

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

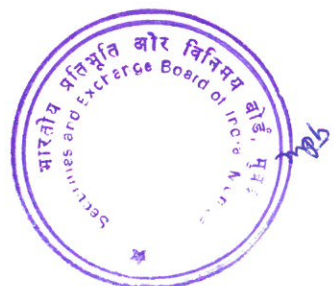
Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992

In the matter of Abyss Assam Real Estate Limited

In respect of:

1. Abyss Assam Real Estate Limited (PAN: AAHCA4914B)
2. Shri Dhanjit Gayary (DIN: 02216985).
3. Shri Aynal Hoque Talukdar (PAN: AKCPT3295J; DIN: 03563550).
4. Shri Abdul Maleque Miah (PAN: AXVPM6619B; DIN: 03563544).
5. Shri Mazibar Rahman (PAN: AJIPR6467K; DIN: 05270660).
6. Shri Md. Mazibar Rahman (PAN: AOLPR9289M; DIN: 02219083).
7. Shri Tilak Sarma (PAN: BGIPS8454D; DIN: 00765457).

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1. Abyss Assam Real Estate Limited (hereinafter referred to as “AAREL”/ “the Company”) is a Public company incorporated on August 29, 2008 and registered with Registrar of Companies–Shillong (RoC) with CIN: U45201AS2008PLC008794. Its registered office is at Al-Amin Nagar, Near Railway Gate 2, Barpeta Road, Barpeta, Assam – 781315.
 2. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) had conducted an examination into the fund–raising activities of AAREL in respect of issue of Redeemable Preference Shares (“RPS”) and undertook an enquiry to ascertain whether AAREL 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 Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as “DIP Guidelines”) read with Securities and Exchange

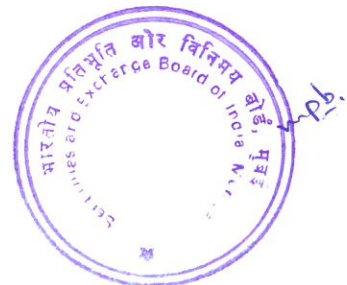


Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "**ICDR Regulations**").

3. On enquiry by SEBI, it was observed that AAREL had made an offer of RPS in the financial years 2008-2009 and 2009-2010 (hereinafter referred to as "**Offer of RPS**") and raised at least an amount of Rs. 1.21 Crores from at least 1395 allottees. The number of allottees and funds mobilized has been collated from the documents collected from from the RoC.
4. As the above said *Offer of RPS* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992 and the Companies Act, 1956. SEBI passed an interim order dated October 13, 2015 (hereinafter referred to as "**interim order**") and issued directions mentioned therein against AAREL and its Directors, viz. Shri Dhanjit Gayary, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman, Shri Md. Mazibar Rahman and Shri Tilak Sarma (hereinafter collectively referred to as "**Noticees**").
5. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded. AAREL had made an *Offer of RPS* during the financial years 2008-2009 and 2009-2010 and raised an amount of Rs. 1.21 Crores as shown below:

Year of Issue	Security Issued	Amount raised (Rs.) (in crores)	Number of allottees
2008-2009	RPS	0.22	1395
2009-2010		0.99	
Total		1.21	1395

6. The above *Offer of RPS* and pursuant allotment were deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) read with section 27(2) of the SEBI Act, and the relevant provisions under DIP Guidelines and ICDR Regulations, were not complied with by AAREL in respect of



the *Offer of RPS*.

7. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated October 13, 2015 with immediate effect.
- i. "AAREL shall not mobilize any fresh funds from investors through the Offer of Preference Shares or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;
 - ii. AAREL and its present Directors, viz. Shri Dhanjit Gayary (DIN: 02216985), Shri Aynal Hoque Talukdar (PAN: AKCPT3295J; DIN: 03563550), Shri Abdul Maleque Miah (PAN: AXVPM6619B; DIN: 03563544), Shri Mazibar Rahman (PAN: AJIPR6467K; DIN: 05270660), are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;
 - iii. The past Directors of AAREL, viz. Shri Md. Mazibar Rahman (PAN: AOLPR9289M; DIN: 02219083) and Shri Tilak Sarma (PAN: BGIPS8454D; DIN: 00765457), 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;
 - iv. AAREL and its abovementioned past and present Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;
 - v. AAREL, shall provide a full inventory of all its assets and properties;
 - vi. AAREL's abovementioned past and present Directors shall provide a full inventory of



- all their assets and properties;
- vii. AAREL and its abovementioned present Directors, shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the *Offer of Preference Shares*, without prior permission from SEBI;
- viii. AAREL and its abovementioned present Directors, shall not divert any funds raised from public at large through the *Offer of Preference Shares*, which are kept in bank account(s) and/or in the custody of AAREL;
- ix. AAREL and its abovementioned Directors shall furnish complete and relevant information in respect of the Offer of Preference Shares (as sought by SEBI letters dated February 12, 2015; March 4, 2015 and March 29, 2015), within 14 days from the date of receipt of this Order.”
8. The interim order also directed the AAREL and its Directors/promoters 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 Preference Shares* along with interest, if any, promised to investors therein;
- ii. Directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;
- iii. Directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.

9. Vide the said interim order, AAREL, its abovementioned Directors were given the



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

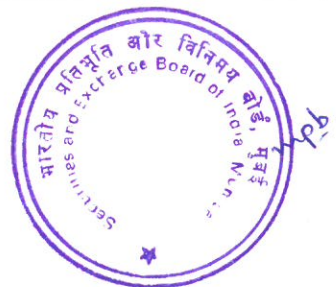
10. *Service of interim order:* The copy of the said interim order was sent to the Noticees vide letter dated October 13, 2015 which were not delivered. Subsequently, vide notification dated November 09, 2016 published in newspaper *The Times of India* , and notification dated November 08, 2016 published in newspaper *Anand Bazar Patrika* , the Noticees were notified by SEBI, that interim order dated October 13, 2015 was issued against them and they were given a final opportunity to submit their reply in the matter.
11. Vide notification dated June 10, 2017 published in newspapers *The Times of India* and *Anand Bazar Patrika*, the Noticees were notified by SEBI that they will be given the final opportunity of being heard on July 20, 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.
12. *Hearing and submissions:* Noticees did not avail the opportunity of hearing held on July 20, 2017. Vide letter dated July 17, 2017, which was received in the Guwahati Local Office, SEBI on July 24, 2017, AAREL, and Shri Dhanjit Gayary and Shri Mazibur Rahman have filed their replies and sought for an adjournment of the personal hearing. I have perused their submissions for adjournment and I note that no attendant circumstances have been brought to the notice of the Board for seeking such adjournment. Further, I note from their reply that the Noticee considered it advisable to first file their reply and then seek a personal hearing, and has sought for an adjournment solely on that ground. In this regard, I note that the public notification of the personal hearing was made on June 10, 2017 and the Noticees had reasonably ample time to file their request for adjournment. In view of the above, the request for adjournment has not been acceded to. I observe that the Noticees have made submissions on merits of the case, and the same has been taken on



record for consideration.

13. Vide the aforesaid reply dated July 17, 2017, AAREL, Shri Dhanjit Gayary and Shri Mazibur Rahman have submitted, *inter alia*, the following:

- i. AAREL had collected an amount of Rs. 1,21,03,400/- from about 1,419 persons till 30th September, 2010,
- ii. The collections were made through agents, resulting in a majority of the amount collected being spent as Agents' commissions and for maintenance of offices. AAREL was having altogether 27 Branches all located in Assam and had more than 71 Agents.
- iii. From the amounts so collected, AAREL had purchased land measuring about 6 Bigha and 1 cottahs at a cost price of Rs. 20,10,000/-. Thereafter, AAREL sold the land at Rs. 45,00,000/- and the amount was paid to investors in the Preferential Shares. As the amount collected was more, full payment could not be made.
- iv. Presently AAREL has no tangible assets which could be converted in cash. However the Directors of AARE had taken upon themselves to make the payment from their own resources but in the meantime the interim order was received prohibiting the directors from selling their assets and therefore the same is pending since then.
- v. AAREL is willing to make the repayment of the due and payable amount to the investors and for that purpose requests the following from SEBI:
 - a. AAREL be permitted to release an advertisement directing the investors to apply for the refund of investment made in the Preferential Shares together with the copy of the certificates.
 - b. AAREL shall examine those claims and if found genuine shall accept the same for payment.
 - c. AAREL be allowed to open an escrow account in any of the Nationalized Bank solely for the purpose of making the payment to the investors in the preferential shares.
 - d. The directors of AAREL shall put in the requisite funds from their own resources and thereafter make the payment.



- e. The same shall be audited by an independent auditor and certificate so granted shall be filed with SEBI.
14. Vide reply dated July 17, 2017, Shri Tilak Sarma has submitted that he had resigned from the directorship of the Company on August 19, 2011 and is not connected and has no responsibility towards the affairs of the Company.
15. Vide letter dated September 8, 2017, SEBI sent letters to AAREL, Shri Tilak Sarma, Shri Dhanjit Gayary and Shri Mazibar Rahman to submit any additional documentary evidence in relation to their replies. However, no further documentary evidence has been submitted in this regard.
16. Vide submissions dated October 12, 2017, the Abyss Assam Workers' Welfare Association has requested SEBI to ensure the refund of investments or any other appropriate order in this regard.
17. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.
- (1) *Whether the company came out with the Offer of RPS as stated in the interim order.*
- (2) *If so, whether the said issues are in violation of Section 56, Section 60 and Section 73 of Companies Act 1956 and the relevant provisions of the ICDR Regulations and the DIP Guidelines.*
- (3) *If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?*

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

18. I have perused the interim order dated October 13, 2015 for the allegation of *Offer of RPS*. I note that neither the company nor the directors filed any reply disputing the same.
19. I have also perused the documents/ information obtained from RoC, and other documents



available on records. It is noted from the information available from the RoC, that AAREL has issued and allotted RPS to at least 1395 investors during the financial years 2008-2009 and 2009-2010 and raised an amount of Rs. 1.21 Crores. I also note from the reply dated July 17, 2017 filed by AAREL, Shri Dhanjit Gayary and Shir Mazibur Rahman, that the number of allottees is stated to be 1419 and the total amount mobilised is Rs. 1,21,03,400/- . Therefore, I find that an amount of Rs. 1,21,03,400/- was mobilized from 1419 investors, based on the details provided by RoC and the Company.

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

ISSUE No. 2- If so, whether the said issues are in violation of Section 56, Section 60 and Section 73 of Companies Act 1956 and the relevant provisions of the ICDR Regulations and the DIP Guidelines.

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

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

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



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

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

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

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

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

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

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



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

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

23. Section 67(3) of Companies Act, 1956 provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first*



proviso.

24. In the instant matter, I find that RPS were issued by AAREL to 1419 investors in the financial years 2008-2009 and 2009-2010. I find that AAREL has mobilized an amount of Rs. 1,21,03,400/- over the financial years 2008-2009 and 2009-2010. The above findings lead to a reasonable conclusion that the *Offer of RPS* by AAREL was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.
25. I find that AAREL 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 AAREL is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
26. Neither AAREL nor its directors have contended that the *Offer of RPS* does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956.
27. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the "Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged." In respect of those issuances, the directors have not 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”.



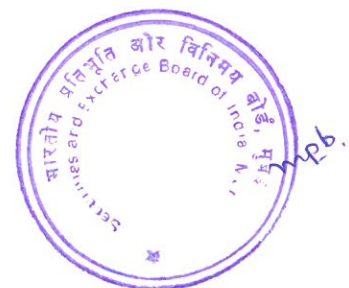
28. Therefore, in view of the material available on record, I find that the *Offer of RPS* by AAREL falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offer of RPS* are deemed to be public issues and AAREL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.
29. Further, since the offer of RPS is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. I note that the Company, Shri Dhanjit Gayary and Shri Mazibar Rahman have submitted that an amount of Rs. 45 lakh has already been repaid to the investors. In this regard, appropriate directions are passed in this order.
30. I have perused the submission dated October 12, 2017 received from the Abyss Workers' Welfare Association requesting for ensuring refund of investments to the Association. As discussed earlier, the Company and its directors are liable for refund under section 73 of the Companies Act, 1956. However, it is pertinent to note that such refund is to be made to the investors who had invested in the RPS of AAREL. Appropriate directions to that effect, is made in this Order.
31. The allegations of non-compliance of the above provisions were not denied by AAREL 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 AAREL has contravened the said provisions. AAREL has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that AAREL 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.

32. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. As the offer of RPS was a deemed public issue of securities, AAREL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that AAREL has not submitted any record to indicate that it has registered a prospectus with the RoC, in respect of the offer of RPS. I, therefore, find that AAREL has not complied with the provisions of section 60 of the Companies Act, 1956.
33. 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 AAREL 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, AAREL has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.
34. The Company was also required to comply with the following provisions of the DIP Guidelines read with regulation 111 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("the ICDR Regulations") in respect of the offer and allotments made during FY 2008–09:

- a. *Clause 2.1.1. – (Filing of offer document);*
- b. *Clause 2.1.4 – (Application for listing);*



- c. Clause 2.1.5 – (Issue of securities in dematerialized form),
- d. Clause 2.8 – (Means of finance),
- e. Clause 4.1 – (Promoters contribution in a public issue by unlisted companies),
- f. Clause 4.11 – (Lock-in of minimum specified promoters contribution in public issues),
- g. Clause 4.14 – (Lock-In of pre-issue share capital of an unlisted company)
- h. Clause 5.3.1 – (Memorandum of understanding),
- i. Clause 5.3.3 – (Due Diligence Certificate)
- j. Clause 5.3.5 – (Undertaking),
- k. Clause 5.3.6 – (List Of Promoters Group And Other Details),
- l. Clause 5.4 – (Appointment of intermediaries),
- m. Clause 5.6 – (Offer document to be made public),
- n. Clause 5.6A – (Pre-issue Advertisement),
- o. Clause 5.7 – (Despatch of issue material),
- p. Clause 5.8 – (No complaints certificate),
- q. Clause 5.9 – [Mandatory collection centres including Clause 5.9.1 (Minimum number of collection centres)],
- r. Clause 5.10 – (Authorised Collection Agents),
- s. Clause 5.12.1 – (Appointment of compliance officer),
- t. Clause 5.13 – (Abridged prospectus),
- u. Clause 6.0 – (Contents of offer documents),
- v. Clause 8.3 – (Rule 19(2)(b) of SC(R) Rules, 1957),
- w. Clause 8.8.1 – (Opening & closing date of subscription of securities),
- x. Clause 9 – (Guidelines on advertisements by Issuer Company),
- y. Clause 10.1 – (Requirement of credit rating),
- z. Clause 10.5 – (Redemption).

35. As per Regulation 111(1) of the ICDR Regulations, the DIP Guidelines "shall stand rescinded". However, Regulation 111(2) of the ICDR Regulations, provides that:

"(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments,—



(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

36. 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"

37. 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..."

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

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

39. I note that Shri Tilak Sarma has submitted that he resigned from the Company on August 19, 2011. The said Noticee has also submitted that since he is no longer connected with the Company he is not liable for the contraventions committed by AAREL. From the records available on MCA21 Portal, I find that Shri Tilak Sarma has in fact resigned from the directorship of the Company on August 19, 2011. However, he was appointed as a director on August 29, 2008 and is therefore, liable for the contraventions of the relevant provisions of the Companies Act, 1956, SEBI Act, DIP Guidelines and ICDR Regulations,



committed during his tenure from August 29, 2008 till August 19, 2011.

40. From the documents available on record, I find that the present Directors in AAREL are Shri Dhanjit Gayary, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman. I also note that, Shri Md. Mazibar Rahman and Shri Tilak Sarma, who were earlier Directors in AAREL, 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 Dhanjit Gayary	August 29, 2008	Continuing
Shri Aynal Hoque Talukdar	August 19, 2011	Continuing
Shri Abdul Maleque Miah	August 19, 2011	Continuing
Shri Mazibar Rahman	May 03, 2012	Continuing
Shri Md. Mazibar Rahman	August 29, 2008	May 03, 2012
Shri Tilak Sarma	August 29, 2008	August 19, 2011

41. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, AAREL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.
42. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director



of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

43. From the material available on record and the details of the appointment and resignation of the directors of AAREL as reproduced in paragraph 40 of this Order, it is noted that , Shri Md. Mazibar Rahman, Shri Tilak Sarma, Shri Dhanjit Gayary were directors at the time of the issuance of RPS. Since these persons were acting as directors during the period of issuance of RPS, 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 AAREL 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 AAREL, 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 AAREL and its Directors, viz. , Shri Md. Mazibar Rahman,



Shri Tilak Sarma, Shri Dhanjit Gayary 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.

44. I note that during the financial years 2008-2009 and 2009-2010 AAREL through Offer of RPS, had collected an amount of Rs. 1,21,03,400/- from various allottees. I note that Shri Dhanjit Gayary has been director of AAREL since financial years 2008-2009, 2009-2010 till present date. I note that Shri Md. Mazibar Rahman and Shri Tilak Sarma were directors of AAREL during financial years 2008-2009 and 2009-2010. 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 AAREL and other directors are limited to the extent of amount collected during his/her tenure as director of AAREL.
45. I note that vide their reply dated July 17, 2017, AAREL, Shri Dhanjit Gayary and Shri Mazibar Rahman have requested for permission to initiate refund and have forwarded their proposal for modus operandi to do the same. I am of the view that since the aforesaid Noticees, along with Shri Tilak Sarma, are held liable for refund, such refund shall be effected only according to the mode prescribed by the Board in this Order.
46. In this regard, I note that, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman were appointed as directors of AAREL only on August 19, 2011, August 19, 2011 and May 03, 2012, respectively i.e. after the period of issuance of RPS. Therefore, following the reasoning as provided in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman are not liable for refund of money as they were not directors during the relevant time of fund mobilization. However, the said Noticees have not denied knowledge/connivance/consent in the act/omission which constitutes violation of the provisions of the public issue and public interest requires that the persons who had such knowledge/connivance/consent be made accountable to the investors. Further, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman had the



responsibility of ensuring that refund of money was made to the investors as prescribed in law. With respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies* (2002 108 Cas 1 Mad):

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

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

47. A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. The noticee cannot therefore wriggle out from liability. A director who is part of a company's board shall be responsible and liable for all acts carried out by a company. Accordingly, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman were also responsible for all the deeds/acts of the Company during the period of their directorship and were obligated to ensure refund of the money collected by the company to the investors as per the provisions of Section 73 of Companies Act, 1956. In view of the failure to discharge the said liability of ensuring refund, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman are liable to be debarred for an appropriate period of time.
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 AAREL and its Directors, viz. , Shri Md. Mazibar



Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary 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 RPS 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 October 13, 2015, AAREL was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors of AAREL 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 no such inventory has been provided either by AAREL or the other Noticees despite the notifications of information of issuance of the interim order through newspaper publications as stated in paragraph 10 of this Order.
50. In view of the discussion above, appropriate action in accordance with law needs to be initiated against AAREL and its Directors, viz. Shri Dhanjit Gayary, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman, Shri Md. Mazibar Rahman and Shri Tilak Sarma.
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. AAREL, Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary shall forthwith refund the money collected by the Company, during their respective period of directorship through the issuance of RPS 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. If AAREL, Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary had repaid/redeemed the Preference Shares to its investors, as submitted in its replies, as per section 73(2) of the Companies Act, along with promised returns, the above directions and the below mentioned consequential directions from paragraphs 51(c) to 51(k), shall be applicable for the amounts still due to be returned to the investors. However, such prior repayments/redemption should have been made by the Company as per the requirement laid down in paragraph 51(c) below, with clear identification of the beneficiaries, and the same shall be certified by Chartered Accountants, as directed in paragraph 51(i) below.
- c. The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable" or through any other appropriate Banking channels, with clear identification of beneficiaries and supporting bank documents.
- d. Shri Md. Mazibar Rahman, Shri Tilak Sarma are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form.
- e. AAREL and Shri Dhanjit Gayary 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.
- f. AAREL, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman, Shri Dhanjit Gayary 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.



- g. AAREL, Shri Md. Mazibar Rahman, Shri Tilak Sarma, Shri Dhanjit Gayary 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.
- h. AAREL and, on its behalf the present directors who joined subsequent to the issues (Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman) , and Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary 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.
- i. After completing the aforesaid repayments, AAREL and, on its behalf the present directors who joined subsequent to the issues (Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah, Shri Mazibar Rahman) and Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary in their personal capacity 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")
- j. In case of failure of aforesaid present directors, who joined subsequent to the issues namely, Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order, 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.

- k. In case of failure of AAREL, Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order, may recover such amounts, from the company and the 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.
- l. AAREL, Shri Md. Mazibar Rahman, Shri Tilak Sarma and Shri Dhanjit Gayary 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.
- m. Shri Aynal Hoque Talukdar, Shri Abdul Maleque Miah and Shri Mazibar Rahman 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 for a period of 4 (four) years from the date of this Order. The above said persons are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 4 (four) years from the date of this order.



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

52. Copy of this Order shall be forwarded to the recognized stock exchanges, 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.

54. A copy of this Order shall also be forwarded to the Local Police/State Government for information.



Madhabi Puri Buch

DATE: November 14, 2017

PLACE: Mumbai

**MADHABI PURI BUCH
WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA