

**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, against Aspen Projects India Limited and its Directors, viz. Shri Abhijit Dasgupta, Shri Bhaskar Saha, Shri Ashim Maitra, Shri Ujjal Kumar Roy, Shri Avijit Kumar Ganguly, Shri Debopam Sur and Shri Goutam Sarkar; its Debenture Trustees, viz. Shri Ram Sunder Bhattacharya and Smt. Mita Roy.

1. Securities and Exchange Board of India ("**SEBI**") vide letter dated February 27, 2013, as addressed to the Chairman and Managing Director, Aspen Group, while stating: *"It has come to our notice that one of your group companies, namely, Aspen Projects India Ltd. ("**APIL**") has raised funds from the public by issuing Debentures and Preference Shares. We also note that the company has also accepted advance against purchase of products, land, etc."*, advised that entity to furnish *inter alia* the following information in respect of issue of Preference Shares and Debentures, etc. by all companies of the Aspen Group including APIL, within fifteen days from the date of receipt of the aforesaid letter, viz. –
 - i. Copy of the Memorandum and Articles of Association of the company(s);
 - ii. Audited Balance Sheet and Profit & Loss Account of the company(s) for the last 3 years;
 - iii. Name, addresses and occupation of all the promoters/directors of the company(s);
 - iv. Names and details of the Key Managerial Personnel of the company(s);
 - v. Information in respect of issue of Preference shares and Debentures by all the companies of Aspen group including APIL, viz. –
 - a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with Registrar of Companies ("**ROC**") for issuance of debentures/preference shares;
 - b. Date of opening and closing of the subscription list for debentures/preference shares;
 - c. Details regarding the number of application forms circulated inviting subscription for debentures/preference shares;

- d. Details regarding the number of applications received;
 - e. Details regarding the number of allottees and list of such allottees;
 - f. Number of debentures/preference shares allotted and value of such allotment against each allottee's name.
 - g. Details regarding subscription amount raised;
 - h. Date of allotment of debentures/preference shares;
 - i. Copies of the minutes of Board/Committee meeting in which the resolution was passed for allotment;
 - j. Date of dispatch of debentures/preference shares certificates;
 - k. Details of the total number of applicants for each of APIL's scheme besides the list of final allottees;
 - l. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of debentures/preference shares.
 - m. Terms and conditions of the issue of debentures/preference shares.
- vi. Information in respect of schemes like Advance from customers against product and land purchase, etc. launched by all the companies of Aspen group including APIL, viz.
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- a. A statement of mobilization and deployment of funds under various schemes duly certified by the Statutory Auditors of the company(s);
 - b. Terms and conditions of the schemes launched;
 - c. Structure of the Plans/Schemes;
 - d. Details of the scheme(s) wise amount mobilized till date alongwith the number of investors under the scheme(s);
 - e. Promises or assurances or assured returns made in the scheme(s);
 - f. Copies of offer documents, application form, pamphlets, brochures of the scheme(s) launched;
 - g. Sample copies of the registration letter and allotment letter issued to the investors who subscribed to the scheme(s);
 - h. Sample copies of the agreement letter/contract required to be entered into by investor/applicant under the scheme(s);
 - i. Options available with the investor if he does not want to hold his investment till maturity;
 - j. Whether any instrument is issued to the investors after receipt of fund?
 - k. If such instruments are issued, whether they are transferable?

1. In case of the scheme(s) pertaining to booking/purchase of goods/properties, please specify the options available with the investors if he does not want to possess the good/property after payment of initial amount?

2. APIL replied to SEBI vide letter dated March 13, 2013, wherein while enclosing the Memorandum and Articles of Association, list of present Directors, it *inter alia* submitted:
 - i. "... APIL primarily carries on business in tea, exports and horticulture and is a closely held unlisted public company.
 - ii. ... as far back as in 2009 pursuant to a query made by APIL it was made clear by yourselves by a letter dated 14th December 2009 that provisions of the SEBI Act is not applicable in case of private placement of debentures and preference shares and no permission is required from SEBI...
 - iii. ... we deny that there is any group company or that APIL is a part of Aspen group. We reiterate that we have not raised funds from the public by issuing debentures or preference shares. The debentures and preference shares issued have been on private placement basis to a service provider.
 - iv. ... we have not made any public placement of debentures or preference shares and therefore there is no question of any prospectus being issued or filed with Registrar of Companies. There is no application circulated inviting subscriptions from members of public for debentures or preference shares. The company has secured debentures and preference shareholders which (are) being done by way of private placement.
 - v. APIL denies that (it) has launched any scheme to take advance from customers against products or for land purchases. Therefore, there are no details to provide. ...
 - vi. (APIL has) not floated any scheme as alleged ... and (APIL does) not come within the purview of SEBI (Collective Investment Scheme) Regulations, 1999."

3. Thereafter, SEBI vide letter dated April 16, 2013, advised APIL to submit *inter alia* the following information, viz. –
 - i. Audited Balance Sheet and Profit & Loss Account of the company(s) for the last 3 years;
 - ii. Names and details of the Key Managerial Personnel of the company(s);
 - iii. Information in respect of schemes like Advance against product purchase, Advance from customer–land, etc. launched by APIL.

4. Vide letter dated April 20, 2013, APIL requested SEBI to grant an extension of four weeks to submit the documents sought vide the abovementioned SEBI letter dated April 16, 2013. Vide letter dated April 26, 2013, while reiterating the request for information (sought vide the letter dated April 16, 2013), SEBI advised APIL to submit the same by May 6, 2013, failing which SEBI would be constrained to initiate appropriate enforcement action.
5. APIL replied to SEBI vide letter dated May 6, 2013, wherein while enclosing Copy of Memorandum and Articles of Association, Audited Balance Sheet and Profit & Loss Account for the last 3 years, Names and addresses, etc. of Promoters/Directors, Board's Resolution for Private Placement Issue of Secured Redeemable Debentures, it *inter alia* submitted –
- i. *"... We have no prospectus/Red Herring Prospectus and/or statement in lieu of Prospectus. For issuance of debentures, we have created charge into ROC, Kolkata and filed Form No. 10 and extract from the minutes of the E.G.M. of the Board of Directors held on 9th December, 2009 that was filed with the ROC is annexed...*
 - ii. *That date of opening of the Subscription List for the debentures in APIL is 15th December, 2009. As it is a Private Placement Issue for ₹ 14.96 Crores, there is no closing date. From the Debenture Form, it would appear that the rate of interest is slightly more than the interest that is paid by nationalized banks.*
 - iii. *The Secured Redeemable Debentures of ₹ 14.96 Crores was by way of Private Placement to a co-operative society. The company did not issue debenture of ₹ 14.96 Crores but issued debentures of ₹ 14.90 Crores. ...*
 - iv. *We had also undertaken a project in respect of a land for which we have been receiving booking for a sum of ₹ 61.59 Lakhs from different persons interested in purchasing of the plot of land.*
 - v. *... we raised a sum of ₹ 61.59 Lakhs in our scheme against land purchase during the period 2009–2010. The said land purchase scheme has been closed in the year 2010–2011 and the entire amount of ₹ 61.59 Lakhs together with interest payable to any person who participated in such product purchase scheme have been paid. The company is now developing its own projects on the said land out of its resources.*
 - vi. *The company has substantial business in tea trading and has turnover in excess of ₹ 12 Crores. The company always maintains a stock of bulk tea for future trading. The company has a product purchase scheme for tea and persons who have participated in such product purchase scheme have the option of receiving packaged tea or could exercise option to exit the scheme.*

- vii. *... under the Product Purchase Scheme, if an investor does not want to hold his investment till maturity, he is paid the principal amount invested by him together with interest @ 8% per annum as on the date of payment. In fact, twenty numbers of persons investing moneys in the Product Purchase Scheme did not want to hold their investments till its respective maturity. No persons participated in Product Purchase Scheme has any complaint and/or has been denied his dues as per the terms and conditions contained in the brochure of the Product Purchase Scheme."*
6. Subsequently, SEBI, vide letter dated October 28, 2013, advised APIL to submit the following additional information in respect of issue of Preference shares and Debentures, by November 4, 2013, viz. –
- i. Copy of audited annual accounts for the year ended March 31, 2013.
 - ii. Copy of Form – 2, filed with ROC as per Section 75 of the Companies Act, 1956, in relation to issuance of shares over the period of time since inception.
 - iii. Copy of Form – 10, filed with ROC as per Section 125 of the Companies Act, 1956, in relation to charge for the purpose of securing any issue of debentures.
 - iv. Whether Debenture Trustees has been appointed? If so, details thereof.
 - v. Whether Debenture Redemption Reserve (DRR) has been created and whether any transfers from Profit & Loss has been made to the said DRR. If so, please provide the details thereof.
 - vi. Copy of Annual Return (alongwith all the attachments) filed with ROC for the last 3 years.
 - vii. Year-wise details regarding the number of allottees and list of such allottees for preference shares as well as debentures.
7. APIL replied to the abovementioned SEBI letter dated October 28, 2013, vide its letter dated November 9, 2013, wherein it requested for a month's time to provide all the required information. However, till date, APIL has not responded to the aforementioned SEBI letter.
- 8.1 The material available on record i.e. correspondences exchanged between SEBI and APIL alongwith the documents contained therein, information obtained from the 'MCA 21 Portal', have been perused. On an examination of the same, it is observed that –

- i. APIL was incorporated on March 9, 2009, with the ROC, Kolkata, West Bengal with CIN No. as U45400WB2009PLC133653, having its Office at 16/7/2B, Keyatala Road, Kolkata – 700029, West Bengal, India.
- ii. The Directors in APIL are Shri Abhijit Dasgupta (DIN 02475280), Shri Bhaskar Saha (DIN 02531517), Shri Ashim Maitra (DIN 02532064), Shri Ujjal Kumar Roy (DIN 02555033), Shri Avijit Kumar Ganguly (DIN 02575466), Shri Debopam Sur (DIN 03079702) and Shri Goutam Sarkar (DIN 03356712).
- iii. From the information submitted by APIL to SEBI, it is observed that it issued *Secured Redeemable Debentures* since incorporation, details of which are reproduced below –

Year	Type of Security	Total Amount (₹ in Crores)
2009 – 10	Secured Redeemable Debentures	1.33
2010 – 11	Secured Redeemable Debentures	7.30
2011 – 12	Secured Redeemable Debentures	6.27
Total		14.90

- iv. In addition to the above, APIL also issued preference shares, details of which are reproduced below –

Year	Type of Security	No. of Subscribers to the Issue	Total Amount (₹ in Crores)
2010 – 11	Preference Shares	222	0.304
2011 – 12	Preference Shares	309	0.457
Total		531	0.761

8.2 In the context of the abovementioned details, the issue for determination in the instant matter is whether the mobilization of funds by APIL through the *issuance of Secured Redeemable Debentures* or the *issuance of Preference Shares*, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"); the Companies Act, 1956 read with the Companies

Act, 2013 and in respect of *issuance of Secured Redeemable Debentures* only, the SEBI (Issue and Listing of Debt Securities), Regulations, 2008 ("**Debt Securities Regulations**").

- 8.3 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."

- 8.4 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. For ascertaining whether the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* are individually a public issue or an issue on private placement basis in accordance with Section 67 of the Companies Act, 1956, the

number of subscribers is of utmost importance. In the facts of the instant case, it is observed that APIL (through its replies to SEBI made vide letters dated March 13, 2013 and May 6, 2013), has merely submitted that "... *we have not made any public placement of debentures or preference shares ... The Secured Redeemable Debentures of ₹14.96 Crores was by way of Private Placement to a co-operative society.*"

- iv. However, through the *issuance of Preference Shares*, APIL has mobilized an amount of ₹0.761 Crores from 531 subscribers/investors. The aforesaid clearly indicates that the number of persons to whom the *issuance of Preference Shares* was made by APIL was way beyond the prescribed limit of forty-nine persons. In addition to the aforesaid, APIL has mobilized an amount of ₹14.90 Crores through the *issuance of Secured Redeemable Debentures*. The quantum of fund mobilization by APIL through the aforementioned *issuance of Secured Redeemable Debentures* when considered in light of APIL's refusal to submit relevant information to SEBI regarding such issuance (till date, APIL has not responded to the SEBI letter October 28, 2013, wherein information was sought in respect of *issuance of Secured Redeemable Debentures*), *prima facie* leads me to draw an adverse but eminently reasonable inference that the number of persons to whom it was made was also way beyond the prescribed limit of forty-nine persons.
- v. APIL 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).
- vi. In view of the above stated facts, the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* when considered individually *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.

8.5 I note that –

- i. From the abovementioned, it will follow that since the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* are each 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 *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* were each made to fifty persons or more by APIL, 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 APIL 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 *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares*.
- 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 *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* is mandatory on APIL. In this regard, there is no evidence on record to indicate whether or not APIL has paid interest to the investors where such *Debentures/Preference* were not allotted within 8 days under the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares*, as per the aforesaid Section. In view of the same, I find that APIL 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 monies 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 *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* have been kept in separate bank account by

APIL. In view of the same, I find that APIL has *prima facie* not complied with the provisions of Section 73(3) of Companies Act, 1956.

- 8.6 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 *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, APIL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. In this regard, APIL in its letter dated May 6, 2013, submitted: "*We have no prospectus/ Red Herring Prospectus and/or statement in lieu of Prospectus.*" In view of the same, I find that APIL has not complied with the provisions of Section 60 of Companies Act, 1956.
- 8.7 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 APIL 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.
- 8.8 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 APIL has not complied

with the provisions of Sections 117B–C of the Companies Act, 1956, in respect of the *issuance of Secured Redeemable Debentures* and therefore, has *prima facie* violated the aforesaid provisions.

- 8.9 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;"

- 8.10 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 APIL, through the *issuance of Secured Redeemable Debentures*, 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) – *Requirement of Credit rating*
- 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(1) – *Debenture Redemption Reserve*
- xv. Regulation 17 – *Creation of security*
- xvi. Regulation 19 – *Mandatory Listing*
- xvii. Regulation 26 – *Obligations of the Issuer, etc.*

8.11 In addition to the above, the following may also be noted in respect of the *issuance of Secured Redeemable Debentures* made by APIL –

- i. Form 10 (filed by APIL with the ROC in accordance with the provisions of the Companies Act, 1956), reveals that APIL created Charge for an amount of ₹14.96 Crores on December 7, 2009, in respect of the *issuance of Secured Redeemable Debentures*. Further, the aforesaid document reveals that the debentures so issued, shall be secured by way of deposit of title deeds of immovable property with the Debenture Trustees. However, from the Balance Sheet for the year ending March 31, 2010 (as submitted by APIL), it is seen that the value of fixed assets including investments made by that company, was only ₹0.41 Crores. The aforesaid fact clearly indicates that Charge created by APIL to secure the *issuance of Secured Redeemable Debentures*, was not backed by sufficient assets.
- ii. From the Balance Sheet for the year ending March 31, 2012, it is observed that there was a significantly high Debt–Equity ratio i.e. 30:1. Such a high Debt–Equity ratio is prejudicial to the interest of the debenture holders and may significantly hamper the ability of the company to fulfill its obligation of redeeming the debentures on maturity.

8.12 Upon a consideration of the aforementioned paragraphs, I am of the view that APIL is *prima facie* engaged in fund mobilising activity from the public, through the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares* and as 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, Sections 117B–C) read with Section 465 of the Companies Act, 2013 and the Debt Securities Regulations.

9. SEBI has a statutory duty to protect the interest of investors in securities and promote the development of, and to regulate, the securities market. Section 11 of the SEBI Act has empowered it to take such measures as it deems fit for fulfilling its legislative mandate. Further, as per 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 *Secured Redeemable Debentures* and *Preference Shares* to fifty persons or more, but fail to comply with the applicable provisions of the aforesaid Companies Acts and the Debt Securities Regulations (in respect of the *issuance of Secured Redeemable Debentures* as mentioned in paragraphs 8.10–8.12 above).
- 10.1 From information obtained by SEBI from the *MCA 21 Portal*, it is observed that APIL appointed *Shri Ram Sunder Bhattacharya and Smt. Mita Roy* as Debenture Trustees for the *issuance of Secured Redeemable Debentures* by that company, which is also observed from the extracts of the Minutes of the Extra Ordinary General Meeting of the Board of Directors of that company held on December 9, 2009 (as submitted vide APIL's letter dated May 6, 2013).
- 10.2 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."*
- 10.3 Based on the material available on record, I find that *Shri Ram Sunder Bhattacharya and Smt. Mita Roy* 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.

11. 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 APIL and no investors are defrauded. In this context, I find that there is no other alternative but to take recourse through an interim action against APIL and its Directors alongwith its Debenture Trustees, viz. *Shri Ram Sunder Bhattacharya and Smt. Mita Roy*, for preventing that company from carrying on further with its fund mobilising activity under the *issuance of Secured Redeemable Debentures* alongwith the *issuance of Preference Shares*.
- 12.1 I note that SEBI is also examining the fund mobilizing activities of APIL through '*Advance against product purchase*' and '*Advance from customer-land*', for determining whether or not such schemes fall within the definition of '*Collective Investment Schemes*', as defined under the SEBI Act and SEBI (Collective Investment Schemes) Regulations, 1999 ("**CIS Regulations**").
- 12.2 From the Balance Sheet of APIL for the year ended March 31, 2011, it is observed that APIL mobilized funds amounting to ₹11.75 Crores under the head '*Advance against product purchase*', which increased to ₹22.67 Crores in the financial year 2011-12 and ₹0.61 Crores under the head '*Advance from customer – land*'. In that context, SEBI had requested APIL to provide information in respect of the aforesaid *Schemes* vide several letters dated February 27, 2013; April 16, 2013; April 26, 2013; December 3, 2013; January 31, 2014 and February 14, 2014.
- 12.3 In reply to the SEBI letter dated February 14, 2014, the Directors of APIL (through their advocate R. L. Gaggar) submitted:
 - i. "*As per the balance sheet ... the collection and/or payments on account of Land Scheme has been totally repaid to the satisfaction of such customer even for 2011-2012 financial year.*
 - ii. "*On that account and the above scheme, the total funds deposited and disbursed was around ₹61 Lakhs only.*
 - iii. "*No scheme or any continuation of such scheme is now operated. Since the same has been stopped and becomes non-operable after the financial year 2011-2012, which will reflect from our accounts.*"

- 12.4 Apart from the abovementioned submissions and those made vide letters dated March 13, 2013 (paragraph 2 above) and May 6, 2013 (paragraph 5 above), APIL failed to provide complete and relevant documentary information to SEBI in respect of its fund mobilizing activities through '*Advance against product purchase*' and '*Advance from customer-land*' (as sought vide SEBI letters February 27, 2013; April 16, 2013; April 26, 2013; December 3, 2013; January 31, 2014 and February 14, 2014). The information sought by SEBI through the aforesaid letters is essential for facilitating determination of whether or not such schemes launched by APIL are '*Collective Investment Schemes*' under the SEBI Act and CIS Regulations.
13. 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, CIS Regulations and the Debenture Trustee Regulations, hereby issue the following directions —
- i. APIL shall not mobilize any more funds from investors through the *issuance of Secured Redeemable Debentures* or the *issuance of Preference Shares* 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. APIL and its Directors, viz. Shri Abhijit Dasgupta, Shri Bhaskar Saha, Shri Ashim Maitra, Shri Ujjal Kumar Roy, Shri Avijit Kumar Ganguly, Shri Debopam Sur and Shri Goutam Sarkar, 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. APIL shall provide a full inventory of all its assets and properties;
 - iv. APIL 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 *issuance of Secured Redeemable Debentures* or the *issuance of Preference Shares*, without prior permission from SEBI;
 - v. APIL and its abovementioned Directors shall not divert any funds raised from public at large through the *issuance of Secured Redeemable Debentures* or the *issuance of Preference Shares*, which are kept in bank account(s) and/or in the custody of APIL;
 - vi. *Shri Ram Sunder Bhattacharya and Smt. Mita Roy* are prohibited from continuing with their present assignment as debenture trustees in respect of the *issuance of Secured*

Redeemable Debentures of APIL 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.

- vii. APIL and its abovementioned Directors shall provide all necessary and relevant information in respect of the schemes '*Advance against product purchase*' and '*Advance from customer-land*' (as sought vide SEBI letters dated February 27, 2013; April 16, 2013; April 26, 2013; December 3, 2013; January 31, 2014 and February 14, 2014) within 15 days from the date of receipt of this Order.
14. The above directions shall take effect immediately and shall be in force until further orders.
15. 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 APIL alongwith the documents contained therein, information obtained from the '*MCA 21 Portal*'. In this context, APIL and its abovementioned Directors; its Debenture Trustees, viz. *Shri Ram Sunder Bhattacharya and Smt. Mita Roy* 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.
16. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against APIL and its abovementioned Directors; its Debenture Trustees, viz. *Shri Ram Sunder Bhattacharya and Smt. Mita Roy*, in accordance with law.

Place: Mumbai
Date: June 5, 2014

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