

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: S. RAMAN, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of Golden Life Agro India Limited and its Directors, viz. Shri Tipu Sultan, Shri Biswanath Mondal, Shri Subhas Sarkar, Shri Nirjal Pal, Shri Swapan Sadhukhan, Shri Chandan Debnath and Shri Uttam Chakraborty; its Debenture Trustees, viz. Smt. Jyotsna Sadhukhan and Smt. Jharna Sarkar.

- 1.1 Securities and Exchange Board of India ("SEBI") received a copy of the Order dated July 15, 2013, passed by the Hon'ble Kolkata High Court in the matter of *Golden Life Agro India Ltd. ("GLAIL") vs. State of West Bengal [W. P. No. 16338 (W) of 2013]*, wherein it was directed:

"Let the matter appear three weeks hence for independent reports to be filed by the State, the Reserve Bank of India and the SEBI into the business conducted by the petitioner company (GLAIL) and its legitimacy."

2. The abovementioned *W. P. No. 16338 (W) of 2013* was filed by GLAIL challenging the Notification issued vide Order No. 1650(19) issued by the Inspector General Registration, State of West Bengal, *"banning the execution and registration of Deed of Conveyance and/or any way transfer the properties of the listed companies."*
3. In compliance with the abovementioned Order of the Hon'ble Kolkata High Court dated July 15, 2013, SEBI vide letter dated July 22, 2013, while stating: *"It has come to our notice that you (GLAIL) are raising funds from public by issuing Non-Convertible Redeemable Secured Debentures (hereinafter referred to as "NCDs") ostensibly by way of private placement. No Prospectus or DRHP or statement in lieu of prospectus or information memorandum (was) filed with (SEBI)"*, advised GLAIL to furnish the following information within ten days from the date of receipt of the aforesaid letter (the aforesaid letter was, however, returned as undelivered to SEBI), viz. –

- i. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with ROC for issuance of NCDs.
 - ii. Copy of the Memorandum and Articles of Association of the company;
 - iii. Audited Balance Sheet and Profit & Loss Account of the company for the last 3 years;
 - iv. Name, addresses and occupation of all the promoters/directors of the company;
 - v. Names and details of the Key Managerial Personnel of the company;
 - vi. Other information in respect of every series of NCDs issued by the company, viz. –
 - a. Date of opening and closing of the subscription list;
 - b. Details regarding the number of application forms circulated inviting subscription;
 - c. Details regarding the number of applications received;
 - d. Details regarding the number of allottees and list of such allottees;
 - e. Number of NCDs allotted and value of such allotment against each allottee's name.
 - f. Details regarding subscription amount raised;
 - g. Date of allotment of NCDs;
 - h. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment;
 - i. Date of dispatch of NCDs;
 - j. Details of the total number of applicants for each of GLAIL's scheme besides the list of final allottee;
 - k. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of NCDs.
 - l. Terms and conditions of the issue of NCDs.
4. SEBI also forwarded a letter dated July 22, 2013, to Shri T Talukder, the advocate representing GLAIL, seeking the abovementioned information. Vide reply dated August 6, 2013, Shri T Talukder, while forwarding a copy of the Audited Balance Sheet and Profit & Loss Account for the year ended March 31, 2012 alongwith a Compact Disc containing details of NCDs issued by GLAIL, *inter alia* submitted the following –
- i. *"Copy of Prospectus – No copy filed with ROC as the issue of debenture is on Private Placement.*
 - ii. *Date of opening and closing – Date of opening 27.12.2010 and date of closing 31.03.2013.*

- iii. *Details regarding the number of applications – No application form circulated to the general public. The application form provided only to the intended subscribers without any right to pass on the offer to any other person to whom the offer was not made directly."*
5. Thereafter, vide Order dated August 6, 2013, as passed in the abovementioned matter i.e. [W. P. No. 16338 (W) of 2013], the Hon'ble Kolkata High Court directed as under:

"Let the matter appear three weeks hence to establish comprehensive reports or affidavits to be filed by the Finance Department of the Government of West Bengal, Reserve Bank of India and the SEBI on the functioning of the petitioner company (GLAIL), the legitimacy of its business and the persons from whom money may have been obtained by the petitioner company. The petitioner company should also indicate a comprehensive list of all its assets and properties.

There will be an order of injunction restraining the petitioner company from dealing with or disposing or alienating any of its fixed assets without the previous leave of Court."

6. In compliance with the Order dated August 6, 2013, of the Hon'ble Kolkata High Court, SEBI submitted an 'Examination Report' on the activities of GLAIL during the hearing held in the matter i.e. [W. P. No. 16338 (W) of 2013], on September 2, 2013. Vide an Order passed on that date, the Hon'ble Kolkata High Court, while disposing of the aforementioned matter, *inter alia* observed:

"SEBI has filed a report, following the representations made by the petitioner company. The report indicates violation of several provisions including the company having resorted to obtaining funds from the public without either applying for mandatory listing or having its offer documents vetted by the appropriate authorities.

In view of what appears from the SEBI report, the appropriate authorities are directed to take steps in accordance with law against the petitioner and particularly the officers of the petitioner company responsible for the multiple defaults.

There will be an order of injunction restraining the petitioner company from dealing with or disposing of or alienating or encumbering any of its assets without the previous leave of the SEBI and the SEBI leave should not be granted without an Executive Director of SEBI approving the same.

It will be open to the petitioners to cause all of any of their assets or properties to be sold under the aegis of SEBI under any asset sale committee that may be set up by SEBI for the purpose of refund of money which appears to have been illegally obtained from the depositors. Both the SEBI and the ROC should monitor the activities of the petitioner company and ensure strict compliance of this order."

7.1 During the intervening period i.e. August 6, 2013 – September 2, 2013, SEBI, vide letter dated August 30, 2013, sought clarifications from CK Jain & Company, Chartered Accountants (Auditors for GLAIL) ("**CK Jain**"), regarding the following as observed from the Audit Report for the year ended March 31, 2013, viz. –

- i. As per point no. 19, the company had not issued any debentures during that year. However, as per Audited Balance Sheet for the year ended March 31, 2012, it was noticed that the company had issued debentures for ₹11,90,62,085.
- ii. Issued Share Capital of the company was ₹28,50,000 whereas as per Note No. 1, Authorised Capital of the company was ₹10,00,000 [*Issued Share Capital could not exceed Authorised Share Capital*].

7.2 In its reply dated September 2, 2013, CK Jain submitted as follows –

- i. *"The break-up of debentures is as under:*

<i>Opening Balance as on April 1, 2011</i>	<i>– ₹ 16051900</i>
<i>Add: New Issued</i>	<i>– ₹ 121964355</i>
<i>Total till March 31, 2013</i>	<i>– ₹138016255</i>
<i>Less: Held for maturity for next one year</i>	<i>– ₹ 18954170 (Under Current Liabilities)</i>
<i>Shown under Long Term Borrowings</i>	<i>– ₹119062855</i>

- ii. *We have issued our report dated 19/06/2012, in which point No. 19 of (Audited Report) went wrong. ...We have rectified report...*
- iii. *The Authorised Capital of the company was ₹1,00,00,000 (increased vide Form 5 submitted on 29/02/2012) and Issued Capital was ₹28,50,000. The error seems to be clerical."*

8.1 Vide another letter dated August 30, 2013, SEBI also sought clarifications from Neha Kedia (Company Secretary for GLAIL), regarding the following as observed from the *Compliance Certificate* for the year ended March 31, 2013, viz. –

- i. As per point no. 19, the company has not issued any securities during the year. However, as per Audited Balance Sheet for the year ended March 31, 2012, it was noticed that the company had issued debentures for ₹11,90,62,085.
- ii. As per point no. 21, there was no redemption of preference shares or debentures during the financial year. But as per the Audited Balance Sheet for the year ended March 31, 2012, it was noticed that there was redemption of debentures in the same year for an amount of ₹2,50,16,855.

8.2 In her reply dated September 11, 2013, Neha Kedia *inter alia* submitted as follows –

- i. *"Due to lack of precision in the interpretation of the definition of 'securities', the Issue of Secured Debentures on private placement by GLAIL which are basically Debt Instrument and shown under the head Long Term Borrowings in the Balance Sheet of the Company was inadvertently not covered in the Point no. 19 of the Compliance Certificate. ...*
- ii. *Further, with respect to point no. 21 of the Compliance Certificate, I regret to inform you that while preparing the Compliance Certificate, due to oversight reference was only made from the Balance Sheet of the company which on prima facie showed an increase of ₹7,80,03,330 under the head Long Term Borrowings and the relevant schedules were inadvertently not provided to me by the Management. It is pertinent to note that the Compliance Certificate was put as document for inspection in the General Meeting of the company, however, none of the member of the company who were having the complete knowledge of the financial transaction didn't noticed the mistake too and the same was filed with ROC by the company. I would like to submit that the mistake was totally unintentional and was not done with any mala fide intentions ..."*

9.1 Pursuant to submission of 'Examination Report' to the Kolkata High Court and upon receipt of the abovementioned replies from CK Jain and Neha Kedia, SEBI, vide letter dated October 25, 2013, sought clarification and also advised GLAIL to submit rectified copies of Annual Account and Annual Report of the company for the year ended March 31, 2012 and also the annual account for the year 2012–13, in view of *inter alia* the following –

*"Auditor's report for the year 2011 – 2012, auditor has certified that **the company has not issued any debentures during the year.** As per the Audited Balance Sheet of your company for the year 2011-2012, it was noticed that the company had issued debentures for ₹11,90,62,085. It is observed that such issuance on more than once occasion to more than 49 persons without following SEBI*

Regulations and without filing any offer document with SEBI, prima facie, is in contravention of SEBI Act, 1992 and Regulations made thereunder.

*... Page 34 of the report for the same year; practicing company secretary has certified that **there was no redemption of preference shares or debentures during the financial year.** But as per Audited Balance Sheet for the year 2011-2012, there is a redemption of debentures in the same year for an amount of ₹2,50,16,855.*

... we had taken up the matter with your auditor as well as the company secretary ... it was replied by your auditor that the company did issue debentures in the year 2011 – 12 for an amount of ₹12,19,64,355 and confirmed that they had already submitted the rectified report to the management. ... However it is noticed that you had not filed the rectified report through your advocate on August 6, 2013, although the same was available with you ...

Further, as per debenture details given by you, it was observed that the company has also issued debentures in the year 2009 – 2010 for an amount of ₹5000 but as per the submissions made by you and MCA portal, date of incorporation of the company is September 15, 2010. If that be so, please clarify as to how the company has issued debentures prior to its incorporation."

- 9.2 A copy of the abovementioned letter dated October 25, 2013, which was returned to SEBI as undelivered, was subsequently forwarded to the Shri T Talukder on November 22, 2013, the advocate representing GLAIL, in accordance with the request made by him vide letter dated October 28, 2013. However, GLAIL (through its advocate) did not respond to the abovementioned letter.
10. Thereafter, SEBI issued a public advisory in several leading national and regional newspapers on November 27, 2013, cautioning investors against the illegal mobilization of funds by GLAIL.
11. In response to the abovementioned public advisory issued by SEBI, GLAIL vide letter dated December 27, 2013, while stating that it had instructed its Advocate to challenge the Order of the Hon'ble Kolkata High Court dated September 2, 2013 [*W. P. No. 16338 (W) of 2013*], *inter alia* requested SEBI to not make any such further publication.
- 12.1 SEBI vide letter dated January 10, 2014, while acknowledging the receipt of GLAIL's letter dated December 27, 2013, advised it to submit the following information, viz. –
- i. Certified copies of Balance Sheet, P&L and Cash Flow Statement of the company for the last three years i.e. 2010–11, 2011–12 & 2012–13;

ii. Details of all the movable and immovable assets of GLAIL.

12.2 A copy of the abovementioned letter dated January 10, 2014, which was returned to SEBI as undelivered, was subsequently forwarded to the Shri B. N. Muni on February 10, 2014, the new advocate representing GLAIL, in accordance with the request made by that company vide letter dated December 27, 2013. However, GLAIL (through its advocate) has not responded to the abovementioned letter.

13.1 The material available on record i.e. correspondences exchanged between SEBI and GLAIL alongwith the documents contained therein; information obtained from the 'MCA 21 Portal'; 'Examination Report' submitted to the Kolkata High Court; replies received from CK Jain and Neha Kedia, have been perused. On an examination of the same, it is *prima facie* observed that –

- i. GLAIL was incorporated on September 15, 2010, with the ROC, Kolkata, West Bengal with CIN No. as U01403WB2010PLC153027, having its registered Office address (as observed from the 'MCA 21 Portal') at 35, Upendra Nath Mitra Lane, Salkia, Howrah, West Bengal–711106. The Directors in GLAIL are Shri Tipu Sultan, Shri Biswanath Mondal, Shri Subhas Sarkar, Shri Nirjal Pal, Shri Swapan Sadhukhan, Shri Chandan Debnath and Shri Uttam Chakraborty.
- ii. GLAIL invited subscription for "Non-Convertible Redeemable Secured Debentures of ₹2546 Lakhs" ("**Offer of NCDs**"), in accordance with the following schemes, viz. -

Scheme – I Multiplier Non-Convertible Redeemable Secured Debenture				
Plan	A			
No. of Debentures	36	48	36	60
Issue Price	3600/-	4800/-	3600/-	6000/-
Redemption Value	4230/-	6315/-	5238/-	10410/-
Redemption Period	15 Months + 1 Day	27 Months + 1 Day	39 Months + 1 Day	63 Months + 1 Day

Scheme – II Multiplier Non-Convertible Redeemable Secured Debenture

Plan	B		C		D	
Issue Price	1000	1000	1000	1000	1000	1000
Redemption Value	1500/-	2000/-	3000/-	6000/-	10000/-	14000/-
Redemption Period	3 Years	4.5 Years	7 Years	10 Years	12 Years	15 Years

Scheme – II Multiplier Non-Convertible Redeemable Secured Debenture Minimum Amount Acceptable of ₹50000/- Dividend Payable Monthly				
Plan	E			
Redemption Period	1 Year + 1 Day	3 Years	5 Years	10 Years
Rate of Dividend	12%	13%	14%	15%

N.B. Maturity Bonus 5 Years = 1.5%, 10 Years = 2% (Only Plan E)

- iii. The "Offer of NCDs" is made on a private placement basis and cannot be accepted by any person other than to whom it is offered. The application under the "Offer of NCDs" can be made for a minimum amount of ₹100 and in multiples of ₹1000 thereafter.
- iv. From the information submitted by GLAIL to SEBI, it is observed that it had issued *Non-Convertible Redeemable Secured Debentures* on several occasions since incorporation, to a large number of investors, details of which are reproduced below –

Year	Type of Security	No. of subscribers to the Issue	Total Amount (₹ in Crores)
2009 – 10	Non – Convertible Redeemable Secured Debenture	1	0.0005
2010 – 11	Non – Convertible Redeemable Secured Debenture	4998	2.31
2011 – 12	Non – Convertible Redeemable Secured Debenture	19904	8.91
2012 – 13	Non – Convertible Redeemable Secured Debenture	12	0.0855
Total		24915	Approximately 11.30

- v. However, from the provisional balance sheet of GLAIL for the year 2012–13 (*as submitted in W. P. No. 16338 (W) of 2013*), the *Debentures* issued by that company was ₹22.50 Crores and the application money received on such *Debentures* was ₹7.70 Crores.

13.2 In the context of the abovementioned details of the "*Offer of NCDs*", the issue for determination in the instant matter is whether the mobilization of funds by GLAIL through the aforesaid Offer, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**") read with the SEBI (Issue and Listing of Debt Securities), Regulations, 2008 ("**Debt Securities Regulations**"); the Companies Act, 1956 read with the Companies Act, 2013.

13.3 I note that the jurisdiction of SEBI over various provisions of the Companies Act in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in ***Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (Civil Appeal no. 9813 of 2011) (Judgment dated August 31, 2012)*** (hereinafter referred to as the "***Sahara Case***"), had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

13.4 In this regard –

- i. Reference is also made to Sections 67(1) and 67(3) of the Companies Act, 1956, which are reproduced as under:

"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) ...

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

*(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation
...*

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

Provided further that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”

- ii. While examining the scope of Section 67 of the Companies Act, 1956, the Hon'ble Supreme Court of India in the *Sahara Case* observed that:

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/ invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ...

Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. ...

I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. ..."

- iii. In the instant matter, for ascertaining whether the "*Offer of NCDs*" is a public issue or an issue on private placement basis in accordance with Section 67 of the Companies Act, 1956, the no. of subscribers is of utmost importance. In the facts of the instant case, it is observed that although the "*Offer of NCDs*" is stated to have been made on a private placement basis, yet, through the same offer, GLAIL approached 24915 investors and mobilized funds amounting to approximately ₹11.30 Crores. The aforesaid facts clearly indicate that the number of persons to whom the "*Offer of NCDs*" was made by GLAIL was 24915 and hence, above the prescribed limit of forty-nine persons under Section 67 of the Companies Act. In addition, GLAIL is not stated to be a non-banking financial company or a public financial institution within the meaning of Section 4A of the Companies Act and therefore, is not covered under the *second proviso* to Section 67(3). In view of the aforesaid, the "*Offer of NCDs*" would *prima facie* qualify as a public issue under the first proviso to Section 67(3) of the Companies Act, 1956, which has been elucidated by the Hon'ble Supreme Court of India in the *Sahara Case*. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall also be administered by SEBI in the case of companies who intend to get their securities listed.

13.5 I note that –

- i. From the abovementioned, it will follow that since the "*Offer of NCDs*" is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under Section 73 of the Companies Act, 1956. In this regard, reference is made to Sections 73 of the Companies Act, 1956, of which sub-Sections (1), (2) and (3) are relevant for the instant case, which is reproduced as under:

"73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) ...

(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, 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, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 1 [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2)]; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees."

- ii. In the *Sahara Case*, the Hon'ble Supreme Court of India also examined Section 73 of the Companies Act, 1956, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons."

- iii. In the facts of the instant case, since the "Offer of NCDs" was made to fifty persons or more by GLAIL, the same will attract the requirement of compulsory listing before a recognized stock exchange in terms of Section 73(1) of the Companies Act,

1956. It therefore *prima facie* appears that GLAIL has violated the provisions of Section 73(1) of the Companies Act, 1956, since it has failed to ensure listing with a recognised stock exchange of the securities issued under the "*Offer of NCDs*".

- iv. As per Section 73(2) of the Companies Act, 1956, the obligation to refund the amount with interest that was collected from investors under the "*Offer of NCDs*" is mandatory on GLAIL. From the provisional balance sheet of GLAIL for the year 2012–13 (*as submitted in W. P. No. 16338 (W) of 2013*), the application money received on the *Debentures* was ₹7.70 Crores. In this regard, there is no evidence on record to indicate whether or not GLAIL has paid interest to the investors where such *Debentures* are not allotted within 8 days under the "*Offer of NCDs*", as per the aforesaid Section. In view of the same, I find that GLAIL has *prima facie* not complied with the provisions of Section 73(2) of the Companies Act, 1956.
- v. Section 73(3) of Companies Act, 1956, says that all moneys received shall be kept in a separate bank account maintained with a Scheduled Bank and if default is made in complying with this sub-Section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees. In the instant case, there is no evidence on record to indicate whether or not funds received from the investors under the "*Offer of NCDs*" has been kept in separate bank account by GLAIL. In view of the same, I find that GLAIL has *prima facie* not complied with the provisions of Section 73(3) of Companies Act, 1956.

- 13.6 Under Section 2(36) read with Section 60 of the Companies Act, 1956, a company needs to register its prospectus with the ROC, before making a public offer or issuing the prospectus. As per the aforesaid Section 2(36), "*prospectus*" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. As mentioned above, since the "*Offer of NCDs*" was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, GLAIL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. In this regard, GLAIL in its reply dated August 6, 2013 (through Shri T Talukder), submitted: "*Copy of Prospectus – No copy filed with ROC as the issue of debenture is on Private Placement*". In

view of the same, I find that GLAIL has not complied with the provisions of Section 60 of Companies Act, 1956.

- 13.7 Under Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by abridged prospectus, contain disclosures as specified. Based on the material available on record, I find that GLAIL has not complied with the provisions of Section 56(1) and 56(3) of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.
- 13.8 Under Section 117B of the Companies Act, 1956, no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless it has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. Further, under Section 117C of the aforesaid Act, where a company issues debentures, it shall create a debenture redemption reserve for the redemption of such debentures, to which adequate amounts shall be credited, from out of its profits every year until such debentures are redeemed. Based on the material available on record, I find that GSHP has not complied with the provisions of Sections 117B–C of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.
- 13.9 It may be mentioned that as per Section 465(1) of the Companies Act, 2013, the Companies Act, 1956, "*shall stand repealed*". However, Section 465(2)(i) of the Companies Act, 2013, provides that:

"(2)Notwithstanding the repeal under sub-section (1) of the repealed enactments, -

(a) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;"

13.10 In addition to the above, reference may be made to the Debt Securities Regulations, which were framed by SEBI in exercise of its powers under Section 30 of the SEBI Act and are applicable to the public issue and listing of debt securities. It may be relevant to note that under the aforesaid Regulations, '*debt securities*' have been defined as '*non-convertible debt securities which create or acknowledge indebtedness, and include debenture...*' In this context, I find that GLAIL, through the "*Offer of NCDs*", which is a public issue of debt securities, has *prima facie* violated the following provisions of the aforesaid Regulations, which contain *inter alia* conditions for public issue and listing of debt securities, viz.

- i. Regulation 4(2)(a) – *Application for listing of debt securities*
- ii. Regulation 4(2)(b) – *In-principle approval for listing of debt securities*
- iii. Regulation 4(2)(c) – *Credit rating has been obtained*
- iv. Regulation 4(2)(d) – *Dematerialization of debt securities*
- v. Regulation 4(4) – *Appointment of Debenture Trustee*
- vi. Regulation 5(2)(b) – *Disclosure requirements in the Offer Document*
- vii. Regulation 6 – *Filing of draft Offer Document*
- viii. Regulation 7 – *Mode of disclosure of Offer Document*
- ix. Regulation 8 – *Advertisements for Public Issues*
- x. Regulation 9 – *Abridged Prospectus and application forms*
- xi. Regulation 12 – *Minimum subscription*
- xii. Regulation 14 – *Prohibition of mis-statements in the Offer Document*
- xiii. Regulation 15 – *Trust Deed*
- xiv. Regulation 16 – *Debenture Redemption Reserve*
- xv. Regulation 17 – *Creation of security*
- xvi. Regulation 19 – *Mandatory Listing*
- xvii. Regulation 26 – *Obligations of the Issuer, etc.*

13.11 Upon a consideration of the aforementioned paragraphs, I am of the view that GLAIL is *prima facie* engaged in fund mobilising activity from the public, through the "*Offer of NCDs*" and a result of the aforesaid activity has violated the aforementioned provisions of the Companies Act, 1956 (Section 56, Section 60 read with Section 2(36), Section 73, Section 117B, Section 117C) read with Companies Act, 2013 and the Debt Securities Regulations.

- 13.12 SEBI advised GLAIL to provide clarification and submit rectified copies of Annual Account and Annual Report of the company for the year ended March 31, 2012; Annual account for the year 2012–13; Certified copies of Balance Sheet, P&L and Cash Flow Statement of the company for the last three years i.e. 2010–11, 2011–12 & 2012–13 and details of all the movable and immovable assets of GLAIL (sought vide SEBI letter dated October 25, 2013 towards the preliminary examination conducted by SEBI in respect of the "*Offer of NCDs*" and also SEBI letter dated January 10, 2014). I note that GLAIL failed to provide the aforesaid information. I note that even after having *prima facie* mobilized funds from investors, GLAIL did not provide relevant details pertaining to the "*Offer of NCDs*" to SEBI. I find it impossible to believe that GLAIL did not have such information to furnish to SEBI especially since the "*Offer of NCDs*" was claimed to have been made on a private placement basis i.e. *only to intended subscribers without any right to pass on the offer to any other person to whom the offer was not made directly*. In addition, I note that GLAIL submitted incomplete and contradictory information in respect of the "*Offer of NCDs*" for the period 2012–13, wherein while submitting to SEBI that the amount raised during the period was ₹0.0855 Crores, it was however, observed from the provisional balance sheet for that financial year (*as submitted by GLAIL in W. P. No. 16338 (W) of 2013*), that the *Debentures* issued by that company was ₹22.50 Crores and the application money received on such *Debentures* was ₹7.70 Crores. I also find a total absence of information regarding the "*Offer of NCDs*" in the public domain which, when coupled with GLAIL's reluctance to furnish relevant and complete information, clearly indicates a lack of transparency on its part. In these circumstances, I find it is essential to determine how GLAIL mobilized funds running into several Crores of rupees without conforming to statutory norms governing public issues. I find that more than a reasonable opportunity has been afforded to GLAIL to respond to SEBI and its refusal do so, when considered in light of the abovementioned *prima facie* finding at paragraphs 13.1–13.11, leads me to believe that such refusal to submit the information sought was only to conceal the true nature and operation of the fund mobilising activity by way of the "*Offer of NCDs*".
14. SEBI's powers under Sections 11, 11A, 11B and 11(4) of the SEBI Act, as interpreted by judicial authority, are not fettered by any other law including the Companies Act and in view of the provisions of Section 55A of the Companies Act, 1956 read with Section 465 of the Companies Act, 2013, administrative authority on the subjects relating to public issue of securities is exclusively with SEBI. For this purpose, SEBI can exercise its

jurisdiction under Sections 11(1), 11A, 11B and 11(4) of the SEBI Act read with Section 55A of the Companies Act, 1956 and Section 465 of the Companies Act, 2013, over companies who issue *Non-Convertible Redeemable Secured Debentures* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Acts and the Debt Securities Regulations (as mentioned in paragraphs 13.1–13.11 above).

- 15.1 From information obtained by SEBI from the *MCA 21 Portal* and BSE website, it is observed that GLAIL appointed "*Smt. Jyotsna Sadhukhan ... by occupation Business*" and "*Smt. Jharna Sarkar ... by occupation Housewife*" as Debenture Trustees for the issue of NCDs by that company. The aforesaid appointment was approved vide a resolution passed in the Extra Ordinary General Meeting of the Board of Directors of GLAIL held on December 10, 2010. Further, it is observed that a Deed of Trust was executed between GLAIL and Smt. Jyotsna Sadhukhan alongwith Smt. Jharna Sarkar on December 21, 2010.
- 15.2 Section 12(1) of the SEBI Act states that: "*No... trustee of trust deed ... shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act*". Further, Regulation 7 of SEBI (Debenture Trustees) Regulations, 1993 ("**Debenture Trustees Regulations**"), provides that: "*no person should act as a debenture trustee unless he is either –*
- i. a scheduled bank carrying on commercial activity; or*
 - ii. a public financial institution within the meaning of section 4A of the Companies Act, 1956; or*
 - iii. an insurance company; or*
 - iv. body corporate."*
- 15.3 Based on the material available on record, I find that Smt. Jyotsna Sadhukhan alongwith Smt. Jharna Sarkar have *prima facie* failed to meet the eligibility criteria specified under the provisions of the Debenture Trustees Regulations and therefore, have acted as unregistered Debenture Trustees, which is a violation of the provisions of the SEBI Act read with the Debenture Trustee Regulations.
16. Protecting the interest of investors is the foremost mandate for SEBI and therefore, steps have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by GLAIL and no investors are defrauded. In light of the same, I

find there is no other alternative but to take recourse through an interim action against GLAIL and its Directors alongwith its Debenture Trustees, viz. Smt. Jyotsna Sadhukhan and Smt. Jharna Sarkar, for preventing that company from further carrying on with its fund mobilising activity under the "*Offer of NCDs*".

17. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4), 11A and 11B of the SEBI Act read with the Debt Securities Regulations and the Debenture Trustee Regulations, hereby issue the following directions –
- i. GLAIL shall not mobilize funds from investors through the issue of *Non-Convertible Redeemable Secured Debentures* or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;
 - ii. GLAIL and its Directors, viz. Shri Tipu Sultan, Shri Biswanath Mondal, Shri Subhas Sarkar, Shri Nirjal Pal, Shri Swapan Sadhukhan, Shri Chandan Debnath and Shri Uttam Chakraborty, 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, till further orders;
 - iii. GLAIL and its abovementioned Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the issue of *Non-Convertible Redeemable Secured Debentures*, without prior permission from SEBI, in consonance with the Order of the Hon'ble Kolkata High Court passed on September 2, 2013 in *W. P. No. 16338(W) of 2013*;
 - iv. GLAIL and its abovementioned Directors shall not divert any funds raised from public at large through the issue of *Non-Convertible Redeemable Secured Debentures*, which are kept in bank account(s) and/or in the custody of GLAIL;
 - v. Smt. Jyotsna Sadhukhan and Smt. Jharna Sarkar are prohibited from continuing with their present assignment as debenture trustees in respect of the issue of *Non-Convertible Redeemable Secured Debentures* of GLAIL and also from taking up any new assignment or involvement in any new issue of debentures, etc. in a similar capacity, from the date of this order till further directions.
18. The above directions shall take effect immediately and shall be in force until further orders.

19. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. correspondences exchanged between SEBI and GLAIL alongwith the documents contained therein; information obtained from the 'MCA 21 Portal'; 'Examination Report' submitted to the Kolkata High Court; replies received from CK Jain and Neha Kedia. In this context, GLAIL and its abovementioned Directors; its Debenture Trustees, viz. Smt. Jyotsna Sadhukhan and Smt. Jharna Sarkar may, within 21 days from the date of receipt of this Order, file their reply, if any, to this Order and may also indicate whether they desire to avail themselves an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.
20. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against GLAIL and its abovementioned Directors; its Debenture Trustees, viz. Smt. Jyotsna Sadhukhan and Smt. Jharna Sarkar, in accordance with law.

Place: Mumbai
Date: May 15, 2014

S. RAMAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA