

CASE STUDY ON: SUBRAT ROY SAHARA V/S UNION OF INDIA AND ORS.

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ABSTRACT

Today the trend of business is at highest ladder of development but no one concerns about the risks upon them while becoming a part of such a business. Sahara case was one of the most important cases in terms of socio-economic offences. In this case there was a fraud that took place with the customers by the Sahara Group. Company failed to comply with a Supreme Court order in 2012 to repay investors in the bond scheme, which the court has said was illegal. With this regard Delhi police 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. The purpose of this case study is to discuss how Sahara Group could raise so much of money without following the prescribed rules and regulations and how did SEBI come to know about the wrongdoings of these two companies. Ultimately it is the investors or customers of that company who faces the loss and this case analysis shows the corporate irresponsibility of the company by not paying the investors as they promised earlier. It can be understood through this case that though companies may not always be rewarded for social responsibility and the failure in so will be faced by the customers only also.

INTRODUCTION

Corruption has come to be viewed as an inevitable, if unfortunate, cost of getting things done in India, and corporate and political panjandrums resolutely adhere to this school of thought. This kind of large-scale fraud is aided by the strong political-corporate nexus that exists in India. Market regulators like the Securities and Exchange Board of India (SEBI) are ultimately powerless in exercising strict control over financial institutions due to severe political pressure. *Securities Exchange Board of India v. Sahara India Real Estate Ltd.*ⁱ is regarded as one of the landmark cases with reference to the power and jurisdiction of SEBI in the case of corporate fundraising. SEBI claimed that in the form of Optionally Fully Convertible Debentures, Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited claim to have collected deposits from general public including cobblers, labourers, artisans and peasants. Around 23 million people, mostly from villages and small towns subscribed to this scheme and invested about 24,000 crores rupeesⁱⁱ. Now before moving on with the main crux of the case, one should understand the term “Optionally Fully Convertible Debentures”.

Since 2009ⁱⁱⁱ, when the Sahara Group’s activities first came under the radar of SEBI leading up to the arrest of Sahara India Pariwar founder Subrata Roy in 2014, both parties have been engaged in an aggressive regulatory conflict. SEBI alleged that Sahara India Real Estate Corp Ltd (SIRECL) and Sahara Housing Investment Corp Ltd (SHICL), which issued Optional Fully Convertible Debentures (OFCD), illegally collected investor money^{iv}. Meanwhile, Sahara denied SEBI had any jurisdiction in the matter.

SEBI went on to order Sahara to issue a full refund to its investors, which was challenged by Sahara before the Securities Appellate Tribunal (SAT)^v. When the SAT upheld SEBI’s order, Sahara moved to the Supreme Court in August 2012, which ordered Sahara to refund investors’ money by depositing it with SEBI. Sahara then declared that most of the US \$3.9 billion had already been repaid to investors, saves for a paltry US \$840 million, which it handed over to SEBI^{vi}. This was disputed by SEBI, which claimed that the details of the investors who were refunded had not been provided. When Sahara failed to deposit the remaining money with SEBI and Subrata Roy skipped his hearing, the Supreme Court of India issued an arrest warrant for the Sahara chief in February 2014^{vii}.

Amid rumours of black money laundering and the misuse of political connections, Sahara vehemently denied all charges and continued to defy SEBI. The regulator persevered through what the Supreme Court referred to as the ridiculous game of cat and mouse¹ and finally managed to pin down Sahara chief Subrata Roy in 2014^{viii}. In this rare victory, SEBI not only brought Sahara to justice, but also made an excellent case for why the regulator, and others like it, require greater autonomy and penalizing powers.

BACKGROUND OF THE CASE

Sahara India Pariwar is an Indian conglomerate headquartered in Lucknow, India with business interests in finance, infrastructure & housing, media & entertainment, consumer merchandise retail venture, manufacturing and information technology^{ix}. Sahara India Pariwar was founded by Subrata Roy in 1978, Gorakhpur. The group operates 4,799 establishments under the Sahara India umbrella^x. Sahara India Real Estate Corporation Limited (SIRECL) and the Sahara Housing Investment Corporation (SHICL), subsidiaries of the conglomerate, buy and develop land for residential housing projects across India^{xi}. Sahara India Pariwar investor fraud case is the case of the failure of Subrata Roy-led Sahara India Pariwar to return Rs 24,000 crore plus interests to its investors as directed by the Supreme Court of India, after a prolonged legal battle with the Securities and Exchange Board of India. Earlier SIRECL and SHICL floated an issue of Optionally Fully Convertible Debentures (OFCDs) and started collecting subscriptions from investors with effect from 25th April 2008 up to 13th April 2011^{xii}. During this period, the company had a total collection of over Rs 17,656 crore. The amount was collected from about 30 million investors in the guise of a “Private Placement” without complying with the requirements applicable to the public offerings of securities.

It was then SEBI caught hold of Sahara, when SAHARA claimed of raising money worth approx. Rs. 24,000 crores raised from estimated 3 crores investors that too through para-chit banking money process. SAHARA contentions included that the investors’ money sometimes went from Rs. 2000 to Rs. 20,000. Meanwhile, SEBI in Nov 2010, had restrained the above two companies from raising funds in the form of Optionally Fully Convertible Debentures (OFCD)^{xiii}.

Facts of the case-

➤ In 2008, RBI debarred Sahara India Financial Corporation from raising fresh deposits. The growth of Sahara's empire was always a mystery; many believed it ran a Ponzi scheme by collecting funds from investors. The group needed continuous flow of fresh funds to keep it afloat. With RBI closing a door on the group from collecting deposits from the people, the group needed a financial instrument that would be out of the purview of RBI but still get access to public funds.

➤ Sahara decided to issue OFCDs by floating two companies - Sahara India Real Estate Corporation (SIREC) and Sahara Housing Investment Corporation (SHIC). It was the Registrar of Companies (ROC) that needed to clear these investment vehicles^{xiv}.

➤ Firstly, the sheer size of the issue makes it a public issue. Any company seeking money from more than 50 persons has to take the approval of SEBI in doing so, in which case the company would have to make all the disclosures required as per SEBI norms. The Sahara group had sought money from nearly 30 million investors. Apart from the size and number of investors, another deliberate error was keeping the issue open ended; ideally such issues should be closed within six weeks. In fact, a Sahara group company kept an issue of Rs 17,250 crore open for 10 years.

➤ Sahara's money-making machine could have continued had it not committed another major mistake. Sahara decided to tap the stock markets to raise money through Sahara Prime City. In doing so the company had to file a Red Herring Prospectus and disclose working and financials of other group companies. This is when K M Abraham spotted SIREC and SHIC and found that the money raised through OFCDs was camouflaged as private placements.

➤ Abraham found out that even though the Sahara group companies collected money they did not have proper records of the identity of its investors. How and to whom would they then return the money? Even professional agencies were unable to locate the investors^{xv}.

➤ The two companies, Abraham alleged, intended to rotate money between group companies. Though the OFCD instruments were issued in the name of the two companies, cheques were sought in the name of Sahara India^{xvi}.

➤ When SEBI issued its order on the wrongdoings of the Sahara group on June 23, 2011, Sahara group took the matter with Securities Appellate Tribunal (SAT). But SAT held the SEBI findings to be correct^{xvii}. SAT in its order said —Why it (Red Herring Prospectus) did not disclose was the fact that the information memorandum was being issued to more than 30

million persons inviting them to subscribe to the OFCDs and there lies the catch...This concealment is, indeed, very significant and goes to the root of the controversy.

➤ Sahara group then approached the Supreme Court but in August 2012, the honourable court asked the group to repay an amount of over Rs 24,000 crore to SEBI within 90 days. The regulator will then distribute the money to bonafide investors. But suddenly Sahara said it had repaid most of the money over the last one year and an amount of just over Rs 5,000 crore was pending^{xviii}.

➤ In the October hearing Supreme Court had clearly hinted that it was no longer amused by the delaying tactics of the Sahara group and would detain the group's officials till the payments are made. The Supreme Court Bench had said that previous orders not been complied with and that was why Roy and the directors have been summoned to explain the delay. Roy did not turn up, thus the non-bailable warrant with an order to appear before the court on March 4.

Issues in the case^{xix}-

➤ First issue which was raised in the case was whether SEBI has the power to investigate and adjudicate in this matter as per Sec 11, 11A, 11B of SEBI Act and under Sec 55A of the Companies Act. Or is it the Ministry of Corporate Affairs (MCA) which has the jurisdiction under Sec 55A (c) of the Companies Act?

➤ Second issue which was raised is that whether the hybrid OFCDs fall within the definition of "Securities" within the meaning of Companies Act, SEBI Act and SCRA so as to vest SEBI with the jurisdiction to investigate and adjudicate?

➤ The Next issue which was raised is the issue of OFCDs to millions of persons who subscribed to the issue is a Private Placement so as not to fall within the purview of SEBI Regulations and various provisions of Companies Act?

➤ Another issue which was raised is whether listing provisions under Sec 73 mandatorily applies to all public issues or depends upon the "intention of the company" to get listed.

Another question which was raised was whether the Public Unlisted Companies (Preferential Allotment Rules) 2003 will apply in this case. The companies also argued that as per the Unlisted Public Companies (Preferential Allotment) Rules 2003, preferential allotment by unlisted public companies on private placement was provided for and permitted without any

restriction on numbers as per the proviso to Section 67 of the Companies Act and without requiring listing of such OFCDs on a recognized stock exchange. They went on to argue that Sec 67 was made applicable to Preferential Allotment made by unlisted public companies only in 2011 by amending the 2003 rules with prospective effect and not with retrospective effect. Hence before the 2011 Rules were framed, they were free to make preferential allotment to more than 50 persons also.

VARIOUS RESPONSES DURING THE CASE

Judicial Response-

The Securities and Exchange Board of India (Sebi) had moved the top court, seeking contempt proceedings against the Sahara Group for allegedly obstructing the process of auctioning its Aamby Valley property in Pune, initiated on court's direction. The Sebi mentioned the matter before a bench headed by Justice Ranjan Gogoi for urgent hearing, saying the Sahara Group has been "obstructing" it by allegedly suspending business^{xx}.

2010

November: Sebi barred Subrata Roy and two of its companies – Sahara India Real Estate Corp (SIREC) and Sahara Housing Investment Corp (SHIC) - from raising any capital through the issue of securities.

December: Sahara appealed in the Allahabad High Court, which ordered SEBI not to take any action until a court order is passed.

2011

January: Delhi High Court issued a warrant against Subrata Roy and four other officials of the group on a complaint that it deceived investors in a proposed housing project of Rs 25,000 crore.

February: Delhi HC stays proceedings against Subrata Roy and four other officials of the group on a complaint that it deceived investors in a proposed housing project.

May: Supreme Court asked SIREC to furnish the format of the application for its optionally fully convertible debenture (OFCD) scheme and a list of accredited agents that raised money on the company's behalf.

June: SEBI ordered Sahara firms to immediately refund the money collected through its sale of OFCDs.

October: Securities Appellate Tribunal (SAT), set up by the Supreme Court, ordered two unlisted Sahara group companies to refund within six weeks about Rs 17,656.53 crore with 15% interest, which it had raised through OFCDs.

November: Sahara moved the Supreme Court against SAT's order and the Supreme Court stayed the SAT order, and asked the two companies to refund Rs 17,400 crores to their investors and asked the details and liabilities of the companies.

2012

January: Supreme Court gives three weeks' time to Sahara to choose between options to return investments made by the public in its OFCD scheme. Sahara to either to give sufficient bank guarantee or attach properties worth the amount raised through OFCDs.

May: Supreme Court is informed by senior counsel Fali Nariman of Sahara India Real Estate Corp that SEBI could not have taken up this issue of Sahara Group of companies raising funds through OFCD as there was no complaint from any investor.

June: SEBI informed the Supreme Court that the real estate division of Sahara India Pariwar had no right to mobilise Rs 27,000 crore from investors through OFCD without complying to the norms of the market regulator.

August: Supreme Court directed Sahara India Real Estate Corporation Ltd (SIRECL) and the Sahara Housing Investment Corporation Ltd (SHICL) to refund over Rs. 24,400 crore to its investors.

2014

February: Supreme Court ordered the arrest of Subrata Roy, for failing to appear in court in connection with the Rs 24,000 crore deposits his company failed to refund to its investors as per a Supreme Court order.

March: Subrata Roy, along with two other directors of Sahara, sent to Tihar jail.

August: SEBI had asked the court to appoint a receiver who would sell Sahara's properties and raise the money. The court has been recovering money from the group in instalments.

October: Revelation was made when only around 4,600 investors in two Sahara group companies had come forward to claim refunds from Sebi, which had asked those who had purchased bonds issued by the entities to claim their money

2015

March: Supreme Court stated that the total dues from Sahara have gone up to Rs 40,000 crore with the accretion of interest.

July: SEBI cancelled the licence of Sahara's mutual fund business.

2016

May: Subrata Roy released on parole from Tihar jail.

2017

April: SEBI court had cancelled the non-bailable arrest warrants against Roy and three of his group firms' directors after they appeared before it in a case filed by the SEBI against them.

May: Roy did not appear before the SEBI court after filing an exemption application on medical grounds. However, the special SEBI court rejected Roy's plea.

July: On 25 July, the court directed the official liquidator of the Bombay high court to initiate the first two steps of the process to auction Aamby Valley.

August: SC asks Sahara Group to deposit Rs1,500 crore in a dedicated SEBI account by 7th September, the apex court had clarified that the Aamby Valley auction process would be stopped if the company furnished the payment in time.

Kapil Sibal, counsel for Sahara, had sought more time for the company to deposit the money and told the court that it would submit two post-dated cheques of 11 November to ensure payment. This request was rejected by the court. The Aamby Valley auction process began on 14 August with the official liquidator inviting bids at a reserve price of Rs 37,392 crore.

Customer's Perspective-

In the present economic and social environment, issues related to corporate social responsibility and ethics are gaining more and more importance, especially in the business sector. The failure

to account for long-term social and environmental impacts makes those business organizations unsustainable. Earlier, it was measured in terms of charitable contributions, consultations with shareholders chosen by the corporation, and the corporation's own definition of "Best Practices" with regard to worker safety or environmental impact. Being socially responsible is the appropriate practice in any corporate. Now, Corporate Social Responsibility (CSR)^{xxi} can be understood as a management concept and a process that integrates social and environmental concerns in business operations and a company's interactions with the full range of its stakeholders like their customers, employees, shareholders, investors, community and the environment^{xxii}. Investors are one of the important stakeholders of any company, who fund part of the money by buying shares or a "part ownership" in the company. Companies may pay their investors, dividends — a share of the profits. Modern investors are not short-sighted, they are "strongly interested in a company's overall reputation and public perception, as well as its relationships with specific stakeholders such as customers, employees and public authorities"^{xxiii}.

It is indicated that the intention of the company was to carry out infrastructural activities and the amount collected from the issue would be utilized in financing the completion of projects, namely, establishing/constructing the bridges, modernizing or setting up of airports, rail system or any other projects which might be allotted to the company from time to time. While processing the prospectus, SEBI^{xxiv} received complaint from one Roshan Lal alleging that Sahara group was issuing Housing Bonds without complying with Rule/Regulation/Guideline by RBI/MCA/NHB, SEBI also received complaint from "Professional Group of Investors Protections" dated 25.12.2009 and 4.1.2010 which prompted SEBI to ascertain the correct factual position^{xxv}. Any company that wants to issue equity shares or Debentures or any other market related instrument to the public through the IPO Process has to file a Draft Red Herring Prospectus or DRHP to SEBI to tell them the details of the public issue^{xxvi}, why they are doing so, their financial position etc. It is pretty standard procedure in India. Thus, Sahara's case is all about OFCD and its investors^{xxvii}.

Sahara's misdeeds are considered as an eye-opener in several respects about the uncertain dealings inside the corporate houses and it brings in to being the need for protecting the interest of several millions of investors, who invested their hard-earned money in such socially irresponsible corporations^{xxviii}.

CONCLUSION

After studying the whole case here are some common factors which plays major role in most of the fraud cases-

No Division of Power

Corporate decisions tend to come from the single views of specific individuals without the appropriate counter balances of the same person plays the role chairman and CEO then that person will either be “overpowered” or “overburdened”.

Failure of Board of Directors

When the democrats choose not to be democratic, democracy fails to be democratic. When directors themselves decides to get involved in malpractices & misconducts then how one can think for the success of the company. Board of directors are mind and soul of an organization. They are supposed to maintain ethical, honest culture within the organization. they are the highest decision-making body of an organization but when they themselves remain quiet or become ignorant or get involved in misconducts, then how the company will flourish.

Weak Regulatory Framework

Poor or non-existent regulation allows the occurrence of misconducts and malpractices. Overexpansion of the Business Excessive growth of the company in the years immediately preceding the governance problems, especially via acquisitions, contribute to the scandal.

Inadequate Compensation System

A compensation system too aggressive and too connected to short-term goals substantially contributes to governance problems. The Illusion of Success of the Business People inside and outside the organization come to believe that the company is an absolute success, ignoring contrary evidence and generation a feeling of invincibility. An internal atmosphere of greed and arrogance- “need is the mother of invention but greed is the mother of corruption.” directors missed the bus in understanding the difference between greed and need.

Violation of CSR

Businesses cannot be successful when the society around them fails and in Sahara scam it shows highly negligent towards public.

White Collar Crime is a socio- economic offence which is generally committed by people of high status or elite class of people in the society. It is done with an intention to receive financial gains by means of committing wrongful activities. Hence, it is a socio- economic offence, it disturbs the economy of a nation where it is committed. It has the impact on the stock markets, international trade, foreign exchange, demand and supply of goods and services etc. In India, there are various laws which has an intention to prevent the occurrence of white-collar crimes and tries to punish the offenders either with imprisonment or fines or both as prescribed in the provisions of Act. Sahara Scam judgement itself shows that how this scam is related as to socio economic offence firstly it is well known that economy is the major thing for the growth of any nation and when this economy is affected it definitely affects the people of that nation. In Sahara scam supreme court given free hand to SEBI for investigating the whole problem and find out that who are mostly affected with this scam finally the output of SEBI was that this case affected the investors' money which disturbs the economy of nation also^{xxix}.

It vests SEBI with powers to investigate into any matter concerning the interest of the investors even if it pertains to companies which are not listed. It clarifies significant points of law and removes the grey areas relating to issue of securities by the so-called unlisted companies taking advantage of the loopholes of law.

In this case the fight given by SEBI to protect the interests of small investors is commendable. But the question here is that whether the case was handled correctly by following all the rules and regulation or it is just a biased one. A debenture may be wholly or partially convertible at the time of redemption depending on the fact that whether the special resolution is passed by the shareholders. Now under **Optionally Fully Convertible Debentures**, it depends on the choice of the investor as when the debt holder wants to convert its debentures into shares. Thus, the very fact which should be taken into consideration is that the investor in this case where he has been issued OFCD should have basic ideas of the performance of the company, market fluctuations and other financial market aspects to gain on the conversion of the debentures. One of the noteworthy facts of this case was that Sahara took investment from the people belonging to the lower strata of the society who don't have much idea about the working of financial institutions, fluctuations in the market and the skill to check the daily performance of the

company. Sahara claimed that it was a private placement and only selected clients were intimated about the scheme. SEBI has no jurisdiction with respect to the same as its jurisdiction is restricted only to listed company. It also contended that OFCD's issued by the company does not fall within the ambit of the definition of the "securities" as provided under the SEBI Act. The main contention raised by the Sahara was that SEBI has no jurisdiction over the unlisted companies and, therefore, objected its interference in the present case on the ground that the said company comes within the ambit of Unlisted Public Companies Rules 2003. But Supreme Court was more satisfied with the arguments of SEBI and finally held that it was stated by Sahara company that its OFCD scheme was a kind of private placement and included only selective clients yet it failed to prove the same, and it is very well evident that it was a kind of public offer in which more than 23 million people invested over which SEBI has complete authority. In the case of private placement, the documents should be submitted by the company that its investors had some relation with the company which in this case was not proved by the Sahara group and thus it does not qualify the claim of the investment being a private placement. I believe that the observation made by the Supreme Court is justified from all perspectives as it emphasized the fact that how Sahara tried to defeat the provisions of various acts like SEBI Act, 1992, Companies Act, 2013 and jeopardized the lives of so many investors who mainly belonged to the lower strata of the society and barely earned enough to keep their body and soul together. It tried to gamble the life of majorly illiterate group of people who have less or no idea of the financial position of a company and thus are ambiguous about harnessing the opportunity to make benefit out of schemes such as OFCD which requires knowledge about performance of the company and basic knowledge about proper time to turn such debentures into shares which will be a profitable for them. Such investors are unaware of the risk that comes along with such luring schemes and out of ignorance they put all their money in one hope given by such unscrupulous managers of these companies. This decision of the Supreme Court in every manner will be a major precedent which will act as a deterrent for them not to involve themselves in such incoherent schemes.

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