

**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 Great Overseas Commodore Limited and its Directors, viz. Shri Tirthankar Dasgupta (DIN:02624914, PAN:AOQPD8911D), Shri Pratap Mondal (DIN:02902251, PAN:BBHPM8968G) and Shri Gora Chand Pandey (DIN:03563700, PAN:BOEPP0786H)

1. Securities and Exchange Board of India ("**SEBI**") received complaints dated October 15, 2014 and October 16, 2014 from agents of Great Overseas Commodore Limited (herein after referred to as '**GOCL**' or '**the company**') regarding mobilisation of funds by the company through the issuance of Redeemable Preference Shares ('**RPS**'). The complainants also provided the lists of investors and the copies of letters of allotment issued by the company to some of the investors.
2. As part of preliminary inquiry, SEBI vide letter dated November 17, 2014 advised GOCL and its directors 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. Copy of annual returns of the company for last 3 years,
 - iv. Names, addresses and occupation of all the promoters/ directors of the company,
 - v. Names and details of the key managerial personnel of the company,
 - vi. Information in respect of issue of preference shares/debentures:
 - a. Copy of Prospectus/ Red Herring Prospectus/ Statement in lieu of prospectus/ information memorandum filed with the Registrar of Companies ('**RoC**') for issuance of preference shares/debentures.
 - b. Date of opening and closing of the subscription list for the said preference shares/debentures.

- c. Details regarding the number of application forms circulated inviting subscription for preference shares/debentures and the number of applications received.
- d. Details of allottees such as names, date of allotment and amount mobilised.
- e. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment.
- f. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of preference shares/debentures.
- g. Terms and conditions of the issue of preference shares/debentures.
- h. Whether the company has applied for listing of its securities with any of the stock exchanges.
- i. Copy of Form 2 and Form 10 filed with the RoC.

However, the aforesaid letters to the company and its directors were returned undelivered by postal authorities. Thereafter, SEBI sent reminder letters dated December 01, 2014 to GOCL and its directors. These letters were also returned undelivered to SEBI by postal authorities.

- 3. Meanwhile, efforts were made to obtain the relevant information/documents from Ministry of Corporate Affairs' (**MCA**) website i.e. MCA21 portal.
- 4. The material available on record i.e. information/documents obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' and information/documents received from the complainants have been perused. On an examination of the same, it is observed that –
 - i The company was incorporated as Great Overseas Commodore Limited (CIN: U45202WB2010PLC153230) on September 21, 2010 with RoC, Kolkata having its registered office at Vill.- Ghatiharania, P.O. – Chuprihara, P.S. - Kultali, West Bengal- 743349.
 - ii The directors of GOCL are Shri Tirthankar Dasgupta, Shri Pratap Mondal and Shri Gora Chand Pandey.

- iii It is observed from the Balance Sheet of the company as on March 31, 2012 obtained from MCA 21 Portal that amount of Rs. 76.35 lakhs is mentioned as 'share application money pending allotment of preference shares'.
 - iv Agents of the company also provided the lists of investors and copies of letters of allotment/share certificates issued by the company to some of the investors. It is observed from the copies of letters of allotment/share certificates issued by the company that GOCL issued RPS during FY 2010-11, 2011-12 and 2012-13. Names of the investors stated on copies of letters of allotment/share certificates are also mentioned in the corresponding list of investors. Based on the lists of investors and copies of letters of allotment/share certificates provided by the complainants, it is observed that GOCL issued RPS to at least 2277 allottees and mobilized funds amounting to Rs.1,98,84,245/-.
5. In the context of the abovementioned details, the issue for determination in the instant matter is whether the mobilization of funds by GOCL through the *offer of RPS*, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**") and the Companies Act, 1956.
 6. 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."
 7. 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. For ascertaining whether the Offer of RPS is in the nature of a public issue in accordance with Section 67 of the Companies Act, 1956, the number of subscribers is of utmost importance.
 - a. In the instant case, it is observed from the lists of investors and copies of letters of allotment/share certificates provided by the complainants that GOCL issued RPS to at least 2277 allottees and mobilized funds amounting to Rs.1.99 Crores. Thus, the number of persons to whom the RPS were issued by GOCL was way beyond the prescribed limit of forty-nine persons in terms of provisions of Section 67(3) of the Companies Act, 1956. SEBI letters to the company and its directors in this regard were returned undelivered by postal authorities. Hence, based on the facts available in this case, including in particular the number of persons to whom the RPS have been issued by GOCL, 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.

- b. GOCL 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.
- 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 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 *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.

...

*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 Saharas 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 GOCL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of RPS*.
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 RPS* was made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, GOCL 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 GOCL registered a prospectus with the RoC. In view of the same, I find that *prima facie*, GOCL 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, contain disclosures as specified. Based on the material available on record, I find that GOCL 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. Upon a consideration of the aforementioned paragraphs, I am of the view that GOCL is *prima facie* engaged in fund mobilizing activity from the public, through the *offer of RPS* and as a result of the aforesaid activity has violated the aforementioned provisions of the Companies Act, 1956 (Section 56, Section 60 read with Section 2(36), Section 73).
13. 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 GOCL and no investors are defrauded. This is especially so as SEBI letters to the company and its directors were returned undelivered by postal authorities. It is also pertinent to mention that GOCL and its directors did not file with RoC the return of allotment and details of the investors to whom RPS have been issued. In light of the same, I find there is no other alternative but to take recourse through an interim action against GOCL 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.
14. 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. GOCL 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. GOCL and its Directors, viz. Shri Tirthankar Dasgupta (DIN:02624914, PAN:AOQPD8911D), Shri Pratap Mondal (DIN:02902251, PAN:BBHPM8968G) and Shri Gora Chand Pandey (DIN:03563700, PAN:BOEPP0786H) 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. GOCL 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. GOCL shall provide a full inventory of all its assets and properties;
 - v. GOCL's abovementioned Directors shall provide a full inventory of all their assets and properties;
 - vi. GOCL 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. GOCL 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 GOCL;
 - viii. GOCL and its abovementioned Directors shall furnish complete and relevant information within 21 days from the date of receipt of this Order.
15. The above directions shall take effect immediately and shall be in force until further orders.
16. The *prima facie* observations contained in Order are made on the basis of the material available on record i.e. information/documents obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal' and information/documents received from the complainants. In this context, GOCL 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.
17. GOCL 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.
18. This interim order cum show cause notice is without prejudice to the right of SEBI to take any other action that may be initiated against GOCL and its abovementioned Directors in accordance with law.

Place: Mumbai
Date: May 06, 2015

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