SURESH CHAND AND ANR. A

v.

SURESH CHANDER (D) THR LRS. AND ORS.

(Civil Appeal No. 482 of 2020)

FEBRUARY 19, 2020 B

[DR. DHANANJAYA Y. CHANDRACHUD AND AJAY RASTOGI, JJ.]

Rajasthan Pre-emption Act 1966: ss. 6, 5 – Right of pre-emption – When accrues – Held: Right of pre-emption is a preferential right to acquire the property by substituting the original vendee – Transfer or sale of an immovable property is a condition precedent to the enforceability of the right – Right of pre-emption is attached to the property and only on that footing it can be enforced against the vendee – Though the right is recognised by law, yet it can be rendered imperfect by the vendor when he transfers the property to another person who also has a superior right to pre-emptor – On facts, plaintiff and second defendant were brothers in joint possession of courtyard having half share each and second defendant sold house alongwith courtyard to first defendant – As regards plaintiff's claim for right of pre-emption, plaintiff had a superior right of pre-emption by virtue of s. 6(3) since he was the brother of the second defendant and first defendant has an inferior right of pre-emption as compared to plaintiff, hence his claim cannot prevail over the superior right of pre-emption of plaintiff – Courts below rightly proceeded on a correct interpretation of the provisions. C D E F

Dismissing the appeal, the Court

HELD: 1.1 Section 5 of the Rajasthan Pre-emption Act, 1966 provides for cases in which the right of pre-emption does not accrue. As a result of Section 5(1)(c), the right of pre-emption does not accrue on a transfer of the property to any of the persons mentioned in Section 6, to any person who has an equal or inferior right of pre-emption. In a case, where a transfer is to a person mentioned in Section 6, the right of pre-emption does not accrue to any person who has an equal or inferior right of pre-emption. In other words, in a case where the vendee also has a right of G H

pre-emption u/s. 6, the right of pre-emption will accrue only to a person with a superior right of pre-emption. [Para 11][898 A-C]

1.2 Section 6(1) specifies the persons to whom the right of pre-emption accrues. Under Section 6(1)(ii), a right of pre-emption accrues in respect of an immovable property to owners of other immovable property with a stair-case, entrance or other right or amenity common to such property and the property that is transferred. Where a right of pre-emption enures to the benefit of a person under the provisions of s. 6(1)(ii), a consequence emanates in terms of s. 5(1)(c). The effect of s. 5(1)(c) is that a right of pre-emption does not accrue, on a transfer to any person mentioned in s. 6, to any person who has an equal or inferior right of pre-emption. Where a transfer is to any of the persons mentioned u/s. 6, the right of pre-emption to the claimant accrues only if the claimant has a superior right. The right of pre-emption, as Section 4 indicates, is subject to the provisions of Section 5. Consequently, where any of the provisions of Section 5 come into operation, the right of pre-emption would not be available. [Paras 12, 13][898-C, G-H; 899 A-C]

1.3 The right of pre-emption is a preferential right to acquire the property by substituting the original vendee. The transfer or sale of an immovable property is a condition precedent to the enforceability of the right. The right of pre-emption is attached to the property and only on that footing can it be enforced against the vendee. Though the right is recognised by law, yet it can be rendered imperfect by the vendor when he transfers the property to another person who also has a superior right to the pre-emptor. [Para 15]

1.4 In the instant case, it has come on the record before the trial court that DC, the predecessor of the appellants, had a pre-existing right in respect of the amenity of the common courtyard or sahan. This was admitted in the written statement filed by BP in the Suit. PW 1 during his cross-examination was confronted with the above written statement. What emerges from the above admission is that DC had a right in common in respect of the amenity of the courtyard. During the course of proceedings before this Court, it was admitted that the courtyard was shared between BP and DC. Therefore, both their rights would fall within

the ambit of the provisions of Section 6(1)(ii). In terms of the provisions of s. 5(1)(c), the right of pre-emption would not accrue to any person with an equal or inferior right of pre-emption. KL executed a sale deed in favour of DC who within the meaning of s. 6(1)(ii) had a right of pre-emption. But the right of pre-emption of DC was inferior to the right which was claimed by BP as the brother of KL, DC right u/s. 6(ii) was subject to a superior right of BP by virtue of s. 6(3). Section 6(3) states that even among persons of the same class, the nearer in relationship to the person whose property is transferred excludes the more remote. [Para 16][900 D-H; 901 A-C]

1.5 It was submitted that the comma appearing in s. 5(1)(c) should be read as "or" and the Section must be interpreted disjunctive; that s. 5(1)(c) should be read as "the right of pre-emption shall not accrue... on a transfer to any of the persons mentioned in s. 6" or "the right of pre-emption shall not accrue... to any person who has an equal or inferior right of pre-emption"; that the plaintiff-BP would not be covered by the first part as the first defendant-DC would be covered by s. 6(1)(ii) and the second part would not apply to the plaintiff as he only has an inferior right of pre-emption against the defendant; that the plaintiff cannot claim any right of pre-emption where a transfer is affected by a person who is covered by any of the clauses of Section 6. However, the disjunctive interpretation of Section 5(1)(c) as suggested cannot be countenanced in view of the plain text of the provision. Reading the provision in a manner as suggested would amount to an exercise of legislative re-drafting. This is impermissible. [Para 17][901 B-F]

1.6 The two segments of s.5(1)(c) are that the first segment contains the words "on a transfer to any of the persons mentioned in s. 6; and the second segment comprises of the words "to any person who has an equal or inferior right of pre-emption". Both segments are separated by a comma and refer to two separate sets of persons. In the first segment the expression "any of the persons" refers to the vendee. In the second segment, the expression "any person" refers to the claimant. In the instant case, the plaintiff-BP had a superior right of pre-emption by virtue of the provisions of Section 6(3) since he was the brother of the

second defendant. DC has an inferior right of pre-emption as compared to BP. Hence his claim cannot prevail over the superior right of pre-emption of BP. The concurrent findings of the trial judge, first appellate court and in second appeal, have proceeded on a correct interpretation of the provisions. [Paras 18, 19] [901 F-H; 902 A-C]

Bishan Singh v. Khazan Singh **AIR 1958 SC 838;** *Radhakisan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi* **AIR 1960 SC 1368 – referred to.**

Case Law Reference

AIR 1958 SC 838	**referred to**	**Para 14**
AIR 1960 SC 1368	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 482 of 2020.

From the Judgment and Order dated 26.11.2010 of the High Court of Judicature for Rajasthan, Jaipur Bench in S.B. Civil Second Appeal No. 395 of 2008.

Puneet Jain, Ms. Christi Jain, Abhinav Deshwal, Harshit Khanduja, Harsh Jain, Ms. Pratibha Jain, Advs. for the Appellants.

S.K. Sinha, Ms. Seema Kashyap, Advs. for the Respondents.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

1. Leave granted.

2. This appeal arises from a judgment and order of the High Court of Judicature of Rajasthan at Jaipur in a second appeal under Section 100 of the Code of Civil Procedure 1908.

3. The issue in the present appeal is whether a right of pre-emption was available to Beni Prasad who is alleged to be a joint owner in possession of the disputed courtyard. This has arisen in the context of the Rajasthan Pre-emption Act 1966[1]. Briefly stated, the facts which have given rise to the present appeal are thus: A suit[2] for pre-emption was instituted by Beni Prasad in the Court of the Civil Judge, Senior Division, Badi, District Dholpur in Rajasthan. Beni Prasad died during

[1] "the Act"

[2] Civil Suit Case No 71 of 1993

the pendency of the proceedings and is represented by respondents 1 to 13. Beni Prasad and Kirorilal were brothers. Beni Prasad filed the suit for pre-emption, against Devicharan who was impleaded as the first defendant and Kirorilal who was impleaded as the second defendant.The appellants in the present appeal are the sons of Devicharan. A sale deed was executed on 6 January 1990 by Kirorilal in favour of Devicharan by which Kirorilal sold his house along with the disputed courtyard to Devicharan. The basis of the suit was that Beni Prasad and Kirorilal, as brothers were joint owners in possession of the disputed courtyard having a half share each. It was argued that the plaintiff in his capacity as the brother of the second defendant, had a right of pre-emption which would prevail against the first defendant, in regard to the purchase of the house and the courtyardfrom the second defendant. The suit was contested by the defendants who filed their written statements. The defence was that the original owners of the property Pyare Lal and Baboo Lal had sold the disputed house to Prabhu Lal, who was the father of the original plaintiff and the second defendant. In the written statement, a plea was taken that on 17 January 1956, a partition had been effected between the members of the family as a consequence of which, the second defendant was allotted the disputed house and the courtyard and the original plaintiff was allotted another property.

4. The Trial Court framed several issues of which specifically issues (iii), (iv) and (vi) have a bearing on the subject matter of the present appeal. Issues (iii), (iv) and (vi) read as follows:

> "iii) Whether, the plaintiff has the right of pre-emption in the sale deed dated 6th of January, 1990.
>
> iv) Whether, there is common entrance to the ancestral house of the defendant no.1 and house purchased by the defendant no.1 from the defendant no. 2. If yes, then what is its effect on the suit.
>
> vi) Whether, the defendant no.1 is also a sharer in the disputed courtyard and he was vested with the right of pre-emption/prior purchase right in respect of the disputed house."

5. Before the Trial Court, the submission which was urged on behalf of the defendants was that the first defendant, Devicharan himself had a share in the disputed property and was vested with a right of pre-emption. In support of the claim of Devicharan to the use of the

A common amenity as a courtyard, reliance was placed on a written statement (Exhibit A2) filed on 15 February 1982 and 17 February 1982 by Beni Prasad in another suit instituted against him by his brother Kirorilal. In the course of his written statement, Beni Prasad stated that Devicharan was also the owner of the disputed courtyard. During the course of the cross-examination in the suit out of which these proceedings B arise, PW 1, who deposed in evidence, was confronted with the above-mentioned written statement. The Trial Judge, in the course of the judgment, recorded that PW 1 had stated that whatever had been set out in the written statement filed by his father would have been correct. On the basis of the admission contained in the written statement in the C suit of 1980, it was urged on behalf of the appellants that Devicharan had an interest in the courtyard which was a common amenity. The legal consequence of this would be that Devicharan also had a right of pre-emption. Hence, the submission was that a right of pre-emption would not be available to Beni Prasad against another holder of the right of D pre-emption, equal or inferior. This submission was rejected by the learned Trial Judge as below:

> "If by way of an argument it may be assumed that Devicharan was vested with the right of transmigration through the said courtyard, even then as compared to the plaintiff, his right of pre-E emption is at lesser level. In this way both of these issues are decided in favour of the plaintiffs and against the defendants."

6. The suit was decreed by the Trial Court. The above finding was affirmed in first appeal. The first appellate court adverted to the written statement (Exhibit A2), which was filed by Beni Prasad in the earlier suit of 1980.However, the appellate court held that notwithstanding F the fact that Devicharan had a right of passage through the disputed courtyard, the plaintiff, who was the brother of Kirorilal, had a better or a higher right as compared to Devicharan since Kirorilal and Beni Prasad were brothers. The first appeal was dismissed.

7. The High Court has dismissed the second appeal in limine G holding that no substantial question of law arose for its consideration.

8. Assailing the judgment of the High Court, Mr Puneet Jain, learned counsel appearing on behalf of the appellants, submitted that:

(i) The provisions of Sections 4, 5(1)(c) and 6(1)(ii) of the Act indicate that a right of pre-emption is not available when the H

person to whom the property has been sold by the vendor is an individual who has a right of pre-emption whether equal or inferior; and

(ii) Pre-emption is a weak form of a right and the legislature, in the present case, has indicated that the right would not be available where the property is sold to a person who is seized of such a right. In other words, it was urged that whether the right of pre-emption available to Devicharan is equal or inferior would be a matter of no relevance having regard to the provisions of Section 5(1)(c).

9. On the other hand, it was urged on behalf of the respondents by Mr S K Sinha, learned counsel, that both the Trial Court and the appellate court came to the conclusion that Beni Prasad and Kirorilal were brothers. Consequently, the assertion by Beni Prasad of a right of pre-emption, when Kirorilal purported to sell the property on 6 January 1990 to Devicharan, has to be valid. Learned counsel submitted that in the event that the claim of the appellants is accepted in terms of the sale deed, a situation may occur by which the respondents are deprived of the use of the common amenity of the disputed courtyard.

10. In assessing the rival submissions, it is necessary to analyse the provisions of the Act. Section 4 is in the following terms:

> "4 Cases in which right of pre-emption accrues. Subject to the provisions contained in section 5, the right of pre-emption shall, upon the transfer of any immovable property, accrue to the persons mentioned in section 6."

The right of pre-emption accrues on the transfer of any immovable property to the classes of persons mentioned in Section 6. But the opening words of Section 4 indicate that the right of pre-emption which accrues under Section 6 is subject to Section 5.

11. Section 5 provides for cases in which the right of pre-emption does not accrue. For the purposes of the present appeal, clause (c) of sub-section (1) of Section 5, which is relevant, provides as follows:

> "5. Case in which right of pre-emption does not accrue – (1) The right of pre-emption shall not accrue -
>
> (a) ***
>
> (b) ***

A (c) on a transfer to any of the persons mentioned in section 6, to any person who has an equal or inferior right of pre-emption;"

As a result of Section 5(1)(c), the right of pre-emption does not accrue on a transfer of the property to any of the persons mentioned in Section 6, to any person who has an equal or inferior right of pre-emption. B In a case, where a transfer is to a person mentioned in Section 6, the right of pre-emption does not accrue to any person who has an equal or inferior right of pre-emption. In other words, in a case where the vendee also has a right of pre-emption under Section 6, the right of pre-emption will accrue only to a person with a superior right of pre-emption.

C 12. Section 6(1) specifies the persons to whom the right of pre-emption accrues. Section 6(1)(ii) is in the following terms:

"6. Persons to whom right of pre-emption accrues – (1) Subject to the other provisions of this Act, the right of pre-emption in respect of any immovable property transferred shall accrue to, D and vest in, the following classes of persons, namely:

…

(ii) owners of other immovable property with a stair-case or an entrance or other right or amenity common to such other property and the property transferred,"

E Sub-sections (2) and (3) of Section 6 are as follows:

"(2) Among the different classes of persons mentioned in sub-section (1), persons of the first class will exclude those of the other classes, persons of the second class will exclude those of the third class. F

(3) Among persons of the same class claiming the right of pre-emption, he person nearer in relationship to the person whose property is transferred will exclude the more remote."

13. Under Section 6(1)(ii), a right of pre-emption accrues in respect G of an immovable property to owners of other immovable property with a stair-case, entrance or other right or amenity common to such property and the property that is transferred. Where a right of pre-emption enures to the benefit of a person under the provisions of Section 6(1)(ii), a consequence emanates in terms of Section 5(1)(c).The effect of Section 5(1)(c) is that a right of pre-emption does not accrue, on a transfer to H

any person mentioned in Section 6, to any person who has an equal or inferior right of pre-emption. In other words, where a transfer is to any of the persons mentioned under Section 6, the right of pre-emption to the claimant accrues only if the claimant has a superior right. The right of pre-emption, as Section 4 indicates, is subject to the provisions of Section 5. Consequently, where any of the provisions of Section 5 come into operation, the right of pre-emption would not be available.

14. In a fourjudge Bench decision of this Court in **Bishan Singh** v **Khazan Singh**[3], Justice Subba Rao (as the learned Chief Justice then was), while dealing with the provisions of the Punjab Pre-Emption Act 1913, summarised the law on pre-emption as follows:

> "11. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. **Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee. Courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means.The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right.** To summarize: (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) **Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place.** (6) **The right being a very weak right, it can be defeated by all legitimate methods, such as**

[3] AIR 1958 SC 838

A **the vendee allowing the claimant of a superior or equal right being substituted in his place.**"

(Emphasis supplied)

In a Constitution Bench decision of this Court in **Radhakisan Laxminarayan Toshniwal** v **Shridhar Ramchandra Alshi**[4], this Court
B dealt with the question whether a suit for pre-emption could be filed prior to execution of the sale deed. Justice J L Kapur, speaking for this Court held thus:

"13. ...The right to pre-empt the sale is not exercisable till a pre-emptible transfer has been effected and **the right of pre-emption**
C **is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means**..."

D (Emphasis supplied)

15. The right of pre-emption is a preferential right to acquire the property by substituting the original vendee. The transfer or sale of an immovable property is a condition precedent to the enforceability of the right. The right of pre-emption is attached to the property and only on
E that footing can it be enforced against the vendee. Though the right is recognised by law, yet it can be rendered imperfect by the vendor when he transfers the property to another person who also has a superior right to the plaintiff pre-emptor.

16. In the present case, it has come on the record before the Trial
F Court that Devicharan, the predecessor of the appellants, had a pre-existing right in respect of the amenity of the common courtyard or sahan. This was admitted in the written statement filed by Beni Prasad in Suit 43 of 1980. PW 1 during his cross-examination was confronted with the above written statement.What emerges from the above
G admission is that Devicharan had a right in common in respect of the amenity of the courtyard. During the course of proceedings before this Court, it was admitted that the courtyard was shared between Beni Prasad and Devicharan. Therefore, both their rights would fall within the ambit of the provisions of Section 6(1)(ii). In terms of the provisions

H [4] AIR 1960 SC 1368

of Section 5(1)(c), the right of pre-emption would not accrue to any person with an equal or inferior right of pre-emption. Kirorilal executed a sale deed on 6 January 1990 in favour of Devicharan who within the meaning of Section 6(1)(ii) had a right of pre-emption. But the right of pre-emption of Devicharan was inferior to the right which was claimed by Beni Prasad as the brother of Kirorilal. Devicharan's right under Section 6(ii) was subject to a superior right of Beni Prasad by virtue of Section 6(3). Section 6(3) states that even among persons of the same class,the nearer in relationship to the person whose property is transferred excludes the more remote.

17. During the course of the arguments, Mr Puneet Jain, learned counsel for the appellants has raised an argument that the comma appearing in Section 5(1)(c) should be read as "or" and the Section must be interpreted disjunctively. It is argued that Section 5(1)(c) should be read as "the right of pre-emption shall not accrue... on a transfer to any of the persons mentioned in Section 6" or "the right of pre-emption shall not accrue... to any person who has an equal or inferior right of pre-emption". It is urged that the plaintiff (Beni Prasad) would not be covered by the first part as the first defendant (Devicharan) would be covered by Section 6(1)(ii) and the second part would not apply to the plaintiff as he only has an inferior right of pre-emption against the defendant. It is submitted that the plaintiff cannot claim any right of pre-emption where a transfer is affected by a person who is covered by any of the clauses of Section 6. However, the disjunctive interpretation of Section 5(1)(c) as suggested by the counsel of the appellants cannot be countenanced in view of the plain text of the provision. Reading the provision in a manner as suggested would amount to an exercise of legislative re-drafting. This is impermissible.

18. The two segments of Section 5(1)(c) are as follows:

(i) The first segment contains the words "on a transfer to any of the persons mentioned in Section 6; and

(ii) The second segment comprises of the words "to any person who has an equal or inferior right of pre-emption".

Both segments are separated by a comma and refer to two separate sets of persons. In the first segment the expression "any of the persons" refers to the vendee. In the second segment, the expression "any person" refers to the claimant. In the present case, the plaintiff

A (Beni Prasad) had a superior right of pre-emption by virtue of the provisions of Section 6(3) since he was the brother of the second defendant. Devicharan has an inferior right of pre-emption as compared to Beni Prasad. Hence his claim cannot prevail over the superior right of pre-emption of Beni Prasad.

B 19. For the above reasons, we are of the view that the concurrent findings of the Trial Judge, the first appellate court and in second appeal, have proceeded on a correct interpretation of the provisions noticed above.

20. We accordingly dismiss the appeal. However, there shall be C no order as to costs.

Nidhi Jain Appeal dismissed.

OSIANS CONNOISSEURS OF ART PVT. LTD. A

v.

SECURITIES AND EXCHANGE BOARD OF INDIA & ANR.

(Civil Appeal No. 54 of 2016)

FEBRUARY 12, 2020 B

[R. F. NARIMAN, S. RAVINDRA BHAT AND V. RAMASUBRAMANIAN, JJ]

Securities and Exchange Board of India Act, 1992: ss. 11AA, 12(1B) – SEBI (Collective Investment Scheme) Regulations, 1999 – Regn 3, Regn 2(h) – Collective Investment Scheme (CIS) – Creation of trust fund by the appellant-trustees – Appellants told by SEBI that these Funds being CIS, they should apply for certificates of registration for these Funds, to which the appellants denied since they were not registered in the form of a company – Thereafter, issuance of notice by SEBI – Order by SEBI that the trust funds shall abstain from collecting any money from the investors or carry out any CIS and refund the entire monies collected by it under its scheme to all the investors – Matter disposed of by the Appellate Tribunal – On appeal held: Statutory scheme under the CIS Regulations is that, if a CIS, as defined u/Regn 2(h), is to be floated by a person, it could only be done in the form of a collective investment management company and in no other form – Collective investment scheme being carried on by the appellants in the form of a private Trust would be in the teeth of the Statute read with CIS Regulations and thus, illegal – In view of the long pendency, issuance of direction to appellant to pay back the principal amount with interest to each investor within the stipulated period. C D E F

Disposing of the appeals, the Court

HELD: 1. It would not be possible to state that the Schemes in the instant case would not be Collective Investment Schemes. It is difficult, therefore, to interfere with the concurrent findings made in this behalf by both SEBI and the Appellate Tribunal. In 1995, Section 12(1B) of the SEBI Act was introduced, by which it became clear that no person can sponsor or cause to be sponsored or carry on or cause to be carried on any collective investment scheme unless he obtains a certificate of registration G H

from the Board in accordance with the regulations. It is important to notice that the expression "person" is used by Section 12(1B). However, in 1999, by amendment, Section 11AA was introduced which defines Collective Investment Scheme. [Para 13] [900 D-H]

2. The statutory scheme under the CIS Regulations is that, if a Collective Investment Scheme, as defined under Regulation 2(h), is to be floated by a person, it could only be done in the form of a collective investment management company and in no other form. This is the reason why Section 11AA uses the expression "company" in sub-Section (2) and not the word "person" (as the CIS Regulations of 1999 had come into force on 15.10.1999; Section 11AA came into force on 22.02.2000). Once the statutory scheme becomes clear, it is clear that the Collective Investment Scheme that was being carried on by the appellants in the form of a private Trust would be in the teeth of the Statute read with the CIS Regulations and would thus be illegal. Thus, it is difficult to upset any part of SEBI's order that remains after the penultimate part of the order was set aside by the Appellate Tribunal. However, this litigation is going on for a long period of time and instead of remanding the matter to SEBI to decide the refund issue afresh, the principal amount repayable to each investor of both the Schemes shall be paid back with 10 per cent interest within the stipulated period. [Paras 15, 16, 17, 18][911 A-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 54 of 2016.

From the Judgment and Order dated 13.10.2015 of the Securities Appellate Tribunal, Mumbai in Appeal No. 62 of 2013.

With

C. A. No. 19936/2017 and 77/2018.

A.N.S. Nadkarni, ASG, Nakul Dewan, Sr. Adv., Moazzam Khan, Ms. Shweta Sahu, Brijesh Ujjainwal, Akshat Goel, M/s. Lex-peritia and Co., Ms. Shirin Khajuria, Shekhar Vyas and Kunal Chatterji, Advs. for the Appellant.

Chander Uday Singh, Sr. Adv., Siddharth Dias, Devansh Gandhi, Puneet Sharma, Pratap Venugopal, Ms. Surekha Raman, Ms. Viddusshi,

Ms. Ayushi Gaur, Akhil Abraham Roy, Vijay Valsan and M/s. K J John and Co., Advs. for the Respondents.

The Judgment of the Court was delivered by

R. F. NARIMAN, J.

CIVIL APPEAL NO. 54 OF 2016

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

2. The civil appeal is allowed to be withdrawn.

CIVIL APPEAL NO. 19936 OF 2017

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

4. Two trusts named Yatra Art Fund Trust (Fund I) and Yatra Art Fund II (Fund II) were created under the Indian Trusts Act, 1882, through execution of Indentures of Trust dated 15.06.2005 and 01.12.2006.

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

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

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

A responded to by Fund I on 16.07.2007, denying that the activities would amount to the activities of a Collective Investment Scheme. As a result thereof, on 12.10.2007, SEBI issued a Show Cause Notice to show cause as to why the Yatra Art Fund should not register itself with SEBI in the prescribed corporate form, as otherwise the collective investment scheme carried out by the Trust would be illegal. The show cause notice also B mentioned that all amounts collected should be refunded within a period of 30 days from the said show cause notice. On 05.11.2007, the appellants responded to the aforesaid show cause notice stating that there was no violation of Section 12 (1B) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with C Regulation 3 of SEBI (Collective Investment Scheme) Regulations, 1999 (hereinafter referred to as 'CIS Regulations'); and as the appellants were not registered in the form of a company, the Regulations themselves would not apply. Secondly, detailed arguments were made as to why the schemes involved could not be said to be collective investment schemes. One year later, on 03.11.2008, a joint representation to SEBI was made D stating that the aforesaid schemes floated by the appellants were not collective investment schemes, reiterating that they were not made in the corporate form.

8. It appears that, at this point of time, SEBI itself was unsure as to whether such funds would amount to collective investment schemes. E However, in 2013, the matter was resuscitated and after giving the appellants a hearing, inasmuch as as many as nine investors complained with regard to Trust Fund No.2, including an Investors' Association, an order was delivered by the whole-time member of SEBI on 06.11.2015 as follows:

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> "29. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11 and 11B thereof and Regulation 65 of the SEBI (Collective Investment Scheme) Regulation, 1999, hereby issue the following directions:
>
> G a. Yatra Art fund shall abstain from collecting any money from the investors or launch or carry out any Collective Investment Schemes including the scheme which have been identified as a Collective Investment Scheme in this Order.
>
> b. Yatra Art Fund is directed to refund the entire monies collected H by it under its scheme to all the investors along with the returns at

the rate of 10% per annum, within a period of three months from the date of this Order and thereafter, within a period of fifteen days, submit a winding up and repayment report to SEBI in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999, including the trail of funds claimed to be refunded, bank account statements indicating refund to the investors and receipt from the investors acknowledging such refunds.

c. Yatra Art Fund is restrained from accessing the securities market and are prohibited from buying, selling or otherwise dealing in securities market for a period of four (4) years.

d. Yatra Art Fund is also directed to immediately submit the complete and detailed inventory of the assets owned by Yatra Art Fund.

e. In the event of failure by Yatra Art Fund to comply with the above directions, the following actions shall follow:

- Yatra Art Fund shall remain restrained from accessing the securities market and would furhter be prohibited from buying, selling or otherwise dealing in securities, even after the period of four (4) years of restraint imposed in Paragraph 29(c) above, till all the monies mobilized through such schemes are refunded to its investors with interest, which are due to them.

- SEBI would make a reference to the State Government/Local Police to register a civil/criminal case against Yatra Art Fund, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and

- SEBI shall also initiate attachment and recovery proceedings under the SEBI Act and rules and regulations framed thereunder."

9. An appeal was carried to the Securities Appellate Tribunal, which was then disposed of on 21.08.2017, following the Appellate Tribunal's judgment dated 13.10.2015 in *Osian's – Connoisseurs of Art Private Limited* v. *Securities and Exchange Board of India & Anr.* It may be pointed out that the Appellate Tribunal set aside the paragraphs of the SEBI's order which required the State Government to make a reference to register civil/criminal cases against the Fund and

A initiate attachment and recovery proceedings under the SEBI Act and Rules and Regulations. However, insofar as paragraph 29 (b) set out hereinabove of SEBI's order was concerned, the Appellate Tribunal remanded the matter to SEBI, adopting the reasoning contained in the earlier Tribunal judgment of 13.10.2015 as follows:

B "……

……

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

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

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

"11 (2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for-

……

F ……

(c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;"

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

12. What is of importance is to notice that the expression "person" is used by Section 12(1B). However, in 1999, by amendment, Section H 11AA was introduced in which it was stated as follows:

"11AA. Collective investment scheme.- (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) or sub-section (2A) shall be a collective investment scheme:

Provided that any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under sub-section (3), involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme.

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

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

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

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

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

(2A) Any scheme or arrangement made or offered by any person satisfying the conditions as may be specified in accordance with the regulations made under this Act.

(3) Notwithstanding anything contained in sub-section (2) or sub-section (2A), any scheme or arrangement—

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

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

A (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;

B (v) under which deposits are accepted under section 58A of the Companies Act, 1956;

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

C (vii) falling within the meaning of Chit business as defined in clause (e) of section 2 of the Chit Fund Act, 1982;

(viii) under which contributions made are in the nature of subscription to a mutual fund;

D (ix) such other scheme or arrangement which the Central Government may, in consultation with the Board, notify, shall not be a collective investment scheme."

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

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

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

Regulation 3 of the CIS Regulations states:

"3. No person other than a Collective Investment Management Company which has obtained a certificate under these regulations

H

shall carry on or sponsor or launch a collective investment scheme."

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

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

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

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

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

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

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

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

23. So far as the interest at the rate of 10 per cent is concerned, this amount will be paid on the principal outstanding amount from the date on which it becomes due to each such member, till the date on which each Fund came to an end, i.e., insofar as Fund No. 1 is concerned

A till 15.09.2011 and so far as Fund No. 2 is concerned till 31.01.2012. The aforesaid interest shall be paid within nine months from the date of this judgment.

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

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25. The appeal stands disposed of.

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

Nidhi Jain Appeals disposed of.