

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

PUBLIC INTEREST LITIGATION NO. 12 OF 2017

**M/s Securities & Time Share
Owners Welfare Association,
Registered Office:-13-F, 1st Floor,
Mookambika Complex, New No. 7,
Old No.4, Lady Desika Road, Mylapore,
Chennai-600 004, Tamil Nadu. ...Petitioner**

Versus

**1. Securities and Exchange Board of India
Plot No. C 4-A, G Block,
New Bank of India, Banda Kurla Complex,
Banda East, Mumbai, Maharashtra-400 051.**

**2. Union of India
Through Ministry of Finance
Government Pleaders Office, Mumbai ...Respondents**

Ms. N. S. Nappinai with Mr. Navin P. Sachanandani
i/b Noelle Ann Park for Petitioner.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir
Mody and Mr. Arnav Misra i/b M/s K. Ashar and Co.
for Respondent No. 1.

**CORAM :DIPANKAR DATTA, CJ. &
ABHAY AHUJA, J.**

**RESERVED ON :NOVEMBER 24, 2022
PRONOUNCED ON :NOVEMBER 30,2022**

ABHAY AHUJA, J.:-

1 This petition has been filed as a public interest litigation by the petitioner-society purportedly established to protect the interest of investors in Time Share Companies seeking direction

to the Respondents to regulate the Time Share Companies as Collective Investment Scheme (CIS) under Securities & Exchange Board of India Act, 1992 (as amended in 2014) (the "SEBI Act") and the Collective Investment Schemes Regulations, 1999 (the "CIS Regulations"). In the alternative, it has been prayed that the Respondents be directed to formulate suitable legislation to regulate Time share companies.

2 The basis on which this petition has been instituted is that the rights of several million residents of India are adversely affected due to malfunctioning, fraud, misrepresentation and other wrongful and/or illegal activities of various Time Share Companies.

3 It has been submitted that though initially in 1999, Petitioner was registered as Sterling Resorts Timeshare Owners Welfare Association, for the protection of the interests of its members, in the year 2009, the name was changed to M/s. Securities & Timeshare Owners Welfare Association and the profile of the Petitioner society was broadened to encompass persons who had invested in time share products of other companies also.

4 Ms. Nappinai, Learned Counsel for petitioner-society would submit that petitioner is a public spirited association, set up for the protection of rights of investors in Time Share Companies and has worked for upholding the rights of Time Share Investors in general and protection of the rights of its members in particular.

5 Learned Counsel submits that Section 11-AA of the SEBI Act, which sets out the definition of a "CIS", clearly

encompasses Time share investments, as such schemes or arrangements:

- (i) seek contributions or payments from investors;
- (ii) such payments or contributions are pooled and utilized by the Time Share Companies to acquire properties;
- (iii) investors make such contributions or payments with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangements;
- (iv) the property and contribution or investment pooled through such scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;
- (v) investors do not have day-to-day control over the management and operation of the scheme or arrangement.

6 She submits that the definition in Section 11-AA does not specify if any or all of the conditions set out therein have to be met to be a CIS as no conjunctions have been used. She would submit that even if it was assumed that all the above clauses have to be met, Time Share Companies would squarely fall within the ambit of the said definition.

7 Learned Counsel submits that in any event most of the Time Share Companies have a corpus accumulated through pooling of investors' fund of over Rs. 100 Crores and since Time Share Companies have not been exempted under section 11-A(3), they would fall within the ambit of Section 11-AA (1).

8 Learned Counsel refers to the interim report of the Dave Committee which was appointed in the year 1997 by the Ministry of Corporate Affairs under the Chairmanship of Dr. S.

A Dave, former chairman of UTI, called the "Committee on Collective Investment Schemes" to submit that the said committee had in its interim report dated 31st December, 1998 suggested that the definition of the CIS was likely to cover arrangements in a nature of Time Share and recorded its suggestion to the Respondent no. 1 SEBI to extend appropriate exemptions to any class of arrangements, which the SEBI did not wish to be regulated as CIS. However, it is submitted that the final report dated 5th April, 1999 did not specifically refer to Time Share Companies but only set out the arrangements which were not CIS.

9 Learned Counsel would submit that since Time Share Companies were not included in the exempted categories and considering their mention in the interim report, they would be covered under the definition of CIS as a scheme or arrangement in section 11AA(1) of the SEBI Act.

10 In support of her contentions, Learned Counsel has placed reliance upon the following decisions:

- (i)** M/s. Rose Valley Real Estate & Constructions Ltd. & Anr. Vs. Union of India & Ors. (2013 SCC Online Cal 13571) (Rose Valley Kolkata)
- (i)** Rose Valley Hotels and Entertainments Ltd. And Ors. Vs. State of Assam and Ors. [(2016) 1 Gauhati Law Reports 483] (Rose Valley Gauhati)
- (ii)** Chandrasen Ganpatrao Bhise Vs. Securities and Exchange Board of India (Order dated 2nd March 2022 passed in Miscellaneous Application No.417 of 2020,

Miscellaneous Application No.486 of 2020, Miscellaneous Application No.556 of 2021 and Appeal No.424 of 2020 by the Securities Appellate Tribunal, Mumbai)

11 She therefore submits that this Court issue mandamus or an order or writ in the nature of mandamus under Article 226 of the Constitution directing the Respondents, its officers, servants and agents to enforce the provisions of Section 11-AA of the SEBI Act and the CIS regulations against the Time Share Companies and in particular Time Share companies with over 100 crores turnover to be included explicitly for submitting to the compliance network mandated by SEBI.

12 Learned Counsel would also submit that if this Court is not inclined to direct the SEBI viz. Respondent no. 1 to enforce the provisions under the SEBI Act, and the regulations with respect to Timeshare companies, then in the alternative, a mandamus be issued to the Union of India directing the Respondents, its officers, its servants or agents to formulate legislation, guidelines and regulations for Time Share Companies in a time bound manner.

13 It is submitted that the petition is being filed in the interest of and for the protection of rights of several million Time share owners, who have been deprived of requisite protection through suitable regulation by the Respondents despite rampant misuse and abuse by various companies involved in the business of selling Timeshares. She submits that instances are abound of the fact that whilst some Timeshare companies may face penalties from SEBI, the regulator, the

investors do not recover their monies. She submits that therefore it is imperative that explicit directions for pre-emptive protection of innocent and the gullible investors be implemented.

14 On the other hand, Mr. Rustomjee, Learned Senior Counsel for the Respondent no.1 SEBI, while denying that the present petition is being filed in the interest of and for the protection of the rights of several million Timeshare owners, would submit that Timeshare is an investment in a holiday scheme which gives an entitlement to a holiday and that the schemes of all Time Share Companies cannot *ipso facto* be said to fall within the definition of CIS under the SEBI Act and the CIS regulations.

15 That for any scheme or arrangement to be qualified as a CIS as defined under the SEBI Act, the test is laid down in section 11AA (2) of the SEBI Act.

16 He would submit that it cannot be said that if a scheme is not exempted under Section 11-AA (3) of the SEBI Act, it can be deemed as CIS. He submits that wherever it has been necessary after taking into account the activities in relation to the definition and the regulations, the Respondent no. 1 has taken action against entities for carrying out unregistered CIS under the garb of Timeshare business. He would submit that in such cases the scheme satisfied the conditions mentioned in Section 11-AA of the SEBI Act. He refers to the cases of **Rose Valley Hotels & Entertainments Ltd., M/s Citrus Check Inn, Royal Twinkle Club Star Private Ltd. and Pancard**

Clubs Ltd., as and by way of instances where the SEBI has considered the schemes/activities of these companies as CIS under the garb of timeshare and taken action against them.

17 Mr. Rustomjee, refers to Section 2(1)(ba) of the SEBI Act under the definition clause to submit that CIS would mean any scheme or arrangement which satisfies the conditions specified under Section 11-AA of the SEBI Act and reiterates that all Time Share Companies cannot be considered as CIS unless they satisfy the conditions mentioned in section 11-AA and whether they satisfy the said conditions or not will have to be interpreted and analyzed according to the facts and circumstances of each scheme. Learned Counsel would submit that a reading of Section 11-AA shows that it deals only with any scheme or arrangement which would fall within the definition of a CIS and satisfies all the conditions mentioned therein. He submits that the scheme provided by different Timeshare Companies may differ from each other. That only upon a complete examination, the Respondent no. 1 can comment on whether the scheme or arrangement which has been entered into between the investors and Timeshare Companies is a CIS or not.

18 Learned Senior Counsel would submit that the Respondent no.1 does not monitor the schemes or activities of companies which do not fall within the purview of the SEBI Act and regulations and that it is only when the SEBI receives any complaint/a reference against a company, it examines the activities of the said company to find out whether the activities /schemes of the said company are covered under the SEBI Act and the regulations. Learned Counsel submits that therefore

whether the Timeshare Companies have been able to fulfill the demand of the investors or not is a remedy that lies elsewhere and this petition is as such misconceived.

19 We have heard Learned Counsel for the parties and with their able assistance, we have perused the papers and proceedings before us including the reply and the rejoinder filed on their behalf.

20 Before proceeding to deal with the submissions made by the Learned Counsel, it would be apposite to set out some of the provisions contained in the SEBI Act and the CIS Regulations.

21 But a little before that, it is worthwhile to look at the preamble to the SEBI Act, which refers to the SEBI Act as, “*an Act to provide for the establishment of a Board to protect the interests of the investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto.*”

22 A cursory look at the Statement of Objects and Reasons in the Bill introducing the SEBI Act also suggests that the SEBI which was established in the year 1988 through a Government Resolution to promote orderly and healthy growth of the securities market and for investors’ protection has been monitoring the activities of the stock exchanges, mutual funds, merchant bankers, etc., to achieve these goals. That since the capital market had witnessed tremendous growth characterized by the increasing participation of the public and to instill and ensure Investor’s confidence in the capital market by investor

protection, by virtue of the SEBI Act, the SEBI was vested with statutory powers required to deal effectively with all matter relating to capital market. The said Statement is usefully quoted as under:

“STATEMENT OF OBJECTS AND REASONS:

Securities and Exchange Board of India (SEBI) was established in 1988 through a Government resolution to promote orderly and healthy growth of the securities market and for investors’ protection. SEBI has been monitoring the activities of stock exchanges, mutual funds, merchant bankers, etc., achieve these goals.

The capital market has witnessed tremendous growth in recent times, characterized particularly by the increasing participation of the public Investors’ confidence in the capital market can be sustained largely by ensuring investors’ protection. With this end in view, Government decide to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market. As Parliament was not in session, and there was an urgent need to instill a sense of confidence in public in the growth and stability of the market, the President promulgated the Securities and Exchange Board of India Ordinance, 1992 (Ord. 5 of 1992) on 30th January 1992.”

23 The functions of the Board are contained in Section 11 of the SEBI Act as under:

“11. Functions of Board.—(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

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

(a) regulating the business in stock exchanges and any other securities markets;

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner.

(ba) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf.

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

(d) promoting and regulating self-regulatory organisations;

(e) prohibiting fraudulent and unfair trade practices relating to securities markets;

(f) promoting investors' education and training of intermediaries of securities markets;

(g) prohibiting insider trading in securities;

(h) regulating substantial acquisition of shares and takeover of companies;

(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries and self-regulatory organisations in the securities market;

(ia) calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities;

(ib) calling for information from, or furnishing information to, other authorities, whether in India or outside India, having functions similar to those of the Board, in the matters relating to the prevention or

detection of violations in respect of securities laws, subject to the provisions of other laws for the time being in force in this regard:

Provided that the Board, for the purpose of furnishing any information to any authority outside India, may enter into an arrangement or agreement or understanding with such authority with the prior approval of the Central Government;

(j) performing such functions and exercising such powers under the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), as may be delegated to it by the Central Government;

(k) levying fees or other charges for carrying out the purposes of this section;

(l) conducting research for the above purposes;

(la) calling from or furnishing to any such agencies, as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions;

(m) performing such other functions as may be prescribed.

(2-A) Without prejudice to the provisions contained in sub-section (2), the Board may take measures to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in Section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market.

(3) Notwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) or clause (ia) of sub-section (2) or sub-section (2A) the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit, in respect of the following matters, namely:—

- (i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;
- (ii) summoning and enforcing the attendance of persons and examining them on oath;
- (iii) inspection of any books, registers and other documents of any person referred to in Section 12, at any place;
- (iv) inspection of any book, or register, or other document or record of the company referred to in sub-section (2-A);
- (v) issuing commissions for the examination of witnesses or documents;

(4) Without prejudice to the provisions contained in sub-section (1), (2), (2-A) and (3) and Section 11-B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely: —

- (a) suspend the trading of any security in a recognised stock exchange;
- (b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
- (c) suspend any office bearer of any stock exchange or self-regulatory organisation from holding such position;
- (d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;
- (e) attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the

regulations made thereunder shall be allowed to be attached.

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation:

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or sub-section (2-A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

(4-A) Without prejudice to the provisions contained in sub-sections (1), (2), (2A), (3) and (4), Section 11-B and Section 15-I, the Board may, by an order, for reasons to be recorded in writing, levy penalty under Sections 15-A, 15-B, 15-C, 15-D, 15-E, 15-EA, 15-EB, 15-F, 15-G, 15-H, 15-HA and 15-HB after holding an inquiry in the prescribed manner.

(5) The amount disgorged, pursuant to a direction issued, under Section 11-B of this Act or Section 12-A of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or Section 19 of the Depositories Act, 1996 (22 of 1996) or under a settlement made under Section 15-JB or Section 23-JA of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or Section 19-IA of the Depositories Act, 1996 (22 of 1996), as the case may be, shall be credited to the Investor Protection and Education Fund established by the Board and such amount shall be utilised by the Board in accordance with the regulations made under this Act."

24 The term "Securities" is defined in section 2(i) of the SEBI Act as under:

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

25 Section 2(h) of the Securities Contracts (Regulation) Act, 1956 defines "securities". By Act 31 of 1999, the said definition was amended to include units issued to investors in "collective investment scheme" as under:-

"Section 2(h) "Securities" include-

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

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

(ic) security receipt as defined in clause (zg) of Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(id) units or any other such instrument issued to the investors under any mutual fund scheme;

(ida) units or any other instrument issued by any pooled investment vehicle;

Explanation -For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of Section 2 of the Insurance Act, 1938 (4 of 1938).

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

*(iii) rights or interests in securities;
(emphasis supplied)*

26 Section 2(ba) was also inserted in the SEBI Act by Act 31 of 1999 which defines collective investment scheme as under:-

"collective investment scheme" means any scheme or arrangement which satisfies the conditions specified in section 11AA".

27 Section 11AA was inserted in the SEBI Act by the said Act 31 of 1999 which refers to Collective Investment Scheme, is quoted as under:-

"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 person 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 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;

(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);

(v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 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 (1 of 1956);

(vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Funds Act, 1982 (40 of 1982);

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

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

(emphasis supplied)

28 The Statement of Objects and Reasons explaining the necessity to effect the above amendments is also usefully quoted as under:

"In the last few years there have been substantial improvements in the functioning of capital markets in India. Market and credit risks have been reduced by requirement of adequate capitalisation, margining and establishment of clearing corporations in stock exchanges, etc. Systemic improvements have been made by introduction of screen based trading and depositories to allow book entry transfer of securities, etc. However, there are inadequate advanced risk management tools. With a view to provide such tools and to strengthen and deepen markets, there is an urgent need to include derivatives as securities in the Securities Contracts (Regulation) Act, 1956 whereby trading in derivatives may be possible within the framework of that Act.

2. Recently many companies especially plantation companies have been raising capital from investors through schemes which are in the form of collective

investment schemes. However, there is not an adequate regulatory framework to allow an orderly development of this market. In order that the interests of investors are protected, it has been decided that the Securities and Exchange Board of India would frame regulations with regard to collective investment schemes. It is, therefore, proposed to amend the definition of 'securities' so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such schemes.

3. It is also proposed to substitute section 29A of the aforesaid Act relating to delegation of powers. At present powers can be delegated to the Securities and Exchange Board of India. It is now proposed to also delegate powers to the Reserve Bank of India.

4. The Securities Contracts (Regulation) Amendment Bill, 1998 was introduced in Lok Sabha on the 4th July, 1998 proposing amendments in the Securities Contracts (Regulation) Act, 1956 to give effect to the amendments mentioned above. The Bill was referred to the Standing Committee on Finance on the 10th July, 1998 for examination and report thereon by the Hon'ble Speaker, Lok Sabha. The Committee submitted its report on the 17th March, 1999. The committee was of the opinion that the introduction of derivatives, if implemented with proper safeguards and risk containment measures, will certainly give a fillip to the sagging market, result in enhanced investment activity and instil greater confidence among the investors/participants. The Committee after having examined the provisions of the Bill and being convinced of the needs and objectives of the Bill, approved the same for enactment by Parliament with certain modifications / recommendation which, inter alia, are stated as under:

(i) A view was expressed before the Standing Committee that since under section 30 of the Indian Contract Act, 1872, the contracts which are cash settled are classified as wagers and trading in wagers is null and void, the index futures which are always cash settled would also be classified as wagers under the said Act. Due to this, no proceedings to enforce an index future contracts either by an exchange against a defaulting broker or client against his broker would stand the legal scrutiny before the court of law. The Committee was, therefore, of the view that there was no harm in having an overriding provision as a matter of abundant caution. They, therefore, suggested the incorporation of the following provision in the Bill, namely:

"Notwithstanding anything contained in any other Act, contracts in derivatives as per this Act shall be legal and valid'.

(ii) The Committee was convinced that stock exchanges which are presently working would be better equipped to undertake trading in derivatives in a sophisticated environment. They further observed that most of these exchanges have already been modernised having state-of-the-art technology, the facility of depository and clearance house and moreover, since they are in a better position to handle the risk profiles of the retail investors, institutional investors and corporate bodies, it would be prudent to allow trading in derivatives by such exchanges only. The Committee had, therefore, proposed that the following Explanation may be added in the Bill, namely: 'The derivatives shall be traded and settled on the stock exchange and clearing house of the stock exchange respectively in accordance with the rules and bye-laws of the stock exchanges.', and

(iii) The Committee was of the opinion that there was a need to define collective investment schemes in the Act. They had recommended that a definition of collective

investment scheme suitably worded in consonance with the definition recommended by the Dave Committee should be included in the Act.

The Central Government have accepted the above recommendations and incorporated the same in the Bill.

5. The Bill seeks to achieve the above objectives."

(emphasis supplied)

29 A look at the afore quoted provisions would suggest that for SEBI to govern a particular activity or an entity, such activity has to be in relation to a security; SEBI is a regulator as mentioned in the preamble to the SEBI Act to protect the interests of the investors in securities and for the regulation of the securities/capital market; any scheme or arrangement under the sun not involving a security would not be the concern of the SEBI.

30 Security or rather securities as quoted above is defined in Section 2(h) of the Securities Contracts (Regulation) Act. It is an inclusive definition and includes, *inter alia*, "units or any other instrument issued by any collective investment scheme to investors in such schemes" in sub clause (ib) to section 2(h). Section 11AA of the SEBI Act as quoted above, which describes a CIS refers to a scheme or an arrangement where contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement.

31 With the above prefatory discussion, we move on to consider the first prayer of the Petitioners, that is to direct the Respondents to enforce Section 11AA of the SEBI Act and the Regulations against all Time share companies. Time share as commonly understood is a holiday membership plan scheme giving benefit of a holiday stay in the hotels to members after they have paid/invested an amount under the scheme. It may involve selling of rooms for a fixed duration of nights/days depending upon the scheme opted by its customers. As quoted above in Section 11AA (2), schemes or arrangements under which the contributions or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement, which contributions/payments are made with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement, which is managed on behalf of the investors, the investors not having day-to-day control over the management and operation of the scheme or arrangement, may be considered CIS.

32 Therefore, whether Time share activities can be considered as a CIS is a question that would depend upon the facts and circumstances of each case and whether they satisfy the said conditions or not will have to be interpreted and analyzed according to the facts and circumstances of each scheme by the Regulator, that is SEBI. Every holiday management scheme or time share scheme will not necessarily be a collective investment scheme until and unless it meets the criteria set out in Section 11AA of the SEBI Act. Therefore even

though nowhere in the definitions as contained in the SEBI Act or in the CIS Regulations, the Timeshare Companies have been specifically mentioned, however considering the wide nature of the definition as contained in section 11-AA and considering that the SEBI has already taken appropriate actions against schemes / arrangements of Timeshare companies as referred to above by Learned Senior Counsel, and also considering that where ever the activities fit into the provisions of section 11AA after examination of the facts, SEBI would take action, we do not think there is any case made out to direct enforcement of the provisions of Section 11AA of the SEBI Act against all Timeshare companies.

33 As rightly submitted by Mr. Rustomjee, Learned Senior Counsel that schemes provided by different Timeshare Companies may differ from each other and SEBI does not monitor and rather cannot monitor the schemes or activities of companies which do not fall within the purview under the SEBI Act and regulation. It would only be when the SEBI receives a complaint, examines the activities complained of in relation to the SEBI Act and CIS regulations, is when it can ascertain whether a scheme or an arrangement between the investor and the so called Timeshare company is a CIS or not. In our view all the schemes which are not exempted under Section 11-AA (3) cannot be said to be CIS *ipso facto*. The schemes of or arrangement by an entity including companies running Timeshare activity may be considered CIS depending upon the facts and circumstances of each scheme. We therefore do not see any merit in the first prayer to direct SEBI to enforce the

provisions of section 11AA against Timeshare companies generally.

34 Also the submission of the Learned Counsel for the Petitioners that Timeshare companies with a turnover of Rs.100 crores or more should be explicitly included for submitting to the compliance network mandated by SEBI, appears to be misplaced as proviso to Section 11AA(1) clearly deems pooling of funds under any scheme or arrangement involving Rs.100 crores or more to be CIS.

35 We however make it clear that we have not in any way held that all Timeshare companies are Collective Investment Schemes as that is for the SEBI to consider on the facts of each case keeping in mind the above discussion.

36 It has also been argued on behalf the Petitioners that the Dave Committee's Interim Report dated 31st December, 1998 had observed in Chapter II with respect to the definition of CIS that, "(w)hile finalizing the definition, the Committee recognizes that it may be possible that some arrangements of this nature like time shares, club memberships etc. would also get covered in the definition" and therefore this Court should enforce the provisions of Section 11AA of the SEBI Act and the CIS Regulations against Timeshare companies.

37 In this context it would be worthwhile to refer to the case of **Rose Valley Kolkata (supra)** where the Calcutta High Court, while considering a challenge to the constitutional

validity of section 2(1)(ba), section 11AA, the third proviso to section 11(4)(f) and section 12(1B) of the SEBI Act, Regulations 2(1)(b)(i), 3, 5, 9, 13, 14, 65, 73 and 74 of the CIS Regulations *inter alia* on the ground that section 11AA had been couched in such language that it conferred unguided power and / or discretion / discriminatory application to select an entity as carrying on the activity (such as arrangements in the nature of time shares, club memberships) of what is termed as a CIS as the same were not included in the exempted categories, upheld the CIS Regulations holding them to be neither unreasonable nor unworkable. Paragraphs 109 to 114 of the said decision are apt and are quoted as under:

“109) A conjoint reading of the relevant Acts, viz. the SEBI Act and the SCR Act together with the objects and reasons of the 1999 Amending Act would leave no manner of doubt that protection of the investors in securities and the manner of ensuring such protection in fullest measure is the heart and soul of the SEBI Act. However, Mr. Pal argued that Section 11AA is so wide that businesses of diverse nature may be caught in the net and in the absence of adequate guidelines, there is likelihood of abuse of discretionary power. I shall assume that the legislation is open-ended, but one has to pose a question here as to whether there was any valid reason for such open-ended legislation? To my mind, it would be quite reasonable to presume that the legislature deliberately intended the legislation to be open-ended to ensure that people with limited financial means are not ruined in the process of trying to get rich quickly and at the same time, no company would have the freedom to fleece. This being the object of the 1999 Amending Act, I feel it is not only the duty of the judiciary to show deference to the legislative judgment but to zealously thwart any attempt by any company to wriggle out of the regulatory

mechanism by ingenious legal arguments, which were not even thought of at least up to the first day the Division Bench considered the appeal filed by the petitioners against the order dismissing the second writ petition filed by them. In *P.G.F. Limited* (supra), the Supreme Court cautioned that the motives of laying a belated challenge to a statutory provision is a factor that the Court should bear in mind. I am of the view, having regard to the facts and circumstances discussed above and more particularly the attempt of the petitioners to urge the Supreme Court to recall an innocuous order (of requesting the High Court to take up the writ petition for hearing within two weeks or to consider vacating of the interim relief) as well as to assert that the order of the Division Bench does not preclude them from contending before me to examine the decision dated 3rd January, 2011 of the whole time member of the SEBI on merits, that the legislation was challenged to prolong the proceedings as well as negate the objection to the entertainability of the writ petition because of availability of an alternative remedy. That apart, in *Govt. of A.P. v. Laxmi Devi*, reported in (2008) 4 SCC 720, the Court has reiterated the principle that mere likelihood of abuse of discretionary power conferred under statute would not render the statutory provision unconstitutional. Mr. Mitra and Mr. Kuhad are thus right in their submission that the challenge to the provisions of the SEBI Act is devoid of merit.

110) In this connection, the decision in *P.G.F. Limited* (supra) may once again be referred to. Introduction of Section 11AA has been upheld not only on the ground of competence of the Parliament but the Court found it to be a step in the right direction for saving the gullible investors from falling prey to unregulated and uncontrolled schemes leading to their ruination (paragraphs 37, 38, 40 and 42). The reason for devising exclusionary operation of activities of certain classes, as in sub-section (3) of Section 11 AA, has also been clearly

discussed as evident from paragraph 39 thereof and I see no reason to dilate thereon.

111) Insofar as the charge of excessive delegation of essential legislative functions is concerned, the same is equally without merit. As regards laying down of principles or guiding norms, law seems to be well-settled that it is not essential that the very section in the statute which confers the power should also lay down the rules of guidance, or the policy for the administrator to follow. If the same can be gathered from the preamble, or the long title of the statute and other provisions therein, the discretion would not be regarded as uncontrolled or unguided and the statute in question will not be invalid. At times, even vague policy statements to guide administrative discretion have been held by the courts as complying with Article 14. I have no hesitation to hold that the CIS Regulations viewed in the light of the object that the SEBI Act after its amendment seeks to achieve, in view of the principles laid down in paragraph 17 of *Jyoti Pershad* (supra), have to be upheld.

112) Besides, it appears that the CIS Regulations were duly placed before the Lok Sabha on 10/12/1999 and the Rajya Sabha on 14/12/1999 in accordance with the statutory mandate in Section 31 of the SEBI Act. If indeed the SEBI, as delegate, had transgressed the permissible limits, the Parliament had the authority to intervene to set things right. No modification having been suggested by the Parliament, it is clear that the CIS Regulations were found to be in order. Abdication of authority by the Parliament, on facts and in the circumstances, also does not arise. The decision in *Kerala SEB* (supra) does not come to the rescue of the petitioners since the terms of the CIS Regulations are neither unreasonable nor unworkable.

113) In my final analysis, the impugned provisions do not suffer from any over-breadth. The net of coverage had to be spread wide and high to check each and every attempt to loot the hard earned money of the aam aadmi for one's personal wrongful gain and so long as abuse of discretionary power is not demonstrated, the petitioners cannot expect any relief.

114) The writ petition stands dismissed, with costs assessed at Rs. 10,00,000/- to be deposited with the Registrar, Original Side, within a month from date. On such deposit being made, the Registrar shall arrange transfer of equal shares in such sum to the State Legal Services Authority and the Calcutta High Court Legal Services Authority within a fortnight thereafter."

(emphasis supplied)

38 We are therefore of the view that, once the Parliament has included the provisions with respect to CIS after considering the Dave Committee report and which provisions have been held to be *intra vires* in the decision of **Rose Valley Kolkata** (supra) as quoted above, it would not be necessary for us to dwell any further on this aspect.

39 In view of the above discussion, in our considered view, the reliance by the Learned Counsel for the Petitioners on the decision of **Rose Valley Kolkata** (supra) does not advance the case of the Petitioners.

40 Learned Counsel for the Petitioners has also relied upon the decision of the Gauhati High Court in the case of **Rose Valley Gauhati** (supra). In our view the decision does not assist the case of the Petitioners as that was a case where there was a specific finding that on the basis of the form of

membership it was not possible to agree with the contention that the scheme was only a holiday management scheme not coming within the purview of CIS more so because there was a term in the contract that as an alternative to enjoying the stay in the hotels, there was an option of refund of deposit at a lucrative rate of interest . No such facts have been pleaded in the present petition and only a general submission has been made to suggest that all time share companies are CIS. Therefore, the facts in that case are clearly distinguishable and the findings not applicable to the case at hand.

41 Petitioner's reliance on the Securities Appellate Tribunal decision in the case of **Chandrasen Ganpatrao Bhise Vs. Securities and Exchange Board of India** (supra), in support of the contention to bring all time share schemes within the ambit of CIS also appears to be misplaced in as much as in the specific facts of that case a reference has been made to the finding of the Tribunal that the time sharing business of the company was a CIS. Moreover that was a case filed by one of the directors of a company namely Pancard Clubs Limited on whom a penalty had been levied under Section 15HA for fraudulent and unfair trade practice for violation by the company of not registering the CIS under Section 12(1B). In the said case the Tribunal quashed the imposition of penalty on the director holding that the penalty for non-registration was under Section 15D(a) and not under Section 15HA as the director had not indulged in fraudulent and unfair trade practice. In our view, the finding that the time sharing scheme that is selling of rooms for a fixed duration of nights / days depending

upon the scheme opted by its customers was held to be a collective investment scheme by the Tribunal itself demonstrates that on a case to case basis after due examination of the facts, the Tribunal may come to a conclusion that a particular scheme is a Collective Investment Scheme. However, that does not mean that every time sharing scheme of selling rooms for a fixed duration of nights and days would be a collective investment scheme, as submitted by the Learned Counsel for SEBI.

42 True that the innocent and gullible investors need to be protected against the abuse in the name of Time shares. However as mentioned above, SEBI – the Regulator being fully empowered to do so, it would therefore not be necessary for us to give any such directions to the Regulator.

43 Having said so, even if such companies, keeping in mind the complex nature of the schemes and the arrangements by which people contribute monies into pools under promises of rights to holidays and the segment of the population that they may touch, require a separate regulation as canvassed by the Learned Counsel for the Petitioners, that clearly in our view is not the job of the Courts. The Supreme Court in the case of ***Mallikarjuna Rao and Ors v. State of Andhra Pradesh & Ors., (1990) 2 SCC 707***, has categorically held that the High Courts or the Administrative Tribunals cannot issue a mandate to the Government to legislate nor recommend / advise / direct legislation on a subject nor even require the executive to

exercise its rule making power in any manner. Paragraphs 11 and 13 of the said decision are usefully quoted as under:

“11. The observations of the High Court which have been made as the basis for its judgment by the Tribunal were only of advisory nature. The High Court was aware of its limitations under Article 226 of the Constitution of India and as such the learned Judge deliberately used the word “advisable” while making the observations. It is neither legal nor proper for the High Courts or the Administrative Tribunals to issue directions or advisory sermons to the executive in respect of the sphere which is exclusively within the domain of the executive under the Constitution. Imagine the executive advising the judiciary in respect of its power of judicial review under the Constitution. We are bound to react scowlingly to any such advice.

13. The Special Rules have been framed under Article 309 of the Constitution of India. The power under Article 309 of the Constitution of India to frame Rules is the legislative power. The power under the Constitution has to be exercised by the President or the Governor of a State as the case may be. The High Courts or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution of India. The Courts cannot usurp the function assigned to the Executive under the Constitution and cannot given indirectly require the Executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the role making power of the Executive under Article 309 of the Constitution of India.”

(emphasis supplied)

44 Therefore, although the second prayer of the Petitioner is in the alternative, the same cannot be entertained and deserves to be rejected forthwith.

45 Moreover, the purposes for which a public interest litigation can be instituted has been very succinctly elucidated by the Supreme Court in the case of ***State of Uttaranchal Vs. Balwant Sing Chaufal & Ors., (2010 (3) SCC 402)*** where it has been clearly observed that PIL can be filed only for the following three purposes and not otherwise:

- (i) for enforcement of fundamental rights of marginalized and deprived sections of the society;
- (ii) for preservation of ecology and environment; and
- (iii) for purity in public administration and probity in governance

46 Paragraphs 75, 76, 96 of the said decision are usefully quoted as under:

“75 We would not like to overburden the judgment by multiplying these cases, but brief resume of these cases demonstrates that in order to preserve and protect the fundamental rights of marginalised, deprived and poor sections of the society, the courts relaxed the traditional role of locus standi and broadened the definition of aggrieved persons and gave directions and orders. We would like to term cases of this period where the Court relaxed the rule of locus standi as the first phase of the public interest litigation. The Supreme Court and the High Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to the poor and marginalised sections of the society.

76 The second phase of public interest litigation started sometime in the 1980s and it related to the Courts’ innovation and creativity, where directions were given to protect ecology and environment. There are a number of cases where the Court tried to protect forest cover, ecology and environment and orders have been passed in that respect. As a matter of fact, the Supreme Court has

a regular Forest Bench (Green Bench) and regularly passes orders and directions regarding various forest cover, illegal mining, destruction of marine life and wild life, etc. Reference of some cases is given just for illustration.

96 In the 1990s, the Supreme Court expanded the ambit and scope of public interest litigation further. The High Courts also under Article 226 followed the Supreme Court and passed a number of judgments, orders or directions to unearth corruption and maintain probity and morality in the governance of the State. The probity in governance is a sine qua non for an efficient system of administration and for the development of the country and an important requirement for ensuring probity in governance is the absence of corruption. This may broadly be called as a third phase of the public interest litigation. The Supreme Court and the High Courts have passed significant orders.”

(emphasis supplied)

47 Applying the aforesaid principles, the present petition, in our considered view, does not fall within any of the aforesaid categories and cannot be styled or filed as a Public Interest Litigation as it is neither for enforcement of fundamental rights of marginalized and deprived sections of the society nor for preservation of ecology and environment nor for purity in public administration and probity in governance but seeking directions to the Respondents to either enforce the provisions pertaining to CIS Regulations against Timeshare companies, which we have found to be without any merit or in the alternate, issue directions to formulate legislation / guidelines / regulations, which we have already held to be *de hors* the scope of our constitutional mandate under Article 226.

48 In view of the above discussion, the Petition deserves to be dismissed and is hereby dismissed with costs of Rs. 25,000/- to be paid by the Petitioner to the SEBI, within a period of two weeks.

(ABHAY AHUJA, J.)

DIPANKAR DATTA, CJ.: -

I have read the well-reasoned judgment authored by my learned brother Ahuja, J. and record my concurrence with the findings and conclusions recorded therein for dismissal of the petition carrying the attractive brand name of "public interest litigation". There is no semblance of public interest, much less substantial public interest, for entertaining this petition. To discourage such misadventures, I would have imposed exemplary costs but have since decided to agree with what His Lordship has imposed.

(CHIEF JUSTICE)