

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 Dreamway Industries Ltd.

In re Deemed Public Issue Norms

In respect of:

S.No.	Name of the Entity	PAN	DIN
1.	Nirupam Santra	CGCPS8873D	3120359
2.	Rupam Santra	CUXPS6610M	3211869
3.	Malay Mallick	ANTPM5722B	3120398
4.	Soumen Manna	AKAPM7425R	3588132
5.	Dipudas Ghosh	AKAPG2593G	3588110

Background

1. Dreamway Industries Ltd. (hereinafter referred to as “**DIL**”/ “**company**”) is a Public Limited Company incorporated on October 21, 2010 and its registered office is at Bagnan, Khadinan Library More, Bagnan, Pin - 711303, West Bengal. The total issued capital of the company as on March 31, 2012 was as follows:
 - i. Equity Shares: 50,000 Shares at ₹ 10/- each
 - ii. Preference Shares: 6,99,900 Shares at ₹ 10/- each
2. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) received a complaint whereby the complainant had *inter alia* requested SEBI to investigate fund mobilization from the public by DIL and to take necessary measures for refund

of money invested by the complainant in the debenture issued by the company.

3. SEBI initiated an enquiry to ascertain whether DIL had made any public issue of securities without complying with the provisions of the Companies Act, 1956, (hereinafter referred to as “**Companies Act**”) Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act**”) and the Rules and Regulations framed thereunder.
4. On an enquiry by SEBI, it was observed that DIL had made an offer of Redeemable Preference Shares (hereinafter referred to as “**RPS**”) in the financial year 2010-2011 (hereinafter referred to as “**Offer of RPS**”) and raised at least an amount of ₹ 69,99,000/- from at least 468 allottees.
5. As the above said *Offer of RPS* was found *prima facie* in violation of respective provisions of the SEBI Act and the Companies Act, SEBI passed an interim order – cum-show cause notice dated September 8, 2017 (hereinafter referred to as “**interim order**”) and issued directions mentioned therein against DIL and its Promoters / Directors, viz. Shri Nirupam Santra, Shri Rupam Santra, Shri Purnendu Santra, Shri Malay Mallick, Shri Soumen Manna, Shri Naba Kumar Santra, Shri Dipudas Ghosh, Shri Bhaskar Ganguly, Shri Prodyumna Kumar Ghosh, Shri Subrata Manna and Shri Subrata Kumar Banerjee.
6. **Prima facie findings/allegations:** In the said interim order, the following *prima facie* findings were recorded. DIL had made an *Offer of RPS* during the financial year 2008-2010-2011 and raised at least an amount of ₹ 69,99,000/- as shown below:

Financial Year	Date of Allotment of Shares	Security Issued	No. of Allotees	No. of Shares Allotted	Amount raised (₹)
2010-2011	31/3/2011	RPS	468	6,99,900	69,99,000/-
Total			468	6,99,900	69,99,000/*-

* No. of allottees and funds mobilized has been collated from the documents obtained from the 'MCA 21 Portal (Form-2 filed by the company with RoC and the list of allottees attached

thereto). However, actual no. of allottees and amount mobilized could be more than the above indicated figures.

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. Accordingly, the resultant requirement under Section 60 read with Section 2(36), Section 56, Section 62, Sections 73(1) and 73(2) of the Companies Act were not complied with by DIL and its Directors / Promoters 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 with immediate effect.
 - *DIL and its above named Promoters / Directors, viz. Shri Nirupam Santra, Shri Rupam Santra, Shri Purnendu Santra, Shri Malay Mallick, Shri Soumen Manna, Shri Naba Kumar Santra, Shri Dipudas Ghosh, Shri Bhaskar Ganguly, Shri Prodyumna Kumar Ghosh, Shri Subrata Manna and Shri Subrata Kumar Banerjee, shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly or indirectly, or associate themselves with any listed company or company intending to raise money from the public;*
 - *DIL and the above named Promoters / Directors 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;*
 - *DIL and the above named Promoter / Directors 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 October 22, 2015.*
9. Vide the said interim order, DIL and the above named Promoters / Directors were called upon to show cause as to why suitable directions/prohibitions under Sections 11, 11(4), and 11B of the SEBI Act should not be issued/imposed, including the following directions, namely:-

- *That the Noticees shall jointly and severally refund the 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), 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*
- *That the Noticees shall be restrained / prohibited from accessing the securities market and buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of four years from the date of effecting the refund as directed above.*

10. DIL, its abovementioned Directors/ Promoters were given the opportunity to file their replies, if any, within 21 days from the date of receipt of the said interim order. The Noticees were directed to furnish an inventory of their assets in their reply. The order further stated in the event the Noticees intend to avail an opportunity of personal hearing, they may do so by seeking a confirmation in writing from SEBI for the same within 90 days from the date of receipt of the interim order. In the event of the Noticees failing to file replies or requesting for an opportunity of personal hearing within the said 90 days, the preliminary findings at paragraphs 9, 11 and 12 of the interim order and directions at paragraphs 16 (i) and (ii) in the interim order shall become final and absolute against the Noticees automatically, without any further orders. The Noticees were to comply with the directions at paragraph 16(i) of the interim order within a period of 90 days from the date of the interim order becoming final. Upon the expiry of the period of 90 days from the date of the interim order becoming final, if the Noticees were to fail to comply with the directions at paragraph 16 of the interim order, the interim order stated that SEBI may initiate appropriate enforcement action under SEBI Act including Recovery, Adjudication or Prosecution in addition to making a suitable reference to State Government / Local Police.

11. *Service of interim order*: The copy of the said interim order was sent to the Noticees vide letter dated September 8, 2017. The interim order was served on all the Noticees except, DIL, Shri Bhaskar Ganguly, Shri Soumen Manna. Since, the interim order could not be served on the aforesaid 3 Noticees, the same was published in newspapers, Anand Bazar Patrika, Sanmarg and Times of India on December 27, 2017.

Reply and Hearing

12. In response to the interim order, the Promoters / Directors of the company submitted their replies vide separate letters, The content of the same are summarised below:

- a. Shri Nirupam Santra vide his letters dated October 9, 2017 and November 6, 2017 replied to the *interim* order as follows:
 - Shri Anupam Santra and Shri Bhaskar Ganguly were the Promoters of the company. At the relevant time, Shri Anupam Santra was with Kolkata Police and he had taken all steps to incorporate DIL (November 12, 2010) and its sister concerns (10 in nos.). He is deceased now.
 - Shri Anupam Santra was his brother. He had signed certain documents in good faith and sometimes he had signed blank papers. His signature has been misutilised and he was made the Director of the company without his knowledge. He is an unemployed youth.
 - He tendered his resignation once he became aware of his directorship in the company. But unfortunately, the officials of the company at the instance of Shri Anupam Santra did not file requisite forms with RoC.
 - The company had refunded some amount to depositors in the financial year 2012-2013 and had stopped all of its activities.
- b. Shri Dipudas Ghosh vide his letters dated October 9, 2017 and November 22, 2017 replied as follows:

- He was the neighbor of Shri Anupam Santra. He had signed certain documents in good faith. His signature has been misutilised and he was made the Director of the company without his knowledge. His signature was forged by Shri Anupam Santra in order to make wrongful gain.
 - He tendered his resignation once he became aware of his directorship in the company. But unfortunately, the officials of the company at the instance of Shri Anupam Santra did not file requisite forms with RoC.
 - He submitted a copy of complaints made to Inspector-in-charge, Bagan Police Station and to Superintendent of Police, Howrah Rural.
- c. Shri Malay Mallick replied to the *interim* order vide his letter dated December 7, 2017 wherein he has submitted as under:
- He was inducted as a Promoter – Director of DIL with effect from October 21, 2010.
 - He has no knowledge regarding finance, accounts and company affairs. He was utilised by the Board of Directors for liaising with people interested in association with the company.
 - Shri Nirupam Santra, Chairman along with his family- Directors was managing the financial portfolio of the company.
 - He was removed from the company on December 1, 2011. Form-32 is annexed with the reply.
 - He had tried to persuade the Chairman and his close associates to not to restore to unfair practices but in vain. They were advised to comply with the requirements as laid down under company law and SEBI formalities but he was not given any access to the office nor any information was shared with him.
- d. Shri Soumen Manna vide his letter dated November 14, 2017 replied as follows:
- He came to know about the order through one of his friend, Shri Dipudas Ghosh who used to work with him in the company as peon.

- When he was unemployed, he had given his bio-data to many of his friends, relatives and acquaintances with the hope that somebody may help him get a job. The said data has been misused by somebody.
 - He has never worked in the capacity of a Director of the company. He has also never signed any document in the capacity of a Director of the company. No communication was made to him with respect to him being appointed as a Director of the company.
 - He has filed a complaint with the local Police Station, Sarsuna for possible forgery and misuse of his documents.
- e. Shri Rupam Santra vide his letter dated November 6, 2017 made similar submissions as made by Shri Nirupam Santra.
13. Before proceeding further in the matter, an opportunity of personal hearing was granted to Shri Nirupam Santra, Shri Dipudas Ghosh, Shri Malay Mallick, Shri Soumen Manna and Shri Rupam Santra (hereinafter collectively referred to as “**Noticees**”) on April 18, 2018 vide hearing notice dated April 2, 2018.
14. On the scheduled date of hearing, Shri Malay Mallick along with his authorized representative, Shri Amiya Ranjan Nanhaku, attended the hearing. Shri Malay Mallick submitted that he has no connection with the company now. The matter pertains to an old time period. He had known Shri Anupam Santra and had joined the company for doing some other business. He further stated that he thought that the company should not be taking money from the market, therefore asked to be removed and was ultimately removed from the company on December 1, 2011. He did not have the understanding of responsibilities and formalities of directorship.
15. At the time of hearing, Shri Soumen Manna submitted that he doesn't stay at the address where SEBI sent the notice and found about the proceedings from Shri Dipudas Ghosh. He further submitted that he worked in the company with Shri Anupam Santra as Security Guard, during which time he was asked for IDs and after he gave these documents, the same have been misutilised. He submitted that he got

to know about the directorship after receiving SEBI notice and that he did not sign any papers and did not know about money mobilization also. He also stated that Shri Anupam Santra was known to him, therefore he was advised to produce Shri Anupam Santra's death certificate. Shri Soumen Manna submitted some documents pertaining to the present company where he is working.

16. Shri Tarapada Santra, father of Shri Rupam Santra and Shri Nirupam Santra appeared as their authorized representative. He submitted that his sons stay in a different city, hence asked him to represent them for the hearing. He submitted that his sons had no idea what his eldest son, Shri Anupam Santra was doing and that the age of sons, Shri Rupam Santra and Shri Nirupam Santra now are 22 and 25 years. Since he did not have the authorisation from them, he was advised to send the authorisation in his favour from his sons. He was also advised to submit proof regarding his sons' age and to produce death certificate of Shri Anupam Santra. It was also informed to him that the copy of complaint as requested by them will be sent to them by post.
17. Shri Dipudas Ghosh appeared for the hearing and submitted that he had a shop and since he could not maintain his family with that money, he asked for a job from Shri Anupam Santra who asked for his IDs and Shri Dipudas Ghosh gave his documents and was working as office boy. He submitted that he did not know that he was a Director till receipt of letter from RoC, and after receiving letter from RoC, he visited and submitted to RoC that he did not sign these documents and asked police to file diary complaint but the police did not file. He also showed the consent letter which he did not sign and stated that he will be giving the letters he wrote to the police and has proof of dispatch thereof but no acknowledgment from the police though he physically confirmed from police. He submitted that when he joined he was paid ₹ 5,000/- for doing office boy job and he gave his resignation letter to Shri Anupam who refused to take it and then he quit the job. He requested for fair investigation into the matter. He has documents to show his signature specimen (copy of PAN card

dated 2010) and savings bank A/c opened in 2010. He was advised to produce a signature certificate from the bank.

18. Post hearing, Shri Tarapada Santra, father of Shri Rupam Santra and Shri Nirupam Santra, submitted letters from Shri Rupam Santra and Shri Nirupam Santra dated April 24, 2018 authorising him to appear on their behalf along with a copy of death certificate of Shri Anupam Santra.

19. Subsequent to the hearing, Shri Dipudas Ghosh vide his letter dated September 13, 2018 submitted as follows:

- He submitted a copy of his Union Bank pass book having his signature along with copy of application before BDO Amta-II having his signature.
- He tendered his resignation before Shri Anupam Santra but taking advantage of his innocence and simplicity, he did not give him any acknowledgment of the receipt thereof.

20. Shri Soumen Manna also made additional submissions, post hearing and the same is as follows:

- He submitted attested copies of his driving licence, marriage certificate and PAN card.
- He submitted a copy of his complaint to the Officer-in-charge of Sarsuna Police Station and stated that the police, initially refused to acknowledge his complaint so he had sent it through post. He does not have any proof of delivery of the communication.

21. Shri Rupam Santra and Shri Nirupam Santra vide their letters dated September 28, 2018 submitted that they do not have any proof of tendering resignation as no receipt was given to them by the company.

Findings and Consideration

22. I have perused the interim order-cum-show cause notice, written and oral submissions and other materials available on record. On perusal of the same, the

following issues arise for consideration.

- i. *Whether the company came out with the Offer of RPS as stated in the interim order?*
- ii. *If so, whether the said issue is in violation of Section 56, Section 60, Section 62 and Section 73 of the Companies Act?*
- iii. *If the findings on issue No. 2 are found in the affirmative, whether Noticees are liable for the violations committed?*

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

23. I have perused the interim order dated September 8, 2017 for the allegation of Offer of RPS. I note from the replies and oral submissions of the Noticees that the issuance of 6,99,900 RPS of value ₹ 69,99,000/- to 468 allottees by the company is not in dispute.

24. I have also perused the documents/ information obtained from the 'MCA 21 Portal' and other documents available on records. It is noted, from information obtained from the 'MCA 21 Portal' based on Form-2 in the matter that DIL that the company has issued and allotted RPS to at least 468 investors during the financial year 2010-2011 (date of allotment- March 31, 2011) and has raised at least an amount of ₹ 69,99,000/-. In view of the receipt of the complaint by SEBI and non-cooperation by the company and its Directors in determining the number of investors to whom the RPS was issued by DIL, it is concluded that the actual number of allottees and amount mobilized could be more than ₹ 69,99,000/-.

25. I therefore conclude that DIL 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, Section 62 and Section 73 of the Companies Act?*

26. 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 a 'public issue'. At this juncture, reference may be made to Sections 67(1) and 67(3) of the Companies Act:

"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)."

27. 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, 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.”

28. Section 67(3) of Companies Act 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, 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 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

29. In the instant matter, I find that RPS were issued by DIL to at least 468 investors in the financial year 2010-2011 raising at least an amount of ₹ 69,99,000/-. In view of receipt of complaint by SEBI and non-cooperation by the company and its Directors in determining the number of investors to whom the RPS was issued by DIL, the actual number of investors of the company could be more than 468. I find that DIL has mobilized at least an amount of ₹ 69,99,000/- during the financial year 2010-2011 which is not a conclusive value as it is based on the information obtained from the 'MCA 21 Portal'. The above findings lead to a reasonable conclusion that the *Offer of RPS* by DIL was a “public issue” within the meaning of the first proviso to Section 67(3) of the Companies Act.

30. I note that that as per the first proviso to Section 67(3) (inserted by the Companies (Amendment) Act, 2000 w.e.f. 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". Also, reliance is placed on the observations made by the Hon'ble Supreme Court of India in Sahara Case wherein the Hon'ble Supreme Court observed: "101. Section 81(1A), it may be noted, is only an exception to the said rule, that the further shares may be offered to any persons subject to passing a special resolution by the company in their general meeting. Section 81(1A) cannot, in any view, have an overriding effect on the provisions relating to public issue. Even if armed with a special resolution for any further issue of capital to person other than shareholders, it can only be subjected to the provisions of Section 67 of the Company Act, that is if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. A public issue of securities will not become a preferential allotment on description of label. Proviso to Section 67(3) does not make any distinction between listed and unlisted public companies or between preferential or ordinary allotment."

31. Even for a moment, if 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."*
32. In respect of the issuance of RPS, the Directors and the Company 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 extant issuance cannot be considered as a private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble SAT 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”.

33. Since, DIL has allotted RPS to more than forty nine allottees, I find that the *Offer of RPS* by DIL is a “public issue” within the meaning of the first proviso to Section 67(3) of the Companies Act.
34. I find that the Promoters / Directors of DIL or the company have not claimed DIL 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 same, I, therefore, find that there is no case that DIL is covered under the second proviso to Section 67(3) of the Companies Act.
35. Therefore, in view of the material available on record, I find that the *Offer of RPS* by DIL falls within the first proviso of Section 67(3) of Companies Act. Hence, the *Offer of RPS* are deemed to be public issues and DIL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act.
36. 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. As per Sections 73(1) and (2) of the Companies Act, 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.
37. I find that no records have been submitted to indicate that the company has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Moreover, the allegations of non-compliance of the above provisions are not denied by the Promoters / Directors of the company. Therefore, I find that DIL has contravened the provisions of Sections 73(1) and (2) of the Companies Act.

38. Section 2(36) read with Section 60 of the Companies Act 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, DIL was required to register a prospectus with the RoC under Section 60 of the Companies Act. I find that DIL 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 DIL has not complied with the provisions of Section 60 of the Companies Act.
39. In view of the aforesaid finding that DIL has failed to register the prospectus and absence of any material to indicate that the company had issued prospectus to solicit money from the public, it cannot be held that company's Promoters / Directors have violated Section 62 of the Companies Act which deals with "Civil liability for mis-statements in prospectus".
40. In terms of Section 56(1) of the Companies Act, 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, 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 DIL 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 or issued application forms accompanying the abridged prospectus. Therefore, I find that, DIL has not complied with Sections 56(1) and 56(3) of the Companies Act.
41. I note that the jurisdiction of SEBI over various provisions of the Companies Act 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. While examining the scope of Section 55A of the Companies Act, 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".

42. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, SEBI has to administer Section 67 of the Companies 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...”

43. In view of the above findings, I am of the view that DIL engaged in fund mobilizing activity from the public, through the offer of RPS and has contravened the provisions of Sections 56(1), 56(3), 2(36) read with 60, 73(1) and 73(2) of the Companies Act during the financial year 2010-2011.

Issue No. 3- *If the findings on issue No. 2 are found in the affirmative, whether Noticees are liable for the violations committed?*

44. I note from the MCA records, the following details of the appointment and resignation of the Directors:

Sl. No.	Name of the Director	Date of appointment	Date of cessation
1	Nirupam Santra	21/10/2010	Continuing
2	Rupam Santra	21/10/2010	2/4/2012
3	Malay Mallick	21/10/2010	1/12/2011
4	Soumen Manna	1/11/2011	1/12/2011
5	Dipudas Ghosh	2/4/2012	Continuing

45. Shri Nirupam Santra and Shri Rupam Santra have stated that they have signed certain documents including blank papers in good faith and their signature has been misutilised by their elder brother, Shri Anupam Santra. In this regard, it is noted that the Noticees knowingly signed documents without reading them including blank papers. Thus, Noticees of their own volition had opened themselves up for liability arising out of their actions and at this stage they cannot be allowed to escape the consequences of their action by merely stating that they had faith in their elder

brother. Noticees have submitted that once it came to their notice that they were the Director of the company, they had tendered their resignation but the same was not filed by the company. However, Noticees have not submitted any particulars as to when and how they came to know about their directorship, what steps they had taken to remove their name from the records of the company viz., correspondence with the company, RoC or filing complaint with the relevant authorities. In light of the same, the submission of the Noticees is not acceptable.

46. Shri Malay Mallick has admitted that he was Promoter-Director of the company but has submitted that he had no knowledge regarding finance, accounts and company affairs. He used to liaison with people who were interested in associating with the company. Here, I would like to rely on Hon'ble SAT Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI* wherein Hon'ble Securities Appellate Tribunal has observed that-

"... the fact that the appellant was not involved in the day to day affairs of BREDL would not absolve the appellant from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956."

47. Based on the Compliance Certificate given by Ms. Neha Kapadia, Practising Company Secretary, it is noted that no Managing Director was appointed during the financial year 2010-2011. However, there is no material to indicate that there was a Managing director during the period of issuance. Thus, in light of the aforesaid order and in the absence of Managing Director in the company during the relevant period, all the Directors of the company are liable and therefore, the submission of the Noticee that he was merely liaising with people who were interested in associating with the company is not acceptable. 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 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. Any Director 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. No Director therefore can state that he was in-charge of a specific role and was not involved in day to day affairs of the company. In view of the same, the argument advanced by the aforesaid Noticee is devoid of any merit.

48. Shri Malay Mallick has submitted that he was aware that the company was not following the relevant rules as laid down under Companies Act and he advised the company to comply with it. The Noticee has not submitted any supporting documents to show that what steps were taken by him to ensure that the company follows the relevant rules and regulations. Mere bald statement of the Noticee is not acceptable. Being the Promoter- Director of the company, it was his responsibility to ensure that the company is functioning as per the extant law. However, the said responsibility was abdicated by the Noticee.

49. Shri Dipudas Ghosh has submitted that he had signed certain documents in good faith and his signature has been misutilised. He has further submitted that his signature has been forged. It is noted from the submission of the Noticee that he is contradicting himself. On one hand he is stating that he signed documents in good faith and then he is claiming that his signature was forged. In view of the same, the submission of the Noticee is not acceptable. As per MCA records, the Noticee is shown as the Director of the company. Apart from submitting an unacknowledged copy of police complaint, Noticee has not submitted any supporting documents to show that he has taken steps to remove his name from the records of the company viz., status of police complaint, if made, correspondence with the company and RoC etc. Thus, the submission of the Noticee is untenable. However, Shri Dipudas Ghosh has claimed that his signature was forged. In light of the same, the burden of proof is on him to prove that his signature was forged and he was made the Director of the company without his knowledge. The said principle has also been recognised by various Courts in catena of cases. In this regard, I note the following observations

of the Hon'ble Securities Appellate Tribunal in the matter of *Kalidas Dutta vs. SEBI* decided on January 23, 2018:

"...we are of the considered opinion that this appeal can be disposed of with a direction to the appellant to obtain appropriate documents/orders from the competent authority to the effect that he was fraudulently appointed as director of the company in question on 10th February, 2015. For this purpose, the appellant is granted time up to one year to do the needful and submit the same to SEBI. In the eventuality of appellant producing the documents to the satisfaction of SEBI that he was fraudulently inducted as one of the directors of the company, SEBI will pass appropriate orders as per law."

50. Therefore, I am of the considered view that Shri Dipudas Ghosh may be granted 365 days' time to obtain appropriate order from the competent authority with respect to his allegation of forgery. The said order, if any, shall reach SEBI within 365 days from the date of this order. Till that time the directions against Shri Dipudas Ghosh passed in this order shall not take effect. Pending such determination, I am compelled to accept the MCA records in respect of his tenure.
51. From the documents available on record, the details of the appointment and resignation of the Noticees as Directors based on MCA records, I find that Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick were both Promoters and Directors of DIL when the company had issued RPS i.e., during the financial year 2010-2011. Shri Soumen Manna and Shri Dipudas Ghosh became the Directors of DIL, subsequent to the issuance of RPS. As per records, Shri Soumen Manna has ceased to be the Director of the company within one month of joining the company while Shri Dipudas Ghosh is still the Director of the company.
52. Sections 56(1) and 56(3) read with Section 56(4) of the Companies Act 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 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, Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick are held liable for the violation of Sections 56(1), 56(3) and 60 of the Companies Act.

53. As far as the liability for non-compliance of Section 73 of Companies Act 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, 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%.

54. From the material available on record and the details of the appointment and resignation of the Directors of DIL as reproduced in table above, it is noted that Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick were the Directors at the time of the issuance of RPS. Hon'ble Securities Appellate Tribunal in the matter of *Pritha Bag vs. SEBI* decided on February 14, 2019 had observed as follows:

"Unless and until a finding is given that the appellant is an officer in default, the mandate provided under Section 73(2) cannot be invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing director, namely, Mr. Indranath Daw and, therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could not be made responsible for refunding the amount under Section 73(2)."

55. In the present case, no material has been brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act or any specified Director of DIL was entrusted to discharge the obligation contained in Section 73 of the Companies Act. Therefore, as per Section 5(g) of the Companies Act all the Directors of DIL at the time of the issuance of RPS, are officers in default and 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 for the non-compliance of the above mentioned provisions. Since, the liability of the company to repay under Section 73(2) of the Companies Act 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 Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick 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.
56. I note that during the financial year 2010-2011, DIL through Offer of RPS, had collected at least an amount of ₹ 69,99,000/- from various allottees. I note that Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick were Directors at the relevant time. Therefore, in view of Hon'ble SAT Order dated July 14, 2017 in the matter of *Manoj Agarwal Vs. SEBI*, I am of the view that the obligation of the aforesaid Directors to refund the amount with interest jointly and severally with DIL and other Directors is to the extent of amount collected during his tenure as Director of DIL which in the instant matter is the full amount.
57. Further, I note that, Shri Soumen Manna was appointed as Director of the company on November 1, 2011 i.e. after the period of issuance of RPS. Further, Shri Soumen Manna had resigned from the company as the Director on December 1, 2011.

Considering Shri Soumen Manna was with the company only for a short period of time, a lenient view is taken in respect of his failure to ensure refund during the short period.

58. Shri Dipudas Ghosh was appointed as a Director of DIL on April 2, 2012 i.e. after the period of issuance of RPS and is still continuing as a Director of DIL. Therefore, following the reasoning as provided in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that Shri Dipudas Ghosh is not liable for refund of money jointly and severally with DIL and other Directors as he was not the Director during the relevant time of fund mobilization. However, I note that the company has a continuing liability to refund the money collected from the public through issuance of RPS pursuant to its failure to comply with public issue norms for said issuance. The fact that Shri Dipudas Ghosh is the present and continuing director of DIL, I find that Shri Dipudas Ghosh is responsible to ensure that DIL makes refund of money to the allottees 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. "

59. In light of the aforesaid order, I note that Shri Dipudas Ghosh is responsible for all the deeds/acts of the company during the period of his 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. In view of the failure to discharge the said liability of ensuring refund, Shri Dipudas Ghosh is liable to be debarred for an appropriate period of time.

60. 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, is to direct Directors of DIL, viz. Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick 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, in order 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 other Noticees.
61. In view of the discussion above, appropriate action in accordance with law needs to be initiated against Noticees, viz. Shri Nirupam Santra, Shri Rupam Santra, Shri Malay Mallick and Shri Dipudas Ghosh.
62. 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 hereby dispose of the interim order dated September 8, 2017 served on Shri Soumen Manna. Further 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. Shri Nirupam Santra, Shri Rupam Santra, Shri Malay Mallick, jointly and severally 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. Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick are directed to provide an updated 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.
- d. Shri Nirupam Santra and Shri Dipudas Ghosh are directed to provide an updated 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.
- e. Shri Nirupam Santra and Shri Dipudas Ghosh 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. Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick are permitted to sell their assets 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 Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick, all in their personal capacity and Shri Dipudas Ghosh who joined subsequent to the issue and is still continuing as a Director, on behalf of the company, 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, Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick in their personal capacity and Shri Dipudas Ghosh who joined subsequent to the issue and is still continuing as a Director, on behalf of the company, 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 holding such certificate.
- i. In case of failure of Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick 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, in accordance with Section 28A of the SEBI Act including such other provisions contained in securities laws.
- j. Shri Nirupam Santra, Shri Rupam Santra and Shri Malay Mallick 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. Shri Dipudas Ghosh is 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 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 for a period of 4 (four) years from the date of this order.
- l. The directions issued against Shri Soumen Manna vide interim order dated September 08, 2017 shall cease to have effect from the date of this order.
- m. Needless to say, in view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of the Noticees shall remain frozen.
63. This order will come into effect with respect to Shri Dipudas Ghosh on the expiry of three hundred and sixty fifth (365) day of this order, if the order of the Competent Authority is not produced by Shri Dipudas Ghosh within such 365 days, or, if produced within such period, the same is not in favour of Shri Dipudas Ghosh. This direction shall not take effect, if the order of the Competent Authority is produced within such period and the same is in favour of Shri Dipudas Ghosh. For the rest of the Noticees, the directions shall come into force with immediate effect.
64. This order is without prejudice to any action that SEBI may initiate under securities laws, as deemed appropriate in respect of the above violations committed by DIL and its Directors and other key persons.
65. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories and registrar and transfer agents for information and necessary action.
66. 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.

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

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DATE: April 16, 2019

PLACE: Mumbai

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA