

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of Riju Cement Limited

In respect of:

1. **Riju Cement Limited (PAN: AADCR3601C)**
 2. **Shri Kanika Maiti (PAN: AOTPM3722N; DIN: 02029931).**
 3. **Shri Anukul Maiti (PAN: AOMPM9182R; DIN: 01884307).**
 4. **Shri Swapan Roy (PAN: ANVPR7210H; DIN: 02621357).**
 5. **Shri Aditya Gorain (PAN: AGJPG4423G; DIN: 01063129).**
 6. **Shri Sutapa Goral (PAN: AGJPG4424B; DIN: 02077139).**
 7. **Shri Gopal Chandra Gorai (PAN: AKLPG0876B; DIN: 02077138).**
 8. **Shri Jayanta Gorai (PAN: AKLPG0875C; DIN: 02077137).**
 9. **Debenture Trustee, viz. Trustee of The Debenture Holders of Icore–E–Services Limited having Office at 54/2, Rafi Ahmed Kidwai Road, Kolkata-700016 (Represented by its Trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)**
1. Riju Cement Limited (hereinafter referred to as “**RCL**”/ “**the Company**”) is a Public company incorporated on May 08, 2006 and registered with Registrar of Companies–Kolkata with CIN: U26942WB2006PLC109177. Its registered office is at Post Office Ukhra, M G Road, Burdwan–713363, West Bengal, India.
 2. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) received reference and complaint against RCL in respect of issue of Secured Redeemable Non-Convertible Debentures (hereinafter referred to as “**NCDs**”) and undertook an enquiry to ascertain whether RCL had made any public issue of securities without complying with

the provisions of the Companies Act, 1956; Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act**”) and the Rules and Regulations framed thereunder including the Securities and Exchange Board of India (Issue and Listing of Debt Securities), Regulations, 2008 (hereinafter referred to as “**ILDS Regulations**”).

3. On enquiry by SEBI, it was observed that RCL had made an offer of NCDs in the financial years 2009-2010, 2010-2011 (hereinafter referred to as “**Offer of NCDs**”) and raised an amount of at least Rs. 39.15 lakhs from at least 539 allottees. The number of allottees and funds mobilized has been collated from the documents submitted with the complaints received by SEBI. Therefore, it was concluded that the actual number of allottees and amount mobilized could be more than the above indicated figures. It was also observed that RCL created a charge for an amount of Rs. 70.00 crores on January 05, 2010 and appointed *Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* as Debenture Trustee for the Offer of NCDs by that company.
4. As the above said *Offer of NCDs* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992, the Companies Act, 1956, and the ILDS Regulations, SEBI passed an interim order dated July 07, 2016 (hereinafter referred to as “**interim order**”) and issued directions mentioned therein against RCL and its Directors viz. Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy, Shri Aditya Gorain, Shri Sutapa Goral, Shri Gopal Chandra Gorai, Shri Jayanta Gorai and its Debenture Trustee, *Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)*. (hereinafter collectively referred to as “**Noticees**”).
5. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded. RCL had made an *Offer of NCDs* during the financial years 2009-2010 , 2010-2011 and raised at least an amount of Rs. 39.15 lakhs as shown below:

Year of Issue	Security Issued	Amount raised (Rs.) (in lakh)	Number of allottees
2009-2010	NCDs	34.54	363
2010-2011		4.61	176
Total		39.15^	539*

[^]*^ No. of allottees and funds mobilized has been collated from the documents submitted with the complaints received by SEBI. However, actual no. of allottees and amount mobilized could be more than the above indicated figures.

6. Further, RCL created a charge for an amount of Rs. 70.00 crores on January 05, 2010 and appointed *Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* as Debenture Trustee for the Offer of NCDs by the company. *Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* was not registered as debenture trustee for the offer of NCDs by that company.
7. The above *Offer of NCDs* and pursuant allotment were deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) and sections 117B and 117C of the Companies Act, 1956 read with section 27(2) of the SEBI Act and the relevant provisions of the ILDS Regulations were not complied with by RCL in respect of the *Offer of NCDs*. Further, the Debenture Trustee viz. *Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* has prima facie violated section 12(1) of the SEBI Act and regulation 7 of the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993 (hereinafter referred to as "**Debenture Trustees Regulations**").
8. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated July 07, 2016 with immediate effect:

- i. *“RCL (PAN: AADCR3601C) shall forthwith cease to mobilize fresh funds from investors through the Offer of NCDs or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;*
- ii. *RCL and its present/past Directors, viz. Shri Kanika Maiti (PAN: AOTPM3722N; DIN: 02029931), Shri Anukul Maiti (PAN: AOMPM9182R; DIN: 01884307), Shri Swapan Roy (PAN: ANVPR7210H; DIN: 02621357), Shri Aditya Gorain (PAN: AGJPG4423G; DIN: 01063129), Shri Sutapa Goral (PAN: AGJPG4424B; DIN: 02077139), Shri Gopal Chandra Gorai (PAN: AKLPG0876B; DIN: 02077138) and Shri Jayanta Gorai (PAN: AKLPG0875C; DIN: 02077137), 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. *RCL and its abovementioned past and present Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;*
- iv. *RCL shall provide a full inventory of all its assets and properties;*
- v. *RCL’s abovementioned past and present Directors shall provide a full inventory of all their assets and properties;*
- vi. *RCL and its abovementioned present Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company, without prior permission from SEBI;*
- vii. *RCL and its abovementioned present Directors shall not divert any funds raised from public at large through the Offer of NCDs, which are kept in bank account(s) and/or in the custody of RCL;*
- viii. *RCL and its abovementioned past and present Directors shall co-operate with SEBI and shall furnish all information/documents sought vide letters dated November 5, 2012; February 5, 2014 and April 11, 2014;*
- ix. *The Debenture Trustee, viz. Trustee of the Debenture Holders of Icore–E–Services Limited (represented by its Trustees, viz. Shri Chandan Dey and Smt*

Kanika Maiti), is prohibited from continuing with its assignment as debenture trustee in respect of the Offer of NCDs of RCL and also from taking up any new assignment or involvement in any new issue of debentures, etc. in a similar capacity, from the date of this Order till further directions.”

9. The interim order also directed the RCL and its Directors to show cause as to why suitable directions/prohibitions under sections 11(1), 11(4), 11A and 11B of the SEBI Act, and section 73(2) of the Companies Act, 1956 read with section 27(2) of the SEBI Act should not be passed against them:

- i. *“Directing them jointly and severally to refund money collected through the Offer of NCDs alongwith interest, if any, promised to investors therein;*
- ii. *Directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;*
- iii. *Directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.”*

10. Similarly, the Debenture Trustee, viz. *Trustee of the Debenture Holders of Icore–E–Services Limited (represented by its Trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)*, were advised to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act including restraining it/them from accessing the securities market and further restraining it/them from buying, selling or dealing in securities, in any manner whatsoever, for an appropriate period should not be issued.

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

12. *Service of interim order:* The copy of the said interim order was sent to the Noticees

vide letter dated July 11, 2016 which were not delivered. The copy of the order was affixed at the addresses of Noticees, Shri Kanika Maiti, Shri Anukul Maiti and Debenture Trustee. Subsequently, vide notification dated November 09, 2016 published in newspaper *Times of India* and notification dated November 08, 2016 published in newspaper *Ananda Bazar Patrika*, the Noticees were notified by SEBI, that interim order dated July 07, 2016 was issued against them and they were given a final opportunity to submit their reply in the matter.

13. Vide notification dated June 10, 2017 published in newspaper *Times of India* and notification dated June 10, 2017 published in newspaper *Ananda Bazar Patrika*, the Noticees were notified by SEBI to avail the opportunity hearing on July 27, 2017 at the time and the venue mentioned therein. The Noticees were advised that in case they failed to appear for the personal hearing before SEBI on the aforesaid date, then the matter would be proceeded *ex-parte* on the basis of material available on record.

14. *Hearing and submissions*: Noticees did not avail the opportunity of hearing held on July 27, 2017. Shri Aditya Gorain, Shri Sutapa Goral, Shri Gopal Chandra Gorai and Shri Jayanta Gorai gave common replies vide letters dated August 4, 2016 and September 9, 2017. Their submissions in brief are as under:

- a) They have sold the factory to Shri Anukul Maiti, M.D. of Icore-E-Services Ltd. on February 25, 2008 and an agreement of sale was made and previously they have sent the same by registered post to SEBI and informed that all the rights and titles of the above named company with office already has been handed over to Shri Anukul Maiti.
- b) After the transfer, they left the Company on same day and they are not the directors of the said Company and necessary papers regarding proof of not being director were sent to SEBI.
- c) They are not liable for any discrepancy found after the Agreement for Sale as they were not directors of the said Company. They requested Mr. Maity to register the sale deed and he regreeted the same work.

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

- (1) Whether the company came out with the Offer of NCDs as stated in the interim order.*
- (2) If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.*
- (3) Whether appointment of Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti), as the Debenture Trustee by RCL is in violation of Section 117B of the Companies Act, 1956 and whether Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti) violated Section 12(1) of SEBI Act and regulation 7 of the Debenture Trustees Regulations*
- (4) If the findings on Issue No.2 and 3 are found in the affirmative, who are liable for the violation committed?*

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

16. I have perused the interim order dated July 07, 2016 for the allegation of *Offer of NCDs*. I note that neither the company nor the directors have disputed the same.
17. I have also perused the documents/ information obtained from the 'MCA 21 Portal' other documents available on records. It is noted, from the investors' complaints received by SEBI in the matter that RCL has issued and allotted NCDs to at least 539 investors during the financial years 2009-2010 and 2010-2011 and raised at least an amount of Rs. 39.15 lakhs. I also note that the number of allottees and funds mobilized have been

collated from the documents submitted with the complaints received by SEBI. Therefore, it is possible that the actual number of allottees and amount mobilized could be more than 539 allottees and Rs. 39.15 lakhs respectively.

18. *I therefore conclude that RCL came out with an offer of NCDs as outlined above.*

ISSUE No. 2- *If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.*

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

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

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

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

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

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation ...

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

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

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

“Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the “section of the public”. Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the

offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ... Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation.”

21. Section 67(3) of Companies Act, 1956 provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.
22. In the instant matter, I find that NCDs were issued by RCL to at least 539 investors in the financial years 2009-2010 and 2010-2011. However, this number is not conclusive as

it is based on the documents received by SEBI along with complaints and the actual number of investors could be more than 539. I find that RCL has mobilized at least an amount of Rs. 39.15 lakhs over the financial years 2009-2010 and 2010-2011 which is not a conclusive value as it is based on the complaints received by SEBI. Further, I find that RCL has created a charge of Rs. 70.00 crores on January 05, 2010. The above findings lead to a reasonable conclusion that the *Offer of NCDs* by RCL was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.

23. Neither RCL nor its directors have contended that the *Offer of NCDs* does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956.
24. I find that RCL has not claimed it to be a Non-banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that RCL is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
25. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the "Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged." In respect of those issuances, the directors have not placed any material that the allotment was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* which lays down that “In terms of Section 67(3) of the Companies Act any issue to ‘50 persons or more’ is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in

multiple tranches and no tranche has exceeded 49 people has no meaning”.

26. Therefore, in view of the material available on record, I find that the *Offer of NCDs* by RCL falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offer of NCDs* are deemed to be public issues and RCL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.
27. Further, since the offer of NCDs is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants.
28. The allegations of non-compliance of the above provisions were not denied by RCL or its directors. I also find that no records have been submitted to indicate that it has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that RCL has contravened the said provisions. RCL has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that RCL has also not complied with the provisions of section 73(3) which mandates that the amounts received from investors shall be kept in a separate bank account. Therefore, I find, that section 73(2) of the Companies Act, 1956 has not been complied with.
29. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), “prospectus” means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. As the offer of NCDs was a deemed public issue of securities, RCL was required to register a

prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that RCL has not submitted any record to indicate that it has registered a prospectus with the RoC, in respect of the offer of NCDs. I, therefore, find that RCL has not complied with the provisions of section 60 of the Companies Act, 1956.

30. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Neither RCL nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, RCL has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.
31. As regards the allegation of section 117C of the Companies Act, 1956, it may be seen that the said provision mandates the company to create a debenture redemption reserve for the redemption of such debentures, to which every year, adequate amounts should be credited out of its profits, until such debentures are redeemed. None of the Noticees denied this allegation. There is no material on record to show that such debenture reserve was created. Therefore, I hold that the company has violated section 117C of the Companies Act, 1956.
32. ILDS Regulations are applicable to the public issue and listing of debt securities. Regulation 2(e) of the ILDS Regulations defines debt securities to mean non-convertible debt securities which create or acknowledge indebtedness, and include debentures. In view of the finding that RCL has made a public issue of debt securities, the ILDS Regulations is also applicable to the instant offer of NCDs. Therefore, I find that the Company has violated the following provisions of the aforesaid ILDS Regulations, which contain *inter alia* conditions for public issue and listing of debt securities, viz.

- i. Regulation 4(2)(a) – Application for listing of debt securities
 - ii. Regulation 4(2)(b) – In-principle approval for listing of debt securities
 - iii. Regulation 4(2)(c) – Credit rating has been obtained
 - iv. Regulation 4(2)(d) – Dematerialization of debt securities
 - v. Regulation 4(4) – Appointment of Debenture Trustees
 - vi. Regulation 5(2)(b) – Disclosure requirements in the Offer Document
 - vii. Regulation 6 – Filing of draft Offer Document
 - viii. Regulation 7 – Mode of disclosure of Offer Document
 - ix. Regulation 8 – Advertisements for Public Issues
 - x. Regulation 9 – Abridged Prospectus and application forms
 - xi. Regulation 12 – Minimum subscription
 - xii. Regulation 14 – Prohibition of mis-statements in the Offer Document
 - xiii. Regulation 15 – Trust Deed
 - xiv. Regulation 17 – Creation of security
 - xv. Regulation 19 – Mandatory Listing
 - xvi. Regulation 26 – Obligations of the Issuer, etc.
33. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case*, had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

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

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

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

“...Listing of securities depends not upon one’s volition, but on statutory mandate...”

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

35. In view of the above findings, I am of the view that RCL was engaged in fund mobilizing activity from the public, through the offer of NCDs and has contravened the provisions of section 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3), and 117C of the Companies Act, 1956, and above mentioned provisions pertaining to the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008.

ISSUE No. 3-Whether appointment of Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustees, viz. Shri Chandan Dey

and Smt Kanika Maiti) as the Debenture Trustee by RCL is in violation of Section 117B of the Companies Act, 1956 and whether Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti), have violated Section 12(1) of SEBI Act and regulation 7 of the Debenture Trustees Regulations?

36. I have perused Form 10 and the Debenture Trust Deed and find that RCL had created a charge of Rs. 70.00 crores for the Offer of NCDs by the Company on January 5, 2010 and RCL had appointed *Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* as the debenture trustee. by way of trust deed dated January 5, 2010.
37. 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 the SEBI (Debenture Trustees) Regulations, 1993, states that *only a scheduled bank carrying on commercial activity or, a public financial institution within the meaning of section 4A of the Companies Act, 1956 or, an insurance company or, a body corporate alone are eligible to get a certificate of registration as Debenture Trustee.*
38. *Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti)* are not eligible to obtain a certificate of registration since it does not satisfy the eligibility criteria mentioned in Regulation 7 of the SEBI (Debenture Trustees) Regulations, 1993. None of the Noticees claimed that *Trustee of The Debenture Holders of Icore–E–Services Limited (represented by its trustee, viz. Shri Chandan Dey and Smt Kanika Maiti)* had received certificate of registration as per section 12(1) of the SEBI Act. In view of the above, I find that *Trustee of The Debenture Holders of Icore–E–Services (represented by its trustee, viz. Shri Chandan Dey and Smt Kanika Maiti)* have dealt in the impugned Offer

of NCDs as debenture trustees, without having a certificate of registration as Debenture Trustee in violation of Section 12(1) of the SEBI Act, 1992.

39. Under section 117B of the Companies Act, 1956 no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless the company has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. I find that RCL has appointed *Trustee of The Debenture Holders of Icore-E-Services Limited (represented by its trustee, viz. Shri Chandan Dey and Smt Kanika Maiti)* who do not have a certificate of registration. Therefore, the appointment of the same is in violation of section 117B of the Companies Act, 1956. Further, since RCL has not issued a prospectus with the relevant information and therefore, the requirement of stating the consent of the debenture trustee to be so appointed on the face of the prospectus has not been complied with.

ISSUE No. 4- If the findings on Issue No.2 and 3 are found in the affirmative, who are liable for the violation committed?

40. Shri Aditya Gorain, Shri Sutapa Goral, Shri Gopal Chandra Gorai and Shri Jayanta Gorai gave common replies vide letters dated August 4, 2016 and September 9, 2017. They submitted, *inter-alia*, that they had sold the factory to Shri Anukul Maiti, M.D. of Icore-E-Services Ltd. on February 25, 2008 and an agreement of sale was made and that all the rights and titles of the above named company with office already has been handed over to Shri Anukul Maiti. They submitted that after the transfer, they left the Company on that same day and they are not the director of the said Company and necessary papers regarding proof of not being director were sent to SEBI. Further, they stated that they are not liable for any discrepancy found after the Agreement for Sale as they were not directors of the said Company and that they had requested Mr. Maity to register the sale

deed and he regretted the same work. I have considered the aforesaid submissions of the Noticee and also perused the MCA records and I find that the Noticees, Shri Aditya Gorain, Shri Sutapa Goral, Shri Gopal Chandra Gorai and Shri Jayanta Gorai became directors of the Company on May 8, 2006 and resigned from directorship of the Company March 18, 2008. I also note that the period of issue/offer of NCDs was during the financial years 2009-2010 and 2010-2011. In view thereof, I accept the submissions of the Noticees that they were not the directors during the relevant period of Offer of NCDs by the Company, hence not liable.

41. From the documents available on record, I find that the present Directors in RCL are Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy. I also note that, Shri Aditya Gorain, Shri Sutapa Goral, Shri Gopal Chandra Gorai, Shri Jayanta Gorai, who were earlier Directors in RCL, have since resigned. The details of the appointment and resignation of the directors are as following:

Name of the directors	Date of appointment	Date of cessation
Shri Kanika Maiti	March 05, 2008	Continuing
Shri Anukul Maiti	March 18, 2008	Continuing
Shri Swapan Roy	September 15, 2009	Continuing
Shri Aditya Gorain	May 08, 2006	March 18, 2008
Shri Sutapa Goral	May 08, 2006	March 18, 2008
Shri Gopal Chandra Gorai	May 08, 2006	March 18, 2008
Shri Jayanta Gorai	May 08, 2006	March 18, 2008

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

of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, RCL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

43. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.
44. From the material available on record and the details of the appointment and resignation of the directors of RCL as reproduced in paragraph 41 of this Order, it is noted that, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy were directors at the time of the issuance of NCDs. Since these persons were acting as directors during the period of issuance of NCDs, they are officers in default as per Section 5(g) of Companies Act, 1956. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified director of RCL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the past and present directors of RCL, as officers in default, are liable to make refund, jointly and severally, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions. None of the Noticees disputed this legal liability by way of any

written or oral submissions. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that RCL and its Directors, viz., Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

45. I note that during the financial years 2009-2010 and 2010-2011, RCL through Offer of NCDs, had collected at least an amount of Rs. 39.15 lakhs from various allottees. I note that Shri Kanika Maiti has been director of RCL since financial years 2009-2010, 2010-2011 till present date. I note that Shri Anukul Maiti has been director of RCL since financial years 2009-2010, 2010-2011 till present date. I note that Shri Swapan Roy has been director of RCL since financial years 2009-2010, 2010-2011 till present date. Therefore, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that the obligation of the director to refund the amount with interest jointly and severally with RCL and other directors are limited to the extent of amount collected during his/her tenure as director of RCL.
46. As far as the liability under sections 117B and 117C of the Companies Act, 1956, is concerned, the liability is on the company to comply with the said provisions. Therefore, RCL is liable for the violation of sections 117B and 117C of the SEBI Act. In respect of the liability under section 12(1) of the SEBI Act, the liability is on the Trustee who act as the debenture trustee without the Certificate of Registration from SEBI as debenture trustee. In view of the above, I find that the Trustee of The Debenture Holders of Icore–E–Services Limited (*represented by its trustee, viz. Shri Chandan Dey and Smt Kanika Maiti*) are liable for the violation of section 12(1) of the SEBI Act read with regulation 7

of the Debenture Trustee Regulations.

47. With respect to the provisions of the respective regulations of the ILDS Regulations enumerated on paragraph 32 of this order, the liability is on the Company to comply with the requirements therein.
48. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct RCL and its Directors, viz., Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy to refund the monies collected, with interest to such investors. Further, in view of the violations committed by the Company and its Directors, to safeguard the interest of the investors who had subscribed to such NCDs issued by the Company, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and the other Noticees.
49. I also note that, vide the interim order dated July 07, 2016, RCL was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors of RCL were also directed to provide an inventory of assets and properties belonging to them. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that up to date inventory has not been provided either by RCL or the other Noticees despite the notifications of issuance of the interim order through newspaper publications as stated in paragraph 12 of this Order.
50. In view of the discussion above, appropriate action in accordance with law needs to be initiated against RCL and its Directors and debenture trustees, viz. Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy, Trustee of The Debenture Holders of Icore-E-Services Limited (*represented by its trustees, viz. Shri Chandan Dey and Smt Kanika Maiti*)
51. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with

sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions:

- (a) RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy shall forthwith refund the money collected by the Company, during their respective period of directorship through the issuance of NCDs including the application money collected from investors during their respective period of directorship, till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.
- (b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as “Non-Transferable”.
- (c) RCL and Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company and their own.
- (d) RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy are permitted to sell the assets of the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.
- (e) RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

- (f) RCL and Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy in their personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.
- (g) After completing the aforesaid repayments, RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("**ICAI**")
- (h) In case of failure of RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order:
- i) may recover such amounts, from the company and the directors liable to refund as specified in paragraph 51(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
 - ii) may initiate appropriate action against the Company, its promoters/directors and the persons/officers who are in default, including adjudication proceedings against them, in accordance with law.
 - iii) would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds;
- (i) RCL, Shri Kanika Maiti, Shri Anukul Maiti, Shri Swapan Roy are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained

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

(j) Trustee of The Debenture Holders of Icore–E–Services Limited(*represented by its trustee, viz. Shri Chandan Dey and Smt Kanika Maiti*) are restrained from accessing the securities market and are further restrained from buying, selling or dealing in securities, in any manner whatsoever, for a period of 4 (four) years from the date of this order.

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

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

53. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies, for their information and necessary action with respect to the directions/ restraint imposed above against the Company and the individuals.

DATE: November 07, 2017

PLACE: Mumbai

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA