WTM/PS/169/IMD/ERO/FEB/2016

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: PRASHANT SARAN, WHOLE TIME MEMBER

ORDER

Under sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 and Clause 17 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 read with regulation 111 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

In respect of –

1. **Amrit Projects Ltd. and its Directors,**
2. **Mr. Kailash Chand Dujari (DIN: 00628742; PAN: ACVPD0419R),**
3. **Mr. Sasanka Roy Sarkar (DIN: 03345064; PAN: BJKPS6178P),**
4. **Mr. Barun Kumar De (DIN: 05195240; PAN: ACNPD1278L),**
5. **Mr. Ranjan Kumar Chowdhury (DIN: 06519275; PAN: ACOPC0503E) and**
6. **Mr. Kali Kishore Bagchi (DIN: 00601879; PAN: ACUPB9253E)**

Date of hearing: September 03, 2015
Appearance:
For noticees: Mr. Prithu Ghose, Advocate for Mr. Kali Kishore Bagchi and Mr. Barun Kumar De.

Mr. Dipanjan Roy, Advocate for Mr. Sasanka Roy Sarkar

Ms. Piyali Mukherjee for Mr. Ranjan Kumar Chowdhury

For **SEBI**: Mr. Prasanta Mahapatra, General Manager, Mr. N. Murugan, Assistant General Manager, Mr. T. Vinay Rajneesh, Assistant General Manager and Ms. Nikki Agarwal, Assistant Manager.

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1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"), vide an ex-parte interim Order dated September 09, 2014 (hereinafter referred to as "the **interim order**") had observed that the company, **Amrit Projects Limited** (hereinafter referred to as "**APL**" or "the **Company**") was *prima facie* engaged in fund mobilizing activity from the public, by making offer and issuing

Redeemable Preference Shares (hereinafter referred to as "**RPS**s") and allegedly failed to comply with the provisions of sections 56, 60 read with section 2(36), 73 of the Companies Act, 1956 read with the Companies Act, 2013 and the provisions of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("**DIP Guidelines**") read with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**").

2. In order to protect the investors who have subscribed to the impugned offer and issue of RPS and to ensure that the Company and its directors are restrained from carrying on with their fund mobilizing activity, SEBI had issued the following directions:

> *"6. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4), 11A and 11B of the SEBI Act and Clause 17 of the DIP Guidelines read with Regulation 111 of the ICDR Regulations, hereby issue the following directions –*
>
> *i. APL 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;*
>
> *ii. APL and its Directors, viz. Shri Kailash Chand Dujari (DIN: 00628742; PAN: ACVPD0419R), Shri Sasanka Roy Sarkar (DIN: 03345064; PAN: BJKPS6178P), Shri Barun Kumar De (DIN: 05195240; PAN: ACNPD1278L), Shri Ranjan Kumar Chowdhury (DIN: 06519275; PAN: ACOPC0503E) and Shri Kali Kishore Bagchi (DIN: 00601879; PAN: ACUPB9253E), 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. APL and the abovementioned Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;*
>
> *iv. APL shall provide a full inventory of all its assets and properties;*
>
> *v. The abovementioned Directors of APL shall provide a full inventory of all their assets and properties;*

vi. APL and its abovementioned Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/ acquired by that company through the Offer of RPS, without prior permission from SEBI;

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

viii. APL and its abovementioned Directors shall, within 21 days from the date of receipt of this Order, provide SEBI with all relevant and necessary information, as sought vide SEBI letter dated February 2, 2014.

7. The above directions shall take effect immediately and shall be in force until further orders.

……..”

3. The interim order was forwarded to the Company and directors, Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De, Mr. Ranjan Kumar Chowdhury and Mr. Kali Kishore Bagchi (collectively referred to as “noticees”) vide SEBI letters dated September 10, 2014. The Company (signed by Mr. Kailash Chand Dujari, director), vide letter dated October 13, 2014, while acknowledging the receipt of the interim order, *inter alia* submitted the following:

(a) As submitted in its earlier response, the Company did not issue any debentures since incorporation. The Company had issued RPS on private placement basis and duly complied with the provisions of Companies Act, 1956 and the rules made thereunder.

(b) The Sahara case judgment was not applicable to the Company and it has not violated any of the provisions of the Companies Act.

(c) The Company made a request for personal hearing.

4. The interim orders were received on behalf of Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De, Mr. Ranjan Kumar Chowdhury, Mr. Kailash Chand Dujari and Mr. Kali Kishore Bagchi.

5. Noticee, **Mr. Barun Kumar De** vide his letters dated October 24, 2014 and March 13, 2015 submitted that he was not aware that he was made a director in the Company and also in Amrit Projects (NE) Ltd. He further submitted that–

i. He never saw the MoA and AoA of the Company.

ii. He never received any invitation to attend meeting of the Board of directors, AGM, EGM of the Company.

iii. He does not hold any equity share of the Company.

iv. Therefore, he had no role to play in the policy making and operations of the Company.

v. His services were hired by Amrit Bio-Energy & Industries Limited some time in 2012 for running the already constructed non-operational 10MW rice husk based power plant at Bankura District in West Bengal. The power plant could be re-commissioned and operated before it was closed in August 2013 for non-availability of matching inputs. He used to get Rs.15,000/- per month for such work from the company. He was not given any letter for hiring him. However, he was given a visiting card indicating his designation as 'director'. He was also told that as he would be visiting important persons, it was better to use such visiting card.

vi. He left the organization immediately after the plant was shut down.

vii. He is a retired professor aged 76 years. He had sustained a head injury during May 2014 and it took time for him to read and partially understand the order (including the order passed in the matter of Amrit Projects (NE) Limited). He filed a reply dated October 24, 2014 and attached a copy of the same.

viii. This noticee requested that his name be dropped from the proceedings and his demat account may be released.

6. The noticees were afforded an opportunity of personal hearing on September 03, 2015. The schedule of the personal hearing was informed to the noticees vide SEBI letters dated August 07, 2015. SEBI also made a public notice in the newspapers, *Times of India* and *Anandbazar Patrika* dated September 03, 2015, regarding the proceedings initiated vide the interim order and the personal hearing fixed on September 03, 2015.

7. In the hearing held on September 03, 2015 –

i. Mr. Prithu Ghose, Advocate appeared for **Mr. Kali Kishore Bagchi** and **Mr. Barun Kumar De**. The advocate submitted that Mr. Kailash Chand Dujari is the Managing Director of the Company. He also filed written submissions and made oral submissions on the lines of such reply. Such submissions of Mr. Kali Kishore Bagchi *inter alia* were:

(a) He was inducted in the Company as a professional to develop projects and used to draw professional fees of Rs.25,000/- only each from Amrit Bio Energy Limited and the Company. He has no knowledge regarding mobilization of money by Company as he was in a different project. He resigned from Amrit Project (NE) Limited and all other group companies during 2013 and the same were intimated to the concerned authorities also.

(b) He was working in a company, Amrit Bio Energy and Industries Limited and was responsible to develop a green field power project in West Bengal. During this period, the CMD had decided to develop a company in Assam to develop another project in north east state due to better industrial benefit. On this pretext, the CMD took his consent and inducted the noticee as a director. The noticee worked sincerely signed a power purchase agreement with the Assam Government Department and Assam Regulatory Commission. The project site of 10MW biomass power project is at Mauri Gaon. Before the same, he had worked with Kanoria group's company, Ludlow Jute Mills Limited as Vice President (Marketing and Product Development).

(c) He has no control on any activities of the Company and he is no more a director and had filed DIR-11 before RoC.

(d) He had been deliberately misled by Chairman and M.D. Mr. K. C. Dujari, giving him untrue impression about the objective and future functioning of the Company. He might have used the noticee's signature.

(e) He has no submissions with respect to the observations made in paragraph 4 of the interim order and provisions said to be violated.

(f) The directions issued vide the interim order are not applicable to him as he resigned from the Company long back.

(g) He is willing to co-operate with SEBI.

(h) He did not have any financial stake in the Company and did not invest money in the projects. He was employed as a professional to develop the power projects only. The CMD is a real estate businessman and was acquainted with him to purchase a flat in Howrah, the same being developed by the Company (which was one of his companies).

ii. The following submissions were *inter alia* made by Mr. Barun Kumar De in the written submissions:

(a) He was working with Amrit Bio-Energy and Industries Limited and was engaged only in running a 10 MW Bio-Mass power plant at Bankura District in the State of West Bengal. During this time, he was fraudulently roped in as director of the Company. He never received any written communication from the Company appointing him as its director. He was never invited to any board meeting of the company. He did not attend any AGM/EGM. He was not provided with a copy of the MoA and has not made any material gain from the Company whatsoever. He does not have any financial stake in the Company and does not hold any share of the Company. He was a director for namesake only.

(b) The noticee was a fulltime professor of a Kolkata based AICTE approved reputed engineering and management institution. Mr. K. K. Bagchi who built the 10MW power plant was one of the Adviser in the institution, who requested the noticee to help in the running of the plant in Bankura. He was introduced to the CMD Mr. K. C. Dujari.

iii. Mr. Dipanjan Roy, Advocate appeared on behalf of **Mr. Sasanka Roy Sarkar** and submitted that this noticee did not sign in any document relating to the Company and had not received any remuneration and had resigned on May 10, 2013. He also submitted that the resignation was not accepted and therefore filed e-Form DIR-II. As requested, liberty was granted to file written submissions.

iv. Ms. Piyali Mukherjee appeared for **Mr. Ranjan Kumar Chowdhury** and filed written submissions and made oral submissions on the lines of such submissions. Such submissions were as follows:

(a) The noticee was appointed as an additional director with effect from February 28, 2013.

(b) The noticee was not involved in the managerial affairs of the Company and did not attend to the business activities of the Company.

(c) The noticee did not attend any board meeting and did not have knowledge of assets and properties of the Company.

(d) The noticee tendered his resignation on May 17, 2013. The resignation was duly accepted and Form DIR-12 was filed. His resignation was with effect from July 15, 2013 as per this form.

(e) The noticee has submitted a representation on September 9, 2014. The noticee further submitted that he is aged and suffering from illness since long.

(f) The notice requested that he may be dropped from the proceedings.

8. Mr. Sasanka Roy Sarkar filed his written submissions dated September 21, 2015, wherein he *inter alia* made the following submissions:

(a) The noticee happened to meet Mr. Kailash Chand Dujari, Managing Director of Amrit Projects (NE) Limited and erstwhile directors of the Company and was given an offer to join the Company as director for improving the business in the north eastern part of the country in accordance with the objects of the Company. However, the illegal mobilization of funds was suppressed.

(b) On consenting to act as a director on basis of non-fiduciary capacity, the noticee was appointed as a "Non-Executive Director" under the category "Promoter" with effect from January 21, 2013. Form-32, which was duly authenticated by the Managing Director of the Company and also certified by the Company Secretary, was filed with the RoC.

(c) The letter of appointment, curiously, mentions the date of issue as February 04, 2013 and the appointment as director in non-executive capacity ought to have taken effect therefrom.

(d) The noticee had continued in the capacity of a non-executive director of the Company from January 21, 2013 to May 10, 2013, merely for a period of 3 months and few days.

(e) During the period of directorship, the noticee was never served with any notice or otherwise for any board meeting or communication of any vital decision adopted by a resolution by the board of directors of the Company sufficient to form the quorum.

(f) The noticee was reasonably prevented from discharging official obligations if any and as sequel to which he was not a signatory and neither could have signed any vital documents giving

effect to the allegations levelled by SEBI in the interim order nor had he any knowledge of such issue and respective statutory provisions. He had not accepted any remuneration during his stint as a non-executive director of the Company and was also not a signatory to any bank account of the Company.

(g) The alleged violations had taken effect much earlier to the appointment (on 21.01.2013) of the noticee in the Company. The same casts aspersions as to the conduct of the affairs of the Company on the day to day basis and also the role and culpability of the erstwhile directors and some present directors of the Company in respect of alleged illegal mobilization of funds from public through offer of RPS.

(h) The noticee had tendered his resignation on May 10, 2013 and the same was acknowledged. However, the board of directors failed to give effect to the same by filing with the RoC due to reasons best known to the board of directors and the Companies Act, 1956 was also silent of any such omission.

(i) The absence of any statutory provisions in respect of filing of resignation directly with the RoC on account of advertence or otherwise omission by the board of directors by way of adopting a resolution to that effect had prompted the noticee to file DIR-11 on July 28, 2015 with the RoC under section 168 of the Companies Act, 2013, giving it effect from May 10, 2013. Copy of DIR-11 was annexed.

(j) <u>Grounds in support of the contentions</u>:

i. Non-executive directors or Independent Directors 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. Their appointment provide specialized knowledge and skill to the Company contributing in better corporate governance performance.

ii. Whether a non-executive director is actually liable or not will be a question of evidence.

iii. Going through the entire process of prosecution is in itself a turbulent experience and could act as a serious disincentive to join the board where they are not even involved in the day to day management of the Company.

iv. The liability of the Managing Director when compared with the other directors is comparatively higher. Whether a particular director could be proceeded against or not is again a matter of evidence. Normally, the presumption as to the culpability of the Managing Director as the officer in default is much stronger and almost conclusive in nature.

v. In cases where the Company has no managing director/whole time directors, all directors including non-executive directors remain liable for any omission or commission of acts. However, in case where the Company has whole-time directors, the liability of the non-executive director is limited for ensuring compliance with specific provisions of the Act which cast individual responsibility on the director concerned.

vi. In KK Ahuja vs. VK 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 and also be in-charge of the same. The Apex Court has provided a two-pronged test to examine whether a person can be deemed responsible. The first is a legal, statue 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 a fact based test, where though specific instances, 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.

vii. The Ministry has come out with a Circular no. 8/2011 dated March 25, 2011 which relieves the non-executive directors against penal action to be taken against them. This would continue to spur the non-executive directors to perform their role diligently but at the same time protects them against prosecution risks in the event of their innocence. The Circular imposes greater obligations on the RoC to verify relevant information and records before initiating prosecution against independent or nominee directors.

viii. In Sangramsinh P. Gaekwad and others vs. Shantadevi P. Gaekwad, the Hon'ble Apex Court has made observation against fiduciary duties of directors of an incorporated body which amply satisfies the non-application of such duties on a non-executive director.

ix. Chapter IX of the Indian Trusts Act provides for certain obligations in the nature of trusts. The Trust Act recognizes various kinds of trusts including resulting trust. An express trust, however, may be created by reason of an agreement between the parties (Barclays Bank vs. Quistclose Investments – 1970 AC 567). By reason of section 88 of the Indian Trusts Act, a person bound in fiduciary character is required to protect the interest of other persons but the heart and soul thereof is that as between two persons one is bound to protect the interests of the other and if the former availing of that relationship makes a pecuniary gain for himself, section 88 would be attracted.

x. What is sought to be prevented by a person holding such fiduciary benefit is unjust enrichment or unjust benefit derived from another which is against conscience that he should keep. When a person makes a pecuniary gain by reason of a transaction, the *cestui qui* trust created there must be restored back.

xi. In Union Carbide of India, Mr. Keshub Mahindra, Chairman (a non-executive director) was booked by the CBI under the same sections as the managing director, executive director, works-manager and others directly involved in the day-to-day running of the company. The Bhopal trial court was informed that the company always had a managing director or whole time directors. This implied that the executive powers of management were not on the non-executive directors.

9. I have considered the interim order, the submissions made by the noticees and the material available on record. The interim order has alleged that the Company made a public issue of RPS and failed to comply with the provisions of sections 56, 60 read with section 2(36), 73 of the Companies Act, 1956 read with the Companies Act, 2013 and the provisions of the DIP Guidelines read with the ICDR Regulations. In this regard, the following observations are noted from the interim order:

"iii. *APL issued "Redeemable Preference Shares" ("Offer of RPS") in accordance with inter alia the following terms and conditions –*

a. "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.

b. 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.

c. The payment of maturity amount and all the returns as mentioned in the documents are tentative in nature."

iv. The details of plan launched by APL in respect of the Offer of RPS are as under –

PLAN	***H2***	***A2***	***B2***	***C2***	***D2***	***E2***	***F2***	***G2***
Issue Price per share (₹)	100	100	100	100	100	100	100	100
Redemption Period	1 Year	3 Years 6 Months	5 Years 6 Months	6 Years 3 Months	7 Years 6 Months	10 Years 6 Months	12 Years 6 Months	15 Years 9 Months
Redemption Value	109	130	170	200	250	380	500	800

v. *It is observed from the information submitted by APL that it passed the following resolutions at its Extra Ordinary General Meetings, for issuance of RPS.*

Date of Resolution	**Type of Meeting**	**No. of *RPS* to be issued**	**Face Value of Share (₹)**	**Amount (₹ in Crores)**
05-04-2004	Extra Ordinary General Meeting	210000	100	2.90
		8000	1000	
08-04-2005	Extra Ordinary General Meeting	800000	100	11.00
		30000	1000	
03-04-2006	Extra Ordinary General Meeting	1700000	100	20.50
		35000	1000	
02-04-2007	Extra Ordinary General Meeting	560000	100	8.30
		27000	1000	

vi. *APL issued RPS during the Financial Years 2006–07, 2007–08, 2008–09, 2009–10 and 2010–11, details of which are provided below –*

Year	Date of Allotment	No. of Securities	Amount Per Share (₹)	No. of persons to whom issued (Approx.)	Total Amount Raised (₹ in Crores)
2006-07	31.05.2006	87921	100	2371	0.88
	31.07.2006	5230	1000	77	0.52
		133851	100	1159	1.33
	31.08.2006	151974	100	578	1.52
	30.09.2006	8765	1000	128	0.88
	28.02.2007	7796	1000	97	0.78
		151631	100	3861	1.52
	Total	547168	1000/100	8271	7.43
2007-08 & 2008-09	Details Not Available	77434	1000	936	7.74
		1418523	100	Details Not Available	14.18
	Total	1495957	1000/100	936 (Approx.)	21.92
2009-10	Details Not Available	50000	1000	Details Not Available	5.00
		155000	100		1.55
	Total	205000	1000/100		6.55
2010-11	Details Not Available	450000	100	Details Not Available	4.50
Total		**2698125**	**100**	**##9207**	**40.40**

##Details in respect of the total number of allottees under the Offer of RPS for the Financial Years 2006–07, 2007–08, 2008–09, 2009–10 and 2010–11, is not available. Therefore, the number of allottees has been tentatively indicated as at least 9207 on account of available information.

a. "*Under the Offer of RPS, it is observed that during the Financial Year 2006–07, APL allotted RPS of ₹100 each to 7969 individuals/investors and RPS of ₹1000 each to 302 individuals/investors. For the aforesaid allotments, APL mobilized funds amounting to approximately ₹7.43 Crores. These facts prima facie indicate that the Offer of RPS was a public*

issue of securities since the number of persons to whom such Offer was made, was above the limit of forty–nine persons as prescribed under Section 67(3) of the Companies Act, 1956.

b. *It is also observed that during the Financial Years 2007–08, 2008–09, 2009–10 and 2010–11, APL mobilized funds under the Offer of RPS amounting to approximately ₹32.97 Crores. However, details in respect of the number of allotments made during the aforesaid Financial Years (except in respect of allotment of RPS of ₹1000 each to 936 individuals/investors during the Financial Years 2007–08 and 2008–09), were not made available to SEBI, by APL. In view of how the Offer of RPS has been handled by APL (i.e. during the Financial Year 2006–07 itself, the no. of allotments of RPS of ₹100/1000 each were made to 8271 individuals/investors), I feel it is an eminently reasonable conclusion to draw from the facts in the instant matter that such Offer during the aforementioned Financial Years, would have also been subscribed several times over the threshold for a private placement.*

……"

10. With the above facts and allegations/observations made in the interim order, I proceed to consider whether the Company made a public issue of RPS or not. To ascertain whether an issue of securities is a 'public issue' or done on 'private placement', a reference to section 67(3) of the Companies Act, 1956 needs to be made:

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) ...

(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).*

In terms of section 67(3), as amended by the *Companies (Amendment) Act, 2000, with effect from December 13, 2000*, no offer or invitation shall be treated as made to the public by virtue of sub-sections (1) or (2), as the case may be, if the offer or invitation can properly be regarded, in all 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. More importantly, in terms of the first *proviso* to the aforesaid section, the provisions of section 67(3) shall **not** apply in a case where the **offer or invitation to subscribe for shares or debentures** is made to **fifty persons or more**. Therefore, the number of subscribers becomes relevant to judge whether an issue of shares are for public or on a private placement basis, in the light of the above said provision. Therefore, if an offer of securities are made to fifty or more persons, it would be deemed to be a public issue. Non-Banking Financial Companies (NBFCs) and Public Financial Institutions (PFIs) are exempted only from the first *proviso* to section 67(3). Therefore, NBFC or PFI do not have any restriction on the number of allottees as imposed on a company which is not an NBFC or PFI. However, such companies also need to prove that its offer falls either under clause (a) or (b) of section 67(3) to claim such issuance to be a private placement. The Company is not an NBFC or PFI.

11. From the table (*which provides the details of allotment of RPS*), it can be seen that for Financial Years (FY) 2006-07, 2007-08, 2008-09 the Company has allotted securities to more than 49 persons. It is noted that for FY 2008-09, 2009-10 and 2010-11, the number of allottees is not available as the Company failed to provide information and documents as directed in the interim order. This information was also sought during the inquiry, which the Company did not provide. The interim order has observed that the Company did not file the Return on Allotments (Form 2) for the FYs 2007–08, 2008–09, 2009–10 and 2010–11. Therefore, wherever the details of number of allottees are

not available (i.e. for 2008-09, 2009-10 and 2010-11), it is inferred from the number of securities issued, the manner of previous allotments made (to more than 49 persons) and the absence of information regarding the number of allottes (even at this stage), that in such instances too the Company had issued RPS to more than 49 persons. Therefore, in terms of the first proviso to section 67(3), the Company has definitely made a public issue of such securities. The Company has merely stated that it issued securities under a private placement. This submission therefore has no merit in the light of the clear statutory provision under the first *proviso* to section 67(3) of the Companies Act, as discussed in the previous paragraph.

12. By making a public issue of RPSs, the Company was mandated to comply with all the legal provisions that govern and regulate public issue of such securities, including the Companies Act, 1956 and the SEBI Act and regulations. In this regard, I note that in terms of section 55A of the Companies Act, 1956, SEBI shall administer various provisions (*as mentioned therein*) of the said Act with respect to issue and transfer of securities by listed companies, companies that intend to list and also those companies that are required to list its securities while making offer and issue of securities to the public. 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*".

Under section 11A of the SEBI Act, SEBI is also empowered to regulate, by regulations/general or special orders, the matters pertaining to issue of capital, transfer of securities and matters related thereto. Accordingly, the Company, having made a public offer and issue of securities, as observed above, is under the jurisdiction of SEBI.

13. The interim order has alleged that the Company failed to comply with sections 56, 60 and 73 of the Companies Act, 1956. In this regard, I observe the following:

a. 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, contain 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'. There is no Prospectus produced by the Company with respect to its offer of RPS. Accordingly, I find that the Company has failed to comply with sections 56 and 60.

b. By making a public issue of RPS, the Company had to compulsorily list such securities in compliance with section 73(1) of the Companies Act, 1956. As per section 73(1) 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. There is no material to say that the Company has filed an application with a recognized stock exchange to enable the RPSs to be dealt with in such stock exchange. Therefore, the Company has failed to comply with this requirement.

c. Section 73(2) states that "*Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money*".

As the Company failed to make an application for listing such securities, the Company had to forthwith repay such money collected from investors. If such repayments are not made within 8 days after the Company becomes liable to repay, the Company and every director is liable to repay with interest at such rate. The liability of the Company to refund the public funds collected through offer and allotment of the impugned RPSs is continuing and such liability would continue till repayments are made. There is no record to suggest that the Company made the refunds as per law. Further, SEBI is also in receipt of complaints from investors alleging that the Company has defaulted in returning their monies. The Hon'ble Supreme Court of India in the Sahara case has examined section 73 and made the following observations:

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

In view of the above observations, I find that the Company has not complied with the mandate under section 73(2) of the Companies Act, 1956.

d. Section 73(3) states that - *All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 1 [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2)]; and if default is made in complying with this sub- section, the company, and every officer*

of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees." . As found above, the Company had not applied and obtained listing permission. The Company is therefore in non-compliance with this provision also.

e. As the amounts mobilized through the issue of securities have not been refunded within the time period as mandated under law, it would therefore be appropriate to levy an interest @ 15% p.a. as provided for under section 73(2) of the Companies Act, 1956 read with rule 4D (*which prescribes that the rates of interest, for the purposes of sub-sections (2) and (2A) of section 73, shall be 15 per cent per annum*) of the Companies (Central Government's) General Rules and Forms, 1956, on the amounts raised by the Company through its offer and issuance of RPS, including Rs.40.40 crore (as alleged in the interim order) due to be repaid by the Company. As stated above, the liability of the Company to refund the public funds collected through offer and allotment of the impugned RPSs is continuing and such liability would cease only if the repayments are made in accordance with the relevant provisions of law.

f. SEBI had issued the DIP Guidelines in exercise of powers under sections 11 and 11A of the SEBI Act. The Guidelines mandates disclosures to the public when a company proposes to make public offer of securities as applicable during the relevant point in time. Though the DIP Guidelines are presently rescinded, the action for any non-compliance of such Guidelines are protected in terms of regulations 111 of the ICDR Regulations. Therefore, the Company was under a statutory mandate to comply with the DIP Guidelines in respect of its offer and issue of RPS, as applicable during the relevant period. However, it had failed to comply with the following provisions of the DIP Guidelines read with regulation 111(2) of the ICDR Regulations:

    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)

14. In view of the above observations, I conclude that the Company made a public issue of RPS during FY 2006-07 to 2010-11 and failed to comply with the provisions of sections 56, 60 and 73 of the Companies Act, 1956 read with the Companies Act, 2013 and the above stated provisions of the DIP Guidelines read with the ICDR Regulations.

15. The interim order has also observed that "*From the information available on the 'MCA 21 Portal', it is observed that APL has not filed the Return on Allotments (Form 2) for the Financial Years 2007–08, 2008–09, 2009–10 and 2010–11. Further, it is observed that APL has not filed its Balance Sheet for the Financial Years 2006–07, 2007–08 and 2008–09*". Even as on date, the last balance sheet that has been filed is for the FY 2012-13.

16. The interim order is issued to Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De, Mr. Ranjan Kumar Chowdhury and Mr. Kali Kishore Bagchi also. With respect to their culpability, I observe the following: As per information available in the MCA portal, the following are the present directors of the Company:

IN/DPIN/PAN	Full Name	Present residential address	Designation	Date of Appointment
00601879	KALI KISHORE BAGCHI	FLAT NO-9,AMRITDHAM, NITYANANDA NAGAR,BAKULTALA, HOWRAH, 711109, West Bengal, INDIA	Director	27/04/2004
00628742	Kailash Chand Dujari	62, LAKE PLACE, Kolkata, 700029, West Bengal, INDIA	Managing director	20/11/1990
03345064	SASANKA ROY SARKAR	NEW KADAMTALA, N N ROAD, BYE LANE, PO COOCHBEHAR, COOCHBEHAR, 736101, West Bengal, INDIA	Director	21/01/2013
05195240	Barun Kumar De	48/51, PURNA MITRA LANE, SWISS PARK,, KOLKATA, 700033, West Bengal, INDIA	Director	06/02/2012

(a) From the above, it is noted that Mr. Kali Kishore Bagchi and Mr. Kailash Chand Dujari (Managing Director) were in the board of directors of the Company, prior to the offer, during the period when the impugned offer and issue of RPS was made as per the interim order and also continue as directors till date. Though Mr. Kali Kishore Bagchi submitted that he had resigned in 2013, the MCA records do not support such stand of this noticee.

(b) Mr. Sasanka Roy Sarkar has contended that he was appointed a non-executive director and has made elaborate submissions as to why he cannot therefore be made liable. He enclosed a copy of the Form-32 with respect to his appointment and a copy of his resignation letter dated May 10, 2013. I have perused the Form-32 and note that this noticee was appointed as a "Director" under the category "Promoter" on January 21, 2013. The Form-32 also indicates that he was a non-executive director. However, as per the 'consent letter' attached to this e-Form 32, this noticee has consented to act as "director". This noticee has also stated that though he tendered his resignation, the same was not acted upon and he is shown as a director. He further submitted that he filed DIR-11 on July 28, 2015 in terms of section 168 of the Companies Act, 2013. However, as per the information available in the MCA portal, this noticee still continues as a director in the Company.

(c) **Barun Kumar De** has *inter alia* submitted that he had no role to play in the policy making and operations of the Company and that he was hired by Amrit Bio-Energy & Industries Limited some time in 2012 for running the already constructed non-operational 10MW rice husk based power plant at Bankura District in West Bengal. He further submitted that he used to get Rs.15,000/- per month for such work from the company and was not given any letter for hiring him. He submitted that the power plant was closed in August 2012 and he resigned thereafter. However, as per the information available in the MCA portal, this noticee has joined the Company on February 06, 2012 and still continues as one of the directors of the Company. He has not taken action against the previous management/Company in even after receipt of the interim order. In view of the same, it appears that he has colluded with the Company/management in respect of the violations and default in making repayments.

(d) **Mr. Ranjan Kumar Chowdhury** was a director in the Company from February 28, 2013 till July 15, 2013.

(e) The Company has been found to have violated sections 56, 60 and 73 of the Companies Act, 1956 and the DIP Guidelines with respect to its public offer and issue of securities during Financial Years 2006-7 till 2010-11, as observed above.

In the light of the above facts, I observe the following:

(i) In terms of section 291 of the Companies Act, 1956, the board of directors of a company shall be entitled to exercise all such powers and do all such acts and things as the company is authorized to exercise and do. Therefore, the board of directors shall be responsible for the conduct of the business of a company and liable for any non-compliance of law and such liability shall trickle down to individual directors.

(ii) Accordingly, a director who is part of a company's board shall be responsible and liable for all acts carried out by a company unless exemptions are provided.

(iii) With respect to the culpability of a director for breach of law by 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 Comp Cas 1 Mad):

"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}

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.

In view of the above reasons, I find that there need not be any differential treatment to Mr. Sasanka Roy Sarkar by virtue of him being a 'non-executive director'.

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

(v) The liability of the company and directors to repay under section 73(2) of the Companies Act, 1956 and section 27 of the SEBI Act, is a continuing liability and the same continues till all the repayments are made. Such liability is a joint and several liability on them. Therefore, the directors (*irrespective of whether they continue or resign*) who were present during the period when the Company made the offer and allotted RPSs shall be liable for violation of sections 56, 60 and 73 of the Companies Act, including the default in making refunds as mandated therein. As the liability to make repayments under sections 73(2) of the Companies Act read with section 27 of the SEBI Act is a continuing liability, the persons who join the Company's Board pursuant to the offer and allotment of RPSs shall also be liable if the Company and the concerned directors have failed to make refunds as mandated under law.

(vi) The Company and its directors are also responsible for complying with the DIP Guidelines. As the said provisions have not been complied with, they are liable for the consequences of such non-compliance.

(vii) Accordingly, for the reasons mentioned above, Mr. Kailash Chand Dujari and Mr. Kali Kishore Bagchi are found liable, as directors of the Company, for the violation of sections 56, 60 and 73 of the Companies Act, 1956 as found in this Order and would also be liable to make refunds in terms of section 73(2) of the Companies Act read with section 27 of the SEBI Act, as ordered herein.

(viii) Mr. Barun Kumar De, Mr. Sasanka Roy Sarkar and Mr. Ranjan Kumar Chowdhury are also liable, as directors of the Company, for the consequences of the violation of sections 56, 60 and 73 of the Companies Act, 1956 as found in this Order and would also be liable to make refunds in terms of section 73(2) of the Companies Act read with section 27 of the SEBI Act, as ordered herein. These directors have also not taken steps to remedy the violation and default in making repayment even after the issuance of the interim order.

17. 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 and the SEBI (Disclosure and Investor Protection) Guidelines, 2000 read with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, hereby issue the following directions:

(a) **Amrit Projects Limited and its directors, Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De and Mr. Kali Kishore Bagchi along with Mr. Ranjan Kumar Chowdhury (former director),** jointly and severally, shall forthwith refund the money collected by the Company through the issuance of Redeemable Preference Shares (*which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956 and the DIP Guidelines*), to the investors including the money collected from investors, till date, pending allotment of securities, 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 to investors shall be effected only in cash through Bank Demand Draft or Pay Order.

(c) The Company/its present management are permitted to sell the assets of the Company only for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised Bank.

(d) **Amrit Projects Limited, its present management including Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De and Mr. Kali Kishore Bagchi,** 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 details of contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.

(e) After completing the aforesaid repayments, the **Company** shall file a certificate of such completion with SEBI, within a period of three months from the date of this Order, from 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").

(f) **Amrit Projects Limited and its directors, Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De and Mr. Kali Kishore Bagchi along with Mr. Ranjan Kumar Chowdhury (former director),** are also 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.

(g) In case of failure of **Amrit Projects Limited and its directors, Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De and Mr. Kali Kishore Bagchi along with Mr. Ranjan Kumar Chowdhury (former director),**in complying with the aforesaid directions, SEBI, on the expiry of the three months period from the date of this order, -

a) shall recover such amounts in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.

b) 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.

c) 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

d) would also make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the Company.

e) would also make a reference to the Ministry of Corporate Affairs to flag the names of notice directors in its database so that information may be perused by RoC or any other regulatory authority.

(h) **Amrit Projects Limited** is directed not to, directly or indirectly, access the capital 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 years from the date of completion of refunds to investors as directed above.

(i) **Mr. Kailash Chand Dujari, Mr. Sasanka Roy Sarkar, Mr. Barun Kumar De,Mr. Kali Kishore Bagchi and Mr. Ranjan Kumar Chowdhury** are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, with immediate effect. They are also restrained from issuing prospectus, offer document or advertisement soliciting money

from the public and 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. The above directions shall come into force with immediate effect and shall continue to be in force from the date of this Order till the expiry of 4 years from the date of completion of refunds to investors, as directed above.

(j) The above directions shall come into force with immediate effect.

18. 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 including former directors and other key persons.

19. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories for information and necessary action.

20. 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.

PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Date: February 26th, 2016
Place: Mumbai