# CORPORATE CRIME AND CAPITAL MARKET WITH SPECIAL FOCUS ON SAHARA CASE

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## Introduction

It is said that with great power comes great responsibility but what happens when this great responsibility is misused to gain personal profit. A very good example will be the ongoing tussle between Sahara and SEBI (Security Exchange Board of India). Sahara is one of the mammoth company in India so people have the considerable amount of faith in the company and its main founder Subroto Roy. However, the ongoing feud has changed many things and one of them is Sahara's reputation. In the ongoing sections of the paper, we will focus how all of the above has happened. The capital business sector in India is a business opportunity for securities, where organizations and governments can raise long haul stores. It is a business sector intended for the offering and purchasing of stocks and bonds. Stocks and securities are the two noteworthy approaches to creating capital and long haul reserves. Accordingly, the security markets and securities exchanges are considered as capital markets. The capital markets comprise of the essential business sector, where new issues are conveyed to speculators, and the auxiliary business sector, where existing securities are exchanged. Moreover, the Indian Equity Markets and the Indian Debt markets do shape part of the Indian Capital business sector. How corporate fraud mainly cases like Sahara has affected the capital market will be diagnosed in depth. Before going into anything the main definition of Fraud shall be taken into consideration and Fraud is defined as "any act done with the intent to deceive another party thereto or his agent, or to induce him to enter into the contract and includes the following acts such as the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the active concealment of a fact by one having knowledge or belief of the fact; a promise made without any intention of performing it; any other act fitted to deceive; any such act or omission as the law specially declares to be fraudulent". Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech[1]. The authors believe that there is an implied contract between the investor and the investment company and fraud makes a contract voidable. An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract[2]. So fraud in a way makes the contract between both of the parties weak. In India people

[1] Section 17 of Indian Contract Act,1872
[2] Section 2(i) of Indian Contract Act,1872

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value relationships. Relationships are sacred for people and when it comes to their hard-earned money that relationship and the trust are very important for people. But when that trust is hampered then it straightaway reflects and affects the economy of the nation. Maybe because of these reasons India is still a developing country and not a developed country. However, situations can change with combined effect from the authorities as well as the investors. Under this paper, all the things are considered and discussed at large. The Sahara case also will be considered along with its effect on the current capital market will also be examined thoroughly.

**Facts**

The facts of the case are hereby given chronologically. Sahara India Real Estate Corporation (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) are the two companies controlled by Sahara Group[3]. SIRECL in its extraordinary general meeting held on 03.03.2008 resolved through a special resolution decided to raise funds through unsecured OFCDs by way of private placement to friends, associates, group companies for which they filed a red herring prospectus with the registrar of company Kanpur.[4] There was no advertisement to public regarding this[5]. Company authorized its board of directors to decide it's terms and conditions and revision thereof , namely, face value of each OFCD, minimum application size, tenure, conversion and interest rate[6]. In the red herring prospectus, it was specifically mentioned that SIRECL does not want to get their securities listed in any of the recognized stock exchange[7]. It was also stated that only those person to whom information memorandum was circulated or approached will be eligible to apply[8]. It was also stated that the money received from the investment will be used for financing the acquisition of township, residential apartments, shopping complexes etc[9]. The company also had the intention to engage in electric power generation and transmission business.[10]SIRECL also filed the RHP before the ROC of Uttar Pradesh on 13.03.2008 which was registered on 18.03.2008.[11] SIRECL than has circulated the IM in April 2008.[12] Company had a total collection of 19400,86,64,200 from 25.04.2008 to 13.04.2011.[13] Company had a total collection of 17656,53,25,500 on 31.08.2011.[14] SHICL also convened an annual general meeting on 16.09.2009 to raise funds by issue of

[3] (2013)1SCC1
[4] Id.
[5] Id.
[6] Id.
[7] Id. at 4
[8] Id.
[9] Id.
[10] Id. at page 5
[11] Id.
[12] Id.
[13] Id. at page 8
[14] Id.

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OFCDs.[15] This was proposed to be done by private placement, to friends, family, relative, employees etc.[16]With similar kind of action, an RHP was filed with the ROC of Mumbai, Maharashtra[17] These two companies collected over 2 crore from the investors.[18] SEBI came to know about this large-scale collection of money from the public by the issuance of OFCDs.[19] SEBI issued a show cause notice to SIRECL and SHICL stating that the issue of OFCD was a public issue and thus was liable to be listed under section 73 of Companies Act, 1956.[20] The Hon'ble Supreme court illustrated when the issue of OFCD will not be a public issue[21]. Such as when the offer is made to less than 50 persons, offer made to the existing shareholders, offers made to particular addressee and when it is accepted by them in person etc.[22] It is stated in the law clearly that when there are more than 50 investors in any scheme by any company then SEBI approval is required and this investment cannot be treated as private investment.[23] The high court of Bombay ordered Sahara to refund the money with interest 15% per annum with SEBI.[24] The Supreme Court ordered to deposit the amount collected by them with 15% per annum interest within three months.[25] The Sahara Company or any of its directors failed to comply with the direction issued by the Hon'ble Supreme Court on 31.08.2012 and 5.12.2012 so contempt petition was filed against these two companies[26]. This attitude of the contemnors forced the court to issue non-bailable warrant against Mr Subrata Roy and three other directors[27].

## Investor Protection

Investors protection concentrates on ensuring that investors are completely informed about their purchases, exchanges, transactions and affairs of the company with which they are going to build up their budgetary relations[28]. It is essentially a push to make sure that who are putting their cash in business sector ought not be defrauded by any party. Investors invest their hard earned money in the market and the misfortune makes them monetarily and even emotionally debilitated. There are three regulatory framework for investor protection India:

[15] Id. at page 9
[16] Id.
[17] Id.
[18] (2013)1SCC1
[19] Id.
[20] (2013)1SCC1
[21] Id.
[22] Id.
[23] Sec 67(3) of Companies act 1956
[24] (2013) 1 SCC 1
[25] Id.
[26] (2014) 8 SCC 470
[27] Id.
[28] DR. KVSN JAWAHAR BABU; S. DAMODAHR NAIDU, INVESTOR PROTECTIONS MEASURES BY SEBI, Arth Prabandh: A Journal of Economics and Management Vol.1 Issue 8 ISSN 2278-0629, 1, (2012)

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1. The SEBI Act, 1992 - The main aim of this act is to empower SEBI for the protection of the interest of investors and for this SEBI has taken certain investor protection measures, they are following:

    - Simplification of share transfer and allotment procedure
    - Unique order code number
    - Time stamping of contracts
    - Role of sub-brokers
    - Investor Protection Fund[29]

SEBI has on its official site listed a number of grievances under which an investor can approach to SEBI.[30]

2. The Companies Act, 1956 (repealed) and the successor Companies Act, 2013- Investor Education and Protection Fund (IEPF) has been set-up under Section 205C of the Companies Act, 1956 by way of the Companies (Amendment) Act, 1999 to support the activities relating to investor education, awareness and protection.[31] Under this fund, various programmes on investor education and awareness are organized through Voluntary Associations or organizations registered under Fund[32].

The 2013 Act introduces new provisions for ensuring accountability and transparency in a company's management for safeguarding investors interest such as proscription of forward dealing of securities (S.194), prohibition of insider trading (S.195), facilitating exit opportunities for dissenting shareholders (S.230,27,13) introduction of class action suits (S.245), registered valuers (S.247) and offence of fraud (S.447), and enhancing penalties for breaches and non-compliances[33].

3. The Securities Contracts (Regulation) Act, 1956 - This Act accommodates the immediate and roundabout control of for all intents and purposes all parts of securities trading and the running of stock exchanges, and means to prevent undesirable transactions in securities.[34]

[29] http://www.sebi.gov.in/annualreport/9697/pt1b2c.html, last visited on: 02.09.2016, 11:39pm
[30] http://www.sebi.gov.in/sebiweb/, last visited on: 02.09.2016, 11:40pm
[31] http://www.mca.gov.in/Ministry/pdf/IEPF.pdf, last visited on: 03.09.2016, 12:08am
[32] supra
[33] ARYA TRIPATHY, INDIA: INVESTORS PROTECTION MEASURES UNDER COMPANIES ACT, 2013 – LESSONS FROM THE PAST, PSA LEGAL COUNSELLOR, http://www.mondaq.com/india/x/365216/Corporate+Governance/Investor+Protection+Measures+Under+Companies+Act+2013+Lessons+From+The+Past, last visited on: 03.09.2016,01:05am
[34] SANKALP JAIN, INVESTORS' PROTECTION IN INDIA: REGULATORY FRAMEWORK AND INVESTORS' RIGHTS, OBLIGATIONS & GRIEVANCES, file:///C:/Users/acer/Downloads/SSRN-id2462944.pdf, last visited on: 03.09.2016, 12:31am

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4. The Depositories Act, 1996 - This Act provides for the establishment of depositories in securities with the objective of ensuring free transferability of securities with speed, accuracy, and security.[35]

5. The Prevention of Money Laundering Act, 2002- The main objective of this Act is to allow the confiscation of property derived from or involved in money laundering and it also provides the measures for preventing money laundering.[36]

## Critical Analysis

Here we are contending on the methods by which to deter corporate crime with backing of Sahara case decision. This case is not just around two parties, the impact of fraud done inside the limits have affected the entire nation's economy. The act done by few individuals inside an organization has affected entire of the country's fund and market as in Para 4 of the judgement it has been stated that "market abuse is a serious financial crime which undermines the exceptionally financial structure of this country and will make imbalance in wealth between haves and have not's".[37] The apex court has settled on its decision which might be lawfully right; yet as we go near the impact of this scam we will come to know how the trust of uncountable investors was broken. They are down and out monetarily and emotionally as they had invented an excess of cash due to their trust on this huge name company. In one of his article Professor Coffee has said that fine is not sufficient enough as penalties in these kind of cases, further he has written that 'the notion of a legal threat must be developed in terms of a "mean/variance" analysis of the total range of penalties applicable to the offender'.[38] These types of crime generally becomes passion for the people since it accompanies more fame ,wealth furthermore it makes you rich in next to no time range. Though we know the crime is not violent and even if monetary penalty is proportionate to imprisonment, courts would never precisely determine the trade-offs and would squander extensive time and resources in the attempt[39]. In this case however imprisonment was given to Mr. Roy and two different directors yet the court additionally was prepared to grant bail to them on state of instalment of some money, our contention here is that what will be the estimation of this whole of cash to them who are directors or executors of such a big company and who has effectively earned an excessive amount of cash out of some fraud. As it is appropriately brought up by Arens and Lasswell "that the principle criteria to judge a sanction law is to whether the society has a tendency to be more secure after application of this law than before"[40] so here we can conclude the

[35] supra
[36] supra
[37] Subarata Roy Sahara v. Union of India(UOI) and ors; MANU/SC/0406/2014
[38] JOHN COLLINS COFFEE, JR; CORPORATE CRIME AND PUNISHMENT: A NON-CHICAGO VIEW OF THE ECONOMICS OF CRIMINAL SANCTIONS; 17 Am. Crim. L. Rev. 419 1979-1980, 6,(1980)
[39] supra
[40] LEO DAVIS, PENOLOGY AND CORPORATE CRIME, 58 J. Crim. L. Criminology & Police Sci. 524 1967,2,(1967)

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strictness of the judgment of this case by considering whether after this judgment any company has committed such fraud or not. One of the greatest loophole is delay in justice, the court has taken years in offering equity to poor investors as it is said Justice Delayed is Justice Denied so this may prompt to a real loss to the investors and to the society at large. The judges should to have taken a less time in delivering justice to the investors cause the delayed justice brings about awful effects on victims and if the crime is such which is affecting the country's economy then we can imagine about the effect that how bad it will be. The court more likely than not given expedient judgment it would have been agreeable to the poor investors who have endured an excessive amount because of this fraud. Sometimes on account of delay in justice the indictment itself free enthusiasm for justice and now and again the costs of the entire prosecution make them suffer more financially and the delay makes them less intrigued or interested in the equity. The Special Bench comprising Hon'ble Mr. Justice K.S. Radhakrishnan and Hon'ble Mr. Justice J.S. Khehar confirmed that it was a very tough and tiring work for them. After pronouncing 207-page judgment of this case and turning down the bail plea of Sahara group chief Subrata Roy and its two directors; same evening, Justice Khehar sent a note to the Supreme Court Justice Registry that in future, no matter pertaining to any Sahara group company should be placed before a bench of which he is part[41]. This shows how the judges themselves got drained as a result of this delay in justice and these delays make them work increasingly because they do not have to manage 2-4 cases, they have various cases pending before them. This case was stretched for some three and half years or more already now the SC should be more strict towards getting the answer of straight forward question that when the money will be before Court or SEBI and in the pockets of every one of those poor investors who are out there and enduring in light of this fraud done by this great company.

But the bench of Chief Justice TS Thakur, Justices AR Dave and AR Sikri remained to a great degree careful about the famous slip between the container and the lip, communicating its mistake at endeavours by Sahara, which was guided by the apex court to store Rs 5,000 crore in real money and an equivalent sum in bank ensure by 31 August 2012. Most likely tired of Sahara looking for rehashed expansions for raising the money from its benefits, the judges even denied consent to the gathering to utilize extraordinary offices in Tihar for wooing investors[42]. This perspective of judges sets a best example for the every one of us that law is same for us, and under the watchful eye of a judge or inside the court we as a whole are same. Nobody is rich and poor in the eyes of justice be it the founder of an enormous company or a common man, everyone is equal. This case is historic point as a result of its certainties as well as for maintaining peoples' pride and confidence in the judiciary that legal fallacy can't jumble what is so obviously a gross infringement of the administrative regime of the nation. That the court did not permit details to happen to

[41] MANISH CHIBBER, SAHARA: AMID ALLEGATIONS OF 'PRESSURE', SC JUDGE KHEHAR OPTS OUT , THE INDIAN EXPRESS,http://indianexpress.com/article/india/india-others/sahara-amid-allegations-of-pressure-sc-judge-opts-out/, last visited on 12.09.2016, 02:45pm

[42] supra

maintaining what is correct keeps up our confidence in the legal system. The perceptions of the judges are a blowout for an understudy of corporate laws. Justice Radhakrishnan takes the reader through a complete foundation of corporate laws, securities directions in India. His words are unburdened by overwhelming legitimate contentions and smooth as silk; Justice Khehar, then again, is sharp and searing, when he alludes to the verging on stubborn resistance of the appellants in maintaining a strategic distance from SEBI's jurisdiction, for reference once he said on the alleged OFCD register that "One might not want to make any farfetched comment, but rather there is no other alternative yet to record that the impression rising up out of the investigation of the single section extricated above is, that the same appears to be absolutely unreasonable, and may well be, invented, prepared and made up[43]" and also he stated about the statics of the Sahara that "It is not easy to overlook that the financial transactions under reference are not akin to transactions of a street hawker or a cigarette retail made from a wooden cabin. The present controversy involves contributions which approximate Rs 40,000 Crores, allegedly collected from the poor rural inhabitants of India. Despite restraint, one is compelled to record that the whole affair seems to be doubtful, dubious and questionable. Money transactions are not expected to be casual, certainly not in the manner expressed by the two companies." Further, "One would therefore, have no hesitation in concluding, that a party which has not been fair, cannot demand a right based on a rule founded on fairness[44]."

## Important Aspects

This is not the 1st instance of large scale fraud. In a country where majority of the population is suffering from poverty the rich people by exploiting people keep on getting rich. In Karl Marx's language, the rich get richer and the poor get poorer. This sorry state of economy draws a very devastating picture of the economy. There have been many large-scale scams for example 2G scam, Satyam, Tatra, Sardha and many others. Corruption today has become an obvious and concerning problem. One of the biggest reason behind this kind of large-scale scam is political involvement. What else can be done when the governing power gets corrupt and uses the power in an adverse way. Well the answer is nothing can be done until and unless the government comes clean. However, let us face the reality that is not going to happen any time sooner. Because of this the regulating authority like SEBI becomes powerless and finally they have to let go the culprit. However, Sahara case is an example that not always the powerful gets away. We will now focus on certain points as to why and how at the very first place such a gigantic scam took place. One of the main issue was the issue of Private Placement. Under Companies Act, 1956 private placement was a big issue. The very term was not described at all. Taking the advantage of this lacuna the Sahara group issued OFCDs under the veil of private placement. They put their case forward saying that there was no recommended breaking point of the quantity of individuals to whom private placement offers can be made. However, this problem regarding private placement has been solved in the 2013 Act. The

[43] (2013) 1 SCC 1
[44] supra

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2013 Companies Act has defined the very term "Private Placement[45]". The detailed rules and procedure are described as below.

- The private arrangement offer can be made to most extreme 50 people in a money related year.
- However this number does exclude Qualified Institutional Buyers and Employees to whom offers have been offered under the ESOP Scheme.
- Hence if the offer is made to more than 50 people, then, whether the organization plans to run down its securities or not on any perceived stock trade in or outside India, such issue will be regarded to be under open offer.
- No crisp offers or solicitations under private positions can be made by an organization unless it has either dispensed the shares offered under the before private arrangements or the offer/welcome has been pulled back or deserted.
- Any offer which does not consent to the arrangements as to private position under the 2013 Act will be esteemed to be an open offer and it might need to conform to all the significant arrangements of the 2013 Act, SEBI Act and SCRA.
- The instalment for membership under the private arrangement might need to be made with check or request draft or through other keeping money channels, however not with money.
- The Company might distribute its securities inside a time of 60 days from the date of receipt of allocation cash. On the off chance that it neglects to dispense the securities inside such era, it might need to discount the application cash inside 15 days from the finishing of the 60 day time span. On the off chance that the organization neglects to discount the cash inside the given course of events, it should need to reimburse the cash with premium @ 12% for each annum from the expiry of the 60th day.
- The application cash got from the private position offer should be saved in a different ledger in a booked bank.
- Offers under private positions should be made just to such people whose names have been recorded by the organization preceding the welcome to subscribe. The organization might keep up a complete record of the offer made under private position and such record should be documented with the Registrar within 30 days from the date of dissemination of private situation offer letter.
- Companies issuing securities under private arrangements might not be permitted to discharge any open ads or use any media, advertising or dispersion channels or specialists to advise general society everywhere about such an offer.
- When an organization makes allocation of securities under private position, it should record with the Registrar an arrival of designation in the Form PAS-3.
- Penalty for contradiction of the arrangements:
- Fine for promoters and chiefs which may reach out up to higher of the amount included in the offer/welcome, or Rs 2 crores.

[45] Sec 42(2) explanation (ii) of Companies Act 2013

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- Company should discount the cash to the supporters inside a time of 30 days of the request forcing punishment.[46]

Some provisions under Companies (Prospectus and Allotment of Securities) Rules, 2014 has also been made. Looking at these new rules and laws it can be said that effective measures have been taken to stop the malpractice. Use of the term share in the 1956 Act gave scope to malpractice however the replacement of the word securities in place of shares has stopped companies from doing any kind of mischief behind the legal veil. A limitation has been conveyed on the quantity of people to whom a private arrangement offer can be made in a budgetary year. This number being 200, most extreme 4 offers for private situation can be made by an organization amid a budgetary year[47]. Utilization of managing an account channels has been made mandatory for private position, which should lessen the chances to launder cash. The way that on resistance of any of the arrangements identifying with the private situation, the offer might of course be dealt with as open offer should come about into more prominent co-appointment amongst MCA and SEBI. Every one of these progressions will prompt better administration and straightforwardness of the issues of the organizations. These rules might help in controlling the large-scale corruption that is taking place in the present scenario and the interest of the honest investor might be safeguarded. The other steps which can be taken to cease these kind of large scale is stopping political influence on the corporate world. These are two different dimensions altogether merging them together can be a drastic result. The authors feel that half of the corruption in India will stop when the political influence will be stopped. It is seen in the current case that one of the famous corporate tycoon Subroto Roy ignored the supreme court's orders, from acts like this it can be implied that there are some political party involved because when a person is sure that he will get away then only such audacious act is committed. The whistleblowers shall be protected because without their courage such large scale misdeed would not have surfaced and the laws would not have changed. When some strong legal protection will be provided to the whistleblowers the chances of such scams will decrease. Not only crimes in corporate sector but in any sector the crime will come into daylight. Cases like this shall be handed over to NCLT for quick disposal. Regulatory bodies like SEBI and other shall be bestowed with more power so that they can take effective steps without any influence from the political arena. India bags the 76th position in global corruption Index[48]. This is an wake up call to not only the government, the regulating authority or the judicial system but to the whole nation to wake up and take control of the situation before it gets too late. According to the authors and with the end goal of this paper, OFCDs are those debentures which can alternatively completely changed over.

[46] Section 42 of Companies Act 2013

[47] Companies (Prospectus and Allotment of Securities) Rules, 2014

[48] http://www.transparency.org/cpi2015 last visited on 11.09.2016,4:30pm

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