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Concept of Deemed Public Issue – a case study of Sahara India Judgement of the Supreme Court of India

"acta exterior indicant interiora secreta" (external action reveals inner secrets)

Leap of faith for advancement of corporate law in India – 15 June 1988 and 13 December 2000

Companies (Amendment) Act, 1988 came into effect on 15 June 1988. This amendment made certain revolutionary changes in the best interest of the stakeholders of a public company. W.e.f. 15 June 1988, any public company intending to make a public issue of shares or debentures was required to file an application for listing of such securities. The requirement of filing an application for listing brought the essential mandate of making significant disclosures about the promoters, business, financial statements, current state of affairs. The Amendment also obligated the companies to refund the share application money with interest if the company failed to procure a listing approval. The eligibility criteria for companies to get listed on recognized stock exchanges reduced the risk of undesirable or unsuitable companies from raising funds from the public.

This amendment, however, did not deter public companies from adopting a by-pass route of making multiple private placements/ preferential allotments to specific persons. Further, there was no limit on the number of such preferential offers that a company could make in a financial year.

It however took more than 12 years thereafter for the Government of India to take cognizance of such mischievous conduct by India Inc. By Companies (Amendment) Act, 2000, the concept of a deemed public issue was introduced by inserting a numeric threshold of persons to whom the shares or securities could be allotted by a company was introduced under s. 67(3) of the Companies Act to legally assume such issue as a public issue of securities.

The above changes marked the statutory introduction of corporate governance principles. Either of these legislative amendments obligated issuers of securities to discharge higher burden of corporate responsibility, transparency and accountability towards the stakeholders. Timely and appropriate disclosures pertaining to corporate information and performance, essential for an investor to make an informed decision was

implemented. These changes also expected a change of mindset from the Indian corporates by instilling financial discipline in their affairs and adherence to norms of compliance towards contributors of financial resources.

It was unfortunate that instead of embracing the spirit of law governing the transparency and accountability while making public issues, the misdemeanour of adopting aggressive interpretations and avoiding compliance of statutory provisions continued. It did not however, go unnoticed. SEBI and Department of Company Affairs stepped in to enforce appropriate compliance. Such compliance actions were challenged before different courts and tribunals. The binding interpretation of 'deemed public issue' was settled by the Supreme Court of India in the case of Sahara Real Estate Corporation Limited.

Introduction – Genesis of 'private placements'
Sahara India Real Estate Corporation Limited (**"SIRECL"**) and Sahara Housing Investment Corporation Limited (**"SHICL"**), (conveniently called **"Saharas"**), are the companies controlled by Sahara Group. SIRECL was originally incorporated as Sahara India C Junxion Corporation Limited on 28.10.2005 as a public limited company under the Companies Act and it changed its name to SIRECL on 7.3.2008. As per the Balance Sheet of the company as on 31.12.2007, its cash and bank balances were ₹ 6,71,882 and its net current assets worth ₹ 6,54,660. Company had no fixed assets nor any investment as on that date. SIRECL's operational and other expenses for the three quarters ending 31.12.2007 were ₹ 9,292 and the loss carried forward to the Balance Sheet as on that date was ₹ 3,28,345.

SIRECL, in its extraordinary general meeting held on 3.3.2008, resolved through a special resolution passed in terms of section 81(1A) of the Companies Act, 1956 (equivalent to s. 62(1)(c) of the Companies Act, 2013) to raise funds through unsecured Optionally Fully Convertible Debentures (**"OFCDs"**) by way of "private placement" to "friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara Group of Companies" (**"Sahara Group"**) without giving any advertisement to general public. SIRECL authorized its Board of Directors to decide the terms and conditions and revision thereof, namely, face value of each OFCD, minimum application size, tenure, conversion, and interest rate. Board of Directors, consequently, held a meeting on 10.3.2008 and resolved to issue unsecured OFCDs by way of private placement, the details of which were mentioned in the Red Herring Prospectus ("RHP") filed with the Registrar of Companies ("RoC"), Kanpur. SIRECL had specifically indicated in the RHP that they did not intend to get their securities listed on any recognized stock exchange, and that only those persons to whom the Information Memorandum ("IM") was circulated and/or approached privately who were associated/affiliated or connected in any manner with Sahara Group, would be eligible to apply. Further, it was also stated in the RHP that the funds raised by the company would be utilized for the purpose of financing the acquisition of townships, residential apartments, shopping complexes etc. and construction activities would be undertaken by the company in major cities of the country and also would finance other commercial activities/projects taken up by the company within or apart from the above projects. RHP also indicated that the intention of the company was to carry out infrastructural activities and the amount collected from the issue would be utilized in financing the completion of projects, namely, establishing/ constructing the bridges, modernizing or setting up of airports, rail system or any other projects which might be allotted to the company from time to time in future. RHP also highlighted the intention of the company

to engage in the business of electric power generation and transmission and that the proceeds of the current issue or debentures would be utilized for power projects which would be allotted to the company and that the money, not required immediately, might be parked/invested, inter alia, by way of circulating capital with partnership firms or joint ventures, or in any other manner, as per the decision of the Board of Directors from time to time. SIRECL, under Section 60B of the Companies Act, filed the RHP before the RoC, Uttar Pradesh on 13.3.2008, which was registered on 18.3.2008. SIRECL then in April 2008, circulated IM along with the application forms to its so-called friends, associated group companies, workers/employees and other individuals associated with Sahara Group for subscribing to the OFCDs by way of private placement. Then IM carried a recital that it was private and confidential and not for circulation. It would be relevant to refer to the statements made by SIRCEL in the IM:

Private & Confidential (Not for Circulation) Information Memorandum for Private Placement of Optionally Fully Convertible Unsecured Debentures (OFCD)

This Memorandum of Information is being made by Sahara India Real Estate Corporation Limited (formerly Sahara India 'C' Junxion Corporation Limited) which is an unlisted Company and neither its equity shares nor any of the bonds/debentures are listed or proposed to be listed. This issue is purely on the private placement basis and the company does not intend to get these OFCD's listed on any of the Stock Exchanges in India or Abroad. This Memorandum for Private Placement is neither a Prospectus nor a Statement in Lieu of prospectus. It does not constitute an offer for an invitation to subscribe to OFCD's issued by Sahara India Real Estate Corporation Limited. The Memorandum for Private Placement is intended to form the basis of evaluation for the investors to whom it is addressed and who are willing and eligible to subscribe to these OFCD's. Investors are required to make their own independent evaluation and judgment before making the investment.

The contents of this Memorandum for Private Placement are intended to be used by the investors to whom it is addressed and distributed. This Memorandum for Private Placement is not intended for distribution and is for the consideration of the person to whom it is addressed and should not be reproduced by the recipient. The OFCD's mentioned herein are being issued on a private placement basis and this offer does not constitute a public offer/ invitation. SIRECL issued Abode Bond, Real Estate Bond and Nirmaan Bond with tenure ranging from 48 months to 120 months and convertible into equity shares at the option of the investor.

SIRCEL floated the issue of the OFCDs as an open ended scheme and collected Rs 19,400 crore from 25.4.2008 to 13.4.2011 from 2,21,07,271 investors.

SHICL, also convened an Annual General Meeting on 16.9.2009 and passed a special resolution to raise funds by issue of OFCDs, by way of private placement, to *"friends, associated group companies, workers/employees and other individuals associated/affiliated or connected in any manner with the Sahara Group companies". Consequently, a RHP was filed on 6.10.2009 under Section 60B of the Companies Act with the RoC, Mumbai, Maharashtra, which was registered on 15.10.2009. Later, SHICL issued OFCDs of the nature of Housing Bond; Income Bond, Multiple Bond.*

SEBI steps in

SEBI had come to know of the large scale collection of money from the public by Saharas through OFCDs, while processing the RHP submitted by Sahara Prime City

Limited, another Company of the Sahara Group, on 12.1.2010 for its initial public offer. When SEBI sought a clarification from Enam Securities Private Limited, merchant bankers of Sahara Prime City Limited about the complaint received from one Roshan Lal alleging that Sahara Group was issuing Housing bonds without complying with Rules/Regulations/ Guidelines issued by RBI/MCA/NHB. The Merchant Banker replied that SIRECL and SHICL were not registered with any stock exchange and were not subjected to any rule/ regulation/guidelines/notification/directions framed thereunder and the issuance of OFCDs were in compliance with the applicable laws. Following the above, another letter dated 26.2.2010 was also sent by the Merchant Banker to SEBI stating that SIRECL and SHICL had issued the OFCDs pursuant to a special resolution under Section 81(1A) of the Companies Act, 1956 passed on 3.3.2008 and 16.9.2009 respectively. Further, it was also pointed out that they had issued and circulated an IM prior to the opening of the offer and that RHP issued by SIRECL dated 13.3.2008 was filed with RoC, U.P. and Uttarakhand and RHP issued by SIHCL dated 6.10.2009 was filed with RoC, Maharashtra.

Based on preliminary review, SEBI informed SIRECL and SHICL that the issuance of OFCDs was a public issue and, therefore, securities were liable to be listed on a recognized stock exchange under Section 73 of the Companies Act. It was pointed out that the issuance of OFCDs by Saharas was prima facie in violation of Sections 56 and 73 of the Act and also various clauses of DIP Guidelines and SHICL had also prima facie violated Regulations 4(2), 5(1), 6, 7, 16(1), 20(1), 25, 26, 36, 37, 46 and 57 of ICDR 2009. Both the companies were, therefore, directed to show cause why action should not be initiated against them including issuance of direction to refund the money solicited and mobilized through the prospectus issued with respect to the OFCDs, since they had violated the provisions of the Companies Act, SEBI Act, erstwhile DIP Guidelines and ICDR 2009.

Ministry of Corporate Affairs also initiated independent investigations against Saharas in respect of the alleged violations.

Sahara questions SEBI's legal authority

From the very inception of the scheme to issue OFCDs through the hearings before the Supreme Court, Saharas maintained its stance that -

(i) Saharas had made private placement of OFCDs to persons who were associated with Sahara Group and such issues were not public issues;

(ii) OFCDs issued were in the nature of hybrid as defined under the Companies Act and SEBI did not have jurisdiction to administer those securities since Hybrid securities were not included in the definition of 'securities' under the SEBI Act, SCR Act etc.

(iii) such hybrids were issued in terms of Section 60B of the Companies Act and, therefore, only the Central Government had the jurisdiction under Section 55A(c) of the Companies Act;

(iv) Sections 67 and 73 of the Companies Act could not be made applicable to Hybrid securities, so also the DIP Guidelines and ICDR 2009; and

(v) Saharas had raised funds by way of private placement to friends, associates, group companies, workers/employees and other individuals associated/ affiliated with Sahara Group, without giving any advertisement to the public and RoC, Kanpur and Maharashtra had registered those RHPs without any demur and, therefore, it was unnecessary to send it to SEBI.

SEBI Final Order and Conclusions

SEBI passed its final order through its whole-time member (WTM) on 23.6.2011. SEBI examined the nature of OFCDs issued by Saharas and came to the conclusion that OFCDs issued would come within the definition of securities as defined under Section 2(h) of SCR Act. SEBI also found that those OFCDs issued to the public were in the nature of Hybrid securities, marketable and would not fall outside the genus of debentures. SEBI also found that the OFCDs issued, by definition, design and characteristics intrinsically and essentially, were debentures and the Saharas had designed the OFCDs to invite subscription from the public at large through their agents, private offices and information memorandum. SEBI concluded that OFCDs issued were in fact public issues and the Saharas were bound to comply with Section 73 of the Companies Act, in compliance with the parameters provided by the first proviso to Section 67(3) of the Companies Act. SEBI took the view that OFCDs issued by Saharas should have been listed on a recognized stock exchange and ought to have followed the disclosure requirement and other investors' protection norms. Having found so, SEBI directed Saharas to refund the money collected under the Prospectus dated 13.3.2008 and 6.10.2009 to all such investors who had subscribed to their OFCDs, with interest.

SEBI's final order summarized its salient conclusions as under:

1. OFCDs are hybrid instruments and are `debentures.

2. The definition of `securities under Section 2(h) of the SCR Act is an inclusive one and can accommodate a wide class of financial instruments. The OFCDs issued by the two Companies fall well within this definition.

3. The issue of OFCDs by the two Companies is public in nature, as they have been offered and issued to more than fifty persons, being covered under the first proviso to Section 67(3) of the Companies Act. The manner and the features of fund raising under the OFCDs issued by the two Companies further show that they cannot be regarded to be of a domestic concern or that only invitees have accepted the offer.

4. Section 60B deals with the issue of information memorandum to the public alone. Therefore the same cannot be used for raising capital through private placements as the said provision is exclusively designed for public book built issues. When a company files an information memorandum under Section 60B, it should apply for listing and therefore has to be treated as a listed public company for the purposes of Section 60B(9) of the Companies Act. Further, Section 60B has to be read together with all other applicable provisions of the Companies Act and cannot be adopted as a separate code by itself for raising funds, without due regard to the scheme and purpose of the Act itself. The same evidently has never been the intention of the Parliament.

5. The two companies, in raising money from the public, in violation of the legal framework applicable to them, have not complied with the elaborate investor protection measures, explained in paragraph 25 above. This, inter alia, also means that the rigorous scrutiny carried out by SEBI Registered intermediaries on any public issue by a public company have been subverted in the mobilization of huge sums of money from the public, by the two Companies.

6 The two Companies have not executed debenture trust deeds for securing the issue of debenture; failed to appoint a debenture trustee; and failed to create a debenture redemption reserve for the redemption of such debentures.

7. The two Companies have failed to appoint a monitoring agency (a public financial institution or a scheduled commercial bank) when their issue size exceeded Rs 500 cr., for the purposes of monitoring the use of proceeds of the issue. This mechanism is put in place to avoid siphoning of the funds by the promoters by diverting the proceeds of the issue.

8. The two companies failed to enclose an abridged prospectus, containing details as specified, along with their forms.

9. The companies have kept their issues open for more than three years/ two years, as the case may be, in contravention of the prescribed time limit of ten working days under the regulations.

10. The two companies have failed to apply for and obtain listing permission from recognized stock exchanges.

Proceedings before Securities Appellate Tribunal – SAT upholds SEBI Final Order and directs refund

Aggrieved by the order of SEBI, Saharas filed appeals before the Securities Appellate Tribunal (SAT). SAT upheld the Order passed by SEBI and passed a common order on 18.10.2011. SAT held that OFCDs issued were securities within the meaning of Clause (h) of Section 2 of SCR Act, so also under SEBI Act. Tribunal also noticed that RHP issued by SIRECL was registered by the RoC on 18.3.2008, though information memorandum (IM) was issued later in April 2008 in clear violation of Section 60B of the Companies Act.

SAT further held that IM was issued through 10 lakh agents and more than 2900 branch offices to more than 30 million persons inviting them to subscribe to the OFCDs which amounted to invitation to public.

SAT also found fault with the RoC as it had failed to forward the draft RHP to SEBI since it was a public issue and hence violated Circular dated 1.3.1991 issued by the Department of Company Affairs, Government of India.

SAT concluded that having made a public issue, Saharas cannot escape from complying with the requirements of Section 73(1) of the Companies Act on the ground that the companies had not intended to get the OFCDs listed on any stock exchange. SAT also examined the scope and ambit of Sections 55A of Companies Act read with Sections 11, 11A and 11B of SEBI Act and took the view that a plain reading of those provisions would indicate that SEBI has jurisdiction over the Saharas since OFCDs issued were in the nature of securities and hence should have been listed on any of the recognized exchanges of India.

SAT confirmed the SEBI Order against Saharas to refund a sum of ₹ 17,400 crore approximately on or before 28th November, 2011.

Saharas appeal before the Supreme Court of India

Aggrieved by the Order passed by SAT, Saharas preferred an appeal before the Supreme Court. Based on the submissions, various questions of laws were raised before the Supreme Court. Following cardinal issues concerning “deemed public issue” principles came up for consideration before the Supreme Court:

Questions of Law Framed

(i) Whether Section 67 of the Companies Act implies that the company's offer of shares or debentures to fifty or more persons would ipso facto become a public issue, subject to certain exceptions provided therein and the scope and ambit of the first proviso to Section 67(3) of the Act, which was inserted w.e.f. 13.12.2000 by the Companies (Amendment) Act, 2000;

(ii) What is the scope and ambit of Section 73 of the Companies Act and whether it casts an obligation on a public company intending to offer its shares or debentures to the public, to apply for listing of its securities on a recognized stock exchange once it invites subscription from fifty or more persons and what legal consequences would follow, if permission under sub-section (1) of Section 73 is not applied for listing of securities;

(iii) Scope of Section 73(2) of the Companies Act regarding refund of the money collected from the Public.

Questioning the interpretation of the provisions of the Companies Act and SEBI Act, Saharas argued that:

(a) After the insertion of the definition of securities in Section 2(45AA) as including hybrid and the definition of hybrid in Section 2(19A) of the Companies Act, the provisions of Section 67 were not applicable to OFCDs which have been held to be hybrid. Various bonds issued by Saharas, were never shares or debentures but hybrids, a separate and distinct class of securities. Section 67, it was submitted, speaks only of shares and debentures and not hybrids and, therefore, Section 67 would not apply to OFCDs issued by SIRECL.

(b) Referring to various terms and conditions of the Abode Bond, Nirmaan Bond and Real Estate Bond Saharas submitted that they are convertible bonds falling with the scope of Section 28(1)(b) of the SCR Act, in view of Section 9(1) and Section 9(2)(m) of that Act and are not listable securities within the meaning of Section 2(h) of the SCR Act and hence there is no question of making applications for listing under Section 73(1) of the Companies Act was also submitted that three Registrars of Companies West Bengal, Kanpur, and Mumbai had, at different point of time, registered the RHPs at different places over a period of nine years. Registrars of Companies could have refused registration under Section 60(3) of the Companies Act as well, if there was non-compliance of the provisions of the Companies Act. Saharas pointed out that having not done so, it is to be presumed that private placement under Section 60B of the Companies Act was permissible and hence no punitive action including refund of the amounts is called for and the order to that effect be declared illegal.

Intriguing Arguments by Saharas

An intriguing argument was advanced by Saharas that any act of compulsion on Saharas to list their shares or debentures on a stock exchange would make serious inroad into their corporate autonomy. According to Saharas, the concept of autonomy involves the rights of shareholders, their free speech, their decision making and all other factors.

Secondly, SEBI's insistence that Saharas ought to have listed their shares or debentures on a recognized stock exchange in accordance with Section 73 of the Companies Act would necessarily expose shareholders and debenture holders to the risks of trading in shares and

would also compel unlisted companies to seek financial help from investment bankers. Relying upon the judgment of this Court in ***Union of India vs. Allied International Products Ltd. & Anr. (1970) 3 SCC 594*** Saharas submitted that Section 73(1) was enacted with the object that the subscribers would be ensured the facility of easy convertibility of their holdings when they have subscribed to the shares on the representation in the prospectus that an application for quotation of shares had been or would be made. It is the obligation on the company which has promised the members of the public that their shares would be marketable or capable of being dealt with in the stock exchange. In support of this argument, Saharas referred to Section 51 of the Companies Act, 1948 (U.K.) and the judgment in ***In re. Nanwa Gold Mines Ltd. (1955) 1 WLR 1080*** and submitted that the object of Section 51 was to protect those persons who had paid money on the faith or the promise that their shares would be listed.

Other principal submissions by Saharas

(a) Sub-section (1) of Section 73 is qualified by the term intending, which means Section 73(1) deals with companies that want to issue new shares or debentures to be listed, and which have declared to the investors that they intend to have those shares or debentures dealt with on the stock exchange. In such a case, Section 73(1) obliges those companies to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be dealt with on the stock exchange or each such stock exchange, before the issue of a prospectus.

(b) The role of Section 73(1) is narrow and limited and those companies which do not intend to list their securities on a stock exchange are not covered by this provision. Further, the expression to be dealt in on stock exchange occurring in the heading of Section 73 must be read in the text of that Section, to reach the understanding that it is not merely the invitation of shares or debentures to the public which warrants the application of Section 73, but it is only when such companies intend to have their shares or debentures listed on the stock exchange that the prescription under Section 73 shall apply. Saharas' contended that the company's freedom to contract under the Constitution as well as the Law of Contracts needs to be safeguarded and that persons who belong to the lower echelons of society, while it is necessary that they must never be duped, ought not be prevented from investing in measures which would add to their savings and that to deprive them of such an opportunity would be a serious infraction.

(c) Referring to Section 64 of the Companies Act, Saharas submitted that the expression "deemed to be prospectus" indicates that whenever shares or debentures which are allotted can be offered for sale to the public, such a document is deemed to be a prospectus and has legal consequences. Section 73 operationalizes the intention of a company which is allotment of shares with a view to sell to the public as contemplated in Section 64 of the Act. So, while Section 64 refers to the documents containing such an offer as a prospectus, Section 73 requires the company to make an application before the issue of the prospectus.

(d) Mere filing of prospectus is not reflective of the intention to make a public offer. The purpose of issue of prospectus is to disclose true and correct statements and it cannot be

characterized as an invitation to the public for subscription of shares or debentures. Filing of the prospectus or the administration of Section 62 on account of misstatement in a prospectus should be undertaken by the Central Government on account of explanation to Section 55A of the Companies Act.

(e) The manner in which a listed public company will offer its shares would be determined under the SEBI Act as well as the SEBI Regulations.

(f) Section 60B of the Companies Act, as such, does not presuppose or prescribes an intention to list. Section 60B enables a prospectus to be filed where a company is not a listed public company.

(g) IM or RHPs can be filed although an offer of shares may be made by way of private placement or to a section of the public or even to the public, but yet without intending it to be listed and that the stand of SEBI that where there is an offer of shares or debentures by way of prospectus, it amounts to an offer of shares to the general public and, therefore, to be dealt with on a stock exchange, is completely flawed and that Section 73 cannot be interpreted to impinge upon the corporate autonomy of the company.

(h) Section 67 of the Companies Act does not imply that a company's offer of shares or debentures to fifty or more persons would ipso facto become a public issue. In order to determine whether an offer is meant for the public at large or by way of private placement, what is relevant is the intention of the offeror. In other words, the numbers are irrelevant, it is only the intention to offer to a select or identified group which will make the offer a private placement. The proviso to sub-section (3) of Section 67 of the Companies Act should be appreciated in that background.

(i) A private placement is not authorized by interpretative provision in Section 67(3) but is in fact the will of the company reflected in a Special Resolution under Section 81(1A) of the Companies Act which deals with preferential allotment. Saharas' argued that when there is a private placement, irrespective of the number, then the offer of shares need not take place through a prospectus but can even take place through a letter or a memorandum.

SEBI's contentions

It was submitted on behalf of SEBI that Saharas' basic assumption that they are covered by 2003 Rules was erroneous. A public issue would not become a preferential allotment by merely labelling it as such and the facts on record show that the issue could not be termed as a preferential allotment. A preferential allotment is made by passing a special resolution under Section 81(1A) and is an exception to the rule of rights issue that requires new shares or debentures to be offered to the existing members/holders on a pro rata basis. Once the offer is made to more than forty-nine persons, then apart from compliance with Section 81(1A), other requirements regarding public issues have to be complied with.

After insertion of the proviso to Section 67(3) in December, 2000, private placement as allowed under Section 67(3) was restricted up to forty nine persons only and 2003 Rules were framed keeping this statutory provision in mind and were never intended for private placement/preferential issue to more than forty nine persons and the amendments to these rules made in the year 2011 merely made

the said legal position under the 2003 Rules, explicit.

OFCDs are 'debentures' by name and the nature and the definition of 'debenture' as given under Section 2(12) of the Companies Act includes any other securities. SEBI maintained that the securities as defined in Section 2(45AA) of the Companies Act includes hybrids and, therefore, hybrids fall in the definition of debentures and are amenable to the provisions of Sections 67 and 73 of the Companies Act.

Supreme Court rules

The Supreme Court noted that the documents produced before the apex court and before the fact- finding authorities do not show the relationship Sahara Group had with the investors. Claim of Saharas was that the investors were their friends, associated group companies, workers/employees and other individuals who were associated/affiliated or connected with Sahara Group. Saharas, in the bonds, sought for a declaration from the applicants that they had been associated with Sahara Group. No details had been furnished to show what types of association the investors had with Sahara Group. Bonds also required to name an introducer, whose job evidently was to introduce the company to the prospective investor. If the offer was made to those persons related or associated with Sahara Group, there was no necessity of an introducer and an introduction. Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have not discharged. Fact finding authorities have clearly held that Saharas had not discharged their burden which is purely a question of fact.

The Supreme Court did not find any perversity or illegality in the findings of SEBI or SAT which call for interference by the apex court sitting in appeal under Section 15Z of the SEBI Act. The Supreme Court therefore fully concurred with the Tribunal that the money collected by Saharas through their RHPs dated 13.3.2008 and 6.10.2009, through the OFCDs, were from the public at large and the same would amount to collection of money by way of issue of securities to the public, a finding which calls for no interference by this Court sitting under Section 15Z of the SEBI Act.

Lifting of Corporate Veil

The Supreme Court took a special note of the fact that through this dubious method SIRECL had –

(i) utilized the services of its staff in 2900 branches/service centres;

(ii) utilized the services of more than one million agents/representatives;

(iii) approached more than thirty million investors;

(iv) out of 30 million persons approached, 22.1 million persons invested in the OFCDs;

(v) SIRECL raised nearly 20,000 crore

and concluded that the Court can, in such circumstances, lift the veil to examine the conduct and method adopted by Saharas to defeat the various provisions of the Companies Act read with the provisions of the SEBI Act.

Supreme Court concludes on Deemed Public Issue

Based on the above facts and circumstances, the Supreme Court fully endorsed the findings recorded by SEBI and SAT that the placement of OFCDs by Saharas was nothing but issue of debentures to the public, resultantly, those securities should have been listed on a recognized stock exchange.

The Supreme Court noted that Section 67dealt with the offer of shares and debentures and

invitation to subscribe to the same to the public. It further stated that no offer or invitation shall be treated as made to the public, or to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation. A public company can escape from the rigor of provisions, if the offer is made by companies mentioned under Section 67(3A), i.e. by public financial institutions specified under Section 4A or by non-banking financial companies referred to in Section 45I(f) of the Reserve Bank of India Act, 1934.

Following situations, it is generally regarded, as not an offer made to public.

- Offer of securities made to less than 50 persons;
- Offer made only to the existing shareholders of the company (Right Issue);
- Offer made to a particular addressee and be accepted only persons to whom it is addressed;
- Offer or invitation being made and it is the domestic concern of those making and receiving the offer.

Resultantly, the Supreme Court concluded that if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation.

Obligations of the Issuer in case of a deemed public issue

Section 73(1) of the Companies Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act.

The Supreme Court acknowledged that from the years 1988 to 2000, private placement of preferential allotment could be made to fifty or more persons if the requirements of Clauses (a) and (b) of Section 67(3) are satisfied. However, after the amendment to the Companies Act, 1956 on 13.12.2000, every private placement made to fifty or more

persons becomes an offer intended for the public and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange.

Intent of the Issuer to make a public issue

Saharas had vehemently argued that the issuer companies announced loudly and clearly time and again through IM, RHP and application forms that they had no intention to get the OFCDs listed on any recognized stock exchanges in India or abroad.

The Supreme Court observed that listing is a legal responsibility of the company which offers securities to the public, provided offers are made to 50 or more persons. In view of the clear statutory mandate, the contention raised, based on Rule 19 of the SCR Rules framed under the SCR Act, has no basis. Legal obligation flows the moment the company issues the prospectus expressing the intention to offer shares or debentures to the public, that is to make an application to the recognized stock exchange, so that it can deal with the securities. A company cannot be heard to contend that it has no such intention or idea to make an application to the stock exchange. Company's option, choice, election, interest or design does not matter, it is the conduct and action that matters and that is what the law demands. Law judges not what is in their minds but what they have said or written or done. ***Lord Diplock in Gissing vs. Gissing (1971) 1 AC 886,*** has said, As in so many branches of English Law, in which legal rights and obligations depend upon the intention of each party, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that partys words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. Lord Simon in ***Crofter Hand Woven Harris Tweed Co. Ltd. vs. Veitch [1942] AC 435,*** opined that in some branches of law, intention may be understood to cover results which may reasonably flow from what is deliberately done, the principle being that a man is to be treated intending the reasonable consequences of his acts.

The maxim "acta exterior indicant interiora secreta" (external action reveals inner secrets) applies with all force in the case of Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited on matters of fact as well as law. Conduct and actions of Sahara Group of Companies indicated their intention. Such so called intention must be judged from their subsequent conduct. In the case of Sahara India, the Supreme Court of India observed that subsequent illegality shows that Sahara Group of Companies contemplated illegality. A person's inner intentions are to be read and understood from his acts and omissions. Whenever, in the application of an enactment, a person's state of mind is relevant, the above maxim comes into play. (***Ref. Bennion on Statutory Interpretation, 5th Edn., p. 1104***)

State of mind and its manifestation – critical for assessment of corporate conduct

The Supreme Court observed that what is intended is a matter of the mind. Therefore, unless actions speak for themselves, no presumption can be drawn on the intent of a party. Intent as one commonly understands

is something aimed at or wished as a goal; it is something that one resolves to do; it is a will to achieve as an end; it is a direction as one's course; it is planning towards something to be brought about; it is something that an individual fixes the mind upon; it is a design for a particular purpose. When a party expresses its design repeatedly in writing, as it is the case of Saharas, no contrary assumption should normally be drawn. But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, intent has its limitations also, confining it within the confines of lawfulness. It has already been concluded above, that SIRECL and SHICL had not invited subscriptions to their respective OFCDs by private placement. It has been held, not only inferentially, but also as a matter of law (on an interpretation of section 67 of the Companies Act), as also, as a matter of fact, that the SIRECL and SHICL had called for subscription to their respective OFCDs by way of an invitation to the public. It has also been deduced that an invitation for subscription from the public, could have been made only by way of listing, through one or more recognized stock exchange(s). It has also been concluded that the purpose sought to be achieved by the two companies (relying on section 60B of the Companies Act) by merely complying with the requirements of the procedure contemplated in section 60B of the Companies Act, is not acceptable in law, as section 60B is not a standalone provision. Section 60B of the Companies Act has to be harmoniously read along with other provisions of the Companies Act (as for instance section 67). Saharas must be deemed to have intended to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the Sahara Group of Companies could have intended, what was contrary to the mandatory requirement of law.

Saharas, according to the Supreme Court, did not follow any of those statutory requirements. On a combined reading of the proviso to Section 67(3) and Section 73(1), it is clear that the Saharas had made an offer of OFCDs to fifty persons or more, consequently, the requirement to make an application for listing became obligatory leading to a statutory mandate which they did not follow.

Action taken by SEBI and upheld by SAT in other cases

The Sahara Judgement has been implemented by SEBI in letter and spirit in several other issues of securities. The Securities Appellate Tribunal in Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016) observed that "In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant has violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning".

In the case of "In re Orion Industries Limited" ("OIL")(In re deemed public issue norms) RPS were issued by OIL to 4,191 investors during the financial years 2011-12 and 2012-13 and OIL has raised total amount of ₹ 5,46,48,000. Since, OIL has allotted RPS to more than forty-nine allottees, SEBI concluded that the offer of RPS is a "public issue" within the first proviso of Section 67(3) of Companies Act and OIL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act.

Missed Opportunities:

While the Supreme Court of India laid down the foundational interpretation of what constitutes a 'deemed public offer', the Supreme Court could have also laid down

some principles regarding the corporate law practices or compliance gaps observed in the case:

1. The special resolutions passed by the Sahara Group of Companies did not fulfil the regulatory expectations of the Companies Act insofar as it lacked the specificity or identity of persons to whom the securities were offered on a private placement basis. Interestingly, the Companies Act mentions 'any persons' to whom the shares would be offered on a preferential allotment basis. The language employed by the statute does not permit the resolution to include a 'select group of persons' to be described by a nebulous unidentifiable class of population. The phrase has now found its way to section 42 of the Companies Act, 2013. The essence of a special resolution under s. 81(1A) of CA 1956 (as well as under section 62 of Companies Act, 2013), would be to name the potential allottees so that the shareholders would be aware of the identity and credentials of persons to whom securities would be offered in priority over the existing shareholders and the extent to which the existing shareholders rights would be diluted.

2. There does not seem to be any discussion about the contents and compliance in relation to the explanatory statement attached to the notices convening general meetings of Saharas. It is quite likely that the explanatory statements fell quite short of the legislative expectation under the then applicable law regarding mandatory disclosures.

3. The nature of securities issued were Optionally Fully Convertible Debentures. If these were to be converted into equity shares of the Sahara entities, the authorized share capital ought to have been increased upfront prior to the opening of the subscription to OFCDs as a prudent compliance norm.

4. Raising funds using OFCDs required enhancement of borrowing powers by the Saharas. It is not clear whether the Sahara Group of Companies had passed any resolution seeking a borrowing limit of ₹ 20,000 crore with the paid up capital continuing at a meagre ₹ 10 Lacs.

5. The OFCDs were optionally convertible securities and were unsecured. To this extent, the amount raised by the Saharas would constitute 'deposits' within the meaning of s. 58A of the Companies Act, 1956 and Rules made thereunder. It is not clear whether the non-compliance of the Companies (Acceptance of Deposits) Rules, 1975 was tested by the Registrar of Companies.

6. The debt-equity ratio for SIRECL or SHICL after raising funds through the issue of OFCDs would have been 20,000 crore: 10 Lacs. This would be an obvious recipe for financial disaster or fraud. Such numbers demonstrate for themselves a complete failure by the board of directors to fulfil the fiduciary obligations towards stakeholders.

Section 42 of the Companies Act, 2013

The concept of 'deemed public issue' as well as mandatory listing requirements have been included under section 42 of the Companies Act, 2013. Under s. 42, a private placement can be made only to 'identified persons' and the total number of such identified persons cannot exceed 200 in a financial year. The interpretative guidance provided by the Supreme Court of India in the Sahara Judgement continues to apply with full force and effect.

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