

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 Sukhchain Hire Purchase Limited (PAN: AAGCS6659C) and its Directors, viz. Mr. Malwinderwant Singh (DIN:639523, PAN: ALSPS7699N), Mr. Sukhraj Bahadur Singh (DIN:659193, PAN:AQVPS7675N), Mrs. Vijay Laxmi Kathait (DIN:2548164, PAN:ALLPK5580D), Mr. Jitendra Singh Gurjar (DIN:2548187, PAN:ALZPG7304F), Mr. Guriqbal Singh Bhullar (DIN:3028807, PAN:AAQPB6799M), Mr. Harpreet Singh (DIN:758659, PAN:BCSPS6136G), Mrs. Harjit Kaur Bhullar (DIN:02939598, PAN:AARPB9746R), Mr. Abhay Shukla (DIN:2891493, PAN:AQZPS7964C), Mr. Vishwanathan Iyer (DIN:2952081, PAN:AADPI3574N), Mr. Akshay Tiwari (DIN:5108463, PAN:ACNPT2976P).

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1. Securities and Exchange Board of India ("**SEBI**") received a communication dated December 12, 2012, from Ministry of Finance forwarding a complaint regarding illegal raising of funds through the issuance of debentures by some companies including Sukhchain Hire Purchase Limited (hereinafter referred to as '**SHPL**' or '**the company**').
 - 2.1 As a part of preliminary inquiry, SEBI vide letter dated March 28, 2013 advised SHPL to furnish *inter alia* the following information/documents, viz. –
 - i. Copy of the Memorandum and Articles of Association of the company.
 - ii. Details such as names, addresses, PAN and contact details of past and present directors of the company.
 - iii. Brochures pertaining to schemes/offers made available to public.
 - iv. Copies of application forms submitted by investors/applicants.
 - v. Sample copies of registration letter and allotment letter issued to investors.
 - vi. details of scheme wise amount mobilized by the company along with the number of investors under the schemes.

- vii. Certified copies of audited financial statements of the company for FY 2009-10, 2010-11, 2011-12.
- viii. Copies of Income Tax Returns filed by the company for the last three years.

2.2 SHPL vide its letter dated April 18, 2013 provided *inter alia* the following documents/information, viz.:

- i. Copy of the Memorandum and Articles of Association of the company.
- ii. Details of past and present directors of the company as on September 08, 2012.
- iii. Certified copies of audited financial statements of the company for FY 2009-10, 2010-11, 2011-12.
- iv. Copies of Income Tax Returns filed by the company for FY 2010-11, 2011-12, 2012-13.

SHPL also stated that it is registered as a Deposit-accepting Non-Banking Finance Company ("**NBFC**") with Reserve Bank of India ("**RBI**").

SHPL also *inter alia* submitted that " *The company is eligible to source the deposits and funds as defined in clause (bb) of the Section 45 I of the RBI Act, 1934 read with Non-Banking Financial Companies Acceptance of Deposits (Reserve Bank) Directions, 1998 as applicable to it. The company has not mobilized any funds from the general public which are outside the purview of the above RBI Regulations nor mobilized any funds which fall under SEBI (Collective Investment Schemes) Regulations, 1999. The conditions specified under section 11AA of the Securities and Exchange Board of India Act, 1992 are not applicable for the funds raised by the company*".

2.3 SEBI also received communication dated October 29, 2013 from Registrar of Companies ("**RoC**"), Gwalior *inter alia* stating that SHPL has issued secured debentures 10 times to more than 50 subscribers collectively on private placement basis.

2.4 Thereafter, SEBI vide e-mail dated November 18, 2013 sought *inter alia* following information/documents from SHPL :

- i. Details of debenture issue of the company, copies of EGM approving issue of debentures, copy of Minutes of Board meeting approving the allotment, copy of any approval taken for the said debenture issue.

- ii. Copy of brochure & advertisement (if any) circulated for the debenture
- iii. Date of opening of debenture issue and date of closing of debenture issue.
- iv. Name, address and PAN of each allottee of the debentures. Number of debentures issued to each allottee.
- v. How did the company approach these debenture holders. Were any of these allottees known to promoter/ director of the company, if yes, detail of association. If these were approached through any broker then name/ address of said brokers be provided.
- vi. Copies of application forms received by the company and details of consideration received from them and the details of the bank account of the company.
- vii. Copy of annual report of the company for one year prior to allotment, for the financial year during which allotment made and for financial year subsequent to allotment.

2.5 SHPL vide its letters dated November 28, 2013, December 06, 2013 and December 13, 2013 provided certain information including the details of debentures issued by the company and lists of allottees. SHPL in the aforesaid letters also submitted:

- i. *"The Company is an Asset Finance Company registered with Reserve Bank of India as a "Non Banking Financial Company" vide registration no. A-06.00514. The acceptance of deposits and issue of debentures are regulated by RBI.*
- ii. *The company has issued Secured Redeemable Non Convertible Debentures (NCDs) with fixed returns in different series for its working capital requirement for financing physical assets which are mainly commercial vehicles and two wheelers. The company has issued debentures on private placement basis.*
- iii. *The company did not issue any brochure/ advertisement for subscribing the said debenture issues as the same were under private placement. Only the application form is given to the prospective subscribers containing terms and conditions for issue of debentures which is clearly marked ' Private and confidential - Not for Circulation'.*
- iv. *All the debenture holders have association with Promoters/directors, employees and their relatives, friends and associates. Brokerage is paid for services rendered to the company as per applicable norms."*

- 2.6 SEBI vide e-mail dated June 24, 2014 requested RBI to confirm the registration status of SHPL. RBI vide e-mail dated June 26, 2014 confirmed that SHPL is registered as NBFC with RBI.
3. The material available on record i.e. correspondence exchanged between SEBI and SHPL along with the documents contained therein; information/documents obtained from the ROC, Gwalior; ; information/documents 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 –
- SHPL was incorporated on May 15, 1995 with the ROC, Gwalior with CIN No. as U65921MP1995PLC024674. SHPL has its Registered Office situated at Plot No.78, 1st Floor, VM Arcade, M.P. Nagar, Zone-II, Bhopal, Madhya Pradesh-462011.
 - The Directors of SHPL are Mr. Malwinderwant Singh , Mr. Sukhraj Bahadur Singh, Mrs. Vijay Laxmi Kathait, Mr. Jitendra Singh Gurjar, Mr. Guriqbal Singh Bhullar, Mr. Harpreet Singh, Mrs. Harjit Kaur Bhullar, Mr. Abhay Shukla, Mr. Vishwanathan Iyer and Mr. Akshay Tiwari.
 - The name of debenture trustee is Mr. Hemant Sahu having address at H No. 105-A, Ravidas colony, JK Road, Bhopal, Madhya Pradesh-462011.
 - The details of the schemes as mentioned in the brochure cum application form submitted by SHPL are as follows:

"Private Placement of Flexi Bonds in the nature of Secured Redeemable Non-Convertible Debentures (NCDs)

<i>Non Cumulative Scheme</i> <i>(Minimum Rs. 20000/- and above)</i>			<i>Cumulative Scheme</i> <i>(Minimum Rs. 5000/- and above)</i>	
<i>Period</i>	<i>Monthly Interest</i>	<i>Quarterly Interest</i>	<i>Period</i>	<i>Yield</i>
<i>12 months + 1 day</i>	<i>10.00%</i>	<i>10.00%</i>	<i>12 months + 1 day</i>	<i>10.42%</i>
<i>24 months</i>	<i>10.50%</i>	<i>10.50%</i>	<i>24 months</i>	<i>11.50%</i>
<i>36 months</i>	<i>11.50%</i>	<i>11.50%</i>	<i>36 months</i>	<i>13.50%</i>
<i>48 months</i>	<i>11.50%</i>	<i>11.50%</i>	<i>48 months</i>	<i>14.35%</i>
<i>60 months</i>	<i>11.50%</i>	<i>11.50%</i>	<i>60 months</i>	<i>15.26%</i>

	<i>Double Bond</i>	
Rs. 10,000	72 months	Rs. 20,034
	11.75%	"

- v. As per the information submitted by SHPL vide letter dated January 16, 2014, SHPL issued NCDs of face value Rs.1000/- each . The details of the NCDs are as follows:

Year	Issue Opening Date	Allotment Date	Series	No. of Debentures	Amount (Rs.)	No. of Applications	No. of Allottees	Date of Charge Creation in ROC
2010-11	8-Oct-2010	31-Dec-2010	A	4517	4517000	48	39	02/08/2011
	1-Jan-2011	31-Mar-2011	B	1395	1395000	20	15	04/11/2011
2011-12	2-Apr-2011	30-Apr-2011	C	2550	2550000	15	11	05/09/2011
	14-May-2011	15-Jun-2011	D	1132	1132000	10	7	07/01/2011
	16-Jun-2011	30-Jul-2011	E	2440	2440000	24	20	19/08/2011
	3-Aug-2011	15-Sep-2011	F	1958	1958000	14	14	19/07/2011
	30-Sep-2011	15-Nov-2011	G	2610	2610000	24	20	30/11/2011
	26-Nov-2011	16-Jan-2012	H	2565	2565000	27	26	02/10/2012
	23-Jan-2012	19-Mar-2012	I	1855	1855000	17	13	24/03/2012
2012-13	5-Apr-2012	15-May-2012	J	5016	5016000	26	18	21/05/2012
	5-Jun-2012	18-Jul-2012	K	3795	3795000	26	20	23/07/2012
	1-Aug-2012	8-Sep-2012	L	2931	2931000	30	24	09/12/2012
	8-Sep-2012	20-Oct-2012	M	6915	6915000	44	41	22/10/2012
	20-Oct-2012	20-Nov-2012	N	4040	4040000	21	18	22/11/2012
	21-Nov-2012	22-Dec-2012	O	4880	4880000	36	25	26/12/2012
	22-Dec-2012	19-Jan-2013	P	5478	5478000	41	29	19/01/2013
	20-Jan-2013	25-Feb-2013	Q	1170	1170000	9	8	03/04/2013
	26-Feb-2013	29-Mar-2013	R	1915	1915000	12	10	29/04/2013
2013-14	1-Apr-2013	25-Apr-2013	T	7840	7840000	18	15	15/05/2013
	26-Apr-2013	20-May-2013	U	5529	5529000	30	25	13/06/2013
	21-May-2013	18-Jun-2013	V	4230	4230000	30	27	NA
		TOTAL		74761	7,47,61,000	522*	425*	

* It has been stated by SHPL that 522 applications were received from 425 persons for the subscription of the said issuance of NCDs.

vi. SHPL has also provided the details of the brokers and brokerage paid as follows:

Period	Number of investors	Amount	Number of dealing brokers	Brokerage paid
8-31 Oct.,2010	19	1820000	3	30950
1-30 Nov, 2010	22	1806000	3	32020
1-31 Dec. 2010	7	891000	2	12510
1-31 Mar. 2011	19	1295000	3	37600
2-30 Apr. 2011	15	2550000	2	76500
1-May-15 June 11	10	1132000	2	30160
16 June-30 July 11	24	2440000	4	65400
1 Aug.-15 Sept 11	14	1958000	3	51740
16 Sept- 15Nov 11	24	2610000	3	74100
16 Nov11-16 Jan 12	27	2565000	4	60090
17 Jan-19 Mar 12	17	1855000	3	54100
1Apr-15 May 12	26	5016000	4	142280
1 June-18 July 12	26	3795000	5	101750
1 Aug-8 Sept.12	30	2931000	3	66730
9 Sep.-20 Oct. 12	44	6915000	8	191050
21 Oct.-20 Nov 12	21	4040000	6	109800
21 Nov.-22Dec.12	36	4880000	11	133600
24 Dec.12-19 Jan.13	41	5478000	8	139750
1-25 Feb.13	9	1170000	3	33100
1-29 Mar.13	12	1915000	5	56050
1-25 Apr.13	18	7840000	8	223000
26 Apr. -20 May 13	30	5529000	7	156010
21 May-18 June 13	30	4230000	8	122700
	521	7,46,61,000		20,00,990

vii. The company has also informed that brokerage has been paid in respect of all the applicants of the debenture issue except for one who was a direct applicant. It was informed that in the case of the application of one of the investors, who applied for 100 debentures by depositing Rs. 1,00,000/- received on January 01, 2011, the brokerage was not paid as the investor is the friend of the director of the company.

viii. SHPL vide its letter dated December 13, 2013 also stated that RBI vide circular dated June 27, 2013 read with circular dated July 02, 2013 has put restriction to issue debentures to 49 persons on private placement basis as against “no limit” provided under section 67(3) of the Companies Act, 1956.

4. In the context of the abovementioned details of the Offer of NCDs, the issue for determination in the instant matter is whether the mobilization of funds by SHPL through the aforesaid Offer, is in accordance with the provisions of the SEBI Act, 1992 ("SEBI Act") read with the SEBI (Issue and Listing of Debt Securities), Regulations, 2008 ("Debt Securities Regulations"); the Companies Act, 1956.
5. 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, 1956. 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."

6. 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 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, 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 NCDs* is a public issue or an issue on private placement basis in accordance with Section 67 of the Companies Act, 1956, examination of two main issues arising in the context of the instant case are of utmost importance.
 - a. **Whether by virtue of the second proviso to section 67 (3) of the Companies Act, an offer made by SHPL to fifty or more persons may be exempted from the requirements pertaining to a public offer?**
 - b. **Whether SHPL has discharged its burden of proof for establishing that the offer of redeemable preference shares by it was a private placement?**

These issues are examined below:

- a. **Whether by virtue of the second proviso to section 67 (3) of the Companies Act, an offer made by SHPL to fifty or more persons may be exempted from the requirements pertaining to a public offer?**

SHPL is an NBFC registered with RBI. It is noted that as per the first proviso to section 67(3), the public offer and listing requirements contained in the Companies Act, 1956, would become automatically applicable to a company making an offer to fifty or more persons. However, the second proviso to section 67(3) exempts NBFCs and PFIs from the applicability of the first proviso. However, I note that the second proviso to sub-section (3) of section 67 is not a blanket rule, and does not exempt NBFCs and PFIs from the applicability of provisions pertaining to private placements contained in sub-section (3) of

section 67. Thus, the rule of automatic applicability of the public offer requirements of the Companies Act would not be triggered for an NBFC or PFI making an offer of shares or debentures to fifty or more persons, only if the concerned NBFC or PFI can show that the offer was a private placement in terms of sub-section (3) of the section 67 of the Companies Act, 1956. In order to comply with sub-section (3) of section 67, SHPL is required to show that it had an intention to offer the debentures to only those persons who received the offer, or that the offer is a domestic concern of SHPL. In view of the foregoing, as a registered NBFC, SHPL can be exempted from the requirements pertaining to a public offer only if SHPL can prove that the offer was a private placement in terms of section 67 (3) of the Companies Act, 1956. Therefore, the mere fact that SHPL is an NBFC does not exempt SHPL from the requirement of proving that the offer of NCDs made by it to more than fifty persons was a private placement in accordance with section 67 (3) of the Companies Act, 1956, or from complying with public offer requirements of sections 56, 60 etc. of the Companies Act, 1956.

b. Whether SHPL has discharged its burden of proof for establishing that the offer of redeemable preference shares by it was a private placement?

- i. I note that sub-section (3) of section 67 of the Companies Act, which pertains to private placements, requires an offer in a private placement to be made to a specific and pre-determined set of persons, or persons who are associated with the offeror company in a way so as to make the offer a domestic concern of the company. The association between the offeror company and offerees for determining whether an offer is in the nature of a private placement needs to be established on a case-to-case basis. In *Sahara India Real Estate Corporation Limited and Ors. Vs. SEBI*, decided by the Hon'ble Supreme Court vide order dated August 31, 2012, it was held that under sub-section (3) of section 67 of the Companies Act, 1956, the "*Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have not discharged.*"
- ii. In view of sub-section (3) of section 67, SHPL is required to show that the offer made to each of 425 persons, who were allotted NCDs in the instant case, was not intended to be available for subscription by the general public.

I observe that SHPL has not made available to SEBI any material or information to indicate that the offer of secured non-convertible debentures by SHPL to 425 allottees which raised Rs. 7.48 Crores during period of FY 2010-11 to 2013-14 was intended to be a private placement meant only for a specific or selected group of persons, as required by sub-section (3) of section 67 of the Companies Act. It is noted from the contents of the brochure cum application form of SHPL that the persons who could invest in the NCDs are mentioned as " Individual, Trust, Agriculture, HUF, Mutual Fund, partnership, corporate bodies, Financial Institutions, Professional, Business, Shareholder, others etc.". The space provided for "Others " in the said Application Form indicates that the applicants were not identified prior to the publication of the Application Form. SHPL also admitted that except for one investor (who was directly introduced by one of the directors), the company had paid brokerage in respect of all other applications. The aforementioned facts clearly indicate that the offer was open to the general public, and not merely to a specific pre-determined group of persons. The offerees *prima facie* appear to be general categories of persons who were permitted to apply for the NCDs of SHPL, and do not satisfy the element of specificity required by the sub-section (3) of section 67. I also note that there is no evidence of any prior determination of the identity of the offerees of what has been claimed by SHPL to be the private placement of NCDs.

- iii. I also note that SHPL has not submitted the copies of invitation letters or offer documents through which it sought subscription from the pre-determined investors. Thus, SHPL has not discharged the burden of proof to establish that the offer of secured non-convertible debentures made by it was a private placement.

- 7. In view of the above, I find that SHPL is not exempted from the applicability of section 67(3) of the Companies Act, 1956 and the issuance of the NCDs by SHPL in the instant case is *prima facie* a public issue in terms of the provisions of Section 67(3) of the Companies Act, 1956.
- 8. 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 also be administered by SEBI.

9. I note that –

- i. From the abovementioned, it will follow that since the *Offer of NCDs* 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 sub-section (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 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.

...

*Section 73(2) says that every company and every director of the company who is an officer in default, shall 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. The scope of the above mentioned provisions came up for consideration before this Court in *Raymond Synthetics Ltd. & Ors. V. Union of India* (supra), wherein the Court held that in a case where the company has not applied for listing on a stock exchange, the consequences will flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus. I am, therefore, of the view that since *Sabaras* had violated the listing provisions and collected huge amounts from the public in disobedience of law, SEBI is justified in directing refund of the amount with interest."*

- iii. Having regard to the abovementioned observations of the Hon'ble Supreme Court of India, since the *Offer of NCDs* is *prima facie* a public issue in accordance with the provisions of the Companies Act, 1956, 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 and also compliance with provisions of Sections 73(2) and 73(3) of that Act.

- iv. In the facts of the instant case, it *prima facie* appears that SHPL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of NCDs*.
10. 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 NCDs* was construed as a public offer. Having made a public offer, SHPL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. In the instant case, there is no evidence on record to indicate whether or not SHPL has filed a prospectus. In view of the same, I find that *prima facie*, SHPL has not complied with the provisions of Section 60 of Companies Act, 1956.
 11. 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 and contain disclosures as specified. Based on the material available on record, I find that SHPL has not complied with the provisions of Section 56(1) and 56(3) of the Companies Act, 1956 and therefore *prima facie*, has violated the aforesaid provisions.
 12. Under Section 117B of the Companies Act, 1956, no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless it has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed.

Section 12(1) of the SEBI Act states : "*No... trustee of trust deed ... shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act*". Debenture trustee of SHPL viz. Mr. Hemant Sahu is not registered with SEBI. Further, Regulation 7 of SEBI (Debenture Trustees) Regulations, 1993 ("**Debenture Trustees Regulations**"), provides that: "*no person should act as a debenture trustee unless he is either –*

- i. a scheduled bank carrying on commercial activity; or*
- ii. a public financial institution within the meaning of section 4A of the Companies Act, 1956; or*
- iii. an insurance company; or*
- iv. body corporate."*

Based on the material available on record, I find that Mr. Hemant Sahu has *prima facie*, failed to meet the eligibility criteria specified under the provisions of the Debenture Trustees Regulations and therefore, has acted as unregistered Debenture Trustees, which amounts to violation of the abovementioned provisions of the SEBI Act read with the Debenture Trustee Regulations. I also find that SHPL has not complied with the provisions of Sections 117B of the Companies Act, 1956.

13. Further, under Section 117C of the aforesaid Act, where a company issues debentures, it shall create a debenture redemption reserve for the redemption of such debentures, to which adequate amounts shall be credited, from out of its profits every year until such debentures are redeemed. There is no evidence on record that indicates creation of debenture redemption reserve by SHPL. I, therefore, find that SHPL has not complied with the provisions of Sections 117C of the Companies Act, 1956.
14. In addition to the above, reference may be made to the Debt Securities Regulations, 2008, which were framed by SEBI in exercise of its powers under Section 30 of the SEBI Act and are applicable to the public issue and listing of debt securities. It may be relevant to note that under the aforesaid Regulations, '*debt securities*' have been defined as '*non-convertible debt securities which create or acknowledge indebtedness, and include debenture...*' In this context, I find that SHPL, through the *Offer of NCDs*, which is a public issue of debt securities, has *prima facie* violated the following provisions of the aforesaid Regulations, which contain *inter alia* conditions for public issue and listing of debt securities, viz.

- i. Regulation 4(2)(a) – *Application for listing of debt securities*
 - ii. Regulation 4(2)(b) – *In-principle approval for listing of debt securities*
 - iii. Regulation 4(2)(c) – *Credit rating has been obtained*
 - iv. Regulation 4(2)(d) – *Dematerialization of debt securities*
 - v. Regulation 4(4) – *Appointment of Debenture Trustee*
 - vi. Regulation 5(2)(b) – *Disclosure requirements in the Offer Document*
 - vii. Regulation 6 – *Filing of draft Offer Document*
 - viii. Regulation 7 – *Mode of disclosure of Offer Document*
 - ix. Regulation 8 – *Advertisements for Public Issues*
 - x. Regulation 9 – *Abridged Prospectus and application forms*
 - xi. Regulation 12 – *Minimum subscription*
 - xii. Regulation 14 – *Prohibition of mis-statements in the Offer Document*
 - xiii. Regulation 15 – *Trust Deed*
 - xiv. Regulation 16 – *Debenture Redemption Reserve*
 - xv. Regulation 17 – *Creation of security*
 - xvi. Regulation 19 – *Mandatory Listing*
 - xvii. Regulation 26 – *Obligations of the Issuer, etc.*
15. Upon a consideration of the aforementioned paragraphs, I am of the view that SHPL is *prima facie* engaged in fund mobilising activity from the public, through the *Offer of NCDs* 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, Section 117B, Section 117C) and the Debt Securities Regulations, 2008.
16. 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, 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, over companies who issue *Non-Convertible Redeemable Debentures* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Acts and the Debt Securities Regulations. Steps therefore, have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by SHPL 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 SHPL and its Directors alongwith its Debenture Trustee, viz. Mr. Hemant Sahu , for preventing that company from further carrying on with its fund mobilising activity under the *Offer of NCDs*.

17. 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 read with the Debt Securities Regulations and the Debenture Trustee Regulations, hereby issue the following directions –
- i. SHPL shall not mobilize any fresh funds from investors through the *Offer of NCDs* 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. SHPL and its Directors, viz. Mr. Malwinderwant Singh (DIN:639523, PAN:ALSPS7699N), Mr. Sukhraj Bahadur Singh (DIN:659193, PAN:AQVPS7675N), Mrs. Vijay Laxmi Kathait (DIN:2548164, PAN:ALLPK5580D), Mr. Jitendra Singh Gurjar (DIN:2548187, PAN:ALZPG7304F), Mr. Guriqbal Singh Bhullar (DIN:3028807, PAN:AAQPB6799M), Mr. Harpreet Singh (DIN:758659, PAN:BCSPS6136G), Mrs. Harjit Kaur Bhullar (DIN:02939598, PAN:AARPB9746R), Mr. Abhay Shukla (DIN:2891493, PAN:AQZPS7964C), Mr. Vishwanathan Iyer (DIN:2952081, PAN:AADPI3574N), Mr. Akshay Tiwari (DIN:5108463, PAN:ACNPT2976P) 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. SHPL 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. SHPL shall provide a full inventory of all its assets and properties;
 - v. SHPL's abovementioned Directors shall provide a full inventory of all their assets and properties;
 - vi. SHPL 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 NCDs*, without prior permission from SEBI;

- vii. SHPL and its abovementioned present Directors shall not divert any funds raised from public at large through the *Offer of NCDs*, which are kept in bank account(s) and/or in the custody of SHPL;
- viii. SHPL shall furnish complete and relevant information within 21 days from the date of receipt of this Order.
- ix. The Debenture Trustee, viz. Mr. Hemant Sahu , is prohibited from continuing with his present assignment as a debenture trustee in respect of the *Offer of NCDs* of SHPL and also from taking up any new assignment or involvement in any new issue of debentures, etc. in a similar capacity, from the date of this order till further directions.
18. The above directions shall take effect immediately and shall be in force until further orders.
19. 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 SHPL 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 the RoC, Gwalior. In this context, SHPL 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.
20. Similarly, the Debenture Trustee, viz. Mr. Hemant Sahu , may, within 21 days from the date of receipt of this Order, file his reply, if any, to this Order and may also indicate whether he desires to avail an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.
21. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against SHPL and its abovementioned Directors; its Debenture Trustee, viz. Mr. Hemant Sahu, in accordance with law.

Place: Mumbai
Date: February 11, 2015

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