IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF OCTOBER, 2020

PRESENT

THE HON'BLE MR. ABHAY S. OKA, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE ASHOK S. KINAGI

WRIT APPEAL NO. 399 of 2020 (GM-RES)

C/w

W.P.Nos.8644/2020, 8748/2020, 8545/2020

IN W.A.No.399/2020 (GM-RES)

Between:

Securities Exchange Board of India
Having its office at SEBI Bhavan
Panchavati 1st Lane, Gulbai Tekra Road
Ahmedabad – 380 006

(Formally having its office at Sakar-1
Ground Floor, Opposite:Nehru Bridge
Gandhigram Railway Station
Ashram Road, Ellisbridge
Ahmedabad – 380 009)

... Appellant

[By Shri Tushar Mehtha, Solicitor General of India/Senior Advocate,
along with Shri Pratap Venugopal,
Shri Nithin Prasad, Shri Vidur Nair and
Shri T. Suryanarayana – Advocates of
M/S King and Partridge - through Video Conferencing]

And:

1. Franklin Templeton Trustees Services Pvt. Ltd
Having its Registered Office at
Indiabulls Financial Centre, Tower-2
12th and 23rd Floor, Senapati Bapat Marg
Elphinstone (W) Mumbai – 400 013

2. Franklin Templeton Asset Management (India) Pvt. Ltd
Having its office at:
Indiabulls Financial Centre, Tower-2
12th and 23rd Floor, Senapati Bapat Marg
Elphinstone (W) Mumbai – 400 013

Also having an office at
202 Abhijit-III, Opposite to Mayor's Bunglow
Mithakhali Six Roads, Navrangpura
Ahmedabad-380 006.

3. Mr. Areez Phirosha Khambatta
Aged 83, Male
Having his address at
8th Floor, White House, Panchvati
Ahmedabad – 380 006

4. Ms. Persis Khambatta
Aged 75, Female
Having her address
8th Floor, White House, Panchvati
Ahmedabad – 380 006

5. Khambatta Family Trust
8th Floor, White House, Panchvati
Ahmedabad – 380 006

6. Franklin Templeton Inc
Franklin Resources Inc
C/o Corporate Secretary
One Franklin Parkway San Mateo
CA 94403-1906

7. Union of India
Through Ministry of Corporate Affairs
Serious Fraud Investigation Office
Fountain Telecom, 6th Floor, Building-1
Mahatma Gandhi Road
Mumbai
Maharashtra – 400 001

(Opp. No.1, 2 and 6 are original Resp.No.2, 3 and 4 in the petition;
Opp. No.3, 4 and 5 are the original Petitioners No.1, 2 and 3 in the petition;
Opp.No.7 is the original Resp.No.5 in the petition.)

... Respondents

(By Shri Harish Salve and Shri Janak Dwarkadas, Senior Advocates, assisted by Ms. Ankita Singhania and instructed by Shri Ashish Bhan, Shri Harsh Pais, Ms. Anuradha Agnihotri, Shri Kunaal Shah, Shri Mohit Rohatgi, Shri Shubhang Setlur, Ms. Sanjam Arora, Shri Anirudh Kapoor, Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of M/s Tri Legal for R1 & R2)

Shri Adithya Sondhi, Senior Advocate along with Shri Paritosh Gupta, Shri Karan Joseph – Advocates for R3, R4 and R5

Shri K.G. Raghavan, Senior Advocate instructed by Shri Ashish Bhan, Shri Harsh Pais, Ms. Anuradha Agnihotri, Shri Kunaal Shah, Shri Mohit Rohatgi, Shri Shubhang Setlur, Ms. Sanjam Arora, Shri Anirudh Kapoor, Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of M/s Tri Legal for R6)

Shri M.B. Naragund, Additional Solicitor General along with Shri. M.N. Kumar, CGC for R7).

This writ appeal has been filed on the Letters Patent Appeal No.311/2020 filed before the High Court of Gujarat at Ahmedabad against the order dated 08.06.2020 which dismissed Civil Application No.1/2020 filed for vacating the interim relief granted by the Gujarat High Court by order dated 03.06.2020 in the Special Civil Application No.7201/2020 (As stated in Para-3 and 4 in "E" of Part-1 Appeal Memo)

Vide order dated 19.06.2020 in SLP 7553/2020 with Transfer Petition (c) Nos.663-664/2020 passed by Supreme Court of India, it is ordered to hear the matter before this Hon'ble High Court by Division Bench (Order dated 19.06.2020 placed at Flag-"A")

"SEBI v. Franklin Templeton Trustee Services Pvt. Ltd. bearing LPA No.311/2020 in SCA No.7201/2020 filed before the Gujarat High Court"

IN W.P. No.8644/2020

Between:

1. Mr. Areez Phirozsha Khambatta
   Aged 83, Male
   Having his address at
   8th Floor, White House, Panchvati
   Ahmedabad – 380 006

2. Ms. Persis Khambatta
   Aged 75, Female
   (Having her address at
   8th Floor, White House, Panchvati
   Ahmedabad – 380 006)

3. Khambhatta Family Trust
8th Floor, White House, Panchvati
Ahmedabad – 380 006

…Petitioners

(By Shri Adithya Sondhi, Senior Advocate along with
Shri Paritosh Gupta and Shri Karan Joseph of
M/s. Gupta Law Associates Advocates for Petitioners)

And:

1. Securities and Exchange Board of India
Having its office at
Sakar-1, Ground Floor
Opposite Nehru Bridge
Gandhigram Railway Station
Ashram Road, Ellisbridge
Ahmedabad – 380 009

2. Franklin Templeton Asset Management (India) Pvt. Ltd
Having its office at
Indiabulls Financial Centre, Tower-2
12th and 13th Floor, Senapati Bapat Marg
Elphinstone (W), Mumbai – 400 001

Also having an office at

202 Abhijit-III, Opp. Mayor's Bunglow
Mithakhali Six Roads Navrangpura
Ahmedabad – 380 009

3. Franklin Templeton Trustees Services Pvt. Ltd
Having its Registered Office at
Indiabulls Financial Centre, Tower-2
12th and 13th Floor, Senapati Bapat Marg
Elphinstone (W), Mumbai – 400 013

4. Franklin Templeton Inc
Franklin Resources Inc
C/o Corporate Secretary
One Franklin Parkway San Mateo
CA 94403-1906

5. Union of India
Through the Ministry of Corporate Affairs
Serious Fraud Investigation Office
Fountain Telecom, 6th Floor, Building-1
Mahatma Gandhi Road
Azad Maidan, Fort, Mumbai
Maharashtra – 400 001

…Respondents

(Shri. Tushar Mehtha, Solicitor General of India/Senior Advocate along with Shri. Prathap Venugopal, Shri. Nithin Prasad, Shri Vidur Nair and Shri T. Suryanarayana – Advocates of M/S. King and Partridge for R1

By Shri Harish Salve and Shri Janak Dwarkadas,
Senior Advocates, assisted by Ms. Ankita Singhania and instructed by Shri Ashish Bhan, Shri Harsh Pais,
Ms. Anuradha Agnihotri, Shri Kunaal Shah,
Shri Mohit Rohatgi, Shri Shubhang Setlur,
Ms. Sanjam Arora, Shri Anirudh Kapoor,
Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R2 & R3

Shri K.G. Raghavan, Senior Advocate instructed by
Shri Ashish Bhan,
Shri Harsh Pais, Ms. Anuradha Agnihotri,
Shri Kunaal Shah, Shri Mohit Rohatgi,
Shri Shubhang Setlur, Ms. Sanjam Arora,
Shri Anirudh Kapoor, Ms. Chitra Rentala,
Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R4

Shri. M.B. Naragund, Additional Solicitor General along with
Shri. M.N. Kumar, CGC for R5

Shri. Puneet Jain, Smt. Revathy Adinath Narde for Applicants in IA-3/2020)

This writ petition has been filed praying to (A) quash and set aside the impugned decision, notice dated 23.04.2020 and communication addressed to investors on 23.04.2020 communicating the said decision, issued by Franklin Templeton vide Annexure D and E. (AA) Quash and set aside the notice dated 28.05.2020 regarding e-voting and unit holders meet send through e-mail by R3 vide Annexure K/1 colly to the petition. (B) Declare that regulation 40 to the said regulations is not applicable to the said six Schemes as the initiation of winding up has not been proper and legal. (C) Declare that inaction on part of Franklin Templeton on request for redemptions has been illegal. (D) Direct Franklin Templeton to register the redemption filed by petitioners and other senior citizens at the NAV as on the date the funds were closed and to forthwith release the consequent amounts with such interest, as may be deemed appropriate to this Hon'ble Court. (E) Direct to the respondent board to initiate appropriate proceedings against Franklin Templeton and its responsible officers for the deeds of mismanagement and misdemeanor and for violation of the rules/regulations framed for protection of investors. (F) Direct to the respondent Board to constitute an appropriate body to manage the said funds till the satisfaction of the redemption of the unit holders. (G) State the implementation and operation of the impugned decision, notice dated 23.04.2020 and communication addressed to investors on 23.04.2020 communicating the said decision vide Annexure D and E to the petition. (GG) Pending hearing and final disposal of the present petition, your lordships may be pleased to stay respondent No.3 enclosed as Annexure-K/1-colly to the petition. (H) Pending hearing and final disposal of the present petition, your lordship may be pleased to direct Franklin Templeton to refrain from calling for a meeting purportedly under Regulation 41 (1) of the Regulations. (I) Direct Franklin Templeton, their officers and agents to forthwith register the redemptions filed by the petitioners and other senior citizens at the NAV as on the date the funds were closed and forthwith release the consequent amounts to them. (J) Pending hearing and final disposal of the present petition, you lordship may be pleased to direct R6 to conduct Forensic Auditing of the Accounts of the said Six Mutual Funds and Franklin Templeton and submit reports with its observations before this Hon'ble Court. (K) Grant Ad-interim relief in terms of prayers (F), (G), (H), (I) and (J).

IN W.P. No.8748/2020

Between:

M/s. Chennai Financial Markets and Accountability
Represented by its President Manoj K Sheth
Having its registered office at
GA Florentina, No.43, 1st Main Road
Gandhi Nagar, Adyar, Chennai – 600 020

…Petitioner

(By Shri Nithyaesh Natraj and Shri Vaibhav, Advocates)

And:

1. The Securities and Exchange Board of India
Southern Regional Office (SRO)
7th Floor, 756-L, Anna Salai
Chennai – 600 002, Tamil Nadu
Also having their corporate office at
Plot No.C4-A, G- Block, near bank of India
Bandra Kurla Complex, Bandra East
Mumbai, Maharashtra – 400 051

2. Franklin Templeton Asset Management India Pvt. Ltd
Indiabulls Finance Ctr, Tower 13th Floor
Elphinstone Road, Mumbai – 400 013

Also having Regional branch at
4b, MGR Main road,
Kandancavadi, Perungudi
Chennai – 600 096

3. Franklin Templeton Trustee Services Private Limited,
Indiabulls Finance Centre,
Tower 2, 12th and 13th Floor, Senapati Bapat Marg,
Elphinstone (West), Mumbai – 400 013

4. Sanjay Vishwanath Sapre
Wholetime Director
Franklin Templeton Asset Management India Pvt. Ltd
Flat 41/A, Embassy Apartments

46 Nepean Sea Road
M Hill, A K Marg
Mumbai - 400 036

5. Jayaram Subramaniam Iyer
Director
Franklin Templeton Asset Management India Pvt Ltd
2001, Tower B3, Godrej Platinum
Pirojsha Nagar, Near Godrej Memorial Hospital
Vikhroli East
Mumbai – 400 079

6. Vivek Kudva
Director
Franklin Templeton asset Management India Pvt. Ltd
Flat 202, 2nd Floor, Vishnu Villa
7B Worli Sea Face
Opp Bandra Worli Sea Link
Worli Colony
Mumbai – 400 030

7. Radhakrishnan Venkata Subramaniam,
Director,
Franklin Templeton Asset Management India Pvt. Ltd
Flat No.52, Tower 3, Pebble Bay
1st Main Road, Dollars Colony
Near RMV Club
Bangalore – 560 094

8. Pradip Panalal Shah
Director
Franklin Templeton Asset Management India Pvt. Ltd
72A Embassy Apartments
7th Floor, Napean Sea Road
Mumbai – 400 006

9. Tabassum Abdulla Inamdar
703, Imperial Heights
Tower B Best Nagar
Motilal Nagar
Mumbai – 400 104

10. Santosh Das Kamath
MD and Chief Investment Officer
Franklin Templeton Asset Management India Pvt. Ltd
Indiabulls Finance Ctr, Tower 13th Floor
Elphinstone Road, Mumbai – 400 013

…Respondents

(Shri. Arvind Datar, Senior Advocate along with
Shri. Prathap Venugopal, Shri. Nithin Prasad, Shri Vidur Nair and
Shri T. Suryanarayana – Advocates of
M/S. King and Partridge for R1

By Shri Janak Dwarkadas, Senior Advocate,
assisted by Ms. Ankita Singhania and instructed by Shri Ashish Bhan, Shri Harsh Pais,
Ms. Anuradha Agnihotri, Shri Kunaal Shah,
Shri Mohit Rohatgi, Shri Shubhang Setlur,
Ms. Sanjam Arora, Shri Anirudh Kapoor,
Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R2 & R3

Shri. Udaya Holla, Senior Advocate, instructed by
Shri Ashish Bhan, Shri Harsh Pais,
Ms. Anuradha Agnihotri, Shri Kunaal Shah,
Shri Mohit Rohatgi, Shri Shubhang Setlur,
Ms. Sanjam Arora, Shri Anirudh Kapoor,
Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R4 to R10

Shri Ashish A. Kamath, Advocate for Applicants in
IA No. 1/2020 and IA No. 2/2020)

This writ petition has been filed praying to issue a writ in the nature of writ of mandamus by exercising the inherent jurisdiction under Article 226 of the Constitution of India and directing the R1 to initiate appropriate proceedings including but not limited to appropriate penal/criminal proceedings against the R2 to R10 under the provisions of the SEBI Act and the Rules and Regulations thereunder in the larger interests of the market as

well as unit holders and further direct the R1 to ensure that the R2 to 10 complete repayment of the investments of the unit holders in the six debt Schemes in a time bound manner under the supervision, guidance and aegis of this Hon'ble Court and/or and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

The counsel for the petitioner has also filed these applications that is interim direction in W.P. No. 7744/2020 (3 Nos), interim injunction petition in W.P.No.7744/2020 and interim stay petition in W.P.No. 7744/2020.

IN W.P. No.8545/2020

Between:

Amruta Garg
(Formerly Amruta Narendra Nikam)
W/o Arjun Garg
R/o F-2, 2nd Floor, Lajpat Nagar-III
New Delhi – 110 024

...Petitioner

(By Shri Ravindra Shrivastava, Senior Advocate along with
Shri Abhinav Shrivastava, Shri Arjun Garg,
Shri S. Mahesh Sahasranaman, Shri Anshuman Shrivastava,
Shri Abhijeet Shrivastava, Ms. Garima Tiwari,
Shri Karan Kohli, Shri Karan Chadha and
Shri Chaitanya S.G. – Advocates)

And:

1. Union of India
Through Secretary,
Ministry of Corporate Affairs
"A" Wing Shastri Bhawan Garage
No.14, Dr. Rajendra Prasad Road
New Delhi
Delhi – 110 001

2. Ministry of Finance
Through its Secretary
Rajpath Marg, E Block
Central Secretariat, New Delhi
Delhi – 110 011

Also at: 3rd Floor, Jeevan Deep Building
Sansad Marg, New Delhi
Delhi – 110 001

3. Securities Exchange Board of India
Through its Chairman
5th Floor, Bank of Baroda Building
16, Sansad Marg, New Delhi
Delhi – 110 001

4. Serious Fraud Investigation
Office through its Director
2nd Floor, Paryavaran Bhawan
CGO Complex, Lodhi Road
New Delhi, Delhi – 110 003

5. Franklin Templeton Asset
Management (India) Pvt. Ltd
Indiabulls Finance Center
Tower 2, 12th and 13th Floor
Senapati Bapat Marg
Elphinstone West, Mumbai
Maharashtra – 400 013 IN

Also at 707-710, 7th Floor,
Ashoka Estate Building 24
Barkhamba Road, Opposite
Statesman Building, or, next to
Gopal das Building and Near,
Barakhamba, Road
Delhi – 110 001

6. Franklin Templeton Trustee
Services Pvt. Ltd
Indiabulls Finance Center

Tower 2, 12th and 13th Floor
Senapati Bapat Marg
Elphinstone (West), Mumbai – 400 013

7. Templeton International Inc.
300 SE 2nd St Ste 600
FORT LAUDERDALE FL,
33301-1950 United States

8. Franklin Resources Inc, USA
ONE FRANKLIN PARKWAY BUILDING 920
SAN MATEO CA 94403
United States

…Respondents

(By Shri. Tushar Mehtha, Solicitor General of India
along with Shri. M.B. Naragund, Additional Solicitor General,
and Shri. M.N. Kumar CGC for R1, R2 and R4

Shri. Arvind Datar, Senior Advocate
Shri. Pratap Venugopal, Shri. Nitin Prasad,
Shri Vidur Nair and Shri T. Suryanaryana of
M/S. King and Partridge Advocates for R3,

Shri. Harish Salve and Shri. Janak Dwarakadas,
Senior Advocates assisted by Ms. Ankita Singhania and
instructed by Shri Ashish Bhan, Shri Harsh Pais,
Ms. Anuradha Agnihotri, Shri Kunaal Shah,
Shri Mohit Rohatgi, Shri Shubhang Setlur,
Ms. Sanjam Arora, Shri Anirudh Kapoor,
Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R5 & R6

Shri. K.G. Raghavan, Senior Advocate
instructed by Shri Ashish Bhan, Shri Harsh Pais,
Ms. Anuradha Agnihotri, Shri Kunaal Shah,
Shri Mohit Rohatgi, Shri Shubhang Setlur,
Ms. Sanjam Arora, Shri Anirudh Kapoor,
Ms. Chitra Rentala, Shri Rajendra Dangwal, Advocates of
M/s Tri Legal for R7 & R8)

This writ petition has been filed praying to declare regulations 39, 40 and 41 of the 1996 Regulations as *ultra vires* the SEBI Act, 1992 and unconstitutional and violative of Article 14. Quash of impugned notice dated 23.04.2020 issued by R6 for winding up of 6 Schemes. Quash of impugned notice dated 28.05.2020 issued by R6 for winding up of 6 Schemes. Direct the respondent to allow the petitioner to redeem/or direct the respondent to refund the money invested by the petitioner in the Franklin Templeton short term income plan forthwith at the present NAV. Issue direction to R3 (SEBI) to conduct an investigation into the affairs of a Mutual Fund under Section 61 of the SEBI (Mutual Fund), Regulations, 1996 against R5 and 6. Issue direction directing the R4 (SFIO) to conduct an investigation into the affairs of the private R5 and 6 and to prosecute the personal responsible criminally. Issue direction to R5 and 6 to assist and provide all necessary details to R3 pertaining to the decision for winding up of its 6 Schemes.

This writ appeal and writ petitions having been heard through Video Conferencing hearing and reserved for judgment, coming on for pronouncement of Judgment, this day, ***Chief Justice*** delivered the following:

JUDGMENT

OVERVIEW:

1. The event which lead to filing of this group of petitions is the notice dated 23rd April, 2020 issued by the Franklin Templeton Trustee Services private Limited (for short "the Trustees") by taking recourse to the provision of sub-clause (a) of clause (2) of Regulation 39 of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (for short 'the Mutual Funds Regulations'). By the said notice, it was declared that the Trustees have decided to wind up the following six Schemes of the Franklin Templeton Mutual Fund:

i) Franklin India Low Duration Fund (Number of Segregated portfolios – 2)
ii) Franklin India Ultra Short Bond Fund (Number of Segregated portfolios – 1)
iii) Franklin India Short Term Income Plan (Number of Segregated portfolios – 3)
iv) Franklin India Credit Risk Fund (Number of Segregated portfolios – 3)
v) Franklin India Dynamic Accrual Fund (Number of Segregated portfolios – 3)
vi) Franklin India Income Opportunities Fund (Number of Segregated portfolios – 2)

2. There were three writ petitions filed in the High Courts of Delhi, Gujarat and Madras for challenging the action of winding up of the aforesaid six Schemes (for short "the said Schemes"). A criminal petition was filed in Madras High Court seeking a writ of mandamus against the respondents therein for setting criminal law in motion against those who were allegedly responsible for the winding up of the said Schemes.

3. On 19th June, 2020, the Apex Court passed an order in Special Leave Petition (civil) No.7553/2020 and Transfer Petition (civil) Nos.663-664/2020), transferring the aforesaid four cases to this High Court. The order of the Apex Court reads thus:

> "After hearing the learned senior counsel appearing for the parties at length, we are not inclined to entertain the interim order dated 08.06.2020 passed by the High Court of Gujarat at Ahmadabad in Civil Application No. 1 of 2020 in Special Civil Application No. 7201 of 2020.
>
> It is pointed out that several writ petitions are pending in the High Court of Gujarat, The High Court of Delhi as well as the High Court of Judicature at Madras. **It is agreed that let the matters be transferred to the High Court of Karnataka, to be heard by a Division Bench. Thus, we request the**

Hon'ble Chief Justice of the High Court of Karnataka to take up matters himself in a Division Bench. Let the pending matters be transmitted to the High Court of Karnataka, including the appeal filed by SEBI before the High Court of Gujarat against the interim order.

Let the matters be transmitted to the High Court of Karnataka within 15 days by the concerned High Courts. **Let the High Court of Karnataka hear and finally decide the matter, including SEBI appeal, within three months.**

As per the list provided by the learned counsel, the following matters are to be transmitted to the High Court of Karnataka:-

- M/S Chennai Financial Markets and Accountability V. SEBI and others, W.P.No.7744/2020 filed before the Madras High Court.
- Areez Phirozsha Khambatta and Ors. V. SEBI and Ors., Civil Application No.7201 of 2020 filed before the Gujarat High Court.
- Amruta Garg (Formerly Amruta Narendra Nikam) V. UOI and Ors., W.P. (Civil) 3366/2020 filed before the Delhi High Court.
- M/S. Chennai Financial Markets and Accountability V. Additional Director General of Police, CRL OP No. 8660/2020 filed before the Madras High Court.

- SEBI V. Franklin Templeton Trustee Services Pvt. Ltd., bearing LPA No. 311/2020 in SCA No. 7201/2020 filed before the Gujarat High Court.
- LPA No. 311/2020 – Securities and Exchange and Board of India Versus Franklin Templeton Trustees Services Pvt. Ltd. & others.

In view of the above, the Special Leave Petition and the Transfer Petitions are disposed of."

4. In Writ Petition No.7744/2020 filed in the Madras High Court, Special Civil Application No.7201/2020 filed in the Gujarat High Court and Writ Petition (Civil) No. 3366/2020 filed in the Delhi High Court, the challenge in substance is to the decision of the winding up of the said Schemes. In addition, there are directions prayed for against the Securities and Exchange Board of India (for short, 'SEBI') established under the provisions of the Securities and Exchange Board of India Act, 1992 (for short 'SEBI Act'). In the writ petition filed before the Delhi High Court, there is also a challenge to the validity of the Regulations 39, 40 and 41 of the Mutual Funds Regulations. Crl. P. No.8660/2020 has been filed in the Madras High Court, essentially seeking a relief of a writ of mandamus directing registration of First Information Report. Letters Patent Appeal (LPA) No.311/2020 filed before

the Gujarat High Court is an appeal directed against the interim order passed by the learned Single Judge of Gujarat High Court in Special Civil Application No.7201/2020. As per the aforesaid order dated 19th June 2020, the Apex Court transferred the aforesaid cases to this High Court. The same were registered and renumbered in this High Court. After registration in this Court, the following corresponding new numbers have been assigned:

Original case number	Name of the High Court	New case number assigned by the High Court of Karnataka
W.P.No.7744/2020	Madras High Court	WP. No.8748/2020
Spl CA No.7201/2020	Gujarat High Court	WP.No.8644/2020
WP (Civil) No.3360/2020	Delhi High Court	WP.No.8545/2020
Crl.OP.No.8660/2020	Madras High Court	CRL.P.NO.3206/2020
LPA No.311/2020	Gujarat High Court	W.A.No.399/2020

5. Presumably, due to the situation created by pandemic COVID -19, there was some delay in receiving the files from the High Courts. After receiving the files, it was noticed that the service of notice was not completed and therefore, the pleadings were incomplete. By order dated 8th July 2020, this Court issued notice to the respondents and directed that counter/reply/statement of objections shall be filed by all the respondents by 22nd July 2020 and Rejoinder, if any, shall be filed by 29th July 2020. However, in criminal petition filed in Madras High Court, notice was issued on 15th July 2020 as the file was received late. By order dated 6th August 2020, the hearing was fixed from 12th August 2020 in the afternoon session on day-to-day basis. As per the direction of the Apex Court in the aforesaid transfer order, the present Bench was constituted by the Chief Justice to hear the above transferred cases.

6. From 8th July 2020, COVID–19 positive cases started multiplying in the State of Karnataka and the figures issued by the Department of Health from time to time will show that from July, 2020, every day about 1500 to 2500 new positive cases were being reported in Bengaluru Urban District. Now, about 4000 to 5200 cases positive cases per day are being reported in

Bengaluru. The spread of COVID -19 pandemic has also badly affected the High Court of Karnataka and in July 2020, more than fifty staff members were tested positive. By the time we deliver this Judgment, the figure has crossed 180 mark. The COVID-19 has not spared Judicial Officers in the State and Registrars of this Court. To reduce the footfall in the High Court complex, there was no other option but to take recourse to virtual hearing. That suited the learned members of the Bar. The reason is that the members of the Bar could argue while sitting at New Delhi, Mumbai, Chennai, Bengaluru and London. As noted in the last part of this Judgment, with the cooperation of all the learned counsel, video conference hearing was conducted to everyone's satisfaction for several days and hours. The submissions were concluded on 24th September 2020.

7. The hearing commenced on 12th August, 2020. Before commencement of the oral arguments, this Court made a query to the learned counsel appearing for all the parties whether anyone had any objection for the use of zoom platform for conducting the video conferencing hearing. None of the learned members of the Bar had any reservations about the use of zoom platform.

8. Before we go to the submissions made across the Bar, it will be necessary for us to briefly narrate the few factual aspects set out in the pleadings filed on record. The factual aspects are common in all these petitions and, therefore, we are adverting to the facts of the case stated in W.P.No.8545/2020 (Delhi Petition).

FACTS OF THE CASE:

IN WRIT PETITION No 8545 OF 2020:

9. It is pointed out that 6th respondent - Franklin Templeton Trustee Services Private Limited (the Trustees), entered into business of Mutual Funds in India in the year 1996. It is a company covered by definition of "Trustee" within the meaning of clause (g) of Regulation 2 of the Mutual Funds Regulations. The 5th respondent is an Asset Management Company (for short 'AMC') within the meaning of clause (d) of Regulations 2 of the Mutual Funds Regulations. The 8th respondent – Franklin Resources Inc, is a USA based company of which, the 7th respondent – Templeton International Inc is a subsidiary company. The 7th respondent is a "sponsor" within the meaning of clause (x) of Regulation 2 of the Mutual Funds Regulations. It is pointed out in the petition that on 4th January, 1996, the Franklin Templeton Mutual Fund (for short 'the Mutual Fund') was

constituted as a Trust under the provisions of the Indian Trust Act, 1882 (for short 'the Trusts Act'), as defined under clause (q) of Regulations 2 of the Mutual Funds Regulations. The 'Mutual Fund', as defined in clause (q) of Regulations -2 means, a fund established in the form of a trust to raise monies through the sale of units from the public or a section of the public under one or more Schemes for investing in securities, including money market instruments or gold or gold related instruments or real estate assets. The 7th respondent – Templeton International Inc sponsored the said Mutual Fund. Under clause (y) of Regulation 2 of the Mutual Funds Regulations, the word 'Trustees' is defined and it means the Board of Trustees or the Trustee Company who hold a property of a Mutual Fund in trust for the benefit of the unit-holders.

10. An agreement dated 5th January, 1996 was entered into by and between the Trustees of the Mutual Fund and the 5th respondent AMC by which, AMC was appointed as investment manager to the Schemes of the Franklin Templeton Mutual Funds (for short 'FTMF'). The said agreement was amended by a supplemental investment agreement of management dated 26th August, 2005**.** The investment manager was approved by SEBI

to act as AMC for FTMF. The petitioner has invested a sum of Rs.5,00,000/- in the year 2018 in Franklin India Short Term Income Plan launched by FTMF.

11. The first case of novel corona Virus (COVID–19) was reported in India on 30th January, 2020 and from 25th March, 2020, the nationwide lockdown was imposed by the Government of India. Prior to that, on 11th March, 2020, the World Health Organization (WHO) had declared COVID–19 as a global pandemic. On 9th April, 2020, AMC requested SEBI for enhancement of borrowing limit prescribed in Regulation 44 (2) of the Mutual Funds Regulations, from 20% to 30%. This request was made in respect of Franklin India Income Opportunities Fund. By a letter dated 13th April 2020, SEBI allowed the said request subject to certain conditions including the condition that incremental borrowing limit should be used only for the purposes of redemption. It appears that by e-mail dated 22nd April 2020, a similar request was made by AMC in respect of three other Schemes. By a letter dated 22nd April 2020, SEBI communicated to AMC that its request for enhancement to 40% in case of Franklin India Short Term Income Fund and Franklin India Income Opportunities Fund was granted subject to conditions

mentioned therein. In case of Franklin India Credit Risk Fund, the borrowing limit was enhanced to 30% subject to conditions. The condition of using the incremental borrowing limit only for redemption was incorporated in the said letter. On 14th April 2020, AMC addressed e-mail to SEBI. In the said e-mail, it was mentioned that as a last resort, the Mutual Fund may be required to resort to suspension of redemption as permitted under the Regulations and a request was made for removing the restriction of being able to suspend the redemptions only for a period of 10 days out 90 days. After few days i.e., on 20th April, 2020, the Trustees submitted a proposal to SEBI for winding up of the said Schemes and Franklin India Dynamic Accrual Fund. By the said letter, while seeking permission to wind up, forbearance on the proposal for winding up was sought from SEBI.

12. On 23rd April, 2020 the Trustees issued the impugned notice informing that they have decided to wind up the said Schemes mentioned in paragraph 1 above, pursuant to the provisions of sub-clause (a) of clause (2) of Regulation 39 of the Mutual Funds Regulations. It was mentioned therein that the Trustees of FTMF, after careful analysis and review of the recommendations made by AMC and on consultation with the

investment team, were of the considered opinion that an event has occurred, which requires the said Schemes to be wound up. It was mentioned that winding up was the only viable option to preserve the value for unit-holders and to enable an orderly and equitable exit for all investors under the unprecedented circumstances. It was mentioned in the said notice that in view of the provisions contained in Regulation 40 of the Mutual Funds Regulations, the Trustees and AMC have ceased to carry on any business activity in respect of the said Schemes.

13. It is pointed out that on 27th April, 2020, the Reserve Bank of India (for short 'the RBI') announced Rs.50,000 crores Special Liquidity Facility for Mutual Funds (SLF-MF), in the background of heightened volatility in capital markets. It was mentioned therein that under SLF – MF, RBI shall conduct repo operations of 90 days tenor at the fixed repo rate. It was stated that the funds available under SLF – MF shall be used by Banks for extending loans to Mutual Fund. On 6th May 2020, Ms. Jenny Johnson, the Chief Executive Officer of Franklin Templeton had issued a public statement blaming SEBI for issuing strict regulations and circulars leading for winding up of the said Schemes. On 7th May 2020, a press release was issued by SEBI stating that SEBI has advised

FTMF to focus on returning money to the investors in the context of the winding up of the said Schemes. On 8th May 2020, AMC issued a notice explaining what Ms. Jenny Johnson said. On 28th May, 2020, the Trustees issued notices of e-voting and unit-holders meet as per Regulation 41 (1) of the Mutual Funds Regulations, seeking approval of unit-holders for one of the two options. The first option was of authorizing the Trustees to take steps for winding up of the said Schemes. The second option was to authorize Deloitte Touche Tohmatsu India LLP (for short 'Deloitte') to do the said job.

14. On 3rd June, 2020, the writ petition was filed before the Delhi High Court to which, this Court has on its transfer assigned W.P.No.8545 of 2020. The first substantive prayer in the writ petition was to declare Regulations 39, 40 and 41 of the Mutual Funds Regulations as *ultra vires* SEBI Act, 1992. A prayer was also made for quashing the impugned notices dated 23rd April 2020 and 28th May 2020. Another prayer was for directing the respondents to refund the money invested by the petitioner in the Franklin Templeton Short Term Income Plan or to allow the petitioner to redeem the Units. A writ of mandamus is sought directing SEBI to conduct an investigation into the affairs of FTMF

as contemplated under Regulation 61 of the Mutual Funds Regulations. Another prayer was made seeking a writ of mandamus against the 4th respondent Serious Fraud Investigation Office to register FIR and to conduct investigation into the affairs of Trustees and AMC.

15. Before we go to the reply/response filed by the 3rd respondent - SEBI and the other companies, it is necessary for us to refer to the facts of other petitions and prayers made therein.

IN WRIT PETITION NO. 8644 OF 2020
AND WRIT APPEAL NO. 399 OF 2020

16. Now we come to writ petition No.8644/2020. The petitioners in this writ petition filed before the Gujarat High Court are claiming to be the investors in the said Schemes of the Mutual Fund. According to their case, the petitioners have invested a sum of Rs.6,05,50,000/- having the value of Rs.7,84,72,210/- as on the date of declaration of the winding up i.e., on 23rd April, 2020. The challenge in the petition, as originaly filed was to the notice dated 23rd April 2020. Thereafter, by an amendment, a challenge was incorporated to the notice dated 28th May, 2020 as well. There is a prayer for declaration that Regulation 40 of the Mutual Fund Regulations is not

applicable to the said Schemes. The main contention raised in the petition is that the discretion conferred on a Mutual Fund under sub-clause (a) of clause (2) of Regulation 39 is subject to the fulfillment of the conditions as provided in clause (15) of Regulation 18. It is contended that consent of the unit-holders was required for winding up, in view of clause (15) of Regulation 18. Various other factual contentions have been raised in the writ petition. By order dated 3rd June 2020, the learned Single Judge of the Gujarat High Court, while issuing notice, stayed the operation and implementation of the notice dated 28th May, 2020. Being aggrieved by the said interim order passed by the learned Single Judge, SEBI has preferred an appeal to the Division Bench of the Gujarat High Court which has been numbered as Writ Appeal No.399/2020 on its transfer to this Court.

IN WRIT PETITION NO. 8748 OF 2020

17. Writ Petition No. 8748/2020 was filed before the High Court of Judicature at Madras. The petitioner therein is a Society registered under the Tamil Nadu Societies Registration Act, 1975. The said society has filed the said petition in the nature of a Public Interest Litigation. The main grievance in the petition is about the inaction on the part of SEBI. It is pointed out that the

petitioner has made a representation to SEBI on 28th April, 2020 against AMC.

IN CRL.P.NO.3206/2020

18. CRL. P.No. 3206/2020 was filed by the petitioner in Writ Petition No.8748/2020 in the High Court of Judicature at Madras seeking a direction to the respondents to register First Information Report against AMC and the Trustees as well as various officers of the said companies for the offences under the Economic Offences Act. As First Information Report was registered during the pendency of this petition, the same has been disposed of.

BRIEF SUMMARY OF IMPORTANT CONTENTIONS IN THE STATEMENT OF OBJECTIONS FILED BY SEBI, AMC AND TRUSTEES:

19. Now we are referring to the statement of objections/response/counter filed by the contesting respondents.

20. In W.P.No.8545/2020, the 3rd respondent – SEBI has contended that though the petitioner has contended that the Regulations 39, 40 and 41 are *ultra vires* and unconstitutional as well as violative of Article 14 of the Constitution of India, the petitioner has not explained how Article 14 has been violated. It is contended that Regulation 39 (2) has to be read with the

Regulation 41 of the Mutual Funds Regulations. It is contended that Regulation 41 only deals with the procedure and the manner of the winding up process. It is contended that Regulation 39 (2) only states that a Scheme can be wound up after repaying the amount due to the unit-holders but the manner in which the repayment is to be made is provided under Regulation 41. It is contended that under Regulation 41, the approval of the unit-holders is needed only for authorizing the Trustees or any other person to take steps for winding up of a Scheme, consequent upon the decision of winding up of the Scheme. It is submitted that Regulation 41 provides adequate protection to the unit-holders. It is contended that under clause (1) of Regulation 41, a right has been conferred on the unit-holders to participate in the winding up process and clause (2) of Regulation 41 lays down that the assets of the Scheme have to be disposed of in the best interests of unit-holders. It is further submitted that the repayment of the amount to the unit-holders, as contemplated by clause (2) of Regulation 39 is not the redemption. It is a repayment in accordance with Regulation 41. It is contended that the Trustees, after careful analysis and review of the recommendations submitted by AMC decided to wound up the

said Schemes pursuant to sub-clause (a) of clause (2) of Regulation 39. It is submitted that once the Trustees have decided to wind up the Schemes on the happening of an event which in their opinion requires immediate winding up, the requirement to go to unit-holders for approval is limited to seeking approval of the unit-holders for authorizing the Trustees or any other person for taking steps for winding up. In paragraph 18 of the statement of objections, it is pointed out that if the decision of winding up is reversed, the Trustees would have to reopen the Scheme for transactions and all unit-holders would put 100% redemption requests immediately, as a result, the Mutual Fund would have to make distress sale of securities at very deep discount as the market is under distress. It is contended that such a distress sale of the assets of a Scheme would considerably reduce the Net Asset Value (NAV) which will be detrimental to all the unit-holders. It is contended that winding up of the Schemes after paying all liabilities will preserve the value for all unit-holders and provide equitable exit to all investors.

21. It is repeatedly stated in the statement of objections that sub-clause (a) of clause 2 of Regulation 39 does not envisage any consent of the unit-holders and the voting in terms of clause

(1) of Regulation 41 is only to authorize the Trustees or any other person to take steps to realize the assets of the Schemes. It is contended that a few investors should not be allowed to derail the whole procedure of winding up, as it may adversely affect the other investors of the Mutual Fund Schemes and millions of investors in the market at large.

22. It is contended that SEBI has already initiated a Forensic Audit/inspection with regard to the said Schemes under winding up. It is contended that vide letter dated 27th May, 2020, the Forensic Audit/inspection of the books of accounts and other records and documents of the FTMF, AMC and Trustees has already been initiated. If any violation is found, appropriate action will be taken under the law and that said inspection process should not be linked with the decision of the Trustees to voluntarily winding up the said six Schemes.

23. Reliance is placed on the circulars dated 23rd March 2020 and 30th April, 2020 by which, the timelines fixed in the earlier circulars was extended. It is further submitted that sub-clause (a) of clause (2) of Regulation 39 confers finality on the decision of the Trustees. It is contended that in view of Regulation 40

read with sub-clause (b) of clause (3) of Regulation 39, the decision to wind up of a Scheme automatically takes effect.

24. Referring to press release dated 7th May, 2020 relied upon by the petitioners, it is submitted that said press release is only an advisory to the FTMF to focus on returning the money of the investors as soon as possible. It is submitted that if in the Forensic Audit/inspection ordered by SEBI in respect of the said Schemes under winding up, any illegalities are found, an action will be initiated. However, the same need not be linked with the winding up process.

25. Lastly it is submitted that the powers conferred on the Trustees are not vague or arbitrary, as the same are subject to regulatory provisions of the Mutual Funds Regulations. Hence, it is contended that the Regulations 39 to 41 are legal and valid.

26. The statement of objections filed by SEBI in W.P.No.8644/2020 is more or less similar.

27. The statement of objections have been filed by AMC and Trustees. It is contended that the petitioners have sought for private remedy against a private person in connection with the private transactions. It is submitted that SEBI, which is a

specialized sectoral regulatory authority is already seized of the matter. It is submitted that the petitioners have not exhausted the alternate and efficacious remedies available to them. It is pointed out that SEBI has already initiated Forensic Audit/inspection into the affairs of the answering respondents on 27th May, 2020 and both the companies are extending cooperation for the Forensic Audit/inspection.

28. Reliance is placed on the Master Circular for Mutual Funds dated 10th July, 2018 and other circulars. It is submitted that the circulars have put in place an extensive regime to regulate management of the Mutual Funds. Various safeguards provided in the said Master Circulars have been set out. It is submitted that SEBI has wide powers of special review, audit and inspection with respect to the affairs of the Mutual Funds under SEBI Act as well as under Chapter-VIII of the Mutual Funds Regulations. Reliance is placed on Regulations 61 and 66 of the Mutual Funds Regulations which authorize SEBI to appoint an investigating officer to inspect and/or to investigate the affairs of the management Trustees and AMC. Reliance is placed on Section 11 of SEBI Act read with Regulation 76 of the Mutual Funds Regulations which confer powers on SEBI to take any measures

as it thinks fit in order to protect the interests of the investors in securities and promote the development of, and to regulate the securities market.

29. It is submitted that where the legislature has designated an authority under a specific law to regulate a specific sector, the Courts should refrain from interfering in respect of the said matter. It is pointed out that SEBI has already taken action by appointing a Forensic Auditor. It is stated that both the companies are cooperating with the Auditor.

30. It is submitted that the petitioners have not exhausted the efficacious remedies available to them by approaching the Securities Appellate Tribunal. It is submitted that they have approached SEBI by filing complaints for redressal of their grievances, which are already registered on SEBI's Complaints Redress System (SCORES). It is pointed out that the petitioners, in the petition filed before the Gujarat High Court have filed two complaints with SCORES. But, without awaiting the response from SCORES, within 30 days thereafter, the writ petitions have been filed and therefore, two parallel remedies have been adopted for the same cause of action.

31. It is also contended that these writ petitions involve various complex and disputed questions of fact and there is an alternate efficacious mechanism in law to thoroughly examine and deal with such factual allegations. It is submitted that considering the fact that SEBI, being a specialized sectoral regulatory authority is already proceeding with the Forensic Audit/inspection/ investigation, the Writ Court should not exercise its jurisdiction, inasmuch as, the writ petitions involve the disputed questions of fact. Various decisions of the Apex Court have been relied upon in this behalf.

32. It is submitted that the writ petition filed in Gujarat High Court seeks private remedies against a private persons on matters arising out of the contractual relationship. Various other factual details have been pleaded in the statement of objections. It is contended that said Schemes are all debt Schemes. These Schemes invest in debt/fixed income instruments such as non-convertible debentures/bonds issued by corporate issuers. A detailed tabular statement is given for setting out that the said Schemes are 'debt Schemes' based upon features such as Macaulay duration of the portfolio. A detailed procedure is set out for making investments in the Schemes. Reliance is also placed

on the offer documents of the Schemes and its contents. Detailed averments have been made on the functioning of the Mutual Funds as set out in the Mutual Funds Regulations and the structure of the Schemes.

33. It is contended that apart from the said six debt Schemes, FTMF manages additional 27 open ended Schemes, 24 close ended Schemes and 6 Fund Of Funds (FOF) Schemes with approximately Rs. 50,000 crores of assets under management. It is pointed out that around 20 lakh investors who have invested in the other Schemes are not affected by the present winding up.

34. Various details have been set out as to why the decision was taken to wind up the said Schemes. It is contended that COVID–19 pandemic and consequent lockdown of the economy led to severe and sustained liquidity challenges for the said Schemes as bond yields spiked and liquidity in the bond market completely collapsed. There were no viable buyers in the market for certain types of debt instruments. At the same time, the Schemes were facing massive and sustained redemptions from the investors precipitated by the economic shock and uncertainty created by COVID–19 crisis. It is pointed out that the debt

Schemes ordinarily make redemption payments from two main sources of liquidity. The first source is scheduled maturities and interest payments by issuers of the debt instruments from time to time. The second source is prepayments of amounts due by issuers in certain cases. The third source of redemption payment is the sale of investments in the portfolio of Non Convertible Debenture/Bonds (for short, 'NCDs') in the secondary market. It is submitted that the net result for the Schemes due to COVID–19 pandemic and associated market dislocations was a massive and sustained liquidity crisis. Due to liquidity crisis, on one hand, the investors in large numbers suddenly sought redemption and on the other hand, the market for assets meant to fund such redemptions (i.e. corporate bonds) completely seized up.

35. It is pointed out that the said Schemes have been successful over a sustained period of time and have successfully navigated stressed market cycles in the past. The long and successful track record of the Schemes is placed on record. The various facts and figures have been set out.

36. It is pointed out that the impact of COVID -19 pandemic is not a unique to the Indian Corporate bond markets. It is pointed

out that the United States Corporate bond market seized up on account of COVID–19 and related market disruptions. It is pointed out that in European market, at least 76 funds managing assets worth 40 billion USD were compelled to suspend redemption in March, 2020 due to increased demand for withdrawals from investors. It is pointed out that COVID–19 pandemic was a rare, unpredictable and unprecedented with a severe and sustained impact. The impact of COVID–19 has been set out in detail in paragraph 66 of the statements of objections.

37. It is pointed out that due to extraordinary effect of COVID–19 pandemic on the Indian economy led the Government of India and the Reserve Bank of India taking extraordinary measures. In fact, the provisions for initiation of insolvency under the Insolvency and Bankruptcy Code, 2016 (for short 'the Code of 2016') were suspended by six months upto September 2020. Six months moratorium was offered to the borrowers by the banks and non-banking financial institutions up to 31st August, 2020. It is submitted that even the RBI acknowledged the liquidity crunch in the financial markets in India by taking various steps.

38. It is specifically contended that the decision to wind up the said Schemes was taken specifically to protect the interests of all unit-holders in the unprecedented economic conditions and all potential avenue were exhausted before taking such a decision. Various facts and figures have been set out in paragraph 71 and 72 in this behalf.

39. In subsequent paragraphs, there is a reference to detailed considerations and deliberations. It is submitted that the Trustees and AMC were faced with very difficult choice so as to ensure protection of interest of all unit-holders of the Scheme as well as to ensure fair and equitable treatment to all the unit-holders. It is submitted that all potential avenues were duly exhausted. The appropriate answer and the course of action for the Trustees was to wind up the said Schemes pursuant to the express provisions of the Mutual Funds Regulations which was necessary to protect the interests of the investors due to the unprecedented economic environment arising from COVID–19 pandemic. This decision gave the said Schemes the ability to preserve value and to undertake a managed monetization of the portfolio securities. This was necessary for maximizing the value for unit-holders and for distribution of proceeds to unit-holders in a fair, orderly and

equitable manner in accordance with the process prescribed under Regulation 41 of the Mutual Funds Regulations. The alternative would have been a disorderly liquidation by forced sale of sound assets in a hasty and disorganized manner at discounted valuations in adverse market conditions, which would have caused value losses to the entire body in particular, small and retail unit-holders. It is submitted that the decision of winding up was taken specifically with a view to protect the best interests of the unit-holders of the Scheme.

40. The events subsequent to the decision of the winding up have also been set out. It is pointed out that the net asset value (NAV) of each Schemes is being published on daily basis. Details about the cash realized by these six Schemes on account of winding up since the winding up and up to 27th July, 2020 have been set out.

41. It is submitted that the decision of winding up of the said Schemes and decisions regarding investments are taken in accordance with SEBI Regulations and investment objectives of the respective Schemes as set out in the Scheme document. It is contended that the Trustees and AMC have exercised requisite

care and diligence at all times. It is pointed out that the Board of Directors of the Trustees and AMC had also put in place various guard-rails over and above the regulatory requirements of law with a view to manage and mitigate risks for the Schemes. In paragraph 99, various factual details have been set out dealing with the allegations of mismanagement of the said Schemes. It is further submitted that investment in the Scheme of a Mutual Fund is a contractual matter.

42. It is contented that the decision to wind up the said Schemes was pursuant to the express provisions of the Mutual Funds Regulations, as contended in the statement of objections filed by SEBI and it is contended that no approval from the unit-holders is required for taking a decision regarding winding up. While referring to Regulation 18 (15) (c), it is submitted that the reference to wind up is only with respect to winding up of a Mutual Fund as a whole and not to winding up of a Scheme of a Mutual Fund. It is pointed out that the winding up is limited to six Schemes and the other Schemes of FTMF are not affected. It is submitted that sub-clause (c) of clause (15) of Regulation 18 merely refers to winding up and not winding up of a Scheme. It is submitted that Regulations 39 to 40 forming a part of Chapter-V

of the Mutual Funds Regulations dealing with the Schemes of Mutual Fund constitute a specific and complete code dealing with winding up of Schemes of a Mutual Fund. The Regulation 18 is a general Regulation which must be read harmoniously with the specific provisions of Regulations 39 to 42 relating to winding up of the Schemes. It is submitted that if sub-clause (c) of clause (15) of Regulation 18 is to be read into sub-clause (b) of clause (2) of Regulation 39, the provisions of Regulation 39 will be rendered otiose.

43. It is contended that holding of meeting of unit-holders is necessary for seeking approval of unit-holders pursuant to Regulation 41 (1). It is submitted that the process of obtaining authorization from the unit-holders is fair and transparent. There are detailed averments made with regard to manner in which the investments were made by the Schemes.

44. It is contended that on 24th April 2020, the Trustees published notices in compliance with the provisions of sub-clause (b) of clause (3) of Regulation 39. The averments made in various paragraphs of writ petition have been separately dealt with. It is contended that in the petition filed in Delhi High Court, no

grounds have been set out to substantiate the challenge to constitutional validity of Regulations 39 to 41. It is submitted that the Trustees is not a public authority or agency or instrumentality of the State. It is urged that the petitions ought not to be entertained.

45. As far as two foreign entities are concerned, a contention has been raised that no jurisdiction lies with the Court to deal with the foreign private entities.

46. There are rejoinders filed by the petitioners to the statement of objections which are merely argumentative in nature.

SUMMARY OF SUBMISSIONS OF THE PETITIONERS

47. As directed by this Court, submissions of the learned Senior Counsel appearing for the petitioner in the petition filed before the Delhi High Court (W.P.No.8545/2020) were heard first, as there is a challenge therein to the validity of Regulations 39 to 41 of the Mutual Fund Regulations.

48. Shri. Ravindra Srivastsava, the learned Senior Counsel appearing for the petitioners in writ petition No.8545/2020 has

taken us through the various provisions of SEBI Act and the Mutual Funds Regulations. He invited our attention to the objects and reasons of SEBI Act. He submitted that SEBI Act has been enacted essentially for the protection of the investors. The object of enacting the said Act is to confer statutory powers on SEBI to effectively deal with all matters relating to the capital market. From the preamble of SEBI Act, he pointed out that the object of said legislation is to protect the investors and to regulate securities market. He pointed out that vast powers have been conferred on SEBI under section 11 of the said Act. He also invited our attention to sub-sections (2) and (3) of Section 11 of SEBI Act. He pointed out that Section 30 confers power on the Board to make Regulations. He has taken us through the various provisions of the Mutual Funds Regulations and various definitions under clause (d), (f), (q), (s), (u), (x), (y), (z) and (z-i) of Regulation 2. He pointed out the entire Scheme of the Mutual Funds Regulations starting from registration of the Mutual Funds, its structure and its management. He laid emphasis on Regulation 18 which incorporates the duties and obligations of the Trustees. He invited our attention to sub-clause (c) of clause (15) of Regulation 18 and submitted that for winding up of the

Schemes, the Trustees are under an obligation to obtain consent of the unit-holders. He pointed out the various provisions which require the Trustees to exercise due diligence and in particular, clause (25) of Regulation 18. He also pointed out the obligations of AMC under the Regulations. He also pointed out the procedure laid down for launching of the Schemes.

49. Thereafter, he has taken us through the Regulations 39, 40, 41 and 49. He submitted that sub-clause (a) of clause (2) of Regulation 39 permits the Trustees to wind up a Scheme on the happening of an event. He submitted that this provision is completely arbitrary, unguided and vague. There are no specific guidelines laid down by the Mutual Funds Regulation on the question as to which events will qualify the requirement of sub-clause (a) of clause (2) Regulation 39 empowering the Trustees to wind up the Schemes. He submitted that this provisions are manifestly arbitrary and *ultra vires* the provisions of SEBI Act, inasmuch as, the very object of SEBI Act is to protect the interest of the investors and sub-clause (a) appears to have granted a blanket power to the Trustees to wind up Schemes as per their whims and fancies. He submitted that he is going to submit in the alternate that sub-clause (a) of clause (2) of Regulation 39

needs to be read down as the consent provided in sub-clause (c) of clause (15) of Regulation 18 will have to read into it. He urged that both the provisions must be construed harmoniously and it must be held that the powers under sub-clause (a) cannot be exercised without complying with the requirement of obtaining the consent of the unit-holders. He submitted that there is no material placed on record to show that the Trustees have complied with the requirement of obtaining the consent of the unit-holders and the requirement of sub-clause (b) of clause (3) of Regulation 39 of publishing the notice disclosing the circumstances leading to the winding up of the Scheme in two daily newspapers having circulation all over India and one vernacular newspaper having circulation at the place where the Mutual Fund is formed. He submitted that these two statutory compliances have not been made. He urged that the investors stand to lose substantially, inasmuch as firstly, the assets of the said Schemes will be sold and only after clearing the liabilities, remaining amount, if any, will be made available for distribution to the unit-holders. He submitted that under Regulation 42, an enquiry can be made by SEBI only about compliance with the

procedure and the manner of winding up provided under Regulation 41.

50. He also invited our attention to the provisions of Regulation 43 regarding investment objectives of the Mutual Funds as well as Regulation 44 which deals with the investment and borrowing restrictions. He has taken us through the statement of objections filed by SEBI and pointed out that though Forensic Audit/inspection was directed on 27th May, 2020, so far nothing is placed on record to show whether the Forensic Audit is completed or not. He submitted that taking the contentions raised in the statement of objections as correct, SEBI has failed to comply with its statutory obligations and abdicated its duty of protecting the interests of the investors/unit-holders. He pointed out that SEBI has in fact, shown its helplessness to interfere with the impugned decision of the Trustees to wind up the Schemes.

51. The learned Senior Counsel has taken us through offer documents of the Scheme, the correspondence exchanged between the Trustees and SEBI and the impugned notices. He submitted that initially, AMC had taken a stand in the communication dated 14th April 2020 that they have never thought

of winding up of the Scheme and they were considering of only postponement of redemption. He submitted that within a span of three days thereafter, suddenly, there was a change of opinion of the Trustees and they wanted to wind up the said Schemes. He submitted that though the report/guidance of SEBI was sought specifically by addressing a letter, in fact, without waiting for the guidance or advice of SEBI, straightaway the impugned notice dated 23rd April 2020 has been issued. He submitted that as the Trustees and AMC are bound to follow the statutory Regulations framed under SEBI Act, they are performing a public duty and, therefore, their actions are amenable to a challenge under Article 226 of the Constitution of India. He has taken us through the several documents to show as to how the situation did not warrant the winding up of the said Schemes. He submitted that the reasons given for winding up of the Schemes were already in existence much before the COVID 19 pandemic. He submitted that no other Mutual Fund has gone for winding up due to the pandemic. He pointed out that RBI has taken several measures for improving the liquidity. He urged that SEBI, being a statutory authority has not at all gone into the question of genuineness of the reasons put forth by the Trustees for winding up of the said

Schemes. He submitted that SEBI, which is the protector of the unit-holders/investors has failed to discharge its statutory duties. He also relied upon the articles published in the newspapers, magazines etc., and publication of certain information about the said Schemes.

52. Coming to the challenge to the validity of the Regulations 39 to 43 of the Mutual Funds Regulations. He submitted that firstly, the provisions are discriminatory and violative of Article 14 of the Constitution of India. He submitted that his second challenge is on the ground of manifest arbitrariness. His third ground of challenge is that the provisions violate the fundamental rights conferred under Article 21 of the Constitution of India. Lastly, he urged that the said Regulations are *ultra vires* the statutory provisions of SEBI Act.

53. He invited our attention to the powers conferred on SEBI under Section 11-A which are conferred only for protection of investors. He also pointed out that the powers conferred on SEBI under Section 11-B which enable SEBI to issue directions to any person or class of persons including the Trustees of the Trust and any intermediary after holding an enquiry, if it is

satisfied that it is in the interest of the investors to do so. He pointed out the powers conferred on SEBI to frame Regulations under Section 30 of SEBI Act. He submitted that the general regulation making powers conferred on SEBI under sub-section (1) of Section 30 of SEBI Act can be exercised only for carrying out the objects and purposes of the Act. He submitted that very object of establishing SEBI is to protect the interest of the investors and, therefore, under the general powers conferred by sub-section (1) of Section 30 of the Act, SEBI cannot make Regulations providing for winding up of a Scheme of Mutual Fund solely on the basis of the opinion of the Trustees. Referring to sub-section (2) of Section 30 which confers power to frame regulations on specific subjects, he urged that the provisions of sub-sections (1) and (2) of Section 30 of the Act do not empower SEBI to frame the Regulations enabling the Mutual Funds to take unilateral decisions of winding up of its Schemes. He would, therefore, submit that there is no power vesting in SEBI to frame such Regulations providing for winding up of a Scheme of Mutual Funds. He, would, therefore submit that the Regulations 39 to 41 of the Mutual Funds Regulations are completely *ultra vires* SEBI Act.

54. Thereafter, referring to the provisions of the Regulation 39, in particular sub-clause (a) of clause (2), he submitted that it enables the Trustees to wind up a Scheme, when, in their opinion an event occures which requires the Scheme to be wound up. He submitted that this provision is very vague. What is the event contemplated by sub-clause (a) of clause (2) of Regulation 39 is not laid down. There are no checks and balances in the said provisions in the sense that there is no specific provision which enables SEBI to decide whether the event as contemplated by sub-clause (a) has indeed happened. He submitted that sub-clause (a) gives a blanket power to the Trustees for winding up of Schemes as per their whims and fancies which is detrimental to the interests of the investors. He submitted that this Regulation making power is conferred under SEBI Act only with the object of protecting the interests of the investors. But, the impugned Regulations provide for Trustees taking arbitrary action, which will be against the interests of the investors. He submitted that as per sub-clause (a) of clause (2) of Regulation 39, an unfettered power has been conferred on the Trustees without authorizing any statutory authority including SEBI to go into the question as to whether the opinion of the Trustees regarding happening of

any event is lawful and within the four corners of law. He submitted that in view of clause (a) of Regulation 40, once a notice as required by sub-clause (3) of Regulation 39 is published, the Mutual Fund shall cease to carry on any business activities in respect of the said Scheme. Therefore, from the moment the notice as contemplated under clause (3) of Regulation 39 is published, in view of the express provisions of clause (a) and (c) of Regulation 40, the business of the concerned Scheme comes to an end and the units cannot be redeemed by the investors.

55. He submitted that in view of Regulation 41, firstly the Trustees of the Scheme are required to dispose of the assets of the Scheme in the best interests of the unit-holders of that Scheme. The proceeds of sale are required to be first utilized towards discharge of such liabilities as are due and payable in respect of the Scheme and after making appropriate provision for meeting the expenses connected with such winding up, only the balance if any, remains available for distribution to the unit-holders in proportion to their respective interest in the assets of the Scheme. He submitted that the provisions of the said Regulations are very vague and the same confer unguided

powers on the Trustees of a Mutual Fund to take arbitrary decision and act against the interests of the investors.

56. He invited our attention to the stand taken by SEBI that the investigation in the form of Forensic Audit is in progress. He submitted that while responding to the averments in the petition, SEBI has not even disclosed whether the audit is completed and what is the outcome of such audit. He submitted that by this method, by the time audit report is received, the whole thing will become fait accompli, as the winding up process will be finalised.

57. Thereafter, the learned counsel has taken us through the offer document in respect of Franklin India Short Term Income Plan. He pointed out that the risk factors of the Scheme, as mentioned in clause (2) of the offer document indicate that one of the risk factor mentioned is that the length of time for settlement may be affected in the event the Scheme has to meet an inordinately large number of redemption requests. He pointed out that clause (2) also mentions that the Trustees have reserved right to limit or withdraw, sale and/or repurchase/redemption of the units. He also pointed out to the clause relating to the fundamental attributes of the Scheme. He submitted that the

liquidity provision such as repurchase or redemption is a fundamental attributes of the Scheme. He pointed out that the provision regarding the procedure for redemption incorporated in the offer document mentions that the Mutual Funds may limit the right to make redemption. He pointed out that there is a provision for suspension of redemption of units. He pointed out that there are similar provisions in the offer document of all the six Schemes. He submitted that the statement of additional information published by FTMF makes it clear that Templeton International Inc USA is the sponsor. He also pointed out that the clause under the caption 'responsibilities and duties of the Trustees' provides that it is the obligation and duty of the Trustees to obtain consent of the unit-holders of the Scheme, if majority of the Directors of the Trustee company decide to wind up of the Scheme. He pointed out that the offer document contains a clause consistent with the Regulations which provides that the Trustees shall be accountable for their acts, and be the custodian of the funds and property of the Scheme and shall hold the same in trust for the benefit of the unit-holders in accordance with SEBI Regulations and the provisions of the trust deed. He pointed out that there is a specific provision in the offer document

regarding the procedure and the manner of winding up. He submitted that it is specifically stated that the Scheme may be wound up if there are changes in the capital markets and fiscal laws or legal system or any event or series of events occurs, which, in the opinion of the Trustees, requires the Scheme to be wound up. Thus, he submitted that the contingencies under which the winding up can take place are specifically mentioned and, therefore a recourse cannot be taken to sub-clause (a) of clause (2) of Regulation 39 unless such exigencies as set out in the offer document are existing.

58. He invited our attention to master circular for Mutual Funds issued by SEBI in supersession of the earlier circulars and in particular, in supersession of the master circular dated 14th September 2016. While referring to clause 1.12 of the said master circular, he submitted that even the type of a Scheme such as 'open ended' or 'close ended' and the 'investment objectives' can be said to be fundamental attributes and even the redemption is also a fundamental attribute. He pointed out the provisions under Chapter-4 'risk management system'. He invited our attention to clause 4.2.3 which lays down that the

Mutual Funds shall adopt the risk management practices as a part of their due diligence exercise. He submitted that as far as the winding up of the Scheme as provided in sub-clause (a) of clause (2) of Regulation 39 is concerned, there are no guidelines in the Regulations or in the master circular.

59. Thereafter, he invited our attention to the circular dated 30th April 2020 regarding relaxation in compliance with the requirements pertaining to Mutual Funds. He also invited our attention to the notification dated 23rd September 2019 by which, the Securities and Exchange Board of India (Mutual Funds) (second amendment) Regulation 2019 (for short 'the said amendment of 2019') was brought into force and submitted that Regulation 24 was amended with effect from 15th October, 2019 and clause 1A of the 7th Schedule was substituted. The seventh schedule contains restrictions on investments, as provided in clause (1) of Regulation 44. Clause 1A which is incorporated in 7th schedule provides that a Mutual Fund Scheme shall not invest in unlisted debt instruments including commercial papers, except Government Securities and other money market instruments. The proviso therein lays down that Mutual Fund Schemes may

invest in unlisted non-convertible debentures up to a maximum of 10% of the debt portfolio of the Scheme, subject to conditions which may be imposed by SEBI.

60. He invited our attention to what is set out in e-mail dated 14th April, 2020 sent by the President of AMC to SEBI and pointed out that the e-mail sets out the anticipated and continued liquidity stress for the reasons which are mentioned therein. It is pointed out in the said e-mail that the present SEBI Regulations permit suspension of redemptions for a maximum period of 10 working days in every 90 days. Therefore, a request was made to SEBI to remove the restriction on the period of suspension of redemption. He also pointed out that on 20th April, 2020, the Trustees submitted a proposal to SEBI for winding up of the said Schemes. From the said proposal letter, he pointed out that the net outflow for the quarter period of 1st June – 30th September 2019 of the said Schemes was Rs.1,855.39 crores which jumped to Rs.8,697.53 crores in the immediate next quarter. He, therefore, pointed out that the redemption pressure started increasing much before the onset of COVID 19 pandemic. He pointed out that in the said proposal letter, the Trustees pointed out the present

scenario of the economy and that the said Schemes are anticipating the continued liquidity stress.

61. The learned Senior Counsel further invited our attention to the letter dated 14th April, 2020 and pointed out that in the said letter, the stand of AMC was that the last resort was the suspension of redemption. He pointed out that within six days thereafter, by another letter dated 20th April, 2020, the Trustees informed SEBI that winding up of the Scheme was the only option. He submitted that within a span of six days, no development had taken place and the circumstances had not changed. He pointed out that the impugned notice dated 23rd April 2020 mentions that an event has occurred which requires the said Schemes to be wound up. But what was the event which occurred has not been mentioned. Secondly, it is stated that is the only option to preserve the value for the unit-holders. He submitted that in fact, on 27th April, 2020, the RBI had announced Rs.50,000/- crores special liquidity facility for Mutual Funds. He submitted that in view of this special announcement by the RBI, there was no reason for the Trustees to proceed further with the winding up.

62. He pointed out that there is no material placed on record either by AMC or Trustees to show compliance with the requirements of sub-clause (b) of clause (3) of Regulation 39. He submitted that there is nothing placed on record to show that the impugned notices, disclosing the special circumstances for winding up of the said Schemes were published in two daily newspapers having circulation all over India, and a vernacular newspaper circulating at the place where the Mutual Fund is formed, as provided under sub-clause (b) of clause (3) of Regulation 39. He submitted that mere notice of winding up of the said Schemes is not sufficient but the circumstances leading to the winding up must be disclosed. He pointed out the reply given by SEBI when information was sought under the Right to Information Act, 2005. It is stated that SEBI neither confirmed nor denied the existence of any investigation on any specific matters. He invited attention of the Court to the statement of objections filed by SEBI and in particular, paragraph 18 and submitted that SEBI, instead of acting for the benefit of the unit-holders, seems to have taken the side of FTMF. He submitted that SEBI has not at all rebutted the averments made in the writ petition regarding applicability of sub-clause (c) of clause (15) of Regulation 18 to

the process of winding up of the said Schemes. He submitted that SEBI has virtually abdicated its statutory duty by failing to take concrete steps/care to protect the interests of the unit-holders/shareholders. He invited our attention to large number of articles written in several magazines/news papers which are on record wherein the large number of violations made by the Trustees and AMC were pointed out.

63. He submitted that the challenge to the Regulations 39 to 41 is firstly on the ground that the same are *ultra vires* the statutory provisions of SEBI Act. Secondly, the same offend the rights conferred on the unit-holders under Article 14 of the Constitution of India, as it seek to bring about discrimination and arbitrariness. He submitted that moreover, there is a violation of fundamental rights under Article 21 of the Constitution of India as well, which is vested in the unit-holders.

64. He invited our attention to the decision of the Apex Court in the case of ***Securities and Exchange Board of India –vs- Rakhi Trading Private Limited***[1] and submitted that as held by the Apex Court, the main function of SEBI is to make enquiry and

[1] (2018) 13 SCC 753

investigation and to give appropriate directions to the Trustees and AMC to promote the orderly and healthy growth of the securities market. He submitted that on the contrary, the stand taken by SEBI in its statement of objections is disappointing. The confidence reposed on it by the unit-holders has been shaken by such a stand. He invited our attention to another decision of the Apex Court in the case of ***Securities and Exchange Board of India –vs- Akshya Infrastructure Private Limited***[2] and submitted that the Apex Court observed that SEBI is the watchdog of the securities market and its is the guardian to protect the interest of the depositors/unit-holders.

65. Inviting our attention to the statement of objects and reasons as well as the preamble of SEBI Act, he submitted that the main object of enacting SEBI Act is to ensure that SEBI is under a statutory obligation to protect the interest of the investors/unit-holders. He invited our attention to the provisions of Section 11 of SEBI Act, in particular clauses (ba) and (c) of sub-section (2) as well as sub-section (4). He submitted that under Section 11-A and 11-B, there are wide powers conferred on SEBI to issue directions and levy penalty. He submitted that

[2] (2014) 11 SCC 112

the power of winding up of a Mutual Fund is essentially the power of SEBI which cannot be delegated. He submitted that only sub-clause (c) of clause (2) of Regulation 39 is valid and can stand the test of scrutiny.

66. He referred to another decision of the Apex Court in the case of ***Securities and Exchange Board of India –vs- Ajay Agarwal***[3] and submitted that as held by the Apex Court, SEBI Act was enacted to achieve the purpose of promoting the orderly and healthy growth of securities market and protecting the interests of the investors/unit-holders. He submitted that SEBI Act is a welfare legislation and therefore, the paramount duty of the Courts is to adopt such an interpretation as to further and strengthen the very object of enacting such law. He invited our attention to Section 11-C of SEBI Act, and the powers which can be exercised by SEBI.

67. Coming to sub-clause (a) of clause (2) of Regulation 39, he submitted that the provisions contained therein are very vague, inasmuch as, the event contemplated by sub-clause (a) is not specifically defined anywhere. There is no procedure laid down

[3] (2010) 3 SCC 765

for arriving at the decision by the Trustees that an event has indeed occurred as contemplated by sub-clause (a). He submitted that the unguided power has been conferred on the Trustees to wind up of a Mutual Fund as per their whims and fancies. He urged that there are no checks and balances provided in the Regulations either before or after the formation of the opinion by the Trustees. He submitted that the Regulations do not confer any power on SEBI to supervise the exercise of the power under sub-clause (a) of clause (2) of Regulation 39. He submitted that Regulation 40 is completely arbitrary, inasmuch as, it comes into operation from the moment the compliance is made by the Trustees with clause (3) of Regulation 39. Even if the action taken under sub-clause (a) of clause (2) of Regulation 39 is illegal and arbitrary, Regulation 40 operates. Coming to Regulation 41, he submitted that the Scheme is peculiar, inasmuch as, it provides that either Trustees themselves act as liquidators or their nominee can act as a liquidator. Thus, the result is that the Trustees themselves liquidate the Schemes thereby giving scope for collusive sales. As there is no machinery available for taking corrective measures, Regulation 41 becomes absolutely arbitrary. Moreover, there are no

timelines provided therein. He submitted that the provisions of Regulations 39 to 41 are manifestly arbitrary and *ultra vires* the provisions of SEBI Act. He submitted that the provisions of Regulation 41 discriminate between two types of investors, as can be seen from sub-clause (b) of clause (2) of Regulation 41. The creditors who have invested the money in the Scheme other than the unit-holders get priority and the unit-holders who hail from the poor sections of the society are placed in the last in the list of priorities. He submitted that going by the Scheme of the said Regulations, the Trustees hold the money of the investors/unit-holders in trust and for the benefit of the unit-holders. But Regulation 41 makes their position worst than the creditors of the Scheme. He invited our attention to the decision of the Apex Court in the case of ***Pioneer Urban Land and Infrastructure Limited and another –vs- Union of India and others***[4] . He submitted that in view of the dictum laid down by the Apex Court in the above case, the provision regarding winding up of the Scheme has to be treated as arbitrary, inasmuch as, the choice of cut off date exclusively vests in the Trustees. He pointed out that from the moment the Trustees specify the cut off

[4] (2019) 8 SCC 416

date and comply with the clause (3) of Regulation 39, the drastic provision of Regulation 40 comes into picture which has the effect of ceasing the entire business activities of the Scheme and from that date, redemption of units in the Scheme cannot be made. He relied upon the decision of the Apex Court in the case of ***LIC of India and another –vs- Consumer Education and Research Centre and others***[5] which in turn relies upon the decision of the Apex Court rendered in the case of ***D.S. Nakara and others –vs- Union of India***[6]. He submitted that the said Regulations have been framed in exercise of the powers of delegated legislation which do not enjoy the same immunity which a legislation enjoys. He relied upon a decision of the Apex Court in the case of ***Life Insurance Corporation of India and others –vs- Retired LIC Officers Association and others***[7] and submitted that SEBI as a delegatee ought to have exercised its power to frame the Regulations within the four corners of the statutory provisions of SEBI Act. He also invited our attention to a decision of the Apex

[5] (1995) 5 SCC 482
[6] (1983) 1 SCC 305
[7] (2008) 3 SCC 321

Court in the case of ***Indian Express Newspapers (Bombay) Private Limited and others –vs- Union of India and others***[8] .

68. He pointed out that the grounds on which a subordinate legislation can be challenged have been laid down in paragraph-15 of the decision of the Apex Court in the case of ***State of Tamil Nadu and another –vs- P. Krishnamurthy and others***[9] . He urged that when provisions of subordinate legislation are directly inconsistent with the mandatory provisions of the parent statute, such a subordinate legislation can be held to be invalid. He submitted that in the present case, the Regulations under challenge can be held to be invalid, inasmuch as, the same are manifestly unjust, oppressive or outrageous. Thereafter, the learned Senior Counsel has taken us through another decision of the Apex Court in the case of ***Harakchand Ratanchand Banthia and others –vs- Union of India and others***[10]. He submitted that the Regulation 39 of the Mutual Funds Regulations contains the provisions which are uncertain, directionless, unjustifiable and unintelligible. He submitted that if a Regulation does not contain any principles or standard for exercise of power, the same will

[8] (1985) 1 SCC 641
[9] (2006) 4 SCC 517
[10] (1969) 2 SCC 166

have to be held as arbitrary. He placed reliance on the decision of the Apex Court in the case of ***Air India –vs- Nergesh Meerza and others***[11]. He would therefore, submit that the impugned Regulations are violative of fundamental rights conferred under Article 14 of the Constitution of India. He submitted that the common man invests his hard earned money in the Mutual Fund for various good reasons. He submitted that a common man needs the money for his medical treatment, for education expenses of his children etc. Ultimately, the right to live with dignity is also a part of fundamental right of the citizens under Article 21 of the Constitution of India. He submitted that the impugned Regulations operate in an arbitrary manner which infringe the fundamental rights of the unit-holders. Their right of redemption of their investments in the open ended Schemes is completely withdrawn in view of Regulations 39 and 40.

69. Now coming to the challenge to the impugned notices of winding up of the Scheme, he submitted that both the impugned notices are issued in gross violation of the Mutual Funds Regulations. He submitted that the impugned notices are cumulatively *malafide* and action of issuing notices amounts to

[11] (1981) 4 SCC 335

colourable exercise of power by the Trustees and AMC. He submitted that the Trustees have not at all placed on record even an iota of evidence to show in what manner they formed an opinion as provided in sub-clause (a) of clause (2) of Regulation 39. He submitted that the Trustees who are expected to discharge their duties in trust and for the benefit of the unit-holders have not at all performed their duties. The winding up is solely on extraneous grounds. He submitted that the decision of winding up of the Scheme is patently against the interests of the unit-holders. He invited our attention to clause (15) of Regulation 18 and submitted that sub-clause (c) of clause (15) requires that when the majority of the Trustees decide to wind up a Scheme, they are required to obtain the consent of the unit-holders and they cannot curtail the rights of the unit-holders of redemption without their consent. He submitted that the Regulations do not contemplate winding up of a Mutual Fund and in fact, there is no provision of winding up of Mutual Fund in the said Regulations. Therefore, the decision of the Trustees for winding up of the said Schemes is violative of the provisions of sub-clause (c) of clause (15) of Regulation 18. He submitted that sub-clause (c) of clause (15) of Regulation 18 and sub-clause (a) of clause (2) of

Regulation 39 will have to be harmoniously construed. He submitted that before the Trustees take action under sub-clause (a) of clause (2) of Regulation 39, they are required to obtain consent of the unit-holders, as provided under sub-clause (c) of clause (15) of Regulation 18. He submitted that if such interpretation is not accepted, firstly, sub-clause (c) of clause (15) of Regulation 18 will become redundant. Secondly, if such interpretation is accepted, it may save the provisions of sub-clause (a) of clause (2) of Regulation from vice of unconstitutionary.

70. He submitted that the decision of the Trustees of winding up of an open ended Scheme which was taken under Regulation 39 takes away the fundamental rights of the unit-holders of redemption and, therefore, the open ended Scheme becomes a close ended Scheme. He submitted that it also amounts to change in the fundamental attributes of the Scheme, as can be seen from the contents of offer document itself. He also relied upon the master circular for Mutual Funds issued by SEBI on 10th July, 2018 and clause 1.12 thereof and submitted that clause 1.12 specifically records that types of Schemes such as 'open ended' or 'close ended' are fundamental attributes and even the

redemption/liquidity is also a fundamental attributes. He, therefore, submitted that in case of winding up of open ended Scheme, clause (15A) of Regulation 18 will be attracted, as the winding up in such case will amounts to change in the fundamental attributes. He submitted that no change in the fundamental attributes shall be carried out unless the unit-holders are given an option to exit at the prevailing Net Asset Value (NAV) without any exit load. He submitted that therefore, the condition precedent for initiating action under sub-clause (a) of clause (2) of Regulation 39 is compliance with the mandatory requirements of clause (15) and (15A) of Regulation 18.

71. The learned Senior Counsel invited attention of the Court to paragraph 51 of the statement of objections filed by the 5th and 6th respondents (AMC and Trustees) and pointed out that in paragraph 51 it is specifically stated that on 23rd April, 2020, the Trustees, after careful analysis and review of the recommendations submitted by the 5th respondent-AMC took a decision for winding up of the said Schemes. He also pointed out that what was the recommendation made by AMC has not been placed on record and even the decision of the Trustees to

wind up of the Scheme is not placed on record. He submitted that even the temporary liquidity crunch can never be a ground for such a decision. He submitted that the decision of the Trustees of winding up of the Scheme is an arbitrary decision. He submitted that not only that the recommendation of AMC is not placed on record but also the decision of the Trustees is not placed on record. He stated that even the material showing the statutory compliance with the provisions of sub-clause (3) of Regulation 39 has not been placed on record.

72. Now coming to the language used in sub-clause (2) of Regulation 39, he submitted that the repayment to the unit-holders is a condition precedent for exercise of the powers mentioned therein. He submitted that in the present case, no attempt is made to make repayment to the unit-holders. He relied upon a decision of the Apex Court in the case of ***Bhikhubhai Vithlabhai Patel and others –vs- State of Gujarat and another***[12] . He submitted that the decision making process of the Trustees can be certainly gone into by this Court. He submitted that the Court is entitled to examine as to whether there was any material available with the Trustee and whether there were

[12] (2008) 4 SCC 144

reasons recorded for formation of an opinion by the Trustees. He submitted that the Court can also look into the question whether the reasons recorded have any rational relationship with the formation of an opinion by the Trustees.

73. Thereafter, the learned Senior Counsel has taken us through the decision of the Apex Court in the case of ***63 Moons Technologies Ltd., (formerly known as financial technologies India Ltd.,) and others -vs- Union of India and others***[13]. He also relied upon the decision of the Apex Court in the case of ***Barium Chemicals Ltd., and another –vs- Company Law Board and others***[14]. He relied upon a decision of the Apex Court in the case of ***Rampur Distillery Co. Ltd., -vs- Company Law Board and another***[15]***.***

74. He submitted that large number of requests for redemption has nothing to do with the spread of COVID–19. He submitted that there are several other 'open ended Schemes' of various Mutual Funds and none of them have gone for winding up due to COVID–19. He again invited our attention to e-mail dated 14th

[13] 2019 SCC Online SC 624
[14] 1966 Supp SCR 311=AIR 1967 SC 295
[15] (1969) 2 SCC 774

April 2020 of AMC to SEBI in which, AMC has stated that except for taking recourse of suspension of redemption, there may not be any other alternative and therefore, a request was made that suspension of redemption for forty (40) days out of ninety (90) days be permitted.

75. He relied upon a decision of the Apex Court in the case of ***Nirma Industries Limited and another –vs- Securities and Exchange Board of India[16].*** He drew the attention of the Court to several paragraphs of the said decision and pointed out that the case before the Apex Court arose out of the request made by the appellants for withdrawal of public offer to acquire the equity shares of a company under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short, the said Regulations 1997'). The said request was rejected. He invited our attention to Regulation 27 of the said Regulations 1997 which is quoted in paragraph 60 which in turn uses the same phrase of as is used in sub-clause (a) of clause (2) of Regulation 39 of the Mutual Funds Regulations. It provided that no public offer, once made, shall be withdrawn except 'in such circumstances', as in the opinion of the Board (SEBI) 'merits withdrawal'. He pointed

[16] (2013) 8 SCC 20

out that the Apex Court has accepted the argument that permitting such withdrawal would lead to encouragement of unscrupulous elements to speculate in the stock market. He pointed out that the Apex Court further held that permitting the appellants therein to withdraw such public offer would deprive the ordinary shareholders of their valuable right to have an exit option under the said Regulations. Therefore, the learned Senior Counsel submitted that in the present case, the right of redemption of the unit-holders in 'open ended Scheme' is a valuable right. The learned counsel relied upon a decision of the Apex Court in the case of ***Hathising Manufacturing Co. Ltd., Ahmedabad and another –vs- Union of India and another***[17]***.***

76. Thereafter, the learned counsel addressed the Court on the issue of maintainability of writ petition against AMC, Trustees and sponsor. He relied upon what is observed in paragraph 1 of the decision of the Apex Court in the case of ***B.P. Achala Anand – vs- S. Appi Reddy and another***[18] and submitted that the law never remains static and as social norms and values change, the laws too will have to be reinterpreted and recast and the task of a

[17] AIR 1960 SC 923=(1960) 3 SCR 528
[18] (2005) 3 SCC 313

Judge is to mould the law so as to serve the needs of the time. Thereafter, he relied upon a decision of the Apex Court in the case of ***Rohtas Industries Ltd and another –vs- Rohtas Industries Staff Union and others***[19] and pointed out by relying upon paragraph 9 of the said decision that the expansive and extraordinary power of the High Court under Article 226 of the Constitution of India is of a widest amplitude and the language goes to indicate that it can be exercised even against a private individual and is available in a case where another remedy exists. He pointed out that in the said decision, the Apex Court held that an award made by an Arbitrator under Section 10-A of the Industrial Disputes Act, 1947 can be interfered with under Article 226 of the Constitution of India. Thereafter, he relied upon a decision of the Apex Court in the case of ***Zee Telefilms Ltd and another –vs- Union of India and others***[20] and submitted that with the opening up of economy and globalization, more and more governmental functions are being performed and allowed to be performed by private bodies. When the functions of a body are identifiable with the State functions, they would be State actors only in relation thereto. When a body performs governmental

[19] (1976) 2 SCC 82
[20] (2005) 4 SCC 649

functions or quasi-governmental functions as also when the business of the body is of public importance and is fundamental for the life of the people, a writ petition will lie against such a body. Hence, the functioning of the Trustees is akin to public function which has an element of public interest. He invited our attention to paragraphs 31 and 33 of the said decision.

77. Coming back to the decision in the case of ***LIC of India and another (supra),*** he submitted that every action of the public authority or the person acting in public interest or any act that given rise to public element, should be guided by public interest. He submitted that the Apex Court has observed that it is the exercise of the public power or action hedged with public elements becomes open to challenge. He submitted that the Trustees have to act in public interest and the entire business of the Mutual Funds is regulated by SEBI Act and the Mutual Funds Regulations which is a piece of subordinate legislation. He heavily relied on the decision of the Apex Court in the case of ***Binny Ltd., and another –vs- V. Sadasivan and others***[21] and submitted that the Apex Court has reiterated that Article 226 is worded in such a manner that the writ of mandamus could be

[21] (2005) 6 SCC 657

issued even against the private authority, provided that such Private Authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function.

78. On the issue of maintainability, the learned Senior Counsel relied upon the decisions in the case of ***VST Industries Ltd –vs- VST Industries workers' Union and another***[22]***, Ramesh Ahluwalia –vs- State of Punjab and others***[23] and ***Board of Control for Cricket in India –vs- Cricket Association of Bihar and others***[24]***.*** In substance, his submission is that the source of powers vesting in the Trustees is under the Mutual Funds Regulations. Therefore, he submitted that a public duty is imposed by the statutory regulations and discharge of all the obligations of the Trustees towards the unit-holders is a public function and, therefore, the writ petition seeking mandamus against Trustees is maintainable.

79. The learned Senior Counsel relied upon a decision of the learned Single Judge of the Delhi High Court in the case of ***M/S.***

[22] (2001) 1 SCC 298
[23] (2012) 12 SCC 331
[24] (2015) 3 SCC 251

Narinder Batra –vs- Union of India[25] which reiterates that the powers of the High Court under Article 226 of the Constitution of India are plenary and it constitutionally empowers a High Court to issue writs to any person not only for enforcement of fundamental rights but also for any purpose.

80. He submitted that the 6th respondent Trustee is appointed with the prior approval of SEBI, a statutory body, as required by Regulation 17 of the Mutual Funds Regulations. He submitted that if the object of establishment of SEBI is considered and the entire Scheme of the Mutual Funds Regulations is considered, Section 11-B of SEBI Act will have to be read with Regulation 39 of the Mutual Funds Regulations and, therefore, for the purposes of issuing directions under Section 11-B of SEBI Act, SEBI will have to go into the question whether the circumstances, as contemplated by sub-clause (a) of clause (2) of Regulation 39 indeed existed.

81. He submitted that even the terms of reference given to the Auditors/Forensic Auditors are not at all placed on record. He submitted that no one knows what has happened to the Forensic Audit, as it has not seen the light of the day. He submitted that

[25] 2009 SCC Online Del 480

going by the statement of objections filed by SEBI, it is apparent that it has refused to perform its statutory duties as the guardian of the investors/unit-holders. He would, therefore, submit that this Court will have to issue a writ of mandamus, directing the 4th respondent (Serious Fraud Investigation Office) to conduct/hold an investigation/enquiry into the affairs of the AMC and the Trustees, as there is overwhelming public interest involved. He submitted that SEBI has not performed its statutory duty and thereby it has left more than three lakh investors without any relief. He submitted that as the investors or unit-holders are having no other statutory remedy provided either under SEBI Act or under the Mutual Funds Regulations, they have no option but to approach the Writ Court. He would, therefore, submit that interference at the hands of this Court is necessary and prays for allowing the writ petition. Further, he urged that if this Court is of the view and were to come to the conclusion that no case is made out to strike down the impugned Mutual Funds Regulations, the same will have to be read to mean that without the consent of the unit-holders, as contemplated by sub-clause (c) of clause (15) of the Regulation 18, recourse to winding up of the Schemes cannot be taken. He would, therefore, submit that this Court will

have to step in and protect the interests of the large number of investors.

82. In Writ Petition No.8644/2020, Shri. Adithya Sondhi, learned Senior Counsel had made the submissions on behalf of the petitioners. Inviting our attention to the Regulation 39 (2) (a) of the Mutual Funds Regulations he submitted that the condition precedent for winding up of a Scheme is the formation of opinion of the Trustees. He submitted that in the present case, AMC has influenced the decision of the Trustees and in fact, the decision of the Trustees or formation of the opinion of the Trustees is not placed on record at all. He urged that it is very clear from the documents on record that AMC influenced the decision of the Trustees. He invited the attention of the Court to the impugned notice dated 23rd April, 2020 and submitted that while arriving at the decision, the Trustees have relied upon the recommendations of AMC and such recommendations of AMC are also not placed on record. He submitted that in the letter to investors issued by FTMF which is placed on record, it is merely mentioned that in view of the recommendations of AMC, the Trustees were of the opinion that an event has occurred which required the Schemes

to be wind up. He stated that the role played by AMC in the decision of the winding up of the Schemes is on record. He invited our attention to the letter dated 20th April, 2020 of the Trustees addressed to SEBI and submitted that the net outflow, as stated in the said letter for the period between first October 2019 to 31st December 2019 shows that there were large number of requests for redemption during the said period. In the said quarter, the net outflow was Rs.8,697.53 crores and whereas, in the immediate earlier quarter, the net outflow was Rs.1,855.39 crores. He would, therefore, submit that the reason for increase in the demand for redemption was not at all on account of COVID–19. He pointed out the contents of the circular dated 31st May, 2016 issued by SEBI which provided for imposing restrictions on redemption for a specific period of time not exceeding ten working days in ninety days. He submitted that FTMF had made a request to extend the said period of 10 days to 40 days.

83. He invited our attention to the statement of objections filed by AMC and the Trustees and in particular the averments made at page 69 and submits that the averments made therein would

clearly indicate that COVID–19 is not the reason for winding up of the Scheme.

84. He submitted that the assets of a Scheme of a Mutual Fund are always held in fiduciary capacity by the Trustees in trust and for the benefit of the unit-holders. Relying upon the provisions of Section 47 of the Indian Trusts Act, 1882 (for short 'the said Act of 1882'), he submitted that the Trustees cannot delegate their functions. He pointed out that there is a joint statement of objections filed by AMC and the Trustees and the said joint statement of objections is affirmed by the Secretary of AMC and not by the Trustee and from this, an inference can be drawn that the decision for winding up of the Scheme is influenced by AMC. He submitted that as there was a demand for redemption, on 22nd April, 2020, AMC had requested SEBI to grant enhancement of borrowing limit from 20% to 30% in case of one Scheme and 40% in relation to the few other Schemes. He pointed out that said request was immediately granted by SEBI.

85. He invited our attention to the rejoinder filed by the petitioner and in particular, Annexure-T which is a notice of 26th extraordinary general meeting of the Trustees convened on 18th

June, 2020. He pointed out that it was proposed to pass a resolution that the Trustees Company shall indemnify all directors, in connection with liability that any of them may incur in connection with the winding up of the said Schemes. He submitted that this conduct of the Trustees is completely contrary to the provisions of the Mutual Funds Regulations. He invited our attention to various sub-clauses of the Regulations 16 and 18. He submitted that very high standard of conduct is expected from the Trustees and in the present case, there is a clear conflict of interests between the Trustees and AMC. He invited our attention to statement of additional information furnished by FTMF and the email dated 21st May, 2020 addressed by the Grievances Redressal Mechanism Team to the investors and pointed that in the said communisation, it was clearly stated that heightened redemptions were noticed since January, 2020. He submitted that the said e-mail shows that the decision to winding up of the said Schemes is by AMC and not by the Trustees. He pointed out that there was a direct involvement of AMC in the decision making process.

86. He submitted that there is a material on record to show that the Trustees have delegated their power to AMC despite the fact

that there was no such provision in the Trust Deed. He relied upon the interpretation put by the Calcutta High Court in the case of ***Shri. Mahadeo Jew and another –vs- Balkrishna Vyas and another***[26] in particular, what is held in paragraphs 22 and 23. He submitted that it is well settled law that a Trustees cannot transfer his duties, powers and obligations to some other body or person and thereby surrender his own conscience. He submitted that the Trustees cannot transfer their duties unless it is specifically provided in the Trust Deed. He submitted that the draft of the Trust Deed, as contemplated by Mutual Funds Regulations does not provides for insertion of any such clause in the trust deed, empowering the Trustees to delegate their powers to any other person or body. In this behalf, he relied upon a decision of the Apex Court in the case of ***Sheikh Abdul Kayum and others –vs- Mulla Alibhai and others***[27].

87. He argued that if consent as provided in sub-clause (c) of clause 18 of Regulation 15 is not read into sub-clause (a) of clause (2) of Regulation 39, the said sub-clause (c) will become redundant. He invited our attention to a decision of the

[26] AIR 1952 Cal 763
[27] AIR 1963 SC 309

Constitution Bench of the Apex Court in the case of ***Hardeep Singh –vs- State of Punjab and others***[28]. He relied upon what is held in paragraph 42 onwards and submitted that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words. He submitted that no word can be rendered ineffective or purposeless. Thereafter, he relied upon a decision of the Apex Court in the case of ***Swedish Match AB and another –vs- Securities and Exchange Board of India and another***[29]***.*** He submitted that as held in paragraph 104 of the said decision, the Mutual Funds Regulations being regulatory in nature, the intent and object sought to be achieved thereby must be strictly complied with.

88. He invited our attention to the language used by the Regulations and submitted that sub-clause (c) of clause (15) of the Regulation 18 clearly provides that the Trustees are under a mandate to obtain consent of the unit-holders, when the majority of the Trustees decide to wind up the Scheme. He submitted

[28] (2014) 3 SCC 92
[29] (2004) 11 SCC 641

that clause (1) of Regulation 41 refers to approval by simple majority of the unit-holders to the resolution for authorizing the Trustees or any other person to take steps for winding up of a Scheme. He submitted that this approval is entirely different from the consent contemplated in sub-clause (c) of clause (15) of Regulation 18. He invited our attention to the Statement of Additional Information published by FTMF which specifically refers to the procedure for obtaining the consent of the unit-holders in accordance with the provisions contained in clause (15) of Regulation 18. He pointed out that it lays down the manner in which the consent of the unit-holders can be obtained. He submitted that if the Scheme of the Mutual Funds Regulations is considered in its true letter and spirit, it is apparent that every Scheme of a Mutual Fund becomes a trust within a trust. He pointed out the specific provision of the Regulations that the Trustees hold the assets of a Scheme in trust and for the benefit of the unit-holders. He submitted that each Scheme of a Mutual Fund being a trust, the same cannot be revoked without prior consent of the beneficiaries/unit-holders, as required under Section 78 of the Trusts Act. He submitted that winding up of an

individual Scheme amounts to revocation of trust which cannot be made in violation of the statutory provisions of the Trusts Act.

89. He relied upon a decision of the Apex Court in the case of ***Commissioner of Income Tax Andhra Pradesh –vs- The Trustees of H.E.H. The Nizam's Family Trust***[30]***.*** He pointed out that in the said decision, it was found that one deed of trust executed by Nizam provided for a number separate and distinct trusts. He pointed out clause (8) of Regulation 18. The code of conduct mentioned in the fifth schedule to the Mutual Funds Regulations clearly supports his case that each Scheme constitutes a separate trust within the larger trust of a Mutual Fund. He relied upon the observations made by the Apex Court in the case of ***Commissioner of Income Tax, Bombay City I, Bombay –vs- Manilal Dhanji, Bombay***[31]***.*** He relied upon another decision of the Apex Court in the case of ***Sahara India Real Estate Corporation Limited and others –vs- Securities and Exchange Board of India and another***[32] and in particular, what is held in paragraphs 65 and 70 thereof. He relied upon the decision of the Madras High Court in the case of

[30] (1986) 4 SCC 352
[31] AIR 1963 SC 433
[32] (2013) 1 SCC 1

C.*Duraiswami Iyengar and another –vs- The United India Life Assurance Co. Ltd*[33]. He relied upon the said decision in support of his submission that each Scheme is a trust within the larger trust of a Mutual Fund. Thereafter, he invited our attention to the provisions of the Trusts Act regarding the liabilities of the Trustees for the breach of trust. He relied upon the decision of a British Court in the case of ***Wedderburn –vs- Wedderburn***[34].

90. Thereafter, going to his next limb of arguments, based on the provisions contained in clause (15A) of Regulation 18, he submitted that the offer document clearly lays down what are the fundamental attributes of the said Schemes. He submitted that one of the fundamental attributes is the facility of redemption. He submitted that the moment a notice under clause (3) of Regulation 39 is published, in view of Regulation 40, the right of redemption conferred on the unit-holders is taken away and the Scheme ceases to be an 'open ended Scheme'. He submitted that therefore, the action initiated by the Trustees for winding up of the said Schemes clearly amounts to a change in the fundamental attributes of the said Schemes. The condition

[33] AIR 1956 Mad 316
[34] 1 JAC & W 50

precedent for change in fundamental attributes is that the unit-holders are given an option to exit at the prevailing NAV without any exit load. He submitted that in view of non-compliance with the mandatory requirements of clause (15A) of Regulation 18, the decision of the Trustees to wind up of the said Schemes becomes completely illegal. He submitted that by virtue of the publication of a notice under clause (3) of Regulation 39 and in view of what is provided under Regulation 40, the facility of redemption is taken away and therefore unit-holders will not get their hard earned investment back unless the entire procedure under Regulation 41 and 42 is completed. He submitted that thus, the action taken under clause 2(a) of Regulation 39 clearly brings about a change in the fundamental attributes of the said Scheme, inasmuch as, there is no opportunity for the unit-holders to exit by taking the NAV after the date of the decision. Therefore, the decision for winding up of the said Schemes is completely illegal.

91. Learned senior counsel appearing for the petitioner relied upon a decision of the Delhi High Court in the case of ***Mahanagar Telephone Nigam Ltd and etc., –vs- Telecom***

Regulatory Authority of Delhi and etc.,[35] and contended that what cannot be done directly cannot also be done indirectly. Relying upon the very same decision, he submitted that the provisions of Regulation 39 will have to be read harmoniously with the provisions of clauses (15) and (15A) of Regulation 18. He submitted that the action of winding up of the Schemes is an action in *rem* which should be taken as a last resort. In support of his submission, he placed reliance on the decisions of the Apex Court in the case of ***Hind Overseas Pvt Limited –vs- Raghunath Prasad Jhunjhunwalla and another***[36] and ***Swiss Ribbons Private Limited and another –vs- Union of India and others***[37]. He submitted that recourse to winding up of the Scheme can be taken only as a last resort. For the same proposition, he relied upon another decision of the Apex Court in the case of ***Poineer Urgan Land and Infrastructure Limited and another –vs- Union of India and others***[38]***.***

92. He placed reliance on the orders of winding up passed in relation to certain Mutual Funds where there is a provision for redemption. However, he accepted that such orders have been

[35] 2000 SCC Online Del 19
[36] (1976) 3 SCC 259
[37] (2019) 4 SCC 17
[38] (2019) 8 SCC 416

passed by SEBI in exercise of its powers under sub-clause (c) of clause (2) of Regulation 39.

93. He submitted that 32% of the AUM have been invested in the unlisted documents, which percentage could not have exceeded 20%. He relied upon a document styled as 'Review of Risk Management Framework of Liquid Funds, Investment Norms and Valuation of Money Market and Debt Securities by Mutual Funds' and submitted that the recommendation in the said document is that by the end of 31st March, 2020, the minimum investment in listed non-convertible debentures should be 90% and unlisted investment should be maximum 10%. He submitted that on the basis of the said recommendation, SEBI approved the Prudential norms for investment which provide that the Mutual Funds can invest in un-listed document of NCDs up to a maximum of 10% of the debt portfolio. The learned Senior Counsel relied upon clause (2) of Regulation 25 of the Mutual Funds Regulations which required AMC to exercise due diligence and care in all its investment decisions. He submitted that the said care has not been taken by AMC. He invited our attention to the annexure to rejoinder filed by the petitioner which is a

communication addressed by the President of AMC to the unit-holders and pointed out that AMC has blamed the pendency of the present case for the delay. He invited our attention to clause (v) of paragraph 92 of the statement of objections of AMC and the Trustees, in which it is specifically contended that the two Schemes i.e., Franklin India Ultra Short Bond Fund and Franklin India Dynamic Accrual Fund out of six Schemes are now cash positive and have ready cash available for distribution. He pointed out that those two Schemes have the ability to immediately start paying monies to their investors and the main reason why the payments are on hold is the ongoing litigation and specifically the stay order passed by the Gujarat High Court. He submitted that on the one hand, the Trustees took a decision to wind up the said Schemes and on the other hand, they continued to request SEBI for extension of limit of borrowing. The learned counsel has invited our attention to the fact that the progress of the Forensic Audit of the said Schemes is not brought on record and in fact, in the statement of objections, SEBI has categorically stated that it is an internal document of SEBI. Referring to the averments made in paragraphs 29 and 30 of the statement of objections filed by the Trustees and AMC, he submitted that there is no clarity as

to whether the Forensic Audit is ordered or an inspection has been ordered. He submitted that SEBI must explain and must place before this Court the report of the Forensic Audit.

94. About the issue of maintainability, the learned Senior Counsel relied upon a decision of the Apex Court in the case of ***Marwari Balika Vidyalaya –vs- Asha Srivastava and others***[39]***.*** He submitted that the jurisdiction to issue writs under Article 226 of the Constitution of India is not confined only to the statutory agencies/authorities and instrumentalities of the State. The directions can be issued to any other person or body, performing a public duty. He submitted that if the nature of the duties imposed on a particular body is in the nature of public duties, a writ of mandamus can be issued against the said body. On the same proposition, he also relied upon the decisions of the Calcutta High Court in the case of ***Kotak Mahindra Bank Limited –vs- Hindustan National Glass and Industries Limited and others***[40] and in the case of ***The Peerless General Finance and Investment Co. Ltd and another –vs- Canara Bank and***

[39] 2019 SCC Online SC 408
[40] 2009 SCC Online Cal 2112=(2013) 7 SCC 369

***others*[41].** The learned senior counsel, therefore, submitted that intervention at the hands of this Court is necessary for protection of the unit-holders. He submitted that this Court, while exercising jurisdiction under Article 226 of the Constitution of India has power and jurisdiction to go into the merits of the decision of the Trustees. Further, he submitted that as there are no other remedies available to the unit-holders except to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners are before this Court.

95. Now we come to the submissions made by Shri Nithyesh Nataraj, the learned counsel appearing for the petitioners in Writ Petition No.8748/2020. He taken us through the Mutual Funds Regulations and in particular, Regulations 11 and 11B. He pointed out that AMC had indulged in making the investments which are not prudent, as 30% of the investments were made in an illiquid and un-listed documents. He submitted that it was imprudent conduct on the part of AMC to contend that requests for large-scale redemption were due to COVID–19, inasmuch as the same started from October, 2019. He submitted that the Trustees were under an obligation to act in trust and for the

[41] 2011 SCC Online Cal 2913

benefit of the unit-holders, but they have failed to do so. From the joint statement of objections filed by the Trustees and AMC, it is crystal clear that the Trustees have not acted independently and therefore, the decision of the Trustees was influenced by AMC and hence, an adverse inference is required to be drawn.

96. By pointing out the averments made in paragraphs 66 and 67 of the counter affidavit jointly filed by the Trustees and AMC, he submitted that after 23rd April, 2020, the loan amounts of the creditors have been illegally cleared, which could not have been done in the teeth of Regulation 40. He submitted that on 24th April, 2020, redemptions were made contrary to Regulation 40, inasmuch as, after the publication of notice under sub-clause (3) of Regulation 39, no redemption could have been made. He submitted that mandate of clause (15A) of Regulation 18 was not complied with by obtaining consent of the unit-holders or by providing them exit option. The learned counsel invited our attention to Section 11 of SEBI Act and in particular, sub-section (1) which lays down that the duty of the Board is to protect the interests of the investors in securities and to take measures for that purpose. He invited our attention to sub-section (4) of

Section 11 which confers wide powers on SEBI to take various measures provided therein either pending investigation/inquiry or on completion of such investigation or inquiry. He also invited our attention to Section 11B which confers wide power on SEBI to issue directions to any company, in respect of the matters specified in Section 11A.

97. He submitted that in view of clause (2) of Regulation 44, a Mutual Fund is not entitled to borrow more than 20% of the net assets of the Scheme and the duration of such a borrowing cannot exceed a period of more than six months. He submitted that SEBI does not have power to enhance the limit of borrowing to more than 20%. He pointed out that notwithstanding the said express provision, SEBI has permitted borrowing in excess of 20% by its letter dated 22nd April, 2020.

98. The learned counsel invited our attention to the statement of objections filed by AMC and Trustees and in particular, the contentions raised that in case of two Schemes out of six, all borrowings of these Schemes have been paid off in accordance with Regulation 41**.** He submitted that in the teeth of Regulation 40, the borrowings could not have been paid off by AMC. He

pointed out from the document No.181 issued by AMC on 10th July, 2020 which records that even on 24th April 2020, certain redemptions have been made.

99. He submitted that clause (15A) of Regulation 18 is also attracted, inasmuch as, winding up of the Schemes amounts to change in the fundamental attributes of any Scheme. Thereafter, he invited our attention to Section 78 of the Trusts Act which lays down that a Trust cannot be revoked without the consent of the beneficiaries. He submitted that the unit-holders are the beneficiaries of the Trust and hence, the principles of natural justice will apply, as the rights of several unit-holders have been affected. He relied upon the annexures to the order of the Ministry of Home Affairs dated 24th March, 2020 and submitted that action of the Trustees of winding up could not have been taken in the teeth of the said guidelines, as all commercial establishments were ordered to remain closed.

100. He submitted that COVID–19 is not at all a ground for winding up and in any case, the Trustees could have taken a decision for postponement of redemption for meeting the exigency created large scale requests for redemption.

101. He submitted that the relationship between the unit-holders and Trustees is that of principal and agents and, therefore, the provisions of Section 211 and 212 of the Indian Contract Act, 1872 will apply. He submitted that the stand of SEBI regarding Forensic Audit is also confusing. He stated that it is not clear whether it is an investigation or it is an audit. He invited our attention to clauses 4A, 17 and 18 of Regulation 18 and submitted that compliance with the said statutory provisions in respect of these Schemes has not been made and no material has been placed on record in that behalf. He submitted that what action was taken after 1st October, 2019 is not placed on record.

102. He submitted that on the issue of maintainability, a very elitist stand has been taken by SEBI. He submitted that Rupees twenty five lakhs crores is the total investment made in the Mutual Funds and therefore, element of public interest is certainly involved.

103. Now turning to the Criminal Petition No.3206/2020, he submitted that the first respondent, the Economic Offence Wing

of SEBI is a police station within the meaning of sub-clause (s) of Section (2) of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C'). He pointed out that in the complaint made by the petitioner, the allegation against AMC and the Trustees and their Directors was of commission of the offences under the provisions of the Tamil Nadu Protection of Interest of Investors (in financial establishments) Act, 1970 (for short, 'the Tamil Nadu Act') as well as the offences punishable under the provisions of the Indian Penal Code. He submitted that despite such a complaint, no action was taken by the respondents on the basis of the said complaint. We must note here that during the course of hearing, it was pointed out that on the basis of the complaint of the petitioner, a First Information Report has been registered. Therefore this petition has been disposed of by passing a separate order.

SUBMISSIONS OF THIRD PARTY-APPLICANTS:

104. The learned counsel appearing for the applicants in I.A.III of 2020 in Writ Petition No.8644 of 2020 urged that this is a case of complete violation of the Mutual Funds Regulations. He invited our attention to Section 15JB of SEBI Act as well as

Section 15-I thereof. He submitted that considering the Scheme of SEBI Act, there is no remedy available to the investors even after adjudication is made by adjudicating authority in accordance with the provisions of Section 15-I of SEBI Act and the unit-holders have no other remedy except approaching a Writ Court. He submitted that on 7th May 2020, a direction was issued by SEBI to the FTMF to pay the amounts to the unit-holders, but the said direction has not been complied with. He would urge that SEBI has not acted in the best interests of the investors. Though, he relied upon additional affidavit filed by the intervener, he was not permitted to rely upon the same, as it has been filed without permission of the Court. He submitted that clause (15A) of Regulation 18 will have to be implemented by affording an opportunity to the unit-holders to exercise an option to exit by taking the Net Asset Value without any exit load. He submitted that the liquidity issue can never be a ground under sub-clause (a) of clause (2) of Regulation 39 to initiate winding up of the Scheme. He submitted that sub-clause (a) of clause (2) of Regulation 39 will have to be read with clauses (15) and (15A) of Regulation 18. He submitted that the interplay between Regulation 39 and clause 15 of Regulation 18 is very important.

105. He submitted that the investment of the unit-holders does not become asset of either Trustees or AMC. He submitted that the investment is held by the Trustees in fiduciary capacity in trust and for the benefit of the unit-holders. He submitted that the Scheme is founded on trust. He placed reliance on a decision of the Apex Court in the case ***Charan Lal Sahu –vs- Union of India***[42]***.*** He has also relied upon ***Shafin Jahan vs. Asokan K.M. and others***.[43] He invoked *parens patriae* doctrine. He submitted that this Court as a constitutional Court has to act as *parens patriae* and protect the investors of FTMF.

106. The learned counsel appearing for the applicants in IA No. I and II of 2020 in writ petition No.8748/2020 made submissions contending that there is no enquiry made by SEBI about the legality of the decision of the Trustees. He also invited our attention to various provisions of SEBI Act. He submitted that sub-clause (c) of clause (15) of Regulation 18 will apply to winding up of the Scheme under sub-clause (a) of clause (2) of Regulation 39 and, therefore, without the consent of the unit-holders, the winding up could not have proceeded. He also

[42] (1990) 1 SCC 613
[43] (2018) 16 SCC 368

pointed out the correspondence between AMC and SEBI and Trustees and SEBI.

SUBMISSIONS OF SEBI

107. Shri. Arvind Datar, learned senior counsel appearing for SEBI also made detailed submissions. At the outset, he submitted that the criticism made by the petitioners about the inaction on the part of SEBI is un-called for, inasmuch as, every possible action which could be taken under SEBI Act and the Mutual Funds Regulations has been initiated by SEBI. He submitted that in the year 2011, the total investment in the Mutual Funds was of Rupees ten lakh crores which has gone up to Rupees twenty seven lakh crores in the year 2020. He submitted that more than 2000 Mutual Funds are in existence and that SEBI's role is not confined only to Mutual Funds but it extends to all kinds of securities within the meaning of Section 2 of the Securities Contracts (Regulation) Act, 1956. He submitted that the role played by SEBI is being examined in these cases only as regards six Schemes run by one of the several Mutual Funds.

108. While answering the queries made by the Court, he submitted that the Forensic Auditors have submitted an interim report on 3rd August, 2020 which has been furnished to AMC and Trustees. He submitted that after reply submitted by AMC and Trustees is considered by the Auditors, final report will be submitted. He submitted that after the letter dated 20th April 2020 was forwarded by the Trustees, SEBI had received a request on 22nd April 2020 from AMC for enhancement of borrowing limit stipulated by clause (2) of Regulation 44 of the Mutual Funds Regulations. He pointed out that in case of three Schemes, the request was acceded to by SEBI which was communicated by a letter dated 22nd April 2020. As regards compliance of clause (3) of Regulation 39, he submitted that necessary compliance will have to be shown by the Trustees. On a specific query made by the Court, he stated that though for taking action under sub-clause (a) of clause (2) of Regulation 39, a resolution has to be passed by the Board of Directors of the Trustees, SEBI is not aware whether in this case, any such resolution has been passed. He submitted that after the decision was taken by the Trustees, action has been taken by SEBI starting investigation in accordance with the regulation 61 by

ordering a Forensic Audit. He submitted that further action will be taken after receipt of the final Forensic Audit report.

109. Thereafter, he dealt with the arguments addressed by the petitioners regarding applicability of clause 15 (c) of Regulation 18 to sub-clause (a) of clause (2) of Regulation 39. He submitted that Regulations 39 to 42 form a part of Chapter-V which deal with the winding up of the Schemes of Mutual Fund and Regulation 18 which is a part of Chapter-III of the Regulations deals with constitution and management of Mutual Fund and obligations of the Trustees etc. He submitted that action sub-clause (a) of clause (2) of Regulation 39 does not require consent of the unit-holders. He urged that whenever consent of unit-holders is required, the Regulations specifically provide for it. He submitted that sub-clause (c) of clause (15) of Regulation 18 comes into operation only after the Trustees decide that a Scheme should be wound up in accordance with sub-clause (a) of clause (2) of Regulation 39. He pointed out that only under sub-clause (1) of Regulation 41, an approval of the unit-holders by simple majority is contemplated for authorising the Trustees or any other person to take steps for winding up of the Scheme. He

submitted that consent referred in sub-clause (c) of clause (15) of Regulation 18 is referable to approval under clause (1) of Regulation 41.

110. He submitted that clause 15A of Regulation 18 will have no application to winding up, as it applies only when the Trustees want to make a change in the fundamental attributes of any Schemes or any other change which amounts to the modification of the Scheme and affects the interest of the unit-holders. He urged that clause 15A of Regulation 18 operates in a totally different field.

111. He submitted that the Trustees always act in fiduciary capacity and therefore, they are in best position to take a decision on the existence of circumstance which requires winding up of the Scheme. He submitted that if the consent of the unit-holders is read into sub-clause (a) of clause (2) of Regulation 39, it will have disastrous consequences. He submitted that in a given case, if the Trustees find that there are large scale requests for redemption by unit-holders which cannot be met without making distress sale of the assets, the Trustees will be well within their power to take a decision for winding up of a Scheme. He

submitted that if such freedom is not given to the Trustees, they will have to sell the assets by making a distress sale which will affect the capacity of AMC to borrow and ultimately NAV will be substantially reduced thereby causing prejudice to the unit-holders. He submitted that the investment in Mutual Fund is always subject to risks and when the unit-holders make investment by purchasing units, they always take a risk. He submitted that in case, the requirement of consent is read in sub-clause (a) of clause (2) of Regulation 39, if the majority of the unit-holders decline to grant consent, there will be no option but to make a distress sale of the assets of the Scheme to meet the demand for redemption and the same will cause prejudice to the other unit-holders. He submitted that sub-clause (b) of clause (2) of Regulation 39 contains specific provision where seventy-five percent of the unit-holders can decide to wind up a Scheme and if interpretation put to sub-clause (c) of clause (15) of Regulation 18 is accepted, even 50% of the unit-holders will be able to prevent the Trustees from the winding up a Scheme. He invited our attention to the provisions of Section 29 of the Trusts Act which always empowers the Trustees to do the acts which are

reasonable for protection of the trust property and for protection or support of the beneficiaries.

112. Now coming to the writ petition filed in the High Court at Madras, he submitted that the said Public Interest Litigation is not maintainable. He submitted that the unit-holders are not in a helpless position and they can always approach the Court of law for redressal of their grievances. He placed reliance on a decision of the Apex Court in the case of ***S.P. Gupta –vs- Union of India and another***[44] and in particular, paragraph 17 of the said decision in support of his plea that Public Interest Litigation is not maintainable. He submitted that the Public Interest Litigation should be dismissed with costs. He submitted that while dealing with the case of the investors, it must be also remembered that investment in market is always involves a risk and, therefore, the investment made in the Mutual Funds is also subject to risks. He submitted that if the entire Scheme of the Mutual Funds, as envisaged by the Mutual Funds Regulations is considered, the unit-holders are not entitled to refund of their investment and they will get the returns as per the provisions of the Scheme. He submitted that under the Mutual Funds Regulations, SEBI is the

[44] AIR 1982 SC 149

regulator and in fact, the running of a Mutual Fund is highly regulated. He submitted that SEBI had initiated action by ordering Forensic Audit and after receiving the final report, SEBI is bound to take action in accordance with the Regulations and SEBI Act. He submitted that a perusal of the said Regulations will show that the same were brought into force with effect from 9th December, 1996 and thereafter, several amendments thereto have been made from time to time. Inviting our attention to the averments made in the writ petitions filed in Delhi and Madras High Courts, he submitted that there are no allegations that SEBI has not done its statutory duties under the Regulations. He submitted that there are no specific allegations in the writ petitions that SEBI has not abided by a particular Regulation and therefore, a writ of mandamus cannot be issued against SEBI. He relied upon various paragraphs of the statement of objections filed by SEBI dealing with the actions taken by SEBI. He submitted that in case of Mutual Funds, the process of investment to be made by AMC is highly regulated.

113. He submitted that the Court will have to adopt an approach which will ensure that the remedy is not worse than the disease.

He submitted that there is a vast difference between winding up of the Schemes of a Mutual Fund and winding up of a company. In case of winding up of a company, there are statutory provisions which require the involvement of the shareholders in the process of winding up. But, there is no such requirement under the Mutual Funds Regulations in case of the unit-holders. In support of his contention, he relied upon a decision of the Apex Court in the case of ***Poineer Urgan Land and Infrastructure Limited and another –vs- Union of India and others*** and also another decision of the Apex Court in the case of ***Swiss Ribbon Private Limited and another –vs- Union of India and others*** which are referred earlier.

114. He submitted that SEBI is willing to produce a copy of report submitted by the Forensic Auditor on 3rd August 2020. He, however, submitted that it is not a final report and the investigation by the Forensic Auditor is not yet completed. He states that the response of AMC and Trustees has been sought for and after considering their response, final report will be submitted by the Forensic Auditor. He submitted that when the investigation is not yet completed, if the report submitted on 3rd August, 2020 is made public, it will prejudice the investigation.

He submitted that there are annexures consisting of more than one thousand pages to the said report and when the Forensic Auditor is yet to complete the investigation, it will be improper for SEBI to disclose its contents. He submitted that at this stage, no conclusion can be drawn on the basis of the said report. He submitted that he has no objection if for the purposes of deciding this contention raised by SEBI, a copy of the report can be made available to this Court. He submitted that the Court can always go through the report which will be filed in the Court in a sealed cover without making it public. He urged that the Court can go through the report and decide whether it should be made available to the petitioners. At this stage, learned Senior Counsel appearing for the petitioners in Delhi petition submitted that the report cannot be withheld in such a manner from the petitioners. Shri. Janak Dwarakadas, the learned Senior Counsel appearing for AMC and the Trustees submitted that he has a strong objection for SEBI filing the report in sealed cover and for this Court going through the said report even for a limited purposes of deciding the contention of SEBI that under any circumstances, the said report should not be made public.

115. Shri. Arvind Datar, learned Senior counsel relied upon a decision of the Apex Court in the case of ***G. Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, Porayar, Tanjore District, Madras –vs- Raman and Raman Limited, Kumbakonam, Tanjore District and three others***[45]***.*** He also relied upon a decision of the Apex Court in the case of ***Board of Control for Cricket in India –vs- Cricket Association of Bihar and others***[46]. He submitted that no reliefs can be granted in these writ petitions as against SEBI and prays for dismissal of the writ petitions. Lastly, he submitted that further submissions will be canvassed by Shri. Tushar Mehta, learned Solicitor General of India, on the prayer for challenging the constitutional validity of the provisions of Regulations 39 to 42 of the Mutual Funds Regulations.

SUBMISSIONS OF AMC AND TRUSTEES

116. Shri. Harish Salve, learned Senior Counsel appearing for AMC and the Trustees has made detailed submissions. Firstly, he submitted that on instructions, he is making a statement that his clients have no objection, if SEBI appoints an independent

[45] AIR 1952 SC 192
[46] (2014) 7 SCC 383

agency to conduct the process of winding up of said Schemes in accordance with the provisions of Regulation 41 and that AMC and the Trustees will co-operate with such agency appointed by SEBI. He submitted that SEBI has powers under Section 11B of the SEBI Act to stop the process of winding up commenced pursuant to sub-clause (a) of clause (2) of Regulation 39. He submitted that in any case, a Mutual Fund is an intermediary, as contemplated by Section 11 (2) (b) of the SEBI Act. He relied upon the provisions of sub-section (2) of Section 2 of the SEBI Act.

117. Shri. Harish Salve, learned Senior Counsel submitted that the writ petitions filed by the petitioners are based on misconception. A Mutual Fund is not a company which is holding the deposits of the investors. He submitted that on the one hand, the unit-holders have strong objection to the actions of the Trustees and AMC and on the other hand, the unit-holders want to compel AMC and the Trustees to continue to run the Schemes. He submitted that every unit-holder has taken a risk, while making an investment in the Mutual Fund which is always subject to market risks. He submitted that unit-holders are not in a

position of either customers of a bank or shareholders of a company.

118. The learned Senior Counsel has invited our attention to various Regulations and submitted that all the actions done by AMC and the Trustees are in private domain. He invited our attention to Regulation 38 which specifically lays down that no guaranteed returns can be provided to unit-holders in a Scheme unless such returns are fully guaranteed by the sponsor or AMC and unless the name of the person who will guarantee the returns and the manner in which the guarantee is to be met is specifically mentioned in the offer document. He submitted that unless the Scheme is governed by Regulation 38 where the returns are guaranteed, there is an inherent risk in the Mutual Fund transactions.

119. He submitted that the nature of winding up of a Scheme and the nature of winding up of a company are completely different and in fact, winding up of a Scheme is not in that sense winding up, but it is winding down. On the interplay between clauses 15 (c) and 15A of Regulation 18 and sub-clause (a) of clause (2) of Regulation 39, he heavily relied upon sub-clause (d)

of clause (15) of Regulation 18 which was omitted by an amendment with effect from 22nd May 2000. He submitted that sub-clause (c) of clause (15) of Regulation 18 operates post the decision of winding up and therefore, the consent mentioned in sub-clause (c) has a direct co-relation with the approval under clause (1) of Regulation 41. He submitted that there is no difference between the word approval and consent. He urged that clause (15A) of Regulation 18 operates in a different sphere.

120. He reiterated that the decision of winding up under Regulation 39 (2) (a) is always subject to power to issue directions by SEBI under Section 11B of SEBI Act. He submitted that after sending the letter dated 20th April 2020, even if an indication would have been given by SEBI that the Trustee should hold their hands, the Trustees would not have taken action of winding up. However, that has not been done. He stated that he is not disputing the existence of power vesting in SEBI even to stop the process of winding up on the basis of the action initiated by the Trustees in accordance with the Regulation 39 (2) (a). He stated that this Court or SEBI may appoint any agency for conducting the process of winding up and that the Trustees and

AMC will cooperate with such agency appointed either by SEBI or by the Court.

121. He submitted that requests for redemption received by the said Schemes on 23rd April 2020 had to be honoured by AMC, inasmuch as, payment redemption amount has to be made within a period of ten days from the date of receipt of redemption request. On a query made by the Court, he stated that borrowing made after 23rd April 2020 is either for the purpose of payment of redemption or for clearing overdue loan. He submitted that even the investments made by the Mutual Fund are regulated under Regulations 43 and 44. He invited our attention to key information memorandum of Franklin India Credit Risk Fund, which is one of the Schemes under winding up. He pointed out that in the investment objectives of the said Scheme specifically stated therein, it is clearly stated that the investments will be made in AA and below rated corporate bonds (excluding AA+ rated corporate bonds). He stated that even on page two of the said document, this is reiterated. He pointed out from the same document that the investors were fully aware about the risk factors involved in the investment. He submitted that considering

the investment objective, the unit-holders were fully aware of the risks involved in the investment.

122. He invited our attention to e-mail sent by AMC to SEBI on 14th April 2020. The said e-mail contains various factual statements. It is pointed out in the said e-mail that though RBI stepped in with a package of rate cuts and Targeted Long-Term Repo Operations (TLTRO), the same created liquidity only for public sector undertakings and the liquid private sector issuers in the industry. He pointed out that in the e-mail it was specifically mentioned that the moratorium will create significant stress on non-banking financial corporations. It was mentioned in the said e-mail that in case of said Schemes, the maturities of Rs.4,500/- crores were stipulated per quarter and continued liquidity stress was anticipated for the reasons stated in the said e-mail. He pointed out that it was stated therein that in view of the circular dated 1st October 2019 issued by SEBI, unlisted convertible debentures become illiquid and untradeable. He pointed out that a request was made by e-mail to grant permission to the Mutual Funds to trade unlisted papers for a temporary period of one year. It was also requested that non-banking financial

corporations be permitted to avail moratorium on payments to banks. It was requested that SEBI may consider of removing restrictions by allowing postponement of redemption for forty days out of every ninety days. He pointed out that a request was also made through e-mail to SEBI to take proactive and urgent steps to help the industry. He submitted that there was no response from SEBI to this e-mail. He submitted that SEBI did not come out with any concrete steps, in response to the said e-mail. He pointed out that on 20th April 2020, the Trustees had sent a detailed letter to the whole time member/director of SEBI by pointing out the facts and figures in respect of the seven Schemes. He pointed out that the figures of net outflow were stated and it was specifically stated in the letter that two Schemes out of six had only a couple of days' worth of liquidity remaining and the third Scheme will exhaust its borrowing limit in five days. He pointed out that the present scenario of economic was also set out in the said letter. He submitted that in the said detailed letter, the options considered by the Trustees to meet the situation such as suspension of redemption and/or distress sale were also mentioned. He pointed out that the letter records that there will be no other option except to go for winding up of the

Schemes. He stated that in fact, by the said letter, guidance of SEBI was sought and forbearance was also sought. A permission was sought for winding up of the said Schemes mentioned in the said letter. He urged that there was no response from SEBI to the said letter and in fact, SEBI did not react at all. He pointed out that through the e-mail and the letter, SEBI was informed about the impact on the Mutual Fund operations of pandemic of COVID–19. He submitted that the details and figures given in the letter dated 20th April, 2020 clearly show that the decision of the Trustees to wind up the said Schemes is not based only on what had happened due to COVID-19, but it is based on prognosis. He invited our attention to the letter dated 30th March, 2020 addressed by the Associations of Mutual Funds in India. He submitted that the Association, by the said letter, brought to the notice of the Executive Director of SEBI the impact on Mutual Funds operations on account of COVID–19 pandemic and requested SEBI to relax certain guidelines applicable to Mutual Funds. By the said letter, the Association sought exemption from the guidelines issued by SEBI on 30th September 2020 effective from

1st October 2020. He submitted that SEBI did not respond to the said request.

123. He urged that the consent as contemplated by Regulation 18 (15) (c) cannot be read into Regulation 39 (2) (a). He urged that if consent of the unit-holders is considered as a requirement under Regulation 39 (2) (a), the difference between Regulation 39 (2) (a) and Regulation 39 (2) (b) will be completely obliterated. Moreover, Regulation 40 does not provide that the restrictions thereunder will be triggered only on the unit-holders consenting for winding up as contemplated by sub-clause (a) of clause (2) of Regulation 39. In fact, the restrictions imposed by Regulation 40 trigger immediately after compliance with clause (3) of Regulation 39. He submitted that sub-clause (d) of clause (15) of Regulation 18 which provided for consent of the unit-holders has been deleted. He submitted that superimposition of sub-clause (c) of clause (15) of Regulation 18 on sub-clause (a) of clause (2) of Regulation 39 is not at all called for. He submitted that sub-clause (c) of clause (15) of Regulation 18 refers to a decision already taken by the Trustees for winding up and therefore, what is contemplated by sub-clause (c) of clause (15) of Regulation 18

is nothing but an approval under clause (1) Regulation 41. He submitted that there is no difference between the meaning of the words 'approval' and 'consent'. He submitted that if textual interpretation is given to the provisions of the Regulations, there is no scope to read the word 'consent' into the provisions of sub-clause (a) of clause (2) of Regulation 39 and in fact, the 'consent' as contemplated by sub-clause (c) of clause (15) of Regulation 18 is the approval contemplated under clause (1) of Regulation 41.

124. He invited our attention to the minutes of the meeting dated 23rd April 2020. He submitted that none of the petitioners had called upon the Trustees to produce the said minutes and in fact, in none of the writ petitions, there is a challenge to the decision taken by the Board of Trustees on 23rd April 2020. He submitted that the writ petition filed as a public interest litigation in Madras High Court is not maintainable, especially when the unit-holders who are directly affected have filed petitions in Delhi and Gujarath High Courts. He submitted that the petitions filed before the Delhi and Gujarat High Courts are not public interest litigations and therefore, the proceedings are adversarial in nature. Hence, the normal rules of pleadings will apply.

125. He submitted that essentially, the Court is dealing with the contract between the unit-holders and the Mutual Fund which is a regulated contract which can be put to an end to as a contract, but the right to terminate the contract is constricted by Regulations 39 to 41. He submitted that the contractual relationship between the Trustees and the unit-holders is strictly regulated by the said Regulations. He submitted that if the prayer sought in clause-A in the petition filed before the Delhi High Court (WP.No.8545/2020) is granted, the said contractual relationship will become unregulated.

126. He submitted that each Scheme of a Mutual Fund is a separate trust. The reason is that the assets of Schemes run by the same Mutual Fund are not pooled. He submitted that the assets of different Schemes run by the Mutual Funds are like watertight compartments. He submitted that under none of the Schemes, the returns are guaranteed. He submitted that even after winding up of the Schemes, the provisions regarding disclosure of half yearly reports and annual reports will continue to be applicable till the process of winding up is completed.

127. He requested the Court to again go through the figures reflected in the letter dated 20th April 2020 and submitted that if the figures of AUM (Assets Under Management) of the Schemes as on 1st March 2020 are considered, it is apparent that between 1st March, 2020 till 20th April 2020, the redemption amounts are 1/3rd or more than 1/3rd of AUM as on 1st March, 2020. He invited our attention to the provisions of the Trusts Act and submitted that winding up of a Scheme does not amount to revocation of the Trust and in fact, it is an execution of the Trust.

128. He, submitted that the prayer made in the writ petition for investigation will not survive for consideration, inasmuch as, the Forensic Auditor has been appointed by SEBI to investigate in accordance with Regulation 66.

129. He, thereafter, invited our attention to a written note by which, a reference has been made to the factual allegations in the petitions filed in three High Courts. He submitted that the allegations of violation of Mutual Funds Regulations are not at all substantiated by the petitioners. Thereafter, he invited our attention to relevant allegations in the petitions and the response of AMC and the Trustees in their statement of objections. He

submitted that each and every factual allegation has been specifically dealt with in the statement of objections filed by AMC and the Trustees. He pointed out that the pleadings made by AMC and the Trustees in the petition filed before the Delhi High Court will show that the Assets Under the Management of the Schemes were to the extent of Rs.52,000 crores in October, 2019 which have been reduced to Rs.25,000 crores as on 23rd April 2020.

ARGUMENTS OF SEBI ON CHALLENGE TO VALIDITY OF REGULATIONS 39 TO 41:

130. Shri. Tushar Mehta, the learned Solicitor General of India made a detailed submissions on behalf of SEBI essentially on the challenge to the constitutional validity of the Regulations 39 to 41. While inviting attention of the Court to Regulations 39 to 41, he dealt with the arguments canvassed by the petitioners that it is the duty of SEBI to adjudicate on the correctness of the decision of the Trustees for winding up of a Scheme under sub-clause (a) of clause (2) of Regulation 39. He submitted that as provided in sub-clause (b) of clause (2) of Regulation 39, seventy five percent (75%) of the unit-holders can take a decision to wind up the Scheme and hence, if the contention of the petitioners is

accepted, then less than 75% of the unit-holders who are opposing the winding up will be entitled to approach SEBI, calling upon it to adjudicate upon the correctness of the decision of the Trustees. He pointed out that the Regulations provide three modes of winding up. The first mode can be adopted by the Trustees, the second mode can be adopted by 75% of the unit-holders and the third mode can be adopted by SEBI. The Scheme of the Regulations is such that SEBI cannot interfere with the decision making power conferred on the Trustees or on 75% of the unit-holders, as the case may be, to wind up a Scheme. The role of SEBI is under Regulation 42 which requires SEBI to verify as to whether all measures for winding up of the Scheme, as provided under the Regulations have been complied with. He submitted that if the requirement of consent is read into sub-clause (a) of clause (2) of Regulation 39, effectively, the process of winding up of the Schemes under sub-clauses (a) and (b) will be winding up as per the desire of the unit-holders.

131. The learned Solicitor General of India submitted that it is well settled that the scope of judicial review of economic decisions is considerably narrow. He submitted that the Mutual

Funds Regulations constitute a specialized delegated legislation belonging to the sphere of the economic policy and therefore, the scope of judicial review is considerably narrow. In support of his submissions, he relied upon the law laid down by the Apex Court in the case of ***Swiss Ribbon Private Limited*** (supra) and in particular, the decision of justice Holmes quoted therein. He also relied upon a decision of the Apex Court in the case of ***Bhavesh D. Parish and others –vs- Union of India and another***[47]. He submitted that the Mutual Funds Regulations constitute the Regulations framed by an expert body like SEBI dealing with the Mutual Funds. He submitted that the laws relating to economic activities are required to be viewed with greater latitude by the Courts than the laws touching the civil rights. He relied upon a decision of the Apex Court in the case of ***R.K. Garg –vs- Union of India and others***[48]***.*** He submitted that when it comes to a petition involving challenge to economic and fiscal regulatory measures, the Courts will have to show restraint, as the Judges are not experts in the field. He submitted that it is not the case of the petitioners that SEBI lacks the competence to frame the Mutual Funds Regulations. The said Regulations will have to be

[47] (2000) 5 SCC 471
[48] (1981) 4 SCC 675

shown to be contrary to SEBI Act or contrary to the constitution of India.

132. Coming to the arguments of the petitioners as regards the manifest arbitrariness, he submitted that the exhaustive Scheme of the said Regulations is required to be considered while dealing with the argument of the arbitrariness. He submitted that there is an eligibility criteria for registration of a Mutual Fund. The Mutual Funds Regulations also provide for what should be the contents of the Trust Deeds. Regulation 17 provides that no Trustee shall be initially or anytime thereafter be appointed without prior approval of the Board. The disqualification for being appointed as Trustees are also laid down under Regulation 16 which are very stringent provisions. He submitted that Regulation 18 lays down the rights and obligations of the Trustees. He pointed out that even the Investment Management Agreement between the Trustees and AMC is regulated and the contents of the same are provided in the fourth Schedule. He submitted that one of the clauses therein empowers the Trustees to dismiss AMC with the approval of SEBI. He submitted that a detailed Code of Conduct for Trustees and AMC has been laid down. He submitted that there are several restrictions on investments to be made by AMC

and there are strict investment norms provided therein and therefore, the Trustees will have to pass through the stringent tests which are laid down in the Regulations and that is how a latitude is given to the Trustees when it comes to taking a decision regarding winding up. He submitted that the conduct of the Trustees is highly regulated by the Mutual Funds Regulations. He submitted that three tier structure constituting 'sponsor', 'Trustees' and 'AMC' is provided under the Regulations. He invited our attention to Regulation 38 which provides that no guaranteed returns can be provided in a Scheme unless such returns are fully guaranteed by the sponsor or AMC and unless a statement indicating the name of the person who will guarantee the returns and the manner in which the guarantee is to be met are specifically mentioned in the offer document. He submitted that the decision of the Trustees of winding up of the said Schemes is a commercial decision and when the Trustees have to act in a highly regulated regime, it cannot be said that the provisions giving freedom to the Trustees to wind up the said Schemes is manifestly arbitrary. He relied upon a decision of the Apex Court in the case of ***Joseph Shine –vs- Union of India***[49]***.***

[49] (2019) 3 SCC 39

He submitted that the provisions can be manifestly arbitrary, only when something is done by the Legislature capriciously, irrationally and in disproportionate manner. He submitted that this type of manifest arbitrariness is not attracted in these petitions. He submitted that the same is the test laid down by the Apex Court in the case of ***Shayara Bano –vs- Union of India and others***[50]***.***

133. He submitted that as far as violation of Article 14 is concerned, mathematical nicety or perfect equality are not required under Article 14, as held by the Apex Court in the case of ***Kedar Nath Bajoria, Son of Ramjidas Bajoria –vs- State of West Bengal***[51]***.*** He submitted that it is not the requirement of Article 14 of the Constitution of India that classification should be scientifically perfect. He relied upon a decision of the Apex Court in the case of ***Venkateshwara Theatre –vs- State of Andhra Pradesh and others***[52]***.*** He submitted that the provisions of the Regulations regarding winding up of the Schemes sub-serve larger public interest of safeguarding commercial interests of majority of the unit-holders. He relied upon a decision of the

[50] (2017) 9 SCC 1
[51] 1954 SCR 30
[52] (1993) 3 SCC 677

Apex Court in the case of ***Internet and Mobile Association of India –vs- Reserve Bank of India***[53]***.***

134. He submitted that under the Scheme of the Mutual Funds Regulations, the Trustees act in a fiduciary capacity, in trust and for the benefit of the unit-holders. He submitted that the Mutual Funds Regulations further provide for execution of written instrument of trust deed duly registered under the provisions of the Indian Registration Act, 1908 and the provisions thereof must be in consistent with the Regulations.

135. He submitted that the words "repaying the amounts due to the unit-holders" used in clause (2) of Regulation 39 suggest that the amount due to the unit-holders must be paid before the winding up of process is formally completed. He submitted that once the compliance is made by the Trustees with clause (3) of Regulation 39, Regulation 40 (c) triggers in and redemption must be stopped and only after winding up of the Scheme is completed, the amounts available will be distributed amongst the unit-holders.

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[53] 2020 SCC Online SC 275

136. Lastly he submitted that the power of regulatory body like SEBI cannot be questioned unless it is shown to have been used for extraneous reasons. He would, therefore, submit that there is absolutely no merit in the challenge to the constitutional validity of Regulations 39 to 41.

SUBMISSIONS OF AMC AND TRUSTEES:

137. Shri. Janak Dwarakadas, learned Senior Counsel appearing for AMC and the Trustees submitted that the relationship between the unit-holders, AMC and the Trustees is purely contractual and therefore, the issue involved in these petitions is purely in a private domain. He firstly dealt with the issue of borrowings made by AMC after 23rd April 2020. He submitted that the borrowings were made firstly for meeting the demand made by Bank of Baroda and secondly for meeting the redemption requests for which requisitions were made upto 23rd April 2020. He submitted that making such borrowing will not amount to carrying on business activities. He relied upon a decision of the Apex Court in the case of ***State of Gujarat –vs- Raipur Manufacturing Co. Ltd***[54] for the purposes of interpreting

[54] AIR 1967 SC 1066

the word 'business'. He relied upon another decision of the Apex Court in the case of ***Director of Supplies and Disposals, Calcutta –vs- Member, Board of Revenue, West Bengal, Calcutta***[55] and in the case of ***Girdharilal Jivanlal Maheswari – vs- The Assistant Commissioner of Sales Tax, Nagpur***[56]***.*** He submitted that on 24th April 2020, only one borrowing was made. He also pointed out from the affidavit filed on 18th September 2020 the circumstances under which the borrowings were made.

138. He invited our attention to clause (12) and (25) of Regulation 18. He submitted that it is the duty of the Trustees to ensure that the Trust properties are properly protected, held and administered by a proper person. He invited our attention to key information memorandum of the said Schemes and submitted that there was no investment made after 23rd April 2020, in view of clause (a) of Regulation 40, as making investment of the funds will amount conducting business activity. He submitted that for protecting the interest of the unit-holders and for meeting the demand by the creditors, such steps were required to be taken by making borrowings. He submitted that the disclosure of the said

[55] AIR 1967 SC 1826
[56] (1957) 59 Bom LR 710

fact has been made in accordance with clause (4) of Regulation 41. He has taken us through the contents of the affidavit filed by AMC and the Trustees on 18th September 2020 and pointed out the manner in which the borrowings were made. He submitted that there is no compromise made on the interest of the unit-holders. He invited our attention to paragraph 12 of the affidavit filed by SEBI, dealing with the Forensic Audit report. He urged that the report is only a preliminary report which is subject to modification and it is a part of the investigation. He submitted that the copies of the report should not be made available to any of the parties. He submitted that it is for SEBI to take a final decision on the basis of the final report which may be submitted by the Auditors. He relied upon the decisions of the Apex Court in the case of ***Khatri and others –vs-*** **State of Bihar and others**[57]**,** ***Pratibha –vs- Rameshwari Devi and others***[58]***, Renu Kumari –vs- Sanjay Kumar and others***[59], ***Shri. Ram Krishna Dalmia –vs- Shri. Justice S.R. Tendolkar and others***[60] *and* ***T.T. Antony –vs- State of Kerala and others***[61]***.*** Lastly he relied

[57] (1983) 2 SCC 266
[58] (2007) 12 SCC 369
[59] (2008) 12 SCC 346
[60] AIR 1958 SC 538
[61] (2001) 6 SCC 181

upon a decision of the Apex Court in the case of ***Sidhartha Vashisht –vs- State (NCT of Delhi)***[62]***.***

SUBMISSIONS OF SEVENTH AND EIGHTH RESPONDENTS:

139. Shri. K.G. Raghavan, learned Senior Advocate appearing for 7th Respondent (the sponsor) and the 8th respondent in W.P.No. 8545/2020 and for the 4th respondent in W.P.No. 8644/2020 urged that there are no allegations made against the companies which he is representing. He urged that in paragraph 44 of the petition filed before the Gujarat High Court, there are only vague allegations. He submitted that really no action was prayed for against the companies which he is representing. He submitted that as far as the unit-holders are concerned, his clients will have no role to play. Inviting our attention to the Regulation 38 (a) he submitted that in case of none of the said Schemes, the returns were guaranteed to the unit-holders and therefore, the said companies have no role to play.

[62] (2010) 6 SCC 1

SUBMISSIONS OF THE DIRECTORS OF AMC AND TRUSTEES:

140. Shri. Udhay Holla, learned Senior Counsel representing the Directors of AMC and Trustees invited attention of the Court to the averments made in paragraph 8 of the writ petition filed before the Madras High Court and submitted that the averments made therein are not tenable. He also invited our attention to paragraph 32 of the Statement of objections filed in the said writ petition. He invited our attention to Regulations 16, 18 and 49R and submitted that there is adequate system of internal control and risk management in AMC. He submitted that AMC is strictly maintaining the books of accounts, records and the documents, as required by Regulation 50.

REJOINDER OF THE PETITIONERS:

141. Shri. Ravindra Srivatsava, the learned Senior Counsel appearing for the petitioners in W.P.No.8545/2020 gave a brief rejoinder and submitted that the requirement of obtaining consent of the unit-holders is not only found in sub-clause (c) of clause (15) of Regulation 18 but it is very much a part of the Scheme document. He invited our attention to the statement of additional

information and in particular, page 714 of the common compilation and submitted that the requirement of obtaining consent of the unit-holders is accepted by FTMF itself, as the statement of additional information is issued by it. He submitted that some meaning will have to be assigned to the consent referred in sub-clause (c) of clause (15) of Regulation 18. He submitted that SEBI which has framed the Regulations is now trying to disown it by contending that the unit-holders will have no say in the matter of decision of winding up taken by the Trustees. He submitted that in exercise of its powers under Section 11B, SEBI can interfere with the decision of the Trustees under sub-clause (a) of clause (2) of Regulation 39. He submitted that if the contention raised by AMC, the Trustees and SEBI that winding up at the instance of the Trustees does not require consent of the unit-holders is accepted, sub-clause (c) of clause (15) of Regulation 18 will become superfluous and redundant.

142. He submitted that sub-clause (c) of clause (15) of Regulation 18 specifically refers to consent of the unit-holders to the decision of the Trustees of winding up of a Scheme and the approval contemplated by clause (1) of Regulation 41 is for

authorizing the Trustees or any other person to take steps for winding up. He submitted that the approval under clause (1) of Regulation 41 is not to the decision of the winding up but it is for appointing an agency to do the work of winding up.

143. As regards the decision of the Trustees under sub-clause (a) of clause (2) of Regulation 39, he submitted that no opinion is formed by the Trustees, as can be seen from the minutes of meeting dated 24th April 2020. He submitted that though the notice of 23rd April 2020 refers to recommendation of AMC, a copy of the recommendation is also not placed on record. He submitted that the minutes only reflect approval of the Trustees to the decision of AMC. He submitted that the minutes do not reflect happening of an event which is contemplated by sub-clause (a). He submitted that the event contemplated by the sub-clause (a) is akin to public interest. He submitted that the large number of requests for redemption is mainly a ground for suspension of redemption. He pointed out that the copies of the minutes of the meeting of the Board of Trustees do not bear signatures. He submitted that the averments made in the statement of objections filed by the Trustees and AMC are not

supported by verification and by an affidavit. He has taken us through the minutes of meeting dated 23rd April 2020 and submitted that the minutes clearly show that the Trustees have acted under the influence and dictates of AMC which completely defeats the very Scheme of the Mutual Funds Regulations regarding functional and decisional separation between AMC and the Trustees in the matter of a winding up decision. He submitted that the deliberations recorded in the minutes on the adverse impact of COVID 19 cannot be a ground for winding up. Relying upon a decision of the Apex Court in the case of ***Commissioner of Police, Bombay –vs- Gordhandas Bhanji***[63]***,*** he submitted that though the Trustees could have taken factual inputs from AMC, the Directors of AMC could not have been a part of the decision making process of AMC. He submitted that on careful scrutiny of the minutes of meeting dated 20th April 2020 and 23rd April 2020, it is apparent that the decision of Mr. Sanjay Sapre, head of AMC carried the day.

144. He submitted that the minutes show that some officers of SEBI were interacting with AMC and the Trustees and there

[63] AIR 1952 SC 16

appears to be a tacit approval to the decision of winding up by SEBI. He submitted that surprisingly, SEBI has not at all placed on record any documents to show the action taken by SEBI on the basis of the letter of AMC dated 14th April 2020 of AMC and the letter dated 20th April 2020 of the Trustees. He submitted that SEBI, being a statutory body has not done its duty.

145. The learned counsel submitted that this Court can always examine the decision making process of the Trustees leading to winding up of the said Schemes. He stated that process shows undue, haste and colourable exercise of power by misusing COVID-19 situation as an opportunity for the collateral purpose of winding up. He submitted that there are sufficient grounds to believe that the situation was created largely due to mismanagement/mishandling of the investments made by AMC, violation of the Regulations committed by AMC and due to the act of creating risk by ill-thought investments. He submitted that the minutes disclose that the decision for winding up was solely on the basis of the so-called commercial expediency.

146. He urged that there is no absolute discretion conferred on any person including the Trustees to take a unilateral decision as

per their whims and fancies. He submitted that such a discretion cannot emanate from a contract or a trust. He submitted that the *sine qua non* for a trust is a creation of fiduciary relationship.

147. He was critical of the role played by SEBI. He submitted that the failure of the statutory authority like SEBI to respond to the letters dated 14th April 2020 and 20th April, 2020 is very significant. He submitted that SEBI has shown totally indifferent approach and has not done anything for protecting the interest of the unit-holders. He submitted that SEBI has not even examined whether the Trustees had complied with the statutory requirement of clause (3) of Regulation 39 and it has failed to ascertain as to whether there was a compliance with sub-clause (b) of clause (3) of Regulation 39. He submitted that if the minutes of meeting dated 20th April 2020 and 23rd April 2020 were forwarded by the Trustees to SEBI, it was the duty of SEBI to place the same on record. He submitted that perusal of the minutes of board meetings will show that the official business between statutory body like SEBI on the one hand and the Trustees and AMC on the other hand was conducted telephonically instead of transacting the official business by written communications. He

submitted that inaction on the part of SEBI is very glaring, as it did not object to the borrowings made by the Mutual Fund after 23rd April 2020. He submitted that the argument to the effect that the Trustees have an unfettered discretion to take a decision of winding up is completely fallacious, as can be seen from paragraph 23 of a decision of the Apex Court in the case of ***Delhi Transport Corporation –vs- D.T.C. Mazdoor Congress and others***[64]***.*** He submitted that the arguments canvassed by the petitioners about the arbitrariness of the decision have not been rebutted by any of the respondents.

148. He submitted that the argument that the petitioners want to compel the Trustees to run the Scheme is completely unfounded. He submitted that the petitioners being the unit-holders are entitled to seek the relief of quashing of the illegal decision taken by the Trustees. He submitted that the argument of AMC and the Trustees that there is nothing wrong in the investments made is only based on the document of a Scheme which does not pertain to the Scheme in which the petitioner has made investment. He submitted that the petitioner is concerned only with the Short Term Income Mutual Fund which is a debt Scheme

[64] 1991 Supp (1) SCC 600

and in the document relating to the said Scheme, it is specifically mentioned that the investments objective is to seek stable returns and no information is provided in the said document about the proposal to make investments in low rated portfolios.

149. He submitted that the argument that even in the teeth of clause (a) of Regulation 40, borrowings can be made by Mutual Fund after action is taken under clause (3) of Regulation 39 is completely erroneous and untenable. He submitted that the cases relied upon for interpreting the word 'business' arose out of the taxing statutes. He submitted that both the contextual and textual interpretation of clause (a) of Regulation 40 will clearly indicate that all the business activities including borrowing and substitution of creditors is completely prohibited. He submitted that the question is whether the action of borrowing is contrary to clause (a) of Regulation 40. The question whether the decision to borrow is right or wrong is irrelevant.

150. As regards the maintainability of the writ petition against AMC and the Trustees, he submitted that the decisions relied upon by the respondent in the case of ***Federal Bank Ltd –vs-***

Sagar Thomas and others[65] is not applicable to the facts of the case. Lastly he submitted that a privilege as regards the document Forensic Audit report has to be specifically claimed, as held by the Apex Court in the case of ***S.P. Gupta –vs- Union of India***[66]***.*** He submitted that in judicial proceedings, the disclosure of facts is a rule and withholding the disclosure is an exception. He submitted that the document can be withheld only on the ground of overwhelming public interest. He submitted that even in a most sensational/sensitive case like purchase of Rafael Aircrafts, the Apex Court directed to supply of the documents which were required to be filed in a sealed cover to the parties. In support of his submission, he referred to a decision of the Apex Court in the case of ***Manohar Lal Sharma –vs- Narendra Damodardas Modi and others***[67]***.*** He submitted that the petitioners needed to go through the audit report only for assisting the Court. He submitted that the investigation by Forensic Auditors cannot be on par with the investigation in a criminal case. He submitted that unfortunately, SEBI, in paragraph 14 of its affidavit dated 2nd September 2020 has taken a stand for

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[65] (2003) 10 SCC 733
[66] 1981 Supp SCC 87
[67] (2019) 3 SCC 25

protecting the interests of FTMF. He submitted that the order dated 8th June 2020 passed by the Delhi High Court will indicate that by simply placing reliance on the fact that the Forensic Audit was ordered, SEBI wanted the Court to throw out the petition. He submitted that the affidavit of SEBI also shows that the summary of the complaints of the investors was forwarded to the Forensic Auditors which includes the complaints made by the petitioners and other investors.

151. Shri. Adithya Sondhi, learned Senior Counsel submitted that the report on Forensic Audit is not an evidence and therefore, privilege cannot be claimed. In any case, the privilege has to be specifically claimed. He relied upon the decisions of the Apex Court in the case of ***State of Punjab –vs- Sodhi Sukhdev Singh***[68] and ***Reserve Bank of India –vs- Jayantilal N. Mistry***[69]***.*** He invited attention of the Court to the provisions of Section 179 and 180 of the Companies Act to contend that the borrowing is a part of day to day business of a company. He relied upon a decision of the Apex Court in the case of ***Official Trustee of***

[68] AIR 1961 SC 493
[69] (2016) 3 SCC 525

***Tamil Nadu –vs- Udavumkarankal and others*[70].** He submitted that the fact that four Schemes out of six Schemes under winding up have become cash rich shows that the decision of the Trustees of winding up was erroneous or flawed. He also countered the submissions made by the respondents regarding maintainability of the writ petitions.

152. Shri. Puneeth Jain and Shri. Ashish Kamath, the learned counsel made submissions on behalf of the intervener, supporting the claim of the petitioners.

CRIMINAL PETITION

153. As regards criminal petition filed before the Madras High Court, after the submissions made by the learned counsel were concluded, it was pointed out that the respondents in the above criminal petition have registered a first information report and accordingly, the criminal petition has been disposed of by a separate order.

WRIT APPEAL

As regards Writ Appeal, we are not dealing with it separately as it arises out of an interim order passed in writ

[70] AIR 1993 SC 1472=1993 Supp (3) SCC 509

petition filed in Gujarat High Court and as the interim order will merge with the final order.

MAIN ISSUES INVOLVED

154. There are various factual and legal issues which arise for consideration. Upon considering the pleadings and the submissions made by the learned counsel for the respective parties, the following main questions arise for consideration:

i) Whether Regulations 39, 40, and 41 of the Mutual Funds Regulations are *ultra vires* the provisions of the Securities and Exchange Board of India Act, 1992 and unconstitutional being vague, manifestly arbitrary, unreasonable? Whether the Regulations 39, 40 and 41 are violative of Articles 14 and 21 of the Constitution of India?

ii) Whether obtaining consent of the unit-holders in accordance with the provision of sub-clause (c) of clause (15) of Regulation 18 of the Mutual Funds Regulations is a condition precedent for winding up of a Scheme in accordance with the provision of sub-clause (a) of clause (2) of Regulation 39 of the Mutual Funds Regulations?

iii) Whether compliance with clause (15A) of Regulation 18 of the Mutual Funds Regulations is a condition

precedent for winding up of a Scheme in accordance with sub-clause (a) of clause (2) of Regulation 39?

iv) Whether the writ petitions filed by the petitioners by invoking the Article 226 of the Constitution of India are maintainable for challenging the impugned notices dated 23rd April 2020 and 28th May, 2020 issued by Franklin Templeton Trustee Services private Ltd?

v) If the answer to question (iv) is in the affirmative, whether this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, can go into the merits of the decision of the Trustees to wind up the said Schemes? Whether the notices dated 23rd April, 2020 and 28th May, 2020 are valid and legal?

vi) Assuming that the decision of winding up is valid, whether the Trustees have established that they have complied with sub-clauses (a) and (b) of clause (3) of Regulation 39?

vii) Assuming that the decision of the Trustees of winding up is lawful, whether AMC could have lawfully made the borrowings after 24th April 2020 for the purposes for meeting the demands for redemption and for the purposes of repaying the outstanding loans notwithstanding the provision of clause (a) of Regulation 40? Whether AMC could have lawfully paid the

redemption amount after 24th April, 2020 in case of redemption requests received prior to 24th April, 2020?

viii) Whether the petitioners are entitled to have a copy of report of the Forensic Auditor which is produced on record by SEBI in a sealed envelope and whether any privilege can be claimed in respect of the said document by SEBI, AMC and Trustees?

ix) Whether the petitioners are entitled to have un-redacted copy of the Resolutions dated 20th April 2020 and 23rd April 2020 passed by the Board of Directors of the Trustees, redacted copies of which are placed on record by the Advocate for AMC and the Trustees?

x) Whether SEBI has jurisdiction under Section 11B of SEBI Act to interfere with the decision of winding up of a Scheme, taken pursuant to sub-clause (a) of clause (2) of Regulation 39?

xi) Whether any directions are required to be issued against SEBI?

155. We have carefully considered the submissions. We have carefully gone through all the decisions relied upon by the learned counsel appearing for the parties. Multiple decisions have been relied upon laying down the same principles. We have specifically referred only those decisions which are relevant for

consideration of the questions which are required to be decided. Even otherwise, we are following the settled principles laid down therein.

THE OVERVIEW OF THE RELEVANT PROVISIONS OF SEBI ACT

156. The Securities and Exchange Board (for short 'SEBI') was established in the year 1988 by the Government of India under a Government Resolution with the object of promoting orderly and healthy growth of the securities market and for investors' protection. At that time it was not a statutory body. The Securities and Exchange Board of India Ordinance, 1992 (Ordinance No.5 of 1992) was promulgated on 30th January, 1992. The SEBI Act was subsequently enacted which shall be deemed to have come into force on 30th January, 1992. It is necessary to firstly refer to the statement of objects and reasons of the SEBI Act which read thus:

> **"Statement of Objects and Reasons**.— Securities and Exchange Board of India (SEBI) was established in 1988 through a Government Resolution to promote orderly and healthy growth of the securities market and for investors' protection. SEBI has been monitoring the activities of stock

exchanges, Mutual Funds, merchant bankers, etc., to achieve these goals.

The capital market has witnessed tremendous growth in recent times, characterised particularly by the increasing participation of the public. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. With this end in view, Government decide to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market. As Parliament was not in session, and there was an urgent need to instill a sense of confidence in the public in the growth and stability of the market, the President promulgated the Securities and Exchange Board of India Ordinance, 1992 (Ord.No. 5 of 1992) on 30th January, 1992.

The Bill seeks to replace the aforesaid Ordinance".

(Underline supplied)

157. As can be seen from the preamble of SEBI Act, the same has been enacted to provide for the establishment of a Board (SEBI) to protect the interests of investors in securities and to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto.

158. Section 3 of SEBI Act provides for establishment of SEBI. Chapter-IV of the said Act deals with the powers and functions of SEBI. Section 11 of SEBI Act is relevant which read thus:

> "**11. Functions of Board -** (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.
>
> (2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for—
>
> (*a*) regulating the business in stock exchanges and any other securities markets;
>
> (*b*) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, Trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;
>
> (*ba*) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf;

(*c*) registering and regulating the working of venture capital funds and collective investment Schemes, including Mutual Funds;

(*d*) promoting and regulating self-regulatory organisations;

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

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

(*g*) prohibiting insider trading in securities;

(*h*) regulating substantial acquisition of shares and takeover of companies;

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

(*ia*) calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities;

(*ib*) calling for information from, or furnishing information to, other authorities, whether in India or outside India, having functions similar to those of the Board, in the matters relating to the prevention or detection of violations in respect of securities laws, subject to the provisions of other laws for the time being in force in this regard:

Provided that the Board, for the purpose of furnishing any information to any authority outside India, may enter into an arrangement or agreement or understanding with such authority with the prior approval of the Central Government;

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

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

(*l*) conducting research for the above purposes;

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

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

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

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

(*i*) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;

(*ii*) summoning and enforcing the attendance of persons and examining them on oath;

(*iii*) inspection of any books, registers and other documents of any person referred to in Section 12, at any place;

(*iv*) inspection of any book, or register, or other document or record of the company referred to in sub-section (2-A);

(*v*) issuing commissions for the examination of witnesses or documents;

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

(*a*) suspend the trading of any security in a recognised stock exchange;

(*b*) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

(*c*) suspend any office bearer of any stock exchange or self-regulatory organisation from holding such position;

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

(*e*) attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under Section 26-A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of Section 28-A shall apply:

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.

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

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or

sub-section (2-A), take any of the measures specified in clause (*d*) or clause (*e*) or clause (*f*), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

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

(4-A) Without prejudice to the provisions contained in sub-sections (1), (2), (2A), (3) and (4), Section 11-B and Section 15-I, the Board may, by an order, for reasons to be recorded in writing, levy penalty under Sections 15-A, 15-B, 15-C, 15-D, 15-E, 15-EA, 15-EB, 15-F, 15-G, 15-H, 15-HA and 15-HB after holding an inquiry in the prescribed manner.

(5) The amount disgorged, pursuant to a direction issued, under Section 11-B of this Act or Section 12-A of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or Section 19 of the Depositories Act, 1996 (22 of 1996) or under

> a settlement made under Section 15-JB or Section 23-JA of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or Section 19-IA of the Depositories Act, 1996 (22 of 1996), as the case may be, shall be credited to the Investor Protection and Education Fund established by the Board and such amount shall be utilised by the Board in accordance with the regulations made under this Act."
>
> (Underlines supplied)

159. Sub-section (1) of Section 11 specifically lays down that one of the duties of SEBI is to protect the interest of investors in securities. Considering the objects and reasons of SEBI Act, the duty to protect the investors is the paramount duty of SEBI. The second duty is to promote the development of securities market and the third duty is to regulate the securities market. The measures which can be taken by SEBI have been enlisted in sub-section (2) which provides for registering and regulating the working of Mutual Funds. Sub-section (4) also confers vast powers on SEBI to take various measures in the interests of investors or securities market. Section 11-A empowers SEBI to issue regulations for protection of investors in the matters relating to issue of capital, transfer of securities and other

matters incidental thereto and the manner in which certain matters shall be disclosed by the companies. Clause (b) of sub-section (1) of Section 11-A also confers a power on SEBI to issue general and special orders prohibiting companies from issuing of prospectus, or any other document, soliciting money from the public for the issue of securities. At this stage, we may note here that the words 'securities' has been defined in clause (i) of Section 2 of SEBI Act. It provides that securities has the same meaning assigned to it in Section 2 of the Securities Contracts (Regulation) Act, 1956. Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 defines the securities which include the units or any other instruments issued to the investors under any Mutual Fund Scheme.

160. Section 11-B of SEBI Act provides for vesting of plenary powers in SEBI to issue directions. Section 11-B reads thus:

> **11B. Power to issue directions and levy penalty -** (1) Save as otherwise provided in Section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary—
>
> (*i*) in the interest of investors, or orderly development of securities market; or

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

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

it may issue such directions,—

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

(*b*) to any company in respect of matters specified in Section 11-A,

as may be appropriate in the interests of investors in securities and the securities market.

(2) Without prejudice to the provisions contained in sub-section (1), sub-section (4-A) of Section 11 and Section 15-I, the Board may, by an order, for reasons to be recorded in writing, levy penalty under Sections 15-A, 15-B, 15-C, 15-D, 15-E, 15-EA, 15-EB, 15-F, 15-G, 15-H, 15-HA and 15-HB after holding an inquiry in the prescribed manner.

Explanation.—For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by

> indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.
>
> (Underlines supplied)

161. Various directions can be issued under Section 11B (1) against the persons mentioned in Section 12. Perusal of Section 12 shows that the trustees of trust deed and intermediaries are included therein. Clause (g) of Regulation 2 of the Securities and Exchange Board (Intermediaries) Regulations, 2008 specifically includes AMC under the Mutual Funds Regulations in the definition of intermediaries. Therefore, SEBI has a power to issue directions under Section 11B (1) against the Trustees and AMC. Whether, SEBI can interfere with the decision of the Trustees of winding up is an issue which is discussed separately.

162. Section 11-C confers powers on SEBI to appoint investigating authority to investigate, when SEBI has a reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market or any person associated with securities

market has violated the provisions of SEBI Act, the Rules framed thereunder and the Regulations made thereunder or the directions issued by SEBI thereunder. The investigating authority has been conferred with the vast powers as set out in sub-section (3) onwards of Section 11C. There are various penal provisions incorporated in Chapter VI-A of SEBI Act. Section 15D provides for imposition of the penalties in case of certain defaults in relation to Mutual Funds. Section 15E provides for imposition of penalty on AMCs, on account of its failure to comply with any of the Rules and Regulations providing for restrictions on the activities of AMCs. The minimum penalty prescribed is of Rupees one lakh. Section 15HB provides for imposition of penalty on whoever fails to comply with any provision of SEBI Act, the Rules and Regulations made thereunder or the directions issued by SEBI, for which, no separate penalty has been specifically provided. Such person shall be liable to a penalty which shall not be less than Rupees one lakh but it may extend to Rupees one crore. The procedure for imposing penalties is laid down under Section 15-I.

163. Another relevant provision of SEBI Act is Section 30 which confers powers to make Regulations, which reads thus:

> **30. Power to make regulations -** (1) The Board may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—
>
> (*a*) the times and places of meetings of the Board and the procedure to be followed at such meetings under sub-section (1) of Section 7 including quorum necessary for the transaction of business;
>
> (*b*) the term and other conditions of service of officers and employees of the Board under sub-section (2) of Section 9;
>
> (*c*) the matters relating to issue of capital, transfer of securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies under Section 11-A;
>
> (*ca*) the utilisation of the amount credited under sub-section (5) of Section 11;

(*cb*) the fulfilment of other conditions relating to collective investment Scheme under sub-section (2-A) of Section 11-AA;

(*d*) the conditions subject to which certificate of registration is to be issued, the amount of fee to be paid for certificate of registration and the manner of suspension or cancellation of certificate of registration under Section 12.

(*da*) the terms determined by the Board for settlement of proceedings under sub-section (2) and the procedure for conducting of settlement proceedings under sub-section (3) of Section 15-JB;

(*db*) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

164. On conjoint reading of the objects and reasons of SEBI Act and its various provisions especially Sections 11, 11A, 11B and 11C, it can be said that SEBI is required to act as a watchdog of securities market. Apart from regulating and promoting growth of securities market, the paramount duty of SEBI is to protect the interest of investors. It is the duty of SEBI to keep a constant vigil on securities market for safeguarding the interest of investors.

MUTUAL FUNDS REGULATIONS

165. The Mutual Funds Regulations have been framed by exercising powers under Section 30 read with clause (c) of sub-section (2) of Section 11 of SEBI Act. As noted earlier, clause (c) of sub-section (2) of Section 11, *inter alia,* provides for registering Mutual Funds and regulating the working of Mutual Funds.

166. Some of the definitions under the Mutual Funds Regulations are very relevant for deciding the issues involved in this group of writ petitions. The first relevant definition is of 'Mutual Fund' which is in clause (q) of Regulation 2 of the Mutual Funds Regulations which reads thus:

> "(*q*) "Mutual Fund" means a fund established in the form of a trust to raise monies through the sale of units to the public or a section of the public under one or more Schemes for investing in securities including money market instruments or gold or gold related instruments or real estate assets.
>
> Provided that infrastructure debt fund Schemes may raise monies through private placement of units, subject to conditions specified in these regulations;

Provided further that Mutual Fund Schemes investing in exchange treaded commodity derivatives may hold the underlying goods in case of physical settlement of such contracts."

(underlines supplied)

167. The word "sponsor" is defined in clause (x) of Regulation 2 which reads thus:

"(*x*) "sponsor" means any person who, acting alone or in combination with another body corporate, establishes a Mutual Fund;"

There are three other relevant definitions of 'Trustees', 'unit' and 'unit-holder' under clause (y), (z) and z (i) of Regulation 2 which read thus:

"(*y*) "Trustees" mean the Board of Trustees or the Trustee Company who hold the property of the Mutual Fund in trust for the benefit of the unit-holders;]

(*z*) "unit" means the interest of the unit-holders in a Scheme, which consists of each unit representing one undivided share in the assets of a Scheme;

(*z*)(*i*) "unit holder" means a person holding unit in a Scheme of a Mutual Fund."

(underlines supplied)

Clause (u) of Regulation 2 defines a “Scheme” to mean a Scheme of a Mutual Fund launched under Chapter-V of the Mutual Funds Regulations. In this group of writ petitions, we are concerned with ‘open-ended Scheme’ which is defined in clause (s) of Regulation 2. It is defined as a Scheme of a Mutual Fund which offers the units for sale without specifying any duration for redemption.

168. Chapter II of the Mutual Funds Regulations provides for registration of a Mutual Fund. Chapter III provides for constitution and management of Mutual Fund and operation of Trustees. Chapter IV provides for constitution and management of Asset Management Company and custodian. Chapter V provides for Schemes of Mutual Fund.

169. The sponsor is required to apply for registration of a Mutual Fund in accordance with the provisions of Regulation 3 in the prescribed form. Along with the application form, the sponsor is required to submit a draft trust deed, a draft investment management agreement and a draft custodian agreement. Regulation 9 provides for grant of a registration certificate in Form

No.B. Regulation 10 is relevant, which provides for terms and conditions of registration. It reads thus:

> **"10. Terms and conditions of registration**.—The registration granted to a Mutual Fund under regulation 9, shall be subject to the following terms and conditions—
>
> (*a*) the Trustees, the sponsor, the asset management company and the custodian shall comply with the provisions of these regulations;
>
> (*b*) the Mutual Fund shall forthwith inform the Board, if any information or particulars previously submitted to the Board was misleading or false in any material respect;
>
> (*c*) the Mutual Fund shall forthwith inform the Board, of any material change in the information or particulars previously furnished, which have a bearing on the registration granted by it;
>
> (*d*) payment of fees as specified in the regulations and the Second Schedule."
>
> (underlines supplied)

170. Regulation 14 provides for constitution of a Mutual Fund in the form of a Trust. It provides that the instrument of trust which shall be in the form of a deed shall be executed by the sponsor in favaour of the Trustees and the same is required to be registered under the provisions of the Indian Registration Act, 1908. Thus, a

Mutual Fund is a trust within the meaning of the Trusts Act. The contents of the deed should be as provided in the Third Schedule.

171. In view of clause (y) of Regulation 2, the Trustees within the meaning of the Mutual Funds Regulations will be either a Board of Trustees or a Trustee Company. The Trustees within the meaning of Regulation 2 (y) have fiduciary relationship with the unit-holders of the Mutual Fund. As per Regulation 17, the appointment of a Trustee can be made only with the prior approval of SEBI. As far as the duties, responsibilities and obligations of the Trustees are concerned, we are discussing the same at a subsequent stage.

The appointment of the Trustees is to be made by the sponsor with the prior approval of SEBI. After the Trust Deed is executed under the Indian Registration Act in accordance with the Regulation 14, the Trustees and AMC are required to execute an investment management agreement containing the clauses as provided in the fourth schedule to the Mutual Funds Regulations. The investment management agreement is required to be executed with the prior approval of SEBI.

172. As per Regulation 19, an application for approval of Asset Management Company is required to be made in Form No.D. Clause (1) of Regulation 20 provides that the sponsor or, if so authorized by the trust deed, the trustees shall appoint AMC subject to approval by SEBI. Regulation 22 provides for imposition of conditions for grant of approval. The job of AMC is to make the investment of funds of the Schemes of the Mutual Fund. Apart from the sponsors, the Trustees and AMC, there is a fourth player involved in the management of a Mutual Fund which is the custodian appointed by the Mutual Fund to carry out the custodial services. The custodian is defined in clause (h) of Regulation 2 to be a person who has been granted a certificate of registration to carry on the business of custodian of securities under the provisions of the Securities and Exchange Board of India (Custodian of Securities) Regulations, 1996.

173. Now we come to the 'Schemes' of Mutual Fund. There can be various Schemes of a particular Mutual Fund. As provided in clause (1) of Regulation 28, every Scheme shall be launched by AMC. But it is provided that no such Scheme shall be launched by AMC unless it is approved by the Trustees and a

copy of the offer document is filed with SEBI. What should be the contents of offer document is also specified. There is a provision for listing of units of a Scheme of a Mutual Fund on a recognized stock exchange, as provided in Regulation 31-B.

174. Regulations 39 to 41 which are most material for deciding the questions involved in this group of writ petitions provide for winding up of a Scheme. We are elaborately dealing with the same separately.

175. Chapter VI under the heading 'Investments Objectives and Valuation Policies' provides for computation of Net Asset Value (for short 'NAV') in accordance with the Regulation 48. This chapter also provides for the manner in which investments should be made by a Mutual Fund and incorporates restrictions on investments.

176. We may note here that in the Mutual Funds Regulations, there is no specific provision for cancellation of registration of a Mutual Fund or winding up of a Mutual Fund. The provisions contained in Regulations 39 to 42 are only in respect of winding up of a particular Scheme of a Mutual Fund. A Mutual Fund can

float various Schemes of various categories such as ‘open ended Schemes’, ‘close ended Schemes’, ‘capital protection oriented Schemes’ and ‘real estates Mutual Fund Schemes’ etc. Chapter VI-A is a chapter which deals with the ‘Real Estate Mutual Funds Schemes’.

177. From the Mutual Funds Regulations, it appears that a Mutual Fund can have one or more Scheme. The monies collected from the investors/unit-holders under a Mutual Fund Scheme can be invested by Mutual Fund in accordance with Regulation 43 in (i) securities, (ii) money market instruments, (iii) privately placed debentures, (iv) securitised debt instruments, which are either asset backed or mortgage backed securities, (v) gold or gold related instruments, or (vi) real estate assets as defined in clause (a) of regulation 49A or (vii) infrastructure debt instruments and assets as specified in clause (1) of regulation 49L. The investments so made under Regulation 43 are subject to restrictions specified in the Eighth Schedule. Regulation 48 is about computation of NAV of each Scheme to be made by a Mutual Fund. Under the Scheme of the Regulations, AMC, by exercising due diligence and care, is required to take decisions

regarding investments by a Mutual Fund. The Code of Conduct prescribed for AMC is also a part of the Regulations.

178. Chapter VIII deals with inspection and audit. Under Regulation 61, SEBI has powers to investigate into the affairs of a Mutual Fund and inspect its records by appointing one or more persons as inspecting officers. Regulation 61 reads thus:

> **"61. Board's right to inspect and investigate**.—(1) The Board may appoint one or more persons as inspecting officer to undertake the inspection of the books of account, records, documents and infrastructure, systems and procedures or to investigate the affairs of a Mutual Fund, the Trustees and asset management company for any of the following purposes, namely:—
>
> (*a*) to ensure that the books of account are being maintained by the Mutual Fund, the Trustees and asset management company in the manner specified in these regulations;
>
> (*b*) to ascertain whether the provisions of the Act and these regulations are being complied with by the Mutual Fund, the Trustees and asset management company;

(*c*) to ascertain whether the systems, procedures and safeguards followed by the Mutual Fund are adequate;

(*d*) to ascertain whether the provisions of the Act or any rules or regulations made thereunder have been violated;

(*e*) to investigate into the complaints received from the investors or any other person on any matter having a bearing on the activities of the Mutual Funds, Trustees and asset management company;

(*f*) to *suo motu* ensure that the affairs of the Mutual Fund, Trustees or asset management company are being conducted in a manner which is in the interest of the investors or the securities market."

(underlines supplied)

Under Regulation 66, SEBI has power to appoint an Auditor to inspect and investigate into books of accounts and affairs of AMC and the Trustees. The Auditors, in view of proviso to Regulation 66, can act as inspecting officer for the purpose of investigation and inspection contemplated by Regulation 61. After a report is submitted on investigation or inspection in accordance with Regulation 64, it is the duty of the

Chairman of SEBI or SEBI to take action as laid down in Regulation 65. This power is apart from the plenary power vesting in SEBI under Section 11C of SEBI Act to appoint Investigating Authority to investigate into affairs of an intermediary. Chapter IX of the Mutual Funds Regulation lays down the procedure for action in case of default. The defaults for which action can be taken have been set out in Regulation 68. Other defaulters are laid down in Regulation 75A. Regulation 76 is relevant which reads thus:

> **"76. Adjudication, etc.**.—The Board may for the offences specified in sections 15A to 15E of the Act initiate action under section 15-I of the Act and in case of violation of any of the provisions of the Act or the regulations, initiate action under section 11, 11B or section 24 of the Act.
>
> (2) The Board may in addition to suspension or cancellation of certificate, order suspension of launching of any scheme of a mutual fund for a period not exceeding one year for violation of any of the provisions of these regulations after following procedure under this Chapter.
>
> (3) The Board may during the pendency of any proceeding of suspension or cancellation under this

> Chapter also order suspension for launching of any scheme not exceeding three months without following procedure under this Chapter:
>
> **Provided** that no order shall be passed without giving an opportunity of hearing."

179. Before we deal with the specific submissions made across the Bar, we must elaborately consider the role of (i) the sponsor, (ii) the Asset Management Company (AMC), (iii) the Trustees and especially their obligations to the investors. We have already outlined the Scheme of the Mutual Funds Regulations. We must also consider the interplay amongst the three players namely, the sponsors, AMC and the Trustees. The sponsor in this case is the Templeton International Inc (7th respondent in WP. No.8545/2020) which is a subsidiary company of Franklin Resources Inc, USA (8th respondent in W.P.No. 8545/2020). The role of sponsor, going by the Mutual Funds Regulations, is limited to making an application for registration of a Mutual Fund. The eligibility criteria for becoming the sponsor is laid down in chapter II with which we are not concerned. In understanding

the relationship amongst the three players i.e., the sponsor, AMC and Trustees, Regulation 7B is relevant which reads thus:

> **"7B. (1)** No sponsor of a Mutual Fund, its associate or group company including the asset management company of the fund, through the Schemes of the Mutual Fund or otherwise, individually or collectively, directly or indirectly, have –
>
> (a) 10% or more of the share-holding or voting rights in the asset management company or the trustee company of any other Mutual Fund; or
>
> (b) Representation on the board of the asset management company or the trustee company of any other Mutual Fund.
>
> (2) Any shareholder holding 10% or more of the share-holding or voting rights in the asset management company or the trustee company of a Mutual Fund, shall not have directly or indirectly, -
>
> a) 10% or more of the share-holding or voting rights in the asset management company or the trustee company of any other Mutual Fund; or
>
> b) Representation on the board of the asset management company or the trustee company of any other Mutual Fund.
>
> (3) Any person not in conformity with the sub-regulations (1) and (2) of this regulation, as on the date of the coming into force of this regulation shall comply with the sub-regulations (1) and (2) within a

period of one year from the date of the coming into force of this regulation:

Provided that in the event of a merger, acquisition, Scheme of arrangement or any other arrangement involving the sponsors of the Mutual Funds, shareholders of the asset management companies or trustee companies, their associates or group companies which results in the incidental acquisition of shares, voting rights or representation on the board of the asset management companies or trustee companies, this regulation shall be complied with within a period of one year of coming into force of such an arrangement."

180. The Regulation 7B ensures that there is no conflict of interest. Therefore, the Regulation 7B provides that a sponsor of a Mutual Fund and even its associate and group companies including AMC of the fund through the Schemes of Mutual Fund cannot have 10% or more shareholding or voting rights in AMC or Trustee company or any other Mutual Fund. Similarly, the sponsor or its associates or group of companies cannot have the representation on the board of AMC or Trustee company or any other Mutual Fund. A trust deed, as contemplated by Regulation 14 has to be registered as an instrument of trust executed by the

sponsor in favour the Trustees or Trustee company. The third schedule lays down the mandatory clauses to be incorporated in the trust deed. One of the most important clauses therein is clause (3) which requires that the trust deed must provide that the Trustees shall take into their custody, or under their control, all the property of the Schemes of the Mutual Fund and hold it in trust for the unit-holders. The second important clause in the third schedule is that the trust deed must specifically provide that the unit-holders would have beneficial interest in the trust property to the extent of individual holding in respective Schemes. Thus, all the property of the Schemes of a Mutual Fund is in custody and under control of the Trustees and that the Trustees hold the same in fiduciary capacity for the benefit of the unit-holders. Moreover, it is provided that the unit-holders would have beneficial interest in the trust property.

181. As regards the obligations of the Trustees to the beneficiaries, there are important mandatory clauses required to be incorporated in the trust deed. As far as the duties and responsibilities of the Trustees are concerned, clauses (8) to (10) of the third schedule are relevant which read thus:

"8. The Trust Deed shall provide for the duty of the trustee to take reasonable care to ensure that the funds under the Schemes floated by and managed by the asset management company are in accordance with the Trust Deed and Regulations.

9. The Trust Deed must provide for the power of the Trustees to dismiss the asset management company under the specific events only with the approval of Board in accordance with the Regulations.

10. The Trust Deed shall provide that the Trustees shall appoint a custodian and shall be responsible for the supervision of its activities in relation to the Mutual Fund and shall enter into a custodian Agreement with the custodian for this purpose."

The above clauses must be incorporated in a Trust Deed in view of Regulation 15 which reads thus:

"15. Contents of trust deed.—(1) The trust deed shall contain such clauses as are mentioned in the Third Schedule and such other clauses which are necessary for safeguarding the interests of the unit-holders.

(2) No trust deed shall contain a clause which has the effect of—

> (*i*) limiting or extinguishing the obligations and liabilities of the trust in relation to any Mutual Fund or the unit-holders; or
>
> (*ii*) indemnifying the Trustees or the asset management company for loss or damage caused to the unit-holders by their acts of negligence or acts of commission or omission."

182. Basically, the duty to take care of the interest of the unit-holders is the most important duty of the Trustees, as they hold the assets of the Schemes in fiduciary capacity. Sub-clauses (i) and (ii) of clause (2) of Regulation 15 make it clear that by making a provision in the trust deed, the liabilities and obligations of the Trustees to any Mutual Fund cannot be limited or extinguished. Sub-clause (ii) clause (2) of Regulation 15 clearly indicates that the Trustees or AMC are responsible for any loss or damage caused to the unit-holders by their acts of negligence or acts of commission or omission. The reason is that it is provided that there cannot be a clause indemnifying the Trustees for such a loss or damage. There is a salutary provision in the third schedule in the form of clause 17 which lays down that the trust deed shall contain a clause to the effect that no amendment to the trust deed shall be carried out without the prior approval of

SEBI and unit-holders. Thus, amendment to the trust deed is impermissible without the prior approval of the unit-holders.

183. Before we go into the provisions contained in Regulation 18 which lay down the rights and obligations of the Trustees, there is one more clause in the third schedule which is clause 12 which also gives an idea about the role of the Trustees. Clause 12 read thus:

> "12. The Trust Deed shall provide for the responsibility of the Trustees to supervise the collection of any income due to be paid to the Scheme and for claiming any repayment of tax and holding any income received in trust for the holders in accordance with the Trust Deed, Regulations."

We must also refer to clause 7 of the third schedule which reads thus:

> "7. The Trust Deed shall provide that the Trustees shall appoint an asset management company approved by the board, to float Schemes for the Mutual Fund after approval by the Trustees and Board, and manage the funds mobilised under various Schemes, in accordance with the provisions of the Trust Deed and Regulations. The

> Trustees shall enter into an Investment Management Agreement with the asset management company for this purpose, and shall enclose the same with the Trust Deed."

(Underlines supplied)

184. Thus, AMC is to be appointed by the Trustees after seeking approval of SEBI. AMC so appointed is empowered to launch Schemes of a Mutual Fund after approval of SEBI and manage the funds mobilized under various Schemes in accordance with the provisions of the trust deed and the Mutual Funds Regulations. It is the duty of AMC to invest the funds collected under the Schemes.

185. Now we come to the rights and obligations of the Trustees as laid down in Regulation 18. The first and foremost obligation is to enter into an investment management agreement containing the clauses which are provided in the fourth schedule. As laid down in clause (4) of the Regulation 18, the duty of the Trustees is that they should ensure before the launch of any Scheme that AMC complies with the various requirements provided therein, such as having the systems in place for its back office, dealing

room and accounting, appointment of all key personnel including fund managers for the Schemes, appointment of Auditors, appointment of registrars etc. There are very important duties assigned to the Trustees in sub-clauses (8) to (15) of Regulation 18 of the Mutual Funds Regulations which read thus:

> "(8) The Trustees shall ensure that the asset management company has been managing the Mutual Fund Schemes independently of other activities and have taken adequate steps to ensure that the interest of investors of one Scheme are not being compromised with those of any other Scheme or of other activities of the asset management company.
>
> (9) The Trustees shall ensure that all the activities of the asset management company are in accordance with the provisions of these regulations.
>
> (10) Where the Trustees have reason to believe that the conduct of business of the Mutual Fund is not in accordance with these regulations and the Scheme they shall forthwith take such remedial steps as are necessary by them and shall immediately inform the Board of the violation and the action taken by them.

(11) Each trustee shall file the details of his transactions of dealing in securities with the Mutual Fund on a quarterly basis.

(12) The Trustees shall be accountable for, and be the custodian of, the funds and property of the respective Schemes and shall hold the same in trust for the benefit of the unit-holders in accordance with these regulations and the provisions of trust deed.

(13) The Trustees shall take steps to ensure that the transactions of the Mutual Fund are in accordance with the provisions of the trust deed.

(14) The Trustees shall be responsible for the calculation of any income due to be paid to the Mutual Fund and also of any income received in the Mutual Fund for the holders of the units of any Scheme in accordance with these regulations and the trust deed.

(15) The Trustees shall obtain the consent of the unit-holders—

(*a*) whenever required to do so by the Board in the interest of the unit-holders; or

(*b*) whenever required to do so on the requisition made by three-fourths of the unit-holders of any Scheme; or

(*c*) when the majority of the Trustees decide to wind up or prematurely redeem the units.

(*d*) [* * *]

[(15A) The Trustees shall ensure that no change in the fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme and affects the interest of unit-holders, shall be carried out unless,—

(*i*) a written communication about the proposed change is sent to each unitholder and an advertisement is given in one English daily newspaper having nationwide circulation as well as in a newspaper published in the language of region where the Head Office of the Mutual Fund is situated; and

(*ii*) the unit-holders are given an option to exit at the prevailing Net Asset Value without any exit load.]

(underlines supplied)

186. We are considering clause (15) of Regulation 18 in the subsequent part of the judgment, when we consider the provisions of Regulations 39 to 42. Clause (18) of Regulation 18 provides that the Trustees shall quarterly review the networth of AMC. Thereafter, there are other clauses regarding Due Diligence and Specific Due Diligence, as contained in clause (25).

As a part of specific due diligence, it is provided that it is the duty of the Trustees to prescribe and adhere to the Code of ethics.

187. Now we come to the duties and responsibilities of AMC. As pointed out earlier, AMC is required to be appointed by the Trustees. The form of application for appointment/approval of AMC is as per Form-D. It must be clarified here that the power to appoint AMC is with the sponsor, but if it is so authorized by the trust deed, the Trustees are empowered to appoint AMC. The qualifications for appointment of AMC are also laid down in Regulation 21.

188. The fourth schedule lays down what should be the mandatory clauses in the investment management agreement executed by and between the Trustees and AMC, as provided in clause (2) of Regulation 18. The role of AMC is reflected from the contents of the fourth schedule.

What is important is clause (20) of the Regulation 25 which reads thus:

> "(20) The asset management company and the sponsor of the Mutual Fund shall be liable to compensate the affected investors and/or the

Scheme for any unfair treatment to any investor as a result of inappropriate valuation."

The said clause means that if any investor gets unfair treatment as a result of inappropriate valuation, AMC and sponsor of the Mutual Fund are liable to pay the compensation to the investors. Regulation 26 provides for Mutual Fund appointing a custodian to carry out the custodial services for the Schemes of the said fund. Regulation 27 provides that Mutual Fund is required to enter into a custodial agreement with the custodian with the prior approval of the Trustees.

189. Now, we come to the provisions of the Mutual Funds Regulations which lay down the procedure for launching the Schemes. The procedure for launching the Schemes of a Mutual Fund is laid down in Chapter-V. Regulation 28 makes it clear that no Schemes can be launched by AMC unless it is approved by the Trustees and a copy of offer document is filed with SEBI. It is provided that the sponsor or AMC shall invest not less than 1% of the amount which would be raised in the new fund offer or Rupees fifty lakhs, whichever is less. It is provided that such investment shall not be redeemed unless the Scheme is wound

up. In what manner the disclosure should be made in the offer document is laid down in Regulation 29. SEBI has power to require AMC to carry out such modification in the offer document as it may be deem fit in the best interest of investors. There are provisions regarding listing the 'close ended Scheme' and re purchase of 'close ended Scheme'. In case of open ended Scheme, the unit-holders can apply for redemption at any time.

190. Thus, to summarize, a Mutual Fund is registered at the instance of the sponsor. The sponsor is required to execute a trust deed in favour of the Trustees. It can be a Board of Trustee or a Trustee company. The appointment of Trustees is to be made with the prior approval of SEBI. The Trustees have to appoint AMC by entering into investment management agreement. Perusal of the fourth schedule which describes the contents of the investment management agreement shows that it is the responsibility of AMC to float the Schemes for the Mutual Fund with the approval of the Trustee. It is the responsibility of AMC to manage the funds mobilized under various Schemes which shall be invested by AMC in accordance with the provisions of the Trust Deed and the Mutual Funds Regulations. There is

also a power vesting in the Trustees to dismiss AMC with the prior approval of SEBI. Before doing so, AMC must be asked to submit a report, as may be required by the Trustees or SEBI. There is a right vested in the Trustees of obtaining the information from AMC concerning the various Schemes of the Mutual Fund and quarterly reports on the functioning of the various Schemes of the Mutual Fund and it is the responsibility of the Trustees to ensure that AMC is diligent and the activities of AMC are conducted in accordance with the provisions of the Regulations.

191. As provided in the third schedule, the property of the Schemes is in the custody and/or under control of the Trustees and that the Trustees are required to act in trust for the interest of the unit-holders. The unit-holders are having the beneficial interest in the trust property. Thus, it can be broadly said that it is the duty of the Trustees to safeguard the interests of the investors in the Scheme, as the assets of a Scheme are held by the Trustees in trust for the benefit of the investors.

192. Various provisions of the Regulations contemplate that there should not be any conflict of interest amongst key players and therefore, it is provided that no AMC or its Directors, Officers,

or employee of any AMC shall be eligible to be appointed as a Trustee of any other Mutual Fund. It is also provided that no person who is appointed as a Trustee of a Mutual Fund shall be eligible to be appointed as a Trustee of any other Mutual Fund. It is provided that two third (2/3rd) of the Trustees shall be independent persons and they shall not be associated with the sponsors. If a trustee company is appointed as a trustee, its directors cannot act as a Trustee of any other Trustee company unless the object of the Trust is not in conflict of interest with the object of the Mutual Fund. It is also provided that the Trustee company and AMC cannot have the same Auditor.

193. Before we turn to the interpretation of the relevant provisions of the Mutual Funds Regulations, it is necessary to summarize the obligations and duties of AMC and the Trustees under the Mutual Funds Regulations. We enlist some of the important duties and obligations.

A. <u>Obligations of the Trustees:</u>

(i) To ensure that AMC enters into transactions in accordance with the Mutual Funds Regulations and the Scheme [Regulation 18 (7);

(ii) To ensure that AMC takes adequate steps to ensure that interests of investors of one Scheme are not being compromised with those of any other Scheme or activities of AMC [Regulation 18 (8)];

(iii) To ensure that all the activities of AMC are conducted in accordance with the provisions of the Mutual Funds Regulations [Regulation 18 (9)];

(iv) To take remedial steps and to inform SEBI about the violations of the Mutual Funds Regulations committed by AMC [Regulation 18 (10)];

(v) The Trustees shall be accountable for and be the custodian of the funds and property of the respective Schemes and shall hold the same in trust for the benefit of the unit-holders in accordance with the Mutual Funds Regulations and the provisions of the Trust Deed [Regulation 18 (12)];

(vi) Obligation to take steps to ensure that the transactions of the Mutual Fund are in accordance with the provisions of the trust deed [Regulation 18 (13)];

(vii) The Trustees shall be under an obligation to obtain consent of the unit-holders when the majority of the Trustees decide to wind up or prematurely redeem the units [Regulation 18 (15) (c)];

(viii) Obligation not to effect change in the fundamental attributes of any Scheme or any other change which would modify the Scheme and which affects the interests of the unit-holders, without complying with the requirements of clause 15A of Regulation 18 [Regulation 18 (15A)];

(ix) Obligation to review all transactions carried out by and between the Mutual Funds, AMC and its associates [Regulation 18 (17)];

(x) To abide by the Code of Conduct as specified in the fifth Schedule [Regulation 18 (22)];

(xi) To periodically review the investor's complaints received and redressal of the same by AMC [Regulation 18 (21)];

(xii) To exercise General Due Diligence, as incorporated in clause (25) of Regulation 18 which includes maintaining of the records of the decisions of the Trustees at their meetings and minutes of the meetings and prescribing as well as adhering to a code of ethics [Clause-A and B under Regulation 18 (25)];

(xiii) To take into custody or under their control all the property of the Schemes of the Mutual Fund and hold it in trust for unit-holders [clause (3) of Third Schedule];

(xiv) To act in the interest of the unit-holders [clause (5) of Third Schedule];

(xv) To dismiss AMC under specific events with the approval of SEBI [clause (9) of Third Schedule];

(xvi) To appoint a custodian and shall remain responsible for the supervision of its activities in relation to the Mutual Fund and to enter into an agreement with the custodian [clause (10) of Third Schedule];

(xvii) To perform the duties as specified in Regulation 49-I of the Mutual Funds Regulations (applicable to real estate Mutual Fund Scheme); and

(xviii) To produce to the inspecting officer such books of accounts, records and other documents and to furnish such statements and information relating to the activities of the Mutual Fund in its custody or control [Regulation 63 (1)].

B. <u>Obligations of the AMC:</u>

i) To invest the funds raised under various Schemes in accordance with the provisions of the Trust Deed and Regulations [clause (iii) of fourth Schedule];

ii) Not to acquire any of the assets out of the Scheme property which involves the assumption of any liability which is unlimited or which may result in encumbrance of the Scheme property [clause (iv) fourth schedule];

iii) Not to take up any activity in contravention of the Mutual Funds Regulations [clause (v) of fourth schedule];

iv) To disclose the basis of calculating the repurchase price and NAV of various Schemes of the fund to the investors at such intervals, as may be specified by the Trustees and SEBI [clause (viii) of fourth schedule];

v) To furnish information to the Trustees concerning the operations of various Schemes of the Mutual Fund managed by it at such intervals and in such a manner, as may be required by the Trustees [clause (ix) of fourth schedule];

vi) To submit quarterly reports on functioning of the Schemes to the Trustees [clause (x) of fourth schedule];

vii) To take all reasonable steps and exercise due diligence to ensure that investment of funds pertaining to any Scheme is not contrary to the provisions of the Mutual Funds Regulations and the Trust Deed [clause (1) of Regulation 25];

viii) To exercise due diligence and care in all its investments decisions as would be exercised by

other person engaged in the same business [clause (2) of Regulation 25];

ix) To abide by the provisions of the Code of Conduct, as specified in fifth schedule;

x) To report and disclose all the transactions in debt and money market securities including inter Scheme transfers, as may be specified by SEBI [clause (21) of Regulation 25];

xi) Not to launch any Schemes unless it is approved by the Trustees and a copy of the offer document is filed with SEBI [clause (1) of Regulation 28];

xii) To follow the Advertisement Code set out in the sixth schedule [Regulation 30];

xiii) To make stipulated disclosures in the offer document [Regulation 29];

xiv) To despatch the redemption or repurchase proceeds within ten working days from the date of redemption or repurchase [clause (b) of Regulation 53];

xv) To prepare in respect of each financial year, an annual report and annual statement of accounts of the Schemes [Regulation 54 read with 11th schedule]; and

xvi) To make periodical and half yearly disclosures [Regulations 58 and 59].

INTERPRETATION OF PROVISIONS REGARDING WINDING UP OF A SCHEME (ISSUE NOs (ii) and (iii):

194. Now, we go to the relevant provisions regarding winding up of Schemes. The specific provisions regarding winding up of a Scheme are contained in Regulations 39 to 42 which read thus:

> **"39. Winding up**.—(1) A close-ended Scheme shall be wound up on the expiry of duration fixed in the Scheme on the redemption of the units unless it is rolled over for a further period under sub-regulation (4) of regulation 33.
>
> (2) A Scheme of a Mutual Fund may be wound up, after repaying the amount due to the unit-holders,—
>
> (*a*) on the happening of any event which, in the opinion of the Trustees, requires the Scheme to be wound up; or
>
> (*b*) if seventy-five per cent of the unit-holders of a Scheme pass a resolution that the Scheme be wound up; or
>
> (*c*) if the Board so directs in the interest of the unit-holders.

(3) Where a Scheme is to be wound up under sub-regulation (2), the Trustees shall give notice disclosing the circumstances leading to the winding up of the Scheme:—

(*a*) to the Board; and

(*b*) in two daily newspapers having circulation all over India, a vernacular newspaper circulating at the place where the Mutual Fund is formed.

40. Effect of winding up.—On and from the date of the publication of notice under clause (b) of sub-regulation (3) of regulation 39, the trustee or the asset management company as the case may be, shall—

(*a*) cease to carry on any business activities in respect of the Scheme so wound up;

(*b*) cease to create or cancel units in the Scheme;

(*c*) cease to issue or redeem units in the Scheme.

41. Procedure and manner of winding up.—(1) The trustee shall call a meeting of the unit-holders to approve by simple majority of the unit-holders present and voting at the meeting resolution for authorising the Trustees or any other person to take steps for winding up of the Scheme:

Provided that a meeting of the unit-holders shall not be necessary if the Scheme is wound up at the end of maturity period of the Scheme.

(2)(*a*) The trustee or the person authorised under sub-regulation (1) shall dispose of the assets of the Scheme concerned in the best interest of the unit-holders of that Scheme.

(*b*) The proceeds of sale realised under clause (a), shall be first utilised towards discharge of such liabilities as are due and payable under the Scheme and after making appropriate provision for meeting the expenses connected with such winding up, the balance shall be paid to the unit-holders in proportion to their respective interest in the assets of the Scheme as on the date when the decision for winding up was taken.

(3) On the completion of the winding up, the trustee shall forward to the Board and the unit-holders a report on the winding up containing particulars such as circumstances leading to the winding up, the steps taken for disposal of assets of the fund before winding up, expenses of the fund for winding up, net assets available for distribution to the unit-holders and a certificate from the Auditors of the fund.

(4) Notwithstanding anything contained in this regulation, the provisions of these regulations in

respect of disclosures of half-yearly reports and annual reports shall continue to be applicable until winding up is completed or the Scheme ceases to exist.

42. Winding up of the Scheme.—After the receipt of the report under sub-regulation (3) of regulation 41, if the Board is satisfied that all measures for winding up of the Scheme have been complied with, the Scheme shall cease to exist.

(underlines supplied)

195. Apart from the question of validity of the provisions of Regulations 39 to 41, another issue is whether for winding up a Scheme, the requirement of obtaining the consent of the unit-holders, as provided in clause (15) of Regulation 18 can be read into sub-clause (a) of clause (2) of Regulation 39. Another issue is regarding interplay between, clause (15A) of Regulation 18 and sub-clause (a) of clause (2) of Regulation 39. For the sake of convenience, we are reproducing herewith both clauses (15) and (15A) of Regulation 18 which read thus:

"(15) <u>The Trustees shall obtain the consent of the unit-holders</u>—

(*a*) whenever required to do so by the Board in the interest of the unit-holders; or

(*b*) whenever required to do so on the requisition made by three-fourths of the unit-holders of any Scheme; or

(*c*) when the majority of the Trustees decide to wind up or prematurely redeem the units.

(*d*) [* * *]"

(15A) The Trustees shall ensure that no change in the fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme and affects the interest of unit-holders, shall be carried out unless,—

(*i*) a written communication about the proposed change is sent to each unitholder and an advertisement is given in one English daily newspaper having nationwide circulation as well as in a newspaper published in the language of region where the Head Office of the Mutual Fund is situated; and

(*ii*) the unit-holders are given an option to exit at the prevailing Net Asset Value without any exit load."

(Underlines supplied)

196. The argument of the petitioners is that the consent, as contemplated by sub-clause (c) of clause (15) of Regulation 18 is mandatory and it is a condition precedent for winding up of

a Scheme pursuant to sub-clause (a) of clause (2) of Regulation 39.

197. On the other hand, the contention of the respondents is that Regulations 39 to 42 which are a part of Chapter-V of the Mutual Funds Regulations constitute a complete code for winding up of a Scheme and, therefore, what is provided in clauses (15), and (15A) of Regulation 18 which form a part of Chapter-III of the Mutual Funds Regulations cannot be imported into Regulation 39. It is contended that if the consent of the unit-holders as contemplated by sub-clause (c) of clause (15) of Regulation 18 is made applicable to winding up of a Scheme pursuant to sub-clause (a) of clause (2) of Regulation 39, sub-clause (b) of clause (2) of Regulation 39 will become redundant, inasmuch as, it provides that if 75% of the unit-holders of a Scheme pass a resolution for winding up of a Scheme, it can be wound up. It is submitted that if the interpretation as per the case of the petitioners is accepted, the difference between sub-clauses (a) and (b) of clause (2) of Regulation 39 will be completely obliterated. It is also contended by the respondents that the entire business of Mutual Funds is highly regulated in terms of the

Mutual Funds Regulations and an expert statutory body like SEBI is the regulatory authority. There are several safeguards and safety rails provided in the Mutual Funds Regulations which ensure that the Trustees act for the benefit of the unit-holders and investors. The provisions of the Regulations require the Trustees and AMC to maintain arms' distance. The Trustees are the experts in the field and by using their expertise, they have to decide what is in the interest of the unit-holders. If the Trustees are of the considered view that the interests of the unit-holders will be sub served by winding up of a Scheme, they should have freedom to take a decision of winding up. Except when compliance is made with the provisions of Regulation 38, the investment in Mutual Fund never has guaranteed returns and the investment in the Mutual Fund is always subject to risks. Those investors who wants fixed returns normally take recourse to safe investments like Government securities, bank deposits etc. Moreover, it was argued that the Trustees cannot be forced to continue to run the Schemes. One of the arguments made was that on the one hand, the petitioners have made very serious allegations against the Trustees and AMC of mismanaging the funds of not acting in fiduciary capacity in the interest of the unit-

holders etc, and on the other hand, by filing these writ petitions, they want to force the Trustees and AMC to run the said Schemes. An argument is also canvassed by the respondents that the Trustees and AMC were never put to notice that even for winding up of the Schemes under sub-clause (a) of clause (2) of Regulation 39, consent of the unit-holders will be required. If they were made aware of the said position, they would not have floated the said Schemes at all. It was also submitted that the consent referred in sub-clause (c) of clause 15 of Regulation 18 is an approval as contemplated by clause (1) of Regulation 41(1). It was submitted that there was no difference between the concept of 'consent' and 'approval' and in fact, it is one and the same.

198. There is a serious doubt whether the aforesaid arguments are open to FTMF, in view of the Statement of Additional Information published by it. We find that the fact that the consent of unit-holders is required for winding up of a Scheme pursuant to sub-clause (a) of clause (2) of Regulation 39 is accepted by FTMF in the Statement of Additional Information published by it.

But, still we will have to do the exercise of interpreting relevant Regulations. Now the question is in what manner sub-clause (c) of clause (15) of Regulation 18 can be interpreted. On the approach of the Court, we will be guided by the law laid down by the Apex Court in the case of ***Ajay Agarwal*** (supra). That was a case where the issue was of the interpretation of Section 11B of the SEBI Act, in the context of invocation of the said provision by the Chairman of SEBI for restraining the respondents before the Apex Court from associating with any corporate body in accessing the securities market and prohibiting/restraining them from buying and selling in the securities market. The issue was of retrospective operation of Section 11B. In paragraph 34, the Apex Court held thus:

> "**34. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. It is a well-known canon of construction that when the court is called upon to interpret provisions of a social welfare legislation the paramount duty of the court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it**. Keeping this principle in mind if

> we analyse some of the provisions of the Act it appears that the Board has been established under Section 3 as a body corporate and the powers and functions of the Board have been clearly stated in Chapter IV and under Section 11 of the said Act."
>
> (emphasis added)

199. In the case of ***Securities and Exchange Board of India – vs- Kishore R. Ajmera***[71]***,*** the Apex Court has dealt with the objects of SEBI Act. In paragraph 25 of the said decision, the Apex Court held thus:

> "25. The SEBI Act and the Regulations framed thereunder are intended to protect the interests of investors in the Securities Market which has seen substantial growth in tune with the parallel developments in the economy. **Investors' confidence in the capital/securities market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to pre-empt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the capital** market. The primary purpose of the statutory enactments is to provide an environment conducive to increased participation and investment in the securities market

[71] (2016) 6 SCC 368

> which is vital to the growth and development of the economy. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light".
>
> (emphasis added)

200. Regulation 18 is titled as "Rights and Obligations of the Trustees" which is a part of Chapter-III titled as "Constitution and management of Mutual Fund and operation of Trustees etc". Regulation 18 sets out several obligations of the Trustees. In clause (15), the word 'shall' has been used. When Regulation 18 contains several obligations of the Trustees, one cannot argue that the obligations mentioned therein need not be performed. An obligation is a legal duty to do or not to do any act. The Trustees have no choice but to discharge their obligations. Moreover, the Trustees have to act in fiduciary capacity *qua* unit-holders. Regulation 18 does not provide for any exceptions. Therefore, strict interpretation of the clauses in Regulation 18 is called for. Mutual Funds Regulations, being framed under SEBI Act, is a piece of subordinate/delegated Social Welfare Legislation as SEBI Act, as held by the Apex Court, is itself a Social Welfare Legislation. There are as many as twenty seven clauses in

Regulation 18. Clause (15) of Regulation 18 provides that the Trustees shall obtain the consent of the unit-holders in three contingencies which are enlisted in sub-clauses (a), (b) and (c) thereof. Sub-clause (a) is applicable whenever the Board requires the Trustees to do so in the interest of the unit-holders. The Board is defined in clause (a) of Section 2 of the SEBI Act to mean SEBI. Thus, for doing a particular act, if SEBI wants the Trustees to take consent of the unit-holders in the interest of the unit-holders, it is the obligation of the Trustees to obtain their consent. Under sub-clause (b), when a requisition is made by three-fourth of the unit-holders of any Scheme providing that for the purposes of doing a particular act, the consent of the unit-holders is necessary, the Trustees are under a mandate to obtain consent of the unit-holders. Sub-clause (c) is applicable when "the majority of the Trustees decide to wind up or prematurely redeem the units". Thus, sub-clause (c) requires the Trustees to obtain consent of the unit-holders when the majority of the Trustees decide to wind up or prematurely redeem the units.

201. An argument is tried to be canvassed on behalf of the respondents that sub-clause (c) does not deal with winding up of

a Scheme. The said argument is fallacious for more than one reason. Firstly, the Mutual Funds Regulations do not provide for winding up of a Mutual Fund, but it only provide for winding up of a Scheme. Secondly, Regulation 14 provides that a Mutual Fund shall be constituted in the form of a trust under a deed which is registered in accordance with the Indian Registration Act, 1908. As, a Mutual Fund is a trust which is governed by the Trusts Act, obviously, there is no provision made in the Mutual Funds Regulations for winding up of a Mutual Fund. As stated earlier, sub-clause (c) of clause (15) of Regulation 18 applies to a decision to wind up or a decision to prematurely redeem the units. The word 'unit' as defined in clause (z) of Regulation 2 to mean the interest of the unit-holders in a Scheme. Thus, the decision of majority of the Trustees to redeem the units is a decision to redeem units in a particular Scheme. This indicates that sub-clause (c) deals with a Scheme of a Mutual Fund. On the one hand, there is no specific provision incorporated in the Mutual Funds Regulations for winding up of a Mutual Fund and on the other hand, there is a specific provision for winding up of a Scheme. Therefore, there is no manner of doubt that sub-clause (c) of clause (15) of Regulation 18 refers to a decision of majority

of the Trustees to wind up a Scheme. No other winding up is contemplated by the Regulations. As per the definition of 'Trustees' contained in clause (y) of Regulation 2, the Trustees can be a Board of Trustees or a Trustee Company. In this case, the Trustees are a Trustee Company. Therefore, in this case, the decision to wind up a Scheme will be always by majority of the Board of Directors of the Trustees. As stated earlier, the Mutual Funds Regulations do not provide for winding up of any of the entities, save and except a Scheme. Hence, clause (c) undoubtedly refers to winding up of a Scheme.

202. Whenever the Trustees exercise powers which are conferred on them or whenever the Trustees take actions which are permissible to be taken under the Mutual Funds Regulations, they remain bound by their obligations laid down under Regulation 18. There are no exceptions carved out to the obligations contained in Regulation 18. There is no specific provision in the Mutual Funds Regulations which overrides the obligations of the Trustees as provided in Regulation 18. The reason appears to be that it is the obligation of the Trustees to take in their control the property of Schemes of a Mutual Fund

and hold it in trust and for the benefit of the unit-holders. They always act in fiduciary capacity. Such a clause is required to be incorporated in the trust deed which is required to be executed as per Regulation 14. The said mandatory clause is clause (3) in third schedule.

203. Now, we come to sub-clause (a) of clause (2) of Regulation 39 which provides that a Scheme of the Mutual Fund may be wound up on happening of any event which in the opinion of the Trustees requires a Scheme to be wound up. It is obvious that such an opinion has to be of majority of the Board of Trustees or of majority of Directors of a Trustee company, as the case may be. Clause (3) of Regulation 39 provides that where a Scheme is to be wound up under sub-clause (2), the Trustee shall give notices as provided therein. Once such notices are published, Regulation 40 triggers in, as a result of which, the Trustees and AMC are under an obligation to stop carrying on any business activities in respect of the Scheme and not to create or cancel the units of the Scheme and to stop issuing or redeeming the units. Therefore, the first step towards winding up triggers in after a

publication is made as per clause (3) of Regulation 39. Clause (1) of Regulation 41 reads thus:

> **"41. Procedure and manner of winding up**.— (1) The trustee shall call a meeting of the unit-holders to approve by simple majority of the unit-holders present and voting at the meeting resolution for authorising the Trustees or any other person to take steps for winding up of the Scheme:
>
> **Provided** that a meeting of the unit-holders shall not be necessary if the Scheme is wound up at the end of maturity period of the Scheme."

204. The approval contemplated by clause (1) of Regulation 41 is for limited purposes of authorizing either the Trustees or any other persons to take steps for winding up of the Scheme. Thus, clause (1) of Regulation 41 comes into picture only after a valid decision is taken to wind up a Scheme in accordance with one of the three sub-clauses (a), (b) and (c) of clause (2) of Regulation 39 and after due compliance is made with clause (3) of Regulation 39. The approval contemplated by said provision is not to the decision of the winding up of a Scheme. The approval is only on the issue who will take steps for winding up of the

Scheme. Whether the Trustees will take steps or any other person. The approval under clause (1) of Regulation 41 has nothing to do with the decision to wind up a Scheme. The approval is only for authorising the Trustees or any other person to take steps for actual winding up.

205. Coming back to sub-clause (c) of clause (15) of Regulation 18, the consent of the unit-holders contemplated therein is at a stage when the majority of the Trustees decide to wind up a Scheme or prematurely redeem the units. This consent is to the decision to wind up a Scheme. It has nothing to do with the approval granted by the unit-holders under Regulation 41 (1) for authorizing either the Trustees or any other person to take steps for winding up of the Scheme. The steps for winding up of a Scheme are provided in clause (2) of Regulation 41. The first step is to dispose of the assets of the Scheme in the best interest of the unit-holders. The second step is to apply the sale proceeds towards discharge of liabilities as are due and payable under the Scheme. The third step is to set apart the amount of the expenditure likely to be required for liquidation. The fourth step is to distribute the balance to the unit-holders in proportion to their

respective interest in the assets of the Scheme as on the date of the decision of winding up. Even assuming that the word 'approval' and 'consent' convey the same meaning, the approval contemplated by clause (1) of Regulation 41 is completely different from the 'consent' contemplated by sub-clause (c) of clause (15) of Regulation 18. Thus, the 'consent' contemplated in sub-clause (c) of clause (15) of Regulation 18 cannot be equated with or read as an 'approval' contemplated by clause (1) Regulation 41. As there is an express provision of approval of unit-holders in clause (1) of Regulation 41, there was no reason for the framers of the Regulations to provide for the same approval in some other Regulation.

206. As the word consent used in sub-clause (c) of clause (15) of Regulation 18 has nothing to do with approval under Regulation 41 (1), some meaning will have to be assigned to the word 'consent' contemplated by sub-clause (c) of clause (15) of Regulation 18, in view of the well settled law regarding the interpretation of statutes. In the case of ***O.P. Singla and another***

-vs- Union of India and others*[72]*, in paragraph 17, the Apex Court held thus:

> "xxxx **However, it is well recognised that, when a rule or a section is a part of an integral Scheme, it should not be considered or construed in isolation. One must have regard to the Scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them**. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning. xxxx"
>
> (emphasis added)

Therefore, the provision of sub-clause (c) of clause (15) of Regulation 18 cannot be read in isolation. We have to consider the entire Scheme of the Mutual Funds Regulations for assigning meaning to the consent contemplated by sub-clause (c) of clause (15) of Regulation 18.

207. In the case of ***Hardeep Singh*** (supra), in paragraph 44 of the said decision, the Apex Court held thus:

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[72] (1984) 4 SCC 450

> **"44. No word in a statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the statute. By construction, a provision should not be reduced to a "dead letter" or "useless lumber". An interpretation which renders a provision otiose should be avoided otherwise it would mean that in enacting such a provision, the legislature was involved in "an exercise in futility" and the product came as a "purposeless piece" of legislation and that the provision had been enacted without any purpose** and the entire exercise to enact such a provision was "most unwarranted besides being uncharitable".
>
> (emphasis added)

Therefore, sub-clause (c) of clause (15) of Regulation 18 has to be interpreted in such manner that the 'consent' contemplated therein does not become ineffective or purposeless. It cannot be allowed to become redundant. There is another decision on the subject which is in the case of ***Union of***

India –vs- Brigadier P.S. Gill[73], in paragraph 17, the Apex Court held thus:

> **"17. Each word used in the enactment must be allowed to play its role howsoever significant or insignificant the same may be in achieving the legislative intent and promoting legislative object**. Although it is unnecessary to refer to any decisions on the subject, we may briefly recount some of the pronouncements of this Court in which the expression "subject to" has been interpreted."
>
> (emphasis added)

208. Thus, it is the duty of this Court to assign some significant meaning to the word 'consent' contemplated by sub-clause (c) of clause (15) of Regulation 18. Moreover**,** a provision of law must be construed in such a manner that it subserves the purpose of law. Even if contextual or textual interpretations are adopted, only one conclusion is possible that the consent contemplated by sub-clause (c) is to the majority decision of the Trustees for winding up of a Scheme or premature redemption of units in a Scheme. As stated earlier, sub-clause (a) of clause (2) of Regulation 39 provides that a Scheme of Mutual Fund may be wound up if, in the opinion of the Trustees, an event has occured which requires

[73] (2012) 4 SCC 463

the Scheme to be wound up. Clause (3) of Regulation 39 uses the words “where a Scheme is to be wound up”. On mere formation of opinion by the Trustees as provided in sub-clause (a) of clause (2) of Regulation 39, it cannot be said that the Scheme can be termed as ‘a Scheme to be wound up’ within the meaning of clause (3). When the majority of the Trustees form an opinion as contemplated by sub-clause (a) of clause (2) of Regulation 39, the Trustees are under a mandate to take consent of the unit-holders as contemplated by sub-clause (c) of clause (15) of Regulation 18. Only after such consent is taken, it can be said that the Scheme is to be wound up as provided in clause (3) of Regulation 39. It is only after obtaining such consent that recourse to clause (3) of Regulation 39 can be taken.

209. Obviously, there can be a ‘consent’ of the unit-holders to a proposed of winding up of a Scheme only if the majority of the unit-holders give consent to do so. Sub-clause (c) of clause (15) of Regulation 18 is silent on the nature of majority. Obviously, it is not a specific majority like three-fourth majority. Wherever three-fourth majority of the unit-holders was intended, the Mutual Funds Regulations say so. For example, sub-clause (b) of clause

(15) of Regulation 18 and sub-clause (b) of clause (2) of Regulation 39. Therefore, it has to be a simple majority. For this purpose, we must make a reference to a decision of a Full Bench of the Allahabad High Court in the case of ***Wahid Ullah Khan – vs- District Magistrate, Nanital and others***[74]. In paragraph 32, the Allahabad High Court held thus:

> **"32. The word "majority" speaks of greater number out of the total number which cannot be a fixed number. In fact, the starting point of majority is more than half, but any number more than half still continues to be majority.** Majority cannot be said only confining to more than half. Majority of three-fourths of the total number, two-thirds of the total number would all come within the sphere of the word "majority". A person is said to have won by a majority of fifty thousand votes or thirty thousand votes. All speak about the extent of majority. **A majority may start from a number which is more than half and would continue till the balance of the number excluding one number. In the matter of votes if a resolution is carried either in favour or against by all it is said to be unanimous. Majority is used in contradiction to minority.** Thus, there must exist a minority vote. So, even where one vote is cast in favour or against resolution the balance of the total number of votes cast would all be a number of majority vote."
>
> (emphasis added)

[74] 1993 SCC Online All 175

210. The meaning assigned by the Allahabad High court to the word majority appears to be most correct meaning. The Black's Law Dictionary provides that a majority means a number that is more than half of a total. Therefore, consent, as contemplated by sub-clause (c) of clause (15) of Regulation 18 will have to be by a simple majority of the unit-holders of a particular Scheme which is decided to be wound up.

FTMF HAS ACCEPTED THE REQUIREMENT OF CONSENT

211. There is one very important factual aspect which goes to the root of the matter. It is not as if FTMF was unaware of this mandatory requirement. Statement of Additional Information published by FTMF is placed on record at page 707 of the common compilation. The title of the Statement of Additional Information reads thus:

> "**FRANKLIN TEMPLETON MUTUAL FUND**
> **STATEMENT OF ADDITIONAL INFORMATION**
>
> This Statement of Additional Information (SAI) contains details of Franklin Templeton Mutual Fund, its constitution, and certain tax, legal and general information. **It is incorporated by reference (and is legally a part of the Scheme information document).**

Asset Management Company:	Franklin Templeton Asset Management (India) Pvt. Ltd.
Trustee Company:	Franklin Templeton Trustees Services Pvt. Ltd.
Sponsor:	Templeton International Inc., U.S.A.

Please retain this SAI for future reference. Before investing, investors should also ascertain about any further changes in this SAI after the date of SAI from the Mutual Fund's Investor Service Centres/Website/Distributors or Brokers.

This SAI is dated June 30, 2019."

(emphasis added)

Under the topic "Responsibilities and Duties of the Trustee" incorporated in the Statements of Additional Information (SAI) clause (b) is relevant which reads thus:-

"b) **The Trustee shall obtain consent of the unit holders of the Scheme(s)**:

i) When the Trustee is required to do so by SEBI in the interests of the unit-holders; or

ii) Upon the request of three-fourths of the unit holders of any Scheme(s) under the Mutual Fund; or

iii) **If a majority of the directors of the Trustee company decide to wind up the Scheme(s) or prematurely redeem the units**."

(underlines and emphasis added)

Neither the Trustees nor AMC have disowned the above clause which is in their own statement of Additional Information. They have not placed on record any material to show that the above clause was subsequently modified.

Sub-clause (iii) above is very specific which refers to a contingency when majority of the directors of the Trustee company decide to wind up Scheme(s). In such a case, as laid down by clause (b) above, the Trustees are under a mandate to obtain consent of the unit-holders. This is how FTMF has read sub-clause (c) of clause (15) of Regulation 18. What is stated in SAI is a part of the Scheme information. Thus, even in the additional information published by FTMF itself, there is a specific clause that the Trustees shall obtain consent of the unit-holders of the Scheme, if a majority of the directors of the Trustee company decide to wind up a Scheme. Thus, even FTMF clearly

understood and accepted that if majority of directors of the Trustee company decide to wind up a Scheme, the consent of the unit-holders of such Scheme is mandatory.

212. Therefore, there is no merit in the argument canvassed on behalf of the Trustee company and AMC that the consent referred in sub-clause (c) of clause (15) of Regulation 18 cannot be read into sub-clause (a) of clause (2) of Regulation 39. The question of reading it consent into sub-clause (a) of Clause (2) of Regulation 39 is not material. Sub-clause (c) of Clause (15) of Regulation 18 constitutes the obligation of the Trustees. The argument canvassed that the consent referred in sub-clause (c) is an approval as referred in clause (1) of Regulation 41 also deserves to be rejected. Thus, we are of the considered view that after majority of the directors of the Trustee company decide to wind up a Scheme pursuant to sub-clause (a) of clause (2) of Regulation 39, before taking further action under clause (3) of Regulation 39, it is the duty of the Trustees to obtain the consent of the unit-holders to the decision of winding up of the Scheme. The consent will be by a simple majority of the unit-holders. Without obtaining such a consent, action under clause (3) of Regulation 39 cannot be taken by the Trustees. Even if such an

action is taken, it will be illegal. Therefore, the first stage of the process of winding up of a Scheme will not trigger in unless such a consent is obtained. In the facts of this case, admittedly, no such consent is obtained by the Trustees.

213. Even if the interpretation, as aforesaid, is adopted, the difference between sub-clauses (a) and (b) of clause (2) of Regulation 39 will not be obliterated. Sub-clause (b) operates when seventy five percent of the unit-holders of a Scheme pass a resolution that a Scheme should be wound up. Sub-clause (b) will operate when the proposal of winding up is by a minimum 75% of the unit-holders. Sub-clause (a) will apply only when the Board of Directors of Trustee company or the Board of Trustees decide to wind up a Scheme. To such a winding up, the consent of the unit-holders of the said Scheme necessary. The consent will be of simple majority. Under clause (a), the proposal of winding up must come from the Trustees. Under clause (b), winding up can start even when the Trustees are not willing to wind up a Scheme. In case of sub-clause (b), seventy five percent of the unit-holders must agree for winding up. When the winding up is proposed by the Trustees in accordance with sub-clause (a), it

will require consent of unit-holders by a simple majority. The majority need not be of seventy five percent of the unit-holders. It will be a simple majority of the unit-holders. Sub-clauses (a) and (b) of clause (2) of Regulation 39 will operate in different contingencies even if our interpretation is correct.

214. On behalf of SEBI, it was canvassed that reading the word 'consent' of the unit-holders contained in sub-clause (a) will have disastrous consequences. As held earlier, it is the obligation of the Trustees to take consent of the unit-holders when the Board of Directors of the Trustee company, by majority, take a decision to wind up a Scheme or prematurely redeem the units in a Scheme. As the Mutual Funds Regulations lay down that this is the obligation of the Trustees, the argument that not giving freedom to the Trustees to wind up a Scheme will be disastrous, will not stand to reason. In fact, the provision for consent ensures that the Trustees do not wind up any Scheme as per their whims and fancies. This provision is made consistent with the object of protecting interest of the unit-holders. If such a provision of consent is not provided, the sub-clause (a) will attract vice of arbitrariness. The Court cannot allow the Trustees to commit

breach of their own obligations contemplated under Regulation 18 of the Mutual Funds Regulations solely on the ground that the compliance with the obligations will be disastrous. The Trustees and AMC must work within the framework of the Regulations. The Trustees have to act in fiduciary capacity. They cannot say that they will not perform a particular obligation set out in Regulation 18 on the pretext that the consequences of compliance will be disastrous. It is argued that if the unit-holders by a simple majority do not consent to the decision of the winding up, AMC will have to make distress sale of investments resulting into substantial reduction of NAV and the same will cause prejudice to the unit-holders. Even the said argument does not have any merit, inasmuch as, not permitting the Trustees or the Trustee company to wind up a Scheme in accordance with sub-clause (a) of clause (2) of Regulation 39 will be a decision of the majority of the unit-holders. Therefore, unit-holders can have no complaint about the winding up.

215. In any case, in the facts of this case, as pointed earlier, in the Statement of Additional Information published by FTMF itself, it is clearly provided that the Trustees shall obtain consent of the

unit-holders of the Scheme, if a majority of the directors of the Trustees Company decide to wind up the Scheme. After having made this representation in the Statement of Additional Information, now the Trustees cannot contend to the contrary and say that they are not under any obligation to obtain such a consent.

216. Some argument was canvassed on deleted sub-clause (d) of clause (15) of Regulation 18. The deleted sub-clause (d) read thus:

> "(d) **when any change in the fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme or affect the interest of the unit-holders is proposed to be carried out unless the consent of not less than three-fourths of the unit holders is obtained**:
>
> Provided that no such change shall be carried out unless three fourths of the unit holders have given their consent and the unit holders who do not give their consent are allowed to redeem their holdings in the Scheme.

Provided further that in case of an open ended Scheme, the consent of the unit-holders shall not be necessary if:

(i) The change in fundamental attribute is carried out after one year from the date of allotment of units.

(ii) (ii) the unit-holders are informed about the proposed change in fundamental attribute by sending individual communication and an advertisement is given in English daily newspaper having nationwide circulation and in a newspaper published in the language of the region where the head office of the Mutual Fund is situated.

(iii) The unit-holders are given an option to exit at the prevailing Net Asset Value without any exit load.
Explanation: For the purposes of this clause "fundamental attributes" means the investment objective and terms of a Scheme."

It must be noted here that sub-clause (d) was deleted by the SEBI (Mutual Funds) (Second Amendment) Regulations, 2000 with effect from 22nd May 2000. By the same second Amendment Regulations, with effect from the same date, clause 15A of Regulation 18 was incorporated, which reads thus:

"(15A) The Trustees shall ensure that no change in the fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme and affects the interest of unit-holders, shall be carried out unless,—

(i) a written communication about the proposed change is sent to each unitholder and an advertisement is given in one English daily newspaper having nationwide circulation as well as in a newspaper published in the language of region where the Head Office of the Mutual Fund is situated; and

(*ii*) the unit-holders are given an option to exit at the prevailing Net Asset Value without any exit load."

217. Sub-clause (d) of clause (15) before its deletion was applicable only in case of change in the fundamental attributes of a Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme or affect the interest of the unit-holders. Such change required consent of not less than three fourths of the unit-holders in case of Schemes other than open ended Schemes. The deleted clause (d) had nothing to do with the winding up of a Scheme. In fact, by deleting the said sub-clause (d), its modified version was incorporated in the form

of clause (15A), which deals with the contingencies of change in the fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme. Therefore, in our view, the deletion of sub-clause (d) from clause (15) of Regulation 18 is of no consequence as far as interpretation put to sub-clause (c) of clause (15) of Regulation 18 is concerned.

ARGUMENT BASED ON CLAUSE (15A) OF REGULATION 18

218. The petitioners have argued that when winding up of a 'open ended Scheme' is made, it ceases to be an open ended Scheme, as the unit-holders are not entitled to redemption. Therefore, it was submitted that the winding up of a Scheme cannot be effected unless the unit-holders are given an option to exit at the prevailing NAV without any exit load. However, on its plain reading, clause (15A) does not apply to winding up of a Scheme, but it is applicable only when there is a proposal to change any fundamental attributes of any Scheme or the trust or fees and expenses payable or any other change which would modify the Scheme, affecting the interest of the unit-holders. The effect of winding up of a Scheme is that after following the

procedure under Regulations 39 to 41, the Scheme comes to an end and it is completely wiped out. In case of winding up of a Scheme, after distribution of money to the unit-holders in accordance with Regulation 41, the Scheme ceases to exist. Even if the changes, as contemplated by clause (15A) of Regulation 18 are brought about, the Scheme continues to exist.

219. In case of winding up of an 'open ended Scheme', in view of Regulation 40, the unit-holders cannot seek redemption and they are entitled to receive money on *pro rata* basis, remaining available after sale proceeds of the assets of the Scheme are applied for clearing all the liabilities of the Scheme. In case of winding up of an 'open ended Scheme', the right of redemption of the unit-holders is completely taken away due to winding up and not due to change of fundamental attributes. The act of change of fundamental attributes is completely different from the action of winding up of a Scheme inasmuch as, once the winding up of a Scheme in accordance with Regulation 39 triggers in, the redemption comes to an end. Therefore, the argument that winding up of an 'open ended Scheme' cannot be made unless

clause (15A) of Regulation 18 is complied with is completely devoid of any merit and deserves to be rejected.

THE MEANING OF THE WORDS "AFTER REPAYING AMOUNT DUE TO UNIT-HOLDERS"

220. There are other issues concerning the provisions regarding winding up of the Schemes. One of the arguments canvassed was that before winding up takes place, repayment of the amount due to the unit-holders has to be made. For that purpose, reliance was placed on the phraseology used in clause (2) of Regulation 39 to the effect that 'a Scheme of a Mutual Fund may be wound up, after repaying the amount due to the unit-holders.....'. clauses (1) and (2) of Regulation 39 lay down the modes or the contingencies in which a Scheme can be wound up. Clause (1) is applicable only to a 'close-ended Scheme'. We have already referred to three contingencies/modes of winding up contained in sub-clauses (a), (b) and (c) of clause (2) of Regulation 39. In case of all the three modes, the Trustees are under an obligation to give notice as contemplated by clause (3) of Regulation 39. The moment notices are issued and published as provided in sub-clause (a) and (b) of clause (3) of Regulation 39, Regulation

40 triggers in and therefore, the Trustees and AMC must stop carrying on any business activity in respect of the Scheme and the Trustees or AMC cannot create or cancel the units in the Scheme and cannot issue or redeem the units in the Scheme. Thereafter, the process of winding up is to be conducted either by the Trustees, if they are authorized to do so by a simple majority of unit-holders or by any other person authorized by a simple majority of the unit-holders. However, in case of winding up of the Scheme at the end of maturity period, such approval of the unit-holders is not required. After authorization is made under clause (1) of Regulation 41, the Trustees or the person authorized must dispose of the assets of the Scheme in the best interests of the unit-holders and the proceeds derived from such sale shall be first applied to discharge of the liabilities in the Scheme. Thereafter, a provision has to be made for meeting the expenses in connection with the winding up. The balance amount is to be paid to the unit-holders in proportion to their respective interest in the assets of the Scheme as on the date when the decision for winding up is taken. Therefore, the repayment of the amount due to the unit-holders, as provided in clause (2) of Regulation 39 is the amount payable to the unit-holders in

accordance with sub-clause (b) of clause (2) of Regulation 41. In case of winding up of a Scheme, the amount due to the unit-holders is the one which is payable as per sub-clause (b) of clause (2) of Regulation 41. If the argument that the amount due and payable as per the Scheme to the unit-holders must be paid before taking a decision for winding up is accepted, it will completely defeat the Scheme of Regulations 40 and 41. It will completely defeat the very object of providing for winding up of a Scheme. Therefore, once the process of winding up as per clause (2) of Regulation 39 commences, the unit-holders are entitled to claim the amounts payable only as per sub-clause (b) of clause (2) of Regulation 41.

COMPLIANCE WITH CLAUSE (3) OF REGULATION 39 (Issue No (vi):

221. It must be noted here that though the case of AMC and Trustees is that compliance with clause (3) of Regulation 39 was made on 24th April 2020, there is no material placed on record to show that a notice disclosing the circumstances leading to the winding up of the Schemes was published in a vernacular newspaper circulating at the place where the Mutual Fund is

formed. The stand specifically taken during the course of submissions made by Shri Arvind Datar, the learned Senior Counsel appearing for SEBI was that it is for AMC and Trustees to show whether compliance of sub-clause (b) of clause (3) of Regulation 39 was made. However, no documents are placed on record by the Trustees to show such a complete compliance was made by publication of notice in vernacular newspaper having circulation at the place where the Mutual Fund is formed. Regulation 40 triggers in only from the time at which compliance with sub-clause (b) of clause (3) of Regulation 39 is made.

ISSUE No (vii) BORROWINGS:

222. Though, in the facts of the case, in the absence of consent contemplated by sub-clause (c) of clause (15) of Regulation 18, there cannot be any winding up of the said Schemes as provided in sub-clause (a) of clause (2) of Regulation 39, the legal issue squarely arises about the interpretation of Regulation 40, as specific submissions have been canvassed across the Bar on the said issue. The said issue is whether, after issue and publication of notice as contemplated by clause (3) of Regulation 39, AMC or Trustees can borrow money for the purposes of repayment of

loan or for the purposes of meeting the requisition for redemption requests received before the date of compliance of clause (3) of Regulation 39. It is the contention of AMC and Trustees that on or after 24th April 2020, borrowing was made firstly to clear the outstanding loan repayable to Bank of Baroda and secondly, for meeting the requisitions for redemption received up to 23rd April 2020. There is an affidavit filed on this aspect jointly by the Trustees and AMC on 18th September 2020. It is stated therein that for the said six Schemes, borrowing of Rs.3,113 crores was made on 24th April, 2020 from HSBC for the purpose of meeting redemptions. Out of it, a sum of Rs. 2,583 crores has been repaid to HSBC by 15th September 2020. On 24th April 2020, an amount of Rs.362 crores was borrowed from Tri-Party Repo Dealing and Settlement (for short 'TREPS'). This borrowing was for funding redemption received up to 23rd April 2020. As the loan through TREPS was a temporary facility, it was replaced by amount advanced by AMC of Rs.363 crores on 27th April 2020. It is pointed out that the loan from Bank of Baroda of Rs.1000 crores (utilised to meet the redemptions) was up for repayment on 20th May 2020. Though, moratorium was sought from Bank of Baroda, the same was denied. To avoid any action by Bank of Baroda, a

loan of Rs.900 crores was taken through TREPS and an amount of Rs.100 crores was advanced by AMC. It is stated that on 8th September 2020, the amount borrowed from TREPS was repaid by availing loan of Rs.900 crores from JP Morgan. This is the factual position which will have to be kept in mind in the context of the stand of the Trustees that the provisions of clause (3) of Regulation 39 were complied with on 24th April 2020.

223. For the sake of convenience, we are again reproducing the Regulation 40 which reads thus:

> **"40. Effect of winding up**.—On and from the date of the publication of notice under clause (b) of sub-regulation (3) of regulation 39, the trustee or the asset management company as the case may be, SHALL—
>
> **(*a*) Cease to carry on any business activities in respect of the Scheme so wound up;**
>
> **(*b*) Cease to create or cancel units in the Scheme;**
>
> **(*c*) Cease to issue or redeem units in the Scheme."**
>
> (emphasis added)

224. Regulation 40 triggers in from the date of publication of notice as provided under sub-clause (b) of clause (3) of Regulation 39. The contention of AMC and Trustees is that the

borrowing made by them after the stage of clause (3) of Regulation 39 will not amount to carrying on business activities within the meaning of clause (a) of Regulation 40. The submission of AMC and Trustees is that business activities contemplated by clause (a) of Regulation 40 will not include the borrowings. In this regard, reliance was placed on the decision in the case of ***State of Gujarat –vs- Raipur Manufacturing Co. Ltd*** (supra). This was a case wherein the Apex Court dealt with the interpretation of expression 'business' within the meaning of the Bombay Sales Tax Act, 1953. In paragraph 4, the Apex Court specifically observed that it was discussing the meaning and expression "business" in the context of a Taxation law. Reliance was also placed by AMC and Trustees on the decision of the Apex Court in the case of ***Director of Supplies and Disposals Calcutta –vs- Member, Board of Revenue, West Bengal, Calcutta*** (supra). Even in this case, the Apex Court dealt with the concept of "business" under the provisions of the Bengal Finance (Sales Tax) Act, 1941. Another decision was pressed into service which is of Bombay High Court in the case of ***Girdharilal Jivanlal Maheswari –vs- The Assistant***

Commissioner of Sales Tax, Nagpur[75]. In the said case, the Bombay High Court was concerned with the question whether the sale of agricultural produce generated from his only land by the petitioner therein amounts to carrying on business of sale or supply those goods. The High Court considered that the definition of word 'dealer' under the Central Provinces and Berar Sales Tax Act, 1947. In paragraph 15, the Bombay High Court relied on a British decision in the case of ***Jessel M.R. in Smith –vs- Anderson (1880) 15 Ch. D 247)***. Ultimately, the Bombay High Court held that while an agriculturist who cultivates his lands no doubt engages himself in the business of agriculture, that is not the same thing as engaging in the business of sale and supply of agricultural produce. It was held that as the assessee who is the owner of the property is entitled to earn an income therefrom, and merely because he has engaged himself in certain activities which enable him to earn income, it cannot be said that he has engaged himself in a particular business. These are the decisions rendered specifically under the Taxation laws. The rules of interpretation of Taxing statutes require that if two interpretations

[75] (1957) 59 Bom LR 710

of a provision are possible, the one which is favourable to the assessee is required to be accepted.

225. But, in the context of the Scheme of the Mutual Funds Regulations, this Court will have to consider the meaning of 'business activities'. As stated in the earlier part of our discussion, a Scheme is launched by AMC with the approval of the Trustees. There are different categories of Schemes in which the investments are made by the members of the public. From plain reading of the provisions of Regulation 43, it is clear that the money received from the unit-holders and investors is required to be invested by AMC strictly in accordance with Regulation 43. The investments are to be made subject to investment restrictions specified in the seventh schedule. As far as borrowings are concerned, clause (2) of Regulation 44 provides that the Mutual Fund shall not borrow except to meet temporary liquidity needs of the Mutual Fund for the purpose of repurchase, redemption of units or payment of interest or dividend to the unit-holders. The proviso to clause (2) of Regulation 44 clearly provides that a Mutual Fund shall not borrow more than twenty percent (20%) of the net assets of the Scheme and the duration of such borrowing

shall not exceed a period of six months. Thus, in short, the business of a Mutual Fund consists of (i) launching Schemes, (ii) receiving the investments from the unit-holders/investors, (iii) investing the money so collected from the unit-holders/investors in accordance with Regulation 43 and other relevant Regulations and (iv) paying the returns in various modes to the unit-holders/investors. The returns can be in the form of repurchase of the units, redemption of units, payment of interest or dividend to the unit-holders, as the case may be, depending upon the nature of the Scheme. Making such returns is certainly a business activity of a Scheme. The income so generated by investments made in accordance with Regulation 43, can also be invested by AMC. Clause (3) Regulation 44 provides that save as otherwise expressly provided, a Mutual Fund shall not advance any loans for any purposes. However, clause (4) of Regulation 44 provides that a Mutual Fund may lend and borrow securities in accordance with the framework relating to short selling and securities lending and borrowing specified by SEBI. The provisions of Mutual Funds Regulations are intended to regulate activities of Mutual Funds for promoting its healthy growth and for protecting interest of unit-holders. In a case of

Taxation law, the rules of interpretation applicable provide that if there are two interpretations possible, the one in favour of assessee will have to be preferred. In case of Mutual Funds Regulations, a construction needs to be adopted which will subserve the object of SEBI Act.

226. It is pertinent to note here that clause (a) of Regulation 40 uses the words "business activities in respect of the Scheme" and not merely business of the Scheme. As stated earlier, the activities of repurchase of units, redemption of units or payment of interest or dividend are also a part of business of a Scheme. In view of clause (2) of Regulation 44, a Mutual Fund can borrow only for the purposes of meeting temporary liquidity needs for the purpose of repurchase, redemption of units, payment of interests or dividend to the unit-holders. For example, if there are large number of requests for redemption of units by the unit-holders in respect of 'open ended Scheme', a Mutual Fund may face temporary liquidity crunch. In such a situation, it is permissible for a Mutual Fund to make borrowings only for payment of redemption amount. Therefore, borrowings made as specified in clause (2) of Regulation 44 will certainly amount to 'business

activities' of a Mutual Fund or a Scheme, inasmuch as, such borrowings are made for the purpose of meeting demand for redemption which is a part of business of the Scheme.

227. Regulation 40 is interlinked with Regulation 41. In view of Regulation 40, the moment compliance is made with clause (3) of Regulation 39, the 'business activities' of the Scheme of a Mutual Fund must stop. The creation or cancellation of units and issue or redemption of the units of the said Scheme must also cease. The reasons is, as required by sub-clause (a) of clause (2) of Regulation 41, all the assets of the Scheme under winding up are required to be disposed of in the best interest of unit-holders and thereafter, as per sub-clause (b) of clause (2) of Regulation 41, the proceeds of the sale are required to be applied firstly towards discharge of liabilities of the Scheme. Secondly, the expenses in connection with the winding up are required to be set apart and thirdly, the balance amount remaining after clearing the liabilities has to be distributed to the unit-holders in proportion to their respective interest in the assets of the Scheme. The object of Regulation 40 of the Mutual Funds Regulation is to ensure that the moment compliance is made with clause (3) of Regulation 39,

the assets available at that point of time should be made available for sale. The assets cannot be allowed to be depleted by creating more liability. That is the reason why the redemption must immediately cease. Therefore, it must be held that the borrowings made by AMC, in terms of clause (2) of Regulation 44, are 'business activities' of a Scheme within the meaning of clause (a) of Regulation 40. If borrowings are made in accordance with clause (2) of Regulation 44, the act of replacement of the borrower, as done by the AMC and the Trustees in the present case, will have to be also held to be a part of business activities in respect of the Scheme.

REDEMPTION AFTER THE COMPLIANCE WITH REGULATION 39 (3) (a)

228. As regards redemption requests received prior to compliance with clause (3) of Regulation 39, the argument of AMC and the Trustees was that in view of clause (d) of Regulation 53, the redemption or repurchase proceeds are required to be dispatched within ten working days from the date of redemption notwithstanding the decision of winding up. As held earlier, the dispatch of redemption proceeds or repayment of

redemption proceeds is also a part of business activity of a Scheme which is completely prohibited once the Regulation 40 triggers in. Therefore, the argument that the redemption requests made by the unit-holders on 23rd April 2020 were required to be honoured even after Regulation 40 had triggered in cannot be accepted. Once there is a compliance with clause (3) of Regulation 39, the mandatory provisions of Regulation 40 forthwith operate. There is no exception carved out to any of the clauses in Regulation 40. It is obvious that such a failure to dispatch the redemption or repurchase proceeds due to applicability of provision of Regulation 40 cannot be termed as a failure within the meaning sub-clause (c) of Regulation 53. Therefore, the consequences such as payment of interests and penalty as provided in clause (d) of Regulation 53 may not follow.

Re. Issue No.(iv)- maintainability:

229. Now, we must deal with the issue of maintainability of the writ petitions. This issue must be dealt with in two parts. The first part is whether this Court is powerless to issue a writ under Article 226 of the Constitution of India, even if there is a specific breach of statutory provisions of the Mutual Funds Regulations

and the provisions of the SEBI Act, by AMC or the Trustees. The second part will be whether in writ jurisdiction under Article 226 of the Constitution of India, this Court should interfere with the decision of the Trustees of winding of the said Schemes.

230. Now, coming to the first part of the issue of maintainability, various decisions have been relied on by the rival parties. The first decision is in the case of ***Rohtas Industries*** (supra) wherein, the issue before the Apex Court was whether writ jurisdiction under Article 226 of the Constitution of India can be exercised for interfering with an Award passed by an Arbitrator under Section 10A of Industrial Disputes Act, 1947. The Apex Court held that interference can be made with the Award passed under Section 10A, in exercise of the powers conferred under Article 226 of the Constitution of India.

231. In the case of ***Praga Tools Corporation –vs- C.A. Imanual and others***[76]***,*** the issue before the Apex Court was whether in a writ petition filed under Article 226 of the Constitution of India, the Court can go into the question of validity of an

[76](1969) 1 SCC 585

agreement entered into between the employees and a company. In paragraphs 6 and 7, the Apex Court held thus:

> **"6.** In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not be, but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus *etc*. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its

workmen or to resolve any private dispute. (See *Sohan Lal* v. *Union of India*), [1957 SCR 738] In *Regina* v. *Industrial court* [(1965) 1 QB 377] mandamus was refused against the Industrial court though set up under the Industrial courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J. in *R.* v. *Lawisham Union* [(1897) 1 QB 498, 501] "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. **An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus**

can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. [Cf. *Halsbury's Laws of England*, (3rd ed.), Vol. II, p. 52 and onwards].

7. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

(emphasis supplied)

232. Thus, it was held that a mandamus can be issued to an official of a society to compel him to carry out the terms of the

statute under or by which the society is constituted or governed. It was also held that a mandamus would also lie against a company or corporation constituted by a statute for the purposes of fulfilling public responsibilities.

233. In the case of ***Binny Ltd., and another –vs- V. Sadasivan and others*** (supra), in paragraphs 29 to 32, the Apex Court held thus:

> **"29.** Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. **This writ could also be issued against any private body or person, especially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is**

sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to *Halsbury's Laws of England*, 3rd Edn., Vol. 30, p. 682,

"*1317.* A public authority is a body, not necessarily a county council, Municipal Corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government

or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in *State of U.P.* v. *Bridge & Roof Co. (India) Ltd.* [(1996) 6 SCC 22] and also in *Kerala SEB* v. *Kurien E. Kalathil* [(2000) 6 SCC 293] . In the latter case, this

Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties."

(emphasis supplied)

It was reiterated by the Apex Court that a writ under Article 226 of the Constitution of India can be issued against a private body or person, in view of the words used in Article 226, but the scope of mandamus is limited to enforcement of a public duty.

234. Another decision pressed into service was in the case of ***Marwari Balika Vidayala –vs- Asha Srivastava and others*** (supra). The issue before the Apex Court in the said case was regarding maintainability of a writ petition as against a private school receiving grant-in-aid to the extent of dearness allowance. In paragraph 15, the Apex Court held thus:

> **"15.** Writ application was clearly maintainable in view of aforesaid discussion and more so in view of the decision of this Court in *Ramesh Ahluwalia* v. *State of Punjab* (supra) in which this court has considered the issue at length and has thus observed:
>
> > "13. in the aforesaid case, this Court was also considering a situation where the services of a Lecturer had been terminated who was working in the college run by the Andi Mukti Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. In those circumstances, this Court has clearly observed as under: (*V.R. Rudani case*, SCC PP.700-701, paras 20 & 22)
> >
> > "20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of

fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

22. Here again, we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the Statute. Commenting on the development of this law, Professor de Smith states:'To be enforceable **by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract**. We share this view. The judicial control over the fast expanding maze of bodies affecting the

rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellant on the maintainability of the writ petition.

The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgments in *Unni Krishnan* and *Zee Telefilms Ltd.* brought to our notice by the learned counsel for the appellant Mr. Parikh.

14. In view of the law laid down in the aforementioned judgment of this Court, the **judgment of the learned Single Judge as also the Division Bench of the High Court cannot be sustained on the proposition that the writ petition would not maintainable merely because the respondent institution is a purely unaided private educational institution. The appellant had specifically taken the plea that the respondents perform public**

> **functions i.e. providing education to children in their institutions throughout India**."
>
> (emphasis added)

In the above case, the Apex Court quoted with the approval, the decision in the case of ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and another –vs- V.R. Rudani and another (1989) 2 SCC 691.***

235. In the case of ***Zee Telefilms Ltd., -vs- Union of India*** (supra), the issue was whether the Board of control for Cricket in India can be subjected to a writ jurisdiction under Article 226 of the Constitution of India. In paragraphs 31 to 33, the Apex Court held thus:

> **"31.** Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is

not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.

32. This Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani* [(1989) 2 SCC 691] has held: (SCC pp. 692-93)

"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. The term 'authority' used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. **The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body**

performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty, that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in *Pradeep Kumar Biswas case* [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] hence there is force in the contention of Mr Venugopal that this petition under Article 32 of the Constitution is not maintainable."

(emphasis added)

236. In the case of ***Federal Bank Ltd –vs- Sagar Thomas and others*** (supra), the issue before the Apex Court was whether a writ petition under Article 226 of the Constitution of India was maintainable against a company incorporated under the Companies Act, other than a Government company. This was a case where the Apex Court was dealing with an order passed by the High Court, by which, in a writ petition challenging the order of dismissal of a Manager of Federal Bank, it was held that the writ petition was maintainable. The entire law on the subject was considered in some detail by the Apex Court. Paragraphs 18, 26 and 27 of the judgment are relevant which read thus:

> **"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against** (*i*) the State (Government); (*ii*) an authority; (*iii*) a statutory body; (*iv*) an instrumentality or agency of the State; (*v*) a company which is financed and owned by the State; (*vi*) a private body run substantially on State funding; **(*vii*) a private body discharging public duty or positive obligation of public nature;** and (*viii*) a person or a body under liability to discharge any

function under any statute, to compel it to perform such a statutory function."

(emphasis added)

"26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though the case of nationalized banks stands on a different footing. There may well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lakhs will become a scheduled bank. All the same, banking

activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building the economy of the State; on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier,

these are all regulatory measures to keep a check and provide guidelines and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities, maybe manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. Care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production, which is important for the economy, may not go down, yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies."

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes

which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to."

(emphasis supplied)

What is material for our purposes is what is held in paragraphs 18 and 27. A writ petition under Article 226 of the Constitution of India may be maintainable against a private body discharging public duty or positive obligation of public nature. A writ of mandamus can be issued against a person or a body under a liability to discharge any function under any statute, to compel it to perform such a statutory function. If a private body or person violates the statutory provisions of the statute such as the Industrial Disputes Act, Minimum Wages Act, Factories Act, laws relating to environment, a writ would certainly be issued for compliance with those statutory provisions. These are Welfare Legislations. Even SEBI Act is held to be a 'Welfare Legislation'.

237. We may go back to the decision of the Apex Court in the case of ***Binny Ltd., and another –vs- V. Sadasivan and others*** (supra) wherein, in paragraph 11, the Apex Court held thus:

> **"11.** Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. **However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision**

sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. **At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.** In a book on *Judicial Review of Administrative Action* (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson, M.R. urged, it is important for the courts to 'recognise the

> realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies such as these are just as capable of abusing their powers as is Government."

(emphasis supplied)

Hence, the Apex Court held that a writ could be issued against any private body or a person, especially in view of the words used in Article 226 of the Constitution of India for enforcement of a public duty. We have already quoted paragraph 29 of the above decision, in which it was held that if a private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. A body can be said to be performing a public function when it seeks to achieve some collective benefits for the public or a section of the public and is accepted by the public or section of the public having authority do so.

238. In the case of ***Ramakrishna Mission and another –vs- Kago Kunya and others***[77] the Apex Court has dealt with the question whether Ramakrishna Mission is a State, within the

[77] (2019) 16 SCC 303

meaning of Article 12 of the Constitution of India. In paragraph 32, the Apex Court held thus:

> **"32.** Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an "authority" within the meaning of Article 226. State Governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present

> case, the absence of State control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority."
>
> (emphasis supplied)

However, the issue whether AMC and Trustees are State within the meaning of Article 12 of the Constitution of India does not arise here. The question is whether they can be said to be any authority within the meaning of Article 226 of the Constitution of India.

239. At this juncture, we may note here that the respondents have also relied upon a decision of the Bombay High Court in the case of ***Chanda Deepak Kochhar –vs- ICICI Bank Limited and another***[78]. However, the issue involved in that case was whether a writ could be issued against ICICI bank limited for interfering with the order of termination of the Managing Director. However, the said decision cannot be made applicable to the facts of the present case, inasmuch as the issue involved in this writ petition is entirely different from the said case.

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[78] 2020 SCC Online Bom 374

240. Thus, from the aforesaid decisions of the Apex Court, the position which emerges is that a writ of mandamus could be issued against any private body or a person discharging a public duty or discharging positive obligation of public nature. If a private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such private body or a person, the public law remedy under Article 226 of the Constitution of India can be invoked. A body is said to be performing a public function or duty when it seeks to achieve collective benefit to the general public or a section of the public and it is accepted by the public or a section of the public having authority to do so. Moreover, a writ may be issued to a private body or private person when they fail to comply with the provisions of any statute which need to be complied with by all concerned, including a private company. This is so because of the language used by Article 226 of the Constitution of India which shows that a writ can be issued to any person or authority. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution provided the above tests are satisfied. Hence, the High Court

under Article 226 of the Constitution can exercise power of judicial review of the action of such a body.

241. There cannot be any difficulty in holding that a writ of mandamus can be issued against SEBI, as it can be said to be an agency and instrumentality of the State. The question is whether a writ of mandamus under Article 226 can be issued against the Trustees.

242. It was argued that the relationship between the unit-holders on the one hand and AMC and the Trustees on the other hand is purely a contractual relationship which is regulated by the Mutual Funds Regulations and, therefore, a writ cannot be issued in contractual matters. However, the above submission cannot be accepted inasmuch as, the Mutual Funds Regulations are framed in exercise of the powers under statutory provisions of Section 30 of the SEBI Act and a Mutual Fund is a creation of the said statutory Regulations and is governed by the said statutory Regulations. Therefore, the Trustees, as defined in the Mutual Funds Regulations are also creation of statutory Regulations. Their activities are completely regulated by the said Regulations.

243. We have already quoted the mandatory obligations on the part of the Trustees as well as AMC under the Mutual Funds Regulations. The Trustees hold the assets and the property of the Mutual Fund and its Schemes in trust and for the benefit of the unit-holders. We have already quoted various obligations of the Trustees. Those obligations are essentially for protecting the interest of the unit-holders who are members of the general public. The Trustees act in a fiduciary capacity and for protecting the interest of the unit-holders. A Mutual Fund is defined under clause (q) of Regulation 2 to mean a fund established in the form of a Trust to raise monies through sale of units to public or a section of public. Those who are not in position to deal with stocks and shares can do so by investing in Mutual Funds. Under the Mutual Funds Regulations, it is the legal obligation of the Trustees to act for the benefit of the unit-holders strictly in accordance with the Mutual Funds Regulations framed in exercise of the powers under the SEBI Act. In fact, clause (12) of Regulation 18 clearly mandates that the Trustees shall be accountable for and be the custodian of the funds and property of the respective Schemes and shall hold the same in trust and for the benefit of the unit-holders in accordance with the Mutual

Funds Regulations. The Trustees have to ensure that the transactions entered into by AMC are in accordance with the Schemes and the Mutual Funds Regulations. It is their statutory duty to ensure that all the activities of AMC are conducted strictly in accordance with the provisions of the Mutual Funds Regulations. These are the duties and obligations of the Trustees to public or a section of public who invest money in Mutual Fund. Any member of public can become a unit-holder. In case of the Trustees of a Mutual Fund, they do not have the choice of selecting beneficiaries. As is clear from the Mutual Funds Regulations, object of said Regulations is to protect the investors and to regulate Mutual Funds. The investors are public or a section of public. The Regulations is a piece of a delegated legislation under SEBI Act. The object of SEBI Act is to protect the investors and to regulate securities market. It is a Welfare Legislation. A very important duty of looking after and protecting the interest of the unit-holders who are members of public or a section of public has been entrusted to the Trustees. Therefore, it can be said that Trustees perform a public duty or discharge a public function *qua* large number of investors/unit-holders. The Trustees seek to achieve some collective benefits for a section of

the general public namely, the unit-holders. Thus, it can be safely concluded that that the Trustees, while exercising powers under the Mutual Funds Regulations, discharge a public duty and perform public function. Any violation of public duty by the Trustees and corresponding denial of rights of unit-holders will entitle unit-holders to invoke Article 226 of the Constitution of India for enforcing the public duty.

244. Even otherwise, if the Trustees commit violation of statutory Regulations, this Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India is certainly empowered to issue a writ of mandamus for enforcement of statutory Regulations.

245. What is challenged in these writ petitions is the decision of the Trustees under sub-clause (a) of clause (2) of Regulation 39 of the Mutual Funds Regulations. If the said decision is shown to be taken in violation of the express provisions of the Mutual Funds Regulations or by committing breach thereof, a writ of mandamus can be always issued to the Trustees by this Court by exercising power under Article 226 of the Constitution of India.

RE. ISSUE NO.(ix) – ENTITLEMENT TO RECEIVE COPY OF THE RESOLUTION:

246. Whether Writ Court can interfere with the decision of the Trustees to wind up of the said Schemes by going into the merits of the decision is another issue which we are called upon to decide in the facts of the case. The connected issue is whether the decision making process is illegal.

247. The first ground of attack was that the Trustees themselves have not formed an independent opinion on the issue of winding up and they have merely accepted the recommendations of AMC to wind up the said Schemes. Moreover, it is alleged that the decision of the Trustees was influenced by AMC, inasmuch as, their top officers and Directors were present in the meetings of the Board of Directors of the Trustees which were held on 20th April 2020 and 23rd April 2020. Another argument canvassed is that the grounds which are set out in the letter dated 20th April 2020 by the Trustees and the grounds set out in the resolution of the Board of Directors of the Trustee Company are not the genuine grounds on which a decision for winding up of the said Schemes could be taken. One more argument has been

canvassed that this Court can go into the merits of the decision making process adopted by the Board of Directors of the Trustees Company.

248. Now, coming to the challenge to the decision taken by the Trustees of winding up of the Schemes, at the outset, it must be noted that along with the statement of objections, neither AMC nor the Trustees have placed on record the resolution passed by the Trustees for winding up of the said Schemes. Even SEBI did not produce the resolution passed by the Trustees. In fact, when this Court made a query about the resolution, Shri. Arvind Datar, the learned senior counsel appearing for SEBI stated that the same will be produced by the Trustees. Only during the course of arguments made by Shri Harish Salve, learned Senior Counsel appearing for AMC and the Trustees, the minutes of the meeting of the Board of Directors of the Trustee company held on 20th April 2020 and 23rd April 2020 were placed on record along with an affidavit of 17th September 2020. The contention raised in this affidavit is that the grievance regarding the non production of minutes was not at all raised in the pleadings in the writ petition and the same was made for the first time during the course of oral

arguments made in Writ Petition No. 8545/2020 and 8644/2020. Surprisingly, in paragraph five of the said affidavit, a specific contention was raised contending that the minutes of the meetings of the Board of Directors of the Trustees held on 20th April 2020 and 23rd April 2020 are confidential in nature which contain confidential/sensitive information. In fact, in the copy of the minutes of the meeting held on 23rd April 2020 annexed to the said affidavit, two portions have been redacted. The above contention of the Trustees and AMC cannot be accepted for the reasons which we are recording. As noted earlier, the Trustees have to act in a fiduciary capacity and the beneficiaries are the unit-holders. Under clause (25) of Regulation 18, it is laid down that the Trustees shall exercise due diligence in the matters set out therein. There are two categories of due diligence. One is 'Specific Due Diligence' and another is 'General Due Diligence'. Under the heading 'Specific Due Diligence', in sub-clause (v), it is provided that the Trustees shall maintain records of their decisions, meetings and minutes of meetings. In addition to this, the fifth Schedule contains the Code of Conduct. Clause (22) of Regulation 18 clearly lays down that the Trustees shall abide by the Code of Conduct, as specified in the Fifth Schedule. Clause

(2) of the Code of Conduct prescribed in the Fifth Schedule reads thus:

> "**2. Trustees and asset management companies must ensure the dissemination to all unit-holders of adequate, accurate, explicit and timely information fairly presented in a simple language about the investment policies, investment objectives, financial position and general affairs of the Scheme.**"
>
> (emphasis added)

249. Thus, the duty of the Trustees is to disseminate to all the unit-holders an accurate, adequate, explicit and timely information about the various aspects including the general affairs of the Schemes of a Mutual Fund. It is the obligation of the Trustees to maintain the record of their decisions including the minutes of the meetings. There is also an obligation to disseminate accurate information about the financial position and general affairs of the Schemes. The financial position and general affairs of the Scheme will include the information about a resolution passed for winding up of a Scheme. Further, the third Schedule which provides for contents of the Trust Deed incorporates clause (5) which mandates that the Trust Deed shall provide that it shall be

the duty of the Trustees to act in the interest of the unit-holders. Thus, if such an important decision is taken by the Trustees of winding up of a Scheme which affects the interest of unit-holders, they are entitled to know the reasons for the decision. If the Trustees withhold the reasons contained in the Board resolution from the affected unit-holders, they will be committing a breach of their duties under the Regulations and also a breach of trust. Hence, it is the duty and obligation of the Trustees to disseminate information by providing a copy of the resolution recording a decision to wind up a Scheme.

250. Another relevant provision is clause (6) of Third Schedule which reads thus:

> **"(6).** The Trust Deed shall provide that it is the duty of Trustees to provide or cause to provide information to unit-holders and board as may be specified by the board."

Hence, there is a statutory obligation on the part of the Trustees to furnish the information to the unit-holders, as may be specified by SEBI. This is over and above clause (2) above. Unfortunately, SEBI did not exercise its statutory power. However, the obligation to maintain the minutes of the meetings

and obligation to disseminate information to the unit-holders will naturally include the obligation to provide copies of the minutes of the meeting recording a decision of winding up of a Scheme to the affected unit-holders. As far as the unit-holders are concerned, no confidentiality can be attached to such a resolution inasmuch as, the requirement of third Schedule is that the Trust Deed must provide that the unit-holders will have beneficial interest in the Trust property to the extent of individual holding in respective Schemes. If the unit-holders have beneficial interest in the Trust property which includes the assets of the Scheme, surely, the unit-holders are also entitled to have a look at the decision taken by the Trustees to wind up the Scheme. Therefore, the said contention raised in paragraph five of the affidavit dated 17th September 2020 regarding confidentiality attached to the minutes deserves to be rejected. And, therefore, there was no reason for the Trustees to redact the minutes of the meeting. The Trustees have no right to prevent the unit-holders from having access to the minutes of the meeting of its Board of Directors in which, a decision was taken to winding up of the said Schemes.

MERITS OF THE DECISION OF WINDING UP: ISSUE NO.(v)

251. Now we come to the decision to wind up the said Schemes. It is necessary to refer to the reason given by the Trustees in the notice dated 23rd April 2020 issued in accordance with sub-clause (a) of clause (2) of Regulation 39. The relevant part thereof reads thus:

> "The Trustees of Franklin Templeton Mutual Fund in India, after careful analysis and review of the recommendations submitted by Franklin Templeton Asset Management (India) Private Limited (the AMC), and in close consultation with the investment team, **are of the considered opinion that an event has occurred, which requires these Schemes to be wound up and that this is the only viable option to preserve value for unit-holders and to enable an orderly and equitable exit for all investors in these unprecedented circumstances**."
>
> (emphasis added)

252. Under clause (3) of Regulation 39, it is the obligation of the Trustees to disclose in the notice the circumstances leading to winding up of the Scheme. The circumstance narrated in the notice dated 23rd April 2020 is that the winding up of the said

Schemes is the only viable option to preserve value for unit-holders and to enable an orderly and equitable exit to all the investors. It also records that formation of the said opinion is after careful analysis and review of the recommendations of AMC and in close consultation with the investment team. However, in the Resolution of the Board dated 23rd April 2020, it is recorded that apart from the Directors of the Trustees, two independent Directors of AMC, the President of AMC were invited to attend the meeting. Certain explanation was sought from the President of AMC. It further records that the President stated that number of engagements had taken place with SEBI on the need to wind up the Schemes and SEBI has confirmed informally that they will kindly look into the forbearance sought vide letter dated 20th April 2020. It also records that the President stated that SEBI has indicated that it shall be considerate in procedural forbearances. Ultimately, it is stated in the resolution recorded in the minutes that based on a review of the material placed before it and recommendations of the Board of AMC, winding up of the Schemes is the only viable mode of preserving value for investors and an event has occurred, which requires the Scheme to be wound up. Ultimately, it is recorded that “after careful

considerations, deliberations and re-evaluations of the options placed in the previous meeting and in this meeting of the Board of Directors and the informal discussions with SEBI, the Board of Directors approved the winding up of the Schemes by passing the following resolution. . . . . .. ". The resolution provides that the six Schemes named therein be wound up pursuant to Regulation 39 (2) (a) as an event has occurred which require the said Schemes to be wound up.

253. Prior to the meeting of the Board of Directors of the Trustee company held on 23rd April 2020, there was a meeting of the Board of Directors of the Trustees on 20th April 2020. Mr. Sanjay Sapre, the President of AMC was invited to attend the meeting apart from Senior Corporate Counsel – Legal of AMC. In that meeting, there was in depth discussion based on the statements made by Mr. Sanjay Sapre about the borrowings and the sale of assets. In fact, the Resolution records that the four proposals namely, (i) restricting redemptions/suspension, (ii) Elongate redemption payment, (iii) Distress sale and (iv) winding up of the Schemes were placed before the meeting and after considering the said proposals and options, in principle approval was granted

by the Board of Directors for winding up of the said Schemes. It is also recorded that SEBI is not open to give waiver of ninety days and daily redemptions of Rs.2 lakhs for gating. It is noted that it was unclear whether liquidity position would improve at the end of ninety days.

254. Now we come back to the minutes of the meeting held on 23rd April 2020. It is recorded that Mr. Sanjay Sapre, the President of AMC briefed the Board of Directors of the Trustees on the proposal for winding up of the said six Schemes. The minutes refer to a detailed memorandum placed before the Board. It is noted that the Schemes had fully exhausted a line of credit of Rs.1000 crores received from Bank of Baroda and that HSBC had indicated its inability to provide line of credit exceeding 20% of AUM. The minutes refer to number of engagements with the officers of SEBI. It is also recorded that in the meeting held on 20th April 2020, on the recommendations of the Board of AMC, in principle approval was granted by the Board of Trustee Company to wind up Franklin India Dynamic Assets Allocation Fund of Fund Scheme in addition to the above said six Schemes. The minutes records a decision to exclude the said

Fund of Fund Scheme from winding up. Various queries made by the Board of Directors of the Trustee Company to Mr. Sanjay Sapre are referred in the minutes. Mr. Sanjay Sapre clarified that SEBI Regulations allow AMC and Trustees to impose restrictions on redemptions for a period of ten working days in ninety days and even during said period of ten days, the Scheme is under obligation to honour redemptions requests up to Rs.2 lakhs. It is recorded that the Schemes have more than three lakhs investors in aggregate and, therefore, the Schemes do not have ability to generate adequate cash through sale of assets to honour redemptions requests made by unit-holders/investors. It is recorded that the news regarding imposition of restrictions on redemptions may accelerate redemption demands which may further intensify the liquidity issue. It is noted that on the reopening after ten days period of redemption restrictions, there will be significant increase in the redemptions which will exceed the capacity of the said Schemes to generate liquidity through sale of assets. It is, therefore, stated that it was inadvisable to adopt the said approach. It is recorded that if the Schemes continue to operate for another day of redemptions, there would be further loss of investor value. There was a further discussion

recorded about the consequences if HSBC does not provide Rs.385 crores from the line of credit. Ultimately, it is mentioned in the minutes that the Board noted that based on the review of the materials placed before it and recommendations of the Board of AMC, winding up of the Schemes is the only viable mode of preserving the value for investors/unit-holders and an event has occurred which requires the Scheme to be wound up. In the Resolution, it is mentioned that this was a difficult, yet necessary decision, which has to be made to protect the interests of unit-holders.

255. There was some argument canvassed about the genuineness of these minutes on the ground that the affidavit along with which the same are produced is not affirmed and there is only a digitally signed verification. However, that objection does not survive, inasmuch as, subsequently, an affirmed affidavit has been filed wherein, on oath, a statement has been made that these are the true copies of the minutes of the said meetings.

256. One of the contentions raised on behalf of the petitioners was that the Trustees did not take their independent decision but the same was influenced by AMC, as can be seen from the role

played by the President of AMC who was very much present in both the meetings. In this regard, we have already referred to the Scheme of the Mutual Funds Regulations. The Schemes of the Mutual Fund are required to be floated by AMC. The investments of the funds of the Schemes are to be made by AMC, in terms of the provisions of the Mutual Funds Regulations and the contents of the Trust Deed. As provided in clause (vii), (ix) and (x) of Fourth schedule, there is an obligation on the part of the AMC to ensure that no offer document of a Scheme, key information memorandum, abridged half yearly results and annual results is issued or published without approval of the Trustees. There is an obligation of AMC to furnish information concerning the operations of various Schemes to the Trustees and to submit quarterly reports on the functioning of the Schemes, as may be required by the Trustees. Apart from that, as contemplated by Regulation 54 read with Eleventh Schedule, the AMC is under an obligation to prepare an annual report and statement of accounts of each Schemes in respect of each financial year. There is a right vested in the Trustees of obtaining the information from AMC concerning the various Schemes of the Mutual Funds and to ensure that the activities of AMC are conducted in accordance

with the provisions of the Regulations. AMC acts as a fund manager as well. The investments are made by AMC and in case of open ended Scheme, the redemptions are also dealt with by AMC. Naturally, AMC consists of experts in the field who have intricate knowledge of capital and securities market and various financial aspects. It is the obligation of AMC to report to the Trustees on various aspects of the functioning of the Schemes and from what has been recorded in the minutes of the meeting held on 20th April 2020 and 23rd April 2020, it can be seen that there was a discussion between the Board of Directors of the Trustees and the President of AMC and other persons associated with AMC on the four options which have been noted in the minutes dated 20th April 2020. In the said meetings, certain queries were made by the Board of Directors of the Trustees to Mr. Sanjay Sapre, the President of AMC and other officers of AMC who were present in the meeting about the viable options. The effect of postponement of redemptions by ten days was also discussed. There is a reference to the liquidity crisis created on account of pandemic COVID-19. The minutes record the opinion of AMC that it will be very difficult to meet the significant increase in the demand for redemptions in case there

is a postponement of redemptions for ten days. It has been recorded that due to large borrowings which will be required to be made for meeting the redemptions requests, the investor value and NAV of the units will drastically go down. The tenor of minutes of the meeting dated 23rd April 2020 clearly suggests that there was a detailed discussion with the President of AMC and other officers. The detailed discussion was on the functioning of the said Schemes and financial condition thereof. No doubt, the minutes record that the recommendation of the AMC was to wind up the Schemes.

257. Considering the fact that the Schemes are launched by AMC and the funds of the Scheme are invested by AMC, there is nothing illegal about the presence of the President and other officers of AMC in the Board meetings of the Trustees and the discussion held between Board of Directors of the Trustee Company and the officers of AMC. When a drastic decision of winding up of the Schemes in accordance with Regulation 39(2)(a) of the Mutual Funds Regulations is to be taken, such a decision could not have been taken by the Trustees, without consulting AMC, without deliberating with AMC and without

securing information about the functioning of the said Schemes from AMC. The reason is it is the AMC which was administering the said Schemes. The participation of the President of AMC and other officers in those two meetings will not amount to influencing the Trustees to take a decision of winding up. Therefore, *per se,* there is nothing illegal about the participation of the President and Directors of AMC in the meetings held on 20th April 2020 and 23rd April 2020. There is nothing wrong with the act of the Board of Directors of having consultation with the top brass of AMC. The minutes do not show that the decision was taken by AMC. The decision of winding up is taken by the Board of Directors of the Trustee Company, though the President and other officers of AMC participated in both the meetings. However, the ultimate formation of opinion is of the Board of Directors of the Trustee Company.

258. Now, coming back to sub-clause (a) of clause (2) of Regulation 39, the Trustees can decide to wind up a Scheme of a Mutual Fund on the happening of any event which, in the opinion of the Trustees, requires the Scheme to be wound up. The 'happening of any event' is not specifically defined in the Mutual

Funds Regulations. The event should be such that it requires winding up of a Scheme. 'Happening of an event' means existence of a factual situation or circumstance, which, in the opinion of the Trustees, warrant a decision to be taken to wind up a Scheme. The 'event' referred in sub-clause (a) is nothing but a factual situation arising which requires a drastic decision of winding up of a Scheme to be taken. As the Trustees are holding the assets of the Schemes in fiduciary capacity and as the unit-holders are the beneficiaries of the Trust, the decision under sub-clause (a) of clause (2) of Regulation 39 has to be taken in the best interests and for benefit of the unit-holders. The question raised is whether an event had indeed happened, compelling the Trustees to take a recourse to the provisions of Regulations 39 (2) (a) of the Mutual Funds Regulations.

259. An argument was canvassed by the petitioners that in the communication dated 14th April 2020 sent by AMC to SEBI, the view expressed was that postponement of redemption has to be adopted as a last resort. It was argued that how the situation drastically changed within few days is not brought on record. It is pointed out that nothing is placed on record to show that there

was any drastic change in the situation between 14th and 20th April 2020.

260. On this aspect, we must remember that the lockdown on account of pandemic COVID 19 was imposed from 25th March 2020 which adversely affected the economy and it created enormous stress on economy. The situation in securities market became very volatile, not only in India but also in other countries including the developed countries on account of imposition of lockdown. A judicial notice of the above facts can be taken. Therefore, the period of five to six days could have always brought about major changes in the scenario in the market. When there was volatility in capital market, it is possible that the situation could have undergone a drastic change even in the matter of few hours considering the liquidity crisis and volatile situation created by lockdown. As per the perception of the Trustees, the situation could have undergone a drastic change in a day also.

261. The stand of the petitioners is that there were no grounds available for winding up of the said Schemes. It is argued that admittedly, two out of six Schemes have become cash rich and

thereafter, two more Schemes have become cash rich. But, these are the events which have occurred after the notice under sub-clause (3) of Regulation 39 was issued.

262. On the other hand, the contention of the Trustees is that the decision had to be taken considering the liquidity crunch and considering the fact that it would not have been possible for the said Schemes to honour large number of redemptions requests. Their stand is that AMC was not in a position to deal with such large number of requests for redemptions without large scale borrowing. As borrowing was not possible, distress sale of assets was the only option. As a result of distress sale, the unit-holders' value would have gone down and the NAV also would have been drastically reduced. In fact, this was the main contention raised by SEBI also. Whether a situation was created requiring winding up of the said Schemes is a very complex and complicated issue to decide. A very large number of factors are required to be considered by the Trustees who have in their fold, experts in the field. The question whether the decision of winding up of the said Schemes will be ultimately beneficial to the investors/unit-holders or whether it will be detrimental to the

interest of the investors/unit-holders can be dealt with only by the experts in the field. It is not possible for a Writ Court to decide whether the impugned decision is beneficial to the unit-holders or it is detrimental to their interest. We do not possess expertise to decide whether the decision of winding up was in the best interest of the unit-holders/investors, inasmuch as, basically, the decision of winding up of the said Schemes is a commercial decision. It cannot be said that the factors which are set out in the minutes of the meetings dated 20th April 2020 and 23rd April 2020 were irrelevant or extraneous. The commercial viability of the decision to wind up cannot be decided by a Writ Court. We have held that merely because of the presence of top brass of AMC in the meeting of the Board of Directors of the Trustees, the decision making process is not vitiated. We find nothing wrong with the decision making process. The Court cannot enter into an arena of the merits of the decision which is essentially a commercial decision. It should be best left to the experts in the field. The Board of Trustee company is not a quasi judicial authority. It is not expected to record detailed reasons. Moreover, some latitude has to be given to such decision making process based on commercial considerations and the prevailing condition of

economy. Therefore, in exercise of writ jurisdiction under Article 226 of the Constitution of India, this Court cannot go into the merits of the decision of the Trustee Company to wind up the said Schemes. Therefore, we are unable to interfere with the ultimate decision taken by the Trustee Company to wind up the said Schemes.

263. Detailed submissions have been made that the investments made by the Trustees were contrary to the Mutual Funds Regulations and the terms and conditions in the trust deed. It is not for the Writ Court to go into the nature of investments. It is for SEBI to take action in accordance with law, if it is found that the investments were made in breach of the Mutual Funds Regulations.

Constitutional Validity of the Regulations: ISSUE NO.(i)

264. Now we must deal with the issue of constitutional validity of Regulation 39 to 40. The first submission was that the power to make Regulations is conferred by Section 30 of SEBI Act does not include power to frame Regulations for winding up of the Schemes. We have already quoted sub-section (1) of Section 30 of SEBI Act which confers powers on SEBI by a notification to

make Regulations consistent with the provisions of the SEBI Act for carrying out the purposes of the SEBI Act. Sub-section (2) of Section 30 of the SEBI Act incorporates specific subjects on which Regulations can be framed without prejudice to the generality of the of power conferred by sub-section (1). The very object of the SEBI Act is to preserve the confidence of investors in the capital market by ensuring protection of investors. Therefore, statutory powers have been conferred on SEBI to effectively deal with all matters relating to capital market. Thus, the object of SEBI Act, apart from protecting the interest of the investors is to regulate the securities market while promoting the development thereof. Therefore, one of the objects of the SEBI Act is to promote development of Mutual Funds and to regulate the same. Therefore, the Mutual Funds Regulations make elaborate provisions for creating a three-tier system consisting of 'sponsor', 'AMC' and the 'Trustees'. There are stringent provisions which regulate the activities of AMC and Trustees. The restrictions on their powers have been well defined in the Mutual Funds Regulations. Their rights and obligations have been expressly laid down. In fact, all the activities of the Mutual Funds including management of the Schemes floated by Mutual Funds

are highly regulated by virtue of various provisions of the Mutual Funds Regulations which we have already elaborately discussed in the earlier part of this Judgment. Considering the specific object of the SEBI Act, as found in its preamble, it cannot be disputed that the Regulations of Mutual Funds and its development are the objects of the SEBI Act. On plain reading of sub-section (1) of Section 30, it is crystal clear that the Regulations can be framed for promoting development of Mutual Funds and for regulating the same for protecting the interest of the investors. The regulation of Mutual Funds will also include regulation of winding up of the Scheme of Mutual Funds. If the activity of winding up is not regulated, the Trustees, at their whims and fancies may wind up the Schemes prejudicing the interest of the unit-holders. Therefore, the Regulations which have been framed for regulating the action of winding up of the Schemes can be said to have been framed for carrying out the purposes of the SEBI Act. In absence of Regulations 39 to 42, the action of winding up of the Schemes will remain completely unregulated which will defeat the very object of enacting the SEBI Act. Therefore, it cannot be said that the Regulations 39 to 42 are *ultra vires* the provisions of the SEBI Act. It is not possible

for this Court to accept the submission that Section 30 of the SEBI Act does not confer power on SEBI to frame the Regulations dealing with winding up of the Schemes and regulating the activity of winding up.

265. The other argument is that the provisions of Regulations 39 to 42, especially sub-clause (a) of clause (2) of Regulation 39 confer an unguided power on the Trustees for winding up of the Schemes as per their whims and fancies. The contention is that there are no guidelines provided under the Regulations to decide in which contingencies, the Trustees can take recourse to winding up under Regulation 39 (2) (a). Another argument is that Mutual Funds Regulations do not lay down any guidelines for deciding which are the events on happening of which the Trustees can decide to wind up a Scheme. Therefore, the contention is that Regulation 39 (2) (a) is manifestly arbitrary and it is violative of Article 14 of the Constitution of India. An argument is also canvassed is that as the right of redemption of the unit-holders of 'open ended Scheme' is taken away by the winding up, the Trustees have infringed the rights of the investors under Article 21 of the Constitution of India.

266. We have already held that by virtue of sub-clause (c) of clause (15) of Regulation 18, when the Directors of Trustee company by majority decide to wind up of a Scheme, the Trustees are under an obligation to take consent of the unit-holders before taking action under clause (3) of Regulation 39. Therefore, a Scheme can be wound up only if the unit-holders, by a simple majority, approve the action of formation of the opinion by the Trustees that an event has occurred which requires the Scheme to be wound up. In absence of such consent of the unit-holders to the decision of the Trustees of winding up, the Scheme cannot be wound up. Thus, the opinion of the Trustees as contemplated by Regulation 39 (2) (a) gets translated into actual winding up provided that there is a consent of the unit-holders as aforesaid. The obligation of obtaining consent of the unit-holders incorporated in sub-clause (c) of clause (15) of Regulation 18 acts as a major safeguard against arbitrary and/or colourable exercise of power by the Trustees. They cannot take any such decision as per their whims and fancies as the same is subject to consent of the unit-holders. Therefore, there are sufficient safeguards and safety rails provided. The vice of arbitrariness is not attracted by Regulation 39 (2) (a).

267. The prayer in the petition filed before Delhi High Court is to strike down Regulations 39 to 41. If the activity of winding up of the Scheme is not regulated by introducing the stringent provisions like Regulation 39, the Trustees will be in a position to arbitrarily wind up the Schemes of a Mutual Fund. In view of sub-clause (a), (b) and (c) of clause (2) of Regulation 39, winding up of a Scheme can take place in three contingencies. The first is with consent of majority of unit-holders on the happening of any event which in the opinion of the Trustees requires a Scheme to be wound up. The second contingency is of 75% of the unit-holders of a Scheme passing a resolution that a Scheme be wound up. The third contingency is if SEBI is of the view that winding up of a Scheme is in the interests of the unit-holders. There is no fourth option available for winding up of a Scheme except the above three options. Once winding up process triggers in by virtue of Regulation 39 (3), as per Regulation 40, the business activities of a Scheme under winding up become standstill. This provision ensures that neither the Trustees nor AMC can deal with the assets of the Scheme under winding up.

Therefore, we do not see any arbitrariness in the provisions of Regulation 39.

268. An argument was canvassed that under sub-clause (b) of clause (2) of Regulation 41, the creditors of the Scheme are preferred over the investors/unit-holders. As we have already discussed earlier, in view of clause (2) of Regulation 44, borrowings can be made only for the purposes of repurchase or redemption of units or for payment of interest or dividend to the unit-holders. Thus, borrowings can be made by a Mutual Fund only for meeting the legitimate requests/demands of unit-holders. If the order in which liabilities are to be discharged, as provided under Regulation 41 (2) (b) is reversed, firstly the unit-holders will get their money and, therefore, the creditors from whom the money is borrowed by the Scheme will not get their dues. Therefore, we do not see anything arbitrary in this provision as well. Article 14 does not contemplate mathematical nicety or a perfect equality.

269. Investment in Mutual Funds is subject to risks and there are no guaranteed returns except in a case covered by Regulation 38. In the present case, none of the six Schemes provide for

guaranteed returns. As we have already observed, winding up under Regulation 39 (2) (a) can be resorted in the interest of the unit-holders. In a given case, only way to return some part of their investments to the investors may by adopting the process of winding up. Except in case of a Scheme to which Regulation 38 is applicable, there is no right vested in unit-holders to get a particular return. When such being the case, we fail understand as to how the unit-holders' right guaranteed by Article 21 of the Constitution of India is violated by winding up of a Scheme. Therefore, the said argument is deserves to be rejected. In our considered view, the challenge to constitutional validity of Regulations 39 to 42 must fail. In any case, we are dealing with a legislation in the sphere of economic policy which requires a greater latitude.

Re. Issue No. (ix): - power of SEBI under Section 11B:

270. Another question is about the powers of SEBI under Section 11B of the SEBI Act. We have already held that the power to issue directions under Section 11B (1) can be exercised to issue directions to AMC and the Trustees. The said direction can be issued when SEBI, after making or causing to be made an

enquiry, is satisfied that (a) it is necessary to issue directions in the interest of investors or orderly development of securities market; (b) to prevent the affairs of any intermediary or other persons referred to in Section 12 being conducted in a manner detrimental to the interests of investors of securities market; or (c) to secure the proper management of any such intermediary or person. The first question is whether SEBI has power to interfere with the decision taken by the Trustees under Regulation 39 (2) (a). If SEBI is to test the correctness or validity of such decision of the Trustees, an adjudication is required. The Trustees and AMC will have to be heard in the adjudication process. Section 11B does not contemplate any such adjudication. If an entity to whom a direction under Section 11B has been issued commits any breach thereof or disobeys the same, it will attract penalty under Section 15HB. Before imposing penalty, adjudication as contemplated by Section 15-I is required to be made. There is no provision made in SEBI Act for issuing a notice of the proposed direction under Section 11B and hearing the Trustees or AMC before issuing the direction. No adjudication is contemplated before issuing the directions. Therefore, it is not possible for this Court to accept the contention of the petitioners,

AMC as well as the Trustees that by exercising power under Section 11B, SEBI has power to adjudicate upon the correctness of the decision taken by the Trustees to wind up a Scheme. However, when SEBI finds that the Trustees or AMC are not abiding by the specific provisions of the Mutual Funds Regulations, the power to issue directions can be exercised by SEBI. By way of illustration, we refer to hypothetical cases. After invoking the provisions of Regulation 39 (2) (a), if the Trustees stop redemption the units by taking recourse to Regulation 40 without complying with the mandatory requirements of sub-clause (a) and (b) of clause (3) of Regulation 39, SEBI can always issue a direction under Section 11B not to stop redemptions, unless compliance is made with clause (3) of Regulation 39. If it is found that the Trustees continue to carry on business activities of the Schemes even after action under clause (3) of Regulation 39 is taken, a direction under Section 11-B can be issued by SEBI to stop all business activities.

ROLE OF SEBI IN THIS CASE

271. Now we come to the role of SEBI. One of the main obligations of SEBI is to protect the interest of the investors. The

second obligation is to ensure that the Trustees and AMC of Mutual Funds strictly abide by the provisions of the SEBI Act and the Mutual Funds Regulations. As stated in the statement of objects and reason, the confidence of investors in capital market can be sustained by ensuring that the interest of the investors is protected. The very Scheme of the SEBI Act suggests that SEBI has to act as a watchdog to protect the interests of the investors.

272. Coming back to the facts of the case, as noted in the earlier part of the Judgment, SEBI was not even possessing a copy of the resolution dated 23rd April 2020 passed by the Board of Directors of the Trustees providing for winding up. SEBI did not respond to the e-mail dated 14th April 2020 sent by AMC. SEBI failed to reply to the letter dated 20th April 2020 addressed by the Trustees, in which, permission and guidance of SEBI was sought for winding up of the Schemes. In response to a specific query made by the Court, the learned Senior Counsel appearing for SEBI has stated that SEBI was not aware whether compliance of sub-clauses (a) and (b) clause (3) of Regulation 39 was made by the Trustees. It is an admitted position that this was perhaps the first case in the history where Regulation 39(2)(a) was invoked.

Therefore, SEBI ought to have been cautious and ought to have played very active role. Even for SEBI, such a winding up was an extraordinary event. SEBI did not bother to even enquire about the compliance with clause (3) of Regulation 39 by the Trustees. SEBI did not bother to ascertain whether redemptions and borrowings ceased assuming that compliance of clause (3) of Regulation 39 was made. At the time of admission of Gujarat writ petition, SEBI specifically relied upon an order, by which, Forensic Audit was ordered. But, SEBI did not place on record a copy of an order appointing Forensic Auditor and a copy of such order was filed on record only when this Court questioned the learned Senior Counsel appearing for SEBI about non production of the order of appointment of the Forensic Auditor. The copy was produced on 2nd September 2020 though hearing commenced on 12th August, 2020. No material was placed on record to show the present status of the Forensic Audit. A copy of report dated 3rd August 2020 was offered to be produced for the perusal of the Court only on 2nd September 2020. We fail to understand why a copy of the order appointing Forensic Auditor was not produced by SEBI on its own. Some of the petitioners have filed complaints with SEBI. They are entitled to know the

action taken on their complaints. All that can be said is that SEBI should have been prompt and proactive especially when this perhaps the first case of winding up under Regulation 39(2)(a). A prompt action by SEBI was necessary to sustain the confidence of the investors. As a watchdog, SEBI was expected to play a very proactive role by questioning AMC, Trustees and Sponsor about the compliances with the provisions of the Mutual Funds Regulations. The investors/unit-holders of the said Schemes will be justified in their criticism that SEBI was a silent spectator.

Re. issuance of direction to SEBI:

273. Now we come to the directions sought by the petitioners in these writ petitions against SEBI. Directions have been sought against SEBI for ordering investigation under Chapter VIII of the Mutual Funds Regulations. At this juncture, it is necessary to refer to the material placed on record by SEBI by filing an affidavit dated 2nd September 2020 along with a copy of confidential letter dated 27th May 2020 addressed to M/s Chokshi and Chokshi LLP. By the said letter, the said firm was appointed to conduct Forensic Audit/Inspection of FTMF, AMC and the Trustee Company in respect of the said Schemes which were ordered to

be wound up on 23rd April 2020 and Fund of Fund Scheme. The terms of reference have been annexed to the said letter. The terms of reference are very wide which include checking the exposure of unlisted securities in the wound up Schemes, examining the investment rationale and checking whether due diligence was shown at the time of making investments. The Auditors are also required to check whether adequate effort was made by AMC to sell the unlisted securities. Investigation is also ordered under the said order about the investments made by AMC. The Forensic Auditor is also required to check whether any exit was given to corporates, HNIs or related parties before the decision to wind up. The Forensic Auditor is also required to enquire into whether any money has been siphoned off. The Auditor is also required to go into the issues raised in various complaints received by SEBI regarding said Schemes under winding up and to find out the lapses committed by AMC. It is stated in the affidavit that various documents were forwarded to the Forensic Auditors including the gist of complaints of the investors. It was further stated that after completion of Forensic Audit, a report dated 31st July, 2020 was submitted by the Auditors which was received by SEBI on 3rd August, 2020. It is

further stated that supplementary findings recorded by the Forensic Auditors were received by SEBI on 21st, 24th and 25th of August 2020. It is stated that the report and findings of the Forensic Auditors have been sent to AMC and the Trustees calling for their response. It is stated that what is submitted is not the final report and that the final report will be submitted after considering the views that may be expressed by AMC and Trustees. By the same affidavit, SEBI prayed that a direction should not be issued to it to make the audit report public at this stage.

274. At this juncture, it is necessary to refer to Regulation 66 which reads thus:

> **"66. Appointment of Auditor**.—Without prejudice to the provisions of regulation 55, the Board shall have the power to appoint an Auditor to inspect or investigate, as the case may be, into the books of account or the affairs of the Mutual Fund, trustee or asset management company:
>
> **Provided** that the Auditor so appointed shall have the same powers of the inspecting officer as stated in regulation 61 and the obligation of the Mutual Fund, asset management company, trustee, and their respective employees in regulation 63, shall

be applicable to the investigation under this regulation."

275. From the terms of reference issued to M/S. Chokshi and Chokshi LLP, it is abundantly clear that they were appointed to both inspect and investigate. As could be seen from the proviso to Regulation 66, the Auditors can exercise powers of the inspecting officers appointed under regulation 61. Regulation 61 reads thus:

> **"61. Board's right to inspect and investigate**.—(1) The Board may appoint one or more persons as inspecting officer to undertake the inspection of the books of account, records, documents and infrastructure, systems and procedures or to investigate the affairs of a Mutual Fund, the Trustees and asset management company for any of the following purposes, namely:—
>
> (*a*) to ensure that the books of account are being maintained by the Mutual Fund, the Trustees and asset management company in the manner specified in these regulations;
>
> (*b*) to ascertain whether the provisions of the Act and these regulations are being complied with by the Mutual Fund, the Trustees and asset management company;

(*c*) to ascertain whether the systems, procedures and safeguards followed by the Mutual Fund are adequate;

(*d*) to ascertain whether the provisions of the Act or any rules or regulations made thereunder have been violated;

(*e*) to investigate into the complaints received from the investors or any other person on any matter having a bearing on the activities of the Mutual Funds, Trustees and asset management company;

(*f*) to *suo motu* ensure that the affairs of the Mutual Fund, Trustees or asset management company are being conducted in a manner which is in the interest of the investors or the securities market."

276. Regulation 61 contemplates SEBI appointing a person as inspecting officer for the purposes set out in clause (1) thereof. The procedure to be followed in inspection and investigation is also mentioned in Chapter-VIII. Under Regulation 64, the inspecting officer is under an obligation to submit a report on completion of the inspection or investigation. SEBI has power to direct the inspecting officer to file interim report. It is provided in Regulation 65 that SEBI or its Chairman, after considering the

inspection or investigation report, is empowered to take further action including action under Chapter-V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008 which includes cancellation of registration. The other action which can be taken is a penal action of imposing penalty as specified under Chapter VIA of the SEBI Act. We have already referred to the said provision including the provisions of Section 15HB.

277. As can be seen from the proviso to Regulation 66, the Auditor so appointed has the same powers of the inspecting officer under Regulation 61. Therefore, the appointment of Forensic Auditor for inspection and investigation is in terms of Regulation 61. The provisions of Regulations 62 and 63 are applicable to such investigations by the Auditors. After final report is submitted by the Forensic Auditor in accordance with Regulation 64, depending upon the findings in the report, an action will have to be taken in accordance with Regulation 65 which includes even a penal action under Chapter VIA of the SEBI Act of imposing penalty on AMC and the Trustees or its

Directors. Therefore, a direction will have to be issued to SEBI to take action in accordance with Regulation 65.

PRIVILEGE CLAIMED REGARDING REPORT OF THE FORENSIC AUDITOR:

278. The other issue is regarding making public a copy of the report of the Forensic Auditor, a copy of which is placed on record in a sealed cover. Though a copy of the report (without enclosures) was produced by SEBI in a sealed cover as stated in the affidavit dated 2nd September 2020, a contention raised was that the same should not be made public. The same is the contention of AMC and the Trustees. At one stage, Shri. Janak Dwarakadas, learned Senior Counsel representing AMC and the Trustees had raised an objection even to the Court going through the said report. However, subsequently, Shri. Harish Salve, learned Senior Counsel appearing for AMC and the Trustees stated before the Court that his clients have absolutely no objection for the Court reading the said report with a view to decide the objection raised by SEBI, the Trustees and AMC for making the report public. Paragraphs 1 to 5 of order dated 10th September 2020 are very relevant which are reproduced as under:

“1. At the time of earlier hearing, we had called upon Shri Arvind Datar, the learned Senior Counsel representing Securities and Exchange Board of India (for short "SEBI") to make the stand of SEBI very clear on production of the report of the Forensic Audit. Accordingly, SEBI has filed an affidavit of Shri Lamber Singh S/o Shri Hansraj Singh. The contention raised in the affidavit is that the report will have to be treated as a confidential document. In paragraph 15 of the affidavit, it is stated thus:

"In view of the foregoing, I most respectfully pray, the Hon'ble Court may be pleased not to direct SEBI to make the aforesaid Audit Report public. I further pray that in the event the Hon'ble Court passes a direction to SEBI to submit the said Forensic Report for the consideration of the Court, the said Report may be permitted to be placed in a sealed envelope/cover and marked as 'confidential' in the interest of justice."

(underline supplied)

2. Today, we have heard the submissions of Shri Arvind Datar, the learned Senior Counsel appearing for SEBI in support of what is pleaded in the aforesaid affidavit. Notwithstanding the statement made in paragraph 15 of the affidavit, he states that

SEBI will produce before the Court in a sealed envelope, a copy of the Forensic Audit report submitted by M/s. Chokshi and Chokshi LLP as well as a copy of reply submitted by Asset Management Company (for short "AMC") and the Trustees. He, however, submits that since it is the contention of SEBI that the report is of confidential nature, copies of the report should not be allowed to be furnished to the parties to the petition and the report shall be kept on record in a sealed envelope. However, he states that SEBI has no objection if the Court peruses the report only for the limited purpose of considering the deciding the objections raised by SEBI. We have heard Shri Arvind Datar, the learned Senior Counsel on the plea raised in the affidavit dated 2nd September 2020.

3. At this stage, Shri Arvind Datar, the learned Senior Counsel also stated that the report has annexures running into more than one thousand pages. In view of the statement made by Shri Arvind Datar, the learned Senior Counsel, we direct SEBI to produce a copy of the report (without annexures) as well as a copy of the reply of AMC as well as the Trustees in a sealed envelope. The learned advocate for SEBI shall seek an appointment with the Registrar (Judicial) by calling him on his official cell phone number so that the Registrar (Judicial) will

permit the advocate for SEBI to enter the Court complex and deliver the report in a sealed envelope to the Registrar (Judicial). As soon as the report is received, the Registrar (Judicial) shall keep the sealed envelope in his safe custody. We direct that without a specific order of the Court, the sealed envelope shall not be opened. It follows that copies of the documents shall not be provided to any one.

4. From the issues which are raised in the affidavit filed by SEBI today, it is crystal clear that the Court will have to hear all the parties on the question whether the report is relevant. Considering the prayers made in the petitions, the Court will have to also consider the question of relevancy in the context of the prayers. Thirdly, the issue is whether the report should be kept confidential. These are some of the issues which will have to be considered after hearing the learned counsel appearing for all the parties. Whenever the turn of the learned counsel for the parties to address the Court on merits of the matter comes, we will hear them on the aforesaid issues.

5. We, however, reiterate that no party will be entitled to a copy of the said report unless there is a specific order passed by this Court after hearing the learned counsel for the parties."

279. As noted in the order dated 18th September 2020, the Registrar (Judicial) was directed to produce the report of the Forensic Audit filed in a sealed cover as well as the copies of the minutes in the sealed cover which were kept in his safe custody. Accordingly, as noted in the detailed order dated 22nd September 2020, the Registrar (Judicial) appeared before the Court and produced both the sealed covers which were opened in open Court in presence of the Advocates representing AMC and Trustees and the Advocates for petitioners in W.P.No.8545/2020 and 8644/2020. The said Advocates were permitted to physically appear before the Court. After opening both the sealed covers, notes were taken by one of us (Chief Justice) consisting of two sheets. Thereafter, both the covers were again resealed by the Registrar (Judicial) in open Court and took the same into his custody. The three Advocates who were physically present before the Court have countersigned on resealed covers containing the report of the Auditors and copies of the minutes. The notes made by the Court running into two pages were also kept in a sealed cover which was handed over by the Court Officer to the Personal Secretary to the Chief Justice.

280. We have already referred to Regulation 66. The Forensic Auditor appointed as per Regulation 66 for inspection and investigation has same the powers of the inspecting officers appointed under Regulation 61. Regulation 64 provides that inspecting officer shall, on completion of inspection or investigation submit a report to SEBI. Proviso to Regulation 64 shows that if it is directed to do so by SEBI, he may submit an interim report. Therefore, if SEBI wants the Auditor appointed under Regulation 66 to submit an interim report, SEBI will have to issue a direction to that effect. But, in the case in hand, there is nothing brought on record to show that such a direction was issued by SEBI to the Auditors of submitting an interim report. We have perused the letter dated 3rd August 2020 enclosing therewith the Audit report. It is stated by the Auditors that they conducted Forensic Audit/Inspection of said six Schemes and Fund of Funds Scheme of FTMF. It is recorded that their findings are subject to explanation and formal responses from AMC and Trustees and the findings may undergo a modification. It appears that certain audit requirements were made available to the Auditor by AMC on 30th July, 2020 and 31st July, 2020. It is

stated therein that said documents are in the process of being verified and audit findings, if any, will be submitted by way of supplementary report. Some additional findings are also produced. In the main report, page numbers twenty five onwards are the audit findings up to page number 129. There are rows under each audit finding for recording the responses of AMC and the Trustees. Both the rows under each finding are left blank. There is a reply dated 3rd September 2020 filed by FTMF. Thus, it appears to us that the findings recorded by the Forensic Auditors are not final findings and the same are subject to consideration of responses from AMC and the Trustees. It is specifically stated that based on explanation and responses of AMC and the Trustees, the findings in the report may undergo a modification. As stated earlier, the spaces for recording the explanations/responses of AMC and Trustees are left blank, because, so far, the responses have not been considered by the Forensic Auditors. Thus, it cannot be termed as a report of the Auditors in terms of Regulation 64, as the audit findings mentioned therein are not final and they are subject to modifications, based on the responses sought. Further, it is not even an interim report, as there was no such direction issued by

SEBI in terms of proviso to Regulation 64. Only on the basis of the final inspection or investigation report that SEBI or its Chairman are required to take action in terms of Regulation 65. Thus, the report produced before the Court in a sealed cover can at best described as a tentative report. In our view, the report of the Auditor being tentative and subject to modifications, it is not a relevant document which can be considered by this Court for the purposes of deciding the issues involved in these petitions. If this report is made public, it will adversely affect further investigation considering the fact that it will go viral on social and other media. A writ of mandamus has not been sought by any of the petitioners for production of the report of the Forensic Auditors. Therefore, the only question to be decided is whether the said document produced by SEBI is relevant for deciding the petitions on merits. As the said report is only a tentative report which can undergo modifications, this Court cannot rely upon the said report. Therefore, there is no question of issuing a direction to provide copies thereof to the parties to these writ petitions.

281. Had it been the final report as per Regulation 64 or a provisional/interim report as per the direction of the SEBI, the

issue could have arisen whether a privilege can be claimed. Whether privilege can be claimed or not is the question which will require consideration, provided the final findings or a final report in accordance with Regulation 64 is submitted by the Auditors. Suffice it to say that as the said document is not relevant at all to decide the issue on merits and as the same is a tentative report of the Auditors which is subject to change/modification, it is not necessary for this Court to go into the question of privilege at this stage. However, as and when the final report is submitted or an interim report is filed in terms of the directions issued by SEBI under proviso to Regulation 64, the parties are at liberty to initiate appropriate proceedings for getting the copies of the Forensic Audit report. Therefore, our conclusion is that the copies of the said report cannot be provided to the parties at this stage, as the said report will have to be kept out of consideration for deciding these writ petitions. However, the report and copies of minutes of the meeting which are resealed in open Court shall continue to be kept in the safe custody of the Registrar (Judicial). Even the sealed cover containing our notes, shall be kept in the safe custody of the Registrar (Judicial).

282. In the petition filed before the Delhi High Court, a prayer has been made for directing the investigation against AMC and Trustees through Serious Fraud Investigation Office. Now, there are two investigations in progress. One is by SEBI in exercise of its statutory powers under Regulation 61 read with Regulation 66. The second is the investigation in relation to the offences registered at Chenai. Therefore, at this stage, it is not at all necessary to order investigation at the hands of one more agency.

283. As regards issue of maintainability of the writ petition filed before Madras High Court, it is academic, as the prayers which are made in the said petition need not be granted, in view of the consideration of the prayers made in the petition filed in Delhi and Gujarat High Courts.

284. Based on the provisions of the Trusts Act, an argument was canvassed that every Scheme under a Mutual Fund constitutes a trust within a trust and hence, winding up of a Scheme amounts to revocation of the trust. The argument was that a revocation of trust which is created otherwise than under a Will can be made only in accordance with Section 78 of the

Trusts Act. However, in view of the findings which we have recorded on the question of interplay between sub-clause (c) of clause (15) of Regulation 18 and sub-clause (a) of clause (2) of Regulation 39, it is unnecessary to go into the issues raised based on the Trusts Act.

AVAILABILITY OF EFFICACIOUS REMEDIES

285. One of the argument canvassed was that alternative efficacious remedies are available to the petitioners under the SEBI Act. An argument was canvassed that complaints have been filed by the petitioners with SEBI. It is urged that SEBI has power to impose penalty for violation of the Mutual Funds Regulations. Another argument was canvassed that a remedy of appeal is available before the Securities Appellate Tribunal. We find that an appeal is provided to the Securities Appellate Tribunal under Section 15-T. But there is no appeal provided therein against the decision of winding up. An appeal can lie only after an order is made by adjudicating officer in accordance with Section 15-I. As can be seen from Section 15-I, the power to adjudicate is only for the purposes of imposing penalty. Thus, there is no statutory remedy available to the investors to challenge the decision of the Trustees of winding up. There is no

provision under the SEBI Act for adjudication of complaints of the investors, as a matter of right. In fact, the stand of SEBI is that it has no jurisdiction to go into the question of correctness of the decision of the Trustees of winding up.

CASH RICH SCHEMES

286. Another argument was canvassed based on the statements made in the statement of objections filed by AMC and the Trustees. It is pointed out that at least two Schemes out six have become cash rich. A submission was made by one of the interveners that a direction may be issued to return the money to the investors. However, such a direction cannot be issued, as the same will run contrary to the Mutual Funds Regulations. If the decision of the Trustees of winding up is held to be valid, then the investors will be entitled to receive money, as provided in sub-clause (b) of clause (2) of Regulation 41. The investors will get the money only after sale of assets of the Scheme and that also after making payment to the creditors and making a provision for expenses of liquidation. In case the decision of the Trustees is held to be bad in law, then the unit-holders will have to make requests for redemption.

287. Hence, we summarise our important conclusions as under:

i) We hold that Regulations 39 to 40 of the Mutual Funds Regulations are valid. Hence, issue No. (i) is answered accordingly;

ii) When the Board of Directors of a Trustee company, by majority, decides to wind up a Scheme by taking recourse to sub-clause (a) of clause (2) of Regulation 39, the Trustee company is bound by its statutory obligation under sub-clause (c) of clause (15) of Regulation 18 of obtaining consent of the unit-holders of the Scheme. The consent of unit-holders will be by a simple majority. In view of the obligation of the Trustees under sub-clause (c) of clause (15) of Regulation 18, a notice as required by clause (3) of Regulation 39 can be issued and published only after making compliance with the requirement of obtaining consent of the Unit-holders. Issue No. (ii) is answered accordingly;

iii) Clause 15A of Regulation 18 of the Mutual Funds Regulations 1996 operates in a different field which has nothing to do with the process of winding up of a

Scheme. Therefore, compliance with Clause 15A of Regulation 18 is not a condition precedent for winding up of a Scheme pursuant to sub-clause (a) of clause (2) of Regulation 39. The issue No.(iii) is answered accordingly;

iv) Considering the duties of the Trustees under the Mutual Funds Regulations, they perform a public duty. Therefore, when it is found that the Trustees have violated the provisions of the SEBI Act or Mutual Funds Regulations, a Writ Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, can always issue a writ of mandamus, requiring the Trustees to abide by the mandatory provisions of the SEBI Act or the Mutual Funds Regulations. Issue No. (iv) is answered accordingly;

v) In the facts of the case, for the reasons which we have recorded earlier, no interference can be made with the decision of the Trustees dated 23rd April 2020 of winding up of the said Schemes. However, the decision can be implemented only after obtaining the consent of unit-holders as required by sub-clause

(c) of clause 15 of Regulation 18. Issue No.(v) is answered accordingly;

vi) Issue No. (vi) is answered against the Trustees;

vii) On compliance being made with sub-clauses (a) and (b) of clause (3) of Regulation 39, Regulation 40 triggers in and therefore, AMC or Trustees have no right to continue the business activities of the Schemes which will include borrowings. Similarly, from the date of publication of the notice in accordance with sub-clause (b) clause (3) of Regulation 39, AMC is disentitled to honour the redemption requests made earlier. Issue No.(vii) is answered accordingly;

viii) The copy of the Forensic Audit report produced in a sealed cover, does not contain final findings and it is specifically mentioned therein that after taking the views/responses of SEBI, AMC and Trustee company, some of the conclusions in the report may undergo a change. Hence, the said report can at best be termed as a tentative report. Hence, the same is not relevant for deciding these petitions. As

the said document is not relevant, it is not necessary for this Court to go into the legality of the claim for privilege. Issue No. (viii) is answered accordingly;

ix) After receiving the final findings/report of the Forensic Auditors, SEBI is bound to consider of initiating an action as contemplated by Regulation 65, depending upon the findings recorded therein. Issue No. (xi) is answered accordingly;

x) It is the obligation of the Trustees or Trustee Company to provide copies of the minutes of the meeting held on 20th and 23rd April 2020 to the Unit-holders and no confidentiality can be attached to the said minutes of the meetings. Issue No.(ix) is answered accordingly;

xi) In exercise of the powers under Section 11B of the SEBI Act, SEBI has no jurisdiction to interfere with the decision of winding up of a Scheme made by taking recourse to Regulation 39 (2) (a). Issue No.(x) is answered accordingly;

HEARING THROUGH VIDEO CONFERENCE

288. The record of these writ petitions runs into more than 5,000 pages. Large number of precedents were relied upon by the learned counsel appearing for the respective parties. Considering the fact that in the city of Bengaluru, from the end of July 2020, positive cases of COVID-19 kept on rapidly increasing, the hearing of this group of petitions was conducted from 12th August, 2020 in the afternoon session through video conferencing. The hearing concluded on 24th September 2020. The cases were heard on 29th August 2020 and 19th September 2020 which were the Court holidays. As additional affidavits were produced by AMC and the Trustees, with a view to bring the same to the notice of the other parties, the matters were again listed on 5th October 2020. We must note here that perhaps, this must be the one of the longest hearing conducted through video conferencing. The hearing through video conferencing was conducted on 25 working days for total 61 hours. What is more important is that hearing went on very smoothly without any major glitch. It enabled the learned members of the Bar to appear from London, New Delhi, Chennai, Mumbai and Bengaluru. Only once an issue of connectivity of internet was faced for a brief

period of ten minutes just before the submissions of learned Solicitor General of India were heard. During the course of hearing, decisions of various Courts and number of documents were forwarded by e-mail which were considered by this Court. All the parties will not agree about the correctness of the conclusions drawn on merits. But we are sure that all the parties will agree that notwithstanding the voluminous record, long length of arguments and involvement of complicated legal and factual issues, hearings can be effectively conducted by use of video conferencing facility.

289. While we part with the judgment, we must note that all the learned counsel appearing for the respective parties, at the time of conclusion of hearing, have complimented and appreciated service rendered by the Registrar (Judicial) Shri. K.S. Bharath Kumar and his team as well as Shri. B.M.Satheesha, Shri.C. Shashikanth and Mrs. T. Bhagya, Court Officers by stating that they were extremely efficient. Large number of documents forwarded by the learned counsel through e-mail during the course of hearing were efficiently handled by the team and were immediately placed before the Court. We also express appreciation for service rendered by the aforesaid members of

the staff, Shri. N.Suresh, Hardware Engineer and the team of Computer Committee. We hope and trust that during the period of pandemic, the learned members of the Bar will take recourse to the video conferencing hearing even in complicated matters involving bulky record without having any apprehension. However, hearing of cases over such a long period of time by Video conferencing requires active co-operation of the members of the Bar. We were fortunate to get full co-operation from all of them.

290. Hence, we pass the following:

ORDER

IN WRIT PETITION NOs 8644 OF 2020 AND 8545 OF 2020

i) We hold that no interference is called for in the decision of the Trustees taken on 23rd April 2020 of winding up the said six Schemes;

ii) We hold and declare that the decision of the Trustees (the Franklin Templeton Trustee Services private Limited) to wind up six Schemes mentioned in paragraph-1 of the Judgment by taking recourse to sub-clause (a) of clause (2) of Regulation 39 of the

Mutual Funds Regulations cannot be implemented unless the consent of the unit-holders is obtained in accordance with sub-clause (c) of clause (15) of Regulation 18. Hence, we restrain the Trustees from taking any further steps on the basis of the impugned notices dated 23rd April 2020 and 28th May 2020, till consent of the unit-holders by a simple majority to the decision of winding up is obtained by the Trustees in accordance with sub-clause (c) of Clause (15) of Regulation 18 of the Mutual Funds Regulations;

iii) It will be open for the Trustees to obtain consent of the unit-holders as provided in sub-clause (c) of clause (15) of Regulation 18 and to take further steps in accordance with clause (3) of Regulation 39 of the Mutual Funds Regulations;

iv) We hold that Regulations 39 to 41 of the Mutual Funds Regulations are legal and valid;

v) We direct the Securities and Exchange Board of India to ensure that the Forensic Auditors submits their report in accordance with Regulation 64 at the

earliest. After the report is submitted by the Forensic Auditor, the Securities and Exchange Board of India or its Chairman shall examine the report and shall take a decision on the question of taking action as provided in Regulation 65 of the Mutual Funds Regulations and under SEBI Act. The decision shall be taken within six weeks from the date of the receipt of the Forensic Audit Report;

vi) We direct the Trustees to provide true copies of the Board Resolutions placed on record in sealed cover to unit-holders of the said six Schemes as and when they apply for providing copies thereof;

vii) We hold that the unit-holders are not entitled to receive a copy of the Forensic Audit Report filed on record in a sealed cover;

viii) No other relief is required to be granted in these writ petitions;

ix) The Writ Petitions are partly allowed on the above terms;

x) There will be no order as to the costs.

IN WRIT PETITION NO 8748 OF 2020

In view of the decision on the above two writ petitions, this petition is disposed of with no order as to costs.

IN WRIT APPEAL NO 399 OF 2020

In view of disposal of the Writ Petition No 8644 of 2020, nothing survives in the writ appeal. The same is disposed of with no order as to costs.

COMMON ORDER

All the pending Interlocutory Applications stand disposed of.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

Vr/Mr