

SECURITIES AND EXCHANGE BOARD OF INDIA

INTERIM ORDER CUM SHOW CAUSE NOTICE

UNDER SECTIONS 11(1), 11(4) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992, IN THE MATTER OF GMS INFRASTRUCTURE LIMITED –

	NOTICEES	DIN/CIN	PAN
COMPANY –			
1.	GMS INFRASTRUCTURE LIMITED	U74999WB2010PLC153429	AAECG0030B
DIRECTORS CUM PROMOTERS –			
2.	ASHIM MITRA	2827181	AKDPM2024K
3.	SANJOY MITRA	2827205	NOT AVAILABLE
4.	LOPAMUDRA BANDYAPADHYAY	3126747	AQFPB2001D
DIRECTORS –			
5.	BISWAJIT DAS	5129923	AMPPD6913J
6.	DINESH CHOWHAN	5129934	ANDPC7427M
7.	CHANDAN BISWAS	5129940	ALIPB5094L
8.	RAJESH SINGH	2940521	CLKPS6324N
9.	TUMPA MITRA DUTTA	3619975	BAKPD5407K
10.	SHIB SHANKAR GHOSH	6737733	ATKPG5933F
PROMOTERS –			
11.	SOUMEN PAUL	3124217	BEEPP5894Q
12.	APARNA ROY CHOWDHURY	NOT AVAILABLE	AHOPR4164P
13.	MINA MUKHERJEE	NOT AVAILABLE	ATQPM8850R
14.	GITA KARMAKAR	NOT AVAILABLE	NOT AVAILABLE
15.	GMS MULTI MARKETING SERVICES PVT. LIMITED (PRESENTLY KNOWN AS ADH FOOD PRODUCTS PVT. LIMITED)	U51909WB2010PTC141110	AADCG6529L

- Securities and Exchange Board of India (“**SEBI**”) received an investor complaint dated January 16, 2017, against GMS Infrastructure Limited (“**GMS**”). Vide the aforesaid complaint, the complainant, while submitting a copy of *Redeemable Preference Share Certificate inter alia* alleged non–repayment of interest amount by GMS.

2.1 As a matter of preliminary inquiry, vide separate letters dated March 31, 2017, SEBI sought the following information from GMS and its Directors, –

- i. Copy of Audited Balance Sheet and Annual Returns of the company for the last 3 years.
- ii. Name, addresses, PAN and occupation of all the Promoters/Directors and Key Managerial Personnel of the company.
- iii. Nature of business of the company.
- iv. Other Information in respect of issue of Shares/Debentures:
 - a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of prospectus/Information Memorandum filed with RoC for issuance of Shares/Debentures.
 - b. Date of opening and closing of the subscription list for the said Shares/Debentures.
 - c. Details regarding the number of application forms circulated inviting subscription for Shares/Debentures and number of applications received.
 - d. Details of allottees in the format given below (in hard copy as well as soft copy).

SR. NO.	DATE OF ALLOTMENT (DD/MM/YYYY)	FINANCIAL YEAR	NAME OF ALLOTTEE	ADDRESS OF ALLOTTEE/ CONTACT DETAILS	AMOUNT OF SHARES / DEBENTURES ALLOTTED (₹)
TOTAL					

- v. Copies of the minutes of Board/committee meeting in which the resolution has been passed for raising such additional capital and also for allotment of Shares/Debentures.
- vi. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of Shares/Debentures.
- vii. Terms and conditions of the issue of Shares/Debentures.
- viii. Whether the company has applied for listing of its securities with any of the Stock Exchanges.
- ix. Copies of Form 2 and Form 10 filed with the RoC.

- 2.2 The status of service of the above–mentioned letters dated March 31, 2017 including replies received by SEBI are provided as under –

TABLE I		
	NAME	LETTER STATUS (RETURNED/ DELIVERED)
1.	GMS INFRASTRUCTURE LIMITED	RETURNED WITH REMARK “LEFT”
2.	ASHIM MITRA	RETURNED WITH REMARK “NOT KNOWN”
3.	SANJOY MITRA	RETURNED WITH REMARK “NOT KNOWN”
4.	RAJESH SINGH	RETURNED WITH REMARK “NOT KNOWN”
5.	LOPAMUDRA BANDYAPADHYAY	NOT RETURNED OR ACKNOWLEDGMENT RECEIVED
6.	TUMPA MITRA DUTTA	RETURNED WITH REMARK “NOT KNOWN”
7.	BISWAJIT DAS	DELIVERED (REPLY DATED 17.04.2017 RECEIVED FROM THE DIRECTOR)
8.	DINESH CHOWHAN	RETURNED WITH REMARK “NOT KNOWN”
9.	CHANDAN BISWAS	NOT RETURNED OR ACKNOWLEDGMENT RECEIVED (REPLY DATED 17.04.2017 RECEIVED FROM THE DIRECTOR)
10.	SHIB SHANKAR GHOSH	RETURNED WITH REMARK “NOT KNOWN”

- 2.3 Of the 10 entities to whom letters were issued by SEBI, replies were received from only 2 entities (both Past Directors) i.e. Chandan Biswas and Biswajit Das, vide separate letters dated April 17, 2017. The aforementioned 2 entities stated that they were agents and investors of GMS and had no information or documents to provide to SEBI. They further submitted that they were not aware of their Directorship in the GMS until they received the letter dated March 31, 2017 from SEBI. While alleging that they were deceived into joining GMS by one of its Directors i.e. Sanjoy Mitra, they submitted copies of the *Redeemable Preference Share Certificates* issued to them by the Company.
- 2.4 Thereafter, a physical verification of the Registered Office address of GMS i.e. 48, Malanga Lane, Bowbazar, Kolkata, West Bengal–700012, India, was conducted by SEBI, by a site visit, on September 22, 2017. However, GMS could not be located at the aforesaid address.

3.1 During the intervening period, details pertaining to GMS were sought to be procured by SEBI from the Ministry of Corporate Affairs' website i.e. *MCA 21 Portal*. The following relevant information was taken note of –

- i. **DATE OF INCORPORATION:** September 25, 2010.
- ii. **TYPE OF COMPANY:** Public Limited Company.
- iii. **CORPORATE IDENTITY NUMBER (CIN):** U74999WB2010PLC153429.
- iv. **PAN:** AAECG0030B.
- v. **REGISTERED OFFICE ADDRESS:** 48, Malanga Lane, Bowbazar, Kolkata, West Bengal–700012, India.
- vi. **DATE OF FILING OF LAST ANNUAL ACCOUNTS AND ANNUAL REPORTS –** March 31, 2012.
- vii. **TOTAL ISSUED CAPITAL OF THE COMPANY (AS ON 31.03.2012):**
 - a. Equity Capital: ₹5,00,000.
 - b. Preference Capital: ₹12,28,500.
- viii. **DETAILS OF RELEVANT BOARD MEETING:** NOT AVAILABLE.

3.2 From a perusal of the records available on *MCA21 Portal*, it was apparent that GMS issued and allotted *Redeemable Preference Shares* to raise a sum of ₹13,44,500. Details regarding the aforesaid as available on *MCA21 Portal* and other relevant material on record are reproduced as under –

A. ALLOTMENT DETAILS OF REDEEMABLE PREFERENCE SHARES [AS PER FORM 2 AND COMPLAINTS RECEIVED] –

TABLE II – DETAILS OF REDEEMABLE PREFERENCE SHARES ISSUED		
FINANCIAL YEAR	NO. OF ALLOTTEES	VALUE OF ALLOTMENT (₹)
2010–11	108	12,28,500
2011–12	2	51,000
2012–13	2	65,000
TOTAL	112	13,44,500
<i>GMS had issued Redeemable Preference Shares during the year 2011–12 and 2012–13. However, GMS had not filed Form 2 in this regard.</i>		

ISSUE FOR DETERMINATION –

- 3.3 The issue for determination in the instant matter is whether the mobilization of funds by GMS through the *offer and allotment of Redeemable Preference Shares*, as detailed at paragraph 3.2, is in accordance with the provisions of the SEBI Act, 1992 (“**SEBI Act**”) and the Companies Act, 1956 (“**Companies Act**”)?

RELEVANT PROVISIONS OF LAW AND *PRIMA FACIE* FINDINGS –

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

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

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

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

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

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

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

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

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

3.5 For ascertaining whether the *offer and allotment of Redeemable Preference Shares* by GMS will fall within the scope of Section 67 of the Companies Act, the number of persons to whom such offers were made by GMS is crucial. In terms of the *first proviso* to Section 67(3), *an offer of shares or debentures made to fifty persons or more would constitute an offer to the public*. Further, the Hon'ble Supreme Court of India in *Sabara India Real Estate Corporation Limited vs. SEBI (Civil Appeal no. 9813 and 9833 of 2011)* examined the scope of Section 67 of the Companies Act. At paragraph 86 of the judgment, the Hon'ble Supreme Court observed: "... *if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation.*"

3.6 In this context, the following is noted from the information obtained from the *MCA21 Portal* and other relevant material available on record –

A. ***Offer and allotment of Redeemable Preference Shares –***

- i. GMS offered and allotted *redeemable preference shares* to 108 persons during the Financial Year 2010–11. GMS mobilized approximately ₹12.28 Lakhs through such issuance.
- ii. Under the new Companies Act, 2013, post April 1, 2014, any offer or allotment of securities shall be construed as public issue if the number of offerees/allottees exceeds 200 persons, excluding certain class of subscribers.
- iii. Paragraph 2 of the SEBI Circular dated December 31, 2015 (Procedure to deal with cases prior to April 1, 2014, involving offer/allotment of securities to more than 49 upto 200 investors in a financial year), provides as below –

2. *"Considering the higher cap for private placement provided in the Companies Act, 2013, it has now been decided that in respect of earlier cases involving issuance of securities to more than 49 persons but up to 200 persons in a financial year, the companies may avoid penal action if they provide the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money paid along with 15% interest p.a. thereon or such higher return as promised to investors."*

- iv. As detailed in the preceding paragraphs, GMS and its Directors did not provide any information to SEBI.
- v. Further, from the material available on record, there is no evidence to indicate that GMS provided investors with the requisite option for surrender of *Redeemable Preference Shares* and refund in accordance with the SEBI Circular dated December 31, 2015, in respect of the *offer and allotment of Redeemable Preference Shares* during the Financial Year 2010–11.
- vi. In view of the above, the *offer and allotment of Redeemable Preference Shares* by GMS *prima facie* qualifies to be construed as an offer made to the public in terms of Section 67(3) of the Companies Act.

3.7 It is also observed that GMS is not a Non-banking financial company or a public financial institution within the meaning of Section 4A of the Companies Act, and thus, is not covered under the exceptions provided in the *second proviso* to Section 67(3) of the Companies Act.

3.8 From the above, it will follow that such public issue makes it imperative for GMS to comply with the mandate of Section 73 of the Companies Act. Relevant extract of Section 73 of the Companies Act is reproduced as under:

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

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

(1A)...

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

- 3.9 As the *offer and allotment of Redeemable Preference Shares* by GMS is *prima facie* a public issue in accordance with the provisions of the Companies Act, the same will attract the requirement for such shares/debentures to be dealt on a recognized stock exchange in terms of Section 73 of the Companies Act, as stated above. I find that GMS is *prima facie* in breach of the provisions of Section 73 as well.
- 3.10 Further, in connection with a public issue, Section 56 of the Companies Act mandates that the prospectus issued by a company shall state the matters specified thereunder and Section 60 of the Companies Act mandates registration of such prospectus with the ROC. I find that there is no evidence on record to indicate that GMS has complied with the provisions of Sections 56 and 60 of Companies Act, in respect of the *offer and allotment of Redeemable Preference Shares* by GMS. In view of the same, I find that GMS is *prima facie* in breach of the provisions of Sections 56 and 60 of the Companies Act in connection with the aforesaid *offer and allotment of Redeemable Preference Shares*.
- 3.11 In terms of Section 73(2), the Company and every director who is an officer in default is jointly and severally liable for repayment of the money raised in breach of provisions of Section 73(1). Further, in terms of Section 62 of the Companies Act, every person who *inter alia* is a director of the company at the time of the issue of the prospectus and every person who is a Promoter of the company, are liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein.

3.12 As per the information available on the *MCA21 Portal*, the details of the present and past Directors and Promoters of GMS, including the dates of appointment/cessation as Directors, are as under:

TABLE III							
	NAME OF THE PERSON	CAPACITY	DIN	PAN	RESIDENTIAL ADDRESS	DATE OF APPT.	DATE OF CESSATION
1.	ASHIM MITRA	DIRECTOR AND PROMOTER	2827181	AKDPM2024K	KRISHNAPUR BYE LANE, P.O.-NATAGARH, KOLKATA-700113, W. B., INDIA	25.09.2010	31.03.2013
2.	SANJOY MITRA	DIRECTOR AND PROMOTER	2827205	—	KRISHNAPUR BYE LN, P.O.-NATAGARH, P.S.-GHOLA, 24 PGS(N), KOLKATA-700113, W. B., INDIA	25.09.2010	31.03.2013
3.	LOPAMUDRA BANDYAPADH YAY	DIRECTOR AND PROMOTER	3126747	AQFPB2001D	1, BIBIR BAGAN LANE (HRISHIKESH GHOSH LANE), 10, HOWRAH MUNICIPAL CORP, GOLABARI, HOWRAH-711106, W. B., INDIA	25.09.2010	—
4.	BISWAJIT DAS	DIRECTOR	5129923	AMPPD6913J	D.N. CHATTERJEE ROAD, AGARPARA, P.S.-KDH, KOLKATA-700058, W. B., INDIA	12.01.2011	16.11.2013
5.	DINESH CHOWHAN	DIRECTOR	5129934	ANDPC7427M	NILGUNJ ROAD, AGARPARA, KOLKATA-700109, W. B., INDIA	12.01.2011	16.11.2013
6.	CHANDAN BISWAS	DIRECTOR	5129940	ALIPB5094L	90, JOY PRAKASH COLONY, P.O.-PANIHATI, PS-KDH, KOLKATA-700114, W. B., INDIA	12.01.2011	16.11.2013
7.	RAJESH SINGH	DIRECTOR	2940521	CLKPS6324N	21/1/1, B.ROAD, HOWRAH-711106, W. B., INDIA	20.01.2011	—
8.	TUMPA MITRA DUTTA	DIRECTOR	—	BAKPD5407K	108, KRISHNAPUR ROAD BAILEN, P.O.-NATAGARH, KOLKATA-700113, W. B., INDIA	20.10.2011	16.11.2011
9.	SHIB SHANKAR GHOSH	DIRECTOR	—	ATKPG5933F	B.K.ROAD, NATAGARH, KAMARPARA, PANIHATI, KOLKATA-700113, W. B., INDIA	15.11.2013	—
10.	SOUMEN PAUL	PROMOTER	3124217	BEEPP5894Q	53, P B GHAT ROAD, AGARPARA, KOLKATA - 700058	—	—

11.	APARNA ROY CHOWDHURY	PROMOTER	–	AHOPR4164P	48 F-1 MALANGA LANE, BOWBAZAR, KOLKATA - 700012	–	–
12.	MINA MUKHERJEE	PROMOTER	–	ATQPM8850R	18 PADDAPUKUR LANE, KOLKATA - 700020	–	–
13.	GITA KARMAKAR	PROMOTER	–	-	2/92 A, SREE COLONY, KOLKATA - 700092	–	–
14.	GMS MULTI MARKETING SERVICES PVT. LIMITED	PROMOTER	–	CIN:U51909WB 2010PTC141110	29/3, BT ROAD, THIRD FLOOR, 11 NO BUS STAND, KOLKATA 700056	–	–

3.13 I note that the persons at serial nos. 1–7 of Table III were the Directors during the period of money mobilization and hence, are responsible for the *offer and allotment of Redeemable Preference Shares* in violation of the Public Issue requirements and are also liable for refund of money. The persons at serial nos. 8–9 of Table III were Directors post the mobilization period. The persons/entities at serial nos. 10–14 of Table III are the Promoters of GMS. Hence, they are liable for the alleged contraventions by GMS.

DIRECTIONS –

4.1 From the information obtained from *MCA21 Portal*, it can be reasonably inferred that the money mobilization on the part of GMS is potentially placing investors at risk by not following the requirements of law applicable to a public issue. In the light of the facts in the instant matter, I find this to be a fit case to pass interim directions against GMS and the abovenamed Directors/Promoters.

4.2 In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4) and 11B of the SEBI Act hereby issue, with immediate effect, the following directions, which shall remain in force until further orders:-

- i. GMS and its Directors/Promoters, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas; Rajesh Singh; Tumpa Mitra Dutta; Shib Shankar Ghosh; Soumen Paul; Aparna Roy Chowdhury; Mina Mukherjee; Gita Karmakar and GMS Multi Marketing Services Pvt. Limited (presently known as ADH Food Products Pvt. Limited), shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly

or indirectly, or associate themselves with any listed company or company intending to raise money from the public;

- ii. GMS and its Directors, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas; Rajesh Singh; Tumpa Mitra Dutta and Shib Shankar Ghosh, shall neither dispose of, alienate or encumber any of its/their assets nor divert any funds raised from public through the *offer and allotment of Redeemable Preference Shares*;
- iii. GMS and the above named Directors/Promoters shall co-operate with SEBI and shall furnish all information/documents in connection with the *offer and allotment of Redeemable Preference Shares* sought vide letters dated March 31, 2017.

4.3 The preliminary findings contained in paragraphs 3.6–3.13 of this Order are made on the basis of the information obtained from *MCA21 Portal* and other relevant material on record. GMS and the abovenamed Directors/Promoters (Collectively referred to as “**Noticees**”) are hereby called upon to show cause as to why suitable directions/prohibitions under Sections 11, 11(4), and 11B of the SEBI Act should not be issued/imposed, including the following directions, viz. –

- i. GMS and its Directors, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas and Rajesh Singh, to jointly and severally refund the money collected through the *offer and allotment of Redeemable Preference Shares*, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act till the date of actual payment) within a period of 180 days from the date of receipt of this Order, supported by a Certificate of two independent Chartered Accountants to the satisfaction of SEBI; and
- ii. The Noticees to be restrained/prohibited from accessing the securities market and buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of four years from the date of effecting the refund as directed above.

4.4 The Noticees may, within 21 days from the date of receipt of this *Interim Order–cum–Show Cause Notice*, file their respective replies. GMS and the abovenamed Directors/Promoters

are directed to furnish an inventory of their assets in their reply. In the event the Noticees intend to avail an opportunity of personal hearing, they may do so by seeking a confirmation in writing from SEBI for the same within 90 days from the date of receipt of this Order. In the event of the respective Noticees failing to file replies or requesting for an opportunity of personal hearing within the said 90 days, the preliminary findings at paragraphs 3.6–3.13 of this Order shall become final and absolute against the respective Noticees automatically, without any further orders. Consequently, the Noticees shall automatically be bound by the directions contained in paragraphs 4.2(i)–(ii) till the expiry of a period of four years from the date of repayment to the satisfaction of SEBI.

- 4.5 In case of failure by the respective Noticees to comply with the aforesaid directions within a period of 180 days from the date of receipt of this Order, SEBI may initiate appropriate enforcement action under SEBI Act including Recovery proceedings, Adjudication or Prosecution in addition to making a suitable reference to State Government/Local Police.
- 4.6 Copy of this Order shall be forwarded to the recognized Stock Exchanges and Depositories for information and necessary action. A copy of this Order may also be forwarded to MCA/concerned RoC for their information and necessary action with respect to the directions imposed on GMS and the abovenamed Directors/Promoters.

Place: Mumbai

Date: February 23, 2018

**G. MAHALINGAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**