

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: S. RAMAN, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of Kerala Housing Finance Limited (PAN: AACCK2183P) and its Directors/Promoters, viz. Shri G. Unnikrishnan Nair (DIN: 01402695; PAN: AKHPP5583E), Shri N. Krishnan Nair (DIN: 02566976; PAN: BQYPK5654D), Smt. Komala Unnikrishnan (DIN: 03163184; PAN: AATPU6479N), Shri G. Sureshkumar (DIN: 03550007; PAN: AVXPG2603H), Shri P. Parameshwaran (DIN: 03315007; PAN: AANPP0136H), Shri B. Ajithkumar, Shri Shajan P. G., Shri R. Sukumaran, Shri S. Sureshkumar and Adv. B Manmadhan alongwith its Debenture Trustees, viz. Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates.

- 1.1 Securities and Exchange Board of India ("SEBI") received a reference dated May 29, 2014, from the National Housing Bank ("NHB"), *inter alia* stating that –
- i. Kerala Housing Finance Limited ("KHFL") is a housing finance company having a valid Certificate of Registration without permission to accept public deposits, issued under Section 29A of the National Housing Bank Act, 1987.
 - ii. KHFL's resources *inter alia* include amount mobilized through issuance of *Non-Convertible Debentures* ("NCDs"), reportedly on private placement basis, at different dates.
 - iii. An Inspection of KHFL by NHB as on March 31, 2013, *inter alia* revealed the following –
 - a. KHFL raised the share capital in the form of equity, mainly through its branches 'on tap', without issuing any prospectus or letter of invitation, without filing any prospectus or letter of invitation and not adhering to *Unlisted Public Companies (Preferential Allotment) Amendment Rules, 2011*;
 - b. KHFL had displayed the Offer on its website as "*KHFL Shares & Non-Convertible Secured debentures on private placement only*". KHFL also accepted the subscription amount in cash in many cases from the subscribers, without adhering to KYC compliances and had allotted shares, in many cases after 60 days and in some cases, even after 6 months;
- 1.2 NHB requested SEBI to examine the matter further.

2.1 As a matter of preliminary inquiry, SEBI, vide letter dated October 31, 2014, advised KHFL to furnish *inter alia* the following information in respect of collection of funds through the issue of debentures, equity shares, convertible and other securities, viz.—

- i. Details of the Board of Directors of the company, including details regarding their name, address, DIN number, PAN number etc.;
- ii. Details of the Promoters: Name, address, PAN, number of shares held etc.;
- iii. Details of the Group companies (that are controlled directly or indirectly by the Promoters), Subsidiaries and Associates;
- iv. Details of the shareholders of the company as on date;
- v. Details of issuance of equity shares, debentures, convertible and other securities (from date of incorporation till date);
- vi. Details regarding each applicant (name, complete address and PAN), who have applied in aforesaid issuances, date of application, amount of money received from each applicant, type of the security (share/debenture/convertible debenture), number of securities applied, number of securities allotted, value of such allotment against each allottee's name, date of allotment, date of dispatch of share/debenture certificate etc.;
- vii. Details regarding how the money solicited in the said issues were utilized/invested;
- viii. Copies of Prospectus/Red Herring Prospectus filed with Registrar of Companies (ROC), if any;
- ix. Copies of Board resolution and General meeting resolution authorising such issuance;
- x. Copies of the minutes of Board/committee meeting in which the resolution has been passed for allotment, filed with ROC, if any, regarding issuance;
- xi. Copy of the application forms, Prospectus, Pamphlets, advertisements and other promotional materials circulated for issuance of such securities;
- xii. Details regarding number of application forms circulated inviting subscription for said issuance;
- xiii. Date of opening and closing of the subscription list for the particular issue;
- xiv. Copy of Form 2 under Companies Act, 1956 or its equivalent under Companies Act, 2013, which deals with Return of Allotment (name and address of the shareholders, number of shares allotted to each person), if any, filed with ROC;
- xv. Copies of any trust deed concerning this debenture issuance;
- xvi. If any debenture trustee is appointed in the said debenture issuance, details of the names, address, copies of their consent to act as debenture trustee, etc.;
- xvii. Details of any securities created for issuance of these debentures, Copies of Form 8 and Form 10 (under Companies Act, 1956 or its equivalent under Companies Act, 2013) filed with ROC to be provided;

- xviii. Copies of the Annual Reports filed with Registrar of Companies for the immediately preceding three financial years. If incorporated within three years before the date of the letter, Annual Reports since incorporation;
 - xix. Date of dispatch of debenture certificate etc.;
 - xx. Complete details of the assets held by the company as on date.
- 2.2 Vide letter dated November 17, 2014, KHFL sought additional time to furnish the abovementioned information.
- 2.3.1 Subsequently, vide its letter dated December 4, 2014, KHFL provided *inter alia* details (in a Compact Disc) regarding –
- i. Its Directors;
 - ii. Its Promoters and their shareholding;
 - iii. Shareholding pattern as on March 31, 2014;
 - iv. Details of Debentures that were issued, date of issue, etc.;
 - v. Sample copies of application forms;
 - vi. Details of Debenture Trustees;
 - vii. Annual Reports for the Financial Years 2011–2012, 2012–2013 and 2013–2014.
- 2.3.2 KHFL also submitted – *“Our debenture issue are on private placement basis and we being unlisted entity, there is no requirement of prospectus. However, the matter stands reported to our regulator NHB on regular basis and or subjected to annual inspection.”*
- 2.4 Thereafter, vide letter dated December 19, 2014, KHFL submitted *inter alia* details of amounts raised by shares and debentures and also deployment of the same for the past 5 years.
- 2.5 Vide letter dated December 29, 2014, KHFL made the following submissions –
- i. *“We have been contacting only the local customers who were our loan beneficiaries or debenture holders. Our regulator many times observed that the source of NCDs may be curtailed in future because of RBI restrictions and was encouraging us to go for rating and public issue so that larger control may be possible with more disclosures. We have already launched the exercise of rating through CARE. It would take some time to launch the public issue. We will also go for listing through special window for small companies in future. Banking on this we have put in a request to our regulator for relaxation from directions 2014 on NCD front. It is pending for decision after arguments.”*

- ii. ... Our geographical funding is limited to the State of Kerala and amongst well known customers/friends/contacts who even agreed to subordinate their lending earlier to boost our tier II capital. Many NRI families who have known us for two decades have in fact supported us the capital infusion on hearing our plans for augmenting sources for growing big.
- iii. ... We can never be categorized as 'scheme launchers' as generally seen in other parts of country. ... Our main sources of fund are equity, NCD only.
- iv. While exploring various options for finding funds, we approached our regulator for refinance. During the meeting with NHB on April 23, 2010, we assured them that the company would attain Net Owned Fund (NOF) of ₹10 Crores by March 2011, one of the stipulation for availing refinance.”

2.6 Vide email dated January 20, 2015, KHFL submitted copies of minutes of Board meetings for the period from February 22, 2005 till March 31, 2014. However, it was noted that a majority of the aforesaid minutes, which pertained to meetings held prior to 2012, were provided without the respective list of allottees.

2.7.1 Thereafter, vide letter dated January 28, 2015, KHFL requested SEBI for “an opportunity to explain the circumstances and the data before any inference is drawn by the Hon’ble authority. ...”

2.7.2 Pursuant to the above request, an opportunity was granted to KHFL to appear before the Executive Director, SEBI and to explain its stand in the matter.

2.7.3 The following submissions were made by KHFL to the Executive Director, SEBI during the meeting held on July 7, 2015 and also through its reply dated July 20, 2015, –

- i. KHFL issued debentures to less than 49 persons for every series of allotment. Further, such debentures were issued to the same persons for different series and the number of allottees never crossed the threshold limit of 49 persons and hence, was not a public issue.
- ii. KHFL submitted copy of Notification of NHB in respect of Housing Finance Companies issuance of Non–Convertible Debentures on private placement basis (NHB) Directions, 2014 dated March 19, 2014. KHFL has submitted that the said Notification provides for the purpose of issue, eligibility to issue, rating requirement, maturity, conditions of issue, procedure of issue, etc. of Non–Convertible Debentures by NHB.
- iii. KHFL submitted a copy of Notification on private placement dated March 31, 2014, of Ministry of Corporate Affairs, which provided for an exemption to Rule 14(2)(c) of Companies (Prospectus and Allotment of Securities) Rules, 2014, to Housing Finance Companies registered with NHB.
- iv. KHFL allotted equity shares and preference shares under the Companies Act, 1956.

- v. KHFL never made any advertisement for issuance of *NCDs*. For a short period, KHFL had only stated the structure of liabilities on its website but had not sought or solicited investment.
- vi. KHFL has so far issued A to E series of *NCDs* on private placement basis during the entire period of existence for over two decades and it has repaid the A to C series *NCDs* to the investors.
- vii. KHFL has complied with NHB's direction to refund the debentures issued after April 1, 2014, in a phased manner. KHFL stated that as on June 30, 2015, the outstanding debentures is ₹68.98 Crores consisting of 5886 debenture holders and preference shares of ₹18.73 Crores consisting of 1071 preference shareholders.
- viii. KHFL submitted that the private placement of securities Rules as enacted by Companies Act, 2013 and NHB directions were vastly different and differ on main issues of single customer, capping of limit, etc.
- ix. KHFL stated that all their investors are KYC compliant and they are KHFL's repeat customers.
- x. KHFL submitted a Certificate dated July 22, 2015, from its Company Secretary stating that the company has complied with all the provisions of the Companies Act, 2013, with regard to allotment of debentures, preference shares and equity shares made by it till date.

2.7.4 Subsequently, vide letter dated August 10, 2015, SEBI advised KHFL to provide information regarding the issue of *Preference shares*. Thereafter, through its reply dated August 31, 2015, KHFL submitted details in respect of *Preference shares* issued by them during the Financial Years 2014–15 and 2015–16.

3. The material available on record i.e. correspondence exchanged between SEBI and KHFL alongwith the documents contained therein; reference received from NHB, the submissions made to the Executive Director at the meeting held on July 7, 2015, and information obtained from the Ministry of Corporate Affairs' website i.e. *MCA 21 Portal*, have been perused. On an examination of the same, it is observed that –

- i. KHFL (CIN: U65992KL1992PLC006417) was incorporated on March 5, 1992, having its office at 34/413, Old Post Office Building, Beach P.O., Trivandrum–695007, Kerala, India. The address was subsequently changed to 2nd Floor, Africa Plaza, Pulimood Junction, Thiruvananthapuram–695001, Kerala, India.
- ii. KHFL is a housing finance company having a valid Certificate of Registration without permission to accept public deposits, issued by NHB under Section 29A of the National Housing Bank Act, 1987.

- iii. KHFL is not listed in any of the recognized stock exchanges in India or abroad.
- iv. The Promoters of KHFL are Shri G. Unnikrishnan Nair, Shri B. Ajithkumar, Shri Shajan P. G., Shri S. Sureshkumar, Shri R. Sukumaran, Shri G. Sureshkumar and Adv. B Manmadhan.
- v. The Directors of KHFL are Shri G. Unnikrishnan Nair, Shri N. Krishnan Nair, Smt. Komala Unnikrishnan, Shri G. Sureshkumar and Shri P. Parameshwaran.
- vi. From the material available on record, it is observed that KHFL allotted Secured Redeemable NCDs ("*Offer of NCDs*") between the Years 1999 to 2014. In this context, the following may be noted –
 - a. From KHFL's reply dated December 4, 2014, it is observed that the company had issued 6 series of NCDs labeled A to F to 23538 allottees and mobilized funds to the tune of ₹157.88 Crores, as detailed below:

Series	Date of Board Resolution	Date of EGM	Date of Allotment/ Issue	Amount Raised (₹ in Crores)	Number of Allottees
A	30.08.1999	30.09.1999	30.09.1999	5.00	3452
B	NA	25.05.2002	25.05.2002	20.00	5339
C	30.11.2005	30.11.2005	19.12.2005	20.00	4106
D	NA	28.05.2009	1.04.2009	60.00	6603
E	5.03.2013	NA	5.03.2013	40.00	3168
F	27.01.2014	5.03.2014	5.03.2014	12.88	870
Total				157.88	23538

**KHFL had informed SEBI that Series F was temporarily discontinued since October 2014 on instructions by NHB. However, from the data submitted by the company regarding issuance of F series, it appears that ₹12.88 Crores had been raised before it was discontinued.*

- b. KHFL has not furnished the entire list of debenture allottees and has furnished only details pertaining to outstanding debentures. Of the total issue for ₹145 Crores to 22,668 debenture holders in cases of A to E series, KHFL (vide letter dated December 4, 2014) has submitted details of outstanding debentures as on March 31, 2014, which adds upto a total of ₹72.27 Crores allotted to 6893 debenture holders as under:

Series	Number of outstanding allottees	Amount (₹ in Crores)
C	181	0.32
D	3847	36.49
E	2865	35.45
Total	6893	72.27
**KHFL has submitted that Debenture Series A and B stands fully repaid.		

- c. In addition, KHFL provided a list of debenture allotment from April 2014 to May 9, 2014 (E Series) and May 15, 2014 to September 19, 2014 (F Series). The details of debentures issued through the aforesaid Series through which an amount of ₹16.03 Crores was raised, is detailed under:

Series E			
Date of Allotment	No. of Investors	No. of NCDs	Value (₹)
09.04.2014	49	6131	6131000
23.04.2014	49	6962	6962000
30.04.2014	49	7367	7367000
05.05.2014	48	8892	8892000
09.05.2014	17	2170	2170000
Grand Total	212	31522	31522000

Series F			
Date of Allotment	No. of Investors	No. of NCDs	Value (₹)
15.05.2014	49	7300	7300000
23.05.2014	49	8079	8079000
29.05.2014	49	3889	3889000
31.05.2014	26	4860	4860000
9.06.2014	49	7095	7095000
16.06.2014	49	8367	8367000
21.06.2014	40	6140	6140000
26.06.2014	49	7202	7202000
30.06.2014	47	7826	7826000
21.07.2014	49	9194	9194000
24.07.2014	49	9077	9077000
4.08.2014	49	5728	5728000
8.08.2014	48	8029	8029000
12.08.2014	47	5704	5704000
19.08.2014	49	6711	6711000
23.08.2014	46	5939	5939000
3.09.2014	47	7005	7005000
17.09.2014	49	5012	5012000
19.09.2014	30	5655	5655000
Grand Total	870	128812	128812000

- vii. Further, KHFL issued *Preference shares* during the Financial Years 2014–15 and 2015–16, details of which, are as under –

Financial Year	No. of allottees	Amount Raised (₹ in Crores)
2014 – 2105	768	12.74
2015 – 2016	303	5.99
Total	1071	18.73

- 4.1 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 KHFL through the aforesaid, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**") read with the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("**DIP Guidelines**") alongwith the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**") and the SEBI (Issue and Listing of Debt Securities), Regulations, 2008 ("**Debt Securities Regulations**") read with the Companies Act, 1956.

4.2 **Offer of NCDs –**

- 4.2.1 I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956.

- 4.2.2 It may be noted that 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."

- 4.2.3 In this regard –

- i. Reference is also made to Sections 67(1) and 67(3) of the Companies Act, 1956, which is reproduced as under:

"67. Construction of reference to offering shares or debentures to the public, etc.

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 *Sabara 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, 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. 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 utmost importance.
 - a. From the material available on record, it is observed that KHFL had issued and allotted 6 series of *NCDs* labeled A to F to 23,538 investors and raised funds to the tune of ₹157.88 Crores between the years 1999 to 2014 [details at pages 6–7, paragraph 3(vi)(a)–(c)].

Offer of NCDs during the Financial Years 2002–03 to 2013–14.

- b. It may be mentioned that Section 67(3) of the Companies Act, 1956, was amended w.e.f. December 13, 2000, *inter alia* to provide for the *first* and *second proviso* to that Section i.e. –

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).

- c. Under the *Offer of NCDs*, it is observed that during the Financial Years 2002–03 to 2013–14, KHFL issued and allotted 4 series of *NCDs* labeled B to E to 19004 individuals/investors and mobilized an amount of ₹136.85 Crores. The number of investors to whom allotments were made under the *Offer of NCDs* during the aforesaid Financial Years alongwith the amount mobilized therein, would *prima facie* indicate that the number of persons to whom such *Offer* was made, was above the limit of forty–nine persons as prescribed under the *first proviso* to Section 67(3) of the Companies Act, 1956. Further, I find that KHFL is not covered under the *second proviso* to Section 67(3) of the Companies Act, 1956.

- d. In view of the above, the *Offer of NCDs* by KHFL *prima facie* qualifies as a public issue of securities under the *first proviso* to Section 67(3) of the Companies Act, 1956, which has been elucidated by the Hon'ble Supreme Court of India in the *Sahara Case*.
- e. 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.

4.2.4 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 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 five thousand rupees.”

- ii. In the *Sabara Case*, the Hon'ble Supreme Court of India also examined Section 73 of the Companies Act, 1956, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons.

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

- iii. Having regard to the abovementioned observations of the Hon'ble Supreme Court of India, since the *Offer of NCDs* is *prima facie* a public issue in accordance with the provisions of the Companies Act, 1956, the same will attract the requirement of

compulsory listing before a recognized stock exchange in terms of Section 73(1) of the Companies Act, 1956 and also compliance with the provisions of Sections 73(2) and 73(3) of that Act.

- iv. In the facts of the instant case, it *prima facie* appears that KHFL has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of NCDs*.

4.2.5 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. 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, the *Offer of NCDs* was a public issues of securities. Having made a public issue, KHFL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. I find that there is no evidence on record to indicate whether or not KHFL has complied with the provisions of Section 60 of Companies Act, 1956, in respect of the *Offer of NCDs*. In view of the same, I find that KHFL has *prima facie* not complied with the provisions of Section 60 of Companies Act, 1956.

4.2.6 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 KHFL 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.

4.2.7 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. Further, under Section 117C of the Companies Act, 1956, 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, I find that KHFL has not

complied with the provisions of Sections 117B–117C of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions in respect of the *Offer of NCDs*.

4.2.8 I also note that SEBI framed the DIP Guidelines, in exercise of the powers conferred under the SEBI Act. In the words of the Hon'ble Supreme Court in the *Sahara Case*, "*DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by ICDR 2009*". In this regard, I observe *prima facie* that KHFL has not complied with the following provisions of the DIP Guidelines (which were applicable from 2000 to June 6, 2008) as regards the *Offer of NCDs during the Financial Years 2002–2003 to 2007–08*, viz. –

- a. Clause 2.1.1. – (Filing of offer document);
- b. Clause 2.1.4 – (Application for listing);
- c. Clause 2.1.5 – (Issue of securities in dematerialized form),
- d. Clause 2.8 – (Means of finance),
- e. Clause 4.1 – (Promoters contribution in a public issue by unlisted companies),
- f. Clause 4.11 – (Lock-in of minimum specified promoters contribution in public issues),
- g. Clause 4.14 – (Lock-In of pre-issue share capital of an unlisted company)
- h. Clause 5.3.1 – (Memorandum of understanding),
- i. Clause 5.3.3 – (Due Diligence Certificate)
- j. Clause 5.3.5 – (Undertaking),
- k. Clause 5.3.6 – (List Of Promoters Group And Other Details),
- l. Clause 5.4 – (Appointment of intermediaries),
- m. Clause 5.6 – (Offer document to be made public),
- n. Clause 5.6A – (Pre-issue Advertisement),
- o. Clause 5.7 – (Despatch of issue material),
- p. Clause 5.8 – (No complaints certificate),
- q. Clause 5.9 – [Mandatory collection centres including Clause 5.9.1 (Minimum number of collection centres)],
- r. Clause 5.10 – (Authorised Collection Agents),
- s. Clause 5.12.1 – (Appointment of compliance officer),
- t. Clause 5.13 – (Abridged prospectus),
- u. Clause 6.0 – (Contents of offer documents),
- v. Clause 8.3 – (Rule 19(2)(b) of SC(R) Rules, 1957),

- w. *Clause 8.8.1 – (Opening & closing date of subscription of securities),*
- x. *Clause 9 – (Guidelines on advertisements by Issuer Company),*
- y. *Clause 10.1 – (Requirement of credit rating),*
- z. *Clause 10.5 – (Redemption).*

4.2.9 As per Regulation 111(1) of the ICDR Regulations, the DIP Guidelines "*shall stand rescinded*". However, Regulation 111(2) of the ICDR Regulations, provides that: "*(2)Notwithstanding the repeal under sub-section (1) of the repealed enactments,— (a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations; (b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations.*"

4.2.10 In addition to the above, reference may be made to the Debt Securities Regulations, which were framed by SEBI in exercise of its powers under Section 30 of the SEBI Act and are applicable to the public issue and listing of debt securities. It may be relevant to note that under the Debt Securities 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 KHFL, through the *Offer of NCDs during the Financial Years 2007–08 to 2013–14*, 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 Trustees*
- 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(1) – *Debenture Redemption Reserve*

- xv. Regulation 17 – *Creation of security*
- xvi. Regulation 19 – *Mandatory Listing*
- xvii. Regulation 26 – *Obligations of the Issuer, etc.*

- 4.2.11 Upon a consideration of the aforementioned paragraphs, I am of the view that KHFL 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 *inter alia* Sections 56(1), 56(3), Section 60 read with Section 2(36) and Section 73; the DIP Guidelines read with ICDR Regulations and the Debt Securities Regulations.
- 4.2.12 Although the *Offer of NCDs* is stated to have been made on private placement basis and that there are no advertisements or promotional circulars as they are under private placement to specific persons, this claim of KHFL conflicts with the advertisement available on its website where a *Graphics Interchange Format (GIF)* image is prominently displayed on the home page of the company's website promoting its shares and debentures. The image reads "*KHFL Shares and Non-Convertible Secured Debentures on private placement only*" and by placing the advertisement on its website, it appears that the company is soliciting subscriptions to its securities from the general public, though it terms the aforesaid *Offer* as being made on private placement.
- 4.2.13 From the material available on record, it is observed that KHFL appointed several individuals, viz. *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates* as the Debenture Trustees for the *Offer of NCDs* by that company.
- 4.2.14 Section 12(1) of the SEBI Act states that: "*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*".
- 4.2.15 In addition, 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."*

4.2.16 Based on the material available on record, I find that *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates*, have acted as unregistered Debenture Trustees, which amounts to violation of the abovementioned provisions of the SEBI Act read with the Debenture Trustee Regulations.

Offer of NCDs during the Financial Year 2014–15 and Offer of Preference Shares during the Financial Years 2014–15 and 2015–16.

5.1.1 Under the *Offer of NCDs*, it is also observed that during the Financial Year 2014–15, KHFL issued and allotted E and F series of *NCDs* to 1082 individuals/investors and mobilized an amount of ₹16.03 Crores [details at page 7, paragraph 3(vi)(c)].

5.1.2 KHFL has contended that Rule 14(2)(c) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 (“**Allotment Rules, 2014**”) (which provides for exemption to Housing Finance Companies registered with NHB) and the National Housing Bank Notification dated March 19, 2014 (Housing Finance Companies issuance of Non–Convertible Debentures on private placement basis (NHB) Directions, 2014 (“**NHB Notification**”), are vastly different from each other and differ on main issues of single customer, capping of limit, etc.

5.1.3 The abovementioned NHB Notification dated March 19, 2014, which came into effect only on April 1, 2014, shall not be applicable to the *Offer of NCDs* in respect of Series B to E, which were made during the Financial Years 2002–2003 to 2013–14.

5.1.4 As regards the issue and allotment by KHFL of E and F series of *NCDs*, which were made during the Financial Year 2014–15, considering that the examination by SEBI in the instant matter has emanated from the reference made by NHB vide its letter dated May 29, 2014 (in respect of allotments of *NCDs* upto the Financial Year 2013–14), it is appropriate that the facts at paragraph 5.1.1 be brought to the notice of NHB.

5.1.5 It is observed that KHFL also issued and allotted *Preference shares* to a total of 1071 allottees during the Financial Years 2014–15 and 2015–16 and mobilized funds amounting to ₹18.73 Crores [details at page 8, paragraph 3(vii)]. In view of paragraph 5.1.4 above, it is appropriate that the aforesaid facts be brought to the notice of NHB.

6.1 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, 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. Steps therefore, have to be taken in the instant matter to ensure that only legitimate fund raising activities are carried on by KHFL and no investors are defrauded.

- 6.2 Further, the Promoters of KHFL, as informed by it, are Shri B. Ajithkumar, Shri Shajan P.G, Shri Sureshkumar (who is also a Director), Shri R. Sukumaran, Adv. B Manmadhan, Shri S. Sureshkumar and Shri G. Unnikrishnan Nair (who is also a Director). Including Shri G Sureshkumar and Shri G. Unnikrishnan Nair, who are Promoter Directors as mentioned above, the other Directors of the KHFL are Shri N. Krishnan Nair, Smt. Komala Unnikrishnan, and Shri P Parameshwaran. Accordingly, it is alleged that the aforementioned Promoters and Directors being the *persons in-charge of and responsible to the Company for the conduct of business*, are responsible under Section 27(2) of the SEBI Act, for the *prima facie* contraventions committed KHFL through the *Offer of NCDs*.
7. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions –
- i. KHFL (PAN: AACCK2183P) shall forthwith cease to mobilize 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. KHFL and its Directors/Promoters, viz. Shri G. Unnikrishnan Nair (DIN: 01402695; PAN: AKHPP5583E), Shri N. Krishnan Nair (DIN: 02566976; PAN: BQYPK5654D), Smt. Komala Unnikrishnan (DIN: 03163184; PAN: AATPU6479N), Shri G. Sureshkumar (DIN: 03550007; PAN: AVXPG2603H), Shri P. Parameshwaran (DIN: 03315007; PAN: AANPP0136H), Shri B. Ajithkumar, Shri Shajan P. G., Shri R. Sukumaran, Shri S. Sureshkumar and Adv. B Manmadhan, 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. KHFL and its abovementioned Directors/Promoters, 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. KHFL shall provide a full inventory of all its assets and properties;
 - v. KHFL's abovementioned Directors/Promoters shall provide a full inventory of all their assets and properties;

- vi. KHFL and its abovementioned Directors/Promoters shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the *Offer of NCDs*, without prior permission from SEBI;
 - vii. KHFL and its abovementioned Directors/Promoters 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 KHFL;
 - viii. The Debenture Trustees, viz. *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates*, are prohibited from continuing with their assignment as debenture trustee in respect of the *Offer of NCDs* of KHFL 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.
8. The above directions shall take effect immediately and shall be in force until further orders.
- 9.1 The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. correspondence exchanged between SEBI and KHFL alongwith the documents contained therein; reference received from NHB, the submissions made to the Executive Director at the meeting held on July 7, 2015, and *MCA 21 Portal*. In this context, KHFL and its abovementioned Directors/Promoters are advised to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act read with 73(2) of the Companies Act, 1956, the DIP Guidelines read with the ICDR Regulations and the Debt Securities Regulations, including the following, should not be taken/imposed against them:
- i. Directing them jointly and severally to refund money collected through the *Offer of NCDs* alongwith 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.
- 9.2 KHFL and its abovementioned Directors/Promoters, 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 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.

- 9.3 Similarly, the Debenture Trustees, viz. *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates*, are advised to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act read with the Debenture Trustee Regulations including restraining them from accessing the securities market and further restraining it from buying, selling or dealing in securities, in any manner whatsoever, for an appropriate period should not be issued.
- 9.4 The Debenture Trustees, viz. *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates*, may, within 21 days from the date of receipt of this Order, file its reply, if any, to this Order and may also indicate whether it desires to avail of 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 KHFL and its abovementioned Directors/Promoters; its Debenture Trustees, viz. *Shri K Jayaprasad, Adv. Shri K Radhakrishnan, Shri Jose Philip, Shri V Ayyappan Nair and M/s Bittu Abraham & Associates*, in accordance with law.
11. A copy of this order shall be furnished to the National Housing Bank for their information and necessary action at their end.

Place: Mumbai
Date: November 20, 2015

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