'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 54 OF 2016

OSIANS CONNOISSEURS OF ART PVT. LTD. Appellant(s)

VERSUS

SECURITIES AND EXCHANGE BOARD OF INDIA & ANR. Respondent(s)

WITH

CIVIL APPEAL NO. 19936 OF 2017

CIVIL APPEAL NO. 77 OF 2018

J U D G M E N T

R. F. NARIMAN, J.

CIVIL APPEAL NO. 54 OF 2016

Learned senior counsel appearing for the appellant seeks permission of the Court to withdraw the civil appeal.

The civil appeal is allowed to be withdrawn.

CIVIL APPEAL NO. 19936 OF 2017

The brief facts leading to the filing of the present civil appeal are as follows:

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Date: 2020.02.19 17:48:46 IST
Reason:

Two trusts named Yatra Art Fund Trust (Fund I) and Yatra Art Fund II (Fund II) were created under the Indian Trusts Act, 1882, through execution of Indentures of Trust

dated 15.06.2005 and 01.12.2006.

A perusal of the trust deed shows that both these trust Funds were created for an initial period of 4-4½ years, the first Fund ending, after extension of one year, on 15.09.2011. Insofar as the second Trust Fund is concerned, this Trust Fund was also extended and ended on 31.01.2012. It may also be mentioned that these Trusts Funds were established so that investors could invest in works of art. In the Confidential Information Memorandum, it was made clear to the investors that these were investments which were fraught with grave risks and that the investors invest in these Trusts Funds with open eyes knowing of the aforesaid risks.

So far as the first Fund was concerned, a total corpus amounting to Rs.10.95 crores was collected from the investors. We are informed that 50 such investors invested in this Fund. So far as the second Fund is concerned, the total corpus was Rs.21.92 crores, with 132 persons having so invested.

On 18.06.2007, the Securities and Exchange Board of India (hereinafter referred to as 'SEBI') first apprised the appellants, who are the trustees of these two Trusts Funds stating that, as these Funds were Collective Investment Schemes, they should apply for certificates of registration insofar as these Funds were concerned. This was responded to by Fund I on 16.07.2007, denying that the activities

would amount to the activities of a Collective Investment Scheme. As a result thereof, on 12.10.2007, SEBI issued a Show Cause Notice to show cause as to why the Yatra Art Fund should not register itself with SEBI in the prescribed corporate form, as otherwise the collective investment scheme carried out by the Trust would be illegal. The show cause notice also mentioned that all amounts collected should be refunded within a period of 30 days from the said show cause notice. On 05.11.2007, the appellants responded to the aforesaid show cause notice stating that there was no violation of Section 12 (1B) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with Regulation 3 of SEBI (Collective Investment Scheme) Regulations, 1999 (hereinafter referred to as 'CIS Regulations'); and as the appellants were not registered in the form of a company, the Regulations themselves would not apply. Secondly, detailed arguments were made as to why the schemes involved could not be said to be collective investment schemes. One year later, on 03.11.2008, a joint representation to SEBI was made stating that the aforesaid schemes floated by the appellants were not collective investment schemes, reiterating that they were not made in the corporate form.

It appears that, at this point of time, SEBI itself was unsure as to whether such funds would amount to collective investment schemes. However, in 2013, the matter

was resuscitated and after giving the appellants a hearing, inasmuch as as many as nine investors complained with regard to Trust Fund No.2, including an Investors' Association, an order was delivered by the whole-time member of SEBI on 06.11.2015 as follows:

> **"29. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11 and 11B thereof and Regulation 65 of the SEBI (Collective Investment Scheme) Regulation, 1999, hereby issue the following directions:**
> **a. Yatra Art fund shall abstain from collecting any money from the investors or launch or carry out any Collective Investment Schemes including the scheme which have been identified as a Collective Investment Scheme in this Order.**
> **b. Yatra Art Fund is directed to refund the entire monies collected by it under its scheme to all the investors along with the returns at the rate of 10% per annum, within a period of three months from the date of this Order and thereafter, within a period of fifteen days, submit a winding up and repayment report to SEBI in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999, including the trail of funds claimed to be refunded, bank account statements indicating refund to the investors and receipt from the investors acknowledging such refunds.**
> **c. Yatra Art Fund is restrained from accessing the securities market and are prohibited from buying, selling or otherwise dealing in securities market for a period of four (4) years.**
> **d. Yatra Art Fund is also directed to immediately submit the complete and detailed inventory of the assets owned by Yatra Art Fund.**
> **e. In the event of failure by Yatra Art Fund to comply with the above directions, the following actions shall follow:**
> **- Yatra Art Fund shall remain restrained from accessing the securities market and would furhter be prohibited from buying, selling or otherwise dealing in securities, even after the period of four (4) years of restraint imposed in Paragraph 29(c) above, till all the monies mobilized through such schemes are refunded to its investors with interest, which**

are due to them.
- SEBI would make a reference to the State Government/Local Police to register a civil/criminal case against Yatra Art Fund, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and
- SEBI shall also initiate attachment and recovery proceedings under the SEBI Act and rules and regulations framed thereunder."

An appeal was carried to the Securities Appellate Tribunal, which was then disposed of on 21.08.2017, following the Appellate Tribunal's judgment dated 13.10.2015 in *Osian's – Connoisseurs of Art Private Limited* v. *Securities and Exchange Board of India & Anr.* It may be pointed out that the Appellate Tribunal set aside the paragraphs of the SEBI's order which required the State Government to make a reference to register civil/criminal cases against the Fund and initiate attachment and recovery proceedings under the SEBI Act and Rules and Regulations. However, insofar as paragraph 29 (b) set out hereinabove of SEBI's order was concerned, the Appellate Tribunal remanded the matter to SEBI, adopting the reasoning contained in the earlier Tribunal judgment of 13.10.2015 as follows:

"……
……

For the reasons stated in our order in Appeal No. 62 of 2013 decided on October 13, 2015 the present appeals are disposed of in terms set out therein"

Having heard Shri K.V. Vishwanathan, learned senior

counsel appearing for the appellants and Shri C. U. Singh, learned senior counsel appearing for the respondent-SEBI, for some time, it would not be possible to state that the Schemes in the present case would not be Collective Investment Schemes. It is difficult, therefore, to interfere with the concurrent findings made in this behalf by both SEBI and the Appellate Tribunal.

Further, the arguments made by Shri Vishwanathan, learned senior counsel, based upon the language of Section 11AA of the SEBI Act does not commend itself to us. It may be mentioned that Section 11 (2)(c) of the SEBI Act states as follows:

> "11 (2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for-
> …….
>
> …….
>
> (c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;"

In 1995, Section 12(1B) was introduced, by which it became clear that no person can sponsor or cause to be sponsored or carry on or cause to be carried on any collective investment scheme unless he obtains a certificate of registration from the Board in accordance with the regulations.

What is of importance is to notice that the expression

"person" is used by Section 12(1B). However, in 1999, by amendment, Section 11AA was introduced in which it was stated as follows:

> **"11AA. Collective investment scheme.- (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) or sub-section (2A) shall be a collective investment scheme:**
>
> **Provided that any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under sub-section (3), involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme.**
>
> **(2) Any scheme or arrangement made or offered by any company under which,-**
>
> **(i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;**
>
> **(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;**
>
> **(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;**
>
> **(iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.**
>
> **(2A) Any scheme or arrangement made or offered by any person satisfying the conditions as may be specified in accordance with the regulations made under this Act.**
>
> **(3) Notwithstanding anything contained in sub-section (2) or sub-section (2A), any scheme or arrangement—**
>
> **(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;**

> **(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934;**
> **(iii) being a contract of insurance to which the Insurance Act, 1938, applies;**
> **(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952;**
>
> **(v) under which deposits are accepted under section 58A of the Companies Act, 1956;**
>
> **(vi) under which deposits are accepted by a company declared as a *Nidhi* or a mutual benefit society under section 620A of the Companies Act, 1956;**
>
> **(vii) falling within the meaning of Chit business as defined in clause (e) of section 2 of the Chit Fund Act, 1982;**
> **(viii) under which contributions made are in the nature of subscription to a mutual fund;**
>
> **(ix) such other scheme or arrangement which the Central Government may, in consultation with the Board, notify,**
>
> **shall not be a collective investment scheme."**

Based on the aforesaid, Shri Vishwanathan argued that it would not be possible for him to fall foul of the law considering that Section 11AA uses the word "company" and not "person", and as his client carried on this business in the form of a Trust, the provisions of SEBI Act would not be attracted at all.

This argument would fly in the face of both Section 12(1B) and the CIS Regulations, in particular, Regulation 2(h), which defined a "Collective Investment Management

Company" as follows:

> **"(h) "Collective Investment Management Company" means a company incorporated under the Companies Act, 1956 and registered with the Board under these regulations, whose object is to organise, operate and manage a collective investment scheme;"**

Regulation 3 of the CIS Regulations states:

> **"3. No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme."**

The statutory scheme, therefore, is that, if a collective investment scheme, as defined, is to be floated by a person, it could only be done in the form of a collective investment management company and in no other form. This is the reason why Section 11AA uses the expression "company" in sub-Section (2) and not the word "person" (as the CIS Regulations of 1999 had come into force on 15.10.1999; Section 11AA being enacted and coming into force on 22.02.2000).

Once the statutory scheme becomes clear, it is clear that the collective investment scheme that was being carried on by the appellants in the form of a private Trust would be in the teeth of the Statute read with the CIS Regulations and would thus be illegal.

This being the case, it is difficult to upset any part of SEBI's order that remains after the penultimate part of the order was set aside by the Appellate Tribunal.

However, we find that this litigation has been going on for an extremely long period of time and instead of remanding the matter to SEBI to decide the refund issue afresh, we order as follows:

The principal amount repayable to each investor of both the Schemes shall be paid back within a period of six months from today in the following manner:

We are informed that so far as the first Fund is concerned, 81.32 per cent of the total principal sum of Rs.10.95 crores has been repaid.

Insofar as Fund No. 2 is concerned, we have been informed that 50 per cent of the principal amount of Rs.21.92 crores has been repaid.

The balance owing to the 50 investors of Fund No. 1 and to the 132 investors of Fund No. 2 be therefore, repaid within six months from the date of this judgment.

So far as the interest at the rate of 10 per cent is concerned, this amount will be paid on the principal outstanding amount from the date on which it becomes due to each such member, till the date on which each Fund came to an end, i.e., insofar as Fund No. 1 is concerned till 15.09.2011 and so far as Fund No. 2 is concerned till 31.01.2012. The aforesaid interest shall be paid within nine months from the date of this judgment.

Once the amounts are actually paid within the time period specified, compliance report be filed with SEBI in

this behalf.

The appeal stands disposed of.

CIVIL APPEAL NO. 77 OF 2018

In terms of our judgment in Civil Appeal No. 19936 of 2017, this appeal stands disposed of.

……., J.
[ROHINTON FALI NARIMAN]

……., J.
[S. RAVINDRA BHAT]

……., J.
[V. RAMASUBRAMANIAN]

New Delhi;
February 12, 2020.