

(2003) 11 RAJ CK 0019

In the Rajasthan High Court

Case No : Civil Writ Petition No. 6735 and 6747 of 1999

PACL India Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-11-2003

Acts Referred:

Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999 — Regulation 5(1)

Securities and Exchange Board of India Act, 1992 — Section 11AA, 11AA(1), 11AA(2), 12(1B)

Citation : (2004) 2 BC 331 : (2004) 120 CompCas 470 : (2004) 4 CompLJ 271 : (2004) 49 SCL 250

Hon'ble Judges : Y.R. Meena, J;Khem Chand Sharma, J

Bench : Division Bench

Advocate : C.K. Garg, Vinay Bhasin, S.S. Ray, Abhishekh M. Singhvi, H.A. Ahmadi, P.S. Aron, Gopal Garg, S.K. Bharti, Sangeeta Sharma, Saransh Saini, Jagdeep Dhankhar and Praveen Balwada, for the Appellant; Paras Kuhad, Sunil Nath, Sandeep Taneja and S. Bishnoi, for the Respondent

Final Decision : Allowed

Judgement

Y.R. Meena, J.—In D.B. Writ Petition No. 6735/99, the petitioner has prayed that respondent SEBI be directed to withdraw their instructions dated 10-12-1999 and also quash the letter dated 30-11-1999 issued by respondent No. 2 addressed to petitioner No. 1 and further prayed that provisions of Section 11AA and Sub-section (IB) of Section 12 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the Act, 1992") be declared ultra vires the Constitution of India insofar as it includes "Collective Investment Schemes". The petitioner has further prayed that Regulations [Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999] (hereinafter referred to as "the Regulations, 1999") be declared ultra vires the Constitution of India being inconsistent with and in derogation of the Companies Act, 1956 and these Regulations should not be given effect.

2. In D.B. Writ Petition No. 6747/1999, the validity of similar provisions are challenged and further prayed that directions or mandamus be issued to respondents that scheme of PACL India Ltd, is not subject to the Regulations, 1999.

3. Since both the petitions involve common questions, both the petitions have been heard and are being disposed of by this common order.

4. In both the petitions, the petitioners have prayed that direction be given to respondents that the scheme of PACL India Ltd. is not covered under the definition of "Collective Investment Scheme" as defined u/s 11AA of the Act, 1992. Alternatively, it has been prayed that if the view is taken that the scheme of petitioner PACL India Ltd. is covered under the definition of "Collective Investment Scheme", in that case the provisions of Section 11AA as well as Sub-section (1B) of Section 12 of the Act, 1992 be declared ultra vires the Constitution, and also the Regulations so far as they are made applicable in the case of PACL India Ltd. be declared ultra vires and inconsistent to Companies Act and other Acts.

5. The case of the petitioner in writ petition No. 6735/99, filed by PACL India Ltd. (hereinafter referred to as "the Company") is that the petitioner is a Public Limited Company incorporated under the Companies Act having its registered office at Jaipur and is engaged mainly in the business of sale and purchase of agricultural land and its development spread over for a period from 5 to 10 years, depending upon the choice of the customers at the time of entering into agreement.

6. The questions for our consideration in both the petitions are that:--

"(i) whether the scheme of the company is covered within the definition of "Collective Investment Scheme" as defined in Section 11AA of the Act, 1992;

(ii) whether the Regulations, 1999 are applicable in the case of this Company;

(iii) whether the provisions of Section 11AA and Sub-section (1B) of Section 12 are ultra vires to the Constitution;

(iv) whether the Regulations referred in the prayer clause, in Company's petition is ultra vires and inconsistent to the provisions of the Companies Act and other Acts."

7. Heard learned counsels for the parties.

8. Mr. Paras Kuhad, learned counsel for SEBI raised some preliminary objections and has submitted that this writ petition is not maintainable in view of the order of Their Lordships of the Supreme Court dated 23-7-1999 passed on a transfer petition, filed by SEBI, as Their Lordships have stayed the proceedings of all petitions, pertaining to "Collective Investment Scheme" pending in various High Courts.

9. He further submits that similar matter of petitioner is pending before Delhi High Court, therefore, this writ is not maintainable. He further submits that when same issue is pending before Delhi High Court, writ is not maintainable on that very subject, before this Court.

10. To counter this preliminary objection, learned senior counsels for the petitioner company submits that the stay is limited to the proceedings which were pending on the date of order of Their Lordships dated 23-7-1999 and not to the subsequent petitions specially the subsequent petitions which are on the different issues and subject-matter.

11. In the petition in hand, the petitioner company has challenged the validity of some provisions of the Act, 1992 and also the legality of the Regulations, 1999 and these provisions are inserted in the Act after July 1999 i.e., after order of Their Lordships dated 23-7-1999.

12. Learned counsel further submits that second transfer application was also moved by the SEBI in respect of subsequent petitions, before Their Lordships which includes the present petition and Their Lordships have rejected transfer application as well as stay application. Therefore, it cannot be said that this writ petition is not maintainable because of order dated 23-7-1999.

13. First we will take up the preliminary objections raised by Mr. Kuhad, whether writ is maintainable?

14. To consider whether writ is maintainable, Mr. Kuhad has two-fold arguments that when Their Lordships have stayed the proceedings regarding "Collective Investment Schemes" pending before various High Courts, therefore, this writ is not maintainable and secondly when the same matter is pending before Delhi High Court, parallel proceedings in this Court is not permissible.

15. The facts are not in dispute that the order dated 23-7-1999 was passed on transfer petition filed by SEBI. Their Lordships have stayed the proceedings of the petitions pending in various High Courts challenging the directions of SEBI. The relevant part of the order of Their Lordships reads as under--

"In the meantime writ petitions/proceedings filed by the parties before various other High Courts challenging the directions issued by the SEBI as regards the Collective Investment Scheme shall remain stayed pending before such High Courts. Stay shall stand vacated as soon as Delhi High Court pronounces the judgment. We also hope that Delhi High Court will proceed with the writ petitions/proceedings expeditiously."

16. From the order referred above, we see no substance in the argument of Mr. Kuhad. Nowhere Their Lordships have said in order dated 23-7-1999 that any subsequent writ, if filed in any High Court, challenging the directions of SEBI or challenging the provisions of Regulations, introduced after July 1999 are also subject to order dated 23-7-1999. Their Lordships have used words "writ petitions/proceedings filed by the parties before various other High Courts

challenging the direction issued by the SEBI as regards the "Collective Investment Scheme" shall remain stayed pending before such High Courts. Stay shall stand vacated as soon as Delhi High Court pronounces the judgment. We also hope that Delhi High Court will proceed with the writ petitions/proceedings expeditiously". Their Lordships stayed the proceedings of the petitions, which were pending on the date of order dated 23-7-1999,

17. The petitioner company has not challenged before Delhi High Court, the impugned notices issued after July 1999 by the SEBI. But in the petition in hand, the petitioner has challenged two notices dated 30-11-1999 and 10-12-1999 issued by SEBI to the petitioner company at Jaipur. The impugned notices were not subject-matter before Delhi High Court, thus, these notices can be challenged before this Court, as subject-matter before Delhi High Court is not the same as the subject-matter in the present writ petition.

18. The facts on record reveals the Delhi High Court has issued notices to various companies including the petitioner company, in a writ filed by Mr. Bhattacharya and others. In reply to the notice the petitioner has claimed that the scheme of the company does not come under "Collective Investment Scheme", therefore, notice should be discharged. The Delhi High Court has discharged the notice in case of this petitioner company. Even otherwise the subject-matter is not one and the same. Before Delhi High Court the matter-pertaining to the companies which comes within the definition of "Collective Investment Scheme". In the present writ petition the petitioner has not only challenged the validity of some provisions of the Act, 1992 and legality of some provisions of Regulations, 1999 which are introduced after July 1999 and also the notices which are issued to the petitioner company after 23-7-1999, under the Regulations, 1999. Therefore, it cannot be said that there are parallel proceedings of the same issues. In the writ of Mr. Bhattacharya, validity of provisions of Act, 1992 or the Regulations, 1999 are not in challenge.

19. There is no dispute also on the facts that notices are issued by SEBI and received by the petitioner company in its Head Office at Jaipur and Jaipur falls within the territorial jurisdiction of this Court, therefore, this Court has territorial jurisdiction in this case.

20. SEBI had not only prayed for transfer of this petition in the Apex Court but also had prayed for stay of proceedings in this petition. Both were rejected by Their Lordships. When Their Lordships have rejected the second transfer petition filed by SEBI before Their Lordships regarding transfer of petition filed subsequent to the order dated 23-7-1999 and that transfer petition has been dismissed. On these facts, the only inference which can be drawn is that there was no stay on the proceedings of petition filed after 23-7-1999, the present petition has been filed after 23-7-1999. Thus, this petition is maintainable.

21. To conclude, the order of Their Lordships dated 23-7-1999 (a) relates to the proceedings pending as on 23-7-1999; (b) the order having been passed on

23-7-1999 did not contemplate questions as regards the vires of the Act or the Regulations which were enacted later; (c) the validity of the notices issued by the SEBI on 30-11-1999 and 10-12-1999 could not also have been in contemplation of Supreme Court order, and when the notices are received at Jaipur Head Office, this Court has the jurisdiction and writ is maintainable.

22. Now this brings us to consider whether the scheme of petitioner comes within the definition of "Collective Investment Scheme" and whether Regulations, 1999 applicable in case of this Company.

23. Learned counsel for the petitioner submits that petitioner company is a limited company incorporated under the Companies Act having its registered office at Jaipur and is engaged in the business of purchase and sale of agriculture land and its development for a period from 5 to 10 years depend upon the choice of the customer at the time of entering into agreement.

24. The petitioner company acquires agriculture land from the villagers either directly in their name or by taking possession of the agricultural land after entering into agreement with the villagers for purchase of agriculture land on paying the full amount of consideration to the sellers and also getting an irrevocable power of attorney in favour of the representatives of the Company. Under this scheme the petitioner has purchased big chunk of agricultural land in different places and substantial part of land has already been transferred to the customers as per their agreement.

25. Under the scheme, petitioner company receives applications from its customers for purchase and development of agriculture land. Every business transaction between the petitioner company and its customer is an independent deal for purchase of land between company and customer. Under the agreement, petitioner can make cash down payment or can pay the consideration in instalments,

26. Under the "cash down payment plan", land is allotted to the customers within a period, generally not exceeding 270 days from the date of receipt of consideration while under the "instalment payment plans" the land is to be allotted within a period, generally not exceeding 90 days from the date of receipt of 50% of the consideration.

27. Under the scheme company has to transfer the land by executing the sale deeds in favour of the customers in conformity with the relevant provisions of the Transfer of Property Act, 1882 and Indian Stamp Act, 1899. The petitioner company does not promise any assured return. The said agreement is for the sale of the agricultural land in favour of the customers and development of the same during the tenure of the agreement.

28. Learned senior counsels for the petitioner further submits that the transactions are genuine. The customer is under no obligation to sell the said land to the petitioner-company. On the contrary, the services of the petitioner-

company is made available to the customers to help them to dispose of the said land if either of them so desires to do so. Even the customer is also under no obligation to permit the company to develop the land. Only to help the customers, the company offer its services for developing the plot of land which has been or is to be sold to customers.

29. The aforesaid activity of the company cannot be termed as "Collective Investment Scheme". The Company basically deals in purchase and sale of the land.

30. The facts are not in dispute that before Delhi High Court on a writ filed by Mr. Bhattacharya and others, the SEBI has given more than 500 names of the companies treating them as Agro-Plantation companies. The name of petitioner company also figured, in that list. Thereafter, notices were issued by Delhi High Court to 592 such companies including the petitioner company.

31. In reply to the notice of Delhi High Court, the petitioner company alleged that company is engaged in sale and purchase of land, hence the name of respondent be deleted from the list of respondents in petition filed by Bhattacharya and others.

32. The petitioner company before Delhi High Court has categorically stated that scheme of company does not come within the definition of "Collective Investment Scheme", therefore, notice should be discharged. Finally that notice has been discharged by the Delhi High Court.

33. The petitioner company has also moved another application before Delhi High Court submitting that petitioner had entered into large number of agreements with its customers for sale of agricultural land to them, the petitioner-company has also received payments in terms of the said agreement and petitioner-company is under obligation to execute the sale deeds of the said land in favour of its customers, therefore, the company be permitted to execute the sale deeds in favour of the customers. On 26-5-1999 before Delhi High Court, learned counsel for SEBI stated that he has no objection if the sale deeds are registered provided the transactions are genuine.

34. On 16-11-2000 Delhi High Court appointed Mr. Justice K. Swamidurai (Retd.) as Commissioner to find out whether the transactions entered into by the company are genuine. Justice Swamidurai has submitted his report on 20-9-2001. As per his report the transactions are found genuine. On 3-3-2003, Delhi High Court had discharged the notice issued to the petitioner-company.

35. Learned counsels for the petitioner-company further submit that the notice issued by Delhi High Court to the petitioner-company, treating it as covered under the "Collective Investment Scheme", is discharged, that means scheme of this company now should not be treated as "Collective Investment Scheme".

36. Learned counsels for the petitioner further submit that when petitioner company is engaged in the business of purchase and sale of the agriculture land

and its development, this subject-matter comes under Entry 18 of list II of Seventh Schedule of the Constitution of India.

37. The enactment on that subject is within the domain of the State Government, therefore, firstly the Companies which deals in the purchase and sale of agricultural land does not come under the control of the legislation enacted by the Centre. If Centre has enacted any such law, which covers the subject-matter of IInd List to that extent the provisions of the Act are ultra vires to the Constitution.

38. Thus provisions of Act, 1992 are not applicable in the case of petitioner company. Hence, no directions can be issued by the SEBI under the Regulations, 1999. Therefore, the notice in the form of letter dated 30-11-1999 and 10-12-1999 be quashed and if Court accept this contention, there is no need to go into the validity of the provisions of Section 11AA and Sub-section (1B) of Section 12 of the Act, 1992 and also the validity of the Regulations, 1999.

39. Learned counsels further submits that the background of the provisions in challenge is to protect the interest of the customers or public at large from cheating by agro-plantation companies, in the name of high returns. These companies have collected huge amount from the public and diverted that fund and ran away. In the case in hand, there is no complaint against the petitioner company from any customer that he has been cheated by this company.

40. In written submission, the petitioner has submitted that even in a given case where a scheme or arrangement is covered under Sub-section (1) of Section 11AA, it is necessary that all the four conditions provided under Sub-section (2) of Section 11AA have to be collectively satisfied. If even one of the conditions provided in Sub-section (2) is missing then the said scheme or arrangement cannot be termed as "Collective Investment Scheme" u/s 11AA. To illustrate, it may be pointed out that if it is found that conditions (1) of Sub-section (2) is not attracted, in that event one does not have to travel to conditions 2, 3 and 4 as at that very point it will be treated that the said scheme or arrangement cannot be "Collective Investment Scheme". If condition (1) is attracted but condition No. (2) is not attracted, then also the said scheme or arrangement cannot be termed as "Collective Investment Scheme". Similar will be the case for conditions (3) and (4) as the case may be.

41. In case of petitioner company it is submitted that all the four conditions provided under Sub-section (2) are not collectively attracted and, therefore, the transactions of petitioner company, that is sale and purchase of agricultural land and its development and its related services cannot be termed as "Collective Investment Scheme" u/s 11AA.

42. In order to demonstrate petitioner submits that in condition (1) there are no contributions or payments which are pooled and utilised for the purposes of the scheme or arrangement. In the present case the petitioner entered into an agreement to sell a specified piece of land and development services

subsequently the said piece of land is transferred in the name of the customer by way of registered sale deed. The said piece of land is fully identified and the customer becomes an absolute legal owner of the said land on the registration of the sale deed in his favour. The money received by the company is towards the sale consideration of the land and the customer gets the ownership right over the said piece of land only and has got no right over any of the assets of the company. The moment the sale deed is registered in favour of the customer, the land, which was earlier deemed asset of the company, ceases to be the asset of the company and becomes the asset of the customer.

43. It is submitted in the present case that the petitioner sells a specified asset of the company for valuable consideration and there is no pooling as contemplated in condition (1) of Sub-section (2). If this condition itself is not fulfilled, then also the petitioner company cannot be deemed as "Collective Investment Scheme".

44. It is further submitted by the petitioner that condition No. (2) is also not fulfilled in the present case as the customer agrees to buy a specified/identifiable land from the company for a consideration. By the transaction in question the customer does not receive profits, income, produce or property but in fact purchases immovable agricultural land from the petitioner company for consideration. The transfer of land to the customer is not by gratis nor does the customer receive any profit, but the customer buys the land from the petitioner company and becomes the owner of the land, the customer is entitled to deal with the land and the petitioner company ceases to have right, title or interest in the said land even as per the law. It is, therefore, submitted that condition (2) of subsection (2) is also not fulfilled.

45. Regarding condition No, (3), as pointed out earlier, there is neither a scheme nor arrangement as contemplated in Sub-section (1) of Section 11AA; condition No. (3) is, therefore, not attracted at all. It may, however, be pointed out that the agricultural land which is sold to the customer ceases to be the land of the company and, therefore, under no circumstances can be termed as forming part of the scheme or arrangement. The development of the land is done by the petitioner company as per the terms of the agreement and in case the customer commits a breach of the said agreement the petitioner company shall have no right or title on the said piece of land and can at the moment sue the customer for the damages for breach of the agreement. At the time when the registration of sale deed is done, the petitioner company is dealing for the limited purposes of development of the said land for the said customer. Condition No. (3) is also, therefore, not fulfilled.

46. Since conditions (1) to (3) are not attracted in the present case, there is no question of condition No. (4) being fulfilled. Condition No. (4) cannot be read in isolation and has to be read in association with and together with conditions (1), (2) and (3). In this view of the matter condition No. (4) is also not fulfilled.

47. The petitioner further submits that from the facts and circumstances stated hereinabove, it is, therefore, clear that the transactions of the petitioner company does not fall within the parameters of Section 11AA of the Act of 1992 and cannot be termed as "Collective Investment Scheme". The contention of the petitioner company in fact is also strengthened from the order dated 3-3-2003 passed by the Hon"ble High Court of Delhi as the transactions of the petitioner company are treated as sale and purchase of agricultural land, its development and allied services. In case the Hon"ble Delhi High Court had found that the transaction of the petitioner company was "Collective Investment Scheme" under no circumstances the Hon"ble High Court of Delhi would have permitted the said sale deeds to be registered and permitted the discharge of notice issued to the petitioner company. It is pertinent to point out that the order dated 7-10-1998, 13-10-1998 and 29-10-1998 were applicable to all the plantation companies, agro companies and companies running as "Collective Investment Scheme". The mere fact that the notice issued to the petitioner company was discharged goes on to prove that after examining the transactions of the petitioner company with its customers, the Hon"ble High Court was convinced that no impediment could be imposed on the petitioner company in dealing with their transaction with the customer. That is why this question was understood by respondent No. 2 which is evident from orders dated 26-5-1999 and 26-11-2000 passed by Hon"ble High Court of Delhi and the averments made by respondent No. 2 in para 23 of their Counter Affidavit in the present writ petition. Once they have generalised the feelings of the customers and the loss was found to be correct, the apprehension of the SEBI was found to be unfounded and misplaced. The SEBI cannot regulate the sale and purchase of the agriculture land, the transaction in question.

48, Mr. Kuhad, learned counsel for the respondents while giving the background of "Collective Investment Scheme" has submitted that in 1992, the Central Government took cognizance of the concept known as Collective Investment Scheme and it was discovered that many entities have commenced issuing instruments against the investment in the form of Agro-Bonds, Plantation Bonds etc. by offering very high rate of return, which were not consistent with the normal returns, in such schemes. It was also found that these entities after obtaining funds from the public misutilised these funds by diverting the funds towards purposes which were not disclosed at the time of inviting investments. Such act of these entities not only caused huge losses to the public but also eroded confidence of the investors who have invested their life savings in such bonds. Many of such type of entities closed their companies and ran away.

49. The Central Government found it necessary to design an appropriate regulatory framework for regulating the said entities to protect the interest of the public at large. In 1995, the Parliament has introduced subsection (IB) of Section 12 of the Existing SEBI Act, 1992 and thereby prohibited sponsoring or running of any Collective Investment Scheme without obtaining a certificate of registration from the Board.

50. In 1997, the Central Government has issued statutory directions to SEBI u/s 16 of the SEBI Act directing the SEBI to treat the entities which issue instruments such as Agro-Bonds, Plantation Bonds etc. as Collective Investment Schemes and to formulate draft regulations for this purpose and to make them available for public.

51. SEBI appointed Dave Committee for this purpose. Dave Committee also found that many companies have diverted the funds which were collected under the scheme Agro-Plantation and bonds were issued, Dave Committee submitted its draft report in January 1998 and submitted its final report in December 1998. Dave Committee also noticed that this type of companies spent huge amount on advertisement from fund collected from the public, misdirected that fund and cheated the public at large.

52. In February 1998 in terms of the recommendations of the Dave Committee, the SEBI has issued directions to all companies involved in Collective Investment Scheme that they can mobilise money only after obtaining a rating from the Credit Rating Agency and also undertake a special audit of those Collective Investment Schemes which had mobilised an amount more than Rs. 5 crores from the public.

53. In the meanwhile, Association of Agro-Plantation Corporation of India (AAPCI) issued a public notice claiming that SEBI has no jurisdiction to issue directions to Agro-Plantation Companies regarding their existing schemes.

54. In 1998 several litigations were initiated all over the India in various High Courts with regard to these Companies that these Companies have diverted the funds collected from the public/investors and their interest is not safe in the hands of these companies. Various Public Interest Litigations are also filed in various High Courts in this regard. One Mr. S.D. Bhattacharya and others also filed public interest litigation in Delhi High Court.

55. In that writ petition, the SEBI has given the list of more than 500 agro-plantation companies in Delhi High Court and the Delhi High Court has issued the notice including the notice to petitioner company.

56. SEBI has also filed the transfer application before their Lordships of the Supreme Court to transfer the petitions pending before various High Courts relating to "Collective Investment Scheme". Their Lordships instead of transferring petitions pending before the various High Courts stayed the proceedings in case of such writ petitions.

57. Mr. Kuhad further submits that there is not even a single case where the petitioner has executed the sale deed in favour of the purchaser. Commission on sale to the agents is at very high rate by this petitioner-company. He further submits that the definition of Collective Investment Scheme u/s 11AA of the Act, 1992 covers the cases of property of any description, investors also receive profits of produce from the land, the properties are not being managed on behalf

of the investors. Investors do not have day to day control, therefore, this type of scheme comes within the definition of Collective Investment Scheme u/s 11AA of the Act, 1992. Mr. Kuhad also submits that on the direction of the Court the petitioner-company has approached the SEBI to consider his case whether it comes under the definition of "Collective Investment Scheme". SEBI has taken the view that this company falls within the definition of "Collective Investment Scheme". If petitioner-company has any grievance, the petitioner-company can file the appeal against that order before the appropriate authority.

58. He further submits that some investors have also complained against the company. Copies of such complaints are submitted by respondent No. 2 before Delhi High Court. Mr. Kuhad lastly submits that in these facts and circumstances, the petition should be dismissed.

59. These arguments be taken arguments in petition No. 6747/1999 and both the petitions should be dismissed.

60. Learned counsel for the SEBI Mr. Kuhad after concluding the arguments on 24-4-2003 submitted his written submissions on 30-7-2003. Meanwhile, he also got clarification in respect of order dated 3-3-2003. In order dated 30-5-2003 the Delhi High Court has clarified that though they have discharged the notice in case of petitioner but High Court has not said anything on the issue whether petitioner-company comes within the definition of "Collective Investment Scheme" and also observed that SEBI can decide this issue.

61. Thereafter, one more application has been moved by petitioners before Delhi High Court that whether SEBI only can decide the status of PACL India Ltd. that it is a Collective Investment Scheme? On that application, Delhi High Court has clarified vide its order dated 14-8-2003 that SEBI or any High Court can go into the question of status of PACL India Ltd.

62. First we will take up the issue whether scheme of petitioner company comes within the definition of "Collective Investment Scheme" as defined u/s 11AA of the Act, 1992. Section 11AA reads as under;-

"Collective investment scheme,--(1) Any scheme or arrangement which satisfies the conditions referred to in Sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which,-

(i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilised for the purposes of the scheme of arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day-do-day control over the management and operation of the scheme or arrangement."

63. The case of the petitioner company is that company is engaged in sale and purchase of agricultural land and its development. If company is engaged in purchase and sale of the agricultural land, it cannot come within the definition of "Collective Investment Scheme", Under the scheme of the company, the company receives applications from the customers for purchase and development of agricultural land. Every scheme and transactions between the petitioner company and its customer is independent transaction and specific amount has been paid for purchase of specific piece of land.

64. The customers has the option to pay the consideration either under cash down payment plan or under instalment payment plan. Under cash down payment plan, land is allotted to the customers within a period generally not exceeding 270 days from the date of receipt of consideration while under the instalment payment plan, the land is to be allotted within a period generally not exceeding 90 days from the date of receipt of 50% of the consideration.

65. The amount so paid by the customer is received by the company as an advance against sale of and and its development. For that purpose the company and the customer enter into an agreement. The company transfer the title of the land by executing or securing execution of sale deeds in favour of customer in conformity with the relevant provisions of the Transfer of Property Act, 1882, the Indian Stamp Act, 1899 and the Registration Act, 1908.

66. Under the agreement, the Company does not promise any assured return. It is an obligation under the said agreement is to arrange for the sale of the agriculture land in favour of the customer and develop the same during the tenure of agreement. Under the agreement there is a provision that the customer will be free to sell the same at any time of any person he pleases. The customer is not bound to sell his said land to the petitioner company.

67. It is true that there was lot of complaints against the plantation companies that they collected the money from public in the same of high returns and ran away and cheated the poor public at large. This was noticed by the Central Government and the Central Government has taken the decision to regulate the activities of that type of companies, which cheated the public at large in the name of plantation and finally come with the Regulations and such companies are subject to the Regulations, 1999 to protect the interest of customers and SEBI has given the names of 592 companies engaged in plantation to Delhi High Court and petitioner company is one of them. A notice has been issued to petitioner company, reply to that notice was filed claiming that activity of company is not come within class of agro-plantation companies. After considering reply, notice issued to petitioner has been discharged.

68. The petitioner company has moved one more application before Delhi High Court that the petitioner company has entered into an agreement with some

customers and as per agreement the sale deeds are to be executed in their favour. Learned counsel for the SEBI has not objected in case the sale deeds are executed, provided sale transactions are genuine.

69. Considering the submissions, vide order dated 16-11-2000, the Delhi High Court has appointed Mr. Justice K. Swamidurai (Retd.) to enquire and submit a report regarding genuineness of the transactions entered between the petitioner company and its customers. That final report was submitted on 20-9-2001 by Justice Swamidurai and concluded his report as under;-

"13. My conclusion is drawn as under:

(i) The land which the PACL proposed to transfer to its customers were found to be in actual existence as per the record of the PACL.

(ii) PACL was owner in possession of the land in question either as direct owners or owners by virtue of agreements for sale in their favour by the erstwhile owners and the Powers of Attorney in favour of the representative of PACL by the erstwhile owner, and by paying full amount of consideration to the erstwhile owner.

(iii) The development work on the lands in question was found to be carried out by PACL. While in certain cases, the development work was completed, in some cases, it was still in progress. In some of the cases, it was found that the customers had taken possession of the plots of land, had constructed cottages and were also carrying on their development work, in addition to the development work being carried out by PACL.

(iv) Sale Deeds have been executed and registered in favour of the customers of PACL and their names and addresses had been tallied with their details provided by M/s. Raj K. Agarwal and Associates, a certified copy of which was supplied to me.

(v) The title and the possession of the agricultural land mentioned in the sale deeds, stood transferred unconditionally by means of registered sale deeds in favour of the customers."

70. From the factual report of Justice K. Swamidurai, it appears that transactions entered between the petitioner company and its customers are genuine and they basically relate to purchase and sale of the agricultural land.

71. On these aforesaid facts, which are brought on record, now we have to examine whether the activities of this company falls within the definition of "Collective Investment Scheme" as provided u/s 11AA of the Act, 1992.

72. Sub-section (1) of Section 11AA provides that any scheme or arrangement which satisfies the conditions referred to in Sub-section (2) shall be a "Collective Investment Scheme". In Sub-section (2), 4 conditions are laid down. The words used in Sub-section (1) are that the scheme or arrangement should satisfy the conditions referred, means all the 4 conditions should be satisfied then only

scheme of company can be said that scheme of the company is covered within the definition of "Collective Investment Scheme". Therefore, we have to see whether all the four conditions are fulfilled on the given facts in the present case.

73. Condition No. (i) requires that the contributions, or payments made by the investors, should be pooled and utilized for the purposes of the scheme or arrangements. In the present case, the petitioner has entered into an agreement to sell specified piece of land and subsequently the said piece of land is transferred in the name of the customer by way of registered sale-deed. The piece of land for sale is fully identified and the customer becomes an absolute owner of the said piece of land on registration of the sale-deed in his favour. Against the payment made, customer has only right to get the piece of land for which he has entered into agreement. The customer has no right on the other assets of the company. Payment has not been had to run the business of the company, nor there is any arrangement under the present scheme to share the profits of the company from such business, like shareholders share the profits of the company.

74. Therefore, it cannot be said that the amount paid by the customers is pooled for the purpose of scheme of the company. Thus, it cannot be said that the amount paid or contribution made is pooled. Therefore, condition No. (i) is not fulfilled in the present case.

75. Condition No. (ii) requires that contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property. In the case in hand, the contribution or payment has been made mainly for the purchase of land and for its development. The investment by the customer is not with a view to receive income, profit, produce or property as a gratis from the company. Thus, condition No. (ii) is also not fulfilled.

76. Condition No. (iii) requires that the property of the customer should be managed by company on behalf of the customer. In fact, under the present scheme of this company, there is hardly question of management. It is rather a case of development of the land which has been purchased by the customer from the company, under the agreement and customer has paid also for services for development of land. The company is expected to develop it and hand over it to customer. Thus, in our view condition No. (iii) is also not fulfilled.

77. Condition No. (iv) relates to day to day control of the management and operation of the scheme. It is true that customer may not have day-to-day control over the development activities on the land but that does not mean that the customer has no right over the specific piece of land.

78. As stated above, when any condition out of 4 is not fulfilled, the scheme of the company does not fall within the definition of "Collective Investment Scheme". Here at least first 3 conditions are not fulfilled. In fact, all these 4 conditions can be seen in the cases where companies issued bonds such as plantation bonds and agro plantation bonds. The scheme of those companies

may be treated as "Collective Investment Scheme" and not the company in hand which has business of purchase and sale of land and its development and get the land registered in favour of customer, within the terms of the agreement entered into.

79. To conclude, the facts found by Justice Swamidurai and material brought on record, we hold that all the 4 conditions are not fulfilled in the case of this petitioner.

80. Considering the activity of the petitioner company, reply of the SEBI and report of Justice Swamidurai and the fact that notice has been discharged by Delhi High Court vide order dated 3-3-2003, the scheme of the company cannot be treated as "Collective Investment Scheme".

81. The Entry 18 of List II of Seventh Schedule which relates to the land matters, on that subject-matter only State can legislate and not the Centre. The relevant portion of Entry 18 of List II of Seventh Schedule reads as under;-

"18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

82. There cannot be a Central Legislation on land matters. Even in reply of para 23, respondent No. 2 SEBI has accepted that petitioner is free to purchase agricultural land or to sell it. There is no impediment on such transactions of the Regulations. Further the documents in the nature of deeds/sale deeds and agreement to sale of land cannot be treated as securities or units of "Collective Investment Scheme". The relevant para 23 of the reply filed by SEBI reads as under:-

"That the contents of para No. 23 are not admitted. The matter has no correlation with sale of agricultural lands, It is not admitted that the documents of the nature of sale deeds or agreement to sell are sought to be regulated by the Regulations. The answering respondent is not treating the title deeds and sale deeds, if any, as securities are units of collective investment schemes. The petitioner is free to purchase agriculture land or to sell it. There is no impediment on such transactions in the Regulations."

83. So far the complaint against the petitioner company is concerned, some complaints are made annexures in an application to place the complaint on record. There is only one complaint against PACL India Ltd. made by the Vijay Khatke who alleged in the application that scheme of this company is "Collective Investment Scheme" and many plantation companies have cheated the customers and the investors. The complainant also inquired to know, whether this company is registered with the SEBI under Regulation 5(1) of "Collective Investment Scheme" Regulations, 1999.

84. Nowhere he said that any customer of this company has been cheated by

this petitioner company. No other complaint is on record by any customer of this company that he has been cheated by this company or this company has diverted the funds to somewhere else.

85. In the last, the object to regulate the conduct of agro-plantation companies is to protect the customers from cheating by such companies. By way of additional affidavit filed, Mr. L.M. Sinha, Senior Manager (Legal) of petitioner company has brought on record the facts that the petitioner company has already transferred the land to 1,308 persons. The list of the customers is annexed with the additional affidavit filed by Mr. Sinha in March 2000.

86. Looking to this aspect also, we see no justification to direct that this company should be regulated under the Regulations, 1999.

87. Thus, on the facts and circumstances we agree with learned Sr. Counsels for the petitioner company and also Mr. Dhankar, learned senior counsel in D.B. Civil Writ Petition No. 6747/1999 that the scheme of the company does not fall within the definition of "Collective Investment Scheme", as defined in Section 11AA and Sub-section (1B) of Section 12 of the Act, 1992 as well as Regulations, 1999 have no application.

88. As we have taken the view that scheme of petitioner company does not come within the definition of "Collective Investment Scheme" given in Section 11AA. Regulations, 1999 have no application in case of this petitioner company. Thus, now we need not go into the alternate prayer to examine the validity of provisions of Section 11AA, Sub-section (1B) of Section 12 and legality of Regulation of 1999.

89. In the result, notices dated 30-11-1999 and 10-12-1999 are quashed and both the writ petitions are allowed.