

**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 Progress Cultivation Limited and its Directors, viz. Shri Souvik Mistry (DIN: 02566012), Shri Bikash Howlader (DIN: 02566016) and Shri Ajoy Das (DIN: 05221652).

1. Securities and Exchange Board of India ("**SEBI**") received a complaint dated March 14, 2014, from an investor alleging illegal mobilization of funds by Progress Cultivation Limited ("**PCL**").
- 2.1 Thereafter, SEBI vide letter dated April 8, 2014, advised PCL to furnish the following information within 15 days from the date of receipt of the aforesaid letter, viz. –
 - i. Copy of the Memorandum and Articles of Association of the company;
 - ii. Copy of Audited Annual Accounts of the company for the last 3 years;
 - iii. Name, addresses and occupation of all the promoters/directors of the company;
 - iv. Names and details of the Key Managerial Personnel of the company;
 - v. Other information in respect of every series of debentures/shares issued by the company, 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/shares;
 - b. Date of opening and closing of the subscription list;
 - c. Details regarding the number of application forms circulated inviting subscription;
 - d. Details regarding the number of applications received;
 - e. Details regarding the number of allottees and list of such allottees;
 - f. Number of debentures/shares allotted and value of such allotment against each allottee's name.
 - g. Details regarding subscription amount raised;

- h. Date of allotment of debentures/shares;
- i. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment;
- j. Date of dispatch of debenture/share Certificates;
- k. Details of the total number of applicants for each of PCL's scheme besides the list of final allottee;
- l. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of debenture/shares;
- m. Terms and conditions of the issue of debenture/shares.
- n. Whether the company has applied for listing of its securities with any of the stock exchanges?
- o. Copy of Form 2 and Form 10 filed with the ROC (alongwith all the attachments);
- p. Details of debenture trustee, etc.

2.2 PCL replied to SEBI vide letter dated April 24, 2014, wherein while seeking an extension of 25 working days for submission of the abovementioned information, it provided the following:

- a. Copy of the Memorandum and Articles of Association of the company.
- b. Copy of Audited Annual Accounts of the company for the last 3 years;
- c. Name, addresses and occupation of all the promoters/directors of the company.

2.3 Thereafter, vide letter dated June 6, 2014, PCL informed that: *"Our company has already submitted an application for settlement to SEBI, Mumbai pursuant to Regulation 3 of the Securities and Exchange Board of India (Settlement of Administrative and Civil Proceedings) Regulations, 2014 ("Settlement Regulations") alongwith all information, supporting documents, enclosures and prescribed fee of ₹ 5000 by demand draft on 28.05.2014."* Vide another letter dated July 2, 2014, PCL reiterated that it had already filed an application for settlement to SEBI under the Settlement Regulations. I note that the aforementioned application has been returned to PCL in terms of Regulation 5(1)(d) of the Settlement Regulations.

3. The material available on record i.e. correspondences exchanged between SEBI and PCL 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. PCL was incorporated on March 25, 2009, with the ROC, Kolkata, West Bengal with CIN No. as U01400WB2009PLC134240. PCL's Registered Office is at Moon Sun Apartment, Flat – D, 2nd Floor, Kolkata–700052, West Bengal, India.
- ii. The Directors in PCL are Shri Souvik Mistry, Shri Bikash Howlader and Shri Ajoy Das.
- iii. PCL issued "*Redeemable Preference Shares*" ("***Issue of RPS***") to a large number of investors during the Financial Years 2009–10, 2010–11 and 2011–12, details of which are provided below -

Year	Type of Security	No. of persons to whom <i>RPS</i> were allotted	Total Amount (₹ in Crores)
2009 – 10	Preference Shares	248	0.25
2010 – 11	Preference Shares	1524	1.61
2011 – 12	Preference Shares	143	0.22
Total		1915	2.07

4.1 In the context of the abovementioned details of the *Issue of RPS*, the issue for determination in the instant matter is whether the mobilization of funds by PCL through the aforesaid, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"); the Companies Act, 1956 read with the Companies Act, 2013.

4.2 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."

4.3 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 *Issue of RPS* is 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.
 - a. Under the *Issue of RPS*, it is observed that during the Financial Years 2009–10, 2010–11 and 2011–12, PCL allotted *RPS* to 248, 1524 and 143 individuals/investors respectively and mobilized funds amounting to approximately ₹2.07 Crores. The number of allotments made during the aforesaid Financial Years when viewed in light of refusal to submit complete and relevant information to SEBI, by PCL and its Directors, would *prima facie* indicate that the *Issue of RPS* was a public issue of securities and *prima facie* indicate that the number of persons to whom such *Issue* was made, was above the limit of forty–nine persons as prescribed under Section 67(3) of the Companies Act, 1956.
 - b. PCL 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, 1956 and therefore, is not covered under the *second proviso* to Section 67(3) of the Companies Act, 1956.
 - c. In view of the above, the *Issue of RPS* during the during the Financial Years 2009–10, 2010–11 and 2011–12, would *prima facie* qualify as a public issue under the first proviso to Section 67(3) of the Companies Act, 1956. 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.

4.4 I note that –

- i. From the abovementioned, it will follow that since the *Issue of RPS* 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 *Sabara 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 *Issue of RPS* was made to fifty persons or more by PCL, 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 PCL 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 *Issue of RPS*.
 - 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 *Issue of RPS* is mandatory on PCL. Further, 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 this context, from the Balance Sheets for the year ended March 31, 2011, March 31, 2012 and March 31, 2013, it is observed that PCL mobilized significant monetary amounts, which have been recorded as share application money pending allotment for an unduly long period of time. Details of the same are provided below –

SHARE APPLICATION MONEY (₹ IN CRORES)			
KIND OF SECURITIES	2010–11	2011–12	2012–13
EQUITY SHARES	NIL	0.53	1.70
PREFERENCE SHARES	2.57	4.06	7.09
TOTAL	2.57	4.59	8.79

- In this regard, there is no evidence on record to indicate whether or not PCL has paid interest to the investors where such *RPS* are not allotted within 8 days under the *Issue of RPS* and whether or not funds received from the investors under such *Issue* has been kept in separate bank account by PCL, as per the

aforesaid Sections. In view of the same, I find that PCL has *prima facie* not complied with the provisions of Sections 73(2) – 73(3) of the Companies Act, 1956.

- 4.5 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 *Issue of RPS* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, PCL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. Based on the material available on record, I find that PCL has not complied with the provisions of Section 60 of Companies Act, 1956.
- 4.6 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 PCL 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.
- 4.7 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;"

- 4.8 In addition to the above, the following may also be noted in respect of the *Issue of RPS* made by PCL –
- i. From the Balance Sheets for the year ended March 31, 2011 and March 31, 2012, it is observed that the preference share capital was ₹2.01 Crores and ₹2.22 Crores respectively. However, as per Form 2 (filed by PCL with the ROC, Kolkata), it is observed that an amount of ₹1.86 Crores and ₹2.07 Crores has been indicated as preference share capital for the Financial Years 2010–11 and 2011–12, respectively. It therefore appears that PCL has submitted contradictory information in respect of its preference share capital.
- 4.9 Upon a consideration of the aforementioned paragraphs, I am of the view that PCL is *prima facie* engaged in fund mobilising activity from the public, through the *Issue of RPS* 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,) read with Section 465 of the Companies Act, 2013.
5. 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 securities to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Acts.
6. Protecting the interests 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 PCL 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 PCL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the *Issue of RPS*.

7. 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, hereby issue the following directions –
- i. PCL shall not mobilize funds from investors through the *Issue of RPS* 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. PCL and its Directors, viz. Shri Souvik Mistry (DIN: 02566012), Shri Bikash Howlader (DIN: 02566016) and Shri Ajoy Das (DIN: 05221652), 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. PCL and its abovementioned Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;
 - iv. PCL shall provide a full inventory of all its assets and properties;
 - v. PCL's abovementioned Directors shall provide a full inventory of all their assets and properties;
 - vi. PCL 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 RPS*, without prior permission from SEBI;
 - vii. PCL and its abovementioned Directors shall not divert any funds raised from public at large through the *Issue of RPS*, which are kept in bank account(s) and/or in the custody of PCL;
 - viii. PCL and its abovementioned Directors shall, within 21 days from the date of receipt of this Order, provide SEBI with all relevant and necessary information, as sought vide SEBI letter dated April 8, 2014, in respect of the *Issue of RPS*.
8. The above directions shall take effect immediately and shall be in force until further orders.
9. 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 PCL alongwith the documents contained therein; information obtained from the '*MCA 21 Portal*'. In this context, PCL and its abovementioned Directors 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.

10. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against PCL and its abovementioned Directors in accordance with law.

Place: Mumbai
Date: August 14, 2014

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