WTM/MPB/EFD-1-DRA-IV/ 37 /2019

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11, 11(4),11A and 11B of the Securities and Exchange Board of India Act, 1992

In the matter of G R Agro Project Limited

In re Deemed Public Issue Norms

In respect of:

S.No.	Name of the Entity	PAN	DIN
1.	**Shri Raju Ghosh**	**AOWPG5672E**	**03354113**
2.	**Munmun Ghosh**	**APAPG8731K**	**03355796**
3.	**Shri Avijit Chowdhury**	**APEPC8255N**	**05358817**
4.	**Shri Bibekananda Jana**	**AMKPJ8034F**	**05358821**

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1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") passed an order dated March 22, 2018, (hereinafter referred to as **'Order'**) *inter alia*, in respect of Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana (hereinafter collectively referred to as "**Noticees**") in the matter of G R Agro Project Limited (hereinafter referred to as "**GRAPL**"/ "**the Company**").

2. SEBI vide said Order dated March 22, 2018, observed that GRAPL had engaged in fund mobilising activity from the public, through the Offer of Redeemable Preference Shares (hereinafter referred to as '**RPS**') in the financial year (FY) 2012-13 and had violated the provisions of section 60 read with section 2(36), section 56, section 67 and section 73 of the

Companies Act, 1956 read with section 27(2) of the SEBI Act, 1992.

3. The said Order, *inter alia*, made the following findings qua the Noticees:

"………

37. From the documents available on record, I find that the present Directors in GRAPL are Shri Sachin Kumar Thakur , Shri Mrinal Barman, Shri Tapash Kumar Raha, Shri Ram Kumar Sinha. I also note that ***Shri Raju Ghosh, Munmun Ghosh****, Shri Himadri Bag, Shri Abhijit Maity,* ***Shri Avijit Chowdhury, Shri Bibekananda Jana,*** *who were earlier Directors in GRAPL, have since resigned. The details of the appointment and resignation of the directors are as following:*

Name of the directors	***Date of appointment***	***Date of cessation***
Shri Sachin Kumar Thakur	*November 20, 2014*	*Continuing*
Shri Mrinal Barman	*March 13, 2015*	*Continuing*
Shri Tapash Kumar Raha	*March 13, 2015*	*Continuing*
Shri Ram Kumar Sinha	*August 08, 2014*	*November 20, 2014*
	August 5,2015	*Continuing*
Shri Raju Ghosh	***November 08, 2011***	***July 24, 2013***
Munmun Ghosh	***November 08, 2011***	***April 16, 2013***
Shri Himadri Bag	*May 09, 2014*	*July 19, 2014*
Shri Abhijit Maity	*July 24, 2013*	*August 26, 2014*
Shri Avijit Chowdhury	***August 18, 2012***	***March 27, 2015***
Shri Bibekananda Jana	***August 18, 2012***	***October 25, 2014***

38. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance *of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, GRAPL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.*

39. *As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.*

40. *From the material available on record and the details of the appointment and resignation of the directors of GRAPL as reproduced in paragraph 37 of this Order, it is noted that* ***Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana*** *were directors at the time of the issuance of RPS. Since these persons were acting as directors during the period of issuance of RPS, they are officers in default as per Section 5(g) of Companies Act, 1956. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified director of GRAPL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the past and present directors of GRAPL, as officers in default, are liable to make refund, jointly and severally, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions. Since, the liability of the company to repay under section 73(2) is continuing and such*

liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that GRAPL and its Directors, viz. ***Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana*** *are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.*

41. *I note that during the financial years 2012-2013, GRAPL through Offer of RPS, had collected at least an amount of Rs. 6.531 Crores from various allottees. I note that* ***Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana*** *were the directors of GRAPL during financial years 2012-2013. Therefore, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, I am of the view that the obligation of the director to refund the amount with interest jointly and severally with GRAPL and other directors are limited to the extent of amount collected during his/her tenure as director of GRAPL.*

……….."

4. In the light of the above, vide the Order dated March 22, 2018, the following directions were issued against GRAPL, Noticees and other entities:

"……

47. *In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions:*

 a. *GRAPL, Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana shall forthwith refund the money collected by the Company, during their respective period of directorship through the issuance of RPS including* *the application money collected from investors during their respective period of directorship, till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.*

b. *The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable" or through any other appropriate banking channels with clearly identified beneficiaries.*

c. *Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form.*

d. *GRAPL and Shri Sachin Kumar Thakur, Shri Mrinal Barman, Shri Tapash Kumar Raha, Shri Ram Kumar Sinha, (on behalf of GRAPL) are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company and their own.*

e. *GRAPL and Shri Sachin Kumar Thakur, Shri Mrinal Barman, Shri Tapash Kumar Raha, Shri Ram Kumar Sinha, (on behalf of GRAPL) are permitted to sell the assets of the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.*

f. *Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized* *for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.*

g. *GRAPL and, on its behalf the present directors who joined subsequent to the issues (Shri Sachin Kumar Thakur, Shri Mrinal Barman, Shri Tapash Kumar Raha and Shri Ram Kumar Sinha) and Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, in their personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.*

h. *After completing the aforesaid repayments, GRAPL and on its behalf the present directors who joined subsequent to the issues (Shri Sachin Kumar Thakur, Shri Mrinal Barman, Shri Tapash Kumar Raha and Shri Ram Kumar Sinha) and Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana in their personal capacity shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI") holding such certificate.*

i. *In case of failure of GRAPL, Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from the company and the directors liable to refund as specified in paragraph 47(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.*

j. *GRAPL, Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money* *from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above. The above said directors are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.*

k. *Shri Himadri Bag, Shri Abhijit Maity, Shri Sachin Kumar Thakur, Shri Mrinal Barman, Shri Tapash Kumar Raha and Shri Ram Kumar Sinha are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner for a period of 4 (four) years from the date of this Order. The above said persons are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 4 (four) years from the date of this order.*

l. *The above directions shall come into force with immediate effect.*

48. *I find that Interim Order dated December 03, 2015 has not been passed in respect of the six past directors of GRAPL namely Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity. In view of this, the above directions mentioned at para 47 will take effect as final order against Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity on the expiry of 45 days from the date of service of this, unless any of Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity, within such period of 45 days from the date of service of this order files their objections. If objections are filed*

by any of Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity, the following directions shall be applicable qua that person till disposal of the said objections qua that person, after which this order shall come into effect:

(a) Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity, are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly;

(b) Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly;

(c) Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, shall provide full inventory of all their assets and properties;

(d) Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, shall not divert any funds raised from public at large through the Offer of Redeemable Preference Shares, which are kept in bank account(s) and/or in the custody of GRAPL;

49. The directions mentioned in paragraph 47 in respect of Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury, Shri Bibekananda Jana, Shri Himadri Bag and Shri Abhijit Maity shall takes effect as per paragraph 48.

………"

<u>Submissions and Hearing</u>:

5. Mr. Avijit Chowdhury vide letter dated May 07, 2018 and Mr. Bibekananda Jana vide letter dated nil received by SEBI on May 15, 2018 submitted their reply in the matter. Both of them have submitted similar reply, in order to avoid the repetition, their reply have been collated and reproduced in brief as under:

5.1. That Mr. Raju Ghosh was appointed as Managing Director of the company from May 04, 2012 to April 03, 2017 for salary of Rs. 14,000/- per month including all travel and hotel allowances reimbursement of entertainment expenses telephone, car & driver, free furnish accommodation with electricity bill, medical reimbursement with family, club fees, leave travel concession, insurance (personal accident insurance) upto Rs. 20,000/-, gratuity as provident fund. Mr Raju Ghosh resigned on 24/07/2013.

5.2. That Mr. Ram Kumar Sinha was appointed as a Managing Director of the company salary of Rs. 75,000/- per month, perquisite Rs. 45,000/- per month & others Rs. 15,000/- per month total Rs. 1,35,000/- per month for 3 years up to 7th August, 2017 increment subject to performance as maximum salary of Rs. 25,000/- per month on from 8th August, 2014.

5.3. That Mr. Bibekananda Jana & Mr. Avijit Chowhdury were appointed as Director of the company dated 18th August, 2012 and on the same date Mr. Ujjwal Sasmal had resigned from the company due to personal reasons.

5.4. That Mr. Bibekananda Jana had resigned from the company on 25th October 2014, when he came to know that the company is not working prudently and there is severe negligence upon filling the annual return and balance sheet by Mr. Raju Ghosh.

5.5. That Mr. Avijit Chowdhury had resigned from the company dated 27th March 2015, due to unavoidable circumstances.

5.6. That GRAPL had issued Redeemable Preference Shares on 30th September, 2012. The numbers of Shares Allotted were 6,53,100 with having Nominal Amount of Rs. 10/- each. The amount paid per share on application (Excluding Premium) Rs. 5/-. Total Amount paid on application (Excluding Premium) – Rs. 32,65,500/-. Shares were issued at premium of Rs.90/- each & Total amount payable on premium Rs. 58,779,000/-. Shares are allotted to 302 persons. At the time of allotment Mr. Raju Ghosh was the Managing Director of the Company.

5.7. That the authorized signatory of the all bank accounts are Mr. Raju Ghosh as a capacity of Managing Director.

5.8. That Bibekandna Jana and Avijit Chowdhury did not deny that company has collected fund from public but it was only Rs 32,65,500 /- (thirty two lakhs sixty five thousand five hundred) the share application money @ Rs 5/- per share. The company had taken these share application money for the object the company was incorporated.

5.9. That the bank account statements are in the Custody of Mr Raju Ghosh, whom after several request Bank statement was not delivered to him.

5.10. That the control of the company is in the hand of Mr. Raju Ghosh and Mrs. Munmun Ghosh. Mr. Raju Ghosh resigned from the company on July, 24, 2013 and Mrs. Munmun Ghosh on April 16, 2013.

5.11. That as per the Form 20B for the financial year 2012-2013, it was shown that all the shares of Mr. Raju Ghosh, Mrs Munmun Ghosh and Mr Ujjal Sasmal were transferred to three persons without their knowledge, which is certainly not a valid Transfer. Thus, it was a fraudulent transfer. From the date of transfer, it was clear that the malafide intention of Mr. Raju Ghosh, Mrs Munmun Ghosh and Mr Ujjal Sasmal was to transfer the burden of offence to the other innocent persons. Further, there was no share transfer deed for those transfers.

5.12. That as per Mr. Bibekananda Jana & Mr. Avijit Chowhdury knowledge the company had received only Rs 32,65,500/- (thirty two lakhs sixty five thousand five hundred) the share application money @ Rs 5/- per share from 302 persons.

5.13. That as per section 27 of the SEBI Act, 1992 Mr. Raju Ghosh as a Managing Director of the company did not performe his duty and does not provide the access of the accounts and Bank statement of the company to other directors.

5.14. That Bibekandna Jana and Avijit Chowdhury was appointed as an additional director of the Company and their appointment was not ratified by the company at the Annual general meeting of the company and they were a mere employee of the company. That they do not have any document of the company in their custody.

5.15. That the Apex Court in the case of *National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Another [(2010) 3 Supreme Court Cases 330]*, on a thorough examination of Section 5 and 291 of the Companies Act of 1956 with the definition clause of Section 2 of the Act, listed persons are considered to be responsible to the company for its conduct of the business. On a scrupulous survey of earlier judgment in respect of liability under Section 141 of Negotiable Instruments Act, following principle was laid down:

5.15.1. The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

5.15.2. Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the Company.

5.15.3. Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with the averments in the petition containing that the accused were in charge of and responsible for the *business of the company and by virtue of their position they are liable to be proceeded with.*

5.15.4. Vicarious liability on the part of a person must be pleaded and proved and not inferred.

5.15.5. If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

5.15.6. If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

5.15.7. *The person sought to be made liable should be in charge of and responsible for the conduct of business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.*

5.16. That Master circular No. 1/2011 issued by MCA Dated 29th July, 2011 where there is Managing Director, Whole time Director, Manager or Company Secretary these persons are liable as officer in default. As per the case *G. Vijaya Lakshmi vs SEBI [(2000 100 comp Case 726 (A.P)] and Ravindra Narayan vs Registrar of companies [(1994 81 comp case 95(Raj)]*, Ordinary directors are not liable, unless no managing director or whole time director or manager has been appointed or any directors, i.e. Directors simpliciter are not liable, unless no managing director or whole time director or manager has been appointed by the company.

5.17. That same view was taken in *Garda Chemical Private Limited vs Partho Sarthi R., Assistant Collector Central Excise [(1994) 2ECC 384 (BOM)]* that Managing Director is prima fascia deemed to be officer in default in case of managing director, courts have usually held that he is, prima fascia, deemed to be in charge and responsible for the conduct of business and management of the company and therefore liable for defaults.

5.18. And also *Vijay Kumar Gupta Vs. Registrar of Companies [(2004 118 Comp case 604 (H.P); (2003 CLC777 (H.P)], "….that all the directors of the Company will be officers in default within the meaning Section 5 of the Act only when there is no managing director, whole-time director, manager, secretary, a person charged by the board with the responsibility of complying with the provisions of the Act and the director/directors specified by the board under clause (g) of Section 5…"*

6. Mr. Raju Ghosh and Ms. Munmum Ghosh vide common letter dated May 23, 2018 has stated that they have left the company long back and as per their knowledge all the money was refunded and requested two months' time to discuss the matter with present directors to find out the receipts.

7. In the interest of Natural Justice, vide notice of hearing dated September 11, 2018, Noticees were granted an opportunity of hearing on October 17, 2018 at SEBI, Head Office, Mumbai. Mr. Bibekananda Jana and Mr. Avijit Chowdhury vide separate but identical letters dated September 21, 2018 and September 24, 2018 respectively had requested for adjournment of hearing on the occasion of Maha Astamai of Durga Pooja on October 17, 2108 and also requested for change of place of hearing from Mumbai to Kolkata or to appear through video conference from SEBI Kolkata office. One Mr. Arnab Kumar Banerjee, Advocate, vide email dated October 17, 2018 on behalf of Mr. Raju Ghosh had requested for adjournment of hearing and stated the Mr. Raju Ghosh is not a director in company after 2013 and required time to gather documents for preparation of hearing. Mrs. Munmun Ghosh neither appeared for hearing scheduled on October 17, 2018 nor requested for adjournment of hearing nor submitted any reply in the matter.

8. Acceding to the request and in the interest of Natural Justice, vide email dated October 23, 2018 Mr. Bibekananda Jana, Mr. Avijit Chowdhury and Mr. Raju Ghosh were granted another opportunity of hearing on November 27, 2018. Shri Sumantra Sarathi Mahata, SS Mahata & Associates, Company Secretaries, Authorized Representative (hereinafter referred to as **"AR"**) on behalf of Mr. Avijit Chowdhury and Mr. Bibekananda Jana had appeared for hearing scheduled on November 27, 2018 through video/tele conference from Eastern Regional Office, Kolkata, SEBI (ERO) and made oral submissions. AR made the following submissions:

   "…..

   (a) For Mr. Avijit Chowdhury, AR reiterate the submission made by Mr. Avijit Chowdhury dated May 07, 2018.

(b) *For Mr. Bibekananda Jana, AR reiterate the submission made by Mr. Bibekananda Jana received by SEBI on May 15, 2018.*

(c) *AR accepted that Company had issued of Redeemable Preference Shares (RPS) in the month of September 2012. AR accepted that Mr. Avijit Chowdhury and Mr. Bibekananda Jana were additional director of GRAPL during the period of issuance of RPS. The directorship of Mr. Avijit Chowdhury and Mr. Bibekananda Jana was not ratified in Annual General Meeting. During the period of issuance of RPS, Mr. Raju Ghosh was the Managing Director of GRAPL and Mr. Raju Ghosh was controlling the company. Further, Mr. Raju Ghosh was signatory to all bank account of GARPL.*

AR had no further submissions to make, accordingly, hearing in respect of Mr. Avijit Chowdhury and Mr. Bibekananda Jana is concluded…"

9. Mr. Raju Ghosh vide letter dated November 27, 2018 had once again requested for adjournment of hearing on humanitarian ground that his relative is admitted in Hospital for kidney diseases and in very critical condition. Acceding to the request of Mr. Raju Ghosh and in the interest of Natural Justice, vide email dated January 28, 2019, Mr. Raju Ghosh was granted another opportunity of hearing on February 21, 2019. Mr. Raju Ghosh vide email dated February 20, 2019 had once again requested for adjournment of hearing. Acceding to the request of Mr. Raju Ghosh and in the interest of Natural Justice, vide email dated February 21, 2019, Mr. Raju Ghosh was granted another opportunity of hearing on February 26, 2019. One Mr. Pankaj Patwari on behalf of Mr. Raju Ghosh vide email dated February 25, 2019 had requested to dispense with the personal hearing and vide email dated February 26, 2019 submitted the reply dated February 26, 2019 of Mr. Raju Ghosh. The reply dated February 26, 2019 of Mr. Raju Ghosh in brief are as under:

9.1. That the impugned collection by way of issue of Redeemable Preference Shares (RPS) for 6,53,100 shares was for a paid up value of @ Rs. 10/- only against collection of Rs. 65,31,000/- with redemption after few years at a premium of Rs. 90/- (i.e. Rs. 100/- on redemption). The impugned collection was therefore made only for Rs. 65.31 lakhs as against the allegation and finding in the said Final Order dated 26th March 2018 holding it to be Rs. 6.53 Cr.

9.2. That Raju Ghosh was one of the founder directors of the said company GRAPL.

9.3. That while serving as director with the said Company, during the financial year of 2011-

2012, the said Company had issued Redeemable Preference Shares (RPS) worth Rs.10/- each and with redemption after few years at a premium of Rs. 90/- (i.e. Rs. 100/- on redemption) to members purely on a private placement basis.

9.4. That thereby 6,53,100 Nos. of RPS were issued from 302 members against collection of share value of Rs. 10 X 6,53,100 = Rs. 65,31,000/- and not the future redemption value of Rs. 6.53 Cr as held in the said Final Order of 26th March 2018.

9.5. That the action of collection by way of such private placement was against a bonafide belief and information and after making necessary application to the statutory authority to enhance paid up by way of RPS. The collection details of the same was duly submitted with the Ministry of Corporate Affairs as per Form No. 2 filed with the MCA.

9.6. That at the instance of objection from statutory authority, the RPS so issued during 2011-12 were called back at the earliest from most, if not all the purchasers and cancelled against repayment of amounts paid to their satisfaction within 2012-13.

9.7. That Raju Ghosh do not recall of having received any dispute or claim or complaint from any member regarding such cancellation of RPS, whilst he was associated with the company.

9.8. Subsequently, Raju Ghosh resigned as director from the said Company on 24th July, 2013 as also liquidated his shareholding of the said company and was/is no more associated with the said company or its affairs.

9.9. That even assuming though not admitting the directions qua the said Final Order is applicable to the capacity of Raju Ghosh, the directions to refund the money collected already stands complied to the knowledge, information and belief of Raju Ghosh. The direction of Final Order therefore virtually stands complied and cannot be further insisted upon. The same, if required may be verified.

9.10. That the issue of RPS was made by way of private placement as per the information, bonafide understanding of Raju Ghosh. In any case, the applicability of the deeming provision of section 67(3) of the Companies Act is a disputed question of fact and law and within realm of interpretation. Whether the impugned issue of RPS was in the nature of public issue or not, whether the Hon'ble SEBI will have jurisdiction in matter or not, etc. are all purely mixed questions of law of fact and law and subject to interpretation. No mens rea can be attributed in such a situation against Raju Ghosh, especially considering the fact that he has acted bonafide, all such collection were self-declared in the returns filed with the MCA.

Consideration and Findings

10. I have considered the allegations and materials available on record such as Order dated March 22, 2018 and submissions of the Noticees. On perusal of the same, the findings are as under:

11. I note that the final order dated March 22, 2018 had held that GRAPL has issued and allotted RPS to 302 investors during the financial year 2012-2013 and raised an amount of Rs. 6.531 Crores. I note that in the order dated March 22, 2018, the number of allottees and funds mobilized had been collated from Form 2 filed by the Company with Ministry of Corporate Affairs (**MCA**). It was therefore concluded that GRAPL came out with an offer of RPS as outlined above. Further, the order dated March 22, 2018 has held that GRAPL engaged in fund mobilizing activity from the public, through the offer of RPS and had contravened the provisions of sections 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3) of the Companies Act, 1956.

12. From the submission of the Noticees, I note that they have not denied the issuance of RPS to 302 investors during the financial year 2012-13, however they have contested the quantification of amount raised/mobilized through the issuance of RPS. Mr. Raju Ghosh stated that the collection by way of issue of RPS for 6,53,100 shares was for a paid up value of @ Rs. 10/- only against collection of Rs. 65,31,000/- with redemption after few years at a premium of Rs. 90/- (i.e. Rs. 100/- on redemption), therefore the collection was only of Rs. 65.31 lakhs. Mr. Bibekananda Jana and Mr. Avijit Chowdhury stated that the collection of fund by the company from public by way of issue of RPS was only Rs 32,65,500 /- @ Rs 5/- per share (share application money).

13. The Noticees have not denied the allegations of deemed public issue (offer of RPS) as mentioned in the order dated March 22, 2018. Further, the Noticees have not submitted any case or further evidence challenging the findings of the deemed public issue (offer of RPS) mentioned in the order dated March 22, 2018. Therefore, I reiterate the findings mentioned in the Order dated March 22, 2018 in respect of the fact of deemed public issue (offer of RPS). Considering that the order dated March 22, 2018 has already held that GRAPL has engaged in

fund mobilizing by making a public offer of RPS in violation of deemed public issue norms and issued directions against the Company and its directors, and in view of Noticees submissions, the two issues that merit consideration in the instant order/matter is as under:

Issue No. 1: What is the amount raised/mobilized/collected through the issuance of RPS.

Issue No. 2: Whether the Noticees are liable for the offer of RPS made by GRAPL to public in violation of deemed public issue norms and the extent of their liability, if any.

ISSUE No. 1: What is the amount raised/mobilized/collected through the issuance of RPS.

14. From the documents available on records i.e. from extract of minutes of the resolution of Extra-ordinary General Meeting of the Company held on April 20, 2012, it is noted that the Board of Directors of the Company had accepted /consented to offer, issue and allot up to 10 lakhs RPS at Rs. 100/- each at face value of Rs. 10/- and premium of Rs. 90/- amounting to Rs. 10 Crores. Further, from FORM -2 (Return of allotment), it is noted that date of allotment of RPS was September 30, 2012 and Company had allotted 6,53,100 RPS, total amount paid on application is Rs. 32,65,500/-, total amount paid on allotment is Rs. 32,65,500/- and total premium amount paid was Rs. 5,87,79,000/-. Thus, the total amount paid to the company upon issuance of 6,53,100 RPS was Rs. 6,53,10,000 / -. I note that Mr. Raju Ghosh, Mr. Bibekananda Jana and Mr. Avijit Chowdhury have not submitted any documentary evidence in support of their claim that the amount collected through issuance of RPS was Rs. 65,31,000/- or Rs 32,65,500 /-. Thus, from the extract of minutes of the resolution of Extra-ordinary General Meeting of the Company held on April 20, 2012 and FORM -2 (Return of allotment), I am of the view that RPS were issued at Rs. 100/- per share (i.e. Rs. 10/- face value and Rs. 90/- premium). Similarly, I am also of view that the premium of Rs. 90/- per share was collected by the company on issuance of RPS. Hence, the total amount collected by way of issuance of RPS was Rs. 6.531 crores.

ISSUE No. 2 - Whether the Noticees are liable for the offer of RPS made by GRAPL to public in violation of deemed public issue norms and the extent of their liability, if any.

15. From the documents available on record, I find that that Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana, who were Directors in GRAPL, have since resigned. The details of their appointment and resignation are as under:

Name of the directors	Date of appointment	Date of cessation
Shri Raju Ghosh	November 08, 2011	July 24, 2013
Munmun Ghosh	November 08, 2011	April 16, 2013
Shri Avijit Chowdhury	August 18, 2012	March 27, 2015
Shri Bibekananda Jana	August 18, 2012	October 25, 2014

16. From above, it is noted that Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana were directors at the time of the issuance of RPS (Financial year 2012-13 i.e. date of allotment was Setember 30, 2012). Mr. Bibekananda Jana vide his reply had accepted that he was the director in GRAPL from August 18, 2012 to October 25, 2014. Mr. Avijit Chowdhury vide his reply dated May 07, 2018 had accepted that he was the director in GRAPL from August 18, 2012 to March 27, 2015. Mr. Raju Ghosh vide his reply dated February 26, 2019 had accepted that he was one of the founder director of GRAPL and has resigned on July 24, 2013 i.e. he was director in GRAPL from November 08, 2011 to July 24, 2013. Ms. Mummun Ghosh had not submitted her reply, hence she has not disputed the record of Registrar of Companies (ROC) that she was director in GRAPL from November 08, 2011 to April 16, 2013. Thus, from the documents available on record and from the submissions of the Noticees, I am of the view that tenure of the directorship of the Noticees and their

appointment as director in GRAPL is not in dispute.

17. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, Noticees are liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

18. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an *officer in default* shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith.With regard to liability to pay interest, I note that as per section 73(2) of the Companies Act, 1956, the company and every director of the company who is *an officer in default* is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

19. As per Section 5 of Companies Act, 1956, *"officer who is in default"* means (a) the managing director/s; (b) the whole-time director/s; (c) the manager; (d) the secretary; (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act; (f) any person charged by the Board with the responsibility of complying with that provision; (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

20. Mr. Bibekananda Jana and Mr. Avijit Chowdhury in their reply have stated the following:

    20.1. That Mr. Raju Ghosh was appointed as Managing Director of the company from May 04, 2012 for a period of 5 year; copy of extract of minutes of GRAPL board resolution of appointment of Mr. Raju Ghosh as Managing Director of the Company and copy of appointment letter dated April 20, 2012 of Mr. Raju Ghosh as Managing Director of the Company are submitted by them.

20.2. That at the time of allotment of RPS, Mr. Raju Ghosh was the Managing Director of the Company and Mr. Raju Ghosh as a capacity of Managing Director was the authorized signatory of the all bank accounts.

20.3. That they were appointed as an additional director of the Company and their appointment was not ratified by the company at the Annual general meeting of the company and they were a mere employee of the company.

20.4. That as per MCA Master circular dated July 29, 2011 Managing Director, Whole time Director, Manager or Company Secretary are persons liable as officer in default.

20.5. In the case of *G. Vijaya Lakshmi Vs SEBI, Ravindra Narayan vs Registrar of Companies, Garda Chemical Private Limited Vs Partho Sarthi R., Assistant Collector Central Excise Ordinary and Vijay Kumar Gupta Vs. Registrar of Companies*, the courts have held that Managing Director is prima facie deemed to be officer in default and when there is no managing director, whole-time director, manager, secretary, a person charged by the board with the responsibility of complying with the provisions of the Act and the director/directors specified by the board under clause (g) of Section 5 of Companies Act 1956, all the directors of the Company will be officers in default within the meaning of Section 5 of the Companies Act, 1956.

21. In this regard, I note that Hon'ble Securities Appellate Tribunal (SAT) vide order dated February 14, 2019 in the mater of *Pritha Bag Vs. SEBI* stated that *".....Unless and until a finding is given that the appellant is an officer in default, the mandate provided under Section 73(2) cannot be invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing director, namely, Mr. Indranath Daw and, therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could*

not be made responsible for refunding the amount under Section 73(2).

Reliance on the judgment of this Court by the respondent in the case of Manoj Agarwal vs. SEBI in Appeal No. 66 of 2016 decided on July 14, 2017 is not applicable and is distinguishable. The Tribunal in the case of Manoj Agarwal found that there was no material to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of the said company was entrusted to discharge the application contained in Section 73 of the Companies Act. In the instant case, there is sufficient material on record to show that there was a managing director and in the absence of any finding that the appellant was entrusted to discharge the application contained in Section 73 of the Companies Act, the direction to refund the amount alongwith interest from the appellant is wholly illegal…."

22. In view of aforesaid Hon'ble SAT order and upon perusal of documents available on record i.e. copy of extract of minutes of GRAPL board resolution of appointment of Mr. Raju Ghosh as Managing Director of the Company, copy of appointment letter dated April 20, 2012 of Mr. Raju Ghosh as Managing Director of the Company and FORM 25C (Return of appointment of Managing Director), I find that Mr. Raju Ghosh was appointed as Managing Director of GRAPL from May 05, 2012 for a period of 5 years. I also note that the date of allotment of RPS was September 30, 2012. Hence, at the time of allotment of RPS, Mr. Raju Ghosh was the Managing Director of GRAPL. Therefore, in the present case, in accordance with Section 5(a) of Companies Act, 1956, Mr. Raju Ghosh being the Managing Director of GRAPL at the allotment of RPS is an officer in default and is liable to make refund along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, Mr. Raju Ghosh is co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that GRAPL (as per the findings mentioned in order dated March 22, 2018) and Mr. Raju Ghosh, are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the

above mentioned provisions.

23. Mr. Raju Ghosh vide letter dated May 23, 2018 has submitted that all money was refunded. Vide reply dated May 26, 2019 he had further submitted that RPS so issued during 2011-12 were called back from the purchasers and cancelled against repayment of amounts paid to their satisfaction within 2012-13. I note that the said submission of Mr. Raju Ghosh is with respect to the issuance of RPS during the year 2011-12, however in the present case RPS was issued during the financial year 2012-13 i.e. the date of allotment September 30, 2012. Even if considering that the said submission of Mr. Raju Ghosh is with respect to the issuance of RPS during the financial year 2012-13 i.e. the date of allotment September 30, 2012, I find that he had not submitted any documentary evidence to substantiate that the amount has been refunded to the investors. Hence, I do not find any merit in the said submission of the Mr. Raju Ghosh.

24. I note that during the period of fund mobilization, Ms. Munmun Ghosh, Mr. Avijit Chowdhury and Mr. Bibekananda Jana were directors in GRAPL and Mr. Raju Ghosh was the Managing Direcor of GRAPL. Therefore, following the reasoning as provided by Hon’ble SAT in the matter of *Prita Bag vs. SEBI*, I am of the view that Ms. Munmun Ghosh, Mr. Avijit Chowdhury and Mr. Bibekananda Jana are not liable for refund of money as there is a sufficient documentary evidence available on record which indicate that GRAPL had a Managing Director namely, Mr. Raju Ghosh (who is an officer in default as per Section 5(a) of Companies Act, 1956) during the relevant time of fund mobilization.

25. Further, with respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies* (2002 108 Cas 1 Mad):

> *" 13. …. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.*
>
> *14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-*

opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956. "

26. A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. The director cannot therefore wriggle out from liability. A director who is part of a company's board shall be responsible and liable for all acts carried out by a company. Accordingly, Ms. Munmun Ghosh, Mr. Avijit Chowdhury and Mr. Bibekananda Jana were also be responsible for all the deeds/acts of the Company during the period of their directorship.

27. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct Mr. Raju Ghosh, to refund the money collected, with interest to such investors. Also, in order to safeguard the interest of investors, to prevent further harm to investors and to ensure orderly development of securities market, all the Noticees becomes liable to be debarred for an appropriate period of time.

28. I also note that, vide the order dated March 22, 2018 Noticees were directed to provide a full inventory of all their assets and properties. However, I find that no such inventory has been provided by the Noticees despite the receipt of order by them.

29. In view of the discussion above, appropriate action in accordance with law needs to be initiated against Mr. Raju Ghosh, Ms. Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana.

ORDER

30. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions:

(a) Mr. Raju Ghosh alongwith GRAPL shall jointly and severally, forthwith refund the money collected by the Company during the tenure of directorship of Mr. Raju Ghosh, through the issuance of RPS including the application money collected from investors, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.

(b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as “Non-Transferable” or through any other appropriate banking channels with clearly identified beneficiaries.

(c) Mr. Raju Ghosh is prevented from selling their assets, properties and holding of mutual funds/shares/securities held by him in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

(d) Mr. Raju Ghosh in his personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.

(e) After completing the aforesaid repayments, Mr. Raju Ghosh shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("**ICAI**") holding such certificate.

(f) In case of failure of Mr. Raju Ghosh to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from Mr. Raju Ghosh as specified in paragraph 30(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.

(g) Mr. Raju Ghosh is directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above. The above said director is also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.

(h) Ms. Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, for a period of 4 (four) years from the date of this Order. The above said directors are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 4 (four) years from the date of this Order.

31. The above directions shall come into force with immediate effect.

32. The findings rendered in this order shall prevail in case of any inconsistency of findings rendered in the order dated March 22, 2018. I note that Shri Raju Ghosh, Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana had filed their objections/replies to the said order, therefore, in view of paragraph 48 of the order dated March 22, 2018, directions mentioned at paragraph 47 in the order dated March 22, 2018 in respect of Shri Raju Ghosh,

Munmun Ghosh, Shri Avijit Chowdhury and Shri Bibekananda Jana had not came to effect. However, in respect of other entities mentioned in the order dated March 22, 2018, findings and directions mentioned at paragraph 47 in the order dated March 22, 2018 shall continue to have effect.

33. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories and registrar and transfer agents for information and necessary action.

34. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies, for their information and necessary action.

-Sd-

DATE: APRIL 09, 2019 **MADHABI PURI BUCH**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA