

(2006) 07 DEL CK 0193

In the Delhi High Court

Case No : Writ Petition (C) No. 7463 of 2000

Indian Bank Mutual Fund and Others

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 13-07-2006

Acts Referred:

Securities and Exchange Board of India Act, 1992 — Section 11, 11(1), 11(2), 11B, 17
Trusts Act, 1882 — Section 15, 23, 3, 30, 4

Citation : (2006) 07 DEL CK 0193

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : C.S. Vaidyanathan and S.R. Sharma and Gautam Awasthi, Rajiv Nayyar and Poonam Sharma, for Petitioner No, for the Appellant; Arvind Nigam and Neeraj Malhotra, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—The Writ petitioners are seeking quashing of the impugned order dated 18.2.2000 passed by the Central Government being the Appellate Authority u/s 20 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the SEBI Act). The Appeal u/s 20 of the SEBI Act had in turn been preferred by the petitioners herein as they were aggrieved by an order dated 20.11.1999 passed by the Securities and Exchange Board of India in exercise of its powers u/s 11-B of the SEBI Act. By virtue of the impugned order dated 18.2.2000, the appeal preferred by the petitioners against the said order dated 30.11.1999 was dismissed by the Central Government. The SEBI by its order dated 30.11.1999 had directed as under:

Now, Therefore, in exercise of the powers conferred vide Section 11B of the SEBI Act, 1992 I hereby direct the Indian Bank Mutual Fund to redeem plan A of the Ind Pakash Scheme at prices as assured in terms of the offer document and in case of plan B to pay the cumulative minimum value at the end of the scheme as on 30/11/99.

If the Indian Bank Mutual Fund is not in a position to pay the investors the assured returns as aforesaid, the shortfall shall be borne by the Indian Bank, being the sponsor and principal trustee of the Mutual Fund. The bank shall submit its proposal of funding to Mutual Fund to the extent of shortfall to SEBI within a period of 30 days from the date of this Order.

2. The petitioner No.1 (Indian Bank Mutual Fund) (hereinafter referred to as IBMF) is a mutual benefit fund created under the Indian Trust Act, 1882. The petitioner No.2 is the Indian Bank which is a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 and is the principal trustee of the Indian Bank Mutual Fund. The Securities and Exchange Board of India is the sole respondent.

3. IBMF which is a trust under the Indian Trust Act, 1882 floated various schemes from time to time. In 1991, IBMF conceived a scheme known as the Ind Prakash Scheme. However, the scheme as originally conceived was an assured return scheme and the Reserve Bank of India did not give its clearance to such a scheme. The Reserve Bank of India by its letter dated 19.7.1991 (Annexure P-2) wrote to IBMF as under:

We advise that we have no objection to your mutual fund floating a new scheme to be known as "Ind Prakash" offering returns as indicated in your letter referred to above. However, the mutual fund should not indicate the specific guaranteed returns or bonus in its advertisements and prospectus. Only an approximate minimum yield should be mentioned.

Subsequently, IBMF sent a letter dated 4.11.1991 to the Reserve Bank of India modifying the Ind Prakash Scheme and enclosed a copy of the revised scheme and rules and regulations along with the said letter. In response, the Reserve Bank of India by a letter dated 1.1.1992 indicated as under:

...We have no objection to your launching "Ind Prakash" Scheme with the returns indicated therein.

Thereafter, IBMF floated the scheme as approved by the Reserve Bank of India and published its offer document, a copy of which is annexed as Annexure D to the writ petition. The relevant clauses of the offer document are as under:

2. OBJECT

Indian Bank Mutual Fund has been set up with a view to mobilise savings from the Indian public and to invest them to get a good return on investments and achieve long term capital appreciation and in the process assist capital formation and industrial development of the country and to provide investment expertise for the benefit of the investors. Indian Bank has created a Trust for this purpose. The Trust will pool the funds from members of public for collective investment which would include subscription, acquisition, holding, management, trading or disposal of securities or any other assets whatsoever for the purpose of having the effect of providing facilities for participation by the persons as beneficiaries in

profits or income arising there from.

3. THE SCHEME AND ITS OBJECTIVES

Indian Bank Mutual Fund has formulated "Annual Income and Growth Scheme 1992" under which IND PRAKASH units are being issued by this offer.

The terms and conditions of the scheme are governed by Indian Bank Mutual Fund Scheme known as "Annual Income and Growth Scheme 1992-IND PRAKASH". (Approved by Reserve Bank of India vide their letter DBOD NO.FSC.222/C-469-91/92 dt 1st January 1992). All the expressions used in this Officer Document shall have accordingly the same meaning assigned to them respectively under the said scheme.

The objective of the scheme is to generate and distribute a reasonable annual return to the investors and also to attempt generation of capital appreciation by investing in Non-Convertible/Convertible debentures, Equities, Other Equity related Investments and Money Market Instruments. Keeping in view the nature of the underlying investments, Investment in IND PRAKASH is subject to market risks. While past performance is not necessarily indicative of future results, owing to the diversification of investments across industries and instruments, it has been possible to minimise such risks and generate reasonable income and capital appreciation.

7. RETURN ON INVESTMENT

This scheme is offered with two options viz. Plan "A" and Plan "B"

Plan "A"

INDICATIVE RETURN at the following rates is payable annually to the investors. However, the first payment shall be for the period from 01.06.1992 (i.e. date of allotment) to 31.03.1993.

----- 1st ten months 01.06.1992 to
31.03.1993 - 15.00%

2nd year : 01.04.1993 to 31.03.1994 - 15.25%

3rd year: 01.04.1994 to 31.03.1995 - 15.50%

4th year: 01.04.1995 to 31.03.1996 - 15.75%

5th year: 01.04.1996 to 31.03.1997 - 16.00%

6th year: 01.04.1997 to 31.03.1998 - 16.25%

7th year: 01.04.1998 to 31.03.1999 - 16.50%

Last eight months: 01.04.1999 to 31.03.1999 - 17.00%

Capital appreciation is also likely. A higher return may be decided by the Trustees.

Plan "B"

Investors can also opt for cumulative returns, wherein the value of units will appreciate in tune with the minimum returns indicated under Plan "A" or at higher returns that may be declared. Income will not be distributed till redemption. However, certificates indicating the income accrued every year will be issued on request.

Indicative value of Rs.1000/- invested at the above returns is given below:

Rs. End of 10th month: i.e. as on 31.03.1993 -

1125/- 22nd month : 31.03.1994 -

1297/- 34th month : 31.03.1995 -

1498/- 46th month : 31.03.1996 -

1734/- 58th month : 31.03.1997 -

2011/- 70th month : 31.03.1998 -

2338/- 82nd month : 31.03.1999 -

2724/- End of the Scheme : 31.03.1999 - 3032/-

Note:

1) The investor shall exercise his/her choice out of the above two plans. Under no circumstances request for change from one plan to the other will be entertained. Where no option has been exercised, the investor will be deemed to have exercised option under Plan "A" only.

2. Income under this scheme will accrue from the date of allotment only. No investment will be payable for the subscription period other than incentive as offered as per para 22 of this offer document.

15. DISTRIBUTION ON TERMINATION OF THE SCHEME

Upon termination of the scheme, the Trustees shall proceed as follows:

a) The Trust shall sell all investments and realise all securities and other property then remaining in its hands as part of the Trust Property under the Scheme and shall pay thereout all liabilities so payable.

b) The Trustees shall distribute to Unit holders, in proportion to their respective interest in the Trust property under the Scheme, all net cash proceeds derived from the realisation of the Trust property and available for the purpose of such distribution, after making all provisions and meeting all liabilities. Every such distribution shall be made only against production of the Certificate (s) relating to Units in respect of which, the same is made and upon delivery to the Trustees of such form of request for payment, as the Trustees shall, in their absolute discretion require.

4. According to the petitioners the returns mentioned under the scheme are only indicative returns and cannot be construed as assured or guaranteed returns. On the other hand, it is the contention of the respondents that the investors were given an impression that returns as mentioned in the offer document were assured. To contrast the nomenclature used in the offer document under the Ind Prakash Scheme, the petitioners referred to the offer documents in respect of the Jyothi Scheme of 1990 where the words used are "assured minimum return on the following rates is payable only to the investors." According to the petitioners where minimum returns were assured, it was clearly so stated in the Ind Jyothi Scheme and where returns were only indicative as in the Ind Prakash Scheme it was so mentioned. It is, Therefore, their case that under the Ind Prakash Scheme there was no assured return but only an indicative return was mentioned.

5. The petitioners have supplied the following chart showing the payments under both the options i.e., Plan A and Plan B of the Ind Prakash Scheme:

----- IND PRAKASH									
SCHEME - FLOATED IN 1992 I. PLAN A For the year ending Dividends indicated									
in the offer document % p.a. Dividends actually paid % p.a. Difference excess/									
short % p.a. [B-A] [A] [B] [C] 31-03-1993 15.00 12.00 -3.00 31-03-1994 15.25									
18.00 2.75 31-03-1995 15.50 19.00 3.50 31-03-1996 15.75 15.75 -									
31-03-1997 16.00- - 16.00 31-03-1998 16.25- - 16.25 31-03-1999 16.50- -									
16.50 30-11-1999 11.33 6.45 -4.88 (on the basis (on the basis of Net of 17%									
p.a.) 9.675% p.a.) -50.38									
----- No. of units (of									
FV Rs.10/- each) outstanding as on 30.11.1999 i.e. the date of redemption is -									
31559420									

AMOUNT INVOLVED AS PER COLUMN "C" IS RS.15.90 CRORES II PLAN B Redeemed on Cumulative value of indicated dividends per unit as offer document Amount paid on redm. Per Unit Difference (B-A) [A] [B] [C] 31-11-1999 30.32 19.11 -11.21 No. of units (of FV Rs.10/- each) outstanding as on 30.11.1999 i.e. the date of redemption is - 30026590

AMOUNT INVOLVED PER COLUMN "C" IS RS.33.66 CRORES

TOTAL AMOUNT INVOLVED:RS.15.90 + RS.33.66 = RS. 49.56 CRS.

In the context of the above chart the petitioners submit that although for the year ending 31.3.1993 the returns indicated were 15%, the returns actually paid were only 12% and at that point of time nobody complained. It was further submitted that for the year ending 31.3.1994 while the returns were indicated at 15.25% the returns actually paid came to 18%. Similarly, in the year ended on 31.3.1995 the returns actually paid were in excess of the indicated returns. However, in subsequent years either no returns were actually paid or they were less than what was indicated in the offer document. From these aforesaid facts, the petitioners contend that the investors knew very well that the returns mentioned in the offer document were only indicative returns and they never

understood them to be the minimum assured returns as contended by the respondent.

6. In the order dated 30.11.1999, it is mentioned in paragraph 2 thereof that SEBI had been receiving complaints from various investors stating that the fund was not honouring its commitment made in the scheme and that the fund had not been paying the returns assured to them under the Ind Prakash Scheme and had, in fact, stopped making payments since 1996. As the investors were being adversely affected, a show cause notice dated 22.11.1999 was issued to IBMF and Indian Bank to show cause as to why directions not be passed against them u/s 11-B of the SEBI Act. Thereafter, a personal hearing was granted to them on 29.11.1999 and on the very next day, i.e., on 30.11.1999 the order was passed by SEBI. It is the contention of the petitioners that none of the complaints said to have been received by SEBI were placed before them. In fact, according to them, there was no evidence of any kind or material before the SEBI which would go to show that the investors were in any manner misled by the offer documents. The finding recorded in the order dated 30.11.1999 is to the following effect:

I have no hesitation in concluding that what has been stated under the head "indicative return" is nothing else but an assured return. This is an assurance which is not qualified with reference to NAV becoming lower than the par value. The offer document had categorically stated that the value of units will appreciate in tune with the minimum returns. These promises influenced the investors who purchased the units.

7. In the order dated 30.11.1999 there is also reference to the press release dated 15.6.1999. The press release was issued by the IBMF and read as under:

PRESS RELEASE

Investor-friendly move by Indian Bank Mutual Fund

Ind Prakash scheme of Indian Bank Mutual Fund had offered indicative return to the investors at the time of the scheme in June 1992. The scheme is to be redeemed on November 30, 1999. The scheme performed very well till March 1996 and infact the total dividend declared by the scheme from June 1, 1992 till March 31, 1996, exceeded the total indicative dividend for the said period. Owing to subsequent poor market conditions, the scheme could not generate the required surplus to pay the indicative dividend for the years 1996-97, 1997-98 and 1998-99. In the interest of the investors, Indian Bank, the sponsor bank of the mutual fund has proposed to meet the unpaid dividend liability, even though the scheme has only indicated the return. The bank has approached Reserve Bank of India for necessary permission. The Fund is also proposing to preclose Ind Prakash scheme subject to the approval of unit holders and SEBI.

Dated: June 15, 1999 For Indian Bank Mutual Fund

Investment Manager

Indfund Management Ltd.

MANAGING DIRECTor

With reference to the aforesaid press release in the order dated 30.11.1999 it is observed as under:

Further, the press release issued by the mutual fund also had impact on the investors.

The petitioner contended that these observations are also not backed by any evidence on record. What was the extent of the impact? Which investors were lured? There is nothing on record to establish the same.

8. The learned Counsel for the petitioners then referred to the impugned order dated 18.2.2000 passed by the Central Government u/s 20 of the SEBI Act. First of all, they referred to paragraph 5 of the impugned order wherein it was recorded as under:

On behalf of the appellant, it has been argued that Plan A of the Scheme involved only indicative returns and Plan B involved assured returns.

It is contended before me that it was never submitted that while Plan A involved only indicative returns, Plan B involved assured returns. Such a contention, according to the petitioners could not have been made as, throughout, their case was that entire scheme only referred to indicative returns and not to assured returns. When a pointed question was put to the counsel for the petitioners as to whether they have taken any objection to the recording of this admission, they pointed to ground "D" of the writ petition which is at page 26 of the paper book wherein it is stated as under:

(D) BECAUSE the Ld. Appellate Authority fell in grave error while observing at para 6 that "the scheme thus according to Petitioners envisaged an assured returns only under plan "B", the above said observation is patently perverse in view of the preceding line of the same para where the words used are "returns indicated". It is Therefore submitted that the Petitioners could not have said that the scheme envisaged an assured returns only under plan "B". It is relevant to mention here that the Petitioner has all along been vehemently contending that the "indicative return" does not mean "assured return" and thus it is a matter of records and the Appellate Authority by giving findings contrary to the records has caused a grave miscarriage of justice and has also sought to unsettle the settled facts.

Therefore, it does appear that the statement was not made by the petitioners.

9. The petitioners next referred to paragraph 7 of the impugned order where it has been noted as under:

As against that, SEBI had argued that both Plan "A" and Plan "B" indicated an assured return. It argue that a table indicating the value of Rs.1,000/-

mentioned under Col. 7 "return on investments" clearly implied that the investor would be receiving the returns as shown in the table. They also mentioned that on the intervention of SEBI, Indian Bank Mutual Fund has issued a Press Release dated 15/06/1999. The issuance of this release had a talk of the unit price of the IND PRAKASH Scheme which was listed in Stock Exchange and several units were traded. The Press Release mentioned as follows:

Ind Prakash scheme of Indian Bank Mutual Fund had offered indicative returns to the investors at the time of floating of the scheme in June 1992. The scheme is to be redeemed on November 30, 1999. The scheme performed very well till March 1996 and in fact the total dividend declared by the scheme from June 1, 1992 till March 31, 1996, exceeded the total indicative dividend for the said period. Owing to subsequent poor market conditions, the scheme could not generate the required surplus to pay the indicative dividend for the years 1996-97, 1997-98 and 1998-99....

From the above, it was mentioned by SEBI, it was clear that the Indian Bank itself had accepted its liability and Therefore now they could not go back.

With reference to the aforesaid statement, the petitioners submitted that the SEBI is an adjudicatory authority and cannot argue or defend its own order and in this context reference was made to the following decision:

1. Mohamed Omer, Mohamed Noorullah Vs. S.M. Noorudin,
2. Syed Yakoob Vs. K.S. Radhakrishnan and Others,
- 3 Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar,

In response Mr Nigam who appeared for the respondent referred to the decision in the case of Sterlite Industries (India) Ltd. and Eastern Galvanising Pvt. Ltd. Vs. The Union of India (UOI), The Securities and Exchange Board of India, Mittal Court, Nariman Point, Bombay, The Appellate Authority, Ministry of Finance, North Block, New Delhi and Enam Financial Consultants Pvt. Ltd.,

10. The counsel for the petitioners next referred to paragraph 8 of the impugned order and submitted that it is wrongly recorded therein that there is no dispute with regard to Plan B of the Scheme. It was contended by the petitioners that SEBI failed to appreciate that indicative return did not mean assured return by any stretch of imagination. In this context, they referred to the Chambers Dictionary, Webster's New Word Dictionary and Black's Law Dictionary to show that "indicative" merely has reference to a suggestion whereas "assured" stands on a higher footing, in the sense of being sure, secure or guaranteed.

11. Mr Vaidyanathan, who appeared on behalf of IBMF submitted that the Central Government Guidelines with regard to mutual funds issued on 28.6.1990 did not contain any provision as to a minimum guarantee. Even in the RBI Guidelines of 1990-91 there was no provision with regard to minimum guarantee. The SEBI Mutual Fund Regulations of 1993 were repealed by the SEBI Mutual Fund

Regulations of 1996 (hereinafter referred to as the 1996 Regulations). "Money market mutual fund", "mutual fund" and "offer document" have been defined in Regulation 2(p), 2 (q) and 2 (r) and read as under:

(p) "money market mutual fund" means a scheme of a mutual fund which has been set up with the objective of investing exclusively in money market instruments;

(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;

(r) "offer document" means any document by which a mutual fund invites public for subscription of units of a scheme

Chapter V of The 1996 Regulations deals with schemes of mutual fund and Regulation 29 refers to the disclosures to be made in offer documents. Regulation 29 (1) is relevant and reads as under:

29. Disclosures in the offer document.--(1) The offer document shall contain disclosures which are adequate in order to enable the investors to make informed investment decision including the disclosure on maximum investments proposed to be made by the scheme in the listed securities of the group companies of the sponsor.

2. xxxx xxxx xxxx xxxx

3. xxxx xxxx xxxx xxxx

4. xxxx xxx xxxx xxxx

Regulation 38 provides that no guaranteed return shall be provided in the scheme unless the conditions stipulated therein are satisfied. Regulation 38 reads as under:

38. Guaranteed returns.--No guaranteed return shall be provided in a scheme,

a) unless such returns are fully guaranteed by the sponsor or the asset management company;

b) unless a statement indicating the name of the person who will guarantee the return, is made in the offer document;

c) the manner in which the guarantee is to be met has been stated in the offer document.

With reference to Regulation 38, it was the contention of the petitioner that no such guarantee was made and indicative returns does not mean guaranteed returns. It was also contended that "indicative return" is a term of art and SEBI, RBI, the petitioners and the investors all understood it as such. It is not to be confused with guaranteed returns. In this context, it was submitted that

Therefore, no investor could have been misled. In fact, no investor had come forward and it is also not known to the petitioners as to who complained because the complaints have not been disclosed by SEBI to the petitioners. As regards the issuance of press release of 15.6.1999, it was submitted that it was done under pressure from SEBI as some other scheme of the petitioners was on the anvil. Placing reliance on the decision of the House of Lords in the case of *Peek v. Gurney and Ors.* [1861] 73 All.E.R. 116, it was submitted that if at all anybody could have been misled, it was only the original allottees.

12. Mr Rajiv Nayar who appeared for the Indian Bank contended that clause 1 of the offer document clearly demonstrated that IBMF and Indian Bank were distinct and separate. He further contended that Indian Bank in any event had no liability and it was the trust, i.e., IBMF which was entirely liable if at all. With reference to Clause 2 of the offer document, he contended that there was no guarantee given by the Bank and it was merely the settler and principal trustee. To substantiate these submissions, Mr Rajiv Nayar referred to the Trust Deed itself whereby IBMF was established as a Trust. The Trust Deed is dated 17.11.1989. The recital reads as under:

WHEREAS with a view to mobilise the savings from the public in every nook and corner of the country to help them get a good return on investments and achieve long term capital appreciation and in the process assist capital formation and industrial development of the country and to provide investment expertise for the benefit of the investors, INDIAN BANK, the author of the Trust herein has decided to create a MUTUAL FUND by way of Trust. The Trust will pool the capital from members of the public for its collective investment which would include subscription, acquisition, holding, management, trading or disposal of securities or any other property whatsoever for the purpose, or having effect of providing facilities for the participation by persons as beneficiaries in profits or income arising there from.

Clause 2 indicates that the Trustees shall include the Indian Bank. Clause 3 relates to the corpus of the trust and indicates that Indian Bank transferred a sum of Rs 25 lakhs to IBMF to form the initial Corpus of the Trust. Clause 4 relates to contribution to the scheme by Indian Bank. Clause 5(1) provides that the principal object of the fund is to promote trading and development investment strategies and techniques as the Trustees may consider appropriate to maximize its returns so as to provide a reasonable and attractive dividend and benefits to its Unit holders. Clause 11, which is the indemnity clause, reads as under:

11. Without prejudice to the right of indemnity by law given to the Trustees, the Trustee and every attorney manager, agent or other person appointed by the Trustees hereunder shall be entitled to be indemnified out of the Trust Property in respect of all liabilities and expenses incurred by them or him in the execution of the Trust hereby declared or any of the powers, authorities, and discretions vested in them pursuant to these presents including liabilities and expenses

consequent on any mistake, oversight or error of judgment or want of prudence on the part of the Trustee or any such appointee and against all actions, proceedings, costs, claims and demands in respect of any matter or thing done or omitted in anyway relating to the Trust hereby declared and the Trustees may retain and payout of any money in their hands arising from the Trust hereby declared all sums necessary to effect such indemnity.

13. Mr Nayar has referred to Section 4, 15, 23 and 30 of the Indian Trusts Act. Section 15 prescribes the extent of care which is required to be taken by a Trustee. Section 23 speaks of the liability of a trustee in case of breach of trust and Section 30 relates to indemnity. In this context Mr Nayar referred to the following observations in the order dated 30.11.1999:

It is Therefore, clear that not only the trustees are liable but also the sponsor for being parties to the representation to the investors who would rely upon the standing of the sponsors which in this case is a Public Sector Bank. The bank which is the sponsor of the mutual fund and also the principal trustee has a duty of care to the investors. For the aforesaid reasons, it is concluded that bank being the sponsor and the principal trustee is liable to pay to the beneficiaries.

If the Indian Bank Mutual Fund is not in a position to pay the investors the assured returns as aforesaid, the shortfall shall be borne by the Indian Bank, being the sponsor and principal trustee of the Mutual Fund. The bank shall submit its proposal of funding to Mutual Fund to the extent of shortfall to SEBI within a period of 30 days from the date of this Order.

By virtue of aforesaid observations, Indian Bank, being a principal trustee, has been made liable. He also referred to the impugned order dated 18.2.2000, in particular, to paragraphs 11 and 12 which read as under:

11. The second question is whether the argument that the mutual fund is not in a position to pay and Therefore the responsibility is passed on to the trustee is adequate to take away the responsibilities of the Indian Bank. As far as Mutual Funds are concerned, we noticed that Reserve Bank of India's permission has been obtained and the Bank has applied for Government of India's permission. Purely from the legal angle, however, we are not inclined to accept the view that this in any way dilutes the responsibilities of the mutual funds or the trustees to pay the assured returns.

12. The second aspect of this question, however, relates to the responsibilities of a trustee and the Indian Bank Mutual Fund. It has been argued that they are not obliged to make good the losses where the appellant is responsible for it has also been considered by us.

14. According to Mr Nayar these findings by virtue of which the Indian Bank has been made liable are completely out of sync with the provisions contained in Sections 23 and 30 which speak of the extent or liability of a trustee and the indemnity. Lastly, Mr Nayar reiterated the contentions of the learned Counsel for

the petitioner No.1 (IBMF) that in any event no investor has come forward and SEBI being a quasi-judicial body and having passed an order u/s 11-B cannot come before this Court and support its own order.

15. Mr Arvind Nigam, the learned Counsel appearing for the respondent (SEBI), first of all submitted that SEBI is a necessary party and can defend its order. He argued that SEBI was also acting on behalf of the investors as the custodian of their interests. His further plea was that several roles could be ascribed to SEBI under the SEBI act. It could be an investigator, a prosecutor or a judge. According to him, in the present case the role of SEBI is not in the capacity of a judge but as an investigator and Therefore there was no impediment to SEBI coming forward in defense of its actions. For these submissions, Mr Nigam placed reliance on: --

- (1) Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar,
- (2) Sterlite Industries (India) Ltd. and Eastern Galvanising Pvt. Ltd. Vs. The Union of India (UOI), The Securities and Exchange Board of India, Mittal Court, Nariman Point, Bombay, The Appellate Authority, Ministry of Finance, North Block, New Delhi and Enam Financial Consultants Pvt. Ltd.,
- (3) The United Commercial Bank v. Bhim Sain Makhija and Anr. AIR 1994 Del 181;

Mr Nigam's second submission was that as per the offer document, the public was made to believe that "indicative returns" were the minimum guaranteed returns. He took me through the trust deed. In particular, he referred to clauses 2, 3, 4, 5 and 9 thereof. In this background, he invited my attention to the offer document. Clause 3 of the offer document spells out the scheme and its objectives. Clause 7 refers to the Return on Investment and sets out the two plans -- "A" and "B" referred to above. Mr Nigam submitted that after setting out the "indicative returns" under Plan A, the offer document states that -- "A higher return may be decided by the trustees." He submitted that while there is a reference to "higher returns" there is no mention of "lower returns". According to him, this implies that "indicative returns" simply meant "minimum returns". This, he submitted, is further corroborated by the following expression used in Plan B -- "... in tune with the minimum returns under Plan "A" or at higher returns that may be declared". He submitted that reading the two together and the offer document as a whole, the conclusion is inescapable that the public was made to believe that the "indicative returns" were "minimum returns".

16. Mr Nigam referred to the order passed by the SEBI on 30.11.1999 to indicate the manner in which SEBI had dealt with this matter. He submitted that SEBI had received complaints from various investors stating that the Fund was not honouring its commitments made under the scheme. According to him, the investors had claimed that IBMF had not been paying the returns assured to them under the scheme and that payments had stopped since 1996. It was indicated that on receipt of such complaints SEBI had taken up the issue on

behalf of the investors and had several meetings with the officials of IBMF as well as Indian Bank. On the advice of SEBI, the Indian Bank Mutual Fund issued a public notice in the shape of a press release on 15.6.1999. The contents of the press release have already been mentioned hereinabove. However, the officials of IBMF met with the SEBI officials on the 22.10.1999 and expressed their inability to pay the purported assured returns. In this eventuality, SEBI issued the show cause notice dated 22.11.1999 to IBMF and Indian bank to show cause as to why directions be not passed against them u/s 11B of the SEBI Act, 1992. Thereafter a personal hearing was given. Ultimately, by the order dated 30.11.1999, directions were issued u/s 11B of the SEBI Act as indicated above. By the same order, the chairman of SEBI had expressed his view that what has been stated under the head "indicative return" is nothing else but an assured return. He was also the view that this is an assurance which is not qualified with reference to the NAV becoming lower than the par value. He was of the view that the offer document had categorically stated that the value of units will appreciate in tune with the minimum returns and that these promises influenced the investors who purchased the units. He also concluded that Indian Bank being the principal trustee and the sponsor of the mutual fund also had a duty of care to the investors and Therefore found that the Indian Bank was also liable. According to Mr Nigam the extent of liability is indicated in the chart annexed as Annexure P-1. As per this chart the liability under Plan A is of Rs 15.9 crores and the liability under Plan B is of Rs 33.66 crores. Therefore, the total liability under both the plans is about Rs 49.56 crores.

17. The third submission of Mr Nigam was on the question as to who would have to bear the liability -- Indian Bank Mutual Fund or Indian bank? He submitted that the offer document has been issued by IBMF which, as indicated above, is a trust. Referring to the trust deed, Mr Nigam submitted that Indian Bank was the author of the trust. It was also a principal trustee of the trust. He then referred to Sections 15 and 23 of the Indian Trusts Act, 1882. Section 15 relates to the care required from a trustee. According to this provision, a trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property. Section 23 speaks of the liability for breach of trust. It provides that where a trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee. According to Mr Nigam, Indian Bank was the principal trustee and the sponsor of the scheme. The investors were not paid their assured returns by the trust. This amounted to a breach of trust for which Indian Bank being a principal trustee was also liable.

Therefore, it was submitted by Mr Nigam that the responsibility of Indian Bank to make good the losses suffered by the investors is coextensive with that of the Mutual Fund itself. Mr Nigam also referred to Section 3 of the Indian Trusts Act, 1882. In that section, inter alia, the word "trust" has been defined as an obligation annexed to the ownership of property, and arising out of a confidence reposed in him and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

18. The fourth and last submission of Mr Nigam was with regard to the powers of SEBI u/s 11B of the SEBI Act. He submitted that u/s 11 of the SEBI Act the functions of SEBI have been indicated. It has been provided that it shall be the duty of SEBI to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit. Sub-section (2) of Section 11 specifies some of the measures that may be taken by SEBI. Section 11(2)(c) prescribes one such measure relating to the registration of and regulation of the working of, inter alia, mutual funds. Section 11B was introduced by the amendment of 1995. It empowered SEBI to issue directions to any company in respect of matters specified in Section 11A. He submitted that the Board could pass such directions as may be appropriate in the interests of the investors in securities and the securities market. The only requirement was that such directions be passed after making or causing to be made an inquiry and after the SEBI was satisfied that it was necessary, inter alia, in the interest of investors to do so. The submission Therefore was that the order passed by SEBI on 30.11.1999 was clearly within the powers and functions of SEBI and had been passed after following the due requirements of law inasmuch as the show cause notice was issued and a personal hearing was also granted. Mr Nigam also referred to the following decisions with regard to the scope of powers of SEBI:

- (1) M.Z. Khan Vs. Securities and Exchange Board Of India and Others,
- (2) Securities & Exchange Board of India v. Alka Synthetics Ltd. (1999) 19 SCL 460.

19. In rejoinder, it was contended by the learned Counsel for the petitioners that the offer document did not contain any assurance of minimum returns. Clause 7 of the offer document merely referred to return on investments and no assurance with regard to a specified return was given. The learned Counsel invited my attention to the offer document in respect of the scheme known as IND JYOTHI, a copy whereof has been annexed as Annexure-C to the writ petition. Clause 14 of the offer document pertaining to the IND JYOTHI scheme relates to return on investment. As in the present scheme, the IND JYOTHI scheme also offered two options -- Plan A and Plan B. The opening words of Plan A in the offer document relating to the IND JYOTHI scheme are as under:

Assured minimum return at the following rates is payable annually to the investors.

These words clearly speak of assured minimum returns. But, the words used in the present scheme (i.e., the IND PRAKASH scheme) are materially different. They speak only of "indicative returns.

20. The learned Counsel for the petitioners also submitted that we must not lose sight of the fact that by virtue of a letter dated 27.6.1991, IBMF had sought Reserve Bank of India's permission to launch the IND PRAKASH scheme. In response to this letter, the Reserve Bank of India replied on 19.7.1991 that it had no objection to the floating of the new scheme and offering returns as indicated in the letter. However the Reserve Bank cautioned the Mutual Fund that it should not indicate specific guaranteed returns and that only an approximate minimum yield should be mentioned. By a letter dated 4.11.1991, the Indian Bank Mutual fund submitted a revised scheme to the reserve bank of India. In response, the reserve bank of India, by its letter dated 1.1.1992, conveyed its no objection to the launching of the IND PRAKASH scheme "with the returns indicated." The learned Counsel for the petitioners submitted that in the light of these facts and circumstances it cannot be said that the indicative returns specified in the offer document were minimum assured returns.

21. The learned Counsel for the petitioners also pointed out that under clause 15 of the offer document, upon determination of the scheme, the trust is required to sell all investments and realise all securities and other properties then remaining in its hands as part of the trust property under the scheme and shall pay all liabilities there from. Thereafter the trustees are required to distribute to the unit holders, in proportion to their respective interest in the trust properties under the scheme, all net cash proceeds derived from the realisation of the trust properties and as are available for the purposes of such distribution, after making all provisions and meeting all liabilities. According to the learned Counsel for the petitioners the scheme has terminated and the distribution has been done by 30.11.1999. None of the unit holders have complained. Yet, SEBI passed the order dated 30.11.1999 on the last day of the scheme. The learned Counsel also pointed out that under clause 10 (e) of the Trust Deed, the trustees shall be in no way responsible for any loss that may result from the exercise or non exercise of the powers, authorities and discretions vested in them provided that nothing contained in the Trust Deed would release the trustees from liability in the case of breach of trust knowingly or intentionally committed by the trustees. My attention was also invited to clause 11 of the trust deed which reads as under: --

11. Without prejudice to the right of indemnity by law given to the trustees, the trustee and every attorney manager agent or other person appointed by the trustees hereunder shall be entitled to be indemnified out of the trust property in respect of all liabilities and expenses incurred by them or him in the execution of the trust hereby declared all any of the powers, authorities, and discretions vested in them pursuant to these presents including liabilities and expenses consequent on any mistake, oversight or error of judgment or want of prudence on the part of the trustee or any such appointee and against all actions,

proceedings, costs, claims and demands in respect of any matter or thing done or omitted in any way relating to the trust hereby declared and the trustees may retain and pay out of any money in their hands arising from the trust hereby declared all sums necessary to effect such indemnity.

22. Taking up the first issue as to whether SEBI can be seen to defend its own order dated 30.11.1999, I find that in the context of the present case not much turns on it. In the appeal u/s 20 of the SEBI Act as also in the present writ petition there is no allegation of bias against the SEBI. If bias or malafides had been alleged then, perhaps, the issue of the SEBI taking up cudgels in defense of its actions/order might have been relevant. Because then an over-zealous defense by the SEBI might have circumstantially indicated either an animus against the petitioners or an element partisanship. In the absence of allegations of bias or malafides, the question of whether SEBI can defend its own order pales into insignificance. SEBI's defense has to be regarded as an assistance to the Central Government in the appeal u/s 20 of the SEBI Act and, now, as an assistance to the Court in this writ petition. And, it must be kept in mind that in any lis there are at least two adversarial parties. Here, the lis is between the IBMF and Indian Bank (the petitioners) on the one hand and the body of investors on the other hand. SEBI's role is of a representative nature, on behalf of the investors. Keeping these considerations in mind, there is no merit in this objection raised on behalf of the petitioners.

23. Could SEBI issue the directions which it did by its order dated 30.11.1999? As noted above, the petitioners contended that it was beyond the domain, power and authority of SEBI to issue such directions and, that too, on the last day of the scheme. I am unable to subscribe to this view. SEBI, as the preamble of the SEBI Act would suggest, has been set up to, inter alia, protect the interests of investors in securities. Section 11 of the SEBI Act delineates the functions of SEBI. The general functions are formulated in Section 11(1) and specific measures which could be taken by SEBI are enumerated, though not exhaustively and without prejudice to the general provisions, in sub-section (2) of Section 11. Clause (c) of this latter sub-section permits SEBI to take measures relating to the regulation of, inter alia, mutual funds. Section 11B empowers SEBI to issue directions, as may be appropriate, in the interests of the investors in securities and the securities market. Before such directions are passed, SEBI is required to conduct an inquiry and then satisfy itself that the directions which it proposes to issue would be necessary in the interest of the investors. At this juncture, it would be instructive to note the observations of a Division Bench of this Court in the case of Sterlite Industries (*supra*) to the following effect:

96. In the light of this, we can hardly deny to SEBI its wide discretionary powers to regulate the financial markets and protect the interests of the investors. Measures that SEBI may take in this regard cannot, in the very nature of things, be precisely spelt out. SEBI has necessarily to be given considerable latitude to enable it to effectively and efficiently carry out its obligations under the SEBI Act.

97. Even so, the power given to SEBI is not untrammelled or unlimited. There is a check on the powers of SEBI by the Central Government (and now by the Securities Appellate Tribunal). There is a check by the Central Government on the executive power of SEBI as spelt out in Sections 17 and 18 of the SEBI Act. In so far as the disciplinary powers of SEBI or its powers to impose sanctions or punish a defaulter are concerned, the Central Government acts as an Appellate Authority u/s 20 of the Act. The Central Government can set aside an order of SEBI passed under the provisions of the SEBI Act and thereby rectify an error committed by SEBI.

Similar sentiments were expressed by a learned single Judge of this Court in M.Z. Khan (supra). It was observed that u/s 11 of the SEBI Act, SEBI has the power to protect the interests of the investors in securities by such measures as it thinks fit. This power is of a very wide nature and is not hedged in by any restrictions. The court further observed that both under Sections 11 and 11B a duty is cast upon SEBI to protect the interests of the investors. So, SEBI had the power and authority to issue the directions which it did on 30.11.1999. Whether circumstances warranted the issuance of such directions is another issue altogether. It is sufficient to hold at this stage that SEBI had the power and such directions could be passed by it in exercise of such power. In passing, it must also be mentioned that before passing the order dated 30.11.1999, SEBI had issued a show cause notice to the petitioners and they were also heard. The requirements of an inquiry stipulated in Section 11B of the SEBI Act were, Therefore, also complied with.

24. I now come to the central issue. Do "indicative returns" mentioned in the offer document imply "minimum" or "assured" returns? Clause 3 of the offer document sets out the objective of the IND PRAKASH Scheme which is to generate and distribute a "reasonable annual return to the investors". It also made it clear that "investment in IND PRAKASH is subject to market risks." Clause 7 of the offer document specifies the Returns on Investment under the two options ?" Plan A and Plan B. Under Plan A, the offer document, provides for "indicative return" at the rates specified payable to the investors annually. Plan B is for those who opt for cumulative returns. Indicative values of Rs 1000/- invested under Plan B was indicated for different points of time till the end of the Scheme (i.e., till 30.11.1999). Reading clauses 3 and 7 of the offer document in this manner, it could legitimately be said only "indicative returns" and "indicative values", subject to market risks have been suggested. There is no assurance or guarantee or minimum return.

25. Now, let us look at these clauses with different spectacles, as it were. Clause 3 of the offer document also states that while past performance is not necessarily indicative of future results, owing to the diversification of investments across industries and instruments, it has been possible to "minimize such risks" and "generate reasonable income and capital appreciation". Clause 7, apart from specifying the indicative rates of return also states that "capital appreciation is

also likely" and that "a higher return may be decided by the Trustees." But, there is no mention of either a fall in the capital value or a lower return. Coupled with this is the expression used under Plan B to the following effect:

Investors can also opt for cumulative returns, wherein the value of units will appreciate in tune with the minimum returns indicated under Plan 'A' or at higher returns that may be declared....

Here, the words "minimum returns" are expressly used with reference to the returns under Plan A. Again, there is no reference to lower returns but only to the possibility of higher returns being declared. Therefore, an investor reading the offer document in this manner, could reasonably come to the conclusion that the indicative returns and indicative values under Plan A and Plan B, respectively, are the minimum returns and minimum values.

26. So, it is possible to read the offer document in two ways. One, where the indicative returns are merely indicative and nothing more. Two, where the indicative returns are the minimum or assured returns with the possibility of higher returns but not lower than those indicated.

27. The question that now emerges is whether this ambiguity is accidental or by design ? Did the petitioners intend to confuse and mislead the investors ? The correspondence between IBMF and the RBI prior to the launch of the IND PRAKASH Scheme provides the answer. Prior to the SEBI Act, it was the RBI which was entrusted with the role of regulating Mutual Funds. The correspondence reveals that the initial scheme as suggested by IBMF provided for specified guaranteed returns. This was objected to by the RBI vide its letter of 19.7.1991. Pursuant thereto, IBMF revised the scheme in a manner which, in its opinion, provided for only approximate minimum yields as distinct from guaranteed or assured minimum returns. The revised scheme was submitted to RBI on 4.11.1991 and on 1.1.1992 (prior to the coming into force of the SEBI Act) the Reserve Bank conveyed its no objection to the launching of the IND PRAKASH Scheme "with the returns indicated". These developments indicate that neither IBMF nor the RBI construed these returns to be minimum guaranteed returns. The intention of IBMF, in keeping with the suggestions/directions of RBI, was to not offer minimum guaranteed returns but only approximate minimum yields for which purpose the terminology employed was "indicative returns".

28. Of course, the offer document was not happily worded and this led to the possible ambiguity indicated above. There is a possible Explanation for this inappropriate wording employed in the offer document of IND PRAKASH. The key lies in comparing the offer document of the IND PRAKASH scheme with that of the IND JYOTHI Scheme which was prior in time. The description of Plan A under both the schemes is identical except for the rates and dates being different and the words - "Assured Minimum return..."- used in IND JYOTHI being replaced by the words - "indicative return..." used in IND PRAKASH. Reading these two documents, it does appear that the intention of IBMF was to inform the investors

that the returns were not "assured minimum returns" but merely indicative returns. Unfortunately, IBMF did not suitably amend other parts such as - "a higher return may be decided by the trustees" - which, essentially, went with the expression "assured minimum returns". Plan B was also not suitably re-worded. This morphing genesis of the offer document from the IND JYOTHI Scheme to the IND PRAKASH Scheme is a possible Explanation of the unhappy wording in the offer document.

29. It is well settled that the object of interpretation of a written instrument is to discover the real intention of the author. [see: Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, ; Hind Plastics and Another Vs. Collector of Customs, Bombay and Another, Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, . But, the intention must be gathered from the written instrument [see: Bishundeo Narain Rai (Dead)By Lrs. and Others Vs. Anmol Devi and Others, ; Keshav Kumar Swarup Vs. Flowmore Private Limited, Employing these principles, the offer document by itself can lead to two possible interpretations. In this context, it may be argued that even if the intention of IBMF was to give only "indicative returns" and not "guaranteed returns", investors were not privy to the correspondence with RBI and could not be expected to compare the offer documents of IND JYOTHI and IND PRAKASH and then analyze the same to conclude that there is no "assurance" given in the offer document for the IND PRAKASH Scheme. An unsuspecting investor will only read the offer document and taking the statements at face value interpret the same in the manner which appears reasonable to him. Therefore, it may be argued, in the facts of this case that what the IBMF intended is not as relevant as what the public understood the offer document to mean. Reading the offer document by itself, as observed above, two views are reasonably possible.

30. We have a peculiar situation here. The IBMF intended to offer only indicative returns but the document could be construed as offering (a) only indicative returns or (b) indicated minimum returns capable of only an upward revision. Now, it is possible that all persons reading the offer document understood it in the former sense. It is also possible that all persons understood it in the latter sense. It is, of course, more probable that some understood it in the former sense and some in the latter. It is Therefore necessary to examine the factual position. Was anyone misled? Did anyone read the offer document as one guaranteeing minimum returns? Did anyone complain? It is here that all semantic debates lose relevance. For, I find that there is not a single complaint on record. Neither the SEBI nor the Central Government in its appellate order has referred to any particular complaint or complainant. Apart from a vague reference that complaints were received there is no mention of any specific complaint or complaints. There is no evidence on record to suggest that any member of the public was misled into investing in the scheme on the belief that he or she was assured of minimum returns. It is one thing to say that because of the ambiguity noted above, investors could have been misled and it is quite another to say that one or some of them were, in fact, so misled. There is no

evidence of the latter. In the absence of any such evidence, all arguments based on semantics lose relevance. Therefore, I am of the view, that circumstances did not warrant the issuance of the direction to IBMF to redeem Plan A at prices as "assured" in terms of the offer document and in case of Plan B to pay the cumulative "Minimum" value at the end of the scheme as on 30.11.1999. It may be noted that scheme has worked itself out. All investors have got back their principal amounts Along with an overall return of 14.32% under plan A and of 12.15% under Plan B over the 7½ year scheme period. As submitted by the petitioners, these returns are not insubstantial though they are lower than the indicative returns mentioned in the offer documents. But, according to them, no one complained. And, there is no evidence on record of any such complaint. Finally, the question "is the Indian Bank liable in its capacity as a trustee and sponsor of the scheme? - remains to be considered. This has become academic inasmuch as I have come to the conclusion that IBMF itself is not liable.

31. In view of the foregoing discussion, this writ petition is allowed. The impugned order is set aside and consequently SEBI's directions dated 30.11.1999 u/s 11B of the SEBI Act are also set aside. No order as to costs.