

**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 Aspen Nirman India Limited (PAN:AAKCA3453G); its Directors, Viz. Mr. Abhijit Dasgupta (DIN:02475280), Mr. Bhaskar Saha (DIN:02531517, PAN:ALAPS8382A), Mr. Ashim Maitra (DIN:02532064, PAN:ADQPM0497A), Mr. Ujjal Kumar Roy (DIN:02555033, PAN:AHMPR4384B), Mr. Avijit Kumar Ganguly (DIN:02575466, PAN:AGQPG6356F), Mr. Debopam Sur (DIN:03079702, PAN:BEIPS2119R), Mr. Goutam Sarkar (DIN:03356712, PAN:BMWPS6539M) and its Debenture Trustee, viz. Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar)

1. Securities and Exchange Board of India ("SEBI") received letters dated December 09, 2013 and December 31, 2013 from the Registrar of Companies ('RoC'), Gwalior informing that some companies including Aspen Nirman India Limited (hereinafter referred to as 'ANIL' or 'the company') have issued debentures on private placement basis. RoC also forwarded copies of company's letter dated January 02, 2013 and e-mail dated March 13, 2013.
2. It is observed that the company in its letter dated January 02, 2013 to RoC stated:
"Aspen Nirman India Limited has an approval of issuing Redeemable Secured Debenture to the tune of Rs. 100 crore from the RoC, Madhya Pradesh against the company is selling the debentures to its only member M/S Bagbazar Brahmaputra Urban Society represented by its Secretary Sri Sisir Guin of 73/1, Bagbazar Street, P.O. Bagbazar, Kolkata – 700003."

The company has further stated that *"The Society ultimately sells the debentures to its members getting commission from Aspen Nirman India Limited. Aspen Nirman India Limited is having an Agreement with the Bagbazar Brahmaputra Society in this regard."*

The company also mentioned in the aforesaid letter to RoC that it had issued debentures amounting to Rs. 13 Crores to Bagbazar Brahmaputra Society in FY 2011-12.

3. Further, the company in its email dated March 13, 2013 to RoC had stated that “*Total amount of Debentures of Rs. 14,50,66,430.00 (Rupees fourteen crores fifty lakhs sixty six thousand four hundred thirty only) has been issued in favour of Baghbazar Brahmaputra Urban society, 73/1, Baghbazar Street, P.O. Baghbazar, Kolkata - 700003.*”

It was also mentioned in the said email to RoC that the company invested Rs.2.70 Crores in Aspen Projects India Ltd. during April 2012 to December 2012 towards purchasing share capital of the company.

The company also provided the details of loans given to other group companies by Aspen Nirman India Ltd. during April 2012 to December 2012 to RoC vide said email which are presented in a tabular format below:

Sr. no.	Name of Party	Total Amount of Loan (Rs.)
1.	Aspen Exim Ltd.	77,05,000
2.	Aspen Marketing India	1,62,70,000
3.	Aspen Projects India Ltd.	12,07,50,000
Total		14,47,25,000

Profit and Loss Statement for FY 2011-12 submitted by the company to RoC, Gwalior reflected nil revenue in FY 2011-12. Therefore, *prima facie* it appears that the amount invested by the company in Aspen Projects India Ltd. and loans given to its group companies is out of the amounts mobilized by the company through the issuance of debentures.

4. Meanwhile, SEBI received a reference dated December April 07, 2014 from Reserve Bank of India (“**RBI**”) forwarding a complaint dated January 06, 2014 from investors in Uttar Pradesh alleging the illegal mobilization of funds by ANIL through the issuance of debentures. The complainants also provided a copy of brochure cum application form issued by the company.

5. SEBI also received a complaint dated June 29, 2014 alleging that the company had raised money from several investors in West Bengal. The complainant also forwarded copies of certificates of secured redeemable debentures issued by the company to seven investors.
6. As part of preliminary inquiry, SEBI vide letters dated August 18, 2014 advised the company and its directors to furnish *inter alia* the following information, viz. –
 - a. Details of the past and present directors of the company.
 - b. Nature of activities being conducted by the company.
 - c. Date of opening and closing of the issue.
 - d. Copy of minutes of EGM of the company approving allotment of debentures and board minutes approving allotment.
 - e. Brochures/advertisement pertaining to debenture issue, which were made available to the public.
 - f. Copies of duly filed application forms received from investors/applicants who applied in the debenture issue.
 - g. Name and address of person(s) to whom debentures were allotted, with details including face value of debenture, number of debentures allotted, date of receipt of payment, date of allotment.
 - h. Amount mobilized by issue of debentures till date and amount refunded to investors.
 - i. Name and address of debenture trustee and whether these trustees are registered with SEBI.
 - j. Date of charge creation in the Registrar of Companies (**‘RoC’**), charge identification number.
 - k. Details of properties acquired from money raised from said debenture issue.
 - l. Addresses of all the branches operating in India.
 - m. Name of the broker and amount of brokerage paid, if any.
 - n. Certified copies of audited financial statements for all the financial years during which funds were raised by the company from 2011-12 onwards.

- o. Copies of Income Tax Return filed by the company for financial year 2011-12 onwards.
- p. Details of the regulatory approvals obtained by the company, if any, for said debenture issue.
- q. Details of other fund raising from public in form of debentures/ or other manner (if any) by the company or its group/associates company.
- r. Details of any action initiated/ taken by any other authority (including any court order) against the company in respect of money raised from public.

The letters to the company were sent at its registered office and corporate office address. Letter sent at registered office address of the company was returned undelivered by postal authorities with remarks "addressee moved". Letter sent at the corporate office address at Kolkata was delivered to the company.

The company vide letter dated August 28, 2014 sought at least 3 months for submission of the information/documents sought by SEBI.

- 7. SEBI vide reminder letters dated September 10, 2014 advised the company and its directors to submit the information/documents by September 22, 2014. Letters to directors viz. Mr. Ashim Maitra, Mr. Abhijit Dasgupta and Mr. Goutam Sarkar were returned undelivered by postal authority.
- 8. ANIL vide letter dated September 26, 2014 provided *interalia* the following documents, viz-
 - a. Copy of Debenture Trust Deed
 - b. Copy of Form 10 (registration of charge)
 - c. Copy of an Audit Report for FY 2011-12
 - d. Copy of extract of the meeting of the board of directors of the company held on September 21, 2011
 - e. Copy of EGM of shareholders of the company held on September 22, 2011.
 - f. Copy of certificate of incorporation of the company
 - g. Copy of Memorandum and Articles of Association of the company.

The company sought additional time to provide the remaining information.

9. On October 20, 2014, SEBI official also conducted a physical verification of registered office address of the company. It was found that the company did not exist at the given address.
10. Meanwhile, SEBI received some more complaints in the months of August, September and October 2014 forwarding copies of certificates of debentures issued to them by ANIL.
11. SEBI vide letter dated October 30, 2014 addressed to the company and its directors provided a final opportunity to the company to submit the requisite information by November 10, 2014. ANIL vide its letter dated November 10, 2014 provided *interalia* documents including a copy of Form 10, copy of Debenture Trust Deed, copy of certificate of commencement of business and a copy of business agreement with M/s Bagbazar Brahamaputra Urban Society, Kolkata (**BBUS**) and copy of certificate of commencement of business. It is also mentioned in the said letter that the date of opening of the issue was September 22, 2011.

In a copy of business agreement, ANIL and BBUS have been referred as 'Principal' and 'Service Provider'. Some of the details mentioned in the agreement are as below:

“Scope of Work: The Principal will provide the application forms to the Service provider which generally specifies the date of redemption repayment of principal and interest on specified dates.

Worth: the minimum quantum of work to be provided by the Principal and to be processed by Service Provider is Rs. 10,000/- only within a stipulated time of one year.

Duration: One year extendable as mutually agreed upon and project by the Principal.”

In terms and conditions of the agreement it is mentioned that “The service provider shall sell the debentures strictly to their members only and not to any other person. The debentures shall be sold as per the terms and conditions laid down in the application form for the same. The service provider will be eligible for commission and other reimbursable expenses as per the payment details.”

12. Thereafter, SEBI vide letter dated November 19, 2014 to the company sent at its Kolkata office address advised the company to submit the remaining information sought by SEBI

including the details of allottees of debentures such as number of allottees and the amounts raised from them.

13. The company vide letter dated December 02, 2014 sought further time of 14 days to submit the information. Considering the same, SEBI vide letter dated December 09, 2014 to the company granted additional time till December 16, 2014 to submit the information/documents.
14. ANIL vide letter dated December 18, 2014 requested that since the final opportunity to present required documents is already passed, an opportunity for hearing may be given to the company and allow attorney Mr. Sandip Mazumdar to represent the company on December 22, 2014.
SEBI vide e-mail dated December 19, 2014 granted an opportunity to the company to submit the information/documents personally through their representative.
15. Mr. Sandip Mazumdar appeared on behalf of ANIL on December 22, 2014 at SEBI's Local Office at Indore. However, he did not provide the required documents/information sought by SEBI. He assured that the desired documents shall be provided to SEBI latest by December 26, 2014. This was also informed to the company vide e-mail dated December 22, 2014. SEBI has not yet received any reply from the company till date.
16. On January 09, 2015 SEBI received an e-mail from a complainant forwarding copies of certificates of debentures issued by the company to several other investors.
17. Efforts were also made to obtain the information from Ministry of Corporate Affairs' Website i.e. MCA21 portal.
18. The material available on record i.e. communication exchanged between SEBI and the company; information/documents obtained from the Ministry of Corporate Affairs' website i.e. 'MCA 21 Portal'; information/documents received from RBI; information/documents received from RoC; complaints received and the documents enclosed therewith have been perused. On an examination of the same, it is observed that –

- i. ANIL (CIN:U45200MP2011PLC026774) was incorporated on September 16, 2011 with the RoC, Gwalior having its registered office at U.G. 24, Upper Ground Floor of Orbit, Plot No. 305-306, Scheme No. 54, P.U. 4 Commercial, Indore, Madhya Pradesh, India- 452010.
- ii. The Directors of the company are Mr. Abhijit Dasgupta, Mr. Bhaskar Saha, Mr. Ashim Maitra, Mr. Ujjal Kumar Roy, Mr. Avijit Kumar Ganguly, Mr. Debopam Sur and Mr. Goutam Sarkar.
- iii. It is noted that the address of one of the Directors of the Company Mr. Debopam Sur and Baghbazar Brahmaputra Urban Society, to which debentures have been stated to be issued, is one and the same i.e. 73/1, Bagbazar Street, P.O. Bagbazar, Kolkata - 700003.
- iv. It is observed from a copy of Form 10 and copy of Debenture Trust Deed filed by the company with RoC that the company on September 22, 2011 created a charge of Rs. 100 Crore on its immovable properties, stocks in trade, plants and machinery, furniture and fixtures and book debts to secure the issuance of debentures. The name of debenture trust is Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar) and the office of the trust is situated at 28 Michael Madhusudan Sarani, Ground Floor, Kolkata, West Bengal, India- - 700023.
- v. It is observed from the copies of the minutes of the meeting of the Board of Directors and minutes of EGM of shareholders of the company available on MCA website that the Board of the Directors of the company at the meeting held on September 21, 2011 and Shareholders of the company in EGM held on September 22, 2011 authorised the company to issue Secured Redeemable Non-Convertible Debentures ('**NCDs**') not exceeding Rs.100 Crores on a private placement basis.
- vi. It is mentioned in a copy of the brochure cum application forms provided by the complainant that ANIL is offering NCDs on a private placement basis under the following terms and conditions:

Plan-I Regular Income Redeemable Secured Debentures

<i>Amount</i>	<i>Redemption Period</i>	<i>Monthly Repayment</i>	<i>Incentive</i>	<i>Redemption Amount</i>
25000	18 months	312	Nil	25000
25000	36 months	375	3%	25750
25000	60 months	375	5%	26250

Plan - Monthly Allotment of Secured Redeemable Debentures

<i>Plan</i>	<i>AA</i>	<i>AD</i>	<i>AB</i>	<i>AC</i>
<i>Debenture Value</i>	1200.00	1800.00	3600.00	6000.00
<i>Redemption Period</i>	12 months	18 months	36 months	60 months
<i>Bonus Issue</i>	200.00	600.00	1400.00	3500.00
<i>On completion of total allotment</i>	1400.00	2400.00	5000.00	9500.00

- vii. It is mentioned in the copy of the debenture trust deed available on MCA website that NCDs were being issued by the company under the following terms and conditions:

Plan-I Regular Income Redeemable Secured Debentures

<i>Deposit Amount</i>	<i>Redemption Period</i>	<i>Monthly Repayment</i>	<i>Incentive</i>	<i>Redemption Amount</i>
25000	18 months	312	Nil	25000
25000	36 months	365	3%	25750
25000	60 months	365	5%	26250

Plan II - Multiplier Redeemable Secured Debentures

<i>Issue Price for Minimum Redeemable Secured Debentures (100*10)</i>	1000	1000	1000	1000	1000
<i>Redemption Value</i>	1500	2000	3000	5000	10000
<i>Redemption Period</i>	3 Years	5 Years	7 Years	10 Years	13 Years
<i>Analysed yield on investment</i>	14.47%	14.87%	17%	17.46%	19.38%

viii. It is also observed from the copies of certificates of NCDs provided by complainants that ANIL allotted NCDs to at least 167 allottees and mobilised funds amounting to Rs. 33,59,100/- . The Details of the same are as under-

Financial Year	Number of investors	Amount mobilised (in Rs.)
2011-12	3	1,86,000
2012-13	148	29,04,900
2013-14	16	2,68,200
Total	167	33,59,100

19. 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 ANIL 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.

20. 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 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."

21. 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, the number of subscribers is of the utmost importance.
 - a. It is observed from the copies of certificates of NCDs issued by ANIL that the company issued NCDs to at least 167 allottees and mobilized Rs.33,59,100/- from them during FY 2011-12 and 2013-14. In FY 2012-13 alone, NCDs were issued to at least 148 allottees. NCDs have thus been issued and subscribed by more than forty nine persons. It is important to note that the number of allottees (i.e. 167) and amount raised under the Offer of NCDs (i.e. Rs.33.59 Lacs) during the Financial Years 2011–12 to 2013–14, have been arrived at by merely collating data from the complaints received against ANIL. No details of the investors have been provided by either ANIL or its Directors despite being given several opportunities to do so. It is also pertinent to note that a charge has been created for an amount as high as Rs.100 Crores. It is therefore possible that the number of investors who invested in the NCDs as also the amount raised could be many times more than what has only been collated from the complaints received.

In the brochure and the application form issued by ANIL, it has been mentioned that NCDs were being issued on a private placement basis. However, the

company and its directors have failed to provide any documents to substantiate their claim that the said issue of debentures was a private placement. Merely mentioning that an issue is on a private placement basis does not make it such.

It is also observed that ANIL in its letter dated January 02, 2013 to RoC stated that the company is selling the debentures to its only member M/s Bagbazar Brahmaputra Urban Society. The company also mentioned in the aforesaid letter to RoC that it had issued debentures amounting to Rs. 13 Crores to Bagbazar Brahmaputra Society in FY 2011-12. ANIL in its email dated March 13, 2013 to RoC had also stated that the total amount of Debentures of Rs. 14.51 Crores had been issued in favour of BBUS. It is evident from a copy of business agreement between ANIL and BBUS provided by the company vide letter dated November 10, 2014 that BBUS had been appointed as service provider to further sell the debentures. The company also admitted that it has paid commission to BBUS for selling debentures. This, *prima facie* indicates that ANIL had allotted NCDs to BBUS in FY 2011-12, which in turn transferred these debentures to more than 49 investors. It is observed from the complaints received that in FY 2012-13 alone, NCDs were allotted to at least 148 investors. I note that this method adopted by ANIL for mobilization of funds is only to conceal the true nature and operation of the fund mobilizing activity from public by ANIL acting nominally through BBUS and is nothing but an artifice to circumvent the provisions of section 67(3) of the Companies Act, 1956.

Based on the facts available in this case, including in particular the number of persons to whom the NCDs have been issued by ANIL, 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. ANIL 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).
- c. 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.

22. 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 :

"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 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 ANIL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of NCDs*.
23. 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 made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, ANIL 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 ANIL has filed a prospectus. In view of the same, I find that *prima facie*, ANIL has not complied with the provisions of Section 60 of Companies Act, 1956.
24. 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 ANIL 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.
25. 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. Based on the material available on record, I find that ANIL has not complied with the provisions of

Sections 117B of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.

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*". Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar) are 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 Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar) 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.

26. 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. Based on the material available on record, there is no evidence to indicate whether ANIL has complied with the provisions of Sections 117C of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.
27. In addition to the above, reference may be made to the Debt Securities Regulations, 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 ANIL, 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.*
28. Upon a consideration of the aforementioned paragraphs, I am of the view that ANIL 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.
29. 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 Act and the Debt Securities Regulations. Steps therefore, have to be taken in the instant matter to ensure that only legitimate fund raising activities are carried on by ANIL and no investors

are defrauded. ANIL and its Directors also failed to submit the relevant information including the details of investors sought by SEBI despite being given several opportunities to do so. It was also found during physical verification that the company does not exist at its registered office address. Further, SEBI received many complaints against the company from investors forwarding copies of certificates of debentures issued by the company. In the light of the same, I find that there is no other alternative but to take recourse through an interim action against ANIL and its Directors along with its Debenture Trustee, viz. Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar), for preventing the company from further carrying on with its fund mobilising activity under the *Offer of NCDs*. Considering all the factors in the instant case, it is felt that urgent intervention by SEBI is warranted as otherwise there could be every possibility of irreparable damage to investors.

30. 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. ANIL shall forthwith cease to 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. ANIL (PAN:AABCO6831B) and its Directors, viz. Mr. Abhijit Dasgupta (DIN:02475280), Mr. Bhaskar Saha (DIN:02531517, PAN:ALAPS8382A), Mr. Ashim Maitra (DIN:02532064, PAN:ADQPM0497A), Mr. Ujjal Kumar Roy (DIN:02555033, PAN:AHMPR4384B), Mr. Avijit Kumar Ganguly (DIN:02575466, PAN:AGQPG6356F), Mr. Debopam Sur (DIN:03079702, PAN: BEIPS2119R) and Mr. Goutam Sarkar (DIN:03356712, PAN:BMWPS6539M), 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. ANIL 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. ANIL shall provide a full inventory of all its assets and properties;

- v. ANIL's abovementioned Directors shall provide a full inventory of all their assets and properties;
- vi. ANIL 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 without prior permission from SEBI;
- vii. ANIL 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 ANIL;
- viii. ANIL shall furnish within 21 days from the date of receipt of this Order-
- Complete information as sought by SEBI vide letters dated August 18, 2014, September 10, 2014, October 30, 2014 and November 19, 2014 including details of investors such as names, addresses, contact details (i.e. telephone numbers, e-mail IDs), dates of allotment of debentures, number of debentures issued, total amount mobilized etc.
 - Balance sheets of the company for FY 2011-12 to 2014-15.
 - Date(s) of allotment of debentures to BBUS.
 - Full particulars of subsequent transfer of debentures to investors by BBUS, including date(s), names of investors, number of debentures etc.
 - Details of BBUS such as ownership, registration particulars, names, addresses and contact details of its members.
 - Details of the commission paid by the company to BBUS such as percentage of commission, total amount of commission.
- ix. The Debenture Trustee, viz. Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar), is prohibited from continuing the present assignment as a debenture trustee in respect of the *Offer of NCDs* of ANIL 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.
31. The above directions shall take effect immediately and shall be in force until further orders.
32. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. communication exchanged between SEBI and the company; information/documents obtained from the Ministry of Corporate Affairs' website i.e.

'MCA 21 Portal'; information/documents received from RBI; information/documents received from RoC; complaints received and the documents enclosed therewith. In this context, ANIL 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 the money collected through the Offer of NCDs along with interest, if any, promised to investors therein;
 - ii. Directing them not to issue prospectus or any offer document or any advertisement for soliciting money from the public by 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.
33. ANIL 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 of an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.
34. Similarly, the Debenture Trustee, viz. Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar), 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 desires to avail an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.
35. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against ANIL and its abovementioned Directors; its Debenture Trustee, viz. Aspen Debenture Trust (represented by trustee Mr. Raju Sarkar), in accordance with law.

Place: Mumbai
Date: July 15, 2015

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