

**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 Swarnabhumi Developers Limited (PAN: AANCS2816A) and its Directors, viz. Shri Biswanath Bhattacharya (PAN: AHTPB8323P; DIN: 00596375), Shri Sanjoy Kumar Layek (PAN: ABWPL7019B; DIN: 02261065), Shri Ranjit Kumar Sarkar (PAN: ASWPS3499R; DIN: 05294563), Shri Himangshu Kumar Guha (PAN: ACZPG4691E; DIN: 02818570), Shri Prakash Mandal (PAN: AUTPM0257E; DIN: 02261096) and Shri Sudip Kr Barua (PAN: AEGPB5442M; DIN: 02838550).

1. Securities and Exchange Board of India ("**SEBI**") received a reference dated December 26, 2012, wherein it was alleged that Swarnabhumi Developers Limited ("**SDL**") was mobilizing funds from the public.
- 2.1 Thereafter, SEBI vide letter dated October 1, 2013, sought the following information from SDL, 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 issue of shares/debentures by the company, viz. –
 - a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with Registrar of Companies ("**ROC**");
 - 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, etc.;
 - 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 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 shares/debentures Certificates;
- k. Details of the total number of applicants for each of MIRL's scheme besides the list of final allottee;
- 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, if any, filed with stock exchanges;
- o. Copy of Form 2 and Form 10 filed with ROC;
- p. Details of Debenture Trustee.

2.2 Vide reply received at SEBI on October 23, 2013, SDL submitted only the Balance Sheets of that company. No other information has been received from SDL as on date.

3. The material available on record i.e. correspondences exchanged between SEBI and SDL alongwith documents contained therein, the abovementioned reference dated December 26, 2012 and information obtained from the Ministry of Corporate Affairs' website i.e. *MCA 21 Portal*, have been perused. On an examination of the same, it is observed that –

- i. SDL was incorporated on July 9, 2009, with the ROC, Kolkata with CIN No. as U74140WB2009PLC136665. SDL's Registered Office is at 8B, Ballygunge Terrace, Kolkata – 700029, West Bengal, India.
- ii. The present Directors in SDL are Shri Biswanath Bhattacharya, Shri Sanjoy Kumar Layek and Shri Ranjit Kumar Sarkar.
- iii. I note that Shri Himangshu Kumar Guha, Shri Prakash Mandal and Shri Sudip Kr Barua, who were earlier Directors in SDL, have since resigned.
- iv. Form 2 (Form for Return of Allotment – filed by SDL with the ROC in accordance with the provisions of the Companies Act, 1956), reveals that SDL issued "*Preference*

Shares" ("**Offer of Preference Shares**") to investors during the Financial Years 2010–11 and 2011–12, details of which are provided below -

Type of Security	Year	No. of persons to whom preference shares were allotted	Total Amount (in Lakhs)
Preference Shares	2010 – 11	206	29.28
	2011 – 12	134	16.72
Total		340	46.00

4.1 In the context of the abovementioned details of the *Offer of Preference Shares*, the issue for determination in the instant matter is whether the mobilization of funds by SDL through the aforesaid, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**") read with the Companies Act, 1956 and 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. Construction of reference to offering shares or debentures to the public, etc.

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 that:

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

If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

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

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

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

- iii. In the instant matter, for ascertaining whether the *Offer of Preference Shares* 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 *Offer of Preference Shares*, it is observed that during the Financial Years 2010–11 and 2011–12, SDL allotted *Preference Shares* to a total of 340 individuals/investors and mobilized funds amounting to approximately 46.60 Lakhs. The number of investors to whom allotments were made under the *Offer of Preference Shares* alongwith the amount mobilized therein (details provided in Table at paragraph 3(iv) of page 3), would *prima facie* indicate that such *Offer* was a public issue of securities and *prima facie* indicate that the number of persons to whom such *Offer* was made, was above the limit of forty–nine persons as prescribed under the *first proviso* to Section 67(3) of the Companies Act, 1956.
 - b. It is observed that SDL is not stated to be a Non – banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that SDL 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 Preference Shares* by SDL, 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 *Offer of 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) 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 recognized 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 recognized 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 1 [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub- section (2)]; and if default is made in complying with this sub- section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.”

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

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

- iii. In the facts of the instant case, since the *Offer of Preference Shares* was made to fifty persons or more by SDL, 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 SDL 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 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 Preference*

Shares is mandatory on SDL. In this regard, there is no evidence on record to indicate whether or not SDL has paid interest to the investors within 8 days under the *Offer of Preference Shares*, as per the aforesaid Section. In view of the same, I find that SDL has *prima facie* not complied with the provisions of Section 73(2) of the Companies Act, 1956.

- v. Section 73(3) of Companies Act, 1956, says that all moneys received shall be kept in a separate bank account maintained with a Scheduled Bank and if default is made in complying with this sub-Section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees. In the instant case, there is no evidence on record to indicate whether or not funds received from the investors under the *Offer of Preference Shares* has been kept in separate bank account by SDL. In view of the same, I find that SDL has *prima facie* not complied with the provisions of Section 73(3) of 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 *Offer of Preference Shares* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, SDL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. I find that there is no evidence on record to indicate whether or not SDL has complied with the provisions of Section 60 of Companies Act, 1956. In view of the same, I find that SDL has *prima facie* 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

SDL 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 It is pertinent to note that though the Companies Act, 1956, has been repealed by the Companies Act, 2013, anything done or any action taken or purported to have been done or taken under the Companies Act, 1956, is deemed to have been done or taken under the corresponding provisions of the Companies Act, 2013, by virtue of Section 465(2) of the Companies Act, 2013, and is therefore saved regardless of the repeal of the Companies Act, 1956. 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;"

- 4.8 Upon a consideration of the aforementioned paragraphs, I am of the view that SDL is *prima facie* engaged in fund mobilising activity from the public, through the *Offer 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) read with Section 465 of the Companies Act, 2013.
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 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 (as mentioned in paragraphs 4.1–4.8 above). Steps therefore, have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by SDL and no investors are defrauded. In light of the facts in the instant matter, I find that there is

no other alternative but to take recourse through an interim action against SDL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the *Offer of Preference Shares*.

6. I note that Shri Himangshu Kumar Guha, Shri Prakash Mandal and Shri Sudip Kr Barua, who were earlier Directors in SDL, have since resigned. In this regard, it is *prima facie* observed that the aforementioned former Directors were also involved in the fund mobilizing activity under the *Offer of Preference Shares* carried out by SDL during the period they were Directors in that company.
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. SDL (PAN: AANCS2816A) shall not mobilize funds from investors through the *Offer 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. SDL and its present Directors, viz. Shri Biswanath Bhattacharya (PAN: AHTPB8323P; DIN: 00596375), Shri Sanjoy Kumar Layek (PAN: ABWPL7019B; DIN: 02261065) and Shri Ranjit Kumar Sarkar (PAN: ASWPS3499R; DIN: 05294563) alongwith it past Directors, viz. Shri Himangshu Kumar Guha (PAN: ACZPG4691E; DIN: 02818570), Shri Prakash Mandal (PAN: AUTPM0257E; DIN: 02261096) and Shri Sudip Kr Barua (PAN: AEGPB5442M; DIN: 02838550), 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. SDL and its abovementioned past and present 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. SDL shall provide a full inventory of all its assets and properties;
 - v. The abovementioned past and present Directors of SDL shall provide a full inventory of all their assets and properties;

- vi. SDL and its abovementioned 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 Preference Shares*, without prior permission from SEBI;
 - vii. SDL and its abovementioned present Directors shall not divert any funds raised from public at large through the *Offer of Preference Shares*, which are kept in bank account(s) and/or in the custody of SDL;
 - viii. SDL and its abovementioned present Directors shall furnish complete and relevant information in respect of the *Offer of preference shares* (as sought by SEBI letter dated October 1, 2013), 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. correspondences exchanged between SEBI and SDL alongwith documents contained therein, reference dated December 26, 2012 and information obtained from *MCA 21 Portal*. In this context, SDL 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 SDL and its abovementioned past and present Directors in accordance with law.

Place: Mumbai
Date: December 2, 2014

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