
(2004) 07 P&H CK 0041

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 188 of 2003 and C.M. No. 11405 of 2004

P.G.F. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 248
Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 — Regulation 73, 74
Securities and Exchange Board of India Act, 1992 — Section 11AA, 11AA(2)

Citation : (2005) 124 CompCas 201 : (2004) 4 CompLJ 288 : (2004) 55 SCL 165

Hon'ble Judges : J.S. Khehar, J; Hemant Gupta, J

Bench : Division Bench

Advocate : A.M. Singhvi, Viney Bhasin, Rohit Tandon, Sunil Kumar and Chetan Mittal, for the Appellant; G.E. Vahanvati, Rameeza Hakeem, Praveen Goyal, M.L. Sarin, Munish Jain and Gurmohan Singh, for the Respondent

Final Decision : Dismissed

Judgement

J.S. Khehar, J.

I. Facts pertaining to M/s. PGF Limited:

1. M/s. PGF Limited (hereinafter referred to as "the PGFL") was originally incorporated on 19-1-1983 as Pearls General Finance Limited. Its name was changed to Pearls Green Forests Limited in 1988 and finally to PGF Limited in 1997. Eversince the commencement of business, PGF Ltd. (hereinafter referred to as "the PGFL") claims to be subject to regulation, under the provisions of the Companies Act, 1956, under the Department of Company Affairs, the Company Law Board, and the Registrar of Companies. PGFL has its registered office at S.C.O. No. 1042-43, Sector 22-B, Chandigarh, and its Head Office at 2nd Floor, Vaishali Building, Community Centre, Paschim Vihar, New Delhi.

2. So far the activities of PGFL are concerned, the same have been depicted in a communication addressed by the PGFL to the Securities and Exchange Board of

India (hereinafter referred to as "the SEBI") dated 15-1-1990. PGFL is stated to be operating two kinds of schemes; firstly, a scheme involving sale/sale and development of agricultural land, and secondly, joint venture schemes. During the course of hearing of the instant writ petition on 28-5-2004, learned counsel for the petitioners informed the Court the PGFL had taken a decision to disband all schemes other than its operations relating to business connected with sale of agricultural land and/or sale and development of agricultural land. It is, therefore, that this Court, inter alia, passed the following order on 28-5-2004 :--

"Learned counsel for the petitioners, during the course of arguments unilaterally offered to pay back all the deposits to the investors enrolled under all schemes other than the existing business of sale and purchase and development of land. According to learned counsel, the aforesaid action on behalf of the petitioners would render the instant petition infructuous qua the said schemes.

In view of the above, we grant liberty to the petitioners to make the aforesaid refund, as expeditiously as possible, and preferably before the next date of hearing. The petitioners shall also tender a status report supported by an affidavit in the aforesaid context on the next date of hearing, with a copy in advance to the counsel for the respondents.

The controversy raised in the instant writ petition is, therefore, limited to the scheme/business of the PGFL relating to sale of agricultural land and/ or sale and development of agricultural land.

3. In the Memorandum of Association of PGFL the main objects, the ancillary or incidental objects, and the other objects, of the PGFL have been delineated. A perusal of the objects of the PGFL reveal, that the PGFL could carry out almost any kind of business conceivable. We were tempted to extract herein, the entire text of the objects of the PGFL, but refrained to do so for reasons of brevity. So far as the present controversy is concerned, it would be pertinent to mention, that the main objects of the PGFL include, permissibility to act as agents for purchase, sale and letting on hire land whether the same is agricultural or urban land, on commission basis or otherwise; to carry on the business of farming, horticulture, floriculture, tissue culture, siri culture etc.; to act as brokers, agents, stockists, distributors and suppliers of all kinds of agricultural products; to purchase, take on lease or otherwise clear any land (including waste land, barren land etc.) and to work, develop and maintain the same on their own or on behalf of others, and to sub-divide the land into "units" or "marketable lots"; to sell, lease out or otherwise dispose of any land (including waste land or other barren land etc.) in any "marketable lots" or "units" or in any manner, whatsoever. The ancillary objects or incidental objects include, the permissibility, to pay for any property either in cash or by fully or partly paid shares or by the "issue of securities"; to pay for services rendered (or to be rendered) in acting as trustees for "debenture" or "debenture stock holders" or for guarantying the placing on any "shares" in the company's capital or any debenture or debenture stock or "other securities of the Company" etc.; to sell, improve, manage,

develop, exchange, lease, mortgage, dispose of, turn to account or otherwise to deal with the property of the Company. The other objects include, to issue prefer and defer or any other such sub-stocks or securities based on or representing any shares, stocks or other assets, specially apportioned for the purpose, etc.

4. The only activity which the PGFL is presently engaged in is stated to be the sale of agricultural land and/or the sale and development of agricultural land. It is the contention of the PGFL, that it identifies and procures agricultural land, and transfers the title thereof in units measuring 1350 sq. feet (150 sq. yards) or multiples thereof, in favour of customers, by executing or securing sale deeds in conformity with applicable laws. The agreements executed by the PGFL with its customers, include the obligation of the PGFL, to develop and maintain the land transferred to customers for periods ranging from 5 to 10 years. The consideration payable by customers, is in lieu of the sale of a plot of land of 1350 sq. feet (150 sq. yards), and in lieu of its development besides related services. A customer has the option to pay for the unit of land sold to him either in lump sum or in instalments. The amount paid by the customer is received by the PGFL as an advance against the sale of plots. In other words, the agreement envisages purchase of a plot or multiples thereof by the customer, with an undertaking by the PGFL to fully develop and maintain the same till the land is transferred to the customer. It, therefore, emerges that the customer gets a developed plot, at the end of the stipulated period under the agreement. It is the contention of the petitioners, in view of the aforesaid assertion, that the role of the PGFL is no different than that of a vendor, coupled with an obligation to develop the land. Likewise, it is the case of the PGFL, that the status of the customer is no different than that of a vendee. It is the express case of the PGFL that its activities do not involve the issuance of agro bonds or plantation bonds and the like, therefore, the business of PGFL cannot be considered to fall under the category of "collective investment schemes", as defined under the SEBI Act (as amended from time to time).

5. In response to a public notice dated 18-12-1997, issued by the Board, the PGFL asserted through its letter dated 15-1-1998 (Annexure P.5 with CWP No. 4620 of 2002), that the Board had no jurisdiction over the PGFL, inasmuch as, the provisions of the SEBI Act were not applicable to the PGFL. In response to the aforesaid communication from the PGFL, the Board addressed another letter dated 20-4-1998 (Annexure P.6 with CWP No. 4620 of 2002) to the PGFL. Relevant portion of the aforesaid letter is being extracted hereunder :--

"We understand that you are a company registered with the Registrar of Companies Karnataka with Plantations as one of your main objects. As you might be aware the Government of India has identified SEBI as the regulatory body for entities, which float instruments like Agro/Plantation Bonds, etc.

In accordance with the provisions of the SEBI Act, we had issued a public notice on December 18, 1997 directing all the existing entities engaged in Collective Investment Schemes to file the following information with our offices:

- a. Terms and conditions of the schemes.
- b. Funds raised through all the schemes.
- c. Promises or assurances or assured returns made in the scheme.
- d. Copies of offer documents of the schemes.
- e. Names, details and background of promoters/sponsors.

The information was to be filed with SEBI latest by 15th January, 1998 and accordingly many companies have filed their information with us. From our records, we observe that no information has been filed by your company till date. The non-filing of information by companies which have floated schemes in this nature or collective investment schemes violates the provisions of the SEBI Act and action may be initiated against these companies under the relevant provisions of the Act.

You are directed to immediately inform us the following :

1. Has your company collected funds from the public by issuing instrument like Agro Bonds, Plantations Bonds, etc ?
2. If so, why action should not be initiated against you for violating provisions of the SEBI Act ?

We are enclosing a copy of the order passed u/s 11B of the SEBI Act and a copy of the Public notice dated December 18, 1997.

Your reply should reach within 15 days from the date of this letter failing which we shall be constrained to take action against you under the provisions of SEBI Act."

The PGFL claims to have responded to the aforesaid letter issued by the Board through its communication dated 2-5-1998 (Annexure P.7 with CWP No. 4620 of 2002), wherein it intimated the Board, that it was not issuing any instruments in the nature of agro bonds or plantation bonds. On 24-12-1998, the Board issued a show cause notice (Annexure P.8 with CWP No. 4620 of 2002), to the PGFL informing it that the PGFL had not responded to its communication dated 12-11-1998 (already referred to hereinabove), despite the lapse of the dead-line communicated therein. The Board also informed the PGFL, that it had received a complaint from a customer/investor, of the PGFL, to the effect, that the PGFL had accepted/received instalments from customers/investors upto 19-3-1998; and had also continued to issue unit certificate upto that date. The PGFL was reminded through the aforesaid show cause notice, of the order dated 24-2-1998 (which was also incorporated in the press release, passed by the Board u/s 12B of the SEBI Act, restraining entities from mobilising any money, from the public or from the investors under the existing schemes, unless the instruments of such schemes, carry a rating from one of the four specified rating agencies (see under head - "Regulation of "collective investment schemes" in India"). Attention of the

PGFL was also invited to various orders passed by the Delhi High Court in S.D. Bhattacharya v. SEBI [CWP No. 3352 of 1998], directing the companies to strictly comply with the orders of the Board dated 24-2-1998 and also injuncting, credit rating and plantation companies, from floating new "collective investment schemes", so as to raise further funds, without the permission of the Delhi High Court. In the aforesaid show cause notice dated 24-12-1998, the Board, on account of violations allegedly committed by the PGFL, tentatively decided to initiate prosecution against it, under the relevant provisions of the SEBI Act.

6. In its reply to the show cause notice issued by the Board, the PGFL through its communication dated 9-1-1999 (Annexure P.9 with CWP No. 4620 of 2002), expressed its ignorance, of the orders passed by the Delhi High Court, and therefore, sought copies of the orders passed in S.D. Bhattacharya's case (supra) (by the Delhi High Court), so as to enable it to effectively respond to the show cause notice. The PGFL, in its aforesaid reply dated 9-1-1999, clarified, that it did not admit the correctness of the allegations made in the show cause notice dated 24-12-1998. In response to the reply of the PGFL, dated 9-1-1999, the Board forwarded an extract of a notice which had appeared in the "Indian Express" dated 8-1-1999 to the PGFL, through its covering letter dated 14-1-1999 (Annexure P.10 with CWP No. 4620 of 2002). Relevant extract of the aforesaid notice is reproduced hereunder :--

"Notice to all plantation companies Agro Companies and Companies running collective investment schemes.

This notice is being published pursuant to the directions of the Hon"ble Division Bench of Delhi High Court comprised of Justice Anil Dev Singh and Justice Mukul Mudgal in CWP No. 9639 of 1998 and CM No. 10177 of 1998 in CWP No. 3352 of 1998.

Vide order dated 7th and 13th October 1998 in CWP No. 3352 of 1998 the Hon"ble Delhi High Court has directed that

1. All plantation companies, Agro Companies and companies running collective investment companies shall get themselves credit rated from credit rating companies approved by SEBI.
2. The company shall furnish list of their assets and liabilities.
3. That company shall furnish their list of directors alongwith details of their assets including date, cost and present value of acquisitions.
4. The companies are restrained from selling, disposing of and for alienating their immovable properties and parting with the possession of the same. The directions of these companies are also interdicted from transferring their immovable properties in any manner whatsoever. They shall also not part with possession thereto.
5. That company shall not float new collective schemes to raise further funds

without the permission of Delhi High Court.

6. Insofar as the existing schemes are concerned shall strictly comply with the circular of SEBI dated 24-2-1998.

It has clarified that this order of the Hon"ble High Court will not come in the way of companies intending to refund the money to their investors."

The aforesaid communication addressed by the Board, was responded to by the PGFL through a letter dated 2-2-1999 (Annexure P.11 with CWP No. 4620 of 2002), wherein the PGFL again required the Board to supply it with copies of the orders passed by the Delhi High Court, while reiterating, that in the absence of such orders it was not possible to effectively respond to the allegations levelled in the show cause notice dated 24-12-1998. In response to the letter of the PGFL dated 2-2-1999, the Board addressed a communication dated 10-2-1999 to the PGFL informing it that it had been impleaded as a party respondent in S.D. Bhattacharya's case (supra), and that, the PGFL could obtain copies of orders passed in the aforesaid writ petition directly from the Delhi High Court.

7. Through its response dated 8-3-1999 (Annexure P.13 with CWP No. 4620 of 2002), the PGFL denied the fact, that it. had been impleaded as a party respondent in S.D. Bhattacharya's case (supra) (pending before the Delhi High Court), by referring to the public notice published in the "Indian Express" (relevant portion of which has already been extracted hereinabove), by asserting that its name did not find mention therein. The PGFL, therefore, again sought copies of the orders passed by the Delhi High Court in S.D. Bhattacharya's case (supra), again reiterating that an effective reply to the show cause notice dated 24-12-1998, could not be submitted in the absence of the orders passed by the Delhi High Court. In its response dated 11-3-1999 (Annexure P.14 with CWP No. 4620 of 2002), the Board forwarded copies of the orders passed by the Delhi High Court on 7-10-1998, 13-10-1998 and 29-10-1998 to the PGFL. Despite the supply of the aforesaid orders passed by the Delhi High Court, the PGFL allegedly failed to furnish any reply to the show cause notice (dated 24-12-1998) issued by the Board to the PGFL, which prompted the Board to issue a communication dated 31-8-2000 (Annexure P.15 with CWP No. 4620 of 2002), requiring the petitioner to submit its reply to the show cause notice dated 24-12-1998 within 15 days of the receipt of the aforesaid letter.

8. On 11-9-2000 (Annexure P.16 with CWP No. 4620 of 2002), the PGFL responded to the show cause notice dated 24-12-1998, by asserting that its business was limited to sale and purchase of agricultural land, by entering into agreements with prospective buyers, on a consideration amount mentioned in the agreement. The prospective buyers, on compliance with the terms of the agreement, were entitled to get a piece of land transferred in their names, by executing registered sale deeds, in order to give them legal title. On the basis of the aforesaid factual position, it was asserted by the PGFL, that the underlying

contract between the PGFL and a prospective buyer was, that of sale and purchase of agricultural land. It was, therefore, sought to be concluded that the activities of the PGFL, do not fall within the purview of the SEBI Act and/or the Regulations made thereunder. On account of the aforesaid explanation, the PGFL requested the Board to drop all proposed proceedings against it.

9. On 20-2-2002, the Chairman of the Board, in exercise of powers vested in him u/s 11B of the SEBI Act, considering the gravity of the charges levelled against the PGFL, quantum of funds raised by the PGFL under various investment schemes, non-compliance by the PGFL of communications addressed to it by the Board dated 24-12-1998 and 31-8-2000, mobilisation of funds by the PGFL under "collective investment schemes", without filing initial information, without obtaining credit rating, and without registration with the Board, coupled with the complaints received from the customers/investors of the PGFL, and a reference received from the Reserve Bank of India, and in order to protect the interest of the investors, directed the PGFL, not to collect any money from its customers/investors, even under the existing schemes, nor to launch any new schemes, without obtaining registration from the Board. The PGFL was also directed, to refund the money collected by it under the schemes, as per the terms of the offer, within a period of one month from the date of passing of the order (i.e. by 19-3-2002). In case of non-compliance of the aforesaid directions, the Chairman of the Board informed the PGFL, that prosecution proceedings would be initiated against it under the provisions of SEBI Act, 1992.

10. The PGFL impugned the order dated 20-2-2002, by filing CWP No. 4620 of 2002 in this Court. Noticing the primary contention of the PGFL, namely that the objections raised by the PGFL, in its reply to the show cause notice, had not been considered by the Board, while passing the impugned order dated 20-2-2002, this Court issued an interim direction, staying any further action against the PGFL.

11. CWP No. 4620 of 2002 filed by the PGFL, before this Court, was finally disposed of on 29-4-2002, mainly on account of the fact, that a statement was made by the counsel representing the Board, that the Board would keep the impugned order dated 20-2-2002 in abeyance, if the PGFL agreed to supply, the information sought by the Board within two weeks. On the receipt of the aforesaid information, the Board agreed to re-determine the issue de novo by passing a speaking order. As a consequence of the acceptance of the aforesaid offer, CWP No. 4620 of 2002 was disposed of in the following terms :--

"(i) The Petitioners may file their reply to the show cause notices already served by the respondent on them within three weeks from today;

(ii) In case the petitioners are asked, they would furnish the requisite information to the second respondent;

(iii) In case, the petitioners make a prayer for the grant of an oral hearing, the competent authority shall grant an opportunity of hearing. It is clarified that if shall be open to the petitioners to raise such pleas as they may be advised,

including those which have been raised in this petition;

(iv) The matter shall be finally decided within four weeks from the date of conclusion of oral hearing. In the meantime, the operation of the impugned order shall be kept in abeyance; and

(v) On the passing of the fresh order, the order at Annexure P-17 shall stand superseded."

In furtherance of the directions issued by this court in CWP No. 4620 of 2002, the PGFL was granted a personal hearing by the Chairman of the Board on 11-11-2002. The Chairman of the Board again arrived at the conclusion that the schemes floated by the PGFL were "collective investment schemes" as defined u/s 11AA of the SEBI Act. As a natural corollary thereto, it was concluded that the PGFL should comply with the provisions of the SEBI (Collective Investment Schemes) Regulations, 1999, as well as to obtain registration from the Board for continuation of its existing schemes, and before launching new schemes. Since the PGFL had not applied for registration in terms of the aforesaid 1999 Regulations, it was required to wind up its schemes and re-pay the investors (in terms of Regulations 74 and 73, respectively, of the 1999 Regulations) within a period of one month from the date of the order of the Chairman of the Board (i.e. on or before 5-1-2003). The Chairman of the Board further directed the PGFL, not to collect any money from the investors. The PGFL was also restrained from launching any new schemes. The order dated 6-12-2002 has been impugned by the PGFL through the instant writ petition.

11. Territorial jurisdiction of this Court to entertain the instant writ petition :

12. Before the controversy could be taken up for adjudication on merits, learned counsel representing respondent No. 2, expressed his intention to press preliminary objection No. 3 raised in the written statement filed on behalf of respondent No. 2, wherein it was sought to be asserted that this Court lacked territorial jurisdiction to entertain the controversy in hand.

13. The factual matrix projected by the learned counsel for respondent No. 2, in order to press the aforesaid preliminary objection is, that the impugned order dated 6-12-2002, was passed by the Chairman of the Board at Mumbai. It is asserted that there is no regional office or any other office of the Board located within the territorial jurisdiction of this Court. Additionally, it is pointed out that all notices/communications/letters issued to the PGFL emanated from Mumbai, replies thereto were tendered by the PGFL to the office of the Board at Mumbai, the hearing of the claim raised by the PGFL was also conducted at Mumbai, and therefore, the territorial jurisdiction to initiate proceedings under Article 226 of the Constitution of India, so as to impugn the order dated 6-12-2002, lay only with the Bombay High Court, and certainly not with this Court.

14. Attention of this Court was invited to a sample of the sale agreement (placed on the record of the instant writ petition by the PGFL as Annexure P.6), wherein,

in case of a dispute between the PGFL on the one hand and its customer/investor on the other, only the Civil Courts at Delhi could entertain and settle the same (after the determination of arbitration proceedings), to the exclusion of all other Courts. The Court's pointed attention, in this behalf, was invited to clause 21 of the sample sale agreement which is extracted hereunder :

"21. Jurisdiction

Further to the aforesaid Clause 20 for any consequent legal remedy, only Civil Courts at Delhi shall have jurisdiction to the exclusion of all other Courts."

On the basis of the aforesaid factual position it is submitted that the instant controversy could have been raised, before the Delhi High Court, but certainly not before this Court.

15. In conjunction with the sample sale agreement, learned counsel for respondent No. 2, also invited the Court's attention to the sample sale deed (placed on the record of the instant writ petition as Annexure P.7), wherefrom it was pointed out that the vendor therein was located in the State of Punjab, the authorised attorney of the vendor was employed in and a resident of the State of Haryana, the vendee was employed in and a resident of the Union Territory of Delhi, whereas the land which was sought to be transferred by the PGFL to its customer/investor was located in the State of Andhra Pradesh, Learned counsel for respondent No. 2, however, vehemently contends, that the aforesaid facts are now relevant for determination of the controversy in hand. Learned counsel accordingly, desires to conclude that the aforesaid facts should not be taken into consideration to determine whether or not they constitute a part of the cause of action, for the purpose of determination of territorial jurisdiction, in the instant case, since the said facts are not relatable to the dispute emerging out of the impugned order. It is further contended, that in case the location of the vendor/vendee, the location of the land, or the place of registration of the transferred land, is taken as a relevant consideration for determining territorial jurisdiction, for purposes of the controversy in hand; a part of the cause of action would be deemed to have arisen virtually in every State of the country, and therefore, all the High Courts in India would be deemed to have jurisdiction to entertain the claim projected by the petitioners in the instant case. It is, therefore, reiterated, by learned counsel, that the Bombay High Court, within whose jurisdiction the impugned order was passed can only rightfully entertain the controversy in hand.

16. It is pointed out, that a transfer petition bearing Nos. 264-277 of 1995 was filed by the Board before the Supreme Court titled as SEBI v. Golden Forests India Ltd., an 23-7-1999. The Apex Court is stated to have, passed inter alia the following order :--

"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."

Additionally, it is pointed out that a controversy akin to the one in hand titled as S.D. Bhattacharya's case (supra), has been pending before the Delhi High Court, wherein the Delhi High Court allowed an application for impleading of certain parties in the writ petition and gave directions regarding credit rating, furnishing of lists of assets and liabilities, furnishing of lists of their present directors along with details of the assets, and also restrained them from selling, disposing of, or alienating, their immovable properties or parting with the possession of the same. The companies were also directed not to float any new scheme, or to raise any further funds, without permission of the Court. So far as the existing schemes are concerned, the companies were directed by the Delhi High Court to strictly comply with the Board's direction dated 24-2-1998. By a further order dated 13-10-1998, (passed in S.D. Bhattacharya's case (supra)), the Delhi High Court accepted the plea of the Board to implead 592 companies, allegedly running plantation companies, agro companies etc., as well as companies running equitable investment schemes. While accepting the prayer made, the Delhi High Court, clarified that the order dated 7-10-1998 would also apply to plantation companies, agro companies and companies running equitable scheme irrespective of the fact that they were not amongst the 592 companies specifically ordered to be impleaded in S.D. Bhattacharya's case (supra). On 29-10-1998, the Delhi High Court passed a further order on account of the non-compliance of its earlier order dated 7-10-1998, directing all the 592 companies impleaded in S.D. Bhattacharya's case (supra), as well as, all other companies, which were covered by the order dated 24-2-1998, to comply with the order of the Court, dated 7-10-1998, within three weeks failing which contempt proceedings, besides proceedings for attachment of their properties etc. would be considered against them, on the next date of hearing. On 22-1-2002, the Delhi High Court took into consideration, an affidavit filed by the Board dated 18-1-2002, delineating a list of 513 companies/entities which had failed to comply with the orders passed by the Delhi High Court, dated 7-10-1998 and 13-10-1998; whereupon the Delhi High Court directed, that the Bank accounts of the defaulting companies be frozen with immediate effect. Compliance of the aforesaid order was required to be routed by the respective Banks to the Delhi High Court through the Reserve Bank of India. It is the contention of the learned counsel representing respondent No. 2, that the orders dated 7-10-1998, 13-10-1998 and 29-10-1998, were applicable to the PGFL as well, and yet the PGFL had not complied with any of the said directions. In this behalf, it is also pointed out that the PGFL was fully conscious of the proceedings pending before the Delhi High Court, but had failed to comply with the direction issued by Court.

17. In response, learned counsel for the petitioners has placed emphatic reliance on the following factual matrix :

Firstly, the registered office of the petitioner-company is located at Chandigarh.

All the communications including the impugned order were sent by the Board at its registered office at Chandigarh. The effect of the impugned order was felt at Chandigarh, inasmuch as the PGFL will have to carry out the directions contained in the impugned order from Chandigarh.

Secondly, in the event of winding-up of the petitioner-company, this Court alone, would have jurisdiction to adjudicate upon the issue, since the registered office of the PGFL is located at Chandigarh.

Thirdly, approximately 191.50 acres of land sold by the PGFL is located in the State of Punjab, and about 169.09 acres of land sold by the PGFL to its customers/investors is located in the State of Haryana, a part of the cause of action definitely arises within the territorial jurisdiction of this Court.

Fourthly, the PGFL had earlier filed CWP No. 4620 of 2002 in this Court, wherein it had impugned the order passed by the Board dated 20-2-2002. Neither respondent No. 2, nor any other respondent, had pressed the issue of the territorial jurisdiction of this Court, during the course of proceedings in the aforesaid writ petition.

Fifthly, the order passed by the Board dated 6-12-2002, which has been impugned in the instant writ petition is the outcome of the directions issued by this Court on 29-4-2002 while disposing of CWP No. 4620 of 2002.

Sixthly, the impugned order in the instant writ petition dated 6-12-2002, is an order in substitution/supersession, of the order dated 20-2-2002 (impugned in CWP No. 4620 of 2002), and since the territorial jurisdiction of this Court had not been disputed during the deliberations in CWP No. 4620 of 2002, the same cannot be disputed during the course of the present proceedings.

18. In order to substantiate his contention on the issue territorial jurisdiction, learned counsel for respondent No. 2 invited the attention of this Court to the judgment of the Apex Court rendered in *South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others*, . The object of the learned counsel for respondent No. 2, in citing the aforesaid judgment, was to bring home the ambit and scope of the term "cause of action". The admitted factual position in the aforesaid case was, that a contract was executed between the parties at Bombay. The obligations and liabilities emerging out of the contract were required to be executed at Bombay, inasmuch as, cargo of livestock was to be transported in a ship from Kandla to Damman or Jeddah. In furtherance of the execution of the aforesaid contract, the respondents had executed a bank guarantee at Delhi, and transmitted it to Bombay. The question which arose before the Apex Court was, whether any part of the cause of action had arisen in Delhi, so as to vest jurisdiction in Delhi High Court, to entertain the controversy between the parties. The Apex Court, while adjudicating upon the aforesaid controversy, concluded as under :--

"3. It is settled law that cause of action consists of bundle of facts which give

cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise.... (p. 444)"

The Apex Court, in the aforesaid case concluded, that merely because a bank guarantee had been executed by the respondents at Delhi and transmitted for performance to Bombay, would not constitute a cause of action, so as to enable the respondents to initiate proceedings in the Delhi High Court.

19. Reliance was also placed by learned counsel representing respondent No. 2, on the decision of the Supreme Court in *State of Rajasthan and Others Vs. Swaika Properties and Another*, wherein the Apex Court held, that mere service of notice u/s 52(2) of the Rajasthan Urban Improvement Act, 1959, on the owner at Calcutta, in respect of land situated in the State of Rajasthan, intimating the owners/respondents of the State Government's proposal to acquire land for public purpose, did not constitute an integral part of the cause of action, sufficient to vest the Calcutta High Court with jurisdiction to entertain a petition under Article 226 of the Constitution, challenge the validity of the notification depicting the Government's intention to acquire land. In arriving at the aforesaid conclusion, it was noticed by the Apex Court that the notification issued by the State Government u/s 52(1) of the aforesaid Act, became effective the moment it was published in the Official Gazette, as the notified land became vested in the State Government free from all incumbrances immediately on the issuance of the said notification. The notice served on the respondent, according to the conclusion recorded by the Apex Court, did not constitute an integral part of the cause of action, as it had no bearing on the validity of the notification issued by the State Government. Consequently, the Apex Court set aside the ad interim ex pte prohibitory order passed by the High Court, restraining the State Government from taking steps to take possession of the land of the respondent, after concluding that the High Court did not have the jurisdiction to entertain the petition under Article 226 of the Constitution of India.

20. In *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others*, the Supreme Court again considered the issue of jurisdiction under Article 226 of the Constitution of India. The facts (in the aforesaid case) which were taken into consideration were, that the "ONGC" issued an advertisement in leading newspapers of the country inviting tenders for setting up of a Kerosene Recovery Processing Unit at ONGC's Hazira Complex in Gujarat. The tenders were to be communicated to Engineers India Ltd. (who was acting as consultants for the ONGC). NICCO having its registered office in Calcutta, on reading the Times of India (circulated in Calcutta), became aware of the advertisement. NICCO submitted its tender in response to the aforesaid advertisement. All the tenders

were scrutinised at New Delhi. NICCO's bid was rejected on the ground that it did not fulfil the requisite experience criterion. The final decision in respect of the acceptance of the tender was taken by the Screening Committee at New Delhi. The tender was awarded to some other Company, NICCO filed a writ petition in the Calcutta High Court seeking to restrain the ONGC from awarding the contract without considering the claim of NICCO. According to NICCO, the Calcutta High Court had jurisdiction to entertain the controversy in view of the fact that NICCO had come to know of the tender from a newspaper circulated within the jurisdiction of the Calcutta High Court. The registered office of NICCO was also situated within the same jurisdiction. The tender/offer was made by NICCO from its registered office. Likewise when NICCO's tender was not accepted, it issued a justice demand notice from its registered office, the response to which was addressed to NICCO at its registered office by the ONGC. The Calcutta High Court, on the facts narrated above, entertained the writ petition and directed the ONGC to consider the offer of the petitioner (NICCO) along with others and in case the petitioner's offer was found to be valid as well as the lowest, it should be accepted. The appeal before the Supreme Court was confined to the preliminary objection raised by the ONGC before the High Court, namely, that the Calcutta High Court had no jurisdiction to entertain the writ petition as no cause of action had arisen within the territorial jurisdiction of the Calcutta High Court. The Supreme Court in the aforesaid judgment observed as under :--

"8. From the facts pleaded in the writ petition, it is clear that NICCO invoked the jurisdiction of the Calcutta High Court on the plea that a part of the cause of action had arisen within its territorial jurisdiction. According to NICCO, it became aware of the contract proposed to be given by ONGC on reading the advertisement which appeared in the Times of India at Calcutta. In response thereto, it submitted its bid or tender from its Calcutta office and revised the rates subsequently. When it learnt that it was considered ineligible it sent representations, including fax messages, to EIL, ONGC, etc., at New Delhi, demanding justice. As stated earlier, the Steering Committee finally rejected the offer of NICCO and awarded the contract to CIMMCO at New Delhi on 27-1-1993, Therefore, broadly speaking, NICCO claims that a part of the cause of action arose within the jurisdiction of the Calcutta High Court because it became aware of the advertisement in Calcutta, it submitted its bid or tender from Calcutta and made representations demanding justice from Calcutta on learning about the rejection of its offer. The advertisement itself mentioned that the tenders should be submitted to EIL at New Delhi; that those would be scrutinised at New Delhi and that a final decision whether or not to award the contract to the tenderer would be taken at New Delhi. Of course, the execution of the contract work was to be carried out at Hazira in Gujarat. Therefore, merely because it read the advertisement at Calcutta and submit led the offer from Calcutta and made representations from Calcutta would not, in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not

constitute an integral part of the cause of action. Besides the fax message of 15-1-1993 cannot be construed as conveying the rejection of the offer, as that fact occurred on 27-1-1993. We are, therefore, of the opinion that even if the averments in the writ petition are taken as true, it cannot be said that a part of the cause of action arose within the jurisdiction of the Calcutta High Court." (p. 719)

21. Reliance was also placed, by learned counsel for respondent No. 2, on Union of India and Others Vs. Adani Exports Ltd. and Another, . In the aforesaid case the respondents approached the Gujarat High Court claiming the benefit of the "Passbook Scheme" framed under the "Import Export Policy" introduced with effect from 1-4-1995, in relation to certain credits to be given on export of shrimps. None of the respondents arrayed in the petition, were stationed within the territorial jurisdiction of the Gujarat High Court. The passbooks on account of which the respondents claimed benefits, were issued from Chennai. The export of prawns made by the respondents, and the import of the inputs, benefit for which, was being claimed by the respondents in the writ petitions, were made through Chennai. The Union of India opposed the said petitions asserting that the Gujarat High Court had no territorial jurisdiction on the issues raised by the respondents. The aforesaid objection was overruled by the High Court, whereupon the controversy raised by the respondent was adjudicated upon on merits. In the appeal preferred by the Union of India, the Supreme Court while referring to Article 226(2) of the Constitution of India, observed as under :--

"It is clear from the above constitutional provision that High Court can exercise the jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises. This provision in the Constitution has come up for consideration in a number of cases before this Court. In this regard, it would suffice for us to refer to the observations of this Court in the case of Oil and Natural Gas Commissions. Utpal Kumar Basu (SCC at p. 713) wherein it was held :

"Under Article 226 a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. The expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the court. Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of an enquiry as to the correctness or otherwise of the said facts. Thus the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial."

It is seen from the above that in order to confer jurisdiction on a High Court to

entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the court to decide a dispute which has, at least in part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus of relevance with the lis that is involved in the case. Facts which have no bearing with the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. If we apply this principle then we see that none of the facts pleaded in para 16 of the petition in our opinion, falls into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the courts at Ahmedabad."

In view of the legal position expressed above, the Supreme Court arrived at the conclusion that the Gujarat High Court had no jurisdiction to entertain the petition filed by the respondent.

22. Having laid down the aforesaid foundation, learned counsel representing respondent No. 2, concluded by submitting that this Court did not have the territorial jurisdiction to entertain the instant petition, and that, the factual matrix relied upon by the learned counsel for the petitioner was not relevant to the issue.

23. The Constitution of India, as it was originally adopted, provided for certain basic safeguards for the citizens and residents of India. The aforesaid safeguards were expressed in Part III of the Constitution of India. They were described as fundamental rights. The framers of the Constitution considered the necessity to provide a quick and inexpensive remedy for the enforcement of the fundamental rights, enshrined in Part III of the Constitution of India. Finding that the prerogative writs which the Courts in England had developed, for dealing with issues of urgent and immediate nature, would be suitable for the purpose; Article 226 of the Constitution of India was conceived of to vest in High Courts the authority to issue writs, directions, or orders with the objective of enforcement of the fundamental rights and similar other rights. Despite the fact that wide powers (as indicated above) were conferred on High Courts under Article 226 of the Constitution of India, there were certain jurisdictional limitations, which substantially reduced the efficacy of the said remedy.

24. The Supreme Court for the first time interpreted the jurisdictional aspect of Article 226 of the Constitution of India in *Election Commission, India Vs. Saka Venkata Subba Rao and, .* The question determined by the Supreme Court in the aforesaid case was, whether the Madras High Court had validly entertained a writ petition under Article 226 of the Constitution of India, so as to restrain the Election Commission from enquiring into the alleged disqualification of the

respondent. It would be pertinent to mention that the Election Commission is a statutory authority, constituted by the President of India, with its office permanently located at New Delhi. A Single Judge of the Madras High Court, had entertained the writ petition under Article 226 of the Constitution of India, and had issued a writ prohibiting the Election Commission from proceeding with the enquiry, after overruling the preliminary objection on the issue of jurisdiction. The Supreme Court while holding that the High Court had no jurisdiction to entertain the writ petition, observed as under :--

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises jurisdiction...." (p. 213)

It would be pertinent to mention that the High Court in Election Commission, India's case (supra) after examining the provision of Article 226 of the Constitution of India, arrived at the conclusion, that the power conferred under Article 226, was subject to a two-fold limitation. Firstly, the power could be exercised "throughout the territories in relation to which it exercises jurisdiction"; and secondly, the person (or authority) to whom a High Court, is empowered to issue a writ, direction or order must be located "within those territories". Stated in other words (insofar as the second limitation is concerned), the writ of a High Court could not run beyond the territories over which it had jurisdiction, inasmuch as, the person or authority affected by the writ of a High Court, must be amenable to its jurisdiction, either by residence or location.

25. The Supreme Court again considered the issue of jurisdiction under Article 226 of the Constitution of India in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., . The aforesaid case arose as a consequence of orders passed by the erstwhile High Court of Punjab at Simla, which had declined to entertain a writ petition, on account of lack of jurisdiction. The writ petition before the High Court had been filed by the appellants before the Supreme Court, under the Taxation of Income (Investigation Commission) Act, 1947, praying for the issuance of a writ of prohibition so as to restrain the Income Tax Investigation Commission, located at Delhi, from proceeding with the investigation of cases referred to it under the provisions of the aforesaid Act. The plea raised was, that the assessee against whom the investigation was initiated by the Commission, belonged to Uttar Pradesh. In the aforesaid view of the matter, the assessment proceedings of the petitioners relating to Income Tax (including a reference therefrom), would lie to the High Court in the State of Uttar Pradesh. The Investigation Commission was located at Delhi, and on that account, proceedings against the Commission's orders would lie only to the High Court at Delhi. The Punjab High Court accepted the preliminary objection raised by the respondents and declined to entertain the petition on the ground that it had no jurisdiction in the matter. The Supreme Court, while determining the

controversy, reiterated the legal position recorded in Election Commission, India's case (supra).

26. The same issue came up for consideration before the Supreme Court again in Lt. Col. Khajoor Singh Vs. The Union of India and Another, . In the aforesaid case, the two questions which came up for determination before the Apex Court were, firstly, whether the Government of India can be said to be located in a particular place viz. Delhi, irrespective of the fact that its authority extends over all the States, and in spite of the fact that its officers function throughout India; and secondly, whether there is any scope for introducing the concept of "cause of action" as the basis of exercise of jurisdiction, under Article 226 of the Constitution of India. The first question was answered by the Supreme Court in the following manner :--

"... Now it is clear that the jurisdiction conferred on the High Court by Article 226 does not depend upon the residence or location of the person applying to it for relief; it depends only on the person or authority against whom a writ is sought being within those territories. It seems to us therefore that it is not permissible to read in Article 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High Court. That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction...." (p. 538)

On the second question, the Apex Court held as under :--

"... As we read the relevant words of Article 226 (quoted above) there can be no doubt that the jurisdiction conferred by that Article on a High Court is with respect to the location or residence of the person or authority passing the order and there can be no question of introducing the concept of the place where the order is to have effect in order to determine which High Court can give relief under it. It is true that this Court will give such meaning to the words used in the Constitution as would help towards its working smoothly. If we were to introduce in Article 226 the concept of the place where the order is to have effect we would not be advancing the purposes for which Article 226 has been enacted. On the other hand, we would be producing conflict of jurisdiction between various High Courts as already shown by the illustration given above. Therefore, the effect of an order by whomsoever it is passed can have no relevance in determining the jurisdiction of the High Court which can take action under Article 226....

14. The seat of a Government is sometimes mentioned in the Constitution of various countries but many a time the seat is not so mentioned. But whether the seat of a Government is mentioned in the Constitution or not there is undoubtedly a seat from which the Government as such functions as a fact. What Article 226 requires is residence or location as a fact and if therefore there is a seat from which the Government functions as a fact even though that seat is not mentioned in the Constitution the High Court within whose territories that seat is

located will be the High Court having jurisdiction under Article 226 so far as the orders of the Government as such are concerned...." (p. 539)

It is, therefore, obvious that in deciding the controversy in Lt. Col. Khajoor Singh's case (supra), the Supreme Court reiterated the legal position declared in Election Commission, India's case (supra) and in K.S. Rashid and Son's case (supra).

27. The suggestion to amend Article 226 of the Constitution of India, made by the Apex Court in Lt. Col Khajoor Singh's case (supra), to make it more effective and realistic, became a reality, when Parliament approved the 15th amendment, by which Clause (1A) was added to Article 226. The aforesaid Clause (1A) introduced by the 15th amendment to the Constitution, was subsequently renumbered as Clause (2) by the Constitution's 42nd amendment. Clause (2) of Article 226 of the Constitution reads as under :--

"(2) The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arise for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

After the amendment of the Constitution (noticed above), the jurisdiction of the High Court to entertain a writ petition, has been substantially broadened. A writ petition is now entertainable in a High Court, within the jurisdiction of which, even a part of the cause of action, has occurred.

28. The Apex Court in Navinchandra N. Majithia Vs. State of Maharashtra and Others, , wherein the Supreme Court interpreted the 15th amendment of the Constitution, by which Clause (1 A) was added to Article 226, opined that the object of introducing the amendment made to Article 226, was to overcome the limits of jurisdiction expressed by the Supreme Court in Election Commission, India's case (supra), and to extend the jurisdiction of High Courts under Article 226 of the Constitution of India. It was also concluded that the amendment was aimed at extending the width and the area of reach of writs issued by High Courts. In the aforesaid judgment the Apex Court noticed as under:--

"We make it clear that the mere fact that F.I.R. was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another State. Nor are we to be understood that any person can create a fake cause of action or even concoct one by simply jutting into the territorial limits of another State or by making a sojourn or even a permanent residence therein. The place of residence of the person moving a High Court is not the criterion to determine the contours of the cause of action in that particular writ petition. The High Court before which the writ petition is filed must ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends upon the facts in

each case."

29. It is clear from the conclusions drawn by the Apex Court that an answer to the question, as to whether, the cause of action or a part of the cause of action has arisen within the territorial jurisdiction of a Court, shall have to be determined on the facts of each case.

30. Applying the aforesaid dictum, to the facts and circumstances of the instant case, there can be no doubt, that a part of the cause of action, must be deemed to have arisen to the PGFL, within the territorial jurisdiction of this Court, since it is not disputed that hundreds of acres of agricultural land which are the subject-matter of the alleged sale/purchase activity of the PGFL are located within the territorial jurisdiction of this Court. The ownership rights in the aforesaid property is liable to be effected by the impugned order. It will again be affected one way or the other, by the outcome of the instant determination. Examined from a different angle, the impugned order dated 6-12-2002 has the effect of nullifying, the sale transactions between PGFL and its customers/investors, accordingly, a refund of the investments, which the PGFL has been required to make to its customers/investors, in compliance with the directions contained in the impugned order will have to be implemented from the registered office of the PGFL, which is located at Chandigarh i.e. within the territorial jurisdiction of this Court. Additionally, one cannot overlook the fact that the passing of the impugned order dated 6-12-2002 itself is based on the directions issued by this Court in P.G.F. Ltd v. Union of India [CWP No. 4620 of 2002]. Moreover, a Division Bench of the Rajasthan High Court, examined a similar plea raised on behalf of respondent No. 2 in, PACL India Ltd. v. Union of India [CWP No. 6735 of 1999, dated 28-11-2003] in similar circumstances, and rejected the same. In view of the aforesaid position, there can be no doubt that this Court does not lack territorial jurisdiction to entertain the controversy raised by the PGFL.

III. Regulation of "collective investment schemes" in India :

31. The intricacies involved in the controversy in hand, was realised when counsel projected rival contentions. The main thrust of arguments, at the hands of the learned counsel for the petitioners was, that PGFL is not a "collective investment scheme", and therefore, cannot be subjected to regulation at the hands of the Board, under the Securities Exchange Board of India Act, 1992 (as amended from time to time). Undoubtedly, the answer to the aforesaid query would depend upon, the words, terms, and expressions, used by the Legislature, in defining "collective investment schemes". Another contention advanced was, that the subject of legislation under the SEBI Act was beyond the legislative competence of the Parliament. The historical march of events, whereby the term "collective investment scheme" assumed its final shape, also depict the spirit, the thought, and the object, which came to be cumulatively crystalised, in finalising the legislation in question. It is, therefore, considered appropriate, to examine the march of events, which culminated in the Parliament's effort to define "collective investment schemes".

32. The Securities Contracts (Regulation) Act, 1956 was enacted, with the object of preventing undesirable transactions in securities, by regulating the businesses dealing therewith. Section 2(h) of the aforesaid Act defined the term "securities" as under :--

"(h) "Securities" include--

(i) shares, scrips, stocks, bonds, debentures, debentures stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(id) to (ic)** ** **

(ii) Government securities; and

(ia)** ** **

(iii) rights or interests in securities;"

33. The Securities and Exchange Board of India (hereinafter referred to as "the Board"), was established in 1988 through a Government of India resolution to promote orderly and healthy growth of the security markets, and for investors' protection. The function of the Board included, monitoring of the activities of stock exchanges, mutual funds and merchant bankers etc., to achieve these goals.

34. The capital market experienced a tremendous growth in the early nineties, characterised by an increasing participation of the public. In order to sustain investors' confidence in the capital market, it was essential to ensure investors' protection. The Government of India decided to vest the Board with statutory powers in 1992, so as to enable the Board, to deal with all matters relating to the capital market decisively. The President of India promulgated the Securities and Exchange Board of India Ordinance, 1992, on 30-1-1992. The aforesaid ordinance was substituted by the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the SEBI Act"). By a deeming fiction the SEBI Act was made enforceable with effect from 30-1-1992. The SEBI Act was enacted to vest statutory authority with the Board, so as to enable it to promote the development of the securities market, as well as to regulate the securities market and also to protect the interests of investors in securities. Under the instant enactment, the term "securities" was defined as under:--

"(i) "securities" has the meaning assigned to it in Section 2 of the Securities Contracts (Regulation) Act, 1956."

35. To enable the Board, to function more effectively, a need was felt to amend the aforesaid enactments of 1956 and 1992, in respect of certain categories of intermediaries, persons associated with securities market and companies, on matters relating to the issue of capital, and the transfer of securities. Accordingly, the principal Act of 1992, was amended through the Securities Laws (Amendment) Act, 1995, The amendments inter alia introduced provisions to :

"(a) regulate the companies on matters relating to issues of capital, transfer of securities and other matters incidental thereto;

(b) bring intermediaries like depositories, custodians for securities and some other categories of persons associated with the securities market like foreign institutional investors, credit rating agencies and venture capital funds which play a major role in the development of the capital market which were outside the purview of the Board;

(c) impose monetary penalties also in addition to or other than penalties of suspension or cancellation of certificate of registration which may not be appropriate in all cases of default.

(d) provide for appointment of an adjudicating officer for imposition of penalties; and for establishment of a Securities Appellate Tribunal, to hear appeals from the orders or decisions of the adjudicating officer;

(e) issue regulations without the approval of the Central Government;

(f) allow directors of companies to be appointed as members of the Board so that the Board benefits from the expertise of people familiar with the capital market;

(g) facilitate the issuance and trading of options in securities;

(h) allow the existing stock exchanges to establish additional trading floors outside their area of operation;

(i) make violation of the listing agreement as an offence."

36. Commencing from the early eighties, several concerns (for convenience, referred to as "entities") were operating financial schemes in the market which assured customers of very high returns. Unwary customers were allured/tempted to invest in such financial schemes, through misleading advertisements and aggressive publicity. In 1997, when these entities started defrauding in making payments to their customers/investors, there was a huge uproar. As a result of the discontentment expressed in the public, the Union of India decided to regulate these financial schemes through the Board. It was in continuation of the aforesaid process, initiated by the Government of India, that a press release dated 18-11-1997 was issued declaring the determination of the Government to regulate entities, which were engaged in the sale of agro bonds and plantation bonds, etc., as "collective investment schemes". As per the aforesaid press release, the Board was to delineate the procedure for the aforesaid objective in the form of regulations. u/s 12(1B) of the SEBI Act, all such entities were prohibited by the Board from sponsoring any new scheme till the regulations were finally notified by the Board. Before finalisation of the aforesaid regulations, the Board was first required to publish the draft regulations for public discussion, and later publish the regulations in their final form. u/s 12(1B) of the SEBI Act, a ban was imposed on carrying on any venture capital funds or "collective investment schemes" including mutual funds, except under, and in accordance

with, the regulations finalised by the Board for the aforesaid purpose.

37. With the aforesaid objective in mind, the Government of India constituted a committee under the Chairmanship of Dr. S.A. Dave (hereinafter referred to as "the Dave Committee"). The Dave Committee comprised of representatives from Government Ministries, Regulatory Bodies, Consumer Fora, Professional Bodies as well as Plantation Investors. Pursuant to the aforesaid decision of the Government of India, the Board issued a press release dated 26-11-1997 and a public notice dated 18-12-1997, in all leading newspapers in India intimating the public at large, that it had initiated action for framing regulations in respect of "collective investment schemes", under the SEBI Act. In the aforesaid public notice, the Board restrained entities from introducing any new "collective investment scheme", as also from collecting any further funds. Existing "collective investment schemes", which were already operative, were however, allowed to continue with their operations. Through the aforesaid public notice, the Board also required the entities operating "collective investment schemes", to communicate to the Board, details of the terms and conditions of the existing schemes, including funds raised under the schemes.

38. The Board in the ongoing process of regulating entities which issued agro bonds, plantation bonds etc., accepted the interim recommendations of the Dave Committee (dated 28-1-1998), and directed the existing "collective investment schemes", which were already operating, and which were continuing to raise and mobilise funds from the public, to do so, subject to the condition, that the instruments of such "collective investment schemes" had been got rated through one of the four rating agencies identified for the purpose, namely:--

"(a) Credit Rating Information Services of India Ltd. (CRISIL)

(b) Information and Credit Rating Agency Ltd. (ICRA)

(c) Credit Analysis and Research Ltd. (CARE)

(d) Duff and Phelps Credit Rating India Pvt. Ltd."

The Board issued a further direction requiring every entity which had obtained the afore-stated rating, to incorporate the determination of the rating agency in all of the documents/pamphlets/circulars/advertisements etc., which were distributed to the public for soliciting business for the entity so that the investors/customers had complete information about its activities, assets and liabilities etc.

39. On 31-12-1998, the Dave Committee submitted its report on "collective investment schemes". Based on the data made available to the Dave Committee, it arrived at the conclusion that the existing agro bonds, plantation bonds etc., which had broadly the following salient features, should be treated as "collective investment schemes":--

(a) The scheme were typical open ended, broad disclosures made to the investors were not adequate to enable informed decisions.

(b) The promoters themselves invested a minimal amount in such ventures and sourced a majority of the funds from ordinary investors.

(c) High returns were promised by the schemes i.e., between the range of 18 to 30 per cent per annum on the investments. The returns offered were already higher than any conventional debt instrument. These high returns were a major attraction for the investors.

(d) Effective rural marketing helped many of these companies to mobilise funds over a short period of time. The scheme were aggressively marketed in the rural and semi-urban areas directly, and through a network of agents who were offered attractive commissions. The commissions offered were at times as high as 10 to 15 per cent of the amount mobilised.

(e) Though all the existing schemes were primarily managing investors funds, in most of the cases there was an intermingling of the scheme accounts with those of the companies accounts. Consequently, it was difficult to ensure adequate investor protection in this structure of operations as assets of customers/investors were managed for and on behalf of the investors.

(f) There was high risk associated with these ventures due to the long gestation period involved, coupled with crop risks; specially because the entities did not have sufficient experience in agro based activities.

(g) The scheme operators projected that the income earned by the customers/investors was free of tax liabilities as the income generated was agricultural income, regardless of the fact whether these returns occurred out of genuine agricultural activity or were in fact being paid from other sources including fresh collections. Promise of tax free income was a major attraction for investors in such plantation schemes.

(h) Many schemes had been structured in a way that the entity offered ownership of pieces of land or property to the investors. This feature was used to create a sense of security which arises from owning a real estate asset. The aforesaid impression was sought to be created in the minds of investors, notwithstanding the fact that most of the times the land allotted to the customer/investor was not distinctly identifiable.

40. On the basis of the aforesaid features which were found in the existing scheme the Dave Committee recommended, that entities which issued agro bonds, plantation bonds etc. should be treated as "collective investment schemes", so as to bring them under the purview of the SEBI Act. The Dave Committee, therefore, suggested a fresh definition for the term "collective investment schemes" by identifying three important characteristics thereof, namely, pooling of investments, management by entities, and absence of day to day control of the investors. While recommending the aforesaid definition, the Dave Committee acknowledged that some arrangement of the nature of time shares, club memberships, etc. would also fall within the definition of the term

"collective investment schemes". It was, however suggested, that the Board should be given appropriate powers to grant exemption, to any class of arrangement, which was not desired to be regulated as a "collective investment scheme" including time shares, club memberships etc., while recommending a fresh definition for the term "collective investment schemes", the Dave Committee expressly noticed that it had observed that many of the existing "collective investment schemes" resorted to entering into multiple agreements with the investors, whereby the investor was given the ownership of land, and the entity was given the right to develop the same. The Dave Committee clarified that the substance of such agreements should be appropriately scrutinised to determine whether the scheme was a "collective investment scheme" or not. The Dave Committee asserted, that the presence of day to day control of the investor in the management of the property, should be the prime basis for determining the status of the scheme.

41. The Dave Committee also delineated the conditions which must be satisfied before an entity is licensed to carry out activities of a Collective Investment Management Company, including adequate management and sufficient financial resources. Upon satisfying the aforesaid basic requirements, a collective investment company/entity should be granted licence/registration to operate a "collective investment scheme", subject to the following conditions:--

"(a) A non-independent director in the registered CIMA should not be allowed to hold the office of the director in another CIMA. This was incorporated to ensure avoidance of conflict of interest in business activities of separate entities.

(b) The CIMA must inform SEBI about any material change in the information or particulars which may have a bearing on the approval granted to it.

(c) The CIMA would undertake to comply with the regulations notified by SEBI from time to time.

(d) Any change in the controlling interest of the CIMA would be subject to prior approval of the Trustee, the Board, and the unit holders.

(e) The CIMA would have to furnish such information and documents to the Trustee as and when required.

(f) A payment of prescribed fee would also have to be made to the Board, so as to enable it to bear the financial burden of regulating the activities of an entity.

42. The Dave Committee also recommended that the following obligations should be imposed on the Collective Investment Management:--

"(a) The interest of the CIMA or its related parties should not be placed above the interest of the scheme investors. Towards this end, it would be essential for the CIMA to provide for regulations governing party transactions.

(b) The CIMA would be bound by strict adherence to the scheme's investment policy, offer document and the trust deed.

(c) Participants would be given regular feedback and told of all the information pertinent to their investments.

(d) Participants should not suffer losses because the CIMA or its employees had not acted with reasonable care and diligence.

(e) The CIMA should regularly report to the trustees on the activities of the schemes and the compliance with the regulations.

(f) The CIMA should be bound to comply with the code of conduct prescribed in the regulations.

(g) It should be ensured that the CIMA and its officers and employees, do not benefit from unfair use of information."

43. The Dave Committee also recommended the procedure for launching a "collective investment scheme", which should include necessary disclosures in the offered documents, a registered Collective Investment Management should be eligible to launch a scheme only if it fulfils the following requirements:--

"(a) The scheme should be approved by the trustee and a copy of the offer document must be filed with the Board.

(b) All schemes must be rated by an approved credit rating agency.

(c) No scheme shall be launched without appraisal by an empanelled appraising agency.

(d) The schemes would have to be close ended, and must have a minimum duration of 3 years.

(e) No scheme shall be open for subscription for more than 180 days.

(f) The units of a "collective investment scheme" shall have to be listed on the recognized stock exchanges.

(g) No guaranteed returns will be provided in the scheme. Indicative returns, if assessed by the appraising agency, may be mentioned in the offer document in monetary terms only.

(h) Adequate insurance covers for protection of scheme assets against loss or damage must be taken."

44. Consequent upon the intent expressed by the Government of India and the recommendations made by the Dave Committee, and keeping in mind that many companies, specially plantation companies, agro companies etc., had been raising capital from investors through schemes which were in the form of "collective investment schemes", but were without adequate regulatory framework, to allow an orderly development thereof, and without adequate protection of the interests of investors, it was decided that, the Board should frame regulations with regard to "collective investment schemes". It was, therefore,

proposed to amend the definition of the term "securities" under the SEBI Act, so as to include within its ambit, the derivatives, the units, or any other instruments issued by "collective investment schemes", to the investors in such schemes. The Parliament, therefore, promulgated the Securities Laws (Amendment) Act, 1999, whereby it, inter alia, added Section 11AA to the parent SEBI Act, whereby it exhaustively defined the term "collective investment scheme", worded in consonance with the recommendations made by the Dave Committee. The statement of objects and reasons, of the instant amendment, endorses the aforesaid position. The details of the deliberations and conclusions and recommendations of the Dave Committee, therefore, must be referred to, in order to determine the real basis for the addition to Section 11AA to the SEBI Act. On a perusal of the same, the aim and objective which unambiguously emerges is the protection of innocent investors by regulating the functioning of entities. Section 11AA of the SEBI Act is being reproduced hereunder :--

"11AA. Collective investment scheme.--(1) Any scheme or arrangement which satisfies the conditions referred to in Sub-section (2) shall be 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 utilized for the purposes of the scheme or arrangement;

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

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

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

(3) Notwithstanding anything contained in Sub-section (2), any scheme or arrangement--

(i) made or offered by a cooperative society registered under the Cooperative Societies Act, 1912 or a society being a society registered or deemed to be registered under any law relating to cooperative societies for the time being in force in any State;

(ii) under which deposits are accepted by non-banking financial companies as defined in Clause (f) of Section 45-I of the Reserve Bank of India Act, 1934;

(iii) being a contract of insurance to which the Insurance Act, 1938, applies;

(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952;

(v) under which deposits are accepted u/s 58A of the Companies Act, 1956;

(vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society u/s 620A of the Companies Act, 1956;

(vii) falling within the meaning of Chit business as defined in Clause (d) of Section 2 of the Chit Fund Act, 1982;

(viii) under which contributions made are in the nature of subscription to a mutual fund; shall not be a collective investment scheme."

45. A birds eye view of the march of historical events would reveal, that the Securities Contracts (Regulations) Act, 1956 was enacted for preventing undesirable transactions in securities, by regulating the business dealing therewith. A non-statutory Board was established in 1988 by the Government of India, to promote orderly and healthy growth of the securities market, and for investors protection. The Securities and Exchange Board of India Ordinance, 1992, followed by the Securities and Exchange Board of India Act, 1992, vested statutory authority in the Board to carry out its objectives. The principal Act of 1992 was first amended through the Securities Laws (Amendment) Act, 1995, so as to introduce further regulatory measures. On the basis of the realisation that companies/financial institution/entities were earning huge profits through the operation of financial schemes, by defrauding customers/investors, the Dave Committee was constituted to recommend remedial measures. On the recommendations of the Government of India and the Dave Committee's report, the principal Act of 1992 was amended through the Securities Laws (Amendment) Act, 1999. Through the instant amendment "collective investment schemes" were brought within the scope of the term "securities", for the protection of innocent investors by regulating the functioning of entities. The term "collective investment scheme" was exhaustively defined to include schemes in the nature of plantation bonds, agro bonds, etc. All in all, a tremendous effort aimed at investor protection, so that unwary customers/investors were not defrauded of their lives earnings at the hands of unscrupulous companies/financial institutions/entities.

IV. Is the business activity of PGFL a "collective investment schemes"?

46. The primary contention of the learned counsel for the petitioner, so as to challenge the validity of the impugned order dated 16-12-2002 (Annexure P.3), is that the PGFL is not engaged in a "collective investment scheme". If the petitioners succeed in establishing their aforesaid submission, the action taken by the Board, against the PGFL through the impugned order will have to be set aside.

47. The first and foremost submission of the learned counsel for the petitioner is that a scheme/arrangement to be described as a "collective investment scheme", must satisfy all the ingredients/characteristics enumerated in Section 11AA(2) of the SEBI Act. The aforesaid contention of the learned counsel has not been disputed by the counsel representing the respondents. In order, therefore, to adjudicate upon the aforesaid controversy, the only exercise which has to be

carried out is to determine whether the PGFL satisfies all the ingredients/ characteristics expressed in Sub-section (2) of Section 11AA of the SEBI Act.

48. Before embarking upon the aforesaid exercise, it would first be essential to determine the nature of the activities of the PGFL. In order to enable this Court to examine the activities of the PGFL, learned counsel for the petitioners has invited the attention of this Court to two documents appended to the writ petition, namely, Annexures P.6 and P.7. Annexure P.6 is a sample sale agreement executed by the PGFL with its customers/ investors. Annexure P.7 is a sale deed executed by the PGFL with one of its customers/investors, on the purchase of one unit of agricultural land measuring 1350 sq. feet (150sq. yards). Relying on the aforesaid Annexures, learned counsel for the petitioners wishes to draw the following conclusions:--

Firstly, that the association between the PGFL and its customers/investors is not a one-way traffic. In this behalf it is submitted, that money paid by customers/ investors, is not pooled for collective utilisation in the business activity of the PGFL, (which would make it one way). It is pointed out that in the activities of the PGFL, a customer/investor is not entitled to any gains. According to the learned counsel, the sample sale agreement and the sample sale deed, demonstrate that the relationship between the PGFL and its customers/investors, is of outright sale of agricultural land (by the PGFL to its customers/investors). The aforesaid documents, according to the learned counsel, further establish, that the PGFL passes on a clear marketable title to its customers/investors by way of sale of agricultural land in units or multiples of 1350 sq. feet (150 sq. yards).

Secondly, PGFL offers its customers/investors an option to seek the assistance of the PGFL, for the development of the land purchased. Alternatively, it is also open to the customers/investors to develop the purchased land of their own. In case, a customer/investor opts for the development of land through the PGFL, he has to pay a defined contribution for the said purpose. In case the customer / investor requires the PGFL to develop the agricultural land purchased by him; the PGFL undertakes to do so in consultation with agro-consultants and experts, after taking into consideration factors such as, soil of the purchased land, climate of the area etc. In its developmental activities, the PGFL undertakes to conduct a survey, and demarcation of the land, besides clearing and cultivation the same by planting saplings, trees, plants or by raising crops, as well as by creating the required, irrigation infrastructure. The PGFL also undertakes to use appropriate fertilizers and pesticides, as and when required, in the process of development of its customers/investors land.

Thirdly, the customers/investors are deemed to be the absolute owners of the unit/units of agricultural land purchased by them, as well as in exclusive possession thereof. In this context, it is pointed out, that in the first instance, the PGFL, on receipt of consideration from the customer/ investor, is bound to issue an allotment letter, within a reasonable period (ordinarily not exceeding 270

days, under the "cash down payment plan"; and within a period not ordinarily exceeding 90 days, on or receipt of 50% of the consideration, under the "instalment plan"). The second step, is the execution of a sale deed. In this behalf it is pointed out, that the PGFL is under an obligation to execute a sale deed and thereby transfer the title of the plot of land, in the name every customer/investor. The PGFL also undertakes to supply the customer/investor with a certified copy of the sale deed, procured from the office of the concerned Sub-Registrar before whom it has been registered.

Fourthly, the PGFL undertakes to notify the customers/investors, the factum of completion of development of the land, at least 30 days before the date of the expiry of the agreement, so as to enable the purchaser, to inspect the land sold to him, to verify whether or not the development executed by the PGFL, is in consonance with its undertaking. In case the customer/investor points out any deficiency in the development, the same is to be rectified by the PGFL. Even prior thereto, it is open to the customer/investor, to inspect/supervise the development work and other services being executed by the PGFL.

Fifthly, in case of breach of any of the conditions stipulated in the agreement executed with the customer/investor, by the PGFL, the customer/investor is entitled to terminate the agreement with the PGFL. In case, a customer/investor chooses to terminate his contract with the PGFL, he is entitled to a refund of the money paid by him to the PGFL, together with simple interest at the rate 15% per annum, from the date of the agreement. A customer/investor is likewise authorised to terminate the contract in case the PGFL does not complete the development work within the stipulated time.

Sixthly, in case of breach of the terms and conditions of the contract, by a customer/investor, (including the non-payment of one or more instalments), it is open to the PGFL to terminate the contract. In case of such breach, by a customer, before issuance of the allotment letter, the amount received by the PGFL, is to be refunded subject to specified deductions. In case of such default, committed by a customer, after the issuance of the allotment letter or the registration of land, the PGFL is entitled to cancel the agreement, and pay back the consideration received from the customer/investor after effecting deductions therefrom in the same manner indicated hereinabove (in case of breach before allotment of land), however, in such a case, deductions are of a higher magnitude.

Seventhly, irrespective of the fact that there is no breach on behalf of the customer/investor and/or the PGFL, the terms and conditions regulating the contract, authorise the customer/investor to opt out of the transaction. The opting out is, however, available to the customer, only before issuance of an allotment letter in his favour. Here again, before refund (of the deposit made by the customer/investor), the PGFL is entitled to effect specified deductions.

Eighthly, the customer/investor, has the option to retain or sell the unit/ units of

land purchased by him, after the expiry of the agreement. In case the customer/investor chooses to sell the unit/units of land purchased by him, he can also seek the assistance of the PGFL by making a written request (to the PGFL).

Ninthly, in case of any dispute between the PGFL (on the one part), and the customer/investor (on the other), the sample agreement/sample sale deed, provide for adjudication of the same through arbitration. The PGFL is authorised to appoint an arbitrator for the settlement of a dispute, however, only a retired judicial officer can be appointed as an arbitrator. The determination at the hands of the arbitrator, is to be final and binding on the parties. In furtherance of the arbitration clause, the terms and conditions laid down denote, that the civil Courts at Delhi would have exclusive jurisdiction for any consequential legal remedy.

49. Relying upon the aforesaid factual matrix which constitutes the entire business activity of the PGFL as well as the relationship between the PGFL and its customers/investors learned counsel for the petitioners, reiterated that the business activities of the PGFL, are not in the nature of a "collective investment scheme" as defined u/s 11AA(2) of the SEBI Act, but are simply in the nature of sale and purchase of agricultural land, by the PGFL to its customers, and also the development of the land sold to the customer/investor, at his discretion.

50. Proceeding on the aforesaid factual premise, the first contention of the learned counsel for the petitioner is, that the deposits made by the customers/investors cannot be described as "contributions", nor is it possible to conclude therefrom that the contributions made by the customers/investors are "pooled and utilised for the purposes for which the scheme" is made. In this behalf, it is the vehement contention of the learned counsel for the petitioners, that the deposit made by a customer/ investor, is not utilised collectively for any financial/ monetary gains, nor is it utilised for carrying on any collective objective. Interaction between the PGFL and its customers/investors, is no more (and no less) than that between an ordinary seller and buyer. According to learned counsel for the petitioners, on the basis of the factual position projected in the foregoing paragraph, it is not possible to conclude, that the deposits made by the customers/investors with the PGFL, are to be utilised for any specified collective activity. Therefore, the contention of the learned counsel is, that the activity of the PGFL does not satisfy the mandatory ingredients of a "collective investment scheme" delineated in Section 11AA(2)(f) of the SEBI Act. In order to buttress the argument further, it is sought to be canvassed (hypothetically), that the PGFL could have easily executed two agreements; one for the sale of land and another for rendering services of development of the said land. The submission of the learned counsel for the petitioners is aimed at emphasising, that if the PGFL had entered into two agreements, as suggested, it would not have been possible to conclude that any of its activities had any essence of "collectively" or "pooling".

51. The second submission of the learned counsel for the petitioners in the same stream is, that the activities of the PGFL are not aimed either towards a profit

motive or an income motive, for its customers/investors. In the absence of such a motive, the activity transacted by the customers/investors with the PGFL, can neither be deemed to be in the nature of securities, nor in the nature of a "collective investment scheme". According to learned counsel, insofar as the term "property", used in Section 11AA(2)(ii) of the SEBI Act is concerned, the same can be applicable to properties, other than the agricultural land. Detailed submission, in dealing with the effect that the term "property" used in Section 11AA(2)(ii) of the SEBI Act, insofar as its alleged inapplicability to agricultural land is concerned, has been dealt with by us under the head "Constitutional validity of Section 11AA of the SEBI Act", at a later stage in this judgment. It is emphasised by learned counsel, that from the business activities of the PGFL (summarised above), it emerges that the PGFL assures its customers/investors of neither any profit, nor any income or produce. It is vehemently contended that customers/investors are sold a piece of agricultural land with no further incentive and definitely, no right to any profit/income/produce, whatsoever. It is, therefore, the submission of the learned counsel for the petitioners, that the activities of the PGFL are not in the nature of a "collective investment scheme" as the parameters specified in Section 11AA(2)(ii) of the SEBI Act are also not satisfied.

52. The next contention of the learned counsel for the petitioners is, that the property sold by the PGFL to its customers/investors, which is in the nature of agricultural land, is deemed to be in the exclusive possession of the customer/investor, immediately after the execution of allotment letter and/or registered sale deed. It is also pointed out, that the terms and conditions of the contract entered into between the PGFL and its customers/investors envisage, that the PGFL may develop the unit of land allotted to the customer/investor (at the customers request), but not the right to manage the same. In the absence of any authority with the PGFL to manage the land sold to its customers/investors, it is sought to be contended, that the PGFL does not satisfy the requirements of a ""collective investment scheme", expressed in Clause (iii) of Section 11AA(2) of the SEBI Act. In order to canvass the instant proposition further, learned counsel submits, that the PGFL neither manages the property, nor the contributions made by customers/investors, to the PGFL. It is, therefore, sought to be concluded that the PGFL is not a "collective investment scheme" as envisaged under the SEBI Act.

53. The last submission advanced by the learned counsel for the petitioner is, that the PGFL also does not satisfy the fourth essential ingredients of a "collective investment scheme" expressed in Clause (iv) of Section 11AA(2) of the SEBI Act, inasmuch as PGFL does not have day-to-day control and management of the property sold by it to its customers/investors. For the instant submission, learned counsel has reiterated the factual and legal position expressed in the foregoing paragraph. It is reiterated that the PGFL only develops agricultural land purchased from it by the customers/investors, but does not manage the same for or on behalf of the customers/investors, and certainly has no day to day control over the management of the customers/

investors" property.

54. Are the aforesaid submissions advanced by the learned counsel for the petitioners acceptable ? Does the PGFL not satisfy the requirements of a "collective investment scheme", in terms of the provisions of the SEBI Act ? The answer to the aforesaid queries, according to the learned counsel for the respondents, is diametrically opposite, to the one, projected on behalf of the petitioners. In order to establish the aforesaid assertion, learned counsel for the respondents emphatically points out the following facts:--

Firstly, the activities carried out by the PGFL have all the mandatory features specified in the definition of a "collective investment scheme" u/s 11AA(2) of the SEBI Act- In this behalf, it is pointed out that all the four mandatory features, have been brought out in the order of the Board dated 6-12-2002.

Secondly, from the salient features of the business activity of the PGFL, pointed out in the order dated 6-12-2002, it is clear, that the PGFL while conducting its business activities issues unit certificates for purchase of "units" of agricultural land. Sales of agricultural land made by the PGFL, have a uniform size of 1350 sq. feet (150 sq. yards), in return of a common consideration i.e., a "unit price" of Rs. 5000. These units of sale/purchase, according to learned counsel, can easily be bought and sold on the stock exchange, like any other security. Making a reference to the report of the Dave Committee, it is submitted that many schemes have been structured in a way wherein the customer/investor is offered ownership of a piece of land or property, only to create a sense of security arising from owning a real estate. It is vehemently contended, that most of the times, the piece of land allocated to an investor, is not distinctly identifiable. It is pointed out, that it was in a situation like the one in hand, that the Dave Committee recommended a simple test by identifying three important ingredients, to determine whether or not a particular scheme is a "collective investment scheme". The three important identifying characteristics suggested by the Dave Committee were pooling of investments, management by a separate entity, and absence of day-to-day control of the customers/investors. It is stated that the aforesaid ingredients are present in the nature of activities carried out by the PGFL. It is, therefore, sought to be concluded, that the activities of the PGFL are in the nature of a "collective investment scheme" within the meaning of Section 11AA(2) of the SEBI Act.

Thirdly, the business activity of PGFL i.e. the sale and purchase of land, illustratively depicted through the sample agreement and the sample sale deed (executed by the PGFL with its customers/investors, which have been appended to the writ petition as Annexures P.6 and P.7, respectively), is a total sham. The real purpose of the PGFL is to require the customers/ investors to make contributions of a unit amount of Rs. 5000 and to lure them to do so with an impression that they would be purchasing a real estate asset. Even though, the draft sale agreement, and the draft sale deed, emphatically express, that the customers/investors, are the absolute owners of the unit/units of land, the

ground reality is absolutely to the contrary.

Fourthly, it is pointed out that the PGFL was originally issuing unit certificates. However, with the advancement of legislation (depicted under the head "Regulation of "collective investment schemes" in India" in this judgment), the earlier schemes of the PGFL were substituted, and now allotment letters/registered sale deeds are executed in favour of customers/investors, merely as paper transactions, although the original purpose and object of the earlier schemes have remained unchanged.

Fifthly, it is submitted that there is an apparent contradiction in the assertion made on behalf of the PGFL, inasmuch as, the land allegedly belonging to the customers/investors is still owned and possessed by the PGFL, as the same has been shown in the assets statement of the PGFL. Interestingly, it is pointed out, that the PGFL claims to have reduced its liability by the sale of land, which does not belong to it. As a matter of ground reality, it is pointed out, the PGFL is using the same land for development of projects, such as resorts/golf courses and for colonisation etc. In this behalf, reference has been made to a reply dated 31-8-2002, submitted by the PGFL to the Board, wherein the following factual position stands acknowledged:--

"During the year 1989, the company started joint venture business for different periodicities ranging from 5 to 7 years in which the funds contributed by the joint ventures have been utilised for purchase of agricultural land in different parts of the country and for development as well as maintenance of the same. In the process, company acquired about 9075 acres of land in the different parts of the country and developed the same by developing orchards having different kinds and variety of crops/ fruits like mango, coconut and cashewnut etc. This type of activity starts fruiting after the gestation period of 4 to 5 years and to attain normal production it requires 7-8 years, as such requires long term funds. The company's projected fund flow statement also supports the same. However, company has closed this business from 31-1-2000."

It is pointed out that the crystalised value of the land as on 29-1 -2001 was stated to be approximately Rs. 799 crores. The aforesaid factual situation indicates that the company is still in possession of the entire land which was statedly sold by it to its customers/investors. Furthermore, it is pointed out, in the subsequent projects introduced by the PGFL, it proposes to use the same land which already stands sold to its customers/ investors.

Sixthly, amongst the activities of the PGFL are schemes of arrangements under which, it is offering a composite package i.e. for purchase of agricultural land and its development, with no bifurcation under separate heads, in the accounts maintained by the PGFL. It is submitted, that as a matter of fact, and from the pleadings of the PGFL, it is clear that the cost of the plot sold to a customer/ investor constitutes only 1/3rd of the consideration of Rs. 5000. It is emphatically pointed out, that the PGFL acknowledged before the Chairman of

the Board, during the course of a personal hearing, that out of a sum of Rs. 5000, Rs. 1750 accounts for the cost of the land, for which the sale deed is executed, whereas Rs. 3250 is charged towards maintenance and development of the land sold by the PGFL. It is clarified that the PGFL does not execute any separate document/instrument, to cover a sum of Rs. 3250 being charged by it for maintenance and development of the agricultural lands sold by it to its customers/purchasers. It is, therefore, submitted that it is not justified to accept the activities of the PGFL, merely on the basis of the draft sale agreement and the draft sale deeds, which constituted the sole basis of reliance to project the case set up by the PGFL.

seventhly, an analysis of the cash flow of the alleged sale and purchase scheme (which is stated to be the sole business activity of the PGFL), reveals that a sizeable portion of the amount mobilised by the PGFL, was being paid as commission/marketing expenses for raising funds. The impugned order itself reveals that the PGFL acknowledged through its communication dated 25-7-2002 that marketing and management expenses constitute approximately 39% of the funds mobilised, 85% of the funds mobilised have been disbursed as expenses or as yields, and only 15% of the funds mobilised were actually deployed towards land and its development. It is submitted, that it is not clear whether the aforesaid expenses are debited to the sale price charged for the agricultural land, or the amount charged for the maintenance and development of the land.

Eighthly, the consideration for a unit of land is uniformly taken as Rs. 1750, whereas there can be no uniformity in respect of land value, because the land sold is situated in different places all over India, and further because, there can be no uniformity due to factors like different time of purchase/sale, varying rates, varying needs of purchasers, different rate of stamp duty and registration charges in different States etc. This, according to the learned counsel for the respondents, demonstrates trappings of a "collective investment scheme".

Ninthly, the cost of development of a unit of land is uniformly taken as Rs. 3250, whereas there can be no uniformity in respect of development of land because development of level land would need lower financial inputs, than land located on a hillock or in a river-bed or where the land is undulating. Similarly, irrigation facilities can be installed by incurring less expense on level land, when compared to other kinds of land.

Tenthly, the PGFL has acknowledged through its communication dated 31-5-2002 that out of a total of 15,99,505 investors, 13,63,244 investors have discontinued their association with the PGFL. The aforesaid figures establish out that 85% of the customers/investors have severed their ties with the PGFL. It is, therefore, submitted that the PGFL is making a fool of its customers/investors, and that they sever their contractual relationship with it on realisation of the actualities.

55. The nine factual conclusions drawn by the learned counsel for the PGFL (noticed at an earlier stage under the instant head - "Is the business activity of

PGFL a "collective investment scheme"?"), in order to lay down the foundation of his submission that the PGFL is not a "collective investment scheme", constituted the basis of the primary contention on behalf of the PGFL, namely, that the business activity of the PGFL is merely limited to, outright sale of agricultural land to its customers/ investors, and nothing else. As against the aforesaid claim, one of the assertions made by the learned counsel for the Board is, that the alleged sale of agricultural land by the PGFL to its customers/investors is a mere paper transaction, and a total sham. In our considered view, a determination whether or not the activity of the PGFL is in reality an outright sale of agricultural land to its customers/investors, would go a long way in determining, the real nature of its activities. It is, therefore, that we shall first address ourselves to this aspect of the matter.

56. A closer examination of the sale deed, placed on the record of the instant writ petition as Annexure P.7 reveals that 1350 sq. feet (150 sq. yards) of agricultural land located in village Vellugudari (in the State of Andhra Pradesh), was sold by one Malkit Singh, a resident of district Ropar (in the State of Punjab), through his attorney Rajesh Agarwal, a resident of district Gurgaon (in the state of Haryana), to a purchaser i.e., the vendee Pankaj Karnatak, who is a resident of New Delhi (in the Union Territory of Delhi). The identity of the two witnesses on the aforesaid sale deed, namely, Cewdef Kuldeep and B. Gangeram is unascertainable, since neither their parentage, nor their addresses, nor any other identification particulars of the said witnesses, have been disclosed in the sale deed. The sale deed depicts that it had been prepared/drawn by D. Naveen Krishna, a Document Writer, and a resident of district Nirmal (in the State of Andhra Pradesh). Furthermore, it would be pertinent to mention, that in the sale deed under reference, neither the Khewat number, nor the Khasra number, and nor the Khatoni or Killa number, nor any other means adopted by the Revenue Authorities, have been disclosed, to identify the land sold by the PGFL to the purchaser/vendee Pankaj Karnatak. In the real sense, therefore, the land in question purchased by Pankaj Karnatak, cannot even be identified. In view of the aforesaid factual position, the genuineness of the sale of agricultural land to the vendee Pankaj Karnatak is clearly shrouded in grave suspicion. In case of a dispute with a third party, it would be practically impossible for the vendee, to establish his title to the agricultural land allegedly purchased by him from PGFL. A further examination of the ground realities reveal that the purchaser/vendee Pankaj Karnatak is a resident of New Delhi (in the Union Territory of Delhi), whereas the land purchased by him is hundreds of miles away in village Vellugudari (in the State of Andhra Pradesh). Can Pankaj Karnatak the purchaser (of agricultural land from PGFL), be expected to be in a position to control or supervise the property purchased by him? In our view, it would be practically impossible for him to visit the agricultural land purchased by him, even to determine whether or not the PGFL had carried out its promise/commitment to develop the land on his behalf, merely on account of the tremendous expenses involved to travel from the place where he ordinarily resides, to the place where

the land is located. The issue can be examined by another illustration. Although the PGFL makes an offer to its customers/investors to develop the agricultural land sold by it to them of their own, is it possible for a customer/investor to effectively exercise the option to develop the land by himself. Not only is the land located hundreds of miles away from the place where he ordinarily resides, it is also practically inaccessible for agricultural purposes as pointed out hereinabove. It is, therefore, that we asked learned counsel for the petitioners, during the course of hearing, to inform us whether a single customer/investor had exercised the option to take upon himself the responsibility to develop the agricultural land purchased by him. The answer was not unexpected. We were informed that not a single customer/investor had exercised the option to develop the land on his own. Furthermore, in case of any breach of any of the covenants contained in the agreement to sell/sale deed at the hands of the PGFL it would be practically impossible for the purchaser, even to know of the same, or even to determine the same through others, for the totality of the reasons already narrated hereinabove. Therefore, although the customer/investor had been authorised to seek cancellation of the agreement on account of a breach of the terms and conditions by the PGFL, as a matter of practicality, it is impossible for a customer/investor to invoke the aforesaid clause. Therefore, the option given to a customer/investor or [in the sample sale agreement (Annexure P.6) and the sample sale deed (Annexure P.7)], to require the PGFL to fulfil its commitment in case of any deficiency therein, constitute at best, an attractive inducement to a customer/investor, but serves no practical purpose. Another aspect which demonstrates, that the agreement to sell/sale deed executed by the PGFL with its customers/investors is only a fictional contemplation, (which is far away from reality), is apparent from the manner in which the agricultural land sold by the PGFL to its purchaser Pankaj Karnatak (vide Annexure P.7) has been identified/demarcated. It would be pertinent to mention that the sale deed (Annexure P.7).in its schedule demarcates the agricultural land sold to Pankaj Karnatak as under :--

"Bounded by:

East : 5" Wide Road,

West : 5" Wide Road,

North : Plot No. 140,

South : Plot No. 142."

The impracticality, for the vendee to put the agricultural land purchased by him, for use as agricultural land, is obvious from the fact that the land is inaccessible for agricultural purposes. It would not be possible for any four-wheeled vehicle, be it a bullock cart, a tractor, a tempo, or a truck, to ply on a 5 feet wide road (by which the land purchased by the vendor is bound), without trespassing over a private adjoining property. Accessibility to the agricultural land purchased by Pankaj Karnatak would, therefore, be limited by reaching it on foot, or on a two-

wheeler, be it a bicycle, a scooter or a motor-cycle. The absurdity of the situation is demonstrated from the practical impossibility of utilising the land for agricultural purposes, PGFL admittedly allured the customer/investor into the purchase in question, by describing the land as agricultural land. The very fact that it would be practically impossible to carry the required inputs to, the agricultural land purchased by the customer/investor/ vendee, or even, to carry away the agricultural produce emerging therefrom, leads one to conclude, that the land sold to the customer/investor by the PGFL, does not satisfy the accepted norms for effective utilisation of land, as agricultural land. Another aspect which comes to one's mind is the practicality of registering a sale transaction wherein the land involved is only 1530 sq. feet (150 sq. yards). Ordinarily, only joint sale deeds would be executed collectively in favour of a number of customers/investors by the PGFL. In a situation where a joint sale deed is executed, the impracticality of the various fact situations narrated hereinabove will multiply manifolds. It is also necessary to notice, that the agreement to sell, places an obligation on the PGFL to provide for common facilities and services, such as, an irrigation and drainage system, pipe lines, electrical lines, motor pump sets, temporary sheds, structures etc. The customer/investor, even though stated to be an absolute owner, and in exclusive possession of the agricultural land, sold to him, has no exclusive ownership rights over the aforesaid facilities, and in fact, has been barred, from interfering with the aforesaid facilities and services in any manner, by the terms and conditions recorded in the sample agreement to sell (Annexure P.6) and the sample sale deed (Annexure P.7). A customer/investor is only entitled to use the aforesaid facilities and services, along with others in the neighbourhood. It is difficult to comprehend the nature of the ownership/possessory rights, of a customer/investor, who has no control over the basic facilities essential for effective use of agricultural land. Without control over irrigation and drainage systems, which constitutes the blood stream of agriculture, and without control over motors, pump sets, sheds and structures, a customer/investor is, in reality and for all practical purposes, never in absolute ownership/possession/control, of the agricultural land purchased by him. The closer one examines the terms and conditions of sale and purchase documents, between the PGFL and its customers/investors, the more one realises that the transactions in question are merely a paper transaction. Suffice it to state, that the PGFL itself acknowledged through its communication dated 31-5-2002 that out of a total of 15,99,505 investors, 13,63,244 investors had discontinued. The aforesaid figures lead one to infer that 85% of the customers/investors having realised the true characteristics of the PGFL, severed their ties with it. The aforesaid illustrations are sufficient to draw the conclusion that the alleged business activity of sale and purchase of agricultural land by the PGFL is an effective camouflage over its real activities. In view of the above, we have no doubt in our mind that the projection by the PGFL, that it is engaged in sale and purchase of agricultural land and/or sale and development of agricultural land, is not a truthful expression of its activities. The aforesaid conclusion leads us to infer, that the activities which were earlier being carried on by the PGFL, (before

aggressive regulation aimed at consumer protection were introduced through the legislation), would have been subject to scrutiny/regulation, by the Board; the introduction of the activity of sale and purchase of agricultural land, and/or sale and development of agricultural land, at the hands of the PGFL, as its sole activity, was only to avoid interference at the hands of the Board. In other words what PGFL could not have done directly, is being done indirectly.

57. Despite the conclusion drawn by us in the foregoing paragraph, before the activities of the PGFL can be stated to be in the nature of a "collective investment scheme", it would be imperative to determine whether the PGFL satisfies the four ingredients/characteristics, delineated in the four clauses of Section 11AA(2) of the SEBI Act. According to the submissions advanced by the learned counsel for the petitioners (as have been noticed hereinabove), the PGFL does not satisfy even one of the four ingredients/ characteristics expressed in Section 11AA(2) of the SEBI Act. In the following four paragraphs, we have endeavoured to record conclusions, whether or not PGFL satisfies the four mandatory ingredients/ characteristics of a "collective investment scheme", expressed in Section 11AA(2) of the SEBI Act.

58. The first contention of the learned counsel for the petitioners, is based on the mandatory requirement of a "collective investment scheme" expressed in Section 11AA(2)(i) of the SEBI Act. In this context, the vehement contention of the learned counsel for the petitioners is, that payments made by customers/ investors to the PGFL, are not pooled and utilised collectively, for any common objective. The sequence of facts narrated hereinabove reveal that the business transaction between the PGFL and its customers/investors, involves a deposit of a sum of Rs. 5000. In return for proprietary rights in agricultural land measuring 1350 sq. feet (150 sq. yards), the PGFL charges a consolidated amount of Rs. 1750 from its customers/investors. On account of maintenance and development of the agricultural land sold to customers/investors, the PGFL charges a further amount of Rs. 2350. In this behalf, it would be relevant to notice that the sale consideration constitutes only about one third of the contribution made by the customer/investor, whereas two-thirds of the contribution made by the customer/ investor is charged by the PGFL towards the maintenance and development. The PGFL does not maintain a separate account for each customer/investor depicting the manner of utilization of a sum of Rs. 3250 charged by it for the maintenance of the development of the land sold to him. It is obvious that the cost of development of each unit of agricultural land sold by the PGFL to each customer/ investor cannot be uniform, because development of level land would need lower financial inputs, than development of lands located on a hillock, or in a river-bed, or where the land is undulating. Likewise the existing level of fertility of land, or the cause of infertility of land, will determine the amount required to convert it into productive land. Reclaiming different kinds of waste land will also require different financial inputs. Similarly, irrigation facilities can be installed by incurring less expenses for level land when compared with other kinds of lands. It is, therefore, obvious that although the PGFL demands a specified sum of Rs.

3250 from each customer/investor for the maintenance and development of the land sold to him, it actually pools the amount taken from all the contributors and utilizes it collectively for its customers/investors, spending more on some and less for others. Insofar as the consolidated amount of Rs. 1750, paid by each customer/investor for the purchase of a piece of agricultural land is concerned, here also there are definite trappings of pooling. The PGFL obviously purchases large tracts of land, all over the country at different rates. From the compilation given to us, it emerges that the PGFL has acknowledged the purchase of agricultural land in eleven different States i.e. Tamil Nadu, Andhra Pradesh, Maharashtra, Uttar Pradesh, Punjab, Haryana, Madhya Pradesh, Kerala, Goa, Rajasthan and Himachal Pradesh. The rate of registration for transfer of immovable property, in different States is not the same. It is inconceivable to accept that the thousands of acres of land purchased by the PGFL, over the number of years it has been in business of, was at the same rate. In the absence of purchase of land at the same rate, and in the absence of identity of registration charges for transfer of immovable property in different States, it will be natural to conclude that the money received from the customers/investors is pooled together, whereupon they are sold agricultural land at the same rate. During the course of hearing, we called upon learned counsel to inform us, the source/head to which commission/marketing expenses for its business activity was being debited by the PGFL. We had desired to find out whether those expenses were taken out of Rs. 1750 charged from each customer/ investor for sale of 1350 sq. feet (150 sq. yards) of land; or whether it was deducted out of Rs. 3250 charged from each customer/investor for development of the land sold to him. It will be relevant to notice that 39% of the funds mobilised constitute marketing/business expenses, in our view, deduction of the aforesaid amount, from development and maintenance charges, would constitute a breach of contract, because the amount charged for development and maintenance, could not have been used by the PGFL to solicit its business; whereas, deduction of the amount from the sale consideration charged from customers/investors would lead to the inevitable conclusion, that almost the whole consideration amount was being spent by the PGFL towards commission and marketing expenses, and therefore, the assumption that it was transferring agricultural land virtually without receiving any consideration. Obviously, a "Catch 22" situation. Learned counsel, having been instructed, informed us, that expenses towards commission and other marketing expenses were being debited to the total amount (Rs. 5000) received from the customers/investors. This response of the learned counsel further cements the conclusions recorded above. It, therefore, emerges that Rs. 5000 is not divisible into two separate components as alleged, and that, the entire amount is pooled together for the purposes of the totality of the scheme/ arrangement carried out by the PGFL. Viewed in any manner, it is clear, that in its activities allegedly limited to, sale and purchase of agricultural land and/or sale and development of agricultural land, the PGFL accepts "contributions" from customers/investors, for collective utilisation, and further, that the PGFL pools the investments made by customers/investors with the aim/object of carrying

out the purpose of the overall scheme/arrangement. It is, therefore, not possible for us to accept the first contention of the learned counsel for the petitioners.

59. The second contention of the learned counsel for the petitioners is based on the mandatory requirement of a "collective investment scheme" expressed in Section 11AA(2)(ii) of the SEBI Act. In this behalf, the vehement contention of the learned counsel for the petitioners is, that a customer/investor must receive profit, as well as income, besides produce or property for his investments. Stated in other words, according to learned counsel for the petitioners, if customers/investors of a particular scheme or arrangement are not recipients of profits, as well as income, and also produce or property, the activity in question would not constitute a "collective investment scheme". The interpretation placed by the learned counsel for the petitioners, in our view, it is unacceptable. Clause (ii) of Section 11AA(2) of the SEBI Act, requires that the investor must be a recipient of any one of benefits expressed in Section 11AA(2)(ii) of the SEBI Act i.e. either profit, or income, or produce, or property. The aforesaid provision read in any other manner, would defeat the very purpose or object for its enactment. It is not a matter of dispute that each customer/investor (insofar as the business activity carried out by the PGFL) is a recipient of agricultural land i.e. "property". It is, therefore apparent that each customer/investor of the PGFL is admittedly a recipient of one of the benefits contemplated under Clause (ii) (supra), namely, "property". In view of the above, we are satisfied, that the PGFL, satisfies the second mandatory ingredient/characteristic, of a "collective investment scheme" as has been specified u/s 11AA(2)(ii) of the SEBI Act. It would be pertinent to mention here, that insofar as the term "property" used in Section 11AA(2)(ii) of the SEBI Act is concerned, the contention of the learned counsel for the petitioners, was is that the term "property" used in Section 11 AA(2)(ii) must necessarily exclude agricultural properly. This argument has been considered in detail, in a separate part of this judgment, under the head - "Constitutional validity of Section 11AA of the SEBI Act", wherein it has been concluded that the term "property" used in Section 11AA(2)(ii) of the SEBI Act, would also include agricultural land. In view of the above, we find no merit in the second contention of the learned counsel for the petitioners.

60. The next contention of the learned counsel for the petitioners is based on the mandatory requirement of a "collective investment scheme", expressed in Section 11AA(2)(iii) of the SEBI Act. In this behalf, the contention of the learned counsel for the petitioners is that the PGFL does not "manage", the agricultural land sold by it, to its customers/investors. It is emphatically pointed out that the PGFL merely "maintains" and "develops", at the option of its customers/investors, the agricultural piece of land sold to them. It is also the contention of the learned counsel for the petitioners, that the activities carried out by the PGFL (which constitute maintenance and development), should not be confused with the responsibility of "management". While dealing with the issue, whether or not the sale/transaction executed by the PGFL, with its customers/investors, is merely a paper transaction, we have already recorded, that the alleged activity

of sale and purchase conducted by the PGFL, is in the nature of an arrangement so as to enable the PGFL to continue with its earlier objectives i.e. with its activities before the introduction of the instant scheme/arrangement, and that the alleged sale and purchase of agricultural land and or development of agricultural land, is a mere paper transaction (for details refer to para 56 above). It is clear also from the reasons recorded while drawing the aforesaid conclusions, that a customer/investor has practically no accessibility to the agricultural land purchased by him; it is practically impossible for him to carry on agricultural/or developmental activities on the land purchased by him; the life line/blood stream of agricultural activity which include irrigational and drainage facilities along with ancillary inputs are to remain perpetually, under the control of the PGFL; it is also practically impossible for any customer/investor to have a day to day control over the agricultural land purchased by him. Day to day control with the customer/investor is one of the most important tests delineated by the Dave Committee for arriving at a final determination, whether or not, a scheme/arrangement is a "collective investment scheme". In view of the totality of circumstances noticed above, it is not possible for us to accept the contention of the learned counsel for the petitioner, that the customer/investor, has day to day control over the agricultural land purchased by him or that he himself manages the agricultural land purchased by him. The aforesaid fact situation, therefore, leads to the only other conclusion possible, namely, the agricultural land purchased by a customer/investor is managed on his behalf. In view of the above, we are satisfied that PGFL satisfies the third ingredient/characteristic expressed in Section 11AA(2)(iii) of the SEBI Act.

61. The last contention of the learned counsel for the petitioners is based on the mandatory requirement of a "collective investment scheme" expressed in Section 11AA(2)(iv) of the SEBI Act. The arguments raised for the instant issue, at the hands of the learned counsel for the petitioners, are identical to those noticed in the foregoing paragraph. For the same reasons as have been recorded in the foregoing paragraph, it is not possible to accept the fourth contention of the learned counsel for the petitioners.

62. From a cumulative analysis of the foregoing paragraphs it stands fully establish that the business activity of the PGFL incorporate all the mandatory ingredients/characteristics of a "collective investment scheme", in terms of Section 11AA(2) of the SEBI Act. It is natural for us, therefore, to conclude that the activities of the PGFL constitute a "collective investment scheme" within the meaning of the SEBI Act. While recording our aforesaid conclusions, it also needs to be highlighted, that the activities of the PGFL also satisfy all the ingredients and tests which the Dave Committee had suggested in its report dated 31-12-1998, (for details see under head - "Regulation of "collective investment schemes" in India") for identifying a "collective investment scheme". In view of the aforesaid deliberations, the questions posed hereinabove, are hereby answered in favour of the Board, and against the PGFL.

V. Constitutional validity of Section 11AA of the SEBI Act

63. Dr. A.M. Singhvi, learned counsel for the petitioners, entered appearance to canvass only one issue on behalf of the petitioners, namely, the constitutional validity of Section 11AA of the SEBI Act. In sum and substance, his primary contention is based on the premise, that the amendment of the principal SEBI Act through the Securities Laws (Amendment) Act, 1999, whereby schemes which carried on activities of sale and purchase of agricultural land and/or development of agricultural land, were brought within the purview of the SEBI Act, were beyond the legislative competence of the Parliament, in conjunction with the aforesaid submissions, learned counsel, advanced an alternative contention, namely, that in case in its ultimate analysis, this Court arrives at the conclusion that Section 11AA of the SEBI Act is ultra vires the Constitution, even then, it would not be necessary to strike down the entire provisions. According to learned counsel) Section 11AA of the SEBI Act should be read down in a manner that the business activities of the nature carried out by the PGFL, i.e., sale and purchase of agricultural land and/ or sale and development of agricultural land, are excluded from the purview of Section 11AA of the SEBI Act.

64. To canvass his aforestated submissions, learned counsel for the petitioners has invited the Court's attention to Article 246 of the Constitution of India, which stipulates the ambit and scope of the legislative authority of the Parliament i.e., that Parliament has unfettered and exclusive power to make laws in respect of matters enumerated in List 1 of the Seventh Schedule i.e., in the Union List, and State Legislatures have exclusive power to make laws (to be applicable within the concerned State), in respect of matters enumerated in List II of the Seventh Schedule i.e., in the State List. Since the contentions advanced by the rival parties, do not seriously involve List III of the Seventh Schedule i.e., the Concurrent List, legislative competence in respect of the matters enumerated in List III of the Seventh Schedule, need not be dealt with while adjudicating upon the present controversy.

65. Reference on behalf of the petitioners has been made to Entry 18 of the State List, which is extracted hereunder:-

"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."

It is the emphatic contention of the learned counsel for the petitioners, that Section 11AA of the SEBI Act, and the SEBI (Collective Investment Schemes) Regulations, 1999, impinge on the sphere of legislative activity exclusively vested in the Legislature of a State. Reference in this behalf is made to Entry 18 of the State List. It is pointed out that Section 11AA of the SEBI Act, impinges and interferes with the activity of "transfer and alienation of agricultural land", and "land improvement", by subjecting the activities of the PGFL to control by

the Board. This according to learned counsel is not, permissible at the hands of the Parliament, under Article 246 of the Constitution of India.

66. In order to substantiate the aforesaid contention, learned counsel has invited the Court's attention, to the historical background depicting the march of events and the evolution of the SEBI Act in its present form, commencing from the enactment of the Securities Contract (Regulation) Act, 1956. It was highlighted, that the object of legislation initially was to promote the development of the securities market as well as to regulate securities market. According to learned counsel, Parliament could legitimately legislate on the subject of "securities". In this behalf, reference is made to Entry 48 of the Union List, which is extracted hereunder :--

"48. Stock exchange and future markets."

The pointed and repeated, submission of learned counsel is, that the PGFL is merely engaged in the activity of sale and purchase of agricultural land, and/or seal and development of agricultural land, therefore, to include an entity like the petitioner, within the definition of the term "collective investment scheme", would amount to, a transgression by the Parliament, into the legislative domain of a State Legislature. In advancing his aforesaid contention, learned counsel for the petitioners placed reliance on the decisions of the Apex Court in *Jilubhai Nanbhai Khachar v. State of Gujarat* 1995 Suppl. 596 (1) SCC 596. wherein the Apex Court, exhaustively dealt with the ambit and scope of the term "land", which is the subject matter of Entry 18 in the State List, in the following manner :--

"10. Land in Entry 18 is not restricted to agricultural land alone but includes non-agricultural land etc. The words "rights in" or "over land" confer very wide power which are not limited by rights between the landholders inter se or the landholder or the State or the landholder or the tenant. It is seen that restriction or extinction of existing interest in the land includes provision for abolition and extinguishment of the rights in or over the land. Resumption of the estate is one of the objectives of the Government and the Act seeks to serve that object. Resumption includes all ancillary provisions, cancellation or extinguishment of any existing grant by the ex-Rulers or lease by grant with retrospective effect as was upheld in *Thakur Raghubir Singh v. State of Ajmer (now Rajasthan)* 1959 Suppl. (1) SCR 478." (p. 610)

67. Having again invited the attention of the Court to Entry 18 of the State List, learned counsel desired this Court to examine a number of entries in the Union List and in the Concurrent List, in conjunction therewith, in order to depict the intention of the framers of the Constitution, to exclude from the purview of the Parliaments legislative competence, matters relating to agricultural land and issues connected therewith including land improvement. Entries 82, 86, 87 and 88 of the Union List, which were referred to during the course of arguments, are being extracted hereunder :--

"82. Taxes on income other than agricultural income.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land."

Additionally, Entries 6 and 7 of List III of the Seventh Schedule i.e.. Concurrent List were referred to. The aforesaid Entries are also being extracted hereunder :--

"6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land."

Learned counsel wishes to emphasize, on the basis of the subjects enumerated in the aforesaid entries, that the framers of the Constitution, clearly expressed through the aforesaid entries (under the Union List and the Concurrent List), that the State Legislatures should have exclusive domain on the subject of agricultural land. Thus viewed, it is sought to be concluded, that Parliament has no power to legislate on matters related to agricultural land or matters connected therewith including land improvement. In view of the aforesaid submission, it is contended, that the amendment through which Parliament added Section 11AA to the SEBI Act, has to be struck down, as being ultra vires the legislative competence of Parliament.

68. To substantiate the proposition canvassed in the foregoing paragraph, reliance was also placed on the judgment rendered by the Federal Court in AIR 1941 72 (Federal Court) wherein the Court observed as under :--

"it is convenient to consider the second and third contentions together, viz., that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces; and that, if it were held to be in part beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the competence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the

Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts, viz., the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers."

Besides asserting, that the activities of the PGFL, fall under Entry 18 of the State List, on the basis of the observations of the Apex Court reproduced above, learned counsel also contends, that the pith and substance of the activity of the PGFL is directly relatable to agricultural land and matters connected thereto, and as such it was clearly beyond the scope of the powers vested with the Parliament, to enact a law, regulating the activities of the PGFL.

69. Learned counsel for the petitioner's also, invited the Court's attention to Entry 48 of the Union List (already extracted above), so as to assert, that it was well within the legislative domain of the Parliament to legislate on issues relating to "stock exchanges" and "future markets", and therefore, well within the domain of Parliament to legislate on matters pertaining to promotion, development and regulation of the securities market, as well as interests of investors in securities, however, since the activities of the PGFL do not fall within the framework of Entry 48 of the Union List, but are fully encompassed, within the subject expressed in Entry 18 of the State List, the inclusion of the activities of entities like the petitioner-company, for regulation through the Board u/s 11AA of the SEBI Act, would amount to an act of transgression by the Parliament into the legislative domain of the State Legislatures. In conjunction with the aforesaid submission it is pointed out, that the SEBI Act was enacted under Entry 48 of the Union List, and, therefore, the scope of the SEBI Act should be limited to the subject covered by Entry 48 of the Union List, and since the activities of the PGFL, do not fall under the subject covered by Entry 48 of the Union List, it would be natural to conclude, that in regulating the activities of the PGFL through Section 11AA of the SEBI Act, Parliament has exceeded its legislative jurisdiction.

70. It is also the emphatic contention of the learned counsel for the petitioners that on matters expressed in the State List, there is a total bar of legislative competence of the Parliament. In this behalf, learned counsel for the petitioners has invited Court's attention to the decision of the Supreme Court in State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., relevant part of which, is being extracted hereunder :--

"36. In view of our finding that the impugned enactment is perfectly within the legislative competence of the State Legislature and is fully covered by Entry 8 read with Entry 6 of List II, it is not necessary for us to deal with the arguments based upon Clause (3) of Article 246 of the Constitution except to say the

following: once the impugned enactment is within the four corners of Entry 8 read with Entry 6, no Central law whether made with reference to an entry in List I or with reference to an entry in List III can affect the validity of such State enactment. The argument of occupied field is totally out of place in such a context. If a particular matter is within the exclusive competence of the State Legislature, i.e., in List II that represents the prohibited field for the Union..... Any incidental trenching, as already pointed out, does not amount to encroaching upon the field reserved for Parliament, though as pointed out by T.L. Venkatarama Iyer, J. in *A.S. Krishna Vs. State of Madras*, the extent of trenching beyond the competence of the legislating body may be an element in determining whether the legislation is colourable. No such question arises here." (p. 732)

On the basis of the observations made by the Apex Court (extracted above), it is submitted, that even a liberal interpretation of Entry 48 of the Union List, could not include the activities of the PGFL, within its scope. According to the learned counsel for the petitioners, even a harmonious interpretation of the various entries in the different lists under the Seventh Schedule of the Constitution of India, would not have, such an effect. In fact, according to learned counsel, various entries under the Union List and the Concurrent List (all referred to and extracted above) when read in conjunction with Entry 18 of the State List, lead to the clear conclusion, that the framers of the Constitution did not desire Parliament to legislate on matters relating to agricultural land or on matters connected therewith including land improvement. Reliance, in this behalf, was placed again on the judgment rendered in *McDowell & Co.'s case* (supra), wherein the Apex Court observed :

"37. We may in this connection refer to the Constitution Bench decision of this Court in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, which furnishes a complete answer to the petitioners' contentions on this score. The West Bengal Legislature passed an Act (*West Bengal Oriental Gas Company Act, 1960*) [15 of 1960] with a view to take over the management and control of the undertaking of the Oriental Gas Company. Notifications were issued under the Act taking over the Company which was questioned by way of a writ petition in the Calcutta High Court. The writ petition was dismissed whereupon the matter was brought to this Court. The main contention on behalf of the appellant was that the West Bengal Legislature had no legislative competence to enact the said Act. It was submitted that by virtue of the *Industries (Development and Regulation) Act, 1951*, which contains a declaration in terms of Entry 52 in List I and the Schedule whereof included "fuel gases - (coal gas, natural gas and the like)" under Item 2(3), the power to make law with respect to industries engaged in the manufacture of gas has been vested in the Union and that the State has been totally denuded of that power. It was contended that Entry 24 in List II takes in all industries and that Entry 25 (which reads : "Gas and gasworks") should be confined to matters other than those covered by Entry 24. Inasmuch as the impugned enactment was a law

relating to gas industry, it was submitted, the Act made by the State Legislature is incompetent and void. Reliance was also placed upon Article 246 of the Constitution, All those contentions were negated. The Court opined that having regard to the well-settled principles relating to interpretation of these entries, that interpretation which reconciles and harmonises the contending entries should be adopted and held thus:

"Entry 24 in List II in its widest amplitude takes in all industries, including that of gas and gasworks. So too, Entry 25 of the said List comprehends gas industry. There is, therefore, an apparent conflict between the two entries and they overlap each other in such a contingency the doctrine of harmonious construction must be invoked.... If industry in Entry 24 is interpreted to include gas and gasworks, Entry 25 may become redundant, and in the context of the succeeding entries, namely, Entry 26, dealing with trade and commerce, and Entry 27, dealing with production, supply and distribution of goods, it will be deprived of all its contents and reduced to "useless lumber"... On the other hand, the alternative contention enables Entries 24 and 25 to operate fully in their respective fields; while Entry 24 covers a very wide field, that is, the field of the entire industry in the State, Entry 25, dealing with gas and gasworks, can be confined to a specific industry, that is, the gas industry.... It is, therefore, clear that the scheme of harmonious construction suggested on behalf of the State gives full and effective scope of operation for both the entries in their respective fields, while that suggested by learned counsel for the appellant deprives Entry 25 of all its content and even makes it redundant. The former interpretation must, therefore, be accepted in preference to the latter. In this view, gas and gasworks are within the exclusive field allotted to the States, On this interpretation the argument of the learned Attorney General that, under Article 246 of the Constitution, the legislative power of State is subject to that of Parliament ceases to have any force, for the gas industry is outside the legislative field of Parliament and is within the exclusive field of the Legislature of the State. We, therefore, hold that the impugned Act was within the legislative competence of the West Bengal Legislature and was, therefore, validly made."" (p. 733)

The Supreme Court in McDowell & Co."s case (supra), proceeded to further hold :

" "As we have indicated earlier, that the expression "industry" in Entry 52 of List I bears the same meaning as that in Entry 54 of List II, within the result that the said expression in Entry 52 of List I also does not take in a gas industry;. If so, it follows that the Central Act, insofar as it purported to deal with the gas industry, is beyond the legislative competence of Parliament."

38. The ratio of the above decision fully supports what we have said hereinabove. In fact, Entry 8 is more specific than Entry 25 in List II. While Entry 25 merely speaks of "gas and gasworks", Entry 8 expressly speaks of production and manufacture besides possession, transport, purchase and sale of intoxicating liquors. The ratio of the Calcutta Gas Co., fully supports our conclusion that

industries engaged in the production and manufacture of intoxicating liquors are outside the purview of Entry 24 and fall squarely within Entry 8 in List II and that Entry 52 in List I does not override or impinge upon Entry 8 in List II. According to this decision the expression "industry" in both Entry 24 in List II and Entry 52 in List I must carry the same meaning, which means that if a particular industry is not within the purview of Entry 24 in List II, it would equally not be within the purview of Entry 52 in List I. The decision also supports our conclusion that Article 246 cannot be invoked to deprive the State Legislatures of the powers inhering in them by virtue of entries in List II. To wit, once an enactment, in pith and substance, is relatable to entry 8 in List II or for that matter any other entry in List II, Article 246 cannot be brought in to yet hold that State Legislature is not competent to enact that law." (p. 734)

71. Relying on the judgments referred to above, while canvassing his primary submission on the issue of vires, learned counsel summarised his conclusions by asserting that the activities of the PGFL pertain to a subject falling under an entry in the State List (Entry 18), and therefore, are not subject to regulation at the hands of a law enacted by Parliament. Conversely, it is reiterated that the SEBI Act, was enacted to regulate securities and future markets, and since the activities of the PGFL (sale and purchase of agricultural land and/or development of agricultural land) by no stretch of imagination, can be stated to fall under the said subject, the regulation of the PGFL through the Board under the SEBI Act was clearly out of question.

72. Despite the aforesaid submission of the learned counsel for the petitioners, wherein he desires this Court to declare Section 11AA of the SEBI Act as ultra vires the legislative competence of Parliament, learned counsel for the petitioners advanced an alternative contention, whereby, the petitioners' purpose would be served, and the necessity of striking down Section 11AA of the SEBI Act, avoided. According to the learned counsel, Section 11AA of the SEBI Act would be constitutionally valid if the term "property", expressed in Sub-section (2)(ii) thereof, is read down in a manner, so as to exclude agricultural property therefrom. It is the submission of the learned counsel for the petitioners, that by adopting the aforesaid course of interpretation, the object sought to be achieved by the Parliament to regulate securities, and future markets through Section 11AA of the SEBI Act would be saved. Stated in other words, the alternative contention of the learned counsel for the petitioner is that the term "property" used in Section 11AA(2)(ii) should be read down, so as to exclude agricultural land therefrom, and by doing so, the activities of the PGFL will automatically stand excluded from the purview of the SEBI Act.

73. Mr. G.E. Vahanvati, Solicitor General of India entered, appearance on behalf of respondent No. 1, and assisted this Court solely on the issue of the constitutional validity of Section 11AA of the SEBI Act. His task was, therefore, limited to replying to the submissions advanced by Dr. Abhishek Singhvi.

74. Before advancing submissions on the issue in hand, learned counsel desired

to demonstrate the importance of "investor protection", by placing reliance on the observations made by the Apex Court, expressing desirability of regulating financial institutions, primarily with the objective of protecting innocent investors, from being duped of their lives earnings at the hands of fraudulent financial institutions. In this behalf, the Court's attention was invited the decision rendered by the Supreme Court in *Delhi Cloth and General Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others*, . In the aforesaid case, the Apex Court addressed itself to the constitutional validity of Rule 3A of the Companies (Acceptance & Deposits), Rules, 1975 (hereinafter referred to as "the Deposit Rules") as well as Section 58A of the Companies Act, 1956, whereunder the Deposit Rules were framed. While determining the issue in hand, the Apex Court traced out the legislative history of the Companies Act, commencing from the enactment of the Joint Stock Companies Act of 1850, till the addition of Section 58A to the Companies Act, 1956 [inserted through the Companies (Amendment) Act, 1974]. The Court also noticed the fact, that the Government of India had appointed a committee in 1950, under the chairmanship of Shri Bhabha. On the basis of the recommendations made by the Bhabha Committee, the Companies Act, 1956, was enacted, incorporating therein provisions vesting power with the Central Government, to conduct inspection and investigation. The Government of India appointed another Committee under the chairmanship of Justice A.V. Vishwanatha Sastri, to examine the working of the Companies Act, 1956. The recommendations made by the aforesaid Sastri Committee resulted in the amendments carried out in the principal Act, through the Companies (Amendment) Act, 1960. These amendment were specifically aimed at, safeguarding private investment in the corporate sectors. The Government of India also acquired extensive powers for regulation of the financial management of private sector Companies under the instant amendment. On receipt of numerous complaints of fraud, embezzlement of funds, and gross irregularities in respect of a particular company, the Government of India appointed a Commission of inquiry presided over by Justice S.R. Tendulkar. The said Commission, at a later stage, was headed by Justice Vivian Bose. The report submitted by the Commission, unearthed the intrigue, abuse of trust, jugglery of company funds, misuse and abuse of position of power in the management and affairs of the company in question, as also criminal breach of trust in respect of funds of the company, as well as, the manner of misutilisation of corporate funds and finances for personal advancement. This report led to the Companies (Amendment) Act, 1965, which drastically increased Governmental control, over private sector companies. The Companies (Amendment) Act, 1975 introduced Section 58A. In exercise of power conferred by Section 58A (read with Section 647 of the Companies Act), the Central Government enacted Deposit Rules. Rule 3A of the Deposit Rules, required every company to deposit or to invest, a sum not less than 10 per cent of the amount of its deposit maturing during the year ending on the 31st of March next following, in a manner indicated by the rule, with the objective of protecting the interest of investors. During the course of its deliberations, the Supreme Court noticed that there was a tremendous rush of

investments at the hands of individuals for deposits in non-banking companies. The failure of a number of such non-banking companies, to meet obligations, led to the misery of middle and lower middle class investors (which stand illustrated by the Apex Court in *A.T. Zambre and Others Vs. Kartar Krishna Shashtri*, . It would be pertinent to mention, that even prior to the provisions, which were subject matter of challenge in *Delhi Cloth & General Mills Co. Ltd's* case (supra), Section 45J of the Companies Act, 1934, conferred powers Reserve Bank of India, to regulate or prohibit, the issue of any prospectus or advertisement, by a non-banking institution, soliciting deposits of money from the public, and to specify the conditions subject to which any such prospectus or advertisement, if not prohibited, may be issued. Section 45(5) vested power with the Reserve Bank of India the right to collect information from non-banking companies as to their deposits, and also to give directions in that behalf. In furtherance of the said power, the Reserve Bank of India, had already issued various regulatory measures. While adjudicating upon the controversy. Though the Apex Court held, that the provisions under reference were constitutionally valid, yet while doing so, it recorded the following observations :--

"... The Legislature was not unaware of a known malady that the private sector companies were becoming sick after incurring huge debts, rendering small investors destitutes, heaping miseries on the weaker sections of the society and, therefore, if by a measure a company which is permitted to attract deposits from the public generally described as gullible simultaneously, an obligation is imposed to keep an infinitesimally small portion of assets as liquid finance available for meeting the obligations, namely repayment of deposits maturing in a given year, it cannot be said that this constitutes deprivation of company's fund. If a trust can be compelled to deposit trust funds in a manner prescribed by the statute, if a nationalised or scheduled bank is compelled to maintain requisite liquidity in respect of which a charge of deprivation of property cannot be validity made, it is difficult to entertain the submission that as a regulatory measure if a company for the benefit it enjoys of an enabling power to invite deposits from public is asked to keep in deposit ten per cent of the deposits maturing in a year the same would be deprivatory and therefore arbitrary.

. . . But as noticed in the Statement of Objects and Reasons while introducing the 1974 Amendment Act which incorporated Section 58A in the Companies Act, it was designed to meet cases of abuse or distortion of system, which have, of late, assumed comparatively serious proportion, and stringent measure of control has become inevitable. This is in accord with the report of the Jenkin's Committee in the United Kingdom in which it was observed that the company is not a field of legislation in which finality is to be expected, as the law falls (sic fails) to be applied to a growing and challenging subject-matter and growing use of the company system as an instrument of business and finances and the possibilities of abuse inherent in that system. A vigilant Parliament keeping a close watch over this corporate sector wielding considerable economic power has to take steps by doses to eradicate the abuses of economic power by these

corporations. More insidious the abuses of economic power greater social control became unavoidable for the health of national economy and protection of the persons dealing with corporations. No legal step can be said final or unnecessary because social control has inevitably to follow to defuse abuses of economic power. In such a situation, to say, that a further measure of protection is arbitrary in view of the protection already afforded a begging the issue and the contention must be negated on this short ground." (pp. 186 and 187)

Insofar as Section 58A of the Companies Act is concerned, the Court, in the case under reference, observed as under :--

"... The power conferred by Section 58A on the Central Government to prescribe the limits upto which, the manner in which and the conditions subject to which deposits may be invited or accepted by non-banking companies had a definite object, namely, to check the abuse by the corporate sector and the protect the depositors/investors. Mischief was known and the regulatory measure was introduced to remedy the mischief. The conditions which can be prescribed to effectuate this purpose must a fortiori, to be valid, fairly and reasonably, relate to checkmate the abuse of juggling with the depositors/investors" hard earned money by the corporate sector and to confer upon them a measure of protection namely availability of liquid assets to meet the obligation of repayment of deposit which is implicit in acceptance of deposit. Can it be said that the conditions prescribed by the Deposits Rules are so irrelevant or have no reasonable nexus to the objects sought to be achieved as to arbitrary? The answer is emphatically in the negative. Even at the cost of repetition, it can be stated with confidence that the rules which prescribed conditions subject to which deposits can be invited and accepted to operate to extend a measure of protection against the notorious abuses of economics power by the corporate sector, to the detriment of depositors/investors, a segment of the society which can be appropriately described as weaker in relation to the mighty corporation ... In a welfare State, it is constitutional obligation of the State to protect socially and economically weaker segment of the society against the exploitation by corporations. We therefore, see no merit in the submission that the conditions prescribed bear no relevance to the object or the purpose for which the power was conferred u/s 58A on the Central Government." (p. 188)

75. In the same context as noticed above, learned counsel placed reliance on the judgment of the Supreme Court in Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, . In the aforesaid case, the respondent company issued an Endowment Certification Scheme under which a subscriber was required to pay an annual subscription for a number of years, (varying between a minimum of 10 years to a maximum of 30 years). On the expiry of the maximum period, a sum of money described as the "endowment sum" was payable to the subscriber by the respondent-company. Every subscriber was also entitled to be paid a guaranteed fixed bonus. A certificate acquired "surrender value" after the expiry of three years from the date of

commencement, after subscription for two full years had been paid. A certificate which had not acquired "surrender value" would lapse on non-payment of instalments, whereupon the amount already paid by the subscriber would stand forfeited to the respondent-company, A "lapsed certificate" could, however, be revived at any time, before the expiry date of maturity, on payment of all dues together with interest. The company adopted the actuarial method of accountancy, and accordingly, the forfeited amount was treated as the income of the company. An agent's commission was 30 per cent of the first year's subscription, and 5 per cent of the subsequent subscriptions. On the revival of the scheme, the forfeiture clause was deleted, and an agent's commission was enhanced to 35 per cent of the first year's subscription. The question which came up for determination before the Apex Court was, whether the endowment scheme of the respondent-company was a "prize chit" within the meaning of Section 58A 2(e) of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978. It would be pertinent to mention that the appellant, by treating the endowment scheme of the respondents as a "prize chit", desired to regulate the same, under the provisions of the aforesaid Act. The Apex Court did not accept the aforesaid contention of the appellants. Despite the aforesaid conclusion, on the issue of regulation, and investor protection, the Apex Court noticed as under :--

"... It is open to them to take such steps as are open to them in law to regulate schemes such as those run by the Peerless Company to prevent exploitation of ignorant subscribers. Care must also be taken to protect the thousands of employees. We must also record our dissatisfaction with some of the schemes of the Life Insurance Corporation which appear to us to be even less advantageous to the subscribers than the Peerless Scheme. We suggest that there should be a complete ban on forfeiture clauses in all savings schemes, including Life Insurance Policies, since these clauses hit hardest the classes of people who need security and protection most. We have explained this earlier and we do wonder whether the weaker sections of the people are not being made to pay the more affluent sections! Robbing Peter to pay Paul ?

37. We would also like to query what action the Reserve Bank of India and the Union of India are taking or proposing to take against the mushroom growth of "finance and investment companies" offering staggeringly high rates of interest to depositors leading us to suspect whether these companies are not speculative ventures floated to attract unwary and credulous investors and capture their savings. One has only to look at the morning's newspaper to be greeted by advertisements inviting deposits and offering interest at astronomic rates. On January 1, 1987, one of the national newspapers published from Hyderabad, where one of us happened to be spending the vacation, carried as many as ten advertisements with "banner headlines", covering the whole of the last page, a quarter of the first page and conspicuous spaces in other pages offering fabulous rates of interest. At least two of the advertisers offered to double the deposit in 30 months, 2000 for 1000, 10,000 for 5000, they said. Another advertiser

offered interest ranging between 30 per cent to 38 per cent for periods ranging between six months to five years. Almost all the advertisers offered extra interest ranging between 3 per cent to 6 per cent if deposits were made during the Christmas-Pongal season. Several of them offered gifts and prizes. If the Reserve Bank of India considers the Peerless Company with eight hundred crores invested in government securities, fixed deposits with National Bank etc. unsafe for depositors, one wonders what they have to say about the mushroom non-banking companies which are accepting deposits, promising most unlikely returns and what action is proposed to be taken to protect the investors. It does not require much imagination to realise the adventurous and precarious character of these businesses. Urgent action appears to be called for to protect the public. While on the one hand these schemes encourage two vices affecting public economy, the desire to make quick and easy money and the habit of excessive and wasteful consumer spending, on the other hand the investors who generally belong to the gullible and less affluent classes have no security whatsoever. Action appears imperative." (p. 452)

The same view, as noticed above, was echoed in a supplementing order passed in the aforesaid case :--

"42.1 share my brother's concern about the mushroom growth of financial companies all over the country. Such companies have proliferated. The victims of the schemes, that are attractively put forward in public media, are mostly middle class and lower middle class people. Instances are legion where such needy people have been reduced penniless because of the fraud played by such financial vultures. It is necessary for the authorities to evolve fool-proof schemes to see that fraud is not allowed to be played upon persons who are not conversant with the practice of such financial enterprises who pose themselves as benefactors of people." (p. 454)

76. Reference was also made to the decision rendered by the Apex Court in *Narendra Kumar Maheshwari v. Union of India* 1990 Suppl. SCC 440. In the aforesaid case, the petitioner claiming himself to be a public spirited person and existing shareholder of Reliance Industries Ltd., which in turn was the promoter of Reliance Petrochemicals Ltd., challenged the consent granted by the Controller of Capital Issues to Reliance Petrochemicals Ltd., for the issuance of shares valuing Rupees 500 crores, and of debenture valuing Rs. 516 crores. It was stated, that the Reliance Petrochemicals had issued a prospectus intending to open the issue from 22-8-1988 of about 3 crores debentures of the face value of Rs. 200 each, which was the largest convertible debenture issue in India. It was contended that neither the Union of India, nor the Controller of Capital Issues, should have granted any such consent to the Reliance Petrochemicals Ltd. Although the claim in the aforesaid writ petition raised by the petitioner, eventually came to be dismissed, the Apex Court recorded the following observations in connection with investor protection:

"The present petitions have perhaps brought to the force for the first time a

public interest aspect of the issue of shares and debentures. In the past decades, investors in shares and equities constituted a very limit section of the public and consisted of two extreme types - either persons who could shrewdly apprise the merits of each issue and take a considered decision or persons who just wanted to invest and get a return for their moneys but were indifferent to the terms and condition of such investment. The position has changed in recent years. There has been a vast increase in the number of members of the public who have surplus money to invest; the size of the issues had assume macro-proportions; and the types of instruments are also becoming more and more sophisticated. Entrepreneurs, with legal and expert assistance at their command, could easily trap unwary investors and the developments of a public interest lobby that can scrutinise issue carefully and advise prospective investors on their comparative merits and demerits may not be entirely undesirable.... But we have no hesitation in saying that some procedure has to be evolved to ensure that the CCI gets the benefit of the comments, suggestions and objections from the public before arriving at his decision whether to grant consent or not and, if so on what terms and conditions. Perhaps, evaluation of certain rules in this respect could be examined at this juncture of industrial growth in our country."

77. Having emphasised, and brought home, the desire expressed by the Apex Court, of the necessity of legislation on consumer/investor protection echoed in the various decisions of the Supreme Court, referred to above, learned counsel for respondent No. 1, took upon himself, the task of demonstrating the Constitutional validity of Section 11AA of the SEBI Act.

78. The first responsibility of the learned counsel in the aforesaid context was, to define the entry under which the Parliament had the jurisdiction to legislate on the issue in hand, Learned counsel for respondent No. 1, placed reliance, for the aforesaid purpose, on Article 248 of the Constitution of India, which vests with the Parliament exclusive authority to make laws on a subject-matter, not depicted in the State List and the Concurrent List. This stance was adopted by learned counsel, on the express assertion, that there was no entry in any of the three lists of the Seventh Schedule of the Constitution of India, earmarked for the subject "Investor protection". According to learned counsel, the main object of the Parliament while enacting the SEBI Act besides promotion, development, and regulation of the securities market, was the protection of the interests of investors in such securities i.e., "investor protection", Article 248 of the Constitution is being extracted hereunder :--

"248. Residuary powers of legislation.--(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

79. In conjunction with the aforesaid provision, learned counsel, also referred to

Entry 97 of the Union List, which is extracted hereunder:--

"97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

The clear stance adopted by the learned counsel for respondent No. 1 is, that the subject on which the legislation in issue has been enacted does not expressly fall in any of the entries, in any of the three lists, in the Seventh Schedule of the Constitution.

80. In order to buttress his submission, learned counsel for respondent No. 1, first placed reliance on the decision of the Apex Court in *The Second Gift Tax Officer, Mangalore etc. Vs. D.H. Nazareth etc.*, . The respondent in the aforesaid case was the owner of a coffee plantation. He made a gift by way of a registered deed dated 22-1-1958, of a coffee plantation and other properties in favour of his sons. The market value of the entire gifted property was Rs. 3,74,080, whereas, the market value of the coffee plantation, which was also the subject-matter of the aforesaid gift, was Rs. 3,24,700. The gift tax authorities demanded a sum of Rs. 35,612 as gift tax payable by the respondent. In case other coffee plantation was excluded from tax liability, the respondent would have to pay a gift tax of Rs. 15,761. In order to attain the aforesaid objective, the respondent challenged the right of Parliament to impose gift tax on lands. The plea raised on behalf of the respondents was based on the ground that Entries 18 and 49 of the State List, fall in the legislative domain of a State Legislature and not the Parliament. Entry 18 has already been extracted above. Entry 49 of the State List is extracted hereunder :--

"49. Taxes on lands and buildings."

The High Court accepted the plea of the respondent and arrived at the conclusion that the Parliament had no authority to legislate on the issue. The Apex Court, however, while debating whether or not any of the Entries in the Seventh Schedule, covered the subject-matter of legislation, enacted by Parliament, in the form of the Gift Act, 1958, arrived at the conclusion that neither of the three Lists contained any Entry for the imposition of gift tax. Relevant observations made in this behalf by the Apex Court are being reproduced hereunder :--

"10. The pith and substance of Gift Tax Act is to place the tax on the gift of property which may include land and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in an year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Indeed the lands and buildings are valued to find out the total amount of the gift and what is taxed is the gift. The value of the lands and buildings is only the measure of the value of the gift. A gift-tax is thus not a tax on lands and buildings as such (which is a tax resting upon general ownership of lands and buildings) but is a levy upon a particular use, which is transmission of title by gift. The two are not the same thing and the incidence of the tax is not the same. Since Entry 49 of the State List contemplates a tax directly levied by

reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament. There being no other entry which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law..." (p. 453)

The submission on behalf of the respondent on the basis of the Entries 18 and 49 of the State List were noticed in the following manner :

"The argument is that by Entry 18, "land" of all description is made subject to legislation in the States and by Entry 49 taxes of whatever description on lands in that large sense and buildings generally fall also in the jurisdiction of the State. Reference is made to Entries 45, 46, 47 and 48 of the State List in which certain taxes are to be imposed on land and agricultural land or income from agriculture exclusively by the states in contrast with Entries 82, 86, 87 and 88 where the taxes are imposed on properties other than agricultural land or income from agriculture. It is submitted, therefore, that the general scheme of division of taxing and other entries by which land particularly agricultural land and income therefrom is reserved for the States shows that taxes on lands and buildings read liberally must also cover taxes in respect of gifts of land particularly agricultural land and buildings. If the entry so read can be reasonably said to include the tax, then there can be no question of recourse to the residuary powers of Parliament." (p. 752)

Having concluded that Gift Tax Act, 1958, did not transgress into the subject-matter expressed in Entries 18 and 49 of the State List, and further that it was not beyond the legislative competence of the Parliament to enact the same, the Court recorded the following observations :--

"9. The Constitution divides that topics of legislation into three broad categories: (a) entries enabling laws to be made, (b) entries enabling taxes to be imposed, and (c) entries enabling fees and stamp duties to be collected. It is not intended that every entry gives a right to levy a tax. The taxes are separately mentioned and in fact contain the whole of the power of taxation. Unless a tax is specifically mentioned it cannot be imposed except by Parliament in the exercise of its residuary powers already mentioned. Therefore, Entry 18 of the State List does not confer additional power of taxation. At the most fees can be levied in respect of the items mentioned in that entry, vide Entry 66 of the same list. Nor is it possible to read a clear cut division of agricultural land in favour of the States although the intention is to put land in most of its aspects in the State List. But however vide that entry, it cannot still authorise a tax not expressly mentioned. Therefore, either the pith and substance of the Gift Tax Act falls within Entry 49 of State List or it does not. If it does, then Parliament will have no power to levy the tax even under the residuary powers. If it does not, then Parliament must undoubtedly possess that power under Article 248 and Entry 97 of the Union List." (p. 753)

81. Learned counsel for respondent No. 1 also invited the Court's attention, to the decision of the Supreme Court in *Union of India v. Harbhajan Singh Dhillon*,

(1972) 83 ITR 582 (SC) . The respondent through a writ petition filed in this Court had challenged the vires of Section 24 of the Finance Act, 1969, by which an amendment was made to the provisions of the Wealth Tax Act, 1957, to include the capital value of agricultural land, for computing "net wealth", inter alia, on the ground, that under the Scheme of the Constitution, only the State Legislatures had power to legislate on the subject of agricultural land. The pointed contention on behalf of the respondent was, that the Parliament had legislated on an issue which was the subject-matter of Entry 49 of the State List. As against the aforesaid, the claim of the appellants before the Apex Court was, that the subject-matter of the legislation in question, did not emerge out of any Entry in List II. It was inter alia, the contention of the appellant (as in the instant case), that the legislation in question was within the competence of the Parliament under Article 248 of the Constitution of India read with Entry 97 of the Union List. The main question to be adjudicated upon by the Apex Court, in the aforesaid case was, whether the amendment of the definition of the term "assets", by withdrawing the exemption in respect of agricultural land, was within the competence of the Parliament. Learned counsel, invited the attention of this Court to the submission made by Mr. Palkhiwala, while relying on the Constituent Assembly debate, to the effect, that the three Lists of the Seventh Schedule, were exhaustive in nature and that the residuary power to legislate on residuary issue, could relate only to a matter which arose, or came to be recognised, after the promulgation of the Constitution. Stated in other words, residuary powers (according to the plea advanced in the aforesaid case), would not cover a subject-matter, which was identifiable at the time of framing of the Constitution of India. The aforesaid contention was sought to be repelled by the Apex Court with the following observations :--

"28. We do not think it is a legitimate manner of interpretation. The debates show that notwithstanding that certain taxes were known to the members of the Constituent Assembly they were not mentioned in the final list. Yet it can hardly be argued that they would not fall within the residuary powers." (p. 793)

On the basis of the aforesaid legal position, learned counsel for respondent No. 1 vehemently assets, that according to law declared by the Apex Court, any subject which does not emerge from the State List would be, by necessary implication, within the domain of Parliament for purposes of legislation. The ambit and scope of Article 248 of the Constitution of India as also Entry 97 of the Union List, was deliberated upon by the Apex Court in the aforesaid case in the following manner :--

"17. There does not seem to be any dispute that the Constitution-makers wanted to give residuary powers of legislation to the Union Parliament. Indeed, this is obvious from Articles 248 and Entry 97, List I. But there is a serious dispute about the extent of the residuary power. It is urged on behalf of the respondent that the words "exclusive of agricultural land" in Entry 86, List I, were words of prohibition, prohibiting Parliament from including capital value of agricultural land

in any law levying tax on capital value of assets. Regarding Entry 97, List 1, it is said that if a matter is specifically excluded from an entry in List I, it is apparent that it was not the intention to include it under Entry 97, List I; the words "exclusive of agricultural land" in Entry 86 by themselves constituted a matter and therefore they could not fall within the words "any other matter" in Entry 97, List I. Our attention was drawn to a number of entries in List I where certain items have been excluded from List I. For example, in Entry 82, taxes on agricultural income have been excluded from the ambit of "taxes of income", in Entry 84 there is exclusion of duties of excise on alcoholic liquors for human consumption and on opium, Indian hemp and other narcotic drugs and narcotics; in Entry 86, agricultural land has been excluded from the field of taxes on the capital value of the assets; in Entry 87, agricultural land has again been excluded from the Union Estate duty in respect of property; and in Entry 88, agricultural land has been further excluded from the incidence of duties in respect of succession to property. It was urged that the object of these exclusions was to completely deny Parliament competence to legislate on these excluded matters." (p. 789)

82. Learned counsel for respondent No. 1 having invited our attention to the decision of the Apex Court in *Delhi Cloth & General Mills Co. Ltd.'s. case* (supra), *Peerless General Finance and Investment Co. Ltd.'s. case* (supra) and *Narindra Kumar Maheshwari's case* (supra), emphatically pointed out that the Apex Court has recognised the necessity of legislation for purposes of consumer/investor protection. In fact, the Supreme Court went on to the extent of describing the aforesaid issue as a constitutional obligation, of the State to protect the socially and economically weaker segment of the society against exploitation. In the aforesaid view of the matter, it is contended that "investor protection" constitutes an exclusive subject by itself for purposes of legislation. Since the aforesaid subject-matter does not fall in any of the entries of the State List and the Concurrent List, Parliament alone can legislate on the said subject, under Article 248 of the Constitution of India, read with Entry 97 of the Union List. In conjunction with the aforesaid factual/legal position, learned counsel invited our attention to the objects and reasons for enacting the SEBI Act in 1972, as well as the conditions which necessitated various amendments from time to time leading upto the inclusion of Section 11AA in the SEBI Act, to conclude, that the legislative intent was solely aimed at "investor protection", in order to protect unwary investors from being defrauded by unscrupulous entities. Therefore, it is submitted that the exercise to be carried out to determine, the pith and substance of the legislation in question, would lead only to one subject i.e. "investor protection". In the aforesaid view of the matter, it is sought to be concluded that Parliament's action in amending the SEBI Act by adding Section 11AA thereto falls clearly within its domain and authority, under Article 248 of the Constitution of India read with Entry 97 of the Union List, because the subject of "investor protection" does not fall in any existing Entry in any of the lists in the Seventh Schedule of the Constitution.

83. In order to repudiate the submissions, relating to the issue of vires of Section 11AA of the SEBI Act, advanced on behalf of respondent No. 1, Dr. A.M. Singhvi, learned counsel for the petitioners contended, that while interpreting the provisions of the Constitution of India, facts of a case have no significance, and must necessarily be overlooked. Stated in other words, according to learned counsel, the interpretation of a constitutional provisions, shall always remain the same, irrespective of the facts involved. Accordingly, learned counsel vehemently contends, that the conclusion on the issue in hand must be determined on the basis of the interpretation of the constitutional provisions based on the acknowledged demurrer. According to learned counsel, the acknowledged demurrer in the instant case is, buying and selling agricultural land and/or sale and development of agricultural land. On the basis of the aforesaid demurrer, it is vehemently contended, that the contention of the respondents to the effect that no entry under the three lists in the Seventh Schedule of the Constitution of India, deals with the subject-matter in controversy, is misconceived. Reiterating the sole activity of the PGFL, i.e., sale and purchase of agricultural land and/or sale and development of agricultural land, it is pointed out, that the subject-matter in the present controversy relates to agricultural land and activities connected therewith including land improvement. It is submitted that there is a specific entry in respect of a alienation of agricultural land and land improvement, in the State List i.e., Entry 18 under State List. The solitary contention of the learned counsel for the petitioners, while repudiating the submissions advanced on behalf of the respondents is, that in a situation where a subject-matter is earmarked for legislation, at the hands of the State Legislature i.e., under the State List, Parliament is precluded from effecting legislation in connection therewith. Furthermore, the residuary clause under the Union List i.e., Entry 97 of the Union List, as well as, Article 248 of the Constitution of India cannot, be invoked in a situation wherein the subject governed by the legislation finds mention in the State List.

84. In order to substantiate his aforesaid contention, learned counsel for the petitioners placed reliance on the decision rendered by the Apex Court in *Union of India v. Harbhajan Singh Dhillon*, (1972) 83 ITR 582 (SC) , (the controversy involved in the instant case has been narrated above, while dealing with the same, on the basis of a reference thereto, by the learned counsel for the respondents). The Supreme Court while dealing with the interpretation of Entry 97 of the Union List, as well as Article 248 of the Constitution of India, laid down the guidelines to determine the situation wherein the aforesaid provisions can be invoked by recording the following observations :--

"... On its terms the only question to be asked is: Is matter sought to be legislated included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III; No question has to be asked about List I. If the answer is in the negative then it follows that. Parliament has power to make laws with respect to that matter or tax." (p. 792)

Later on, in the same judgment, the Apex Court, on the issue in hand, observed as under :--

"... If a Central Act does not enter or invade these prohibited fields there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in." (p. 799)

On the basis of the observations made by the Supreme Court extracted above, learned counsel for the petitioners, desired us to conclude, that legislation under Entry 97 of the Union List and/or Article 248 of the Constitution of India, is available to the Parliament, only in a situation wherein the subject-matter in question, does not fall under any Entry expressed in the State List.

85. Reliance was also placed for the same purpose on the decision of the Supreme Court rendered in *Kartar Singh v. State of Punjab* [1994] 3 SCC 569. In the aforesaid case, vires of the Terrorist Affected Areas (Special Courts) Act, 1984, the Terrorist and Disruptive Activities (Prevention) Act, 1985, and the Terrorist and Disruptive Activities (Prevention) Act, 1987, (Commonly known as the TADA Acts), were challenged. Challenge was also made to the constitutional validity of Section 9 of the Code of Criminal Procedure (U.P. Amendment) Act, 1976, by which the Legislative Assembly of Uttar Pradesh had deleted Section 438 of the Code of Criminal Procedure as applicable to the State of Uttar Pradesh. The primary contention of the petitioners, before the Apex Court, in the instant, case was, that Parliament had no legislative authority to enact the TADA Acts. In this behalf, the submission advanced on behalf of the petitioners was, that the subject-matter of the TADA Acts fell, within the legislative field assigned to the State Legislatures, under Entry 1 of the State List, namely, "public order". While controverting the aforesaid contention of the petitioners, reference was made to the factual background, which had resulted in the enactment of the TADA Acts. The legislation is stated to have been enacted after prolonged debate in both Houses of Parliament, where it was highlighted, that ordinary criminal laws were inadequate to meet with the activities of terrorists, which had astronomically increased with the passage of time. The activities of the terrorists were allegedly aimed at breaking down of the constitutional machinery disrupting life and liberty. On the basis of the aforesaid factual matrix, the TADA Acts were stated to have been enacted under Entries 1, 2 and 2A of the Union List, read with Entries 1 and 2 of the Concurrent List. Dealing with the issue of legislative authority of Parliament, the Apex Court observed as under :--

"... While examining the question of legislative competence of Parliament to make a law, the proper approach is to determine whether the subject-matter of the legislation falls in the State List which Parliament cannot enter.

59. If the law does not fall in the State List, Parliament would have the legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or Concurrent

List...." (p. 629).

It would be relevant to mention that the Apex Court, by applying the rule of pith and substance, arrived at the conclusion that the subject-matter of the TADA Acts fell within the domain of Parliament.

86. Learned counsel for the petitioners also placed reliance on the decision rendered by the Apex Court in *Naga People's Movement of Human Rights Vs. Union of India (UOI)*, . The instant judgment was again relied upon, to draw home the point, that in case the subject matter for legislation falls within any of entries under the State List, the Parliament will stand precluded from legislating thereon. In this behalf, reliance was placed on the following observations made in the aforesaid case :

"While examining the legislative competence of Parliament to make a law what is required to be seen is whether the subject-matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List.What is, therefore, required to be examined is whether the subject-matter of the Central Act falls in any of the entries in the State List."

87. Referring to the acknowledged demurrer relating to the scope of activity of the PGFL i.e., the sale and purchases of agricultural land and/ or the sale and development of agricultural land, learned counsel for the petitioners vehemently contends, that the instant subject-matter is fully covered by Entry 18 of the State List and, therefore, Parliament had no authority, whatsoever, to legislate thereon. Accordingly, learned counsel concluded by submitting, that, by including entities like the PGFL within the purview of "collective investment schemes" u/s 11AA(2) of the SEBI Act, the Parliament must be deemed to have transgressed unauthorisedly, into an area of legislation exclusively vested with the State Legislatures, by the Constitution of India.

88. We have carefully examined the rival submissions. Having noticed the contentions advanced on behalf of the PGFL, it is apparent that the foundation thereof is based on the alleged "sole activity" being carried on by the PGFL, i.e., sale and purchase of agricultural land and/or sale and development of agricultural land. Under the head - "Is the business activity of the PGFL "collective investment scheme"?, in this judgment, we have already receded that the alleged "sole activity" of sale and purchase of agricultural land and/or sale and development of agricultural land, at the hands of the PGFL, is a sham and a mere paper transaction. In the aforesaid view of the matter, the very foundation of the submissions of the learned counsel for the PGFL, on the issue of Constitutional validity of Section 11AA of the SEBI Act, falls to the ground, and therefore, requires no further examination. Be that as it may, in the following

paragraphs, we have examined the issues raised on behalf of the petitioners, in respect of the Constitutional validity of Section 11AA of the SEBI Act, by assuming that the activity of the PGFL, is what has been projected on its behalf, namely, sale and purchase of agricultural land and/or sale and development of agricultural land.

89. In Delhi Cloth & General Mills Co. Ltd. case (supra) the Supreme Court had traced out the historical background of the Companies Act, 1956 to determine the true purpose for the addition of Section 58A of the said Act. Likewise, in Kartar Singh's case (supra), the factual background which prompted the Parliament to enact the TADA Acts was the basis for the determination, whether the TADA Acts were legislative enactments under the subject expressed Entry I of the State List, or under Entries 1, 2 and 2A of the Union List read with Entries 1 and 2 of the Concurrent List. We shall, therefore, apply the aforesaid principles to determine the real object and reason for addition of Section 11AA to the SEBI Act. From the narration of the historical march of events, leading to the regulation of "collective investment schemes" in India (under the head, Regulation of "collective investment schemes" in India, in this judgment), it emerges, that the objects and reasons for enacting the SEBI Act were, to promote the development of the securities market, as well as to regulate securities market and also to protect interests of investors in securities. At the time of addition of Section 11AA to the SEBI Act, through the Securities Laws (Amendment) Act, 1999, the objects and reasons recorded establish, that Section 11AA was added to the SEBI Act by the Parliament by accepting the recommendations made in the Dave Committee's report. The Dave Committee had suggested the amendment in question, for the protection of poor, gullible, ignorant, unwary, small investors, by regulating the functioning of entities. The solitary reason for the addition of Section 11AA of the SEBI Act, which emerges, therefore, is - "investor protection". It is not necessary for us to record details herein again in respect of the aforesaid conclusion, because this aspect has elaborately been dealt with, under the head - "Regulation of "collective investment schemes" in India", in this judgment. While deliberating on the vires of Section 11AA of the SEBI Act, we will, therefore, proceed by accepting that the pith and substance of the legislation in question is - "investor protection".

90. The contention of the learned counsel for the petitioners, to the effect, that the activity of the "PGFL i.e. sale and purchase of agricultural land and/or development of agricultural land cannot be regulated by a legislation enacted by Parliament, as it covers a subject enumerated under the State List, is in our view based on a misconceived foundation. The pith and substance rule is relatable to the objects and reasons of a legislation, and not to the activities of a party. The activities of a party are totally irrelevant, to the applicability, of the pith and substance rule. Stated in other words, while examining the issue of legislative jurisdiction, it is the pith and substance of the legislation, and not the pith and substance of the activities of a party, which are relevant. In drawing our conclusion, therefore the relevant question to be examined would be, whether

the pith and substance of the legislation under challenge is "investor protection", and sale and purchase of agricultural land is an activity ancillary thereto; or whether, the pith and substance of the legislation under challenge, is sale and purchase of agricultural land and "investor protection" is ancillary thereto. In answering the aforesaid quarry, the conclusion undoubtedly is in favour of the former i.e., the pith and substance of the legislation in question is "investor protection", whereas sale and purchase of agricultural land and/or development of agricultural land is incidental thereto. According to the decision rendered by the Apex Court in McDowell & Co. case (supra) an incidental trenching, beyond the competence of the concerned legislating body, does not amount to encroaching upon the field reserved for the other body. It will also be relevant to note that in D.H. Nazareth's case (supra) the Supreme Court repelled a contention, similar to the one raised in the instant case, by holding that the Gift Tax Act, 1958 did not transgress into the subject matter covered by Entry 18 of the State List, as the object of the legislation was levy of gift tax i.e., an object which had no relevance to the aforesaid entry. The same position was expressed by the Apex Court in respect of Entry 18 of the State List in Harbhajan Singh Dhillon's case (supra) wherein it was concluded that Entry 18 of the State List was not relatable to the pith and substance of the Wealth Tax Act, 1957. It would be pertinent to mention, that in both the cases referred to above, as is clear from the factual/contextual narration recorded above (in reference to the aforesaid two cases), the legislations in question incidentally trespassed into the subject-matter covered by Entry 18 of the State List. In the aforesaid view of the matter, there can be no manner of doubt, that the pith and substance of the subject-matter of the legislation in hand does not fall under Entry 18 of the State List.

91. For the same reasons, as have been noticed hereinabove (in respect to Entry 18 of the State List), Entries 82, 86, 87 and 88 of the Union List and Entries 6 and 7 of the Concurrent List, which were relied upon by the learned counsel for the petitioners, would be irrelevant for the determination of the issue in hand.

92. The contention of the learned counsel for the respondent to the effect, that the subject of the legislation in question falls within the residuary clause i.e., Entry 97 of the Union List, in our view merits acceptance. We have concluded, hereinabove, that the pith and substance of the Legislature in question does not fall under the subject covered by Entry 18 of the State List. It is not the case of the learned counsel for the petitioners that the subject of "investor protection" falls in any other Entry under the State List. Therefore, in view of the legal position laid down by the Supreme Court in the decision rendered in Harbhajan Singh Dhillon's case (supra), Kartar Singh's case (supra) and Naga Peoples Movement of Human Rights case (supra), namely, that in case the subject-matter of legislation does not fall in any entry under the State List, Parliament alone will have the authority to legislate thereon. Since no Entry under the State List and the Concurrent List in the Seventh Schedule of the Constitution of India, relates to the subject of "investor protection", we find the ascertainment on behalf of respondent No. 1, to the effect that Parliament had the right to legislate on the

subject in hand, under Article 248 of the Constitution of India, read with Entry 97 of the Union List in the Seventh Schedule of the Constitution, because Entries 1 to 96 of the Union List also do not cover the instant subject of legislation.

93. In view of the conclusions recorded hereinabove, we find no merit in the contention of the learned counsel for the PGFL on the issue of vires of Section 11AA of the SEBI Act.

VI Conclusions:

94. On the basis of our determination of the various issues raised, by learned counsel, representing the rival parties before us, our conclusions can be summarised as under :--

Firstly, the preliminary objection raised on behalf of the respondent No. 2, to the effect, that this Court has no jurisdiction to deal with the present controversy, is not acceptable in law- We are satisfied that this Court has territorial jurisdiction to deal with the controversy in hand.

Secondly, tracing the evolution of law leading upto the addition of Section 11AA to the SEBI Act, we are satisfied that the subject of legislation under the SEBI Act relates to the promotion, development and regulation of the securities market as also to protect the interest of the investors in securities, whereas the object of adding Section 11AA to the SEBI Act was pointedly aimed at "investor protection".

Thirdly, the agreement to sell (Annexure P. 6) and the sample sale deed (Annexure P.7) relied upon to demonstrate that the sole activity of the PGFL, is sale and purchase of agricultural land and/or sale and development of agricultural land, is a sham and a mere paper transaction (refer to para 56 above). The said activity of sale and purchase of agricultural land and/or development of agricultural land, projected by the PGFL, in our view, is with the aim and object of screening its real activity. Fourthly, irrespective of the preceding conclusions, on an analysis of the activities of the PGEL, (as have been projected by it), it is clear that the PGFL satisfies all characteristics/ingredients of a "collective investment scheme", expressed in Section 11AA(2) of the SEBI Act. The PGFL is, therefore, a "collective investment scheme" for the purposes of the SEBI Act.

Fifthly, the Parliament is vested with the authority and jurisdiction to legislate on the subject of legislation covered by the SEBI Act, including Section 11AA of the SEBI Act. And that, Section 11AA of the SEBI Act does not impinge upon Entry 18 of the State List in the Seventh Schedule of the Constitution.

And finally, there is no legal infirmity in the impugned order of the Board dated 6-12-2002.

95. In view of the above, the instant petition is liable to be dismissed. The same is accordingly dismissed.

96. It would be pertinent to mention that the learned counsel for the petitioners during the course of hearing of the instant case, on 28-5-2004, unilaterally offered, to pay back all deposits, to the investors enrolled under all schemes except the scheme pertaining to the sale and purchase of agricultural land and/or sale and development of agricultural land, (which alone remained the subject-matter of consideration during the course of deliberations in the instant case). Through Civil Misc. Application No. 11405 of 2004, the steps taken by the petitioners, to fulfil the undertaking recorded on 28-5-2004, were placed on the record of this case. The details placed on record reveal, that much still remains to be done in furtherance of the statement made on 28-5-2004. In the aforesaid circumstances, it will be just and appropriate to direct the PGFL, to complete the aforesaid exercise within a further period of two months, whereafter, it shall handover the entire documentation relating to the refunds made, including the undisbursed funds to the Board. The Board shall then complete the remaining exercise of disbursement of funds in accordance with law.