

## SECURITIES AND EXCHANGE BOARD OF INDIA

## ORDER

**In respect of Interim Orders dated July 31, 2015 and November 20, 2015 in the matter of Kerala Housing Finance Ltd. (KHFL)**

**In respect of:**

| Sr. No.           | Noticees                       | PAN                                              |
|-------------------|--------------------------------|--------------------------------------------------|
| <b>Category :</b> |                                |                                                  |
| 1.                | Kerala Housing Finance Ltd,    | AACCK2183P<br><b>CIN:</b> U65992KLK1992PLC006417 |
|                   | <b>Director(s)</b>             |                                                  |
| 2.                | G Unnikrishnan Nair            | AKHPP5583E                                       |
| 3.                | N Krishnan Nair                | BQYPK5654D                                       |
| 4.                | Komala Unnikrishnan            | AATPU6479N                                       |
| 5.                | G Suresh Kumar                 | AVXPG2603H                                       |
| 6.                | P. Parameshwaran               | AANPP01364                                       |
|                   | <b>Promoter(s)</b>             |                                                  |
| 7.                | B Ajithkumar                   | N.A(*)                                           |
| 8.                | Shajan P G                     | N.A(*)                                           |
| 9.                | S. Sureshkumar                 | N.A(*)                                           |
| 10.               | R Sukumaran                    | N.A(*)                                           |
| 11.               | B Manmadhan                    | NA.(*)                                           |
|                   | <b>Debenture Trustees</b>      |                                                  |
| 12.               | K. Jayaprasad                  | N.A(*)                                           |
| 13.               | K. Radhakrishnan               | N.A(*)                                           |
| 14.               | M/s Bittu Abraham & Associates | N.A(*)                                           |
| 15.               | Jose Philip                    | N.A(*)                                           |
| 16.               | V Ayappan Nair                 | NA.(*)                                           |

(\*) Not Available

*The aforesaid entities are hereinafter referred to by their respective names/serial numbers or collectively as "the Noticees".*

**1. Kerala Housing Finance Ltd. ("KHFL" or "the Company") was a housing finance**

company registered with the National Housing Bank Act, 1987 with effect from April 17, 2006. The Company's registered office is at IInd Floor, Africa Plaza, Pulimood Junction, Thiruvananthapuram - 695001.

2. Securities and Exchange Board of India ("SEBI"), passed an ad interim ex-parte order cum show cause notice dated July 31, 2015 (hereinafter referred to as "**the first interim order**"), against Noticees 1 to 11 and ad interim ex-parte order cum show cause notice dated November 20, 2015 (hereinafter referred to as "**the second interim order**") against Noticees 1 to 16. The said interim orders were passed based on the prima facie conclusion that KHFL had made a public offer and allotment of equity shares, debentures and redeemable preference shares without having complied with the requirements of the Companies Act, the SEBI (Disclosure and Investment Protection) Guidelines, 2000, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 and the SEBI (Issue and Listing of Debt Securities) Regulations, 2008. The first interim order dealt with the public offer of equity shares and the second interim order dealt with the public offer of debentures and preference shares.

3. The said interim orders were passed pursuant to a preliminary examination carried out after a reference was received from the National Housing Bank (NHB) dated May 29, 2014. Subsequently, NHB passed an order dated June 13, 2017 (hereinafter referred to as "**NHB order**") cancelling the registration of KHFL for the following stated reasons:

"

- (a) *Not having the minimum Net Owned Fund (NOF) as stipulated under the National Housing Bank Act, 1987 due to wrong asset classification resulting in short provisioning, recognition of income on NPAs etc;*
- (b) *The Company violated the provision of "Housing Finance Companies Issuance of Non-Convertible Debentures on Private Placement (NHB) Directions 2014" viz. rating requirement, maturity, limits and the amount of issue of non-convertible debentures, conditions for issue of non-convertible debentures, procedure for issuance, debenture trustee etc.,*
- (c) *The Company did not create DTL (Deferred Tax Liability) on amount transferred in the FY 2014-15;*
- (d) *The Company violated provisions of Prevention of Money Laundering Act, 2002 by accepting money in cash and non maintaining, records of cash transactions of more than Rs. 10 lakh as required under Rules framed thereunder;*

- (e) *The Company failed to formulate Asset Liability Management Policy and Risk Management Policy and did not make necessary disclosure as per the Directions, and*
- (f) *The Company failed to submit data to Credit Information Companies (CIC) etc. "*

4. The examination leading to the interim orders considered the information received from KHFL in reply to SEBI's queries and the filings made by the KHFL with RoC as available on the MCA-21 portal maintained by the Ministry of Corporate Affairs (MCA). The prima facie conclusions of the first and second interim orders, replies given to the same and my findings on the alleged violations are discussed separately below.

#### **First Interim order - Equity Share issue**

5. The first interim order noted that KHFL had allotted equity shares to more than 50 persons in a single allotment on 12 occasions since its incorporation, out of which 8 instances were post December 13, 2000 (*i.e., date of notification of amendment to section 67 (3) of the Companies Act*). These 8 instances were as follows:

**TABLE 1**

| <b>Date</b> | <b>Number of Allottees</b> | <b>Total Shares Issued</b> |
|-------------|----------------------------|----------------------------|
| 31-Mar-01   | 51                         | 24,950                     |
| 27-Mar-02   | 193                        | 109,475                    |
| 31-Mar-03   | 58                         | 126,287                    |
| 31-Mar-04   | 562                        | 646,389                    |
| 30-Jun-04   | 68                         | 241,450                    |
| 22-Feb-05   | 104                        | 121,935                    |
| 30-Sep-05   | 62                         | 43,700                     |
| 31-Mar-06   | 138                        | 1,05,215                   |

It was also observed that though on certain dates KHFL made allotments to **less** than 49 persons, it appeared that such allotments were made pursuant to a single offer and done in order to circumvent the provisions of first proviso to section 67(3) of the Companies Act, 1956. These allotments were made in short intervals; the aggregate number of investors to whom such allotments were made, exceeded 49. The list of such allotments is as follows:

**TABLE 2**

| <b>Period between</b>           | <b>No. of allottees</b> | <b>No. of shares issued</b> |
|---------------------------------|-------------------------|-----------------------------|
| March 19, 2007 - March 30, 2007 | 191                     | 3,57,675                    |

|                                        |             |                  |
|----------------------------------------|-------------|------------------|
| September 30, 2007 - November 14, 2007 | 180         | 3,28,525         |
| January 07, 2008- March 31, 2008       | 300         | 14,74,125        |
| August 02, 2008- September 30, 2008    | 104         | 5,71,575         |
| December 11, 2008 - March 31, 2009     | 259         | 14,24,250        |
| June 01, 2009 - June 30, 2009          | 93          | 3,33,225         |
| August 31, 2009- November 06, 2009     | 248         | 13,88,150        |
| December 10, 2009-March 31, 2010       | 160         | 6,72,025         |
| August 06, 2010- October 31, 2010      | 211         | 16,61,200        |
| <b>Total</b>                           | <b>1746</b> | <b>82,10,750</b> |

6. Further the first interim order noted that with respect to the offer and issue of equity shares (i.e. from March 05, 1992 to March 31, 2014), that there was no record to ascertain, as to whether the Company satisfied the provisions of clauses (a) or (b) of section 67(3) of the Companies Act, 1956 to claim that such offer and allotments were made on 'private placement'. Supporting the allegation of public offer having been made by KHFL, reference was drawn to advertisements on the website of KHFL soliciting applications for its 'Private Placement'.

7. Also, the order noted from the records that in most cases, KHFL had not obtained specific approvals from its shareholders prior to the issue of shares, or where such approvals were taken, they were broad in nature and not indicative of 'private placements' having been made. Instances were also identified where instead of special resolutions, as required under section 81(1A) of the Companies Act, 1956 only ordinary resolutions were passed. All of such instances indicated that the issue of equity shares made by KHFL on several occasions were not in order.

8. Consequently, in the first interim order, KHFL was *prima facie* found to have contravened the provisions of sections 56(1), 56(3), 60 and 73 of the Companies Act, 1956 read with sections 2(70), 33(1) and 40 of the Companies Act, 2013, and regulations 4, 5, 6, 7, 25, 26, 32, 36, 37, 46, 47, 57, 58 of the ICDR Regulations and clauses 2.1.1, 2.1.4, 2.1.5, 2.2., 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.6.2, 5.6A and 6.0 to 6.33

of SEBI (Disclosure and Investment Protection) Guidelines, 2000 ("**DIP Guidelines**"). The said finding was also based on the judgment of the Hon'ble Supreme Court in the case of Sahara India Real Estate Corporation Limited & Others vs. SEBI and another (Civil Appeal Nos. 9813 and 9833 of 2011) decided on August 31, 2012. Accordingly as an interim measure KHFL, its directors and promoters were directed *inter alia* not to deal in the securities market or access the capital market and were also asked to show cause why *inter alia* the direction to jointly and severally to refund the money collected through the issue of equity shares along with interest, should not be passed against them.

### **Second Interim order - Debenture issue**

9. The second interim order noted that KHFL had allotted six series of Secured Redeemable NCDs ("**Offer of NCDs**") from the year 1999 to 2014 labeled A to F to 23538 allottees and mobilized funds to the tune of ₹ 157.88 Crores, as detailed below:

**TABLE 3**

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

10. KHFL had earlier claimed that series A and B NCDs were fully repaid. As submitted by KHFL, details of outstanding debentures as on March 31, 2014 are as under:

**TABLE 4**

| <b>Series</b> | <b>Number of outstanding allottees</b> | <b>Amount (₹ in Crores)</b> |
|---------------|----------------------------------------|-----------------------------|
| C             | 181                                    | 0.32                        |
| D             | 3847                                   | 36.49                       |
| E             | 2865                                   | 35.45                       |
| Total         | 6893                                   | 72.27                       |

In addition, details of E Series and F Series NCDs allotted after March 31, 2014 were noted as under:

**TABLE 5**

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

**TABLE 6**

| <b>Series F</b>          |                         |                    |                   |
|--------------------------|-------------------------|--------------------|-------------------|
| <b>Date of Allotment</b> | <b>No. of Investors</b> | <b>No. of NCDs</b> | <b>Value (₹ )</b> |
| 15.05.2014               | 49                      | 7300               | 7300000           |
| 23.05.2014               | 49                      | 8079               | 8079000           |
| 29.05.2014               | 49                      | 3889               | 3889000           |
| 31.05.2014               | 26                      | 4860               | 4860000           |
| 09.06.2014               | 49                      | 7095               | 7095000           |
| 16.06.2014               | 49                      | 8367               | 8367000           |
| 21.06.2014               | 40                      | 6140               | 6140000           |
| 26.06.2014               | 49                      | 7202               | 7202000           |
| 30.06.2014               | 47                      | 7826               | 7826000           |
| 21.07.2014               | 49                      | 9194               | 9194000           |
| 24.07.2014               | 49                      | 9077               | 9077000           |
| 04.08.2014               | 49                      | 5728               | 5728000           |
| 08.08.2014               | 48                      | 8029               | 8029000           |
| 12.08.2014               | 47                      | 5704               | 5704000           |
| 19.08.2014               | 49                      | 6711               | 6711000           |
| 23.08.2014               | 46                      | 5939               | 5939000           |
| 03.09.2014               | 47                      | 7005               | 7005000           |
| 17.09.2014               | 49                      | 5012               | 5012000           |
| 19.09.2014               | 30                      | 5655               | 5655000           |
| Total                    | 870                     | 128812             | 128812000         |

11. The second interim order also took note of preference shares issued by KHFL during the Financial Years 2014–15 and 2015–16, details of which, are as under –

**TABLE 7**

| <b>Financial Year</b> | <b>No. of allottees</b> | <b>Amount Raised (₹ in Crore)</b> |
|-----------------------|-------------------------|-----------------------------------|
| 2014 – 2015           | 768                     | 12.74                             |
| 2015 – 2016           | 303                     | 5.99                              |
| Total                 | 1071                    | 18.73                             |

12. The order took the prima facie view that the allotments of NCDs and preference shares as detailed in the foregoing tables were in the nature of deemed public offer of NCDs and preference shares in accordance with the first proviso to section 67(3) of the

Companies Act, 1956. The order also took the view that the benefit of second proviso to section 67(3) was not open to KHFL. As had been discussed in the first interim order, the second interim order also placed reliance on advertisements placed on KHFL's website indicating that KHFL had been soliciting subscriptions to its securities from the general public.

13. Consequently, KHFL was found to have contravened the provisions of sections 56(1), 56(3), Section 60 read with Section 2(36) and Section 73 of the Companies Act, 1956; the DIP Guidelines read with ICDR Regulations and the ILDS Regulations. Accordingly, as an interim measure KHFL, its directors and promoters were *inter alia*, restrained from mobilizing funds through issue of securities, prohibited from disposing off assets and dealing in securities. Further they were directed to show cause why, *inter alia*, the direction to jointly and severally to refund the money collected through the issue of debentures along with interest, should not be passed against them.
14. In the second interim order, since the issue of NCDs was *prima facie* found to be in the nature of a public issue, based on the available record, Noticee Nos. 12 to 16 namely, K Jayaprasad, K Radhakrishnan, M/s Bittu Abraham & Associates, Jose Philip and V Ayyappan Nair were alleged to have acted as unregistered debenture trustees, thereby having violated section 12(1) of the SEBI Act, 1992 and regulation 7 of the SEBI (Debenture Trustees) Regulations, 1993. Accordingly Noticee Nos. 12 to 16 were prohibited *inter alia* from taking up any new assignment in any issue of debentures.
15. Written replies to the interim orders cum show cause notices, if any, of the noticees were received on the following dates:

| Noticee No. | Noticee                | Reply date (s)                      |
|-------------|------------------------|-------------------------------------|
| 1.          | KHFL                   | November 4, 2015 and March 10, 2016 |
| 2.          | G Unnikrishnan<br>Nair | December 2, 2015                    |
| 3.          | N Krishnan Nair        | December 2, 2015 and April 08, 2016 |
| 4.          | Komala<br>Unnikrishnan | December 2, 2015 and April 08, 2016 |

|     |                                   |                                 |
|-----|-----------------------------------|---------------------------------|
| 5.  | G Suresh Kumar                    | April 25, 2016                  |
| 6.  | P. Parameshwaran                  | April 16, 2016                  |
| 7.  | B Ajithkumar                      | No reply received               |
| 8.  | Shajan P G                        | No reply received               |
| 9.  | S. Sureshkumar                    | No reply received               |
| 10. | R Sukumaran                       | <i>(claimed to be deceased)</i> |
| 11. | B Manmadhan                       | <i>(claimed to be deceased)</i> |
| 12. | K. Jayaprasad                     | March 31, 2016                  |
| 13. | K. Radhakrishnan                  | No reply received               |
| 14. | M/s Bittu Abraham<br>& Associates | March 31, 2016                  |
| 15. | Jose Philip                       | <i>(deceased)</i>               |
| 16. | V Ayappan Nair                    | <i>(deceased)</i>               |

Opportunity of hearing was granted to the Noticees on March 23, 2017. Noticee Nos. 1 to 5 were represented by Advocates Shri Somasekhar Sundaresan and Shri Paras Parekh. Further Noticees 6, 12 and 14 were represented by Dr. K.S. Ravichandran, KSR & Co. Company Secretaries LLP. After the personal hearing, written submissions dated April 11, 2017 and April 06, 2017 were filed by the former and the latter, respectively, summarising their oral arguments.

**16.** A summary of the written and oral submissions made by the Noticees are reproduced below:

**16.1. Reply of KHFL (Noticee No.1) :**

- (i) With respect to the first interim order, KHFL submitted *inter alia* the following-
  - (a) With regard to the observations made in para 9 (c) and 9(d) of the interim order, it is submitted that the information given by the company had some typographical errors in it. Therefore the Board Minutes were relied upon.
  - (b) With regard to the observations made in para 10(a) of the interim order, it is submitted that it had obtained specific approvals from its shareholders when it issued equity shares. There was no general sanction for preferential allotment/ public issue.
  - (c) With regard to the observations made in para 10(b) of the interim order, it is

denied that KHFL had displayed a 'GIF image' on the company's website, promoting its shares and debentures. It submitted that in any case the statement in GIF image "*KHFL shares and Non Convertible Secured Debentures on private placement only*" does not suggest that the company had invited subscriptions to its securities from the public at large. This box item on the website merely intimated that any participation in shares or debentures would be possible only under private placement.

(d) With regard to the observations made in para 11(c) of the interim order, it is submitted that the allotments were on private placement basis. Inadvertently, in some instances, the offer was made to more than 49 persons. However as per section 42 of the Companies Act, 2013 read with Companies (Prospectus and Allotment of Securities) Rules, 2014, a company can offer shares to 200 persons in a financial year. If the referred allotments are tested as per the extant provision, except for allotments in the financial years 2004 and 2006, all other allotments would fall within the 200 persons limit in a year.

(ii) With respect to both the interim orders, KHFL submitted *inter alia* the following:

(a) A Housing Finance Institution (HFI) is an NBFC and would ordinarily be subject to the requirements applicable to NBFCs registered with the RBI. Section 67(3A) of the Companies Act, 1956 empowers SEBI, in consultation with the RBI, to formulate guidelines governing public offer of securities by an NBFC or a public financial institution. It was only on June 27, 2013 that the RBI issued a circular with guidelines regulating private placement of debentures by NBFCs. NHB issued the Housing Finance Companies issuance of Non Convertible Debentures on Private Placement Basis Directions, 2014 which came into effect on April 1, 2014. Therefore in the absence of any guidance issued by SEBI, RBI or the NHB governing private placements, section 67(3) of the 1956 Act cannot be invoked to treat an offer made to 49 persons or more by an HFI as a public offer.

(b) The allottees were close friends, acquaintances of the promoters and directors of KHFL. KHFL obtained declarations from the allottees that the debentures were being issued and subscribed by them with the knowledge that it was a private offer.

(c) The ex parte orders also refer to a "GIF image" displayed on the website. The

said image was not intended to solicit subscribers but merely provided factual information of the various schemes.

- (d) SEBI has erroneously computed the number of allottees in the ex parte order by including existing debenture holders who, had subscribed to additional debentures in the subsequent allotments. The corrected number of allottees is annexed.

**16.2. Reply of P. Parameswaran (Noticee No. 6)**

- (i) P Parameswaran became an independent director of the company only on 18th July 2014. His appointment was approved by the general meeting of the company held on September 30, 2014.
- (ii) He had only attended the Board Meetings held on November 21, 2014, January 30, 2015 , March 30, 2015 May 11, 2015, June 03, 2015 and June 27, 2015.
- (iii) As per section 27 of the SEBI Act, 1992, it is only those persons who were in charge of or who has been responsible for the conduct of the affairs of the company who would be liable for a contravention of the SEBI Act. Sub-section (2) of the Section 27 of the SEBI Act will apply only if it is proved that an offence has been committed with consent or connivance of any director.
- (iv) In the case of the Independent Director P. Parameswaran, the order is wholly unjustified and it cannot be sustained. There may have been allotment of securities in a few board meetings that he had attended after becoming an independent Director. However by such attendance itself, it cannot be said that he is liable.
- (v) Consent or connivance is not a matter of inference. Only if any contravention of the provisions of SEBI Act or regulations is established and if the company is liable, its directors and officers who are responsible for the conduct of its affairs can be fastened with any liability. P Parameswaran has not been in charge of the management and conduct of the affairs of the Company.
- (vi) The submissions made by KHFL were also reiterated by Mr. Parameswaran.

**16.3. Reply of K.Jayaprasad and Bittu Abraham & Associates (Noticees No.12 & 16) :**

- (i) Subsection (1) of Section 117B of the Companies Act, 1956 provides for mandatory appointment of debenture trustees only with respect to issue of

debentures through prospectus or letter of offer to the public. As per regulation 2(ea) of the Securities and Exchange Board of India (Debenture Trustee) Regulations, 1993 ("**DT Regulations**"), "issue" means an offer of sale of securities to the public or by way of private placement of debentures made by a listed company. Thus, only if the issue of debentures was by way of public offer or private placement by a listed company and if they are proposed to be listed, the DT Regulations would apply.

- (ii) SEBI has proceeded on the basis that the company is not an NBFC and hence not entitled to the exception granted under section 67 of the Companies Act, 1956.
- (iii) The Housing Finance Companies Issuance of Non Convertible Debenture on Private Placement Basis (NHB) Directions, 2014 came into effect only on April 1, 2014. However the resolution authorizing the F Series of Debentures was passed on 27th January, 2014 and the Debenture Trust Deed was executed on March 10, 2014. We have not accepted any position as debenture trustee after this series.
- (iv) We had accepted this appointment only in good faith and we have, to the best of our knowledge, not suffered any disqualification and we have not acted in any manner against the interest of the debenture holders nor do we suffer from any conflict of interest. We have ensured that the asset side of the company's balance sheet has sufficient assets to secure the non convertible debentures.

**16.4. Reply of G. Unnikrishnan Nair and Komala Unnikrishnan (Noticees No.2 & 4) :**

G. Unnikrishnan Nair and Komala Unnikrishnan relied on the submissions filed by KHFL.

- 17.** I have considered the allegations levelled against the Noticees in the interim order, their replies/written submissions and other material on record. I note that in the instant case, the directions issued against the Noticees were interim in nature and had been issued on the basis of prima facie findings. SEBI had issued directions vide the interim order in the matter in order to protect the interests of investors in the securities market.

## 18. ISSUES FOR DETERMINATION

- (i) Whether KHFL can be treated as a Non-Banking Financial Company (NBFC) for the purpose of section 67 (3) of the Companies Act, 1956?
- (ii) Whether the offer and allotment of shares and debentures by KHFL constitutes a deemed public offer in terms of first proviso to section 67(3) of the Companies Act, 1956 and section 42 of the Companies Act, 2013, or a 'public offer' in terms of clauses (a) and (b) of section 67(3) of the Companies Act, 1956 and section 42 of the Companies Act, 2013?
- (iii) What provisions of securities law are violated in the instant case?
- (iv) Who would be liable to make refund of monies mobilized through public offer and allotment of shares and debentures by KHFL?
- (v) Whether the Debenture Trustees of KHFL have violated provisions of the SEBI Act read with the DT Regulations?

### 18.1 Whether KHFL can be treated as an Non-Banking Financial Company (NBFC) for the purpose of second proviso to section 67 (3) of the Companies Act, 1956?

As noted earlier in this Order, KHFL was a registered Housing Finance Institution (HFI) holding a certificate of registration (CoR) with NHB from April 17, 2006. Chapter III-B of the Reserve Bank of India Act deals with regulation of NBFCs. Section 45- I(f) of the RBI Act defines an NBFC as follows:

*(f) “non-banking financial company” means–*

*(i) a financial institution which is a company;*

*(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;*

*(iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify;*

The definition therefore is more functional in nature and not linked to registration granted by RBI. HFI is defined in section 2(d) of the National Housing Bank Act , 1987 as follows:

*(d) "housing finance institution" includes every institution, whether incorporated or not, which primarily transacts or has as one of its principal objects , the transacting of the business of providing finance for housing, whether directly or indirectly;*

Consequently, by definition Housing finance Institutions / Housing Finance Companies would ordinarily be subject to the requirements applicable to NBFCs registered with the RBI. However Section 45NC of the RBI Act empowers RBI to exempt NBFCs from the purview of Chapter III-B of RBI Act and RBI has issued a notification dated June 18, 1997 ("**RBI Notification**") expressly exempting HFIs registered with the NHB from the provisions of Chapter III B of the RBI Act. Section 45NC of the RBI Act and the RBI Notification issued thereunder are reproduced below:

**Section 45NC of the RBI Act-**

*"Power of Bank to exempt.*

*45NC. The Bank, on being satisfied that it is necessary so to do, may declare by notification in the Official Gazette that any or all of the provisions of this Chapter shall not apply to a non-banking institution or a class of non-banking institutions or a non-banking financial company or to any class or non-banking financial companies either generally or for such period as may be specified, subject to such conditions, limitations or restrictions as it may think fit to impose."*

**RBI Notification -**

*"The Reserve Bank of India, on being satisfied that it is necessary so to do, in exercise of its powers conferred under section 45NC of the Reserve Bank of India Act, 1934(2) of 1934) hereby declares that the provisions of Chapter IIIB of the Reserve Bank of India Act, 1934 (2 of 1934) shall not apply to a non banking financial company which is a housing finance institution as defined in section 2(d) of the National Housing Bank Act, 1987.*

Therefore it is apparent that any reference to NBFCs would include within its ambit, HFIs as well. Consequently KHFL would be treated as an NBFC for the aforesaid legal provisions with respect to any offer and allotment of shares/debentures, from the date of its registration as an HFI i.e. April 17, 2006.

**18.2 Whether the offer and allotment of shares and debentures by KHFL constitutes a deemed public offer in terms of first proviso to section 67(3) of the Companies Act, 1956 and section 42 of the Companies Act, 2013, or a 'public offer' in terms of clauses (a) and (b) of section 67(3) of the Companies Act, 1956 and section 42 of the Companies Act, 2013?**

18.2.1 Section 67 of the Companies Act, 1956 deals with the conditions or circumstances under which an offer of shares/debentures by a company would be construed as one made to the public. Extracts of the relevant provisions of section 67 of the Companies Act, 1956, dealing with offer of shares or debentures to the public, are reproduced as under:

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

*67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*

*(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*

*(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-*

*(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or*

*(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

*Provided further that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."*

18.2.2 Since some of the allotments of NCDs and RPS were made subsequent to the relevant provisions of Companies Act, 2013 having come into force, the said provisions corresponding to section 67 of the Companies Act, 2013, relevant in the instant case, which came into force on April 01, 2014, are reproduced below:

*"Offer or invitation for subscription of securities on private placement.—*

*42.*

*...*

*(2) Subject to sub-section (1), the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62, in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.*

*...*

*(7) All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.*

*(8) No company offering securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an offer.*

*...*

*"*

Rule 14(2) & (5) of the Rules prescribed under section 42 of the Companies Act, 2013, namely the Companies (Prospectus and Allotment of Securities) Rules, 2014 ("**Companies Rules**"), reads as follows:

*"(2) A company shall not make a private placement of its securities unless –*

*...*

*(b) such offer or invitation shall be made to not more than two hundred persons in the aggregate in a financial year:*

*...*

*(5) The provisions of clauses (b) and (c) of sub-rule (2) shall not be applicable to -*

*(a) non-banking financial companies which are registered with the Reserve Bank of India under Reserve Bank of India Act, 1934; and*

*(b) housing finance companies which are registered with the National Housing Bank under National Housing Bank Act, 1987, if they are complying with regulations made by Reserve Bank of India or National Housing Bank in respect of offer or invitation to be issued on private placement basis:*

*Provided that such companies shall comply with sub-clauses (b) and (c) of sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations."*

18.2.3 Therefore the following points are apparent from the aforesaid provisions of the Companies Act, 1956 and Companies Act 2013 read with the Companies Rules-

- In accordance with the first proviso to section 67 (3) read with the second proviso any offer of shares/debentures to more than 49 persons would be deemed to be a public offer, provided that the shares/debentures are not issued by a Non-Banking Financial Company or Public Financial Institution.
- If however the shares/debentures are issued by an NBFC or a PFI, it would not suffice to be guided by the number of allottees. It also needs to be seen whether the criteria specified in clauses (a) and (b) of Section 67(3) of Companies Act 1956, or section 42(7) & (8) of Companies Act 2013, as the case may be, are satisfied.
- Where the shares/debentures are offered and allotted by a company which is not an NBFC or PFI, even though the number of allottees may be less than 49, whether such offer is a public offer or not, still needs to be checked with reference to clauses (a) and (b) of section 67(3) of the Companies Act, 1956 or section 42(7) &(8) of the Companies Act, 2013 as the case may be.

18.2.4 In view of the above, considering that KHFL was an HFI only from April 17, 2006, in terms of the first proviso to section 67(3) of the Companies Act 1956, read with the law laid down by the Hon'ble Supreme Court in the case of Sahara India Real Estate Corporation Limited & Others vs. SEBI and another (Civil Appeal Nos. 9813 and 9833 of 2011) decided on August 31, 2012, *(as extracted in paras 12 and 13 of the first interim order and para 4.2. of the second interim order)* the following shares/debentures offered and allotted by KHFL would be deemed to be a public offer-

- (i) Shares issued by KHFL as indicated in Table 1 above; and
- (ii) Series A,B, and C NCDs issued by KHFL as indicated in Table 3 above.

This is so because prior to its registration as a Housing Finance Institution (HFI) with NHB, KHFL had the status of an ordinary company making an issue of equity shares to the public at large and could not have claimed any exemption as an NBFC.

18.2.5 During the course of the Hearing, the representatives were told that in the interim orders, SEBI had taken a prima facie view that the offer of shares and debentures were in the nature of public offer. Further, assuming that KHFL's contention is accepted i.e. that it should be considered as an NBFC thereby exempting it from the applicability of first proviso to section 67(3) of the Companies Act, 1956, it is possible that the offer of shares/debentures by KHFL may not be in compliance with clauses (a) and (b) of section 67(3), thereby making the said offer in the nature of a public offer. The representatives of KHFL were therefore asked to file written submissions as to how the offer made by KHFL would qualify to be a private placement instead of a public offer. However, this issue has not been addressed in the written submissions.

18.2.6 In the instant case, from the interim orders and replies filed by the Noticees including the documents submitted by them prior to the interim orders having been passed, I take note specifically of the following:

- (i) **Advertisement on the KHFL website:** The interim orders took note of the fact that a 'GIF image' advertisement was seen on the official website of KHFL which reads as follows: *"KHFL Shares and Non-Convertible Secured Debentures on private placement only"*. In its reply KHFL had submitted the said statement does not suggest that the company had invited subscriptions to its securities from the public. It merely indicated that any participation in shares or debentures would be possible only under private placement.

I am not inclined to accept this submission of KHFL. Private placement of shares or debentures involves a direct offer made to a specific person for allotment of shares/debentures. If the company deems it fit to make an offer to such person(s), it would extend the offer directly without having to announce it to the world at large. KHFL's contention that the GIF image merely conveys that only private placement of shares/debentures is permitted, appears to be an eyewash as also an afterthought. If KHFL's intention was only to privately place shares/debentures, I fail to understand the requirement for such an

advertisement in the first place. It is inexplicable why a 'cautionary notice' is required in the case of subscription to shares and debentures. In my opinion, while ostensibly the purpose of such an advertisement would be only to inform the public about the availability of such shares and NCDs from KHFL, there is a clear element of solicitation from the general public by placing the advertisement in the public domain.

(ii) **Shareholder approvals/Board Resolutions, Application forms etc. for Issuance of equity shares:**

SEBI had been provided some board resolutions and shareholder resolutions in relation to issue of shares and debentures by KHFL. While not every resolution leading to offer and allotment of securities have been submitted to SEBI, the documents submitted throw some light on the manner of issue of securities by KHFL. The first interim order records a shareholder resolution dated September 20, 2010 authorising the board of directors, to allot "*balance equity shares amounting to Rs 1 Cr by private placement to any person or persons*". In addition to the observation that shareholder resolutions in many cases were not in compliance with the Companies Act, the interim order also observed that KHFL had not obtained requisite specific approvals from its shareholders for allotment of equity shares, which it claims as private placement.

I have also taken note of some of the board meeting minutes and shareholder resolutions submitted to SEBI, in relation to issuance of shares/debentures by KHFL. The language used therein does not lead to an inference that the offers of shares/debentures were made or intended to be made by way of private placement to specific persons. Similarly, I note from available records that application forms for debentures were not issued to specific persons even though the application forms mention that the issue is a private placement. Merely stating, in the application forms or by way of declaration, that the issue is in the nature of private placement, does not make them so. A private placement of securities would imply that an offer of securities is only made to those persons who are identified and recorded by an issuing company prior to the invitation or offer and that only such persons receive the offer from the company. If the securities are available for subscription by a person other than the one who

receives the offer or if the offer is not limited for circulation to an identified group of persons then it would constitute a public offer of securities.

- (iii) **Frequency and volume of allottees:** As can be seen from Tables 1 and 2, there have been 8 instances where allotments of shares were made to more than 49 persons and 9 other instances where multiple allotments were made in short intervals resulting in cumulative allotment to more than 49 persons in each period. Similarly as can be seen from Tables 3, 4, 5 and 6, six series of non-convertible debentures (NCDs) i.e. Series A, B, C, D, E and F had been issued and allotted by KHFL. In each case, allotments were made to substantially more than 49 persons, the minimum being in the case of series F (870 allottees) and the maximum being in the case of series D (6603 allottees). Further, Series E and F NCDs were being issued in short intervals albeit to 49 investors in each allotment. Cumulatively these allotments also amount to more than 49 allottees. The second interim order has also recorded that redeemable preference shares (RPS) were issued in the financial years 2014-15 and 2015-16 to a total of 768 and 303 persons, which is reproduced in Table 7 above.

18.2.7 The issues highlighted above coupled with the fact that frequent allotments of shares and debentures were being made to large number of persons convince me that the offer and allotment of shares and debentures by KHFL, indicated in Tables 2 to 7 above, were in the nature of public offers, satisfying the criteria laid down in clauses (a) and (b) of section 67 (3) of the Companies Act, 1956 and section 42 (7) and (8) of the Companies Act, 2013, as the case may be.

18.2.8 The aforesaid logic applies, in my view, to those shares allotted by KHFL not listed in Tables 1 and 2 above. The list of such shares, as extracted from the table at para 9(b) and from para 9(d) of the first interim order, is as follows:

**TABLE 8**

| <b>Date of Allotment</b> | <b>No. of Allottees</b> | <b>No. of shares</b> |
|--------------------------|-------------------------|----------------------|
| 05-Mar-92                | 7                       | 19,000               |
| 21-Feb-94                | 5                       | 27,350               |
| 06-Apr-94                | 73                      | 24,650               |
| 29-Jul-94                | 151                     | 162,470              |
| 20-Sep-94                | 30                      | 14,900               |
| 20-Sep-96                | 1                       | 15,150               |

|           |     |         |
|-----------|-----|---------|
| 27-Dec-96 | 13  | 57,680  |
| 31-Aug-97 | 11  | 1,950   |
| 31-Aug-98 | 47  | 14,150  |
| 31-Mar-99 | 264 | 168,050 |
| 24-Apr-99 | 1   | 350     |
| 30-Sep-99 | 3   | 3,850   |
| 31-Mar-00 | 648 | 224,215 |
| 30-Jun-00 | 2   | 710     |
| 30-Sep-00 | 1   | 700     |
| 30-Sep-04 | 41  | 22,496  |
| 31-Dec-04 | 34  | 18,900  |
| 31-Mar-05 | 2   | 1,275   |
| 30-Sep-06 | 3   | 80,000  |
| 25-Jun-10 | 45  | 239,850 |
| 30-Mar-11 | 38  | 62,055  |
| 30-Sep-11 | 38  | 68,050  |
| 31-Mar-12 | 39  | 69,675  |
| 29-Sep-12 | 32  | 66,025  |
| 31-Jan-13 | 18  | 50,000  |
| 31-Mar-13 | 29  | 77,525  |
| 30-Sep-13 | 36  | 93,250  |
| 31-Mar-14 | 41  | 91,700  |
| Unknown   | 2   | 600     |

18.2.9 From the above discussion, it will follow that the public offer of shares and debentures by KHFL makes it imperative for it to comply with the mandate of section 73 of the Companies Act, 1956 or section 42(10) of the Companies Act, 2013, as the case may be. Relevant extract of the said sections are reproduced as under:

**Companies Act, 1956**

*"Allotment of shares and debentures to be dealt in on stock exchange.*

*73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.*

*(1A) ...*

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

*...." (emphasis supplied)*

**Companies Act, 2013**

"

*"Offer or invitation for subscription of securities on private placement.*

*42.*

...

*(10) If a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, **and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.***

*(emphasis supplied)*

18.2.10 In accordance with the aforestated legal provisions and for the reasons discussed above, the cumulative list of shares and debentures to be refunded, as compiled from Tables 1 to 8 are as follows:

**TABLE 9**

| <b>Equity/Preference/Debenture</b> | <b>Number of shares/debentures</b> | <b>Number of allottees</b> |
|------------------------------------|------------------------------------|----------------------------|
| Equity shares                      | 1,13,06,727                        | 4624                       |
| Preference shares                  | -                                  | 1071                       |
| Debentures (NCDs)                  | -                                  | 23538                      |

In the replies dated March 10, 2016 and April 16, 2016 filed by Noticee Nos. 1 and 6 respectively, it has been submitted that series A and B NCDs have been fully repaid and a portion of series C, D, E and F NCDs have been repaid, as on March 31, 2015. The data submitted in the aforesaid replies are as follows:

**TABLE 10**

| <b>Particulars of NCDs raised, replaced and outstanding</b> |                         |               |                         |               |                                          |               |
|-------------------------------------------------------------|-------------------------|---------------|-------------------------|---------------|------------------------------------------|---------------|
| <b>Series</b>                                               | <b>NCDs Raised</b>      |               | <b>NCDs Repaid</b>      |               | <b>NCDs Outstanding as on 31-03-2015</b> |               |
|                                                             | <b>No. of Allottees</b> | <b>Amount</b> | <b>No. of Allottees</b> | <b>Amount</b> | <b>No. of Allottees</b>                  | <b>Amount</b> |
| A                                                           | 3106                    | 5             | 3106                    | 5             | 0                                        | 0             |
| B                                                           | 5406                    | 20            | 5406                    | 20            | 0                                        | 0             |
| C                                                           | 4098                    | 20            | 4071                    | 19.96         | 27                                       | 0.04          |
| D                                                           | 6603                    | 59.89         | 3610                    | 30.72         | 2993                                     | 29.17         |
| E                                                           | 3168                    | 10            | 575                     | 7.19          | 2593                                     | 32.81         |
| F                                                           | 871                     | 13.18         | 36                      | 0.66          | 835                                      | 12.52         |
| <b>Total</b>                                                | <b>23252</b>            | <b>128.07</b> | <b>16804</b>            | <b>83.53</b>  | <b>6448</b>                              | <b>74.54</b>  |

The data in Table 10 is however not backed by relevant financial documents. Therefore

the liability to refund as indicated in Table 9 above may be reduced to the extent of repayment which has already taken place, based on submission of relevant documents by KHFL.

**18.3 What provisions of securities law are violated in the instant case?**

18.3.1 In connection with the public issue, Section 56 of the Companies Act, 1956 / Section 26 of the Companies Act, 2013 mandates that the prospectus issued by a company shall state the matters specified thereunder and Section 60 of the Companies Act, 1956/ Section 26 of the Companies Act 2013 mandates registration of such prospectus with the ROC. I find that there is no evidence on record to indicate that KHFL has complied with the provisions of Sections 56 and 60 of Companies Act, 1956/ Section 26 of the Companies Act, 2013 in respect of the offer and allotment of equity shares, preference shares and debentures by KHFL. In view of the same, I find that KHFL is in breach of the aforesaid provisions of the Companies Act, 1956 / Companies Act, 2013.

18.3.2 Further, public issue of shares and debentures requires compliance with the norms issued by SEBI. Regarding public issue of shares, from 2000 to August 28, 2009 the SEBI (Disclosure and Investment Protection) Guidelines, 2000 ("**DIP Guidelines**") were in force. In terms of clause 1.4 thereof, the DIP Guidelines *inter alia* applies to all 'public issues' by listed or unlisted companies. 'Public issue' is defined in clause 1.2(xxiii) to mean "*an invitation by a company to public to subscribe to the securities offered through a prospectus*". This definition read with the provisions of the Companies Act, 1956 cited earlier in this Order, makes it clear that DIP Guidelines would apply to a public offer of RPS as well. By not having made the public offer, the noticees are also therefore liable for not having complied with the following significant provisions of the DIP Guidelines, identified in the first and second interim orders:

- (i) Clause 2.1.1. – Filing of offer document
- (ii) Clause 2.1.4 – Application for listing
- (iii) Clause 2.1.5 – Issue of securities in dematerialized form
- (iv) Clause 2.2 - Initial Public Offerings by Unlisted Companies
- (v) Clause 2.8 – Means of finance
- (vi) Clause 4.1 – Promoters contribution in a public issue by unlisted companies
- (vii) Clause 4.11– Lock-in of minimum specified promoters contribution in public issues
- (viii) Clause 4.14 – Lock-In of pre-issue share capital of an unlisted company

- (ix) Clause 5.3.1 – Memorandum of understanding
- (x) Clause 5.3.3 – Due Diligence Certificate
- (xi) Clause 5.3.5 – Undertaking
- (xii) Clause 5.3.6 – List Of Promoters Group And Other Details
- (xiii) Clause 5.4 – Appointment of intermediaries
- (xiv) Clause 5.6 – Offer document to be made public
- (xv) Clause 5.6A – Pre-issue Advertisement
- (xvi) Clause 5.7 – Despatch of issue material
- (xvii) Clause 5.8 – No complaints certificate
- (xviii) Clause 5.9 – Mandatory collection centers
- (xix) Clause 5.10 – Authorised Collection Agents
- (xx) Clause 5.12.1 – Appointment of compliance officer
- (xxi) Clause 5.13 – Abridged prospectus
- (xxii) Clause 6.0 to 6.33 – Contents of prospectus and abridged prospectus
- (xxiii) Clause 8.8.1 – Opening & closing date of subscription of securities
- (xxiv) Clause 8.3 – Rule 19(2)(b) of SC(R) Rules, 1957
- (xxv) Clause 9 – Guidelines on advertisements by Issuer Company
- (xxvi) Clause 10.1 – Requirement of credit rating
- (xxvii) Clause 10.5 – Redemption

18.3.3 SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**") which came into force on August 26, 2009 and which repealed the DIP Guidelines is applicable to the issuance of equity shares made from August 26, 2009 - March 2014. In this regard, it is clear that the Company did not adhere with the following provisions of the ICDR Regulations, identified in the first interim order:

- (i) Regulation 4- General conditions for issue
- (ii) Regulation 5- Appointment of merchant banker and other intermediaries
- (iii) Regulation 6- Filing of draft offer document
- (iv) Regulation 7- Obtaining in-principle approval from the recognized stock exchanges in which the specified securities are to be listed
- (v) Regulations 25 and 26- Conditions of initial public offer
- (vi) Regulation 32- Minimum Promoters' contribution
- (vii) Regulations 36 and 37- Lock-in of specified securities held by promoters and persons other than promoters
- (viii) Regulation 46- Period of subscription
- (ix) Regulation 47 - Pre issue advertisement for public issue

- (x) Regulations 57 and 58 - Manner of disclosures in the offer documents and abridged prospectus.

18.3.4 The following provisions of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ("**ILDS Regulations**"), identified in the second interim order, are also found to have not been complied with :

- (i) Regulation 4(2)(a) – Application for listing of debt securities
- (ii) Regulation 4(2)(b) – In-principle approval for listing of debt securities
- (iii) Regulation 4(2)(c) – Credit rating has been obtained
- (iv) Regulation 4(2)(d) – Dematerialization of debt securities
- (v) Regulation 4(4) – Appointment of Debenture Trustees
- (vi) Regulation 5(2)(b) – Disclosure requirements in the Offer Document
- (vii) Regulation 6 – Filing of draft Offer Document
- (viii) Regulation 7 – Mode of disclosure of Offer Document
- (ix) Regulation 8 – Advertisements for Public Issues
- (x) Regulation 9 – Abridged Prospectus and application forms
- (xi) Regulation 12 – Minimum subscription
- (xii) Regulation 14 – Prohibition of mis-statements in the Offer Document
- (xiii) Regulation 15 – Trust Deed
- (xiv) Regulation 16(1) – Debenture Redemption Reserve

18.3.5 I further note that with respect to the preference shares issued by KHFL indicated at Table No. 7, the provisions of SEBI (issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 relevant to public issue of preference shares (*particularly Chapter II of the said regulations*) have not been complied with by KHFL.

**18.4 Who would be liable to make refund of monies mobilized through public offer and allotment of shares and debentures by KHFL?**

18.4.1 As discussed earlier in this Order, in terms of section 73(2) of the Companies Act, 1956, where the permission for listing has not been sought or where the listing permission has been denied, the company is mandated to refund all monies raised by way of the offer. If such refund has not been carried out, the company and every director who is an officer in default is jointly and severally liable to make the

refund with interest. Further, in terms of Section 62 of the Companies Act, 1956 every person who *inter alia* is a director of the company at the time of the issue of the prospectus and every person who is a promoter of the company, are liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein. The interim orders identified Noticee Nos. 2 to 6 as being directors of KHFL and Noticee Nos. 7 to 11 as promoters, a fact which has not been rebutted by the said noticees. Therefore all of them would be jointly and severally liable to make refund as provided in Section 73(2) read with Section 62 of the Companies Act, 1956. It has been brought to SEBI's notice by email from the Managing Director of KHFL, viz. G. Unnikrishnan Nair (Noticee No. 2) that Noticee Nos. 10 and 11, namely R. Sukumaran and B.Manmadhan are already deceased. Noticee No. 2 was therefore requested by SEBI to provide copies of the death certificates to take the same on record. Upon receipt of valid proof of Noticee Nos. 10 and 11 having been deceased, the proceedings against them will stand abated. However such proof not having been made available to SEBI, as of now the directions in this Order would hold against Noticee Nos. 10 and 11 as well.

18.4.2 Noticee No. 6, viz. P. Parameswaran has submitted in his reply to the interim orders that he was only appointed as an independent director only on 18th July 2014 and that he had only attended board meetings on 21/11/2014, 0/01/2015, 30/03/2015, 11/05/2015, 03/06/2015 and 27/06/2015. He further stated that though there have been allotment of securities in some board meetings that he had attended, such attendance by itself cannot make him liable for non-compliance with public offer norms specified in the Companies Act. From a perusal of the minutes of the board meetings, which P. Parameswaran had submitted by way of reply to the interim order, it is clear that he was involved in the decision making process that related to the issue of debentures on those occasions. Therefore he is now not entitled to take cover by distancing himself from the company claiming to be an independent director. In the circumstances therefore, I am not inclined to consider his request for exoneration.

18.4.3 In view of the above, under Companies Act, 1956, Noticee Nos. 1 to 11 (*subject to the directions at para 18.4.1 above*) would be liable to make refund with

interest at the rate of 15% per annum to all the allottees of the shares and debentures described in this Order, with the exception of those debentures which have already been repaid in terms of the offer.

18.4.4 In accordance with section 42(10) of the Companies Act, 2013, making an offer in contravention of the provisions of section 42, would make the Company liable to refund the monies collected. Further under section 35, which is the *pari materia* provision of section 62 of Companies Act, 1956, the company and every director who was responsible for the issuance of the prospectus and every promoter is liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein. Therefore even under the Companies Act, 2013, Noticee Nos. 1 to 11 (*subject to the directions at para 18.4.1 above*) would be liable to make refund with interest at the rate of 15% per annum to all the allottees of the shares and debentures described in this Order.

### **18.5 Whether the Debenture Trustees of KHFL have violated provisions of the SEBI Act read with the DT Regulations?**

Section 12(1) of the SEBI Act states that: "*No... trustee of trust deed ... shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act*". Regulation 7 of SEBI (Debenture Trustees) Regulations, 1993 ("**DT Regulations**"), provides that: "*no person should act as a debenture trustee unless he is either –*

- i. a scheduled bank carrying on commercial activity; or*
- ii. a public financial institution within the meaning of section 4A of the Companies Act, 1956; or*
- iii. an insurance company; or*
- iv. body corporate."*

I have already concluded, in preceding paragraphs of this Order, that the offer and allotment of shares and debentures by KHFL, as recorded in this Order, were in the nature of a public offer. Noticee Nos. 12 to 16 were admittedly the debenture trustees to the issue of NCDs by KHFL. However I note from the records that Noticee Nos. 15 and 16 are already deceased. Therefore the proceedings against them, viz. Jose Philip and V. Ayappan Nair, stand disposed off. The other debenture trustees, namely K. Jayaprasad and M/s Bittu Abraham & Associates have admitted in their reply that they

have functioned as debenture trustees to the issue of debentures by KHFL but have contended that they were not required to register as a debenture trustee under the DT Regulations since the issue of debentures by KHFL was private placement in nature and did not satisfy the definition of "issue" in regulation 2 (ea) of DT Regulations. Since it has already been concluded that the offer of NCDs was public in nature, I cannot accept their contentions. Therefore I find K. Jayaprasad, K. Radhakrishnan, and M/s Bittu Abraham & Associates to be in breach of section 12(1) of the SEBI Act, 1992 read with regulation 7 of the DT Regulations.

#### **DIRECTIONS**

**19.** SEBI has a statutory duty to protect the interests of investors in securities and promote the development of, and to regulate, the securities market. Section 55A of the Companies Act, 1956, and section 24 of the Companies Act, 2013 confers the jurisdiction on SEBI *inter alia* to administer provisions specified therein, in relation to public issue of securities. Under section 11 of the SEBI Act, SEBI is empowered to take such measures as it deems fit for fulfilling its legislative mandate. Further, sub-section (4) of section 11 lists measures that SEBI may take, by an order in writing, either pending or on completion of investigation or inquiry, in the interest of investors in the securities market. Section 11B empowers SEBI to issue such directions as may be appropriate, in the interest of investors in securities and the securities market, *inter alia*, to any company in respect of issue of capital, transfer of securities etc.

**20.** In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4) and 11B of the SEBI Act, 1992 hereby issue, with immediate effect, the following directions:-

- i Noticee Nos. 1 to 11 i.e. Kerala Housing Finance Ltd. (PAN: AACCK2183P), G.Unnikrishnan Nair (PAN: AKHPP5583E), N. Krishnan Nair (PAN : BQYPK5654D), KomalaUnnikrishnan (PAN : AATPU6479N), G. Sureshkumar (PAN : AVXPG2603H), P.Parameshwaran (PAN : AANPP01364), B Ajithkumar (PAN: N.A.), Shajan P.G. (PAN: N.A.), S. Sureshkumar (PAN:N.A.), R Sukumaran (PAN: N.A.) and B. Manmadhan (N.A.) (*subject to the directions at para 18.4.1*) shall jointly and severally refund the money collected through the offer and allotment of equity

shares, debentures and preference shares of Kerala Housing Finance Ltd. described in para 18.2.10 of this Order with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment) within a period of 180 days from the date of receipt of this Order;

- ii In the interest of investors, the refund as directed hereinabove shall first be carried out in favour of the debenture holders, next in favour of the preference share holders and lastly in favour of the equity shareholders.
- iii The refund as directed hereinabove shall be made through banking channels such as demand draft or electronic mode of transfer and a trail of such refunds shall be maintained by the Noticees for verification, if necessitated at a later date;
- iv Within seven days of completion of refund as directed hereinabove, the Noticees shall file a certificate of such completion with SEBI from two independent Chartered Accountants after proper verification of the details of such refunds from records including bank accounts of the Noticees and after being satisfied that the refund has actually been made. Such certificate shall also cover the amounts claimed to have been refunded in Table 10 of this Order.
- v Till the refund, as directed above, is complete the Noticees Nos. 1- 11 are hereby–
  - (a) restrained from accessing the securities market;
  - (b) prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly; and
  - (c) restrained from associating themselves, with any listed public company or any public company which intends to raise money from the public.
- vi In the event of the Noticees failing to comply with the directions of refund stated above, SEBI shall initiate recovery proceedings in accordance with the provisions of the SEBI Act, 1992.

**21.** Noticee Nos. 1-11 shall be –

- (a) restrained from accessing the securities market;
  - (b) prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly; and
  - (c) restrained from associating themselves, with any listed public company or any public company which intends to raise money from the public,
- for a period of one year from the date of completion of the refund, as directed in para 20 above.

**22.** Noticee Nos. 12 to 14 namely, K. Jayaprasad (PAN:N.A.), K. Radhakrishnan (PAN:N.A.) and M/s Bittu Abraham & Associates (PAN:N.A.) shall not act as debenture trustee in respect of debentures of KHFL and shall not take up any new assignment or involvement in any new issue of securities in a similar capacity, for a period of one year from the date of this Order.

**23.** A copy of this Order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action. A copy of this Order shall also be forwarded to MCA/concerned RoC and National Housing Bank (NHB) for their information and necessary action with respect to the directions imposed on company and directors.

**DATE: August 10, 2017**

**PLACE: Mumbai**

**G. MAHALINGAM**

**WHOLE TIME MEMBER**

**SECURITIES AND EXCHANGE BOARD OF INDIA**