

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: PRASHANT SARAN, 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 Amrit Projects (N.E.) Limited

In respect of:

1. Amrit Projects (N.E.) Limited,
2. Shri Kailash Chand Dujari (DIN: 00628742),
3. Shri Sasanka Roy Sarkar (DIN: 03345064),
4. Shri Barun Kumar De (DIN: 05195240),
5. Shri Ranjan Kumar Chowdhury (DIN: 06519275),
6. Shri Kali Kishore Bagchi (DIN: 00601879),
7. Shri Nishant Prakash (DIN: 00610717),
8. Shri Debdas Chatterjee (DIN: 05192408),
9. Shri Syed Kazim Raza (DIN: 05172720),
10. Shri Jamil Ahmed Farooqui (DIN: 05172708) and
11. Shri Mahammad Azam Khan (DIN: 01449067).

Dates of hearing: April 22, 2015, July 29, 2015 and September 4, 2015

Appearance:

For Noticees: Mr. Abhishek Todi
Mr. Krishnendu Banerjee
Mr. Prithu Ghosh
Ms. Piyali Mukherjee, Advocate
Mr. Tarun Das Sarma, Advocate
Mr. Dipanjan Roy, Advcoate

For Securities and Exchange Board of India: Dr. Anitha Anoop, Deputy General Manager
Mr. N. Murugan, Assistant General Manager
Ms. Nikki Agarwal, Manager

1.1 Amrit Projects (N. E.) Limited (hereinafter referred to as 'APNEL' or 'the company') having its Office at 58, Shima Plaza, 2nd Floor, Ulubari Chariali, G. S. Road, Guwahati, Assam-781007, India, was incorporated on July 07, 2007, with CIN No. as U40101AS2007PLC008429.

1.2 On receipt of information about collection of money by APNEL from public

subsequent enquiry by SEBI, it was observed that APNEL issued *Redeemable Preference Shares* (hereafter referred to as “RPS”) to a large number of investors during the Financial Years 2009– 10, 2010–11, 2011–12 and 2012–13 and collected an amount of Rs.10,38,54,000 from 5,033 investors in total.

2.1 As the above said offer of RPS were found *prima facie* in violation of respective provisions of the SEBI Act, 1992 ("SEBI Act"), the Companies Act, 1956, SEBI passed an interim order dated August 22, 2014 and issued directions mentioned therein against APNEL and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan.

3.1 *Prima facie findings/allegations:* In the said interim order, the following prima facie findings/allegation were recorded. APNEL has made an offer and issued RPS to 5,033 persons and collected Rs. 10,38,54,000, through allotments as shown in the following table:-

Table 1

Year	Type of Security	Date of Allotment	No. of Securities	No. of Allotees	Total amount (Rs.)
2009 – 10	Redeemable Preference Shares	31.03.2010	15,483	185	1,54,83,000
2010 – 11		31.03.2011	11,862	149	1,18,62,000
2011 – 12		31.03.2012	20,968	229	2,09,68,000
2012 – 13		31.03.2013	22,000	1,000	2,20,00,000
		31.03.2013	3,35,410	3,470	3,35,41,000
Total				5,033	10,38,54,000

3.2 APNEL issued RPS in accordance with *inter alia* the following terms and conditions:-

- "Allotment of Redeemable Preference Shares will be made within 30 days from the date of receipt of application. The Letter of Allotment/Redeemable Preference Share Certificate(s) will be delivered to the First/ Sole Application at the address given.*
- The Offer is being made on a private placement basis and cannot be accepted by any person other than to whom it has been offered. Further, this Offer cannot be transferred or renounced in anyone's favour.*
- This application is not an offer to the public in general to subscribe and this document is must for private circulation only for issue of instruments on private placement basis.*
- The payment of maturity amount and all the returns as mentioned in the documents are tentative in nature."*

3.3 The said RPS were issued under different plans for different tenures with different

rates of redemption as shown below:-

Table 2A

PLAN	H2	A2	B2	D2	E2	G2
Issue Price per share (₹)	100	100	100	100	100	100
Redemption Period	1 Year	3 Years	5 Years 6 Months	7 Years	10 Years	15 Years
Redemption Value	109	140	200	300	500	1000

Table 2B

Scheme	MPPS (Redeem on Monthly)			QPPS (Redeem on Quarterly Basis)		
	O1	S1	T1	R1	U1	V1
Plan						
Issue Price Per Share	1000	1000	1000	1000	1000	1000
Redemption Period	5 Years	7 Years	10 Years	5 Years	7 Years	10 Years
Redemption (Month/Quarter)	9.50	10.00	10.75	29.75	31.50	34.50
Minimum Deposit	40000	40000	40000	25000	25000	25000
Final Redemption Amount (with Additional Redemption Premium)	1100	1120	1150	1100	1120	1150

- 3.4** The above offer of RPS and pursuant allotment were deemed public issues of securities under the first proviso to Section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under Section 60, Section 56(1) and 56(3), Sections 73(1), (2) and (3) of the Companies Act, 1956 were not complied with by APNEL, in respect of its offers of RPS.
- 3.5** In view of the prima facie findings on the violations, the following directions were issued in the said interim order dated August 22, 2014, with immediate effect.
- APNEL shall not mobilize funds from investors through the *Offer of RPS* or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;
 - APNEL and its Directors, viz. Shri Kailash Chand Dujari (DIN: 00628742), Shri Sasanka Roy Sarkar (DIN: 03345064), Shri Barun Kumar De (DIN: 05195240), Shri Ranjan Kumar Chowdhury (DIN: 06519275) including its past Directors, viz. Shri Kali Kishore Bagchi (DIN: 00601879), Shri Nishant Prakash (DIN: 00610717), Shri Debdas Chatterjee (DIN: 05192408), Shri Syed Kazim Raza (DIN: 05172720), Shri

Jamil Ahmed Farooqui (DIN: 05172708) and Shri Mahammad Azam Khan (DIN: 01449067), 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. APNEL and the 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;

iv. APNEL shall provide a full inventory of all its assets and properties;

v. The abovementioned past and present Directors of APNEL shall provide a full inventory of all their assets and properties;

vi. APNEL and its 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 RPS*, without prior permission from SEBI;

vii. APNEL and its present Directors shall not divert any funds raised from public at large through the *Offer of RPS*, which are kept in bank account(s) and/or in the custody of APNEL.

3.6 Vide the said interim order, APNEL 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 that the concerned persons may also indicate whether they desire to avail an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

4.1 *Service of interim order:* The copy of the said interim order was sent to the above mentioned entities/ persons vide SEBI's letter dated August 22, 2014. The copies of interim order, were sent through speed post and duly delivered to the above mentioned entities. Subsequently, vide letter dated March 23, 2015, sent through speed post, all the persons against whom the above said interim order was passed, were intimated that they shall be given opportunities of personal hearing on April 23, 2015. The hearing notices were delivered to all the entities except one director i.e. Shri Sasanka Roy Sarkar.

4.2 In addition to this, vide notification dated April 14, 2015, published in newspaper 'Ananda Bazar Patrika', and notification dated April 15, 2015 published in newspaper

‘Times of India’, APNEL and its directors were notified by SEBI that they will be given the final opportunity of being heard on April 23, 2015.

- 5.1 *Hearing and submissions:* Mr. Abhishek Todi appeared on April 23, 2015 on behalf of Nishant Prakash and submitted the copy of ‘Form 32’ stating that the director resigned w.e.f. 15.02.2012. Mr. Krishnendu Banerjee and Mr. Prithu Ghosh appeared on behalf of Barun Kumar De, Shri Kali Kishore Bagchi and Shri Debdas Chatterjee and made oral and written submissions reiterating the same on their behalf. The Advocate, Mr. Triptimoy Talukdar appeared and undertook to file the vakalat on behalf of the company. In view of the absence of vakalat, permission was not granted for making the submissions and the company was considered as absent for the personal hearing.
- 5.2 Shri Syed Kazim Raza, Shri Mahammad Azam Khan, Shri Jamil Ahmed Farooqui vide separate letters all dated 22.04.2015, sought for an adjournment of personal hearing.
- 5.3 In view of the requests for the adjournment, SEBI vide letter dated June 29, 2015 intimated all the noticees that they would be given another opportunity of hearing on July 16, 2015.
- 5.4 Subsequently, vide letter dated July 08, 2015, the entities were intimated that personal hearing scheduled to be held on July 16, 2015 was adjourned to July 29, 2015. On July 29, 2015, Ms. Piyali Mukherjee and Mr. Tarun Das Sarma, the Advocates appeared for the Director, Mr. Ranjan Kumar Chowdhury. They filed written submissions and made oral submissions on the lines of the written submissions. They also sought for one week’s time for filing additional/ revised written submissions.
- 5.5 Thereafter, Mr. Kailash Chand Dujari and Sasanka Roy Sarkar vide e-mail dated July 28, 2015 and Jamil Ahmed Farooqui, Mahammad Asam Khan and Syed Kazim Raza vide three separate letters all dated July 28, 2015, sought for adjournment of hearing on health grounds. The concerned noticees vide letter dated August 11, 2015 were intimated that they would be given another opportunity of hearing on September 04, 2015.
- 5.6 On the date fixed, Mr. Sasanka Roy Sarkar appeared through his Advocate, Mr. Dipanjan Roy. The advocate made oral submissions. He requested time for filing his written submissions. Liberty was granted and time was given till September 20, 2015.

5.7 Ranjan Kumar Choudhury vide letter dated September 09, 2014, filed his submissions as follows:

- He was appointed as additional director of the company on February 28, 2013 and resigned from the company with effect from July 15, 2013.
- He was not involved in the managerial affairs of the company. He never acted as director at any point of time. He did not attend any board meeting and he does not have knowledge about the assets of the Company.
- The Company issued RPS on private placement basis.
- The petitioner is an old and sick man.

5.8 The Company vide letter dated September 11, 2014 had contended that it has issued RPS only on private placement basis and the power of SEBI under section 55A of the Companies Act, 1956 relates only in respect of non-payment of dividend which is different from the restriction of redemption of preference shares out of profits available for dividend, imposed under section 80(1) (a) of the Companies Act.

5.9 Shri Barun Kumar De through his counsel filed the written submissions. The submissions in brief are as follows:-

- He was not aware of the date and place of incorporation of the company.
- Neither was he aware of the present and past directors.
- He is not a director of the company. He did not receive any written letter of appointment and neither did he attend any EGM of the company nor the Board Meeting. He was never invited to attend the board meeting.
- Since he has no power over the Company he could not prevent the activities of the company. He has no financial stake in the company.
- He was full time professor of a reputed Engineering and Management Institution. Shri K.K. Bagchi who built 10MW Power plant, was one of the advisers of this Institution. It is he who introduced him to the CMD, Shri K.C. Dujari. He was only running the power plant and not doing any other activities. He said that CMD misled about the objective and future functioning of the company and that he might have misused the signature. When he came to know about the same, he had resigned from the Company and filed 'form DIR-11' before the ROC. He was not getting any salary from the Company.

5.10 Shri Kali Kishore Bagchi through his counsel filed the written submissions. The submissions in brief are as follows:-

- He was working in a company Amrit Bio Energy and Industries Limited in West Bengal. The CMD of this company wanted to develop another project in North East State. With this pretext, the CMD took his consent for acting as director of APNEL. He did not receive any written letter of appointment. He was working as professional to develop the company. CMD misled him about the objective and future functioning of the company and he might have misused his signature. He resigned once he came to know about this. He has filed DIR-11 before ROC. He resigned from all group companies of Amrit Projects Ltd. during 2013. He was drawing a professional fee of Rs. 25,000 each from Amrit Bio Energy and Amrit Projects Limited.
- He will submit the inventories within a period of one month.
- He had already replied to SEBI vide letters dated October 24, 2014 and March 13, 2015.

5.11 Shri Debdas Chatterjee through his counsel filed the written submissions. The submissions in brief are as follows:-

- He joined as director of the Company on January 27, 2012 at the age of 62 without any written appointment order, after his retirement from a small private company.
- He has never gone to the Kolkata Office of the company or to any of their office in India and has not met the CMD of the Company, Shri K.C. Dujari. He has no financial stake in the company.
- He has not attended any Board meeting and he has not signed any attendance register. He has not received any sitting fee as director. He received Rs. 10,000 for 10 to 11 months.
- When he came to know about their illegal business, he resigned from the company on May 7, 2013 by filing resignation letter.
- He has no knowledge of mobilization of money since he was not engaged in any of the operations of the company. CMD misled him about the objective and future functioning of the company and CMD might have misused his signature. He resigned once he came to know about this. He was fraudulently roped in as non-executive director. He has no control over the activities of the company, he resigned from the company by filing Form 32.

- He will submit the inventories within a period of one month.

5.12 Pursuant to the hearing held on July 29, 2015, “Rejoinder” was filed by Shri Ranjan Kumar Choudhury. The brief of the submissions are as follows:

- He was appointed as additional director with effect from February 28, 2013 but the same was communicated by the company vide letter dated March 1, 2013 to him only on May 17, 2013. (Copy of letter dated March 1, 2013 enclosed).
- He was not involved in the managerial affairs of the company. He never acted as director at any point of time. He did not attend any board meeting and he does not have knowledge about the assets of the Company.
- As soon as it came to his knowledge that he has been appointed as director of the Company he had resigned on the same day (copy of the Resignation enclosed). The same has been accepted by the company and DIR-12 has been duly filed. The concerned authorities have accepted his resignation with effect from July 15, 2013.
- He has also written a letter dated October 21, 2013 to the Registrar of companies informing his status of resignation.
- The petitioner is an old and sick man.
- His name may be expunged from the case

5.13 Subsequently, Shri Ranjan Kumar Choudhury filed an “application for the modification and clarification of the Rejoinder” reiterating the contents of his earlier “Rejoinder”.

5.14 Shri Sasanka Roy Sarkar vide letter dated September 21, 2015 pursuant to the personal hearing held on September 4, 2015 made submissions as follows:

- He met the Managing director Shri Kailash Chand Dujari and other directors of APNEL in a business trip. He was offered the post of director in the Company for the business progress in the North Eastern States suppressing the mobilization of money from public.
- On consenting to such offer for rendering services on the basis of non-fiduciary capacity, he was appointed as a “Non-Executive Director” under the category “Promoter” w.e.f. January 14, 2013, by filing the form 32 authenticated by present and continuing Managing Director of APNEL bearing the DIN No.:- 06628742 and duly certified by Sanjay Kumar Baid (Company Secretary – Whole Time in practice) with the Registrar of Companies, Shillong.

- He continued in the capacity of a Non-Executive Director of APNEL from 14/01/2013 to 10/05/2013 merely for a period of 3 months and a few more days. During the period of Directorship, he was never served with any notice or otherwise for any board meeting or communication of any vital decision as to the business adopted by a resolution by the Board of Directors of the Company.
- He was reasonably prevented from discharging official obligations and as a sequel to which he was not a signatory and neither could he have signed any vital documents.
- He has not accepted any remuneration during the stint as Non-Executive Director of APNEL, also he is not a signatory to any bank account of APNEL.
- The following are the dates of Extra Ordinary General Meeting and dates of resolution in respect of the issue of redeemable preference shares by APNEL and the money involved.

Table 3

Date of resolution	No of RPS to be issued	Face value	Amount involved (in crores)
02/04/2009	16,000	1000	1.6
05/04/2010	12,000	1000	1.2
04/04/2011	21,000	1000	2.1
07/04/2012	23,000	1000	2.3
07/04/2012	3,40,000	100	3.4

- The year of the allotment of such RPS by APNEL being 2009-10, 2010-11, 2011-12 and 2012-13 and the last of allotment being 31/03/2013, the alleged incident has taken effect much earlier than his appointment as a Non-Executive Director on 14/01/2013.
- The conduct of the other erstwhile Directors of the Board and the present continuing one which was unbecoming on their part. So, he tendered his resignation on May 10, 2013, which communication was effected in favour of the registered office of the company, addressed to the Managing Director and was duly acknowledged of such receipt.
- However, the Board of Directors (Whole Time Directors) failed to file the said resignation with the Registrar of the Companies due to the reasons best known to the Board of Directors of APNEL. The Companies Act, 1956 was silent of any such omission.

- Therefore, he filed the same with the Registrar of Companies under section 168 of the Companies Act 2013 by way of filing DIR 11 on July 28, 2015 which was with effect from May 10, 2013 which has been put to effect i.e. April 1, 2014, in view of his shallow knowledge of transitory provisions of the Companies Act. A Xerox copy of the DIR 11 along with the money receipt and the letter of resignation dated May 10, 2013 were annexed and are marked as “B”, “C”, “D”.
- Director’s liability arises because of their position as agents or officers of the company as also for being in the position of trustees having fiduciary relation with the company or its shareholders. Non-executive directors (NEDs) or independent directors (IDs) are those not charged with the day to day affairs and management of the company and are usually involved in the planning and decision making activities. The appointment of NEDs and IDs provide specialized knowledge and skill to the company contributing in better corporate governance performance.
- As far as the culpability is concerned, there is no distinction between EDs and NEDs to determine the penal consequences. Any director, who is an officer in default within the meaning of section 5 of the Companies Act, 1956 read with section 2(60), 2(47) with sub section (5) of section 149 and section 2(51) of the Companies Act, 2013 will be liable to be prosecuted. Whether a Non-Executive Director is actually liable or not will be a question of evidence and proof will be resolved at the stage of trial.
- In case where the company has no Managing Director/ Whole Time Director, all directors including NEDs remain liable for any omission or commission of acts, however, in a case where the company has whole time directors, the liabilities of NEDs are limited for ensuring compliance with specific provisions of the Act which cast an individual responsibility on the director concerned to act as such.
- In *KK Abuja Vs. V.K. Vora* case, the Hon’ble Supreme Court observed that to be liable, a person should fulfil the legal requirement of being a person in law, responsible for the conduct of the business of the company. He should also be in charge of the business of the company. The apex court has provided a two pronged test to examine whether a person can be deemed responsible. The first is legal, statute based test where it has to be proved that the person is responsible for the conduct of the business of the company. The second is fact based test, where

through specific instance, the complainant has to allege that the accused was in control of the day to day business.

- If a person does not satisfy the first test, neither is he required to meet the second test nor can he be held liable. The necessary mens-rea for any wrongful act has to be proved to make a Non-Executive Director culpable.
- Recently, Ministry has come out with a circular relieving the non-executives against the penal actions to be taken against them. This would continue to spur non-executive directors to perform their role. The circular imposes greater obligations on the ROC to verify the relevant information and records before initiating prosecution against independent nominee directors.
- This implied that the executive powers of management were not on non-executive directors.

5.15 Shri Kali Kishore Bagchi submitted his para-wise comments to the interim order at the time of personal hearing held on September 4, 2015. The submissions are in the nature of reiteration of his earlier submission, brought out at 5.10 above.

5.16 Shri Barun Kumar De submitted his para-wise comments to the interim order at the time of personal hearing held on September 4, 2015. The submissions are in the nature of reiteration of his earlier submission. He reiterated that he was not a director during the period from 2006-07 to 2010-11.

6.1 I have considered the allegations, replies, documents downloaded from MCA 21 Portal' and other material on record. On perusal of the same, the following questions arise for consideration. Each question is dealt with separately under different headings.

1. Whether the company came out with the Offer of RPS?
2. If so, whether the said issues are in violation of Section 60, Section 56(1) and 56(3), Sections 73(1), (2) and (3), the Companies Act, 1956?
3. If the findings on question No.2 are found in the affirmative, who are liable for the violation committed?

7.1 *Whether the company came out with the Offer of RPS?:* I have perused the interim order dated August 22, 2014 w.r.t. the allegation of Offer of RPS. The company and its directors have not disputed the said issuance.

7.2 I have also perused the Form 2 filed in respect of the issue of redeemable preference shares on 31.03.2010, 31.03.2011, 31.03.2012, 31.03.2013. On perusal, I find that RPS has been issued by the Company to 5,033 persons resulting in the mobilisation of Rs. 10,38,54,000 as shown in Table 1. The company also vide its letter dated February 25, 2014 admitted the issuance as stated in Table 1. Further on perusal of the application form (Annexure A-7) enclosed to the letter dated February 25, 2014 of the company, I find that the RPS has been issued with the alleged terms and conditions with different plans mentioned in Table 2A and 2B.

8.1 *If so, whether the said issues are in violation of Section 60, Section 56(1) and 56(3), Sections 73(1), (2) and (3), the Companies Act, 1956?* The provisions alleged to have been violated and mentioned in Issue No.2 are applicable to the offer made to the public. Therefore the primary question that arises for consideration is whether the issue of preference shares covered in Issue No 1 is a 'public issue'. At this juncture, reference may be made to sections 67(1) & (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)."

8.2 The following observations of the Hon'ble Supreme Court of India in *Sahara India*

Real Estate Corporation Limited & ORs. Vs. 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:-

"84. 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.

85. 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. (Emphasis supplied).

- 8.3** Section 67(3) 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 {(section 67(3)(a))}, or, if the offer is the domestic concern of the persons making and receiving the offer {(section 67(3)(b))}, 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.
- 8.4** In the instant case, as the offer of RPS has been made by APNEL and allotment to more than 49 persons *on all the allotments dated 31.03.2010, 31.03.2011, 31.03.2012, 31.03.2013*, the offer of RPS falls within the first proviso of section 67(3) of Companies Act, 1956. Thereby, such issues are deemed to be public issues and were

mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956. Further on perusal of the annexure A-7 enclosed to the letter of the company dated February 22, 2014, I find that the said annexure A-7 is titled as “not for public circulation”.

- 8.5** Though the Company contended that the offer was being made on a private placement basis as per the Unlisted Public Companies (Preferential Allotment) Rules, 2003 ('Rule'), I find that the invitation for subscription to the Offer of RPS was extended to 'Individuals, Trusts, Corporate Bodies, HUFs and others'. Such a generalized category of investor(s), cannot be said to satisfy the condition as required under Section 67(3) of the Companies Act. Moreover, in view of the allotment to more than 49 persons, the question of whether the impugned issue was a private placement does not arise.
- 8.6** 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. 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.
- 8.7** The allegation of non-compliance of the above provisions was not denied by the company or directors or the promoters. Neither the company nor the directors produced any record to show that APNEL has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or filed a Prospectus with ROC or issued application forms accompanying the abridged prospectus. Therefore, I find that, APNEL and its directors and promoters responsible for the failure to issue prospectus have not complied with Section 56(1), 56(3) and 60 of the Companies Act, 1956.

- 8.8** Further, by issuing RPS to more than 49 persons, APNEL had to compulsorily list such securities in compliance with 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 within 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.
- 8.9** The allegation of non-compliance of the above provisions was not denied by the company or directors. I find that no records have been submitted to indicate that it had made an application seeking listing permission from stock exchange nor did it refund the amounts consequent upon such failure. Thus, APNEL has contravened the said provisions. APNEL has not provided any records to show that the amount collected by APNEL are kept in a separate bank account. Therefore, I find that APNEL has also not complied with the provisions of section 73(3) as it has not kept the amounts received from investors in a separate bank account and failed to repay the same in accordance with section 73(2) as observed above.
- 8.10** In view of the forgoing findings, I am of the view that APNEL is engaged in fund mobilizing activity from the public, through the offer and issuance of RPS and has contravened the provisions of sections 56, 60 and 73 of the Companies Act, 1956.
- 9.1** *If the findings on question No.2 are found in the affirmative, who are liable for the violation committed:* Section 56(1) and 56(3) read with section 56(4) 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 section.
- 9.2** 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 shall, from the eighth day becomes 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.
- 9.3** 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"

- 9.4 In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, SEBI has the power to administer Section 67 of that Act, in so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed.
- 9.5 SEBI, as per section 27(2) of the SEBI Act, has the powers to proceed against directors of such companies. In cases of financial fraud, the role of directors in prevention of the same is of utmost importance. They are required to take diligent measures in preventing the same. They are also required not to be neglectful in the affairs of the company which results in the violation of various laws such as deemed public issue in violation of law. In cases of deemed public issue in violation of law, money is collected from innocent, ill-informed and gullible public, without the Company giving the statutory protection available to those investors under the law such as, full and necessary disclosures about the company, an exit opportunity by way of listing of the shares. The purpose of refund in such cases as per law, is to protect the investors who have parted their money without having any opportunity of exit and without full disclosures about the Company which deprives their informed consent.
- 9.6 SEBI also has powers under section 11 and 11B of the SEBI Act to pass direction of refund along with interest. The Hon'ble Bombay High court in **B.P. Plc (Formerly B.P. Amoco Plc) vs SEBI**, (2002 (4) Bom CR 79), held that that SEBI has powers to award interest in exercise its power under section 11 and 11B of SEBI Act, as stated below:-

“Applying the principles regarding award of interest as has been held by the Apex Court in *Secretary, Irrigation Department vs. G.C.Roy* (supra) to the effect "a person deprived of the use of money to which he is legitimately entitled to has a right to be compensated for the deprivation, call it by any name. It may be called "interest, compensation or damages," the investors are entitled to be compensated by way of interest for delayed payment.

Under these circumstances we find no substance that there is no power to award such an interest.”

- 9.7 In view of the provisions of law, APNEL and its Directors, viz., Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan. are responsible for the refund. From the available information as per the *Form 32*, the details of the appointment and resignation of all the directors are given in the Table below:

Table 4

S.No.	Name of directors	Date of Appointment	Date of cessation
1	Shri Kailash Chand Dujari	07/07/2007	Continuing as director
2	Shri Sasanka Roy Sarkar	14/01/2013	Continuing as director
3	Shri Barun Kumar De	02/02/2012	Continuing as director
4	Shri Ranjan Kumar Chowdhury	28/02/2013	15/07/2013
5	Shri Kali Kishore Bagchi	07/07/2007	08/04/2013
6	Shri Nishant Prakash	07/07/2007	15/02/2012
7	Shri Debdas Chatterjee	31/01/2012	07/05/2013
8	Shri Syed Kazim Raza	04/02/2013	29/04/2013
9	Shri Jamil Ahmed Farooqui	04/02/2013	29/04/2013
10	Shri Mahammad Azam Khan	04/02/2013	29/04/2013

- 9.8 **Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan** were serving as directors while the impugned issues and allotments of RPS were made. Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar and Shri Barun Kumar De still continuing to be the directors of the Company.

- a. The persons namely Shri Barun Kumar De, Shri Kali Kishore Bagchi, Shri Debdas Chatterjee have submitted that the CMD of the company namely Kailash Chand Dujari had misled them about the objects and future functions of the

Company and he only might have misused their respective signatures. I note from the table 4 above that Barun Kumar De is still continuing as director of the Company. Further, these persons have not placed anything on record to show as to what action they have initiated against the alleged misuse of their signatures. In view of the same, I find no merits in the submission of these persons.

- b. Shri Ranjan Kumar Choudhury in his submission has argued that he had never acted as director of the company and not attended any board meeting. It has also been submitted that he is old and sick and requested for expunging his name from the case. It is clear from the available records that he was a director and the grounds of being old are not relevant to the matter.
- c. Shri Sasanka Roy Sarkar in his submissions has mainly argued as under:
 - He was appointed as ‘non-executive director’ under the category ‘Promoter’ of the Company and continued in such capacity from January 14, 2013 to May 10, 2013. Shri Sasanka Roy Sarkar along with his submissions has also submitted a copy of his resignation letter dated May 10, 2013. However, from the table 4 above and the details available on the ‘MCA-21 portal’, it is noted that Shri Sasanka Roy Sarkar is continuing as director of the Company and is being shown only as a director of the company.
 - Shri Sasanka Roy Sarkar has also submitted a copy of the ‘Form DIR-11’ (i.e. notice of resignation of a director to the registrar), in support of his claim of resignation. A perusal of this document and the receipt attached with the same reveals that the document was submitted only on July 28, 2015 i.e. after passing of the *interim* order dated August 22, 2014.
 - Shri Sasanka Roy Sarkar in his submissions has further argued that the ‘non-executive directors’ are not charged with the day to day affairs and management of the company and are usually involved in the planning and decision making activities. It has been said that the appointment of non-executive directors and independent directors provide specialized knowledge and skill to the company contributing in better corporate governance performance. It has also been said that in case where the company has whole time directors, the liability of non-executive directors are limited for ensuring compliance with the specific provisions of the Companies Act which cast an

individual responsibility on the director concerned to act as such.

In this regard, I note that the role of directors in a company is of utmost importance and they are required to take diligent steps for preventing financial fraud in the Company they are associated with. The directors are also required not to neglect the affairs of the company which results in the violation of various laws such as the instant 'deemed public issue' matter wherein the money is collected from the innocent and gullible public/ investors, without the statutory compliances, i.e. necessary disclosures about the company, exit opportunity, etc. I note that the last available date of allotment of RPS is March 31, 2013, which is definitely after the date of his appointment as director of the Company. I also note that Shri Sasanka Roy Sarkar had admittedly consented to the post of director in the Company for the business progress in North Eastern States. His appointment also coincides with the allotment of 3,57,410 RPS to 4,470 persons and collection of ₹5,55,41,000.

With respect to the culpability of a director for breach of law by a company, I place my reliance on the order of Hon'ble High Court of Madras in the matter of *Madhavan Nambiar Vs. Registrar of Companies* [2002 108 Comp Cas 1 Mad] wherein it was observed that

"13. It may be that the petitioner may not be a whole-time director, but that does not mean he is exonerated of the statutory obligations which are imposed under the Act and the rules and he cannot contend that he is an ex officio director and, therefore, he cannot be held responsible. There is substance in the contention advanced by Mr. Sridhar, learned counsel since the petitioner a member of the Indian Administrative Service and in the cadre of Secretary to Government when appointed as a director on the orders of the Government to a Government company or a joint venture company, he is expected not only to discharge his usual functions, but also take such diligent care as a director of the company as it is expected of him not only to take care of the interest of the Government, but also to see that the company complies with the provisions of the Companies Act and the rules framed thereunder. Therefore, the second contention that the petitioner cannot be proceeded against at all as he is only a nominee or appointed director by the State Government, cannot be sustained in law. 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.

15. Section 5 of the Companies Act defines the expression "officer who is in default". The expression means either (a) the managing director or managing directors ; (b) the whole-time director or whole-time directors ; (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) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors.

16. Section 29 of the Companies Act provides the general power of the board and Therefore it follows there cannot be a blanket direction or a blanket indemnity in favour of the petitioner or other directors who have been nominated by the Government either ex officio or otherwise. Hence the second point deserves to be answered against the petitioner.

17. As regards the first contention, it is contended by Mr. Arvind P. Datar, learned senior counsel appearing for the petitioner that the company or its board had resolved that Thiagaraj S. Chettiar shall be the director in charge of the company of all its day-to-day affairs and, therefore, the petitioner, an ex officio chairman and director, cannot be expected to attend to the affairs on a day-to-day basis. This contention though attractive cannot be sustained as a whole. There may be a delegation, but ultimately it comes before the board and it is the board and the general body of the company which are responsible." [Emphasis supplied]

I note that 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. In view of the above reasons, the contention that the liability is only on those directors who are in day to day management of the business of the company does not stand. Further, I find that there need not be any differential treatment to Shri Sasanka Roy Sarkar by virtue of him being a 'non-executive director'.

- d. Considering the same, I hold Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan, responsible for the issue of RPS in violation of law and regulations and hence jointly and severally responsible with the Company for making refunds along with interest as mandated under Section 73(2) of the Companies Act, 1956 read with Section 27 of the SEBI Act. The resignation of Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil

Ahmed Farooqui and Shri Mahammad Azam Khan, does not take away their liability for the violations committed during the respective tenure.

In this regard, I place my reliance on the order of Hon'ble High Court of Delhi in the matter of *Anita Chadha Vs. Registrar Of Companies* (74 (1998) DLT 537) which reads as *"It was urged that the petitioner after the resignation would no longer come under the expression 'officer who is in default' as contemplated by Sections 5,159 and 220 of the Act. A reading of Section 5 shows that even after the retirement of the petitioner, she would come under the definition of an officer in default."* In view of the same the resignation of Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan, does not affect their liability.

- 9.9** The liability of the company to repay under section 73(2) of the Companies Act, 1956 is continuing and such liability continues till all the repayments are made. Therefore, the directors who join subsequent to the impugned public issues are also responsible for not making the refund, if the company does not repay the money collected, as mandated in section 73(2) of the Companies Act, 1956. I note that the directors who have joined subsequent to the impugned issues, have not exercised necessary diligence after joining as directors in the Company. Neither did they make any attempts to report the wrongdoings of the company to appropriate authorities. The very inaction by these directors against the previous management (for violating the public issue norms as stipulated under the Companies Act, 1956 while making the offer and issuing the preference shares), even after the receipt of the interim order, leads one to conclude on a possible collusion at their end with the Company and its previous management. Further, such directors have also not taken any steps to remedy the violations committed. Therefore, I hold these persons liable for the refund along with the Company.
- 9.10** SEBI has vide the interim order issued directions that APNEL and its directors shall provide a full inventory of all its assets and properties. I find that Shri Nishant Prakash vide letter dated September 18, 2014, has provided certain details of the assets. Others have failed to submit such details. In view of the discussion above, appropriate action in accordance with law needs to be initiated against the Company and such directors.

9.11 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 the APNEL and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan, to refund the monies collected, with interest to such investors. In view of the violations committed by the Company and its directors and promoters, to safeguard the interest of the investors who had subscribed to such preference shares issued by the Company and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and the other noticees.

10.1 In view of the foregoing, I, in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11(1), 11(4), 11A and 11B thereof hereby issue the following directions:

- a) The Company, namely, **Amrit Projects (N.E.) Limited and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan**, shall forthwith refund the money collected by the Company through the issuance of RPS, including the money collected from investors, till date, pending allotment, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.
- b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order.
- c) Amrit Projects (N.E.) Limited and its present management is permitted to sell the assets of the Company only for the sole purpose of making the repayments including interest, as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank.

- d)** Amrit Projects (N.E.) Limited and its present management shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in local daily (where APNEL had allotted RPS) with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.
- e)** If the Company, Amrit Projects (N.E.) Limited had repaid the investors as claimed by it, the Company may include such repayment in the report to be submitted under para 10.1 (f), provided the Company had met with the criteria laid down under para 10.1(b) and provided further that the Company pays interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.
- f)** After completing the aforesaid repayments, Amrit Projects (N.E.) Limited, shall file a report of such completion of repayment 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).
- g)** Amrit Projects (N.E.) Limited and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of shares/ securities, if held in physical form.
- h)** In case of failure of Amrit Projects (N.E.) Limited and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan, to comply with the aforesaid directions, SEBI, on the expiry of the three months period from the date of this order,-
- i. shall recover such amounts in accordance with section 28A of the SEBI Act

including such other provisions contained in securities laws.

- ii. may initiate appropriate action against the Company, its promoters/directors and the persons/officers who are in default, including adjudication proceedings against them, in accordance with law.
 - iii. would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and
 - iv. would also make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the Company.
- i) Amrit Projects (N.E.) Limited and its Directors, Shri Kailash Chand Dujari, Shri Sasanka Roy Sarkar, Shri Barun Kumar De, Shri Ranjan Kumar Chowdhury, Shri Kali Kishore Bagchi, Shri Nishant Prakash, Shri Debdas Chatterjee, Shri Syed Kazim Raza, Shri Jamil Ahmed Farooqui and Shri Mahammad Azam Khan, are 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 four (4) years from the date of completion of refunds to investors as directed above. The above said directors 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 from the date of this Order till the expiry of four (4) years from the date of completion of refunds to investors.
- j) The above directions shall come into force with immediate effect.

10.2 This Order is without prejudice to any action, including adjudication and prosecution proceedings that might be taken by SEBI in respect of the above violations committed by the Company, its promoters, directors and other key persons.

- 10.3** Copy of this Order shall be forwarded to the recognised stock exchanges and depositories for information and necessary action.
- 10.4** 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 with respect to the directions/ restraint imposed above against the Company and the individuals.

Date : February 23rd, 2016
Place: Mumbai

PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA