

**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 M/s Subha Commercial Services Limited(CIN:U51909TR2011PLC008328; PAN:AAQCS2617C) and its Directors namely Shri Goutam Ghosh (DIN:03534885; PAN:AXAPG9340C),Shri Uttam Ghosh (DIN:05204287; PAN:BBWPG4454J), Shri Biswajit Sukla Das (DIN:03534899; PAN:AZGPD5682C) and Shri Ashim Das (DIN:03534849; PAN:ALPPD1324E)

1. Securities and Exchange Board of India ("SEBI") received a copy of Show Cause Notice dated August 05, 2013 issued to Subha Commerical Services Limited ("SCSL") by Office of the Sub Divisional Magistrate, West Tripura alleging illegal mobilization of funds by SCSL and non-repayment of maturity and prematurity values in respect of various financial instruments issued by SCSL.
- 2.1 As part of preliminary inquiry, SEBI vide letter dated September 12, 2013 advised SCSL to furnish information in respect of issuance of securities (debentures, shares, etc.) and various schemes launched by SCSL.
- 2.2 SCSL vide letter dated September 28, 2013 sought extension of time to provide the information sought by SEBI. Thereafter, SCSL vide letter dated November 28, 2013 *inter alia* submitted copies of Memorandum and Articles of Association, Statement of Mobilization and Deployment of Funds by its Auditors, Audited Balance Sheet and Profit & Loss account for the financial year 2011-12 and 2012-13, Minutes of General and Board Meeting wherein resolutions were passed for increase in authorized share capital and issue of preference shares, list of allottees of *Redeemable Preference Shares*, application form, preference share certificate, etc.
- 2.3 Thereafter, SEBI vide letter dated September 04, 2014 advised SCSL to submit the year-wise break-up of number of allottees and amount raised by SCSL through issuance of *Redeemable Preference Shares*. In response, SCSL vide letter dated September 15, 2014 has

submitted the details of allotment, viz. date of allotment, number of allottees, amount raised, etc.

3. I have perused the material available on record i.e. the copy of show cause notice issued by Office of the Sub Divisional Magistrate, West Tripura to SCSL, correspondence between SEBI and SCSL and information/ documents contained therein and information obtained from the Ministry of Corporate Affairs' website i.e.'MCA21'. On an examination of the same, it is observed that –
- a. SCSL was incorporated on August 04, 2011 with CIN as U51909TR2011PLC008328 and having its registered office at Joynagar 1 No. Agartala, Tripura 799001.
- b. The Directors of SCSL are Shri Goutam Ghosh (DIN: 03534885; PAN: AXAPG9340C), Shri Uttam Ghosh (DIN: 05204287; PAN: BBWPG4454J), Shri Biswajit Sukla Das (DIN: 03534899; PAN: AZGPD5682C) and Shri Ashim Das (DIN: 03534849; PAN: ALPPD1324E)
- c. As per the copy of application form submitted by SCSL, it is observed that SCSL offered *Redeemable Preference Shares* with the following terms and conditions:

Private Placement of Redeemable Preference Shares of Rs.10/- Each

Terms & Conditions of the Redeemable Preference Shares Issue

<i>Redemption Period</i>	<i>2 Years</i>	<i>3 Years</i>	<i>6 Years</i>
<i>Issue Price for</i>	<i>1,000/-</i>	<i>1,000/-</i>	<i>1,000/-</i>
<i>Preference Shares (100)</i>			
<i>Redemption Value</i>	<i>1,200/-</i>	<i>1,350/-</i>	<i>2,000/-</i>

- d. As per copies of Minutes of Meeting submitted by SCSL, it is observed that SCSL passed the following resolutions at various General Meetings to increase its authorised capital and issue Preference Shares:

Date of Meeting	Resolution passed at Meeting	Face Value (₹)	Amount (₹)
31.01.2012	Resolved to increase authorised share capital from ₹5,00,000 to ₹1,00,00,000 by creation of 9,50,000 preference shares of Rs.10 each		
20.12.2012	Resolved to issue 310680 Preference Shares	10	31,06,800.00
27.04.2013	Resolved to issue 159700 Preference Shares	10	15,97,000.00
06.11.2013	Resolved to issue 86100 Preference Shares	10	8,61,000.00

- e. As per the Statement of Mobilization and Deployment of Fund from August 04, 2011 to October 31, 2013 submitted by SCSL, an amount of ₹55,64,800/- has been mobilized through issue of *Redeemable Preference Shares*.
- f. As per submissions made by SCSL vide letter dated September 15, 2014, the details of Redeemable Preference Shares issued by SCSL are as follows:

Date of Allotment	Total Amount (₹)	No. of Allottees
25-12-2012	31,06,800.00	377
02-05-2013	15,97,000.00	132
14-11-2013	8,61,000.00	151
29-04-2014	10,02,500.00	190
Total	65,67,300.00	850

- g. As per the details of allotment mentioned above, SCSL had issued and allotted *Redeemable Preference Shares ("Offer of RPS")* to 850 investors and raised a total amount of ₹65,67,3000/-during the financial years 2012-13 to 2014-15.

- 4.1 In the context of the abovementioned details, the issue for determination in the instant matter is whether the mobilization of funds by SCSL through the *Offer of RPS*, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"), the Companies Act, 1956 and with the provisions of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 notified on June 12, 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, at the relevant point of time flows from the provisions of Section 55A of the Companies Act. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in ***Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (Civil Appeal no. 9813 of 2011) (Judgment dated August 31, 2012)*** (hereinafter referred to as the "***Sahara Case***"), had observed 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. (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 invitation 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 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. For ascertaining whether the Offer of RPS are public issues or issues on private placement basis in accordance with Section 67 of the Companies Act, 1956, the number of subscribers is of utmost importance.

- a) In the facts of the instant case, it is observed from the details of allotment provided by SCSL vide letter dated September 15, 2014, that SCSL issued and allotted *Redeemable Preference Shares* and raised an amount of approximately ₹ 65.67 Lakhs from 850 investors during the financial years 2012-13 to 2014-15. It is pertinent to mention that the number of investors to whom the *Offer of RPS* was made by SCSL in the financial years 2012-13 and 2013-14 was much beyond the prescribed limit of forty-nine persons (377 investors in the financial year 2012-13 and 283 investors in the financial year 2013-14). Further, the *Offer of RPS* was also made by SCSL to 190 investors in the financial year 2014-15. Merely stating the issue as a private placement in the application form shall not make it as such. In view of the above stated facts, the *Offer of RPS* by SCSL *prima facie* qualifies as a public issue of securities under Section 67(3) of the Companies Act, 1956, which has been elucidated by the Hon'ble Supreme Court of India in the *Sahara Case*.
- b) In addition, SCSL is not stated to be a non-banking financial company or a public financial institution within the meaning of Section 4A of the Companies Act, 1956 and therefore, is not covered under the *second proviso* to Section 67(3).
- c) In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956 read with Section 67 of the said 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 para, 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 Section 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 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 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 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 SCSL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of RPS*.

- 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 to the public. 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, SCSL 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 that the aforesaid requirement had been complied with, by SCSL. In view of the same, I find that SCSL has *prima facie* not complied with the provisions of Section 60 of the 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 SCSL 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 In addition to the above, reference may be made to the SEBI (Issue and Listing of Non-Convertible Redeemable Preference shares) Regulations, 2013, 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 non-convertible redeemable preference shares. It may be relevant to note that under the aforesaid Regulations, ‘*non-convertible redeemable preference share*’ has been defined as ‘*a preference share which is redeemable in accordance with the provisions of the Companies Act, 1956 and does not include a preference share which is convertible into or exchangeable with equity shares of the issuer at a later date, with or without the option of the holder*’. In this context, I find that SCSL, through the *Offer of RPS*, which is a public issue of non-convertible redeemable preference share, has *prima facie* violated the following provisions of the aforesaid Regulations, which contain *inter alia* conditions for public issue and listing of non-convertible redeemable preference shares, viz.

- i. Regulation 4(2)(a) – Application for listing of securities
- ii. Regulation 4(2)(b) – In-principle approval for listing of securities
- iii. Regulation 4(2)(c) – Credit rating has been obtained
- iv. Regulation 4(2)(d) – Dematerialization of securities
- v. Regulation 4(2)(e) – Minimum tenure
- vi. Regulation 4(3) – Capital Redemption Reserve
- vii. Regulation 4(5) – Appointment of Merchant Banker
- viii. Regulation 5 – Disclosure in offer document
- ix. Regulation 6- Filing of draft Offer Document
- x. Regulation 7 – Mode of disclosure of Offer Document
- xi. Regulation 8 – Advertisements for Public Issues
- xii. Regulation 9 – Abridged Prospectus and application forms
- xiii. Regulation 13 – Minimum subscription
- xiv. Regulation 15 – Prohibition of mis-statements in the Offer Document
- xv. Regulation 16 – Mandatory Listing
- xvi. Regulation 22 – Obligations of the Issuer, etc.

4.8 Upon a consideration of the aforementioned paragraphs, I am of the view that SCSL 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), and the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 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, 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 *Redeemable Preference Shares* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Act. Steps therefore, have to be taken in the instant matter to ensure that only legitimate fund raising activities are carried on by SCSL 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 to an interim action against SCSL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the *Offer of RPS*.

6. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions –
 - i. SCSL shall forthwith cease to mobilize any fresh funds from investors through the *Offer of RPS* or through any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly, till further directions;
 - ii. SCSL (CIN:U51909TR2011PLC008328; PAN: AAQCS2617C) and its directors namely Shri Goutam Ghosh (DIN: 03534885; PAN: AXAPG9340C), Shri Uttam Ghosh (DIN: 05204287; PAN: BBWPG4454J), Shri Biswajit Sukla Das (DIN: 03534899; PAN: AZGPD5682C) and Shri Ashim Das (DIN: 03534849; PAN: ALPPD1324E) 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. SCSL 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. SCSL shall provide a full inventory of all its assets and properties;
 - v. The Directors of SCSL shall provide a full inventory of all their assets and properties;
 - vi. SCSL 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. SCSL 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 SCSL;
 - viii. SCSL and its abovementioned Directors shall, within 21 days from the date of receipt of this Order, provide SEBI with all relevant and necessary information as sought by SEBI.
7. The above directions shall take effect immediately and shall be in force until further orders.

8. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. the copy of show cause notice issued by Office of the Sub Divisional Magistrate, West Tripura to SCSL, correspondence between SEBI and SCSL and information/ documents contained therein and information obtained from the Ministry of Corporate Affairs' website i.e. 'MCA21'. In this context, SCSL 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 not to 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.
9. SCSL and its abovementioned Directors may, within 21 days from the date of receipt of this Order, file their replies, if any, to this Order and may also indicate whether they wish 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 SCSL and its abovementioned Directors, in accordance with law.

Place: Mumbai
Date: May 08, 2015

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