

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 Merlin Agri Projects India Ltd.

In re Deemed Public Issue Norms

In respect of:

S.No.	Name of the Entity	PAN	CIN/DIN
1.	Merlin Agri Projects India Ltd.	AAHCM3265H	U01403WB2011PLC163518
2.	Shri Pinku Majhi	AWHPM3088K	06630315
3.	Shri Tapas Mandal	AWDPM4024F	06514807
4.	Shri Madhu Sudan Sinha	BCXPS8099F	06514806
5.	Shri Pallab Das s/o Shri Gopal Das Vill+P.O.- Nalikul, P.S.-Haripal Hooghly, West Bengal – 712407 India	Not Available	03559039
6.	Shri Subrata Pal	AJCPP2532K	03559038
7.	Shri Amiya Koley	ARXPK1255B	05162288
8.	Shri Diptiman Sarkar	BIIPS6691A	03559034
9.	Shri Raj Kumar Ghosh	AKPPG3596C	03528858
10.	Shri Mir Amirul Ali	AMJPM6984G	03528860

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11.	Shri Sarat Bandapdhya	AJTPB4533F	03302622
12.	Shri Apares Misra	AQNPM2329K	06514794
13.	Shri Barindra Nath Koley	AJEPK9164G	06514800
14.	Shri Bablu Kumar Routh	AKUPR1928A	06514796
15.	Shri Argha Pan	ANZPP9326Q	06514795
16.	Shri Amarnath Sadhukhan	AXKPS8554J	06630313
17.	Shri Amit Kumar Pal	AUEPP4783H	06630314
18.	Shri Touhid Alam	AGMPA8959J	

1. Merlin Agri Projects India Ltd. (hereinafter referred to as “Merlin”/ “the Company”) is a Public company incorporated on June 08, 2011 and registered with Registrar of Companies–Kolkata with CIN: U01403WB2011PLC163518. Its registered office is at M.V.Apartment, 36, G.T.Road, Parbihata, Sripally, P.S.-Burdwan, West Bengal - 713103.
2. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) received complaints from some persons against Merlin in respect of issue of Redeemable Preference Shares (“RPS”) and undertook an enquiry to ascertain whether Merlin 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.
3. On enquiry by SEBI, it was observed that Merlin had made an offer of RPS in the financial years 2011-2012 and 2012-2013 (hereinafter referred to as “Offer of RPS”) and raised at least an amount of Rs. 50,78,000 from at least 56 allottees. The number of allottees and funds mobilized has been collated from the documents submitted with the complaints received by SEBI and Form 2 filed by the Company.
4. As the above said *Offer of RPS* was found *prima facie* in violation of respective

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provisions of the SEBI Act, 1992 and the Companies Act, 1956. SEBI passed an interim order dated June 23, 2017 (hereinafter referred to as “**interim order**”) and issued directions mentioned therein against Merlin and its Directors and promoter, viz. Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandopdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, Shri Touhid Alam (hereinafter collectively referred to as “**Noticees**”)

5. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded. Merlin had made an *Offer of RPS* during the financial years 2011-2012 and 2012-2013 and raised at least an amount of Rs. 50,78,000 as shown below:

Year of Issue	Security Issued	Amount raised (Rs.)	Number of allottees
2011-2012	RPS	46,01,000	52
2012-2013		4,77,000	4
Total		50,78,000	56

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) were not complied with by Merlin 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 June 23, 2017 with immediate effect.
- i. “Merlin and the above named Directors and promoter shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly or

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- indirectly, or associate themselves with any listed company or company intending to raise money from the public;
- ii. Merlin and the above named directors and promoter 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 preference shares;
 - iii. Merlin and the above named Directors and promoter shall co-operate with SEBI and shall furnish all information/documents in connection with the offer and allotment of preference shares sought vide letters dated June 13, 2016.”
8. The interim order also directed Merlin and its Directors/promoters to show cause as to why suitable directions/prohibitions under sections 11(1), 11(4) and 11B of the SEBI Act should not be passed against them:
- i. Directing them jointly and severally to refund money collected through the *Offer and allotment of RPS* with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment), supported by a certificate of two independent Chartered Accountants to the satisfaction of SEBI (to be submitted to SEBI within 7 days of completion of the refund); and
 - ii. Directing them to be restrained/prohibited from accessing the securities market by issue of prospectus/offer document/ advertisement 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.
9. Vide the said interim order, Merlin, its abovementioned Directors/promoter were given the opportunity to file their replies, within 21 days from the date of receipt of the said interim order. The Noticees were also directed to furnish inventory of their assets in their reply. The order further stated the concerned persons may also indicate whether they



desired to avail themselves an opportunity of personal hearing with a confirmation in writing within 90 days from the date of receipt of the order and in the event, Noticees fail to reply or request for personal hearing within 90 days, the preliminary findings at paras 10, 12 and 13 of the order and directions at para 17(i) and (ii) shall become final and absolute against the Noticees automatically without any further orders.

10. *Service of interim order*: The copy of the said interim order were sent to the Noticees vide letter dated June 27, 2017. Subsequently, vide notification dated November 29, 2017 published in newspaper *Times of India* and notification dated November 29, 2017 published in newspaper *Ananda Bazar Patrika*, the Noticees were notified by SEBI, that interim order dated June 23, 2017 was issued against them and they were given one more opportunity to submit their reply in the matter and final opportunity of being heard was accorded on January 02, 2018 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.

11. *Hearing and submissions*: Shri Aniruddha Bhattacharya, Advocate appeared for Shri Mir Amirul Ali, Shri Sarat Bandopadhyaya and Shri Raj Kumar Ghosh and filed copy of submissions dated January 2, 2018. He submitted that offers were made only to 45 persons and those few persons sought investment in their names as well as in the names of their relatives/friends, therefore, there is no violation of section 67 of Companies Act. He further submitted that this was a case of private placement. He submitted that the complaints made to SEBI were subsequent to the resignation of his client directors. However, even if the complaints were taken into account, still the count of offerees would be 49. He submitted that there was no independent liability of directors as per section 73 of the Companies Act.

12. He was advised to produce the following information by filing of an affidavit:

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- a) Complete list of directors (past and present).
- b) Details of resignation by his clients and date of upload of Form 32.
- c) No. of bank accounts and Assets of the Company.
- d) Details of agents and agency from incorporation of the Company till resignation uploaded by the said clients, brochures, bank account statements for the period, original Share Purchase Agreement.
- e) Details about how these 45 persons were related to each other and to the directors/Company
- f) Details of relationship between his clients and other directors (apart from the directorship)

13. Shri Navojit Mukherjee, Advocate appeared for Shri Pallab Das, Shri Diptiman Sarkar, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, Shri Subrata Pal, Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha and filed submissions on behalf of the entities.

14. In regards Shri Pinku Majhi, Shri Tapas Mandal and Shri Madhu Sudan Sinha, the Authorized Representative submitted that the founder directors were responsible and his clients were unaware, accordingly, they were advised to give an affidavit providing the following information:

- a) Reasons for acquiring the Company
- b) Banks statements
- c) List of all agents
- d) Details of money mobilized and bank statements showing repayment

15. In regards Shri Pallab Das, Shri Diptiman Sarkar, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, Shri Subrata Pal, the Authorised Representative, Shri Navojit Mukherjee submitted that the directors had blindly signed but were not aware of what documents



they signed. Accordingly, 3 weeks time was given to submit the said details and the Authorized Representative was also provided copies of Share Purchase Agreements submitted by Shri Aniruddha Bhattacharya, Advocate who appeared for Shri Mir Amirul Ali, Shri Sarat Bandapadhyaya and Shri Raj Kumar Ghosh.

16. Ms. Rumeli Sarkar and Shri Arindam Das, Advocates appeared for Shri Touhid Alam and filed submissions dated December 29, 2017. They also submitted that their client had never given legal consent to be a promoter and never signed the MOA and that they were enquiring regarding the same with MCA as to how he is shown as promoter. Accordingly, they were given 20 days time to collect the information and reply.
17. No one appeared for the Noticees, Merlin Agri Projects India Ltd. And Shri Amiya Koley.
18. Therefore, hearing was concluded in respect of all the entities in the matter. Subsequently, letters were also issued to the Noticees advising the Noticees to provide the documents sought during the hearing.
19. Shri Sarat Bandapadhyaya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh sought inspection of the records and the same was duly given. Further, vide separate affidavits dated March 27, 2018 and reply dated January 2, 2018, they *inter-alia*, submitted:
 - In 2011, they incorporated Merlin and were the initial directors from June 8, 2011. Subsequently, Shri Diptiman Sarkar, a close friend and acquaintance joined the Company as Director from July 8, 2011 and was allotted shares. From June 8, 2011 till February 27, 2013, several other close friends and acquaintances joined as directors for various periods but all resigned on February 27, 2013.
 - They along with Shri Diptiman Sarkar, Shri Pallab Das, Shri Subrata Pal and Shri Amiya Koley (original directors) decided to issue RPS on private placement and every original director was to identify 7 offerees from amongst close friends, acquaintances and would be given brochure in selective manner so the same would



not be public issue. Therefore, a total of 49 offerees were identified and some opted out, so 45 persons were allotted RPS.

- As per the provisions of section 67(3) of the Companies Act, it is not the ultimate number of allottees but the number of offerees/invitees and the purpose of the issue gathered from all circumstances that determine the issue as private placement or public issue. Offer and/or invitation was strictly made to only 45 persons.
- Such allotments were made by the Company in parts as several of these 45 allottees made payments in one or more tranches and also requested that investments be recorded in the names of family members/relatives. The additional persons fall within 'relative' of the actual offeree and such investment was domestic concern of the actual offeree. This was not a public issue and pursuant to special resolution passed under section 81(A) of Companies Act.
- They invested the proceeds of RPS issue in the business and have also redeemed several of RPS. Later, Shri Barindranth Koley and Shri Apares Mishra, who themselves and through some of their relatives had subscribed to RPS with their associates, approached them in January, 2013 and desired to purchase the entire shareholding of the Company and takeover the Company with all its assets and liabilities including outstanding RPS.
- They along with Shri Diptiman Sarkar agreed to sell their entire shareholding by resigning from the Board of Directors and Share Purchase agreements were entered into on February 27, 2013. As on February 27, 2013, they were the only equity shareholders and directors and subsequently, on March 1, 2013, Shri Bablu Kumar Routh, Shri Barindra Nath Koley, Shri Apares Mishra and other associates were appointed as directors in addition to them.
- Subsequently, they resigned on March 7, 2013. Their tenure as director of the Company was from June 8, 2011 to March 7, 2013. After this, they had no knowledge or connection with the Company. They have not made any further offer of RPS. They did not suspect that there would be default in honoring the



commitments of the Company to the balance outstanding RPS holders who were allotted RPS during their tenure.

- Later, they came to know that the Company was informing the investors/creditors that the purchasing shareholders were not responsible for refund but the investors should approach them. They suspect that the purchasing shareholders have siphoned off funds of the Company for their personal enrichment. It is possible that purchasing shareholders after taking control may have made further unreported issue of securities. Therefore, they have made a complaint against the purchasing shareholders with the Police.
- Unable to provide assets of the Company as more than 5 years have passed since his resignation. During their tenure, no agents were appointed for distribution of brochures of RPS. Primary business of the Company was in agricultural sector and the only agents appointed were for buying and selling agricultural produce. Further, during their tenure, there were brochures for private placement of RPS and could not locate the same, however, some copies may be with the Company.
- They have neither issued, authorized issuance of in respect of the 4 alleged complaints and such issuance is beyond their knowledge. Further, complainants, Akkas Ali and Akkas Sheikh appear to be the same person with same address in village Balidiyar and next complainant, Tanjila Bibi, wife of Akkas Ali also has the same address in village Balidiyar and final complainant, Manoyara Bibi also resides at the same address in village Balidiyar. Therefore, assuming, without admitting that the allotments to the 4 complainants were in fact authorized by them, even then, the said 4 complaints appear to be one single offer to subscribe to RPS which may have led to multiple allotments. Further, even assuming without admitting that the allotments to the 4 complainants are construed as 4 separate offers, even then total number of invitations become 49 which is less than 50 as prescribed in the proviso to section 67(3).



- Upon inspection, it was found that the alleged brochures categorically state that the offer was 'private placement' and there is no provision requiring such brochures to be tailor made separately for each individual.

Since RPS were issued by private placement, provisions of section 73(2) are not applicable and as per basic principle of 'separate corporate personality' and 'limited liability', they can't be personally held liable. Vicarious liability can't be fastened on every director of the Company in the absence of clear provisions of the statute and only persons to be held liable for the breaches of the Company are the persons who were actually in charge and responsible to the Company for the management of the Company at the relevant time of breach. Therefore, they are not 'officer in default'.

20. Shri Diptiman Sarkar vide letter dated July 19, 2017 and email dated January 22, 2018, *inter-alia*, submitted the following:

- Shri Sarat Bandopadhyaya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh are promoters as well as directors of Merlin. In 2011, he was requested by these persons to join the Company to handle HR. Prior to this, he was working as Senior Sales Manager in Bajaj Alliance Life Insurance Corporation between 2006 and 2011.
- Subsequently, the aforesaid persons represented that they would like to induct him as director in the Company in case he makes some investment. Accordingly, he deposited Rs. 50,000 and shares were allotted to him. He was also made to sign certain documents Form 32.
- He was a graduate and belonged to humble family, he solely relied on representations made by these persons. The aforesaid persons were running the Company and he had no role in decision making.
- He was paid Rs. 10,000 every month as salary and did not receive any other amount. He left the Company on March 7, 2013.



- In March 2013, he was made to sign certain forms and later, he learnt that these forms were basically pertaining to becoming director. Later, he learnt that the Company filed another form for his resignation and he was left in dark.
- Has not made personal gain out of the business which the Company was undertaking and not collected any money on behalf of the Company. At present, he is working as farmer and has no personal assets except a bike. He also furnished his bank account details and statements, etc.

21. Shri Pallab Das, vide letter dated July 16, 2017 and email dated February 22, 2018 submitted, *inter-alia*, the following:

- Ran a tutorial home and for family needs, joined Bajaj Allianz life insurance company as agent and met Shri Sarat Bandopadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh, who made a very lofty picture of the Company, hence, joined the Company in 2011 and signed various documents. No memorandum or articles were given to him.
- After 6 months, he realized the company was not working properly, he resigned by filing Form 32 and share certificates by signing notarized documents prepared by the directors on May 23, 2012. Shares were transferred in favour of Shri Amirul Ali and Shri Rajkumar ghosh.
- He has no connection with the Company since May 23, 2012.
- He neither collected any fund nor deposited the fund.
- Gave some bank details.
- Is running a small business with friend in the nature of catering and has not received any benefit from the company other than salary for 4 months.
- Not involved in the operation of the Company, the three founder directors have acted in connivance and kept him in dark.
- He is aged and not keeping good health and has to maintain ailing mother.

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22. Shri Subrata Pal, vide letter dated July 17, 2017 and February 22, 2018 submitted, *inter-alia*, the following:

- Was an employee of Bajaj Allianz life insurance Co., had to resign due to family problems.
- While looking for a job, was introduced to Shri Sarat Bandopadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents.
- Was paid salary for 5 months.
- Got suspicious of Company activities, and resigned from the Company by signing Form 32 on 21.2.2012 as well as by notarized document of transfer of shares of Rs. 55,560. Since then, has no connection.
- Gave some bank details.

23. Shri Amiya Koley vide letter dated July 19, 2017 and December 29, 2017, *inter-alia*, submitted:

- He was appointed as paid staff from July 1, 2011. His DIN was approved on January 2, 2012 but he was appointed as director on December 12, 2011 as per Form 32.
- No equity shares were issued in his favour and he resigned on February 21, 2012. He doesn't have access to accounts as he was Additional Director for limited period and resigned from service and directorship simultaneously.
- Relied on SAT Order in Manoj Agarwal to state that during his tenure, only six persons were allotted RPS for Rs. 5,50,000 and prior to maturity of these RPS, he resigned and is not liable to make payment.
- Also contended that he was not a director as on 31.12.2012.

24. Shri Barindra Nath Koley vide letter received in July, 2017 submitted, *inter-alia*, the



following:

- He was director from March 1, 2013 and resigned on December 5, 2013.
- During his tenure of directorship he serviced in good faith and was not aware of any such issuance of RPS. His appointment was made fraudulently as existing directors of the Company misled him and got consent letter signed and as soon as he got knowledge of his appointment, he resigned from the Company.

25. Shri Bablu Kumar Routh vide letter received in July, 2017 and email dated January 22, 2018, submitted, *inter-alia*, the following:

- He was director from March 1, 2013 and resigned on December 5, 2013.
- During his tenure of directorship he serviced in good faith and was not aware of any such issuance of RPS. His appointment was made fraudulently as existing directors of the Company misled him and got consent letter signed and as soon as he got knowledge of his appointment, he resigned from the Company.
- Was an employee of Bajaj Allianz life insurance Co., had to resign due to non-fulfillment of insurance target.
- While looking for a job, was introduced to Shri Amirul Ali who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents. He was assured that the documents will be given to him, however, was not given.
- Initially acted as agent and joined the company in January 2012 and was there till September 2012.
- Was duped by the aforesaid directors and has no knowledge of Company law.
- Was paid salary for 3-4 months.
- Got suspicious of Company activities, and resigned from the Company by signing Form 32 on 5.12.2013.
- Gave some bank details.



26. Shri Argha Pan, vide letter dated July 17, 2017 and February 22, 2018 submitted, *inter-alia*, the following:

- Was an employee of Bajaj Allianz life insurance Co., had to resign due to family problems.
- While looking for a job, was introduced to Shri Raj Kumar Ghosh who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents.
- Was duped by the aforesaid directors and has no knowledge of Company law.
- Was paid salary for 3-4 months.
- Got suspicious of Company activities, and resigned from the Company by signing Form 32 on 24.12.2013.
- Gave some bank details.

27. Shri Apares Mishra vide letter dated August 8, 2017 and email dated January 25, 2018 submitted, *inter-alia*, the following:

- He had never been director of the Company, never attended Board meetings, never signed minutes etc. and it was not in his knowledge that he was director of the Company and it was conspiracy and mere paper transaction.
- He was assigned the duty of selling RPS and appointment of new associates.
- Sometimes he put signature on some papers without knowledge of meaning of contents and in 2013, he was forced to sign on some papers against his wish.
- He initially acted as insurance agent since October 2007 and when the agent work could not be continued with after 2011, he became unemployed and was in urgent need to obtain a job, when through one of his acquaintance who was an employee of



Merlin, joined the Company in July 2011 as an Agency Manager on commission and no salary at all.

- Has no knowledge and was not involved in the functioning of the Company.
- In 2011, the original directors floated the Company and called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director of the Company when he was working as agent. He had no choice, either to quit or to act as dictated by the said directors namely, Shri Sarat Bandapadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
- He is not aware of function and liability of the director. Though he was appointed as alleged director, he was really acting as agent for collection of deposits.
- He was intimidated by same agents in 2015 about the malfunctioning of the Company by directors and he started taking advice from different places. He was advised to resign without delay. Except one-month salary, nothing was paid to him not even the commission as agent. He resigned as director on May 4, 2015.
- Directors asked some money from him to revive the Company, and he gave some blank cheques in good faith and the money was withdrawn to purchase shares in his name as they had already kept documents and got it signed earlier without intimating him.
- Presently carrying on the business of poultry and gave some details of bank accounts and submitted that he has no properties and was paid salary for 2 to 3 months by the Company and nothing else.
- Was kept in dark unaware and not sufficiently educated and was exploited by the above directors.

28. Shri Tapas Mondal, vide letter dated July 17, 2017 and February 28, 2018 submitted, *inter-alia*, the following :

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- Belongs to low-income group and was working as daily labourer. Later, got unemployed and was in urgent need of job, joined the Company in 2011 as an agent on commission and no salary at all.
- Was issued an ID card as agent and his duty was to collect fund from depositors and deposit in the Company.
- Has received during the entire tenure as commission agent and alleged director for four months, total of Rs. 3 lakhs which he has returned to the company by cheque dated 10.4.2013. Hence, he has received nil from the company.
- Has no knowledge and was not involved in the functioning of the Company.
- In 2011, the original directors floated the Company and called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director. He had no choice, either to quit or to act as dictated by the said directors namely, Shri Sarat Bandapadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
- Learnt about the malfunctioning of the Company and except being named as director, his functioning was of an agent.
- Gave some details of bank accounts and submitted that he has no property. Was paid salary for four months only. At present, he has no work and is unemployed.
- Was kept in dark unaware and not sufficiently educated and was exploited by the above directors. Others have used his DSC, taking advantage of him being uneducated.
- Merely signed on bank documents like cheque on behalf of the Company and he received only salary for 5-6 months.
- No question of him acquiring the Company.
- Submitted that list of agents are lying with the aforesaid directors.
- As depositors were pressing hard, he along with others have used their resources to repay 8 RPS holders worth Rs. 9 lakhs out of Rs. 46 lakhs.



29. Shri Madhusudan Sinha, vide letter dated July 17, 2017 and email dated February 28, 2018 submitted, *inter-alia*, the following:

- He was employee of Bajaj Allianz Company till 2012 and had to resign due to lack of work, started acting as collecting agent of Merlin from December 2012.
- In 2013, he was approached by Shri Sarat Bandapadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh who enticed him to join as director and purchase shares of the Company representing a high profile of the Company. Due to unemployment, he had no choice but to sign documents in coercion.
- Was paid salary for 6 months. Had virtually no connection with the Company. Gave some details of bank accounts, etc.
- Was asked to sign documents for opening bank account in the name of Company along with others. Copies of some documents such as debentures of depositors were duly submitted.
- At present working as part time salesman in extremely financial distress.
- The above directors may have manipulated his signature and are the real culprits who have resigned by syphoning the entire money of the Company.
- As depositors were pressing hard, he along with others have used their resources to repay 8 RPS holders worth Rs. 9 lakhs from 2014 to 2017 out of Rs. 46 lakhs.

30. Shri Amarnath Sudhakan vide letter dated August 8, 2017 and email dated February 28, 2018, *inter-alia*, submitted the following:

- He had never been director of the Company, never attended Board meetings, never signed minutes etc. and it was not in his knowledge that he was director of the Company and it was conspiracy and fraudulent act of someone and was mere paper transaction.



- Sometimes he put signature on some papers without knowledge of meaning of contents to save his agency and in 2013, he was forced to sign on some papers against his wish.
- Has acted as casual worker from 2007 to 2010 and then he got unemployed and was in urgent need to obtain a job, when through one of his acquaintance who was an agent of Merlin, joined the Company in 2011 as an agent on commission and no salary at all.
- He was given letter of appointment as agent and was assigned the duty of selling RPS and his duty was to collect fund from depositors and deposit in the Company.
- Has no knowledge and was not involved in the functioning of the Company.
- In 2011, the original directors floated the Company and called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director of the Company when he was working as agent. He had no choice, either to quit or to act as dictated by the said directors namely, Shri Sarat Bandapadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
- He is not aware of function and liability of the director. Though he was appointed as alleged director, he was really acting as agent for collection of deposits.
- He was intimidated by agents in 2015 about the malfunctioning of the Company by directors and he started taking advice from different places. He was advised to resign without delay. Except one/two month salary, nothing was paid to him not even the commission as agent. He resigned as director on May 4, 2015.
- Presently carrying on the business of poultry along with sale and purchase of shares for Rs. 10,000 in his name. Gave some details of bank accounts and submitted that he has no properties.
- Has not made any repayments to depositors directly.
- Was kept in dark unaware and not sufficiently educated and was exploited by the above directors.



31. Shri Amit Kumar Pal vide letter dated August 8, 2017 and email dated February 22, 2018, submitted, *inter-alia*, the following:

- He had never been director of the Company, never attended Board meetings, never signed minutes etc and it was not in his knowledge that he was director of the Company and that it was conspiracy and fraudulent act of someone and was mere paper transaction.
- He was unemployed, appointed as agent on commission basis upon selling RPS and was assigned the duty of selling RPS.
- Sometimes he put signature on some papers without knowledge of meaning of contents to save his agency and in 2013, he was forced to sign on some papers against his wish.
- Has acted as land broker from 2006 to 2010 and then he got unemployed and was in urgent need to obtain a job, when through one of his acquaintance who was an agent of Merlin, joined the Company in 2011 as an agent on commission and no salary at all.
- Was given letter of appointment as agent and his duty was to collect fund from depositors and deposit in the Company.
- Has no knowledge and was not involved in the functioning of the Company.
- In 2011, the original directors floated the Company and called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director of the Company when he was working as agent. He had no choice, either to quit or to act as dictated by the said directors namely, Shri Sarat Bandapadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
- He is not aware of function and liability of the director. Though he was appointed as alleged director, he was really acting as agent for collection of deposits.
- He was intimated by agents in 2015 about the malfunctioning of the Company by directors and he started taking advice from different places. He was advised to resign



without delay. Except one-month salary, nothing was paid to him not even the commission as agent. Resigned as director on May 4, 2015.

- Presently carrying on the business of poultry along with sale and purchase of shares for Rs. 10,000 in his name. Gave some details of bank accounts and submitted that he has no properties.
- Was kept in dark unaware and not sufficiently educated and was exploited by the above directors.

32. Shri Pinku Majhi vide letter dated July 17, 2017 and email dated January 17, 2018 stated, *inter-alia*, the following :

- Belongs to low-income group and was a daily labourer from 2006 to 2009. Then he got unemployed and was in urgent need to obtain a job, when through one of his acquaintance, Shri Tapas Mondal, who was also an agent of Merlin, joined the Company in 2011 as an agent on commission and no salary at all.
- Was given letter of appointment as agent and his duty was to collect fund from depositors and deposit in the Company.
- Has no knowledge and was not involved in the functioning of the Company.
- In 2011, the original directors floated the Company and called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director. He had no choice, either to quit or to act as dictated by the said directors namely, Shri Sarat Bandopadhyay, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
- He is not aware of function and liability of the director. Though he was appointed as alleged director, he was really acting as agent for collection of deposits.
- Learnt about the malfunctioning of the Company and except being named as director, his functioning was of an agent. No share was allotted to him at all. Original directors are in violation of section 59 of Companies Act.

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- Gave some details of bank accounts and submitted that he has no properties and was paid salary for two months only.
- At present, he has no work and is executing work as per fund through NREGS.
- Was kept in dark unaware and not sufficiently educated and was exploited by the above directors.
- Therefore, there was no question of him acquiring the company.
- Submitted that list of agents are lying with the aforesaid directors.
- As depositors were pressing hard, he along with others have used their resources to repay 8 RPS holders worth Rs. 9 lakhs out of Rs. 46 lakhs.

33. Shri Touhid Alam, vide letters dated July 28, 2017 and December 29, 2017 submitted that he was shocked that he had been added as promoter in Merlin and that he was not the promoter of the Company and he suspected that persons involved in the business had done it fraudulently and not by his signature. Further, he vide letter dated February 22, 2018 submitted copy of Adhar card and sought time to submit further documents. Further, vide letter dated April 6, 2018, he submitted copy of MoA, Articles of Association and stated that his signature is not found therein and further enclosed Form 22A, stating that his signature therein is different and not his signature. Accordingly, he requested for expunging his name.

34. I have considered the allegations and materials available on record, including the submissions of the Noticees. 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.*
- (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.

35. I have perused the interim order dated June 23, 2017 for the allegation of *Offer of RPS*. I note that neither the Company nor the directors filed any reply disputing the same, though some directors have claimed that they were not aware of issuance of RPS during their tenure.
36. I have also perused the documents/ information obtained from the 'MCA 21 Portal' and other documents available on record. It is noted, from the investors' complaints received by SEBI and Form 2 filed by the Company in the matter that Merlin has issued and allotted RPS to at least 56 investors during the financial years 2011-2012 and 2012-2013 and raised at least an amount of Rs. 50,78,000. I also note that the number of allottees and funds mobilized has been collated from the documents submitted with the complaints received by SEBI and Form 2. Therefore, it was concluded that the actual number of allottees and amount mobilized could be more than 56 persons and Rs. 50,78,000 respectively.
37. I therefore conclude that Merlin 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.

38. 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)."

39. 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)

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(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.”



40. 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*.
41. In the instant matter, I find that RPS were issued by Merlin to at least 56 investors in the financial years 2011-2012 and 2012-2013. However, this number is not conclusive as it is based on the documents received by SEBI along with complaints and Form 2 and the actual number of investors could be more than 56. I find that Merlin has mobilized at least an amount of Rs. 50,78,000 over the financial years 2011-2012 and 2012-2013 which is not a conclusive value as it is based on the complaints received by SEBI and Form 2.
42. I find that Merlin 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 Merlin is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
43. However, it was contended by Shri Sarat Bandapadhyaya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh that as per the provisions of section 67(3) of the Companies Act, it is not the ultimate number of allottees but the number of offerees/invitees and the purpose of the issue gathered from all circumstances that determine the issue as private



placement or public issue and this was not a public issue and issue pursuant to special resolution passed under section 81(A) of Companies Act.

44. Before giving my observations, I propose to determine whether in fact offer was made only to 45 persons as contended by Shri Sarat Bandopadhyaya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh.
45. Though it was claimed that the offer was made pursuant to special resolution passed under section 81(1A) of the Companies Act, 1956, no mention of the date of resolution was given by the said directors and no copy of the resolution was submitted to support the passing of resolution. Further these directors have not taken any specific stance that the Company has made either an offer or invitation to offer. It is stated in the reply that the Company made offer or/and invitation to subscribe to the RPS. It is unusual a Company will make an offer and invitation to offer together. That being the case, no details as to the number of offers, number of invitations to offer or the details of persons to whom such offer and/or invitation to offer was made, was submitted by these directors. The copy of such claimed letter of offer and/or invitation to offer even in the case of these 45 persons were not submitted by the directors. The contents of the copy of the said offer letters or letter of invitation to offer if produced could have shown whether the offer was specifically made only to those 45 persons. In the absence of this proof the claim that the offer and or invitation to offer was made only to specific 45 persons does not stand supported.
46. It was further submitted that there were 57 allotments made and four Form 2s were filed before ROC. It was further contended that the offer and/or invitation was strictly made to only 45 persons and several of these 45 allottees made payments in one or more tranches and also requested that investments be recorded in the names of family members/relatives. The additional persons fall within 'relative' of the actual offeree and such investment was domestic concern of the actual offeree.

47. I find that the all the four Form 2 in total reflect that the issuance was made to 56

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persons (wrongly numbered in the reply as 57 in reply of the contending directors). As per the contention as the offer was made only to 45, the remaining 11 persons belong to two groups of persons. The first category consists of the same persons (offeree/invitee) making more than one payments and therefore allotted more than once. I find that there are four persons in this category and take note of the same. The second category of persons are, as per the contention, those allottees who were allotted shares pursuant to the actual offeree/invitee wanting the allotment to be made in their spouse or close relative name. As per the claim, the second category has 7 such allottees who are either spouse or close relatives as contented in the reply. The contention of these directors is that these 7 persons were allotted RPS because of the request made by the actual offeree/invitee. There was no evidence adduced to substantiate that such request was made. Therefore, in view of the allotment to these seven persons, the same should be considered pursuant to the offer made by the company to these seven persons. Therefore, even if the double allotments for the same person (4 in number) is excluded, still there is evidence to show that offer was made to 52 persons in view of the allotment to the 52 persons, as reflected in the Form 2s. Therefore, the impugned issue falls within first proviso to section 67(3) since the offer and issue has been made to more than 49 persons. It may be noted this is apart from the 4 allottees covered under the complaints which indicates offer was made to such allottees as well.

48. Further, it is the submissions of the aforesaid directors that they along with Shri Diptiman Sarkar, Shri Pallab Das, Shri Subrata Pal and Shri Amiya Koley (original directors) decided to issue RPS on private placement and every original director was to identify 7 offerees from amongst close friends, acquaintances and would be given brochure in selective manner so the same would not be public issue. Therefore, a total of 49 offerees were identified and some opted out, so 45 persons were allotted RPS. Considering these submissions, I find that as per their own submissions, the Company had made offer to at least 49 persons and if the allottees under the complaints are added (even if as per them, allotments to Shri Akkas Ali, Shri Akkas Sheikh, Smt. Tanjila Bibi



and Smt. Manoyara Bibi are taken as one offer even though Smt. Manoyara Bibi does not appear to be staying at the same address and related to the rest of the persons), then the Company had made offer to more than 49 persons and hence the same issue is a public issue as per the first proviso to section 67(3) of the Companies Act. Herein, I also note that though the directors have claimed that they had neither issued nor authorized issuance of in respect of the 4 alleged complaints and such issuance is beyond their knowledge, I am unable to accept their submissions in view of that no proof has been adduced by them in this regard while on the other hand, the dates of at least four RPS certificates were during the period of their directorship.

49. Coming to the second part of the contention that the remaining seven persons were only domestic concern of actual offerees, I consider the contention of domestic concern of offeree is not sustainable, on the following grounds. Firstly, there was no proof adduced to substantiate the relationship. Secondly, even if they are related as claimed by the directors, the domestic concern as envisaged in section 67(3) (b) of the Companies Act, 1956 is the domestic concern of the persons making and receiving the offer or invitation. It does not envisage domestic concern of the actual offeree. A reference in this regard to the observations in Sahara Judgment may be apposite

“ I may, in this connection, point out that the position in England is almost the same

....An offer is not regarded as an offer to the public if (1) it can properly be regarded in all circumstances as not being calculated to result, directly or individually, in securities of the company becoming available to persons other than those receiving the offer; or (2) otherwise being a private concern of the person receiving it and the person making it: s 75(3). An offer is to be regarded (unless the contrary is proved) as being a private concern of the person receiving it and the person making it if (a) it is made to a person already connected with the company and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of another person already connected with the company;... For these purposes 'person already connected with the company' means (A) an existing member or employee



of the company; (B) a member of the family of a person who is or was a member or employee of the company; (C) the widow or widower, or surviving civil partner, of a person who was a member or employee of the company; (D) an existing debenture holder of the company; or (E) a trustee (acting in his capacity as such) of a trust of which the principal beneficiary is a person within any of heads (A) to (D) above: s756(5)...”

50. The above observations of the Hon'ble Supreme Court and the provision 67(3) (b) show that the domestic concern means the offer or invitation to offer is received by the person connected to the Company and the entire issue should be qualified as domestic concern. It is not the case of these directors that the second category of persons are already connected to the Company as domestic concern. Neither there is any contention that the entire issue is of domestic concern. Therefore, the contention of the directors on this score is also not sustainable.

51. Reference also may be made to another paragraph from the Sahara case which clearly states when a private placement is made to fifty or more persons, it *becomes* an offer intended for public.

“The above discussion clearly indicates that from the years 1988 to 2000, private placement of preferential allotment could be made to fifty or more persons if the requirements of Clauses (a) and (b) of Section 67(3) are satisfied. However, after the amendment to the Companies Act, 1956 on 13.12.2000, every private placement made to fifty or more persons becomes an offer intended for the public and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock



exchange.”

52. Herein, I also note that considering that the complainants are in addition to the allottees mentioned in form 2 filed by the Company, there is an apprehension that there may be many more RPS holders not divulged by the Company. I also note that using brochures to make a private placement is also difficult proposition to accept. In view of all of the above, I am unable to accept the submissions of the directors of the Company and find that the RPS issue was a public issue.
53. The above findings lead to a reasonable conclusion that the Offer of RPS by Merlin was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956. 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”.
54. Therefore, in view of the material available on record, I find that the *Offer of RPS* by Merlin falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the

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Offer of RPS are deemed to be public issues and Merlin was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

55. 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.
56. The allegations of non-compliance of the above provisions were not denied by Merlin 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 Merlin has contravened the said provisions. Merlin has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that Merlin 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.
57. 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, Merlin was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that Merlin 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 Merlin has not complied with the provisions of section 60 of the Companies Act, 1956.

58. 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 Merlin 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, Merlin has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

59. 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"

60. 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..."

61. In view of the above findings, I am of the view that Merlin 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.

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

62. I find that Shri Sarat Bandapadhya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh have admitted to being directors of the Company from June 8, 2011 to March 7, 2013. In

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regards their submissions that Shri Barindranth Koley and Shri Apares Mishra, who themselves and through some of their relatives had subscribed to RPS with their associates, approached them in January, 2013 and desired to purchase the entire shareholding of the Company and takeover the Company with all its assets and liabilities including outstanding RPS and they did not suspect that there would be default in honoring the commitments of the Company to the balance outstanding RPS holders who were allotted RPS during their tenure, I note that Noticees are free to enter into agreements for assigning of liabilities, however, same are separate and independent of the director's obligation to refund under section 73(2) of Companies Act. The parties are free to enforce these agreements independently, however, their statutory liability remains intact and is not diluted by any independent agreements. I also do not find their submissions that since RPS were issued by private placement, hence, provisions of section 73(2) are not applicable tenable as it has already been determined that RPS issue by the Company was a public issue and section 73 specifies the joint and several liability of the Company and directors. In regards their submissions that as per basic principle of 'separate corporate personality' and 'limited liability', they can't be personally held liable, I reiterate that section 73(2) specifies the joint and several liability of the Company and directors who are officers in default to refund the amount collected by the Company in violation of public issue norms. I also do not accept their submissions that vicarious liability can't be fastened on every director of the Company in the absence of clear provisions of the statute and only persons to be held liable for the breaches of the Company are the persons who were actually in charge and responsible to the Company for the management of the Company at the relevant time of breach tenable because Hon'ble SAT in the case of Manoj Agarwal has held that a director is liable for refund of the amount collected by the Company in violation of public issue norms during his directorship. The violation or breach here pertains to the Company collecting money by issue of RPS in violation of public issue norms, therefore, the directors, Shri Sarat Bandapadhyaya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh are liable as they were



not only directors during FY 2011-2013 when the RPS issue was made by the Company but were also the promoters of the Company. I find as per their admission and as per MCA records, Shri Sarat Bandapadhya, Shri Mir Amirul Ali and Shri Raj Kumar Ghosh were directors from June 8, 2011 to March 7, 2013, therefore, were liable for refund as directors during the issue of RPS as officers in default.

63. I have noted the submissions of Shri Diptiman Sarkar that he was requested to join the Company to handle HR and subsequently, the directors of the Company represented that they would like to induct him as director in the Company in case he makes some investment, accordingly, he deposited Rs. 50,000 and shares were allotted to him and was also made to sign certain documents Form 32. He has also submitted that he was made to sign certain forms and later, he learnt that these forms were basically pertaining to becoming director and he also learnt that the Company filed another form for his resignation and he was left in dark. I do not find these submissions of the Noticee tenable as admittedly he is a graduate and was required to be aware of the liability and responsibility arising from signing documents like Form 32 and while assuming directorship. In regards his submission, that he solely relied on representations made by these persons and had no role in decision making, I find that after accepting the position of director, he cannot wriggle out of his responsibility as director. Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I find that as per MCA records and not inconsistent with his submissions, Shri Diptiman Sarkar was director from July 8, 2011 till March 7, 2013, therefore, was liable for refund as director during the issue of RPS.

64. I note the submissions of Shri Pallab Das that he met the directors of the Company who



made a very lofty picture of the Company, hence, he joined the Company in 2011 and signed various documents and after 6 months, he realized the company was not working properly, he resigned by filing Form 32 on May 23, 2012 and that he was not involved in the operation of the Company and was kept in dark. I do not find the submissions of the Noticee tenable and note that that after accepting the position of director, he cannot wriggle out of his responsibility as director. Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I find that as per MCA records and not inconsistent with his submissions, Shri Pallab Das was director of the Company from July 8, 2011 till May 23, 2012, therefore, was liable to refund as director during the issue of RPS.

65. Similarly, I note the submissions of Shri Subrata Pal that he was introduced to the directors of the Company who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents and later got suspicious of the Company's activities, and resigned from the Company by signing Form 32 on 21.2.2012. I find that as per MCA records and not inconsistent with his submissions, Shri Subrata Pal was director of the Company from July 08, 2011 to February 21, 2012, therefore, was liable for refund as director during the issue of RPS.
66. I have noted the submissions of Shri Amiya Koley that he was appointed as director on December 12, 2011 as per Form 32 and he resigned on February 21, 2012 and that he doesn't have access to accounts as he was Additional Director for limited period and relied on SAT Order in Manoj Agarwal to state that during his tenure, only six persons were allotted RPS for Rs. 5,50,000 and prior to maturity of these RPS, he resigned and is not liable to make payment. He also contended that he was not a director as on



31.12.2012. I do not accept his submissions that prior to maturity of these RPS, he resigned and is not liable to make payment as Hon'ble SAT in the case of Manoj Agarwal has held that a director is liable for refund of the amount collected by the Company in violation of public issue norms during his directorship, therefore, it is incorrect to state that the liability of refund arises on maturity of RPS. The violation here is collection of money by issue of RPS by the Company in violation of public issue norms and since Shri Amiya Koley was present as director of the Company during the issue of RPS, he shall be liable. I find that as per MCA records and consistent with his submissions, Shri Amiya Koley was director from December 12, 2011 till February 21, 2012, therefore, was liable for refund as director during the issue of RPS.

67. I have noted the submissions of Shri Barindra Nath Koley that he was director from March 1, 2013 and resigned on December 5, 2013 and during his tenure of directorship he serviced in good faith and was not aware of any such' issuance of RPS and his appointment was made fraudulently as existing directors of the Company misled him and got consent letter signed and as soon as he got knowledge of his appointment, he resigned from the Company. I do not find these submissions of Shri Barindra Nath Koley tenable since these are fundamentally contradictory and even if his submissions that his appointment was made fraudulently was to be considered, the same is not supported with proof and I find that as per MCA records and consistent with his submissions, he was director from March 1, 2013 till December 5, 2013, therefore, was liable for refund as director during the issue of RPS. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Barindra Nath Koley was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.

68. I note the submissions of Shri Bablu Kumar Routh that he was director from March 1,



2013 and resigned on December 5, 2013 and during his tenure of directorship he serviced in good faith and was not aware of any such issuance of RPS and that his appointment was made fraudulently as existing directors of the Company misled him and got consent letter signed and as soon as he got knowledge of his appointment, he resigned from the Company. I also note that he has submitted that he was introduced to Shri Amirul Ali who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents and later got suspicious of Company activities, and resigned from the Company by signing Form 32 on 5.12.2013. I do not find these submissions of Shri Bablu Kumar Routh tenable as these are fundamentally contradictory and even if his submissions that his appointment was made fraudulently was to be considered, the same is not supported with proof and he ought to be responsible while signing blank documents. I note that he has admitted to the directorship of the Company and find that after accepting the position of director, he cannot wriggle out of his responsibility as director. Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I find that as per MCA records and consistent with his submissions, Shri Bablu Kumar Routh was director from March 1, 2013 till December 5, 2013, therefore, was liable for refund as director during the issue of RPS. I note that the fund mobilization by Merlin is from FY 2011-2013 and Shri Bablu Kumar Routh was director from March 1, 2013. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Bablu Kumar Routh was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.



69. Similarly, I also note the submissions of Shri Argha Pan that he was introduced to the directors of the Company who made a very lofty picture of the Company, hence, joined the Company and at the time of joining was made to sign various blank documents and later got suspicious of Company activities, and resigned from the Company by signing Form 32 on 24.12.2013. I find that as per MCA records and not inconsistent with his submissions, Shri Argha Pan was director of the Company from March 1, 2013 to December 24, 2013, therefore, was liable for refund as director during the issue of RPS. I note that the fund mobilization by Merlin is from FY 2011-2013 and Shri Argha Pan was director from March 1, 2013. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Argha Pan was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.
70. I note the submissions of Shri Apares Mishra that he had never been director of the Company, never attended Board meetings, never signed minutes etc. and it was not in his knowledge that he was director of the Company and it was a conspiracy and a mere paper transaction. He has further submitted that in 2011, the original directors called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director of the Company when he was working as agent and that he had no choice, either to quit or to act as dictated by the said directors. Firstly, I find his submissions contradictory and therefore, not tenable. Further, in regard to his submissions that he had no knowledge and was not involved in the functioning of the Company, I do not find these submissions tenable either, as he was director of the Company and after accepting the position of director, he cannot wriggle out of his responsibility as director. Hon'ble Securities Appellate Tribunal (SAT) vide its order



dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I also note that he has stated that he resigned as director on May 4, 2015. I find that as per MCA records and not inconsistent with his submissions, Shri Apares Mishra was director of the Company from March 1, 2013 to May 4, 2015, hence was liable for refund as director during the issue of RPS. I note that the fund mobilization by Merlin is from FY 2011-2013 and Shri Apares Mishra was director from March 1, 2013. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Apares Mishra was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.

71. I also note the submissions of Shri Tapas Mondal that in 2011, the original directors called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director and he had no choice, either to quit or to act as dictated by the said directors and do not find the same tenable. Further, in regards his submissions that he had no knowledge and was not involved in the functioning of the Company, I do not find these submissions tenable as he was director of the Company and after accepting the position of director, he cannot wriggle out of his responsibility as director. Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I also find that as per MCA records and not inconsistent with his submissions, Shri Tapas



Mondal was director from March 1, 2013 and is still continuing as director of the Company, therefore, hence was liable for refund as director during the issue of RPS. I note that the fund mobilization by Merlin is from FY 2011-2013 and Shri Tapas Mondal was director from March 1, 2013. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Tapas Mondal was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.

72. I note the submissions of Shri Madhusudan Sinha that in 2013, he was approached by the directors of the Company to join as director and representing a high profile of the Company and due to unemployment, he had no choice but to sign documents in coercion. I find these submissions not tenable as he ought to have exercised caution and care before signing on any documents and assuming directorship and even if his submissions that he signed documents in coercion was to be considered, the same is not supported with proof and find that as per MCA records and not inconsistent with his submissions, Shri Madhusudan Sinha was director from March 1, 2013 and is still continuing as director, therefore, was liable for refund as director during the issue of RPS. I note that the fund mobilization by Merlin is from FY 2011-2013 and Shri Madhusudan Sinha was director from March 1, 2013. I note that as determined earlier, the RPS issue by Merlin is from FY 2011-2013 and Shri Madhusudan Sinha was director from March 1, 2013. I find that at least one RPS certificate dated March 25, 2013 is on record which is in addition to the Form 2 allottees and since complete details regarding fund mobilization by the Company are not available on record, it is apprehended that there may be more RPS issued by the Company.

73. I note the submissions of Shri Amarnath Sudhakan and Shri Amit Kumar Pal that that they had never been directors of the Company, never attended Board meetings, never



signed minutes etc. and it was not in their knowledge that they were directors of the Company and it was a conspiracy and a mere paper transaction. They have further submitted that in 2011, the original directors called upon them to sign certain documents alleging that they would be given better benefit and would be appointed as Director of the Company when they were working as agents and that they had no choice, either to quit or to act as dictated by the said directors. Firstly, I find these submissions contradictory and therefore, not tenable. Further, in regard to their submissions that they have no knowledge and were not involved in the functioning of the Company, I do not find these submissions tenable either as they were directors of the Company and after accepting the position of director, they cannot wriggle out of their responsibility as directors. Hon'ble Securities Appellate Tribunal (SAT) vide its order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, has considered similar contentions like merely lending name to be a director and non-involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act. I also note their submissions that they resigned as directors on May 4, 2015. However, I find that as per MCA records and consistent with their submissions, Shri Amarnath Sudhakan and Shri Amit Kumar Pal were directors from June 15, 2013 to May 04, 2015, which was subsequent to the issue of RPS, therefore, were not liable for refund as they were not directors during the issue of RPS. However, this conclusion is subject to evidence not being available on record regarding RPS issue by Merlin after March 31, 2013.

74. I note the submissions of Shri Pinku Majhi that in 2011, the original directors called upon him to sign certain documents alleging that he would be given better benefit and would be appointed as Director and he had no choice, either to quit or to act as dictated by the said directors and do not find the same tenable as he ought to have exercised caution and care before assuming directorship. Further, in regards his submissions that he had no knowledge and was not involved in the functioning of the Company, I do not



find these submissions tenable as he was director of the Company and after accepting the position of director, he cannot wriggle out of his responsibility as director. However, I find that as per MCA records and not inconsistent with his submissions, Shri Pinku Majhi was director from June 15, 2013 and is still continuing as director, which was subsequent to the issue of RPS, therefore, was not liable for refund as he was not director during the issue of RPS.. However, this conclusion is subject to evidence not being available on record regarding RPS issue by Merlin after March 31, 2013. Further, I also note that Shri Pinku Majhi is liable to ensure that money collected by RPS is duly refunded to investors in his capacity as continuing director.

75. I note that one money receipt dated April 27, 2013 is also available on record, showing collection of money by Merlin, however, the said money receipt doesn't clearly show that it pertains to a RPS. Therefore, if subsequently during Recovery Proceedings or otherwise, there is evidence of collection of money after March 2013 by RPS issue, then SEBI may initiate appropriate action against the directors during the relevant period of mobilization.
76. Shri Touhid Alam, vide letters dated July 28, 2017 and December 29, 2017 submitted that he was shocked that he had been added as promoter in Merlin and that he was not the promoter of the Company and he suspected that persons involved in the business had done it fraudulently and not by his signature. Further, he vide letter dated February 22, 2018 submitted copy of Adhar card and sought time to submit further documents. Further, vide letter dated April 6, 2018, he submitted copy of MoA, Articles of Association and stated that his signature is not found therein and further enclosed Form 22A, stating that his signature therein is different and not his signature. Accordingly, he requested for expunging his name. I find that though Shri Touhid Alam has contended that he is not the promoter of the Company, however, he has not provided proof showing that his signature has been forged, etc by way of signature verification report by expert in signature verification recognized or registered or accredited by Government of



India or State Government etc. I note that Shri Touhid Alam has been listed as subscriber to the MoA, therefore, he is the promoter of the Company and is liable as promoter for the *Offer of RPS* against the norms of deemed public issue. Therefore, he is liable to be debarred for an appropriate period of time. However, considering his submissions, this order will take effect as final order against Shri Touhid Alam on the expiry of 90 days from the date of service of this order against him, unless he, within such period of 90 days from the date of service of this order provides proof in support of his submissions. If no proof is provided, the Interim order dated June 23, 2017 shall continue against him till the time of said ninety days period, after which this order will come into effect. If proof is filed by him, the Interim order dated June 23, 2017 shall continue qua him till disposal of the said objections qua him and the directions passed herein against Shri Touhid Alam shall be made applicable subject to the determination on the objections.

77. From the documents available on record, I find that the present Directors in Merlin are Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha. I also note that, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, who were earlier Directors in Merlin, have since resigned. The details of the appointment and resignation of the directors are as following:

S.No	Name of the directors	Date of appointment	Date of cessation
1.	Shri Raj Kumar Ghosh	June 08, 2011	March 07, 2013
2.	Shri Mir Amirul Ali	June 08, 2011	March 07, 2013
3.	Shri Sarat Bandapdhya	June 08, 2011	March 07, 2013



4.	Shri Diptiman Sarkar	July 08, 2011	March 07, 2013
5.	Shri Pallab Das	July 08, 2011	May 23, 2012
6.	Shri Subrata Pal	July 08, 2011	February 21, 2012
7.	Shri Amiya Koley	December 12, 2011	February 21, 2012
8.	Shri Barindra Nath Koley	March 01, 2013	December 05, 2013
9.	Shri Bablu Kumar Routh	March 01, 2013	December 05, 2013
10.	Shri Argha Pan	March 01, 2013	December 24, 2013
11.	Shri Apares Misra	March 01, 2013	May 04, 2015
12.	Shri Tapas Mandal	March 01, 2013	Continuing
13.	Shri Madhu Sudan Sinha	March 01, 2013	Continuing
14.	Shri Amarnath Sadhukhan	June 15, 2013	May 04, 2015
15.	Shri Amit Kumar Pal	June 15, 2013	May 04, 2015
16.	Shri Pinku Majhi	June 15, 2013	Continuing

Note: Period of RPS issue: FY 2011-2012 and 2012-2013

78. 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, Merlin and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

79. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is

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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%.

80. From the material available on record and the details of the appointment and resignation of the directors of Merlin as reproduced in paragraph 77 of this Order, it is noted that, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandopdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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 Merlin 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 Merlin, 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. 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 Merlin and its Directors, viz., Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, , Shri Tapas Mandal, Shri Madhu Sudan Sinha 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.

81. I note that during the financial years 2011-2012 and 2012-2013 Merlin through Offer of RPS, had collected at least an amount of Rs. 50,78,000 from various allottees. I note that Shri Tapas Mandal has been director of Merlin since financial year, 2012-2013 till present date. I note that Shri Madhu Sudan Sinha has been director of Merlin since financial year, 2012-2013 till present date. I note that Shri Pallab Das was director of Merlin during financial years 2011-2012, 2012-2013. I note that Shri Subrata Pal was director of Merlin during financial year 2011-2012. I note that Shri Amiya Koley was director of Merlin during financial years 2011-2012. I note that Shri Diptiman Sarkar was director of Merlin during financial years 2011-2012, 2012-2013. I note that Shri Raj Kumar Ghosh was director of Merlin during financial years 2011-2012, 2012-2013. I note that Shri Mir Amirul Ali was director of Merlin during financial years 2011-2012, 2012-2013. I note that Shri Sarat Bandapdhya was director of Merlin during financial years 2011-2012, 2012-2013. I note that Shri Apares Misra was director of Merlin during financial year, 2012-2013. I note that Shri Barindra Nath Koley was director of Merlin during financial year, 2012-2013. I note that Shri Bablu Kumar Routh was director of Merlin during financial year, 2012-2013. I note that Shri Argha Pan was director of Merlin during financial year, 2012-2013. 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 Merlin and other directors are limited to



the extent of amount collected during his/her tenure as director of Merlin

82. In this regard, I note that Shri Pinku Majhi, Shri Amit Kumar Pal and Shri Amarnath Sadhukhan were appointed as directors of Merlin only on June 15, 2013 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 the Shri Pinku Majhi, Shri Amit Kumar Pal and Shri Amarnath Sadhukhan were not liable for refund of money as they were not directors during the relevant time of fund mobilization. Further, Shri Pinku Majhi, Shri Amit Kumar Pal and Shri Amarnath Sadhukhan 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. "

83. 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 Pinku Majhi, Shri Amit Kumar Pal and Shri Amarnath Sadhukhan



were also responsible for all the deeds/acts of the Company during the period of their directorship and was 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 Pinku Majhi, Shri Amit Kumar Pal and Shri Amarnath Sadhukhan are liable to be debarred for an appropriate period of time.

84. 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 Merlin and its Directors, viz. , Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha to refund the monies collected, with interest to such investors. Further, in view of the violations committed by the Company and its Directors and promoters , 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.
85. I also note that, vide the interim order dated June 23, 2017, Merlin was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors/promoters of Merlin 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. I find that most of the Noticees have provided details of their bank accounts, properties etc. However, up to date details of inventory needs to be provided by all the Noticees.
86. In view of the discussion above, appropriate action in accordance with law needs to be initiated against Merlin and its Directors and promoters, viz. Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha, Shri Pallab Das, Shri Subrata Pal, Shri Amiya



Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, Shri Touhid Alam.

87. 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. Merlin, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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. 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. If the directors of the Company had repaid some of their investors as per their submissions as per section 73(2) of the Companies Act, the above directions in (a) and (b) shall be applicable as modified herein, for the amounts claimed to have been returned to the investors:
 - i. Such prior repayments should have been made by the Company as per the requirements laid down in paragraph 87(b) above and the same shall be certified by peer reviewed Chartered Accountants, as directed in paragraph 87(i) below, or
 - ii. The Company and the directors who have repaid the investors, shall produce a peer reviewed Chartered Accountant’s certificate, for the repayments

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claimed to have been made by the company, certifying repayment on verification of the originals of the application form for RPS bearing signature of the RPS holder, certificate of RPS issued by the company to RPS holder and returned to the Company on redemption, payment receipt/voucher issued by the Company to the RPS holders bearing the signature of the RPS holders, (in the absence of payment receipt/voucher an Affidavit of receipt of payment with full description of RPS holders' identity, address and amount received by them) and corresponding proof of debit from the Bank Account of the Company with an original document of proof of identity, address and signature issued by the State/Central Government to the RPS holders bearing their signature and a statement in Chartered Accountant's certificate to the effect that he has made the above said verification enclosing copies of verified documents

- d. Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Amares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha are directed to provide an up to date 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. Merlin and (on its behalf, Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha) are directed to provide an up to date 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.
- f. Merlin, Shri Pinku Majhi, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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. Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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. Merlin and, on its behalf the present director who joined subsequent to the issues (Shri Pinku Majhi) and, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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, Merlin and, on its behalf the present director who joined subsequent to the issues (Shri Pinku Majhi), Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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

Order in the matter of M/s Merlin Agri Projects India Ltd.



Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI") holding such certificate.

- j. In case of failure of Merlin, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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 87(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
- k. Merlin, Shri Pallab Das, Shri Subrata Pal, Shri Amiya Koley, Shri Diptiman Sarkar, Shri Raj Kumar Ghosh, Shri Mir Amirul Ali, Shri Sarat Bandapdhya, Shri Apares Misra, Shri Barindra Nath Koley, Shri Bablu Kumar Routh, Shri Argha Pan, Shri Tapas Mandal, Shri Madhu Sudan Sinha 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.
- l. Shri Amarnath Sadhukhan, Shri Amit Kumar Pal, Shri Pinku Majhi, Shri Touhid Alam 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.

88. In view of my findings recorded at paragraph 76, this order will take effect as final order against the said Shri Touhid Alam on the expiry of 90 days from the date of service of this order against him, unless he, within such period of 90 days from the date of service of this order provides proof in support of his submissions. If no proof is provided, the Interim order dated June 23, 2017 shall continue against him till the time of said ninety days period, after which this order will come into effect. If proof is filed by him, the Interim order dated June 23, 2017 shall continue qua him till disposal of the said objections qua him and the directions passed herein against Shri Touhid Alam shall be made applicable subject to the determination on the objections.
89. In respect of all other Noticees, (except for Shri Touhid Alam as stated in paragraph 88), the above directions at 87 (d), (e), (k) and (l) shall come into force with immediate effect.
90. Hon'ble Calcutta High Court has passed order dated August 12, 2016 in Writ Petition No. 22654 (W) of 2015-Akkas Ali & Ors Vs Union of India & Ors in respect of Merlin Agri Projects India Limited. Therefore, the effect and implementation of the aforesaid directions stated in paragraph 87 excluding 87(d),(e), (k), (l) shall be subject to the directions passed by the Hon'ble High Court in its Order dated August 12, 2016 or any further orders passed therein.
91. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories and registrar and transfer agents for information and necessary action.



92. 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.
93. A copy of this Order shall also be forwarded to the Local Police/State Government for information.

DATE: July 18th, 2018

PLACE: Mumbai



Madhabi Puri Buch

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA