

CASE COMMENT: SAHARA INDIA REAL ESTATE CORPORATION
LTD & ORS VS. SECURITIES & EXCHANGE BOARD OF INDIA
(SEBI) & ANR

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INTRODUCTION

Clientele nowadays are more apprehensive regarding coming into contact with high quality services while capitalizing. The anticipation is not just in receipt of an investment or financing offer from the financial institutions in form of a commodity. They rather expect the institution to have a personality of its own with wider recognition in addition provide the expected return on the economic instruments, which transports services in an atmosphere with satisfaction. In the financial sector the superiority of service is whirling out as an imperative differentiator among the rivals. This case is about Sahara group which did a fraud with their investors. Company failed to act in accordance with a Supreme Court's order in 2012 to pay back investors in the bond scheme, which the court has said was illegal. With this regard law enforcement agency arrest Sahara group owner Subrata Roy in March 2014 and to appear in court over failure of two Sahara companies to pay Rs 19,000 crore by way of dues to be paid to investors.

ABOUT SAHARA GROUP

Sahara India Pariwar was established in 1978 is an Indian conglomerate headquartered in Lucknow, by means of business interests in finance, infrastructure, housing, media & entertainment, consumer merchandise retail venture, manufacturing as well as information technology. The company had an estimated market capitalization of US\$25.94 billion as of March 2011.

TIMELINE OF THE CASE

January 4, 2010- Roshan Lal, a resident of Indore sent a note to the national housing bank, requesting it to inspect into housing bonds issued by two companies of the Lucknow-headquartered Sahara group viz., Sahara India real estate corporation and Sahara housing investment corporation. Being a CA, Roshan Lal brought into being the fact that the bonds,

bought by a large number of investors, were not deal out according to the rules. The national housing bank did not have the wherewithal to investigate the accusation, so it forwarded the letter to the SEBI, The capital market watchdog.¹

November 2010-Securities and Exchange Board of India puts a bar on Sahara India Pariwar chief Subrata Roy and two of its companies - Sahara India Real Estate Corp (SIREC) and Sahara Housing Investment Corp (SHIC) from raising money from the public as they raised several thousand crores via optionally fully convertible debentures which SEBI deemed illegal.

December 2010 - Sahara made appeal in the Allahabad High court which ordered SEBI not to take any action in anticipation of a court order is passed.

January 2011- Delhi High court issued a warrant against Sahara India Pariwar chairman Subrata Roy besides four other officials of the group on a complaint that it mislead and deceived investors in a proposed housing project of Rs.25,000 crore.

February 2011- Delhi High court stays proceedings against Sahara India Pariwar chairman Subrata Roy and four other officials of the group on the basis of aforementioned.

October 2011- Securities Appellate Tribunal (SAT) ordered two unlisted Sahara Group companies to repay within the time frame of six weeks about 17,656.53 crore with 15% interest which it had raised through a flotation of OFCDs.

November 2011- Sahara India Pariwar moved to Supreme Court against SAT's order and in favour of Sahara Group it stayed the SAT order, and ordered the two companies to refund 17,400 crores to their investors also questioned the details and liabilities of the companies.

January 2012- Supreme Court gave three weeks' time to Sahara India Pariwar to decide on between either to give sufficient bank guarantee or attach properties worth the amount raised through OFCD's.

¹ Jagannathan, R. (2016, March 31). Why Is Subrata Roy Not Eager To Get Out Of Jail? The Sahara Case Gets Curiouser. New Delhi, India.

June 2012- SEBI made conversant to the Supreme Court that real estate division of Sahara India Pariwar had no right to mobilize Rs.27, 000 crore from investors through optionally fully convertible debentures (OFCD) devoid of abide by norms of Market regulator - SEBI.

August 2012- Supreme Court directed the India Real Estate Corporation Ltd. (SIRECL) and the Sahara Housing Investment Corporation Ltd. (SHICL) to repay over Rs. 24,400 crore.

February 2014- Subrata Roy was arrested by law enforcement agency on a Supreme Court's warrant, in a dispute with Market Regulator -SEBI.

26 March 2014- He was granted interim bail by Supreme Court of India for the same on condition of depositing Rs 10,000 crore with the market regulator SEBI. As of August 2014, Roy was still in jail and was trying to sell some of his hotel properties to enough so that he could deposit the bail amount.

5 September, 2014- Sahara chief Subrata Roy requested SC for 15 more days to sell properties. Appearing before a bench headed by Justice TS Thakur, Roy's counsel submitted that there have been massive remonstrations outside the hotels subsequently an International newspaper published story that Sultan of Brunei is buying the properties.²

31 October, 2014- Roy was allowed by the Supreme Court to use the jail's conference room in order to sell his hotels in order to collect Rs 10,000 crore for his bail.

QUESTIONS IN ISSUE

Issue 1: Whether SEBI had the Jurisdiction to try the matter or not?

Issue 2: Whether the hybrid OFCDs falls within the definition of "Securities" within the meaning of Companies Act, SEBI Act and SCRA so as to vest SEBI?

Issue 3: Whether the issue of OFCDs is a Private Placement so as not to fall within the purview of SEBI Regulations and various provisions of Companies Act?

² Kanteti, D. V. (2015). Corporate Social Irresponsibility towards Investors- A Case Analysis of Sahara Group. Indian Journal of Research, 198-199.

Issue 4: Whether hybrid instruments also with the ambit of the SEBI to regulate or?

Issue 5: Whether listing provisions under Sec 73 mandatorily applies to all public issues or depends upon the "intention of the company" to get list?

Issue 6: Whether the Public Unlisted Companies (Preferential Allotment Rules) 2003 will apply in this case?

OBJECTIONS RAISED BY THE SEBI

- As per the provision of Section 55A of the Companies Act, 2013, it surfaces the pathway for SEBI's jurisdiction and also confines it to listed public company. In this case, the company in question being an unlisted one does not fall under domain of SEBI's jurisdiction.
- As per the facts of the case if Sahara put up with the fact that it was a private placement and only nominated clienteles were requested for investment then the whole task of OFCD should have been enfolded up within 10 days in accordance with rules and regulations as well as in adherence to the guidelines. Furthermore the offer should have been limited to not more than 50 members.
- In this case more than 23 million people invested in the scheme and it continued for more than 2 years which made it an onus upon the company to make it listed as per Section 73 of the Companies Act, 2013 which forbids private company to take deposits from the public and permits only eligible companies to receive deposits from the public.³ It must be informed to the registrar of the company. Furthermore, in such a state of affairs should bring forward within the purview of the SEBI.
- Consequently, in the light of facts provided and arguments advanced SEBI put forth that OFCD scheme is within the ambit of the definition of securities as provided by SEBI Act 1992 and Sahara should be ordered to refund the deposits of more than Rs. 24000 crores to its investors as it was taken in contravention of the laws of the land.

³ Pande, A. (2014). Corporate fraud in India- case studies of Sahara and Saradha. seven pillars institute

OBSERVATIONS OF THE SUPREME COURT

- Legislative intent and Rule of Harmonious Construction was put in use in this case SC. These rules are used where legislation is ambiguous, or does not appear directly or adequately address a particular issue, or when there appears to have been a legislative drafting error. Section 55A was inserted in the Companies Act 1956 by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000. The Statement of Objects and Reasons give an indication of the intention of the Legislature read as follows: "to provide that the Securities and Exchange Board of India be entrusted with powers with regard to all matters relating to public issues and transfers include power to prosecute defaulting companies and their directors."

Consequently, from aforementioned it is clear that Section 55A, of the legislature, was to vest SEBI with powers to investigate and adjudicate in all the matter related to the public issue of securities.

- The SC rejected the arguments put forth by Appellants and relied on Section 67 to conclude that an offer to 50 or more persons establishes a public issue; hence the issuance of OFCDs by the Appellants was a public issue. To arrive at this conclusion, the SC also lifted the veil to scrutinize the conduct and method adopted by the Appellants further placed reliance on inter-alia the following to conclude that even in spirit the issuance by the Appellants was a public issue.

i) In the IM circulated by the Appellants, it was specified that if the number of interested parties to the OFCD issue surpassed 50 they would approach the ROC to file RHP as per Section 67(3) of the Companies Act;

ii) The Appellants made disclosures that the issue was being made on a private placement basis and that OFCDs would be obtainable only to such persons to whom IM would be circulated. But the fact remains that it was circulated to more than three crore people inviting them to subscribe;

iii) Though put up with, the Appellants could not validate their claim that the investors were friends, associated group companies, workers/employees and other individuals who were the associated/affiliated or connected with Sahara Group.

- The SC specified that Section 73(1) of the Companies Act casts an onus on every company proposing to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no preference but to list their securities on a recognized stock exchange, once they call subscription from over 49 investors from the public. If an unlisted company articulates its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal compulsion to make an application on a recognized stock exchange for listing starts. The Appellants had argued that since they did not intend to offer the OFCDs to the public, this provision should not apply. Nonetheless, as cited above, the SC on the basis of the conduct of the Appellants concluded that they intended to offer the OFCDs to the public and henceforth they were obligated to apply for listing of OFCDs.

- SC specified that the OFCDs allotted by the Appellants absolutely were unsecured debentures by name and nature. And yet, they have the dual features of shares and debentures, as defined by the term "hybrids", though, they remain debentures till the time they are converted. Further, the SC also stated that the definition of "debentures" in Companies Act take account of 'any other securities', and noted that the Appellants have treated OFCDs only as debentures in the IM, RHP, application forms and also in their balance sheet.

- SC relying on the contention of SEBI's jurisdiction over OFCDs, stated that the definition of "securities" in the SCR Act is an inclusive definition and not exhaustive. Further, the definition of "securities" in the SCR Act includes any "other marketable securities of like nature". The SC stated that any security which is capable of being freely transferable is marketable. Since, the OFCDs issued by the Appellants were freely convertible; consequently, they fall within the ambit of "securities" in the SCR Act.

- The SC also stated as Section 55A of the Companies Act, which provides provision regarding delegation of powers to SEBI refers to "securities", and the definition of "securities" in Companies Act includes "hybrids", as a result, SEBI has jurisdiction over hybrids like OFCDs issued by the Appellants.

DECISION OF THE SUPREME COURT

The Hon'ble Supreme Court ordered Sahara to repay the deposits collected by it via Red Herring Prospectus along with an interest rate of 15% up to the date of repayment. It also directed to SEBI to take lawful alternative in case Sahara fails to meet the terms with the said order.

CRITICAL ANALYSIS

The observation made by the Supreme Court is justified from all viewpoints firstly it highlighted the fact that how Sahara exasperated to violate the provisions of various statutes like SEBI Act, 1992, Companies Act, 2013. Secondly put at risk the survivals of numerous investors who predominantly belonged to the lower strata of the society and hardly made sufficient to keep fulfil their necessities. Sahara's gambled the life of majorly illiterate group of people who barely had any knowledge of the financial position of a company and consequently were confused regarding connecting the prospect to make profit out of schemes such as OFCD which necessitates acquaintance and awareness about presentation and performance of the company and of course basic knowledge regarding accurate time to convert such debentures into shares which will be a lucrative for them. Such investors are unacquainted and naive of the risk that approaches lengthwise with such enticing schemes besides out of ignorance they put all their money in one faith given by such deceitful and devious administrators of such companies. This decision of the Supreme Court in every modus will be a foremost precedent which will act as a deterrent for them not to embroil themselves in such incoherent schemes.

CONCLUSION

Many individuals used to invest in Sahara even from low income families also which points toward the factum that Sahara targeted low income group as well as high income group. Sahara was having differentiated merchandises for a number of income groups of the marketplace. Nevertheless many of the clientele didn't get their projected returns. This fraud case dwindled its popularity and people started losing their faith in Sahara hence most of the customers don't want to invest again in the Sahara moreover, Sahara's clientele stayed disgruntled and offended with its association in this scam.