

**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 Pious Agro Industries Limited (PAN: AAFCP3661A) and its Directors, viz. Shri Palas Chandra Dey (DIN:02886441, PAN: APQPD7806Q), Shri Monoranjan Dey (DIN:02886446, PAN: AIMP8612K), Smt Sunita Saha (DIN:05240299, PAN: CDUPS4544N) and Shri Chiranjib Banerjee (DIN: 02886457, PAN: AVAPB1280A)

1. Securities and Exchange Board of India ("**SEBI**") received a complaint dated December 15, 2013 regarding non-payment of the invested money by Pious Agro Industries Limited (herein after referred to as '**PAIL**' or '**the company**'). The complainant also provided a copy of Certificate of Redeemable Preference Shares ("**RPS**") issued by the company.
2. As part of preliminary inquiry, SEBI vide letter dated January 20, 2014 advised PAIL to furnish *inter alia* the following information viz. -
 - i. Copy of the Memorandum and Articles of association of the company.
 - ii. Copy of audited Balance Sheet and Profit & Loss account of the company for last 3 years.
 - iii. Names, addresses and occupation of all the promoters/directors of the company .
 - iv. Names and details of the key managerial personnel of the company.
 - v. Information in respect of issue of preference shares/debentures issued by the Company:
 - a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of prospectus/information memorandum filed with the Registrar of Companies ("**RoC**") for issuance of shares/debentures.
 - b. Date of opening and closing of the subscription list for the said shares/debentures.
 - c. Details regarding the number of application forms circulated inviting subscription for shares/debentures.
 - d. Details regarding the number of applications received.
 - e. Details regarding the number of allottees and list of such allottees.

- f. Number of shares/debentures allotted and value of such allotment against each allottee's name.
- g. Details regarding subscription amount raised.
- h. Date of allotment of the 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 debenture/share certificates, etc.
- k. Details of the total number of applicants for each of PAIL's schemes besides the list of final allottees.
- l. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of shares/debentures.
- m. Terms and conditions of the issue of shares/debentures.
- n. 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.

The aforesaid letter sent to the company returned undelivered by postal authorities. SEBI also sent letters dated January 31, 2014 to the directors of the company. Letters sent to Shri Palas Chandra Dey and Shri Monoranjan Dey were returned undelivered to SEBI by postal authorities with remarks "Left without address". Letter to Smt. Sunita Saha was delivered on February 07, 2014. However, SEBI has not received any reply from her till date. SEBI also sent reminder letter dated March 05, 2014 to the company at their alternate address. This letter was also returned undelivered by postal authorities.

3. Thereafter, SEBI vide letter dated May 20, 2014 and e-mail dated June 09, 2014 advised auditors of the company "*I. Dutta & Associates*" to provide *inter alia* information/documents viz. details regarding the number of allottees, copies of audited annual accounts of the company for last 3 years etc. Auditors of the company vide letter dated May 28, 2014 and e-mail dated June 09, 2014 provided copies of annual accounts of the company for the year ended March 31, 2010, March 31, 2011 and March 31, 2012. They also submitted that the list of allottees was not available with them.

4. Meanwhile, efforts were made to obtain the relevant information/documents from Ministry of Corporate Affairs' ('MCA') website i.e. MCA21 portal.
5. The material available on record i.e. information/documents received from the auditors of the company; information/documents obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' and information/documents received from the complainant have been perused. On an examination of the same, it is observed that –
 - i The company was incorporated as Pious Agro Industries Limited (CIN: U01400WB2010PLC141472) on January 28, 2010 with RoC, Kolkata having its registered office at Near Bajaj Kalimata showroom, Ward No. 13, Arambagh, West Bengal- 712601.
 - ii The directors of PAIL are Shri Palas Chandra Dey, Shri Monoranjan Dey and Smt Sunita Saha. Shri Chiranjib Banerjee, who was earlier director of the company, has since resigned.
 - iii It is observed from the audited Balance Sheet of the company as on March 31, 2012 that PAIL issued 15,76,200 RPS amounting to Rs.1,57,62,000/- during FY 2010-11 and 2011-12. It is specifically mentioned by the auditors of the company in their audit report for the year ended March 31, 2012, at point no. XX, that "*The company has raised 6,55,200 redeemable Preference Shares amounting to Rs. 65,52,000 by way of public issue during the year.*"
6. In the context of the abovementioned details, the issue for determination in the instant matter is whether the mobilization of funds by PAIL through the *offer of RPS*, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**") and the Companies Act, 1956.
7. 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 time 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 :

"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."

8. 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 case, it is observed from the Balance Sheet of PAIL as on March 31, 2012 that the company allotted 15,76,200 RPS amounting to Rs.1,57,62,000/- during FY 2010-11 and 2011-12. Auditors of the company in their audit report for the year ended March 31, 2012, at point no. XX, have specifically mentioned "The company has raised 6,55,200 redeemable Preference Shares amounting to Rs. 65,52,000 by way of public issue during the year." PAIL and its directors failed to submit relevant information sought by SEBI in this regard despite being granted several opportunities to do so. In the absence of any reply from the company, the auditor's statement that the issue of

RPS was by way of a public issue is taken on record as a statement of fact. Based on the facts available in this case, including in particular the submission of the auditors of the company that PAIL raised funds by way of a public issue of RPS, and in the absence of any assertion to the contrary, the only conclusion can be that this issue was nothing but a public issue of securities in terms of provisions of Section 67(3) of the Companies Act, 1956.

- iv. PAIL 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 and therefore, is not covered under the second proviso to Section 67(3) of Companies Act, 1956.
9. 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.
10. 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 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 recognised 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 recognised 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 RPS* 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 PAIL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of RPS*.
11. 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, PAIL 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 PAIL registered a prospectus with the RoC. In view of the same, I

find that *prima facie*, PAIL has not complied with the provisions of Section 60 of Companies Act, 1956.

12. 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 PAIL 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.
13. Upon a consideration of the aforementioned paragraphs, I am of the view that PAIL is *prima facie* engaged in fund mobilising 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).
14. 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, the 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 *Preference Shares* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies. Steps therefore, have to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by PAIL and no investors are defrauded. This is especially so as PAIL and its directors failed to submit the relevant details sought by SEBI despite being granted opportunities to do so. In light of the same, I find there is no other alternative but to take recourse through an interim action against PAIL and its Directors for preventing that company from further carrying on with its fund mobilising activity under the *offer of RPS*. Considering all these factors, it is felt that urgent intervention by SEBI is warranted as otherwise there could be every possibility of irreparable damage to investors.

15. 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, 1992, hereby issue the following directions –
- i. PAIL shall forthwith cease to 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. PAIL and its past/present Directors, viz. Shri Palas Chandra Dey (DIN:02886441, PAN: APQPD7806Q), Shri Monoranjan Dey (DIN:02886446, PAN: AIMPD8612K), Smt Sunita Saha (DIN:05240299, PAN: CDUPS4544N) and Shri Chiranjib Banerjee (DIN: 02886457, PAN: AVAPB1280A) 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. PAIL 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. PAIL shall provide a full inventory of all its assets and properties;
 - v. PAIL's abovementioned Directors shall provide a full inventory of all their assets and properties;
 - vi. PAIL 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. PAIL 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 PAIL;
 - viii. PAIL and its abovementioned Directors shall furnish complete and relevant information within 21 days from the date of receipt of this Order.
16. The above directions shall take effect immediately and shall be in force until further orders.
17. The *prima facie* observations contained in Order are made on the basis of the material available on record i.e. information/documents received from the auditors of the company; information/documents obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' and information/documents received from the complainant. In this context,

PAIL and its abovementioned Directors are advised to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act including the following, should not be taken/imposed against them:

- i. Directing them jointly and severally to refund money collected through the Offer of Redeemable Preference Shares along with interest, if any, promised to investors therein;
 - ii. Directing them to not issue 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, for an appropriate period;
 - iii. Directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.
18. PAIL 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.
19. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against PAIL and its abovementioned Directors in accordance with law.

Place: Mumbai
Date: April 17, 2015

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