has been invoked by SEBI in the instant case, the ratio in the Sterlite case relied on by the Appellants' counsel has no application to the present case.

For the reasons stated above the impugned order is upheld and the appeals are dismissed.

Sd/-
(C. ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: September 13, 2002.