

**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 Newland Agro Industries Limited and its Directors, viz. Shri Gopal Hazra (DIN: 02729113; PAN: ADJPH8999K), Shri Dipankar De (DIN: 02729472; PAN: AGAPD9745P), Shri Sanatan Paul (DIN: 03573387; PAN: AQEPP1934A), Shri Kartick Charan (DIN: 02729195; PAN: AHOPC4656P), Shri Himadri Bag (DIN: 02729318; PAN: AJXPB3796L), Shri Koushik Roy (DIN: 02729367; PAN: ARGPR9526B), Shri Pinku Kumar Das (DIN: 03183384; PAN: AIQPD0779D) and Shri Abhik Hajra (DIN: 02729499; PAN: ACOPH4497C).

1. Securities and Exchange Board of India ("**SEBI**") received a letter dated April 23, 2014, from the Office of the Sub-Divisional Magistrate, Government of Tripura, enclosing a complaint against Newland Agro Industries Limited ("**NAIL**") in respect of non – repayment of amounts arising from subscription of Redeemable Preference Shares.
- 2.1 SEBI vide letter dated June 17, 2014, advised NAIL to furnish *inter alia* the following information within 15 days from the date of receipt of the aforesaid letter, viz. –
 - i. Copy of Memorandum and Articles of Association of the company;
 - ii. Copy of Audited Annual Accounts of the company for the last 3 years;
 - iii. Copy of Annual Returns of the company for 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 shares/debentures issued by the company, viz. –
 - a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of prospectus/Information Memorandum filed with ROC for issuance of Shares/Debentures;
 - 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 shares/debentures allotted and value of such allotment against each allottee's name.
 - g. Details regarding subscription amount raised;
 - h. Date of allotment of share/debenture certificates;
 - i. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment;
 - j. Date of dispatch of shares/debentures;
 - k. Details of the total number of applicants for each of NAIL's scheme besides the list of final allottees;
 - l. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of shares/debentures.
 - m. Terms and conditions of the issue of shares/debentures;
 - n. Details of application for listing of securities issued by NAIL;
 - o. Copy of Form 2 and Form 10 filed with ROC;
 - p. Details of debenture trustee.
- 2.2 Thereafter, vide letters each dated June 18, 2014 (addressed to the Directors of NAIL) and letters each dated June 25, 2014 (addressed to NAIL and its Directors), SEBI once again requested the information sought vide its earlier letter dated June 17, 2014.
- 2.3 NAIL replied to SEBI vide letter dated June 26, 2014, seeking an extension of 30 days for submitting the requisite information, which was granted by SEBI. As no information was received even after 30 days, SEBI sought the abovementioned information vide another letter dated August 5, 2014. However, NAIL has not submitted the required information sought vide the abovementioned letters, to SEBI.
3. SEBI was also in receipt of complaints dated August 18, 2014 and August 25, 2014 and undated complaints received on September 17, 2014 and October 13, 2014, by investors alleging illegal mobilization of funds by NAIL.
4. The material available on record i.e. information obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' alongwith documents annexed with the abovementioned complaints received by SEBI, against NAIL, have been perused. On an examination of the same, it is observed that –

- i. NAIL was incorporated on September 1, 2009, with the ROC, Kolkata, with CIN No. as U01400WB2009PLC138143. NAIL has its Office at Bankadaha, P. S. Bishnupur, Kolkata–722164, West Bengal, India.
- ii. The Directors in NAIL are Shri Gopal Hazra, Shri Dipankar De and Shri Sanatan Paul.
- iii. Shri Kartick Charan, Shri Himadri Bag, Shri Koushik Roy, Shri Pinku Kumar Das and Shri Abhik Hajra, who were earlier Directors in NAIL, have since resigned.
- iv. Form 2 (Form for Return of Allotment – filed by NAIL with the ROC in accordance with the provisions of the Companies Act, 1956, for the Financial Years 2009–10, 2010–11, 2011–12 and 2012–13), revealed that the company issued and allotted *Redeemable Preference Shares* ("***Offer of Redeemable Preference Shares***"), details of which are provided below –

Year	Type of Security	Total Amount Approximate (in Crores)	No. of persons to whom preference shares were allotted Approximate
2009–10	Redeemable Preference Shares	0.98	3525
2010–11		10.23	12179
2011–12		22.75	30532
2012–13		3.68	2650
TOTAL		37.64	48886

- v. From the material available on record, it is observed that NAIL issued *Redeemable Preference Shares* in accordance with *inter alia* the following terms and conditions:
 - a. *"This application form relates to ... Redeemable Preference Shares with a face value of 100 each.*
 - b. *...*
 - c. *This Offer of ... Redeemable Preference Shares to Promoters/Directors, the employees, the shareholders and their friends and relatives only on private placement basis."*

5.1 The issue for determination in the instant matter is whether the mobilization of funds by NAIL through the *Offer of Redeemable 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.

5.2 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."

5.3 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 *Sabara 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. ..."

5.4 In the instant matter, for ascertaining whether the *Offer of Redeemable Preference Shares* is a public issue or issue on private placement basis in accordance with Section 67 of the Companies Act, 1956, the number of subscribers is of utmost importance.

- i. Under the *Offer of Redeemable Preference Shares*, it is observed that NAIL issued and allotted *Redeemable Preference Shares* to approximately 48886 individuals/investors and mobilized an amount of approximately 37.64 Crores during the Financial Years 2009–10, 2010–11, 2011–12 and 2012–13. These facts *prima facie* indicate that the *Offer of Redeemable Preference Shares* was a public issue of securities 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*.
- ii. NAIL 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.
- iii. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall be administered by SEBI.

5.5 I note that –

- i. From the abovementioned, it will follow that since the *Offer of Redeemable Preference Shares* 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 *Offer of Redeemable Preference Shares* was made to fifty persons or more by NAIL, 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 NAIL 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 Redeemable 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 *Offer of Redeemable Preference Shares*, is mandatory on NAIL. In this regard, there is no evidence on record to indicate whether or not NAIL has paid interest to the investors under the *Offer of Redeemable Preference Shares*, as per the aforesaid Section. In view of the same, I find that *prima facie*, NAIL has 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 Redeemable Preference Shares* were kept in separate bank account by NAIL. In view of the same, I find that *prima facie*, NAIL has not complied with the provisions of Section 73(3) of Companies Act, 1956.

- 5.6 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 Redeemable Preference Shares* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, NAIL 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 *prima facie*, NAIL has not complied with the provisions of Section 60 of Companies Act, 1956.

- 5.7 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 NAIL 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.
- 5.8 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;"
- 5.9 Upon a consideration of the aforementioned paragraphs, I am of the view that *prima facie*, NAIL is engaged in fund mobilising activity from the public, through the *Offer of Redeemable 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) read with Section 465 of the Companies Act, 2013.
6. SEBI has a statutory duty to protect the interests 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 thinks 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 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 such as *Redeemable Preference Shares* to fifty persons or

more, but do not comply with the applicable provisions of the aforesaid Companies Acts (as mentioned in paragraphs 5.1–5.9 above). Steps therefore, have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by NAIL and no investors are defrauded. In light of the same and also considering the failure on the part of NAIL to submit relevant information to SEBI, I find there is no other alternative but to take recourse through an interim action against NAIL and its Directors for preventing that company from further carrying on with its fund mobilising activity under the *Offer of Redeemable Preference Shares*.

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. NAIL shall not mobilize funds from investors through the *Offer of Redeemable 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. NAIL and its present Directors, viz. Shri Gopal Hazra (DIN: 02729113; PAN: ADJPH8999K), Shri Dipankar De (DIN: 02729472; PAN: AGAPD9745P) and Shri Sanatan Paul (DIN: 03573387; PAN: AQEPP1934A) including its past Directors, viz. Shri Kartick Charan (DIN: 02729195; PAN: AHOPC4656P), Shri Himadri Bag (DIN: 02729318; PAN: AJXPB3796L), Shri Koushik Roy (DIN: 02729367; PAN: ARGPR9526B), Shri Pinku Kumar Das (DIN: 03183384; PAN: AIQPD0779D) and Shri Abhik Hajra (DIN: 02729499; PAN: ACOPH4497C), 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. NAIL 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. NAIL shall provide a full inventory of all its assets and properties;
 - v. NAIL's abovementioned Directors shall provide a full inventory of all their assets and properties;
 - vi. NAIL and its present Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the *Offer of Redeemable Preference Shares*, without prior permission from SEBI;

- vii. NAIL and its present Directors shall not divert any funds raised from public at large through the *Offer of Redeemable Preference Shares*, which are kept in bank account(s) and/or in the custody of NAIL;
 - viii. NAIL and its present Directors shall furnish complete and relevant information in respect of *preference shares* (as sought by SEBI letters dated June 17, 2014; June 18, 2014 and August 5, 2014), within 21 days from the date of receipt of this Order.
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. information obtained from the Ministry of Corporate Affairs' website i.e. '*MCA 21 Portal*' alongwith documents annexed with the complaints received by SEBI, against NAIL. In this context, NAIL and its abovementioned past and present 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 NAIL and its abovementioned past and present Directors in accordance with law.

Place: Mumbai
Date: November 20, 2014

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