

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

ORDER

Under Sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of Sun-Plant Business Limited and its Directors, viz. Shri Basant Kumar Sasmal (DIN- 00274508; PAN: AWFPS4077C), Shri Amit Kumar Chowdhury (DIN- 03573202; PAN: ACQPC7087F), Shri Mahesh Chandra Prasad (DIN- 03575955; PAN: BBEPP4127P).

1. Securities and Exchange Board of India (“SEBI”) received a letter dated June 30, 2014 from Registrar of Companies (“RoC”), Kolkata, West Bengal stating that Sun-Plant Business Limited (hereinafter referred to as "SBL" or "the company") has raised a large sum of money from public by issuing preference /equity shares to a large number of persons, far exceeding the limits specified in Section 67(3) of the Companies Act, 1956. The letter also states *"The company has not complied with the provisions of Section 73 of the Companies Act, 1956 since in spite of the said issuance of preference/equity shares being in the nature of "Public Issue" no prior approval from Securities and Exchange Board of India was obtained and the shares were not got listed with any recognized Stock Exchange"*.
- 2.1 As a part of preliminary inquiry, SEBI vide letter dated July 10, 2014 to SBL and vide letters each dated July 14, 2014 to its Directors advised them to furnish *inter alia* the following information in respect of issuance of the said securities, viz.
 - i. Copy of the Memorandum and Articles of Association of the company;
 - ii. Audited Annual Accounts of the company for the last 3 years;
 - iii. Annual Returns of the company for the last 3 years;
 - iv. Names, addresses and occupation of all the promoters/directors of the company;
 - v. Names and details of the Key Managerial Personnel of the company;
 - vi. Information in respect of preference 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 preference shares/debentures.
- b. Date of opening and closing of the subscription list for the said preference shares/debentures;
- 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 preference shares/debentures allotted and value of such allotment against each allottee's name.
- g. Details regarding subscription amount raised;
- h. Date of allotment of preference shares/debentures;
- i. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment;
- j. Date of dispatch of preference shares/debentures certificates, etc.;
- k. Details of the total number of applicants for each of SBL's scheme besides the list of final allottees;
- l. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of preference shares/debentures.
- m. Terms and conditions of the issue of preference shares/debentures.
- 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.
- p. Details of debenture trustee viz. name, address, board resolution authorizing their appointment, etc.

2.2 SBL vide letter dated July 26, 2014 sought time of at least 60 days for submission of the information/documents. In response to said letter, SEBI vide letters each dated August 08, 2014 advised SBL and its Directors to submit required information/documents within seven days from receipt of the letter. Thereafter, SBL vide letter, which SEBI received on August 25, 2014, provided the following documents/information:

- i. Copy of the Memorandum and Articles of Association of the company;
- ii. Copies of Audited Annual Accounts of the company for the year 2010-2011

- iii. Copies of Form 20B filed for Annual Returns of the company with RoC for the years 2010-11 and 2011-12.
- iv. Names, addresses and occupation of all the promoters/directors of the company;
- v. Names and details of the Key Managerial Personnel of the company;
- vi. Information in respect of preference shares/debentures issued by the company, viz. –
 - a. Details regarding the number of allottees and list of such allottees
 - b. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment in FY 2007-08 and Dates of allotment of preference shares/debentures in FY 2007-08.
 - c. Details of the total number of applicants besides the list of final allottees
 - d. Terms and conditions of the issue of preference shares/debentures.

SBL vide aforesaid letter also *inter alia* made submissions in respect of certain queries raised by SEBI vide its letters dated July 10, 2014 and July 14, 2014, which are reproduced as under:

- a. *"Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with RoC for issuance of preference shares/debentures - Not applicable, as company has issued preference shares as per subsection (1A) of section 81 of the companies Act, 1956 and Unlisted Public Companies (Preferential Allotment Rules, 2013) based on strictly Private Placement Basis only.*
- b. *Date of opening and closing of the subscription list for the said preference shares/debentures - Not applicable, as the reason stated in (a)*
- c. *Details regarding the number of application forms circulated inviting subscription - Not applicable, as the reason stated in (a)*
- d. *Details regarding the number of applications received - The number of applications received is 699*
- e. *Details regarding subscription amount raised - Amount raised is Rs.57604000*
- f. *Date of dispatch of preference shares/debentures certificates, etc. - On the request of the shareholders, Company delivered preference Shares Certificates by hand within 10 days of allotment*
- g. *Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of preference shares/debentures - The Company did not circulate*

- pamphlets, advertisements and other promotional material for issue of cumulative Redeemable Preference shares. Copy of application forms is given along*
- b. Whether the company has applied for listing of its securities with any of the stock exchanges - No, the company has not applied for listing of its securities with any stock exchanges.*
 - i. Copy of Form 2 and Form 10 filed with the RoC - Copy of Form 2 has been enclosed. Company did not issue Debentures so the question of Form 10 does not arise.*
 - j. Details of debenture trustee viz: name, address, board resolution authorizing their appointment, etc. - Company did not issue debentures."*

SBL has also stated in the aforesaid letter that the annual accounts of the company for the year 2011-12, 2012-13 and annual returns for the year 2012-13 will be submitted within a period of 60 days. However, no communication has been received till date in this regard.

3. The material available on record i.e. correspondence exchanged between SEBI and SBL along with the documents contained therein; information obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' along with communication received from RoC, Kolkata have been perused. On an examination of the same, it is observed that-
 - i. SBL was incorporated on April 29, 2002, with the ROC, Kolkata. The CIN No. is U51900WB2002PLC094568. The Registered Office of SBL is situated at RGM 172, Tegharia, VIP Road, Kolkata, West Bengal- 700059.
 - ii. The Directors of SBL are Shri Basant Kumar Sasmal, Shri Amit Kumar Chowdhury and Shri Mahesh Chandra Prasad.
 - iii. SBL issued RPS in accordance with *inter alia* the following terms and conditions –
 - a. "Such shares shall carry a dividend @12% per annum This dividend shall be payable annually.*
 - b. Such shares are transferable as per the discretion of the shareholder holding such shares in the books of the company.*
 - c. Income tax wherever applicable shall be deducted at source in accordance with the relevant sections of the Income Tax Act, 1961 except when the amount of interest does not exceed the*

limit specified by the Income Tax Act and appropriate forms, ie, Form no.- 15G/15H is furnished to the company at least two months in advance before the due date of interest.

Redemption:

- d. The redemption period shall be 9 year from the date of allotment. The amount shall be redeemed in full. The share holders shall however have an option of premature redemption only after period of 5 (Five) years from the date of allotment.*
- e. shares will be redeemed at a premium 12% of the Nominal value over and above the Nominal value payable at the time of redemption. However, in case of pre-maturity redemption, ie, after a period of 5 years but before 9 years from the date of allotment no such premium shall be payable.*
- f. On maturity the amount along with premium will be paid vide crossed cheque/DD in favour of the first share holder. In case of death of the first share holder it will be paid in favour of second share holder if any. in case of death of both of first and second shareholder or when there is only one share holder the maturity value will be paid to the nominee or legal heir.*

Statutory Obligations:

- g. All the issue is for redeemable preference shares on private placement basis so no prior approval is required from Government/RBI/SEBI or other Statutory Authorities."*

- iv. As per details obtained from Annual Return of SBL for the year ended 31.03.2012 filed by SBL with RoC and the details of the allottees of RPS provided by SBL along with its undated letter, which was received by SEBI on August 25, 2014, it is observed that SBL has allotted "Redeemable Preference Shares" ("RPS") to 470 investors in the Financial Years 2005-06, 2006-07 and 2007-08. The details are given below :

Financial Year	Date of allotment	No. of shares allotted	Amount per share (in Rs.)	Total Amount (in Rs.)	Total no/ of allottees
2005-2006	28/02/2006	508100	10	5081000	65
	31/03/2006	201100	10	2011000	12
	Total	709200	10	7092000	77
2006-2007	30/04/2006	59800	10	598000	12
	31/05/2006	55000	10	550000	3
	30/06/2006	35500	10	355000	4
	31/07/2006	30950	10	309500	3
	31/08/2006	242300	10	2423000	10
	30/09/2006	140900	10	1409000	21
	03/10/2006	127000	10	1270000	1

	20/10/2006	10000	10	100000	1
	26/10/2006	1300	10	13000	3
	28/10/2006	16000	10	160000	2
	30/10/2006	15000	10	150000	2
	01/11/2006	20000	10	200000	1
	10/11/2006	5000	10	50000	1
	13/11/2006	5000	10	50000	1
	22/11/2006	6500	10	65000	3
	27/11/2006	10000	10	100000	1
	28/11/2006	70000	10	700000	1
	29/11/2006	30000	10	300000	1
	30/11/2006	144200	10	1442000	12
	03/12/2006	20000	10	200000	2
	05/12/2006	1050	10	10500	1
	12/12/2006	2500	10	25000	2
	19/12/2006	17000	10	170000	4
	20/12/2006	5600	10	56000	3
	02/01/2007	10000	10	100000	1
	18/01/2007	5000	10	50000	1
	19/01/2007	5000	10	50000	1
	20/01/2007	1000	10	10000	1
	31/01/2007	37500	10	375000	6
	10/02/2007	10100	10	101000	3
	13/02/2007	20000	10	200000	2
	15/02/2007	100000	10	1000000	1
	19/02/2007	10000	10	100000	1
	22/02/2007	1000	10	10000	1
	26/02/2007	2500	10	25000	1
	28/02/2007	40000	10	400000	7
	13/03/2007	4000	10	40000	1
	19/03/2007	31000	10	310000	3
	20/03/2007	2500	10	25000	1
	21/03/2007	10000	10	100000	1
	22/03/2007	9300	10	93000	4
	23/03/2007	2000	10	20000	1
	27/03/2007	22500	10	225000	2
	30/03/2007	9600	10	96000	2
	31/03/2007	74100	10	741000	6
	Total	1477700		14777000	142
2007-08	09/04/2007	9000	10	90000	1
	14/04/2007	16000	10	160000	2
	17/04/2007	10000	10	100000	1

	18/04/2007	5000	10	50000	1
	25/04/2007	12300	10	123000	4
	27/04/2007	30000	10	300000	2
	28/04/2007	5000	10	50000	1
	30/04/2007	127600	10	1276000	17
	08/05/2007	4100	10	41000	4
	14/05/2007	1000	10	10000	1
	15/05/2007	6000	10	60000	1
	21/05/2007	17500	10	175000	1
	25/05/2007	2500	10	25000	1
	28/05/2007	4100	10	41000	1
	30/05/2007	10000	10	100000	2
	31/05/2007	6000	10	60000	1
	13/06/2007	20000	10	200000	2
	14/06/2007	1200	10	12000	2
	21/06/2007	7000	10	70000	1
	22/06/2007	2500	10	25000	1
	28/06/2007	1000	10	10000	1
	30/06/2007	112500	10	1125000	6
	17/07/2007	4500	10	45000	1
	18/07/2007	9000	10	90000	2
	19/07/2007	5000	10	50000	1
	20/07/2007	45000	10	450000	4
	27/07/2007	7000	10	70000	2
	30/07/2007	50000	10	500000	4
	31/07/2007	15500	10	155000	3
	09/08/2007	5000	10	50000	1
	14/08/2007	5500	10	55000	2
	20/08/2007	10000	10	100000	1
	21/08/2007	10000	10	100000	1
	28/08/2007	1000	10	10000	1
	31/08/2007	43000	10	430000	4
	15/09/2007	11000	10	110000	2
	29/09/2007	183500	10	1835000	14
	31/10/2007	112500	10	1125000	12
	30/11/2007	463500	10	4635000	62
	31/12/2007	107800	10	1078000	13
	31/01/2008	55000	10	550000	8
	29/02/2008	176400	10	1764000	24
	31/03/2008	256900	10	2569000	35
	Total	1987400		19874000	251
Total		4174300		41743000	470

- v. SBL has also provided the copies of Board Resolutions passed by its Board of Directors and Copies of Form-2 filed with RoC in the FY 2007-08 for issuance of RPS. The details of the same are mentioned in the table below:

Date of Resolution/Allotment	No. of <i>RPS</i> issued	Face Value of each Share (in Rs.)	Total Amount (in Rs.)
18/04/2007	1782000	10	17820000
25/04/2007	12300	10	123000
27/04/2007	20000	10	200000
28/04/2007	5000	10	50000
30/04/2007	130600	10	1306000
08/05/2007	7600	10	76000
14/05/2007	1000	10	10000
15/05/2007	6000	10	60000
16/05/2007	10000	10	100000
21/05/2007	12500	10	125000
25/05/2007	2500	10	25000
28/05/2007	4100	10	41000
30/05/2007	15000	10	150000
31/05/2007	112000	10	1120000
13/06/2007	20000	10	200000
14/06/2007	1200	10	12000
21/06/2007	7000	10	70000
22/06/2007	2500	10	25000
28/06/2007	1000	10	10000
30/06/2007	49500	10	495000
17/07/2007	4500	10	45000
18/07/2007	9000	10	90000
19/07/2007	5000	10	50000
20/07/2007	85000	10	850000
27/07/2007	7000	10	70000
30/07/2007	105000	10	1050000
31/07/2007	53500	10	535000
09/08/2007	5000	10	50000
14/08/2007	5500	10	55000

20/08/2007	10000	10	100000
21/08/2007	10000	10	100000
28/08/2007	1000	10	10000
31/08/2007	33300	10	333000
15/09/2007	16600	10	166000
29/09/2007	176000	10	1760000
31/10/2007	142000	10	1420000
30/11/2007	510000	10	5100000
31/12/2007	117800	10	1178000
31/01/2008	98000	10	980000
29/02/2008	233400	10	2334000
31/03/2008	445900	10	4459000

- 4.1 From the details available, it is *prima facie* noted that funds to the tune of Rs. 4,17,43,000/- have been mobilized till March 31, 2008 through issuance of 4174300 Redeemable preference shares of face value Rs.10 each.
- 4.2 The company vide its undated letter, which was received by SEBI on August 25, 2014, has submitted under the heading 'Information in respect of issue of Redeemable Preference Shares' that the amount raised is Rs.57604000/-. As per the details mentioned in the Audited Balance Sheet of the company as on March 31, 2011, it is observed that the company has raised Share Application Money of Rs. 1,58,61,000/- in addition to the amount raised through issue of preference shares.
- 4.3 In the context of the abovementioned details of the *Offer of RPS*, the issue for determination in the instant matter is whether the mobilization of funds by SBL through the aforesaid issue of RPS, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"); the Companies Act, 1956 read with the Companies Act, 2013; the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("**DIP Guidelines**") read with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**").
- 4.4 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, at

the relevant point of time 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:

"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."

4.5 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) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended 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.

(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:

"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, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving 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 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. Although the *Offer of RPS* is stated to have been made on a private placement basis, it is an admitted fact that SBL issued RPS to more than 49 investors in each Financial Years 2005-06, 2006-07, 2007-08 in series of allotments and mobilized approximately Rs.4,17,43,000/- from 470 individuals/investors during these three Financial Years. The aforesaid facts clearly indicate that the number of persons to whom RPS was issued by SBL in series of allotments in each of these three years was beyond the limit of forty-nine persons as prescribed under Section 67(3) of the Companies Act, 1956. The frequency of allotments and time span between the series of allotments made *prima facie*, indicate that the method adopted by SBL for mobilization of funds is nothing but a device to circumvent the provisions of section 67(3) of the Companies Act, 1956. I, therefore, find that the *Offer of RPS* was nothing but a public issue of securities under the *first proviso* to Section 67(3) of the Companies Act, 1956 and the company camouflaged the issuance of a public issuance of RPS as private placements.
- b. In addition, SBL 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 *Offer of RPS* by SBL, 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.

4.6 I note that –

- i. From the abovementioned, it will follow that since the *Offer 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) Where a prospectus, whether issued generally or not, states that an application under subsection (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists :

Provided *that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.*

(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 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 fifty 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:

"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 RPS* was made to fifty persons or more by SBL, 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 SBL 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 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 *Offer of RPS* is mandatory on SBL. In this regard, there is no evidence on record to indicate whether or not SBL has paid interest to the investors where such *RPS* are not allotted within 8 days, as per the aforesaid Section. In view of the same, I find that *prima facie*, SBL 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 fifty 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 RPS* has been kept in separate

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

- 4.7 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 RPS* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, SBL 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 SBL has not complied with the provisions of Section 60 of Companies Act, 1956.
- 4.8 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 SBL 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.
- 4.9 As per Section 465(1) of the Companies Act, 2013, the Companies Act, 1956, "*shall stand repealed*". However, Section 465(2)(a) 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;"

4.10 I also note that SEBI had framed the DIP Guidelines, 2000 in exercise of the powers conferred under the SEBI Act. In the words of the Hon'ble Supreme Court in the *Sahara Case*, "*DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by ICDR 2009*". In this regard, I observe *prima facie* that the Company has not complied with the provisions of the DIP Guidelines including the following clauses:

- a. Clause 2.1.1. – (*Filing of offer document*)
- b. Clause 2.1.4 – (*Application for listing*)
- c. Clause 2.1.5 – (*Issue of securities in dematerialized form*),
- d. Clause 2.8 – (*Means of finance*),
- e. Clause 4.1 – (*Promoters contribution in a public issue by unlisted companies*),
- f. Clause 4.11 – (*Lock-in of minimum specified promoters contribution in public issues*),
- g. Clause 4.14 – (*Lock-In of pre-issue share capital of an unlisted company*)
- h. Clause 5.3.1 – (*Memorandum of understanding*),
- i. Clause 5.3.3 – (*Due Diligence Certificate*)
- j. Clause 5.3.5 – (*Undertaking*),
- k. Clause 5.3.6 – (*List Of Promoters Group And Other Details*),
- l. Clause 5.4 – (*Appointment of intermediaries*)
- m. Clause 5.6 – (*Offer document to be made public*)
- n. Clause 5.6A – (*Pre-issue Advertisement*)
- o. Clause 5.7 – (*Despatch of issue material*)
- p. Clause 5.8 – (*No complaints certificate*)
- q. Clause 5.9 – (*Mandatory collection centres including Clause 5.9.1 (Minimum number of collection centres)*)
- r. Clause 5.10 – (*Authorised Collection Agents*)
- s. Clause 5.12.1 – (*Appointment of compliance officer*)

- t. Clause 5.13 – (*Abridged prospectus*)
- u. Clause 6.0 – (*Contents of offer documents*)
- v. Clause 8.3 – (*Rule 19(2)(b) of SC(R) Rules, 1957*)
- w. Clause 8.8.1 – (*Opening & closing date of subscription of securities*)
- x. Clause 9 – (*Guidelines on advertisements by Issuer Company*)
- y. Clause 10.1 – (*Requirement of credit rating*)
- z. Clause 10.5 – (*Redemption*)

4.11 As per Regulation 111(1) of the ICDR Regulations, the DIP Guidelines, "*shall stand rescinded*". However, Regulation 111(2) of the ICDR Regulations, 2009, 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 observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

4.12 Upon consideration of the aforementioned paragraphs, I am of the view that *prima facie*, SBL is engaged in fund mobilizing activity from the public, through the *Offer of RPS* 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; the DIP Guidelines read with ICDR Regulations, 2009.

5. 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 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 *preference shares* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Acts; the DIP Guidelines read with ICDR Regulations, 2009. Steps, therefore, have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by SBL 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 SBL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the *Offer of RPS*.

6. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4), 11A and 11B of the SEBI Act and Clause 17 of the DIP Guidelines read with Regulation 111 of the ICDR Regulations, 2009, hereby issue the following directions-
- i. SBL shall not mobilize any fresh funds from investors through the *Offer 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. SBL and its Directors, viz. Shri Basant Kumar Sasmal (DIN- 00274508; PAN: AWFPS4077C), Shri Amit Kumar Chowdhury (DIN- 03573202; PAN: ACQPC7087F), Shri Mahesh Chandra Prasad (DIN- 03575955; PAN: BBEPP4127P) 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. SBL and the 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. SBL shall provide a full inventory of all its assets and properties;
 - v. The abovementioned Directors of SBL shall provide a full inventory of all their assets and properties;
 - vi. SBL 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 *Offer of RPS*, without prior permission from SEBI;

- vii. SBL and its abovementioned Directors shall not divert any funds raised from public at large through the *Offer of RPS*, which are kept in bank account(s) and/or in the custody of SBL.
 - viii. SBL and its abovementioned Directors shall, within 21 days from the date of receipt of this Order, provide SEBI with all relevant and necessary information sought by SEBI vide letters dated July 10, 2014, July 14, 2014 and August 08, 2014 but not yet furnished.
7. The above directions shall take effect immediately and shall be in force until further orders.
8. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. correspondence exchanged between SEBI and SBL along with the documents contained therein; information obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' along with communication received from RoC, Kolkata, etc. In this context, SBL 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.
9. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against SBL and its abovementioned Directors in accordance with law.

Place: Mumbai

Date: November 24, 2014

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