

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 Zenith Highrise Infracon Limited

In re Deemed Public Issue Norms

In respect of:

S.No.	Name of the Entity	PAN	CIN/DIN
1.	Zenith Highrise Infracon Limited	AAACZ5643B	U45400WB2012PLC173631
2.	Kalyan Banerjee	ADXPB9527D	05189364
3.	Shipra Banerjee	AKKPB3858M	03061691
4.	Kuntal Banerjee	BCUPB1092G	06399077
5.	Namita De Pal	APVPP7716G	03550694

CASE FACTS

1. Zenith Highrise Infracon Limited (hereinafter referred to as “**Zenith**”/ “**the Company**”) is a Public company incorporated on February 07, 2012 and registered with Registrar of Companies–Kolkata (RoC) with CIN: U45400WB2012PLC173631. Its registered office is at Metro Plaza, 2nd Floor 4, H. L. Sarkar Road, Bansdhroni, Kolkata – 700070. However, vide letter dated March 9, 2017, the Company has informed SEBI that it has closed its earlier office and its new address is Nahurya Dharammatala Dakshin, Chandannagar, West Bengal – 712136.
2. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) received

complaints from three persons, namely Mr. Mohadeb Das, Mr. Joydeb Lohar and Ms. Suchitra Thandar, against Zenith in respect of issue of Redeemable Preference Shares (“RPS”) and undertook an enquiry to ascertain whether Zenith 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 Zenith had made an offer of RPS in the financial years 2012-2013 (hereinafter referred to as “**Offer of RPS**”) and raised an amount of Rs. 43,04,000 from 52 allottees. While the RoC records indicate allotment of preference shares in the financial year 2012-13 only to 49 persons, the list of allottees available on record, does not include the names of the three complainants referred to in paragraph 2 of this order, who allegedly have been issued preference shares. As per the certificates of Letter of Allotment submitted by the complainants, they have been allotted 1050 RPS in the financial year 2012-13. Therefore it appears there is a mismatch between the number of allottees as per RoC records and the complaints received by SEBI.
4. As the above said *Offer of RPS* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992 and the Companies Act, 1956. SEBI passed an interim order dated January 10, 2017 (hereinafter referred to as “**interim order**”) and issued directions mentioned therein against Zenith and its Directors and , viz. Kalyan Banerjee, Shipra Banerjee, Kuntal Banerjee and Namita De Pal (hereinafter collectively referred to as “**Noticees**”).
5. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded. As per RoC records, Zenith had made an *Offer of RPS* during the financial year 2012-2013 and raised at least an amount of Rs. 43,04,000 as shown below:

Year of Issue	Security Issued	Amount raised (Rs.)	Number of allottees
2012-2013	<i>RPS</i>	43,04,000	49

Total	43,04,000	49
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6. However, based on the complaints received by SEBI from three persons, there was a mismatch between the data as appearing in the RoC records, and the information provided by the complainants.
7. The above *Offer of RPS* and pursuant allotment were deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) read with section 27(2) of the SEBI Act were not complied with by Zenith in respect of the *Offer of RPS*.
8. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated January 10, 2017 with immediate effect.
 - i. “Zenith shall cease to mobilize fresh funds from investors through the offer and allotment of Preference Shares or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly;
 - ii. Zenith and the aforesaid Directors are prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, or associating themselves with any listed company or company intending to raise money from the public;
 - iii. Zenith and the aforementioned Directors shall not dispose of, alienate or encumber any of its/their assets or not divert any funds raised from public through the offer and allotment of preference shares; and
 - iv. Zenith and the aforementioned Directors shall co-operate with SEBI and shall furnish all information/documents in connection with the *offer and allotment of preference shares*.

9. The interim order also directed the Zenith and its abovementioned directors 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, including the following directions:
- i. Zenith and its above named directors, to jointly and severally refund money collected through the offer and allotment of preference shares, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment) within a period of 180 days from the date of receipt of this order, supported by a certificate of two independent Chartered Accountants to the satisfaction of SEBI; and
 - ii. Zenith and its above named directors be refrained / 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.
10. Vide the said interim order, Zenith and its abovementioned Directors were given the opportunity to file their replies, within 21 days from the date of receipt of the said interim order-cum-show cause notice. The Noticees were further directed to furnish an inventory of their assets in their reply. In the event the Noticees intended to avail an opportunity of personal hearing, they were given the opportunity to do so by seeking a confirmation in writing from SEBI for the same within 90 days from the date of receipt of this Order. The order further stated that in case the Noticees failed to file replies or to request for an opportunity of personal hearing within the aforesaid 90 days, then the directions as reproduced in paragraph 9 of this Order would become final and absolute against the said Noticees, without any further orders.
11. *Service of interim order:* The copy of the said interim order was sent to the Noticees vide letter dated January 11, 2017 which were delivered to Mr. Kalyan Banerjee, Ms. Shipra Banerjee, Mr. Kuntal Banerjee and Ms. Namita De Pal. Subsequently, vide notification

dated February 27, 2017 published in newspaper *Times of India*, the Noticees were notified by SEBI, that interim order dated January 10, 2017 was issued against them.

12. Vide letter dated March 9, 2017, the Company has *inter alia* made the following submissions:

- i. The RoC records stating 49 allottees are correct, and in the absence of any complaint letter and copy of the alleged certificates of letters of allotment of the three complainants as received by SEBI, the Company cannot accept the claims that RPS was allotted to more than 49 allottees. Moreover, the said complaints were entertained without examining the alleged certificates of letter of allotment.
- ii. Mr. Kalyan Banerjee was the person-in-charge for the daily affairs of the Company. Further, Ms. Namita De Pal joined the Co, as director on February 7, 2012 and stayed on for a very short time, and resigned on October 30, 2012. She did not participate in the daily management of the Company and therefore, cannot be deemed to be an officer in default.
- iii. The Company requested for a copy of the complaint letters received by SEBI along with the copies of the alleged RPS documents for verification with its books of accounts.

13. Vide reply dated July 13, 2017, SEBI had forwarded copy of the complaint letters and copy of the RPS documents at the alternate address of the Company. However, the same was returned undelivered. Vide letter dated October 19, 2017, the Company reiterated its request for the copies of the aforesaid documents. Vide reply dated October 26, 2017, SEBI once again forwarded the photocopies of the same to the same address as given in the communications from the Company to SEBI. The said letter along with the photocopies were delivered. Vide letters dated November 11, 2017 and April 4, 2018, the Company requested for an opportunity of personal hearing in the matter. Vide letter dated May 16, 2018, SEBI granted an opportunity of personal hearing to the Noticees on June 5, 2018 which were served by way of affixture at the premises of the last known addresses of Zenith, Mr. Kalyan Banerjee, Mr. Kuntal Banerjee and Ms. Shipra Banerjee. The

hearing notice could not affixed at the address of Ms. Namita De Pal, as available from Form 32 on MCA website, due to insufficient address.

14. *Hearing and submissions:* Mr. Ejaz Khan, Advocate, appeared as the authorized representative of Zenith and its directors, namely, Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee and made the following oral submissions:

- i. While preparing the list of allottees filed with RoC, due to clerical mistake, the names of the three complainants, i.e. Mr. Mohadeb Das, Mr. Joydeb Lohar and Ms. Suchitra Thandar, were missed out from the said list. It was further stated that in the said list of allottees there are multiple entries of 3 persons, i.e. the name of Mr. Krishnachandra Das appeared thrice, the name of Mr. Rajendra Prasad Boot appeared twice and the name of Mr. Srikanta Gorai appeared thrice. It was stated that the said duplications were due to clerical errors.
- ii. After removing the multiple entries and adding the names of the complainants, the total number of allottees to whom the preference shares were allotted are 47 which is below the threshold of 49. Thus the Noticees did not violate any provisions of the Companies Act, 1956 and the SEBI Act.

15. The Noticees were advised to submit documentary evidence to support their contentions and were granted time till July 5, 2018 to submit the same. I note that Ms. Namita De Pal did not appear for the personal hearing. Hearing was concluded as against all the Noticees.

16. Vide reply dated June 1, 2018, Mr. Kalyan Banerjee on behalf of the Company made *inter alia* the following submissions:

- i. In the financial year 2012-2013, the Company raised its capital by allotments of 43,040 RPS of Rs. 100 each through private placement, i.e. to friends and relatives of the members/directors contributing towards the capital. Since the allotments were made to friends and relatives of the members/directors, no written invitation or offer was ever issued by the Company.
- ii. The Auditor's Report dated July 17, 2013 states that the Company had not accepted

- any deposits from the public within the meaning of the Companies Act, 1956 and the rules made thereunder.
- iii. The list of allottees, filed with RoC, contained clerical mistakes made inadvertently. The names of Krishna Chandra Das appeared thrice, Mr. Rajendra Prasad Boot appeared twice and Mr. Srikanta Gorai appeared thrice.
 - iv. Mr. Krishna Chandra Das was actually issued 1500 nos. of RPS but it was wrongly shown as 2500. Therefore there was an excess entry with respect of 1000 RPS against the name of Mr. Krishna Chandra Das. Further, the name and details of Krishna Chandra Das was wrongly inserted instead of Mr. Mohadeb Das.
 - v. The names of the other two allottees, Mr. Joydeb Lohar and Ms. Suchitra Thandar were inadvertently missed out. Further, one of the allottees, Mr. Pradipta Das, was allotted 600 shares which was wrongly shown as 650 in the list of allottees.
 - vi. Therefore, after removing the repetitions and adding the names of the three complainants, the total number of allottees is 47.
17. Vide email dated July 13, 2018, Mr. Kalyan Banerjee on behalf of the Company has forwarded copies of two affidavits signed by Mr. Pradipta Das and Mr. Krishna Chandra Das, stating that they were allotted 600 shares and 1500 shares respectively, and that they did not have any objection towards any corrections or changes being made by the Company in the List of Allottees of Preference Shares for showing the correct information.
18. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.
- (1) Whether the company came out with the Offer of RPS as stated in the interim order.*
 - (2) If so, whether the said issues are in violation of Section 56, Section 60 and Section 73 of Companies Act 1956.*
 - (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.

19. I have perused the interim order dated January 10, 2017 for the allegation of *Offer of RPS*.
20. In the instant matter, I note that as per RoC records RPS were issued by Zenith to 49 investors in the financial years 2012-2013. However, Zenith vide its reply dated June 1, 2018, has submitted that due to repetition of certain names, and after inclusion of the names of Mr. Mohadeb Das, Mr. Joydeb Lohar and Ms. Suchitra Thandar, the total number of allottees is 47 and not 49. I note that Zenith has submitted vide emails dated July 13, 2018, copies of two affidavits from Mr. Pradipta Das and Mr. Krishna Chandra Das claiming that Zenith had allotted no more than 600 RPS and 1500 RPS, respectively to them. I further note that the three complainants, Mr. Mohadeb Bose, Mr. Joydeb Lohar and Ms. Suchitra Thandar, together held 1050 RPS. I also note that Zenith has submitted that details of Mr. Krishna Chandra Das were inadvertently included in the list of allottees in place of Mr. Mohadeb Das, and corresponding excess 1000 shares were shown against the name of Mr. Krishna Chandra Das, whereas in actual fact the 1000 RPS were allotted to Mr. Mohadeb Das. Similarly, 50 RPS which were wrongfully shown to have been allotted to Mr. Pradipta Das were actually allotted to Mr. Joydeb Lohar (20 RPS) and Ms. Suchitra Thandar (30 RPS). I note that the Company has failed to provide any other documentary proof apart from the copies of the affidavits, showing that in fact, Mr. Pradipta Das and Mr. Krishna Chandra Das were allotted 600 RPS and 1000 RPS respectively. For instance, copies of RPS certificates showing the claimed number of shares, bank account statements showing claimed value of investment flowing from Mr. Pradipta Das and Mr. Krishna Chandra Das to the Company's account, the initial letter of allotment, copy of payment receipts or copy of the amended letter of allotment with respect to Mr. Pradipta Das and Mr. Krishna Chandra Das. I am of the view that merely an affidavit claiming so cannot be considered as sufficient proof of the same, and taking that argument as the basis of reconciliation of the information of the list of allottees with the details of the three complainants seems to be an afterthought to avoid liability under the

respective legal provisions. Therefore, I am of the opinion that the submission of having committed errors at the time of filing the list of allottees with the RoC cannot be accepted to have been substantiated satisfactorily.

21. However, after giving due consideration to the repeated names in the list of allottees, I note that Zenith has issued and allotted RPS to 47 investors during the financial year 2012-2013 and raised an amount of Rs. 43,04,000 (excluding the money raised from the three complainants).
22. The same has been admitted by the Company vide its replies dated March 9, 2017 and June 1, 2018.
23. I therefore conclude that Zenith 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.

24. 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).”

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

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

directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

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

26. From the aforesaid it is clear that section 67(1) provides for what constitutes an offer made to the public, which has a non-obstante clause under section 67(3) of Companies Act, 1956 which provides for situations when an offer is not considered as offer to public. As per the said section 67(3) clause (a), 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*.

27. I note that the Company has submitted that the issuance of RPS was made in private placement and thus falls within the non-obstante clause of section 67(3)(a). However, I note that the Company has not provided any further proof to substantiate its claim. Instead, I note that in its submission dated June 1, 2018, it has claimed that since the allotments were made to friends and relatives of the members/directors, no written invitation or offer was ever issued by the Company. This in itself shows that the Company had made an *Offer of RPS* through word of mouth, which could not be said to have been calculated to be made only to its intended recipients. Further, even assuming that the said oral offer was made only to the persons other than the three complainants, the fact that the three complainants have been allotted RPS shows that the offer or invitation falls in the category of one which is 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. Further, the Company has not demonstrated any process to ensure that the offer and the subsequent allotments of RPS were made only to the intended recipients. Thus the present Offer of RPS falls outside the scope of the *non-obstante* clause of section 67(3)(a) of the Companies Act, 1956.

28. As per non-obstante clause of section 67(3) sub-clause (b), if the offer is one can be regarded as a domestic concern of the one making and receiving the offer of shares, it would not be considered a public offer under section 67(1). Reference may be made in this regard to the *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." The Company has not placed any other material for consideration to show that the offer was in satisfaction of section 67(3)(b) of the Companies Act, 1956, i.e. it was made to the known associated persons or domestic

concern. In fact on perusal of the letters received from the complainants, I note that the same reflects that the Company had closed all their branches and as a result the complainants could not understand the process to get refund of the amounts invested by them. If the Company had made allotments to friends and relatives as claimed by it, then the aforesaid complainants should not have had a problem in claiming refund from the Company. In view of the above, I find that the issuance of RPS by Zenith cannot be considered as private placement. The above findings lead to a reasonable conclusion that the *Offer of RPS* by Zenith can be construed to be a “public issue” within the meaning of the section 67(1) of the Companies Act, 1956.

29. I find that Zenith 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 Zenith is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
30. I further find that Zenith has mobilized an amount of Rs. 43,04,000 over the financial year 2012-2013. However, I find that the said amount is not inclusive of the amounts invested by the three complainants, Mr. Mohadeb Das, Mr. Joydeb Lohar and Ms. Suchitra Thandar. As per the complaints received by SEBI from the said complainants, Ms. Suchitra Thandar had invested an amount of Rs. 3000, Mr. Mohadeb Das and Mr. Joydeb Lohar had invested an amount of Rs. 50,000 each. Therefore, based on the above material I find that Zenith had mobilized Rs. 44,07,000. However, there may be more allottees who are not represented in the list of allottees and the amount mobilized can be higher.
31. Therefore, in view of the material available on record, I find that the *Offer of RPS* by Zenith falls within the provision of section 67(1) of Companies Act, 1956. Hence, the *Offer of RPS* are deemed to be public issues and Zenith was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.
32. 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.

33. The allegations of non-compliance of the above provisions were not denied by Zenith 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 Zenith has contravened the said provisions. Therefore, I find that section 73(2) of the Companies Act, 1956 has not been complied with.
34. 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, Zenith was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that Zenith 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 Zenith has not complied with the provisions of section 60 of the Companies Act, 1956.
35. 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 Zenith 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, Zenith has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

36. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case*, had observed that:

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

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

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

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

lawfulness...”

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

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

38. In view of the above findings, I am of the view that Zenith 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) 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?

39. From the documents available on record, I find that the present Directors in Zenith are Kalyan Banerjee and Shipra Banerjee. I also note that Mr. Kuntal Banerjee and Ms. Namita De Pal who were earlier Directors in Zenith, have since resigned. The details of the appointment and resignation of the directors are as following:

Name of the directors	Date of appointment	Date of cessation
Kalyan Banerjee	07/02/2012	Continuing
Shipra Banerjee	07/02/2012	Continuing
Kuntal Banerjee	30/10/2012	20/03/2018
Namita De Pal	07/02/2012	30/10/2012

40. Vide letter dated June 1, 2018, the Company has submitted that Ms. Namita De Pal was appointed a director on February 7, 2012 and resigned on October 30, 2012. It was also submitted that she did not participate in the daily management of the Company as Mr.

Kalyan Banerjee was in charge of the same. On account of her brief tenure as director, it was submitted that Ms. Namita De Pal be absolved of any liability under the present proceedings. From the documents available from MCA21 website, I find that the date of allotment of RPS was March 28, 2013, whereas Ms. Namita De Pal had resigned from her directorship on October 30, 2012. However, I find that on May 30, 2012, the Company had passed a Board Resolution discussing the issue of raising preference share capital of Rs. 45,00,000. I find that Ms. Namita De Pal was a director responsible for the affairs of Zenith at the time of the passing of the Board Resolution. Therefore, I find that Ms. Namita De Pal cannot be completely absolved of the entire liability in the present proceedings.

41. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, Zenith and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.
42. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.
43. From the material available on record and the details of the appointment and resignation

of the directors of Zenith as reproduced in paragraph 39 of this Order, it is noted that Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee 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 Zenith 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 Zenith, 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 Zenith and its past and present Directors, viz. Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

44. I note that during the financial years 2012-2013, Zenith through Offer of RPS, had collected an amount of Rs. 43,04,000 from various allottees. I note that Mr. Kalyan Banerjee and Ms. Shipra Banerjee have been directors of Zenith since financial years 2012-2013 till present date. I note that Mr. Kuntal Banerjee has been director of Zenith since financial years 2012-2013 till 2017-2018. 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 Zenith and other directors are limited to the extent of amount

collected during his/her tenure as director of Zenith.

45. 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 Zenith and its past and present Directors, viz. Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee to refund the monies collected, with interest to such investors. Further, in view of the violations committed by the Company and its Directors, to safeguard the interest of the investors who had subscribed to such RPS issued by the Company, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and Mr. Kalyan Banerjee, Ms. Shipra Banerjee, Mr. Kuntal Banerjee.
46. Further, I am of the opinion that in view of the violations committed by the Company for which Ms. Namita De Pal was liable till her period of directorship from February 7, 2012 to October 30, 2012, it becomes necessary for SEBI to issue appropriate directions against Ms. Namita De Pal.
47. I also note that, vide the interim order dated January 10, 2017, Zenith was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors of Zenith were also directed to provide an inventory of assets and properties belonging to them. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that no such inventory has been provided either by Zenith or the other Noticees, even though vide letter dated March 9, 2017, the Company has stated that it had attached the list of assets of Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee.
48. In view of the discussion above, appropriate action in accordance with law needs to be initiated against Zenith and its Directors, viz. Mr. Kalyan Banerjee, Ms. Shipra Banerjee, Mr. Kuntal Banerjee and Ms. Namita De Pal.
49. I note that Mr. Narayan Chandra Das (DIN: 08000661) was appointed as a director of

Zenith on March 20, 2018, i.e. after the passing of the interim order dated January 10, 2017 with respect to Zenith and its present directors extant as on said date. Since, the issuance of RPS occurred before the appointment of Mr. Narayan Chandra Das as a director, he is not liable for the refund of the proceeds of the RPS. However, as a director of the Company, I find that Mr. Narayan Chandra Das is liable to ensure refund to the investors. In view of this appropriate direction in accordance with law needs to be passed against Mr. Narayan Chandra Das.

ORDER

50. 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. Zenith, Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee 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. Zenith, Mr. Kalyan Banerjee and Ms. Shipra Banerjee are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company and their own.
- d. Mr. Kuntal Banerjee, in his personal capacity, is directed to provide a full inventory of all his 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.
- e. Zenith, Mr. Kalyan Banerjee and Ms. Shipra Banerjee 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.

- f. Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee 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.
- g. Zenith and Mr. Kalyan Banerjee (on behalf of the Company as well as in personal capacity to make refund), Ms. Shipra Banerjee (on behalf of the Company as well as in personal capacity to make refund) and Mr. Kuntal Banerjee (in his personal capacity to make refund), and Mr. Narayan Chandra Das in the capacity as a present director and on behalf of Zenith, 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.
- h. After completing the aforesaid repayments, Zenith, Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee, in their personal capacity, and Mr. Narayan Chandra Das, in his capacity as the present director, on behalf of Zenith, shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("**ICAI**") holding such certificate.

- i. In case of failure of Zenith, Mr. Kalyan Banerjee, Ms. Shipra Banerjee and Mr. Kuntal Banerjee, 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 50(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
- j. Zenith, Mr. Kalyan Banerjee, Ms. Shipra Banerjee, and Mr. Kuntal Banerjee 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.
- k. Ms. Namita De Pal and Mr. Narayan Chandra Das 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, till the expiry of 4 (four) years from the date of this Order. The above said entities 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 till the expiry of 4 (four) years from the date of this Order.
- l. The above directions will take effect as final order against Mr. Narayan Chandra Das on the expiry of 30 days from the date of service of this order, unless Mr. Narayan

Chandra Das, within such period of 30 days, files his objections. If objections are filed, the following directions shall be applicable against Mr. Narayan Chandra Das, till the time of disposal of the said objections, after which this Order shall come into effect:

- i. Mr. Narayan Chandra Das is prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly,
 - ii. Mr. Narayan Chandra Das is restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly,
 - iii. Mr. Narayan Chandra Das shall not divert any funds raised from the public at large through preference shares issue which are kept in bank account(s) and/or in the custody of Zenith.
- m. The above directions with respect to Zenith, Mr. Kalyan Banerjee, Ms. Shipra Banerjee, Mr. Kuntal Banerjee, and Ms. Namita De Pal shall come into force with immediate effect.
51. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories and registrar and transfer agents for information and necessary action.
52. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs/ concerned Registrar of Companies, for their information and necessary action with respect to the directions/ restraint imposed above against the Company and the individuals.

DATE: July 27, 2018

PLACE: Mumbai

**MADHABI PURI BUCH
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**