

## A CRITICAL ANALYSIS OF SAHARA INDIA REAL ESTATE CORPORATION LIMITED (SIRECL) & ORS. VS. SECURITIES & EXCHANGE BOARD OF INDIA (SEBI) & ANR

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### INTRODUCTION

The case<sup>1470</sup> is considered as a milestone decision in the area of the SEBI power & jurisdiction in cases of corporate capital raising in which investor trust is entrusted. According to SEBI, nearly 23 million people, including peasants, labourers, cobblers, artisans, and others, have invested in this scam.

On August 31, 2012, the Hon'ble Apex Court issued one of its most anticipated rulings, ordering the Sahara Group & its 2 entities, SIRECL & SHICL, to provide a Rs 17,400 crores repayment to its persons who invest in a said companies within 3 months of the order's date, plus 15% interest. While confirming the SAT's findings, the Hon'ble Apex Court have also directed SEBI to investigate the case & identify the genuine investor base who is a member of the Optionally Fully Convertible Debentures (OFCDs) sold by the 2 entities, SIRECL & SHICL.

<sup>1470</sup> Sahara India Real Estate Corp. Ltd. & Ors. vs. SEBI & Anr., (2013) 1 SCC 1

**FACTS**

In 1978, Subrata Roy formed Sahara India Parivar, an Indian conglomerate with headquarters in Lucknow, India. Finance, manufacturing, infrastructure & housing, entertainment, consumer merchandise retail ventures, etc, specially lies within business interest of the company.

In 2005 Sahara registered 2 companies, SIRECL & SHIC, under the Companies Act 1956. In March 2008 SIRECL and in September 2009 SHICL (both unlisted companies) approved a special resolution under section 81(1A)<sup>1471</sup> in their general meetings to raise monies/funds via use of private placement of unsecured OFCD to associates, friends, etc. Over the course of three years, from a total of 3 crore investors, both companies raised a sum of Rs 24,029.73 crores.

After the resolution was passed, in 2009, SIRECL & SHICL submitted Red Herring Prospectuses (RHP) with the Registrar of Companies (ROC) in Kanpur & Mumbai, respectively, pursuant to Section 60B of the Act, 1956 and were registered.

RHP said unequivocally that the company had no plans to offer its securities on any publicly traded stock exchange. Only individuals who received the Information Memorandum and/or those with ties to the Sahara's were entitled to apply. The RHPs further stated that the monies obtained will be used to finance the purchase of townships, residential apartments, shopping malls, & other similar properties, as well as for building and infrastructure projects.<sup>1472</sup>

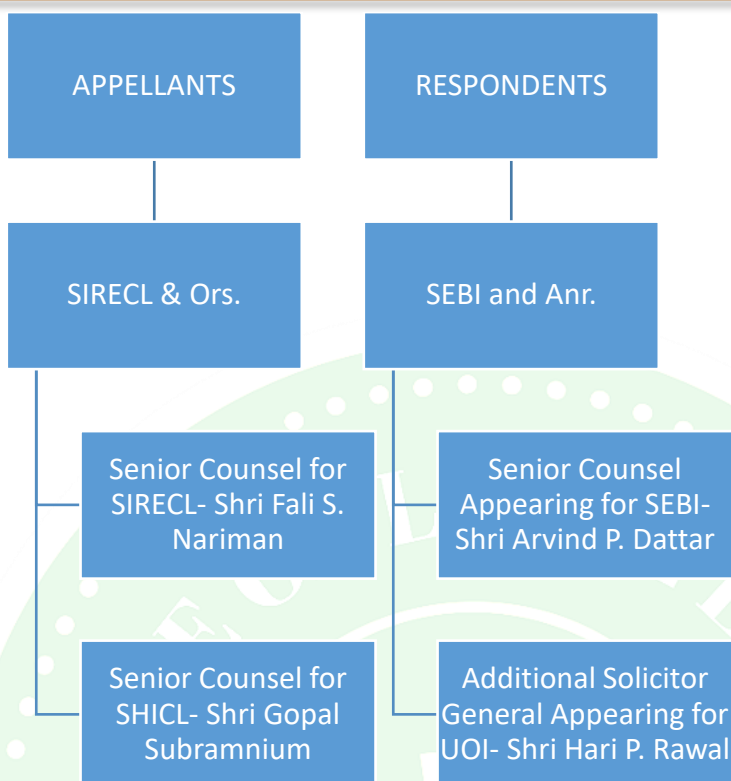
The Sahara's circulated the Information Memorandum accompanied by the application forms allegedly associated with the Sahara's after the RHPs were registered with the ROCs of Kanpur and Mumbai, respectively. This was done by their arrangement of about 2900 branch & 1 million agents, who together collected funds through an open-ended

fundraising initiative. The OFCDs were issued entirely on a private equity basis, with no intention of being listed on any stock exchange, as stated in the Information Memorandum. The Information Memorandum's were sent to almost 30 million people, urging them to sign up for the OFCDs. A man called Roshan Lal also filed a complaint with SEBI, alleging that SHICL & SIRCL utilized illegal means in the issue of OFCDs. After this, The SEBI started a probe against Sahara India's fund-raising practices for SHICL & SIRCL as well as investor information. Regarding Sahara's non-compliance, SEBI issued an interim order stating that there was illegal activity involving the issuing of OFCDs and SHICL & SIRCL were ordered to return the money to the investors, plus interest. Sahara then filed a petition to have the order stayed.

The stay order was subsequently vacated after Sahara failed to cooperate with the authorities, and SEBI issued a final order. The order was even approved by the Securities Appellate Tribunal (SAT). Following that, Sahara appealed in the Hon'ble Apex Court against the SEBI order, challenging SEBI's jurisdiction and alleging a malicious motive on SEBI's side to smear Sahara's market reputation.

<sup>1471</sup> Companies Act, 1956, No.1, Acts of Parliament, 1956 (India).

<sup>1472</sup> Mukul Aggarwal, Deepak Jodhani & Simone Reis, *Supreme Court to Sahara: It's Not Private!*, NISHITH DESAI ASSOCIATES (Feb 14, 2022, 5:25 PM), [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/SC\\_To\\_Sahara\\_-\\_It-s\\_Not\\_Private!.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/SC_To_Sahara_-_It-s_Not_Private!.pdf).



**The following are the issues that the Hon'ble Supreme Court addressed in this case**

**Issue No.-1: Whether MCA has the authority to probe & adjudicate in this case as per u/s 11, 11A, 11B of the SEBI Act & u/s 55A of the 1956 Act according to Section 55A(c) of the 1956 Act?**

Hon'ble Apex Court said that SEBI has the authority to probe & adjudicate this issue. It explicitly stated that the SEBI Act is a special law that grants the SEBI exceptional power to probe & adjudicate in order to safeguard the interests of persons who invest. There is no dispute of jurisdiction b/w the MCA & the SEBI in cases affecting interests of persons who invest since it has specific powers which are not in conflict with any other provisions of law, are equal to them, & must be construed in accordance with them. To support this perspective, the Supreme Court highlighted the intention of the legislature and stated objectives for enacting the SEBI Act and inserting Section 55A<sup>1473</sup> into the 1956 Act to give SEBI unique authority in the areas of issue, allotment, & transfer of securities. Under the

provision of the 1956 Act<sup>1474</sup>, SEBI is empowered to administer in the case of listed public companies & public companies which intend to have their securities listed on a valid stock exchange in India in cases relating to issue & transfer of securities & non-payment of dividends.

**Issue No.-2: Is the issuance of OFCDs to lakhs of people who purchased to the sold a Private Placement that is exempt from Regulations of SEBI & other sections of the 1956 Act?**

The Appellants' claims were dismissed by the Hon'ble Supreme Court; court declared that any share or debenture issue to more than 49 people is constituted a public issue. Despite their claims, The Appellants failed to prove in court that the investors were friends, other persons associated with the Group, etc. The facts clearly show that Sahara's distributed securities to the public in excess of the threshold limit set by statute u/s 67(3)<sup>1475</sup> first proviso, and therefore breached the listing provisions.

<sup>1473</sup> The Companies Act, 1956, inserted by the Companies (Amendment) Act, 2000 (w.e.f. 13-12-2000).

<sup>1474</sup> Companies Act, 1956, § 55A, No. 1, Acts of Parliament, 1956 (India).

<sup>1475</sup> Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).



### **Issue No.-3: Whether Section 73's listing requirements apply to all public problems or whether it is contingent on the "intention of the company" to be listed?**

The Hon'ble Apex Court ruled that a company cannot claim that it has no aim or motive to file a stock exchange application. Hon'ble Court also cited one case<sup>1476</sup> in which court held that "intention" can be interpreted in some branches of law to cover consequences that could rationally flow from what is purposely complete, with the thought that a person should be treated with the rational outcomes of his behaviour in consideration. It will be the conduct and acts that will be considered, and it can easily be seen in this case that the Sahara's offered OFCDs to more people than were allowed under the Act, thus violating the Companies Act's different sections. Finally, the Hon'ble Supreme Court ruled that Sahara's actions and omissions clearly violated Sec. 73 of the Act, 1956 that it was not their intention to list the securities offering available to the general public, and that their allegation that company didn't intend their securities listed was inadequate, because it was a statutory requirement which they should have followed.

### **Issue No.-4: Are the composite OFCDs issued under the scope of the 1956 Act, SEBI Act, & SCRA, 1956 as well as the definition of "Securities"?**

Hybrid securities mean in which features of both debt and equity has there. The Companies Act's section 2(12) is concerned with the term's definition. "debentures" which contains any "other securities". "Hybrid" means any security which has the character of more than one type of security, including their derivatives.<sup>1477</sup> SCRA, 1956 define 'securities' in section 2(h) as specified in section 2(45AA)<sup>1478</sup> and includes hybrids.

The Hon'ble Court said that the SCRA's definition of "securities" an inclusive & not comprehensive

definition, reiterating the Appellants' argument of SEBI's authority over the OFCDs. The SCRA's definition of "securities" covers any "other marketable securities of like sort". And, because OFCDs were issued to millions of individuals in this case, the question of marketability of such an instrument simply does not arise. As a result, these securities come clearly within the SCRA's definition of "securities". As a result, these are hybrid securities, and according to Section 55A of the 1956 Act, SEBI has authority over hybrids such OFCDs sold by the Appellants.

### **ANALYSIS**

The Hon'ble Apex Court ordered the Sahara's (SIRECL & SHICL) to return the amounts collected to all investors, plus a 15% annual interest charge to SEBI membership amount has to be returned from the date of taking amount, which must be done within 3 months., putting an end to a 3 year war between the regular and Sahara. It was obvious from the acts of the two companies that they had not followed the Companies Act and the SEBI Act, and thus avoided compliance with the terms of these Acts.

The Sahara group devised a clever money-laundering scheme that was specifically designed to avoid regulations, exploit loopholes in the wording of several laws, and utilize gaps in the MCA and SEBI's stated authorities.

This case served as a wake-up call to legislators, requires them to rethink the provisions of the country's statutes. It served as a warning in order to prevent future abuses of the law's loopholes. In this case, SEBI's struggle to defend small investors' interests is admirable, and it is only via such cases that people acquire confidence and trust in the country's legal system.

The Saharas' claims appeared to be without merit at first glance. They were only proposed to negate the entire aim of the statutes governing public concerns and other ancillary obligations. It must be remembered that allowing companies to proceed in this way in the future,

<sup>1476</sup> Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] AC 435

<sup>1477</sup> Companies Act, 1956, § 2(19A), No. 1, Acts of Parliament, 1956 (India).

<sup>1478</sup> Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India).

raising enormous quantities of capital from the public under the pretence of a private placement, would be a farce of the entire capital market system.

Making our laws more strict and imposing criminal penalties on such violators is essential in India, so that people do not even consider defrauding these small investors. The laws of countries such as the United States have their own Act for investor protection; this may be adopted by India, and a new act safeguarding investors might be passed by Parliament.

### **CONCLUSION**

This significant ruling is definitely a pivotal incident in India's corporate landscape, as it declares SEBI's absolute authority to probe both listed and unlisted companies. It gives SEBI a wide authority, as well as the power to probe any incident involving the wellbeing of investors. It describes significant main legal points & resolves any confusion about the issuance of securities by "unlisted" firms that take advantage of legal loopholes. Furthermore, in terms of jurisdiction, this decision has bridged the earlier existing divide b/w the MCA & SEBI. In the future, it is anticipated that this verdict would help to prevent turf wars b/w MCA & SEBI over jurisdictional concerns, since it clearly specifies that in areas of public interest, both the SEBI & the MCA shall have equal jurisdiction.

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