

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11, 11(4), 11A and 11B(1) of the Securities and Exchange Board of India Act, 1992

In the matter of R B Horticulture and Animal Project Limited

In re Deemed Public Issue Norms

In respect of:

Noticee. No.	Name of the Entity	DIN / CIN	PAN	Address
1	R B Horticulture and Animal Project Limited	U01122WB2007PLC112359	Not Available	Hasnabad, 24 Parganas, Hasnabad, West Bengal – 743426 48/2 DumDum Road Kolkata – 700 074
2	Shri Sujit Baidya	01723330	Not Available	Vill - Hasnabad (Devi More), P.O. - Hasnabad, P.S. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743435
3	Shri Koushik Baidya	02011631	ALVPB8642D	Vill + P.O. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743426
4	Shri Ranjit Kumar Baidya	01671669	Not Available	Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426
5	Ms. Swapna Baidya	01671773	Not Available	W/o Ranjit Kumar Badiya, Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426

1. R B Horticulture and Animal Project Limited (hereinafter referred to as “**RBHAPL**”/ “**the Company**”) is a Public company incorporated on January 02, 2007 and registered with



Registrar of Companies – Kolkata with CIN: U01122WB2007PLC112359. Its registered office is at “Hasnabad, 24 Parganas, Hasnabad, West Bengal – 743426”.

2. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) conducted an examination into the fund – raising activity alleged against RBHAPL in respect of issue of *Redeemable Preference Shares* (hereinafter referred to as “RPS”) and undertook an enquiry to ascertain whether RBHAPL had made any public issue of securities without complying with the provisions of the Companies Act, 1956; Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “SEBI Act”) and the Rules and Regulations framed thereunder including SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as “DIP Guidelines”) read with SEBI (Issue of Capital and Disclosure requirements) Regulations, 2009 (hereinafter referred to as “ICDR Regulations”).
3. On enquiry by SEBI, it was observed that RBHAPL had made an offer of *Redeemable Preference Shares* during the financial years 2006-07 and 2007-08 (hereinafter referred to as “Offer of RPS”) and raised at least an amount of Rs. 50 lakhs from at least 1,668 allottees. The number of allottees and funds mobilized has been collated from documents obtained from MCA 21 portal i.e. FORM 2 (Return of allotment).
4. As the above said *Offer of RPS* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992 and the Companies Act, 1956. SEBI passed an interim order dated January 08, 2016 (hereinafter referred to as “interim order”) and issued directions mentioned therein against RBHAPL and its directors including Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya (hereinafter collectively referred to as “Noticees”).



5. *Prima facie findings/allegations:* In the said interim order, the following prima facie findings were recorded: RBHAPL had made an Offer of RPS to 1,668 investors and mobilized funds amounting to at least Rs. 50 lakhs during the financial years (FY) 2006-07 and 2007-08. The details are as shown below:

5.1. Upon perusal of the return of allotment (Form 2) as obtained from the 'MCA-21' portal maintained by Ministry of Corporate Affairs, revealed that the Company had issued RPS on different occasions, the details of which are as follows:

S.No.	Date of allotment	Financial Year	No. of investors	No. of RPS	Total Issued Capital (Rs. In lakhs)
1	March 29, 2007	2006-07	365	11,243	11.24
2	August 16, 2007	2007-08	1,303	38,757	38.76
Total			1,668		50.00

5.2. It is observed that RBHAPL had issued RPS in various tranches and had mobilized funds to the tune of Rs. 50 lakhs from 1,668 allottees during FY 2006-07 and 2007-08.

6. The above *Offer of RPS* and pursuant allotment were deemed public issue of securities under the first proviso to Section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under Section 60 read with Section 2(36), Section 56, Sections 73(1), 73(2) and 73(3) of Companies Act, 1956 and DIP Guidelines read with ICDR Regulations were not complied with by RBHAPL in respect of the *Offer of RPS*.

7. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated January 08, 2016 with immediate effect.

i. *"RBHAPL shall not mobilize any fresh funds from investors through the Offer of Redeemable Preference Shares 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. RBHAPL and its present Directors, viz. Shri Sujit Baidya (DIN: 01723330), Shri Koushik Baidya (DIN: 02011631) and Shri Ranjit Kumar Baidya (DIN: 01671669), 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. The past Director of RBHAPL, viz. Swapna Baidya (DIN: 01671773), is 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*
- iv. RBHAPL and its abovementioned past and present 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;*
- v. RBHAPL shall provide a full inventory of all its assets and properties;*
- vi. RBHAPL's abovementioned past and present Directors shall provide a full inventory of all their assets and properties;*
- vii. RBHAPL and its abovementioned present Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the Offer of Redeemable Preference Shares, without prior permission from SEBI;*
- viii. RBHAPL and its abovementioned present Directors shall not divert any funds raised from public at large through the Offer of Redeemable Preference Shares, which are kept in bank account(s) and/or in the custody of RBHAPL;*
- ix. RBHAPL and its abovementioned past and present Directors shall furnish complete and relevant information (as sought by SEBI letter dated October 19, 2015), within 14 days from the date of receipt of this Order."*

8. The interim order also directed RBHAPL and its directors including Shri Sujit Baidya,



Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act and Section 73(2) of the Companies Act, 1956 read with Section 27(2) of 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 Redeemable Preference Shares along with interest, if any, promised to investors therein;*
- ii. *directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;*
- iii. *directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.”*

9. Vide the said interim order, RBHAPL and its abovementioned Directors were given the opportunity to file their replies, within 21 days from the date of receipt of the said interim order. The order further stated the concerned persons may also indicate whether they desired to avail themselves an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

10. Service of Interim Order: The copy of the said interim order was sent to all the Noticees vide common but separate letter dated January 08, 2016 and the same was returned undelivered. The details in this regard are as under:

Noticee. No.	Name of the Entity	Address	Status	Remark
1	R B Horticulture and Animal Project Limited	Hasnabad, 24 Parganas, Hasnabad, West Bengal - 743426	Returned Undelivered	Addressee Moved
		48/2 DumDum Road Kolkata - 700 074	Returned Undelivered	Addressee cannot be located

Noticee. No.	Name of the Entity	Address	Status	Remark
2	Shri Sujit Baidya	Vill - Hasnabad (Devi More), P.O. - Hasnabad, P.S. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743435	Did not Return	As per India post website, delivery status - Not Available
3	Shri Koushik Baidya	Vill + P.O. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743426	Returned Undelivered	Addressee Moved
4	Shri Ranjit Kumar Baidya	Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426	Returned Undelivered	Addressee Moved
5	Ms. Swapna Baidya	W/o Ranjit Kumar Badiya, Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426	Returned Undelivered	Addressee Moved

11. Thereafter, vide notification dated September 05, 2020 published in newspaper *Times of India*, Kolkata edition; notification dated September 05, 2020 published in newspaper *Sanmarg* and notification dated September 05, 2020 published in newspaper *Anand Bazar Patrika*, RBHAPL, Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya was notified by SEBI, that interim order dated January 08, 2016 was issued against them and were advised to download from the website of SEBI (www.sebi.gov.in) or collect the copy of said interim order from SEBI, Eastern Regional Office, Kolkata within ten days from this notification.

12. It is noted that RBHAPL, Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya have not submitted their reply in the matter.

13. In the interest of natural justice, vide common notice of hearing dated November 09, 2020, an opportunity of personal hearing was granted to Noticees on December 08, 2020 through

video conference via WEBEX link. The said hearing notice was sent to the Noticees through SPAD and the same was undelivered as per delivery report obtained from India post website. The details in this regard are as under

Noticee. No.	Name of the Entity	Address	Status	Remark
1	R B Horticulture and Animal Project Limited	Hasnabad, 24 Parganas, Hasnabad, West Bengal - 743426	Undelivered	Insufficient Address
		48/2 DumDum Road Kolkata - 700 074	Undelivered	Insufficient Address / Addressee cannot be located
2	Shri Sujit Baidya	Vill - Hasnabad (Devi More), P.O. - Hasnabad, P.S. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743435	Undelivered	Insufficient Address
3	Shri Koushik Baidya	Vill + P.O. - Hasnabad, 24 Parganas (N), Hasnabad, West Bengal - 743426	Undelivered	Insufficient Address
4	Shri Ranjit Kumar Baidya	Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426	Undelivered	Insufficient Address
5	Ms. Swapna Baidya	W/o Ranjit Kumar Badiya, Village - Amalni, P.O. - Hasnabad, P.S. - Hasnabad, 24 Pgs (N), Hasnabad, West Bengal - 743426	Undelivered	Insufficient Address

14. Additionally, Vide notification dated November 17, 2020 published in newspaper *Times of India*, Kolkata edition; notification dated November 17, 2020 published in newspaper *Sanmarg* and notification dated November 17, 2020 published in newspaper *Sangbad Pratidin*, RBHAPL, Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya were notified by SEBI that they will be given the opportunity of being heard on December 08, 2020 through WEBEX link / video conference.

15. It is noted that RBHAPL, Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya had neither appeared on December 08, 2020 nor requested for any adjournment nor submitted any reply / written submissions in the matter.

Consideration of Issues and Findings

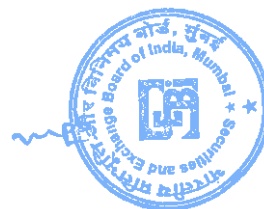
16. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.

- (1) Whether the company came out with the Offer of RPS as stated in the interim order.*
- (2) If so, whether the said offer was in violation of Section 56, Section 60 and Section 73 of Companies Act 1956.*
- (3) If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?*

ISSUE No. 1- Whether the company came out with the Offer of RPS as stated in the interim order.

17. I have perused the interim order dated January 08, 2016 for the allegation of *Offer of RPS*. I note that neither the company nor the directors filed any reply disputing the fact of issuance.

18. I have also perused the documents/ information obtained from the 'MCA 21 Portal' and other documents available on records. With respect to the issuance of *RPS* by RBHAPL, from FORM 2 (Return of allotment) of RBHAPL, it is noted that RBHAPL had issued *RPS*, which are as under:



S.No.	Date of allotment	Financial Year	No. of investors	No. of RPS	Total Issued Capital (Rs. In lakhs)
1	March 29, 2007	2006-07	365	11,243	11.24
2	August 16, 2007	2007-08	1,303	38,757	38.76
Total			1,668		50.00

19. From the above, I note that RBHAPL had issued RPS and had mobilized funds to the tune of Rs. 50 lakhs from 1,668 allottees during the Financial Year (FY) 2006-07 and 2007-08. Thus, I am of the view that RBHAPL had issued and allotted RPS in the FYs 2006-07 and 2007-08.

20. I therefore conclude that RBHAPL came out with an offer of RPS as outlined above.

ISSUE No. 2- If so, whether the said offer was in violation of Section 56, Section 60 and Section 73 of Companies Act 1956.

21. The provisions alleged to have been violated and mentioned in Issue No. 2 are applicable to the *Offer of RPS* made to the public. Therefore the primary question that arises for consideration is whether the issue of RPS is 'public issue'. At this juncture, reference may be made to sections 67(1) and 67(3) of the Companies Act, 1956:

"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)."

22. The following observations of the Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors. v. SEBI* (Civil Appeal no. 9813 and 9833 of 2011) (hereinafter referred to as the "***Sahara Case***"), while examining the scope of Section 67 of the Companies Act, 1956, are worth consideration:-

"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."

23. Section 67(3) of Companies Act, 1956 provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not 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, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as



private placement of shares and debentures. It is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

24. In the instant matter, from FORM 2 - Return of allotment, I find that RBHAPL made an issuance of RPS to 1,668 investors during the FY 2006-07 and 2007-08 and had mobilized an amount of Rs. 50 lakhs. Thus, the above findings lead to a reasonable conclusion that the Offer of RPS by RBHAPL during the FY 2006-07 and 2007-08 was a "public issue" within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.
25. I find that RBHAPL has not claimed it to be a Non-banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that RBHAPL is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
26. Neither RBHAPL nor its directors have contended that the *Offer of RPS* does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956.
27. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the "*Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged.*" In respect of those issuances, the directors have not submitted any reply that the allotment was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find



that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* which lays down that “*In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning*”.

28. Therefore, in view of the material available on record, I find that the *Offer of RPS* by RBHAPL falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offer of RPS* are deemed to be public issues and RBHAPL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.
29. Further, since the offer of RPS is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants.
30. Noticees have not submitted any reply in the matter, therefore, the allegations of non-compliance of the above provisions were not denied by RBHAPL or its directors. I also find that no records have been submitted to indicate that it has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that RBHAPL has contravened the said provisions. RBHAPL has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that RBHAPL has also not complied with the provisions of



section 73(3) which mandates that the amounts received from investors shall be kept in a separate bank account. Therefore, I find, that section 73(2) of the Companies Act, 1956 has not been complied with.

31. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ 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 the offer of RPS was a deemed public issue of securities, RBHAPL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that RBHAPL has not submitted any record to indicate that it has registered a prospectus with the RoC, in respect of the offer of RPS. I, therefore, find that RBHAPL has not complied with the provisions of section 60 of the Companies Act, 1956.

32. In terms of 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 a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Noticees have not submitted any reply in the matter, hence, neither RBHAPL nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in Section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, RBHAPL has not complied with Sections 56(1) and 56(3) of the Companies Act, 1956.

33. I note that the offer and allotment of RPS during the Financial Years 2006-07 and 2007-

08 were made while the SEBI (Disclosure and Investment Protection) Guidelines, 2000 (“DIP Guidelines”) were in force. Clause 1.4 of the DIP Guidelines makes the provisions contained therein applicable to all ‘public issues’ by listed or unlisted companies. ‘Public issue’ is defined in Clause 1.2 (xxiii) to mean “an invitation by a company to public to subscribe to the securities offered through a prospectus.” This definition read with the provisions of the Companies Act cited earlier in this Order, makes it clear that DIP Guidelines would apply to a public offer of RPS as well. The applicability of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 which came into force on August 26, 2009 and which repealed the DIP Guidelines is limited to RPS and convertible securities. Therefore, allotments of RPS till August 26, 2009, would be subject to the provisions of DIP Guidelines. Therefore, I hold that the Company was also required to comply with the following provisions of the DIP Guidelines read with regulation 111 of the ICDR Regulations in respect of the offer and allotments made during FY 2006-07 and 2007-08:

- 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).

34. 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."

35. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, 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. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *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."

"SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange"

36. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, SEBI has to administer Section 67 of that Act, so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed. While interpreting the phrase "intend to get listed" in the context of deemed public issue the Hon'ble Supreme Court in *Sahara Case* observed-

"...But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, "intent" has its limitations also, confining it within the confines of lawfulness..."

"...Listing of securities depends not upon one's volition, but on statutory mandate..."

"...The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant companies could have "intended", what was contrary to the mandatory requirement of law..."

37. In view of the above findings, I am of the view that RBHAPL engaged in fund mobilizing activity from the public, through the offer of RPS and has contravened the provisions of Sections 56(1), 56(3), 2(36) read with Sections 60, 73(1), 73(2), 73(3) of the Companies Act, 1956 and above mentioned provisions pertaining to the DIP Guidelines read with ICDR Regulations.

ISSUE No. 3- If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?

38. I note that Shri Sujit Baidya, Shri Koushik Baidya, Shri Ranjit Kumar Baidya and Swapna Baidya did not make any submissions with respect to their appointment, resignation and tenure of directors in RBHAPL.

39. From the MCA records, I find that till date Shri Ranjit Kumar Baidya, Shri Sujit Baidya and Shri Koushik Baidya are continuing to be a director of RBHAPL. I also note that Ms. Swapna Baidya who was earlier Director in RBHAPL, has resigned on April 12, 2013.

40. Thus, the details of the appointment and resignation of the directors are as follows:

Sl. No.	Name of the Director	Designation	Date of Appointment	Date of Cessation
1	Shri Sujit Baidya	Director	January 02, 2007	-
2	Shri Ranjit Kumar Baidya	Managing Director	January 02, 2007	-
3	Ms. Swapna Baidya	Director	January 02, 2007	April 12, 2013
4	Shri Koushik Baidya	Director	May 05, 2010	-

41. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the

non-compliance of issuing the prospectus as per the said provision. Therefore, RBHAPL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

42. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an *officer in default* shall, from the eighth day when the company becomes liable to repay, 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 if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an *officer in default* is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%. Therefore I hold that RBHAPL is liable to refund the money along with interest at prescribed rate.

43. As per Section 5 of Companies Act, 1956, "*officer who is in default*" means (a) the managing director/s; (b) the whole-time director/s; (c) the manager; (d) the secretary; (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act; (f) any person charged by the Board with the responsibility of complying with that provision; (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

44. In this regard, I note that Hon'ble Securities Appellate Tribunal (SAT) vide order dated February 14, 2019 in the matter of *Pritha Bag Vs. SEBI* stated that "*.....Unless and until a finding is given that the appellant is an officer in default, the mandate provided under*

Section 73(2) cannot be invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing director, namely, Mr. Indranath Daw and, therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could not be made responsible for refunding the amount under Section 73(2).

Reliance on the judgment of this Court by the respondent in the case of Manoj Agarwal vs. SEBI in Appeal No. 66 of 2016 decided on July 14, 2017 is not applicable and is distinguishable. The Tribunal in the case of Manoj Agarwal found that there was no material to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of the said company was entrusted to discharge the application contained in Section 73 of the Companies Act. In the instant case, there is sufficient material on record to show that there was a managing director and in the absence of any finding that the appellant was entrusted to discharge the application contained in Section 73 of the Companies Act, the direction to refund the amount alongwith interest from the appellant is wholly illegal....”

45. Further, it is pertinent to note the observation of Hon’ble SAT vide Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, that:

“..... In view of the fact that out of the amount of Rs.99.06 lakh, amount of Rs.59.06 lakh was collected by BREDL after the appellant ceased to be a Director of BREDL, counsel for SEBI fairly stated on instruction that the obligation of the appellant to refund the amount with interest jointly and severally with BREDL and other Directors set out in the impugned order may be limited to Rs.40 lakh only, because, that was the amount collected by BREDL during the period when the appellant was a Director of BREDL.....

....Section 5 of the Companies Act, 1956 defines the expression ‘officer who is in default’

to mean the officers named therein. Section 5(g) provides that where any company does not have any of the officers specified in clauses (a) to (c) of Section 5, then any director who may be specified by the Board in that behalf or where no director is so specified then all the directors would be "officer who is in default". In the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of BREDL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as per Section 5(g) of the Companies Act, 1956 BREDL and all the directors of BREDL are liable....

Fact that appellant had merely lent his name to be a director of BREDL at the instance of Mr. Soumen Majumder and for becoming a director of BREDL the appellant had neither paid any subscription money to BREDL and the fact that the appellant was not involved in the day to day affairs of BREDL would not absolve the appellant from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956. Admittedly, the appellant was a director of BREDL when amounts were collected by BREDL in contravention of the public issue norms and there is nothing on record to suggest that any particular officer/director was authorised to comply with the public issue norms. In such a case, all directors of BREDL including the appellant would be "officer in default" under Section 73(2) read with Section 5 of the Companies Act, 1956...."

46. In view of Hon'ble SAT Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that the obligation of the officer in default to refund the amount with interest jointly and severally with the Company and other officer in default are limited to the extent of amount collected during his/her tenure as officer in default of the Company.

47. From MCA records i.e. FORM 25C, I find that Shri Ranjit Kumar Baidya was appointed as Managing Director of RBHAPL from March 01, 2007. I also find that Shri Ranjit



Kumar Baidya is continuing to be Managing Director of RBHAPL till date. Thus, I find that Shri Ranjit Kumar Baidya was appointed as Managing Director of RBHAPL from March 01, 2007 till date.

48. At paragraph 18 above I held that RBHAPL had issued and allotted RPS to 1,668 investors during the FY 2006-07 (date of allotment was March 29, 2007) and 2007-08 (date of allotment was August 08, 2007) and mobilized funds to the tune of Rs. 50 lakhs. As per MCA records, at the time of issuance and allotment of RPS in the FY 2006-07 and 2007-08, Shri Ranjit Kumar Baidya was the Managing Director of RBHAPL. Further, in view of Hon'ble SAT order in the matter of *Manoj Kumar Agarwal* and *Pritha Bag* and considering the facts and circumstances of case, I note that in the present matter, during the FY 2006-07 and 2007-08, in accordance with Section 5(a) of Companies Act, 1956, Shri Ranjit Kumar Baidya being the Managing Director of RBHAPL is the *officer in default* for the period of allotment and issuance of RPS in the FY 2006-07 and 2007-08. Therefore, Shri Ranjit Kumar Baidya being managing director in the FY 2006-07 and 2007-08 who is *officer in default*, is liable to make refund of the money collected during his tenure in the financial year 2006-07 and 2007-08, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions.
49. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, Shri Ranjit Kumar Baidya is co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956. Therefore, I find that RBHAPL and Shri Ranjit Kumar Baidya, are jointly and severally liable to refund the amounts collected from the investors for the respective period mentioned in above paragraph, with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.



50. Further, I note that during the period of fund mobilization in the FY 2006-07 and 2007-08, Shri Sujit Baidya and Ms. Swapna Baidya were directors in RBHAPL and Shri Ranjit Kumar Baidya was the Managing Director of RBHAPL. Therefore, following the reasoning as provided by Hon'ble SAT in the matter of *Pritha Bag vs. SEBI* and *Manoj Agarwal vs. SEBI*, I am of the view that for the fund mobilization in the FY 2006-07 and 2007-08, Shri Sujit Baidya and Ms. Swapna Baidya are not liable for refund of money as there is sufficient documentary evidence available on record which indicate that RBHAPL had a Managing Director namely, Shri Ranjit Kumar Baidya, (who is an officer in default as per Section 5(a) of Companies Act, 1956) during period of fund mobilization in the FY 2006-07 and 2007-08.
51. From the material available on record and the details of the appointment and resignation of the directors of RBHAPL as reproduced in paragraph 40 above, it is noted that Shri Koushik Baidya was appointed (May 05, 2010) as director in RBHAPL subsequent to the issuance and allotment of RPS i.e. he was not the director in RBHAPL during the period of issuance and allotment of RPS (FY 2006-07 and 2007-08). By virtue of being directors, he is expected to exercise the powers on behalf of the Company in discharging the obligations of the Company. In this regard, the following observation of the Hon'ble Supreme Court may be apposite.
52. Hon'ble Supreme Court of India vide order dated April 26, 2013 in the matter of *N Narayanan Vs. Adjudicating Officer, Sebi* observed that:
- “.....
33. *Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence.....”*

53. Further, with respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies* (2002 108 Cas 1 Mad):

"13. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956."

54. A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. The director cannot therefore wriggle out from liability. A director who is part of a company's board shall be responsible and liable for all acts carried out by a company. Accordingly, Shri Koushik Baidya was also be responsible for all the deeds/acts of the Company during the period of his directorship.

55. It is noted that the liability to repay is a statutory liability under section 73(2) of the Companies Act, 1956, which mandates the repayment to be made forthwith. The present order only enforces the pre-existing liability of the Company and other officers in default to repay along with interest. It is an additional liability of every director on behalf of the

Company to ensure that the Company complies with the obligation under section 73(2) of the Companies Act, 1956 forthwith. One may argue that the liability of the Company is crystallised only by virtue of an Order by SEBI, therefore, till then there was no liability on the Company and therefore, on the directors. If such argument is accepted, all the legal obligations and compliance requirements pose the risk of being not discharged or postponed on the pretext of non-crystallization. Also, it would make the compliance of regulatory/statutory requirement imposed on the Companies bereft of clarity and incentivize delay in compliance of statutory obligation by the Companies until such non-compliance is enforced through proceedings such as this. If the Board of Directors of a Company cannot be considered to be liable to ensure the legal obligations cast upon a Company, there would be no human instrumentality for discharge of such legal obligations on behalf of the Company. Considering the fact that RBHAPL has not complied with its obligation to repay the amounts collected in violation of deemed public issue and such liability is continuing, I find that the same can only be ensured by its directors.

56. It is noted in light of the continued non-compliance of refund liability by RBHAPL, that Shri Koushik Baidya who joined RBHAPL subsequent to the issuance and allotment of RPS and being a continuing director as per records, has the continuing obligation to ensure compliance of the refund obligation of the Company. Further, Shri Sujit Baidya and Ms. Swapna Baidya who were the directors of RBHAPL during the period of issuance and allotment of RPS but not liable for refund were also obligated to ensure compliance of the refund obligation of the Company during their respective period of directorship. The failure on the part of the directors to discharge their obligation on behalf of the company to ensure that such repayment is made by the Company needs to be dealt with by way of appropriate directions against them in this regard.

57. Therefore in view of RBHAPL's continued violation of its refund obligation, Shri Sujit Baidya, Ms. Swapna Baidya and Shri Koushik Baidya as directors of RBHAPL, during their tenure of directorship, were responsible to ensure that RBHAPL makes refund to the



allottees with interest. Thus, they have failed to ensure the timely refund to the investors by RBHAPL as mandated under law during their respective tenure of directorship. Therefore, they are liable to be debarred from securities market for appropriate period of time.

58. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct RBHAPL and its Director namely Shri Ranjit Kumar Baidya to refund the monies collected, with interest to such investors. Also, in order to safeguard the interests of investors, to prevent further harm to investors and to ensure orderly development of securities market, all the Noticees becomes liable to be debarred for an appropriate period of time.

59. I also note that, vide the interim order dated January 08, 2016, RBHAPL and its directors was also directed to provide a full inventory of all their assets and properties; and furnish complete and relevant information (as sought by SEBI letter dated October 19, 2015), within 14 days from the date of receipt of this Order. However, I find that no such information has been provided either by RBHAPL or other Noticees.

60. In view of the discussion above, appropriate action in accordance with law needs to be initiated against RBHAPL and its Directors viz. Shri Ranjit Kumar Baidya, Shri Sujit Baidya, Ms. Swapna Baidya and Shri Koushik Baidya.

ORDER

61. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4), 11A and 11B(1) of the SEBI Act, hereby issue the following directions:



- 61.1. RBHAPL alongwith Shri Ranjit Kumar Baidya shall forthwith refund, to the investors, the money collected by the Company, during his tenure as Managing Director of RBHAPL, through the issuance of RPS (including the application money collected from investors during their respective period tenure of Managing Director, till date, pending allotment of securities, if any), with an interest of 15% per annum, from the eighth day of collection of funds, till the date of actual payment.
- 61.2. The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable" or through any other appropriate banking channels with clearly identified beneficiaries.
- 61.3. Shri Ranjit Kumar Baidya is directed to provide a full inventory of his assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds / shares / securities, if held in physical form and demat form.
- 61.4. RBHAPL and its present Directors namely Shri Ranjit Kumar Baidya, Shri Sujit Baidya and Shri Koushik Baidya, are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds / shares / securities, if held in physical form and demat form, of the Company.
- 61.5. RBHAPL and its present Directors namely Shri Ranjit Kumar Baidya, Shri Sujit Baidya and Shri Koushik Baidya are permitted to sell the assets, properties and holding of mutual funds/shares/securities held in demat and physical form, by the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund / repayment to the investors till the full refund / repayment as directed above is made.
- 61.6. Shri Ranjit Kumar Baidya is prevented from selling his assets, properties and holding of mutual funds/shares/securities held by him in demat and physical form



except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

- 61.7. RBHAPL, on behalf of the Company its present Directors, namely Shri Ranjit Kumar Baidya, Shri Sujit Baidya and (Shri Koushik Baidya on his own behalf and on behalf of the Company) shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.
- 61.8. After completing the aforesaid repayments, RBHAPL and on behalf of the Company its present Directors, namely Shri Ranjit Kumar Baidya, Shri Sujit Baidya and (Shri Koushik Baidya on his own behalf and on behalf of the Company) shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI") holding such certificate.
- 61.9. In case of failure of RBHAPL and Shri Ranjit Kumar Baidya to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from the company and the director liable to refund as specified in paragraph 61.1 of this Order, in accordance with Section 28A of the SEBI Act including such other provisions contained in securities laws.
- 61.10. RBHAPL is directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the



public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above.

61.11. Shri Ranjit Kumar Baidya is restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above. Shri Ranjit Kumar Baidya is also restrained from associating himself with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.

61.12. Shri Sujit Baidya, Ms. Swapna Baidya and Shri Koushik Baidya are restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner for a period of 4 (four) years from the date of this Order. The above said persons are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 4 (four) years from the date of this order.

61.13. Needless to say, in view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of the Noticees shall remain frozen.

61.14. The above directions shall come into force with immediate effect.

62. Copy of this order shall be sent to all the Noticees.

63. Copy of this Order shall be forwarded to the recognised stock exchanges, depositories and registrar and transfer agents for information and necessary action.

64. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies, for their information and necessary action.

DATE: FEBRUARY 02, 2021

PLACE: MUMBAI

madhabi puri



MADHABI PURIBUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA