

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: PRASHANT SARAN, WHOLE TIME MEMBER.**

ORDER

Under sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of Mondal Construction Company Limited (PAN:AAECM1125F) and its Directors, viz. Shri Samarjit Mondal (DIN - 00320539; PAN: AEOPM6302D), Shri Swapan Kumar Mondal (DIN - 00320633; PAN:AEDPM6336A), Shri Sachi Dulal Mondal (DIN-03501833; PAN: AVSPM3542L), Shri Sanjiv Jain (DIN- 00376008; PAN: ACSPJ9999H) and Shri Indranil Chattopadhyay (DIN:03068256;PAN:AEEPC5718H).

- 1.1 Mondal Construction Company Limited(hereinafter referred to as "MCCL" or "the company") having its registered office at Uttarayan, Chinsurah Station Road, P. O. - Chinsurah (RS), P. S. - Chinsurah, West Bengal- 712102, was incorporated on July01,2004, with the RoC, Kolkata, West Bengal, with CIN No. as U45203WB2004PLC099007.
- 1.2 On receipt of communication dated February 21, 2014 from Office of the Sub-Divisional Magistrate (SDM), Sadar, West Tripura enclosing certain complaints forwarded by SDM, Khowai, Tripura regarding Redeemable Preference Shares ("**RPS**") issued by the Company and subsequent enquiry by SEBI, it was observed that MCCL had issued RPS to 3981 persons during the period of 2005-06 to 2012-13 and collected an amount of Rs. 2,51,94,100/-.
- 1.3 As the above said issuance of RPS was found prima facie in violation of respective provisions of the SEBI Act, 1992 ("SEBI Act"); the Companies Act, 1956, SEBI passed an interim order dated December 15, 2014 (hereinafter referred to as the "**interim order**") and issued directions mentioned therein against MCCL and its directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay.

2.1 *Prima facie findings/allegations:* In the said interim order, the following prima facie findings/allegation were recorded.

- a. MCCL issued RPS of face value Rs.100/-each *inter alia* in terms of following terms and conditions:-

Table 1

Plan	A	B	C	D	E
Issue Price minimum 100 preference shares	1000	1000	1000	1000	1000
Redemption Period	3yrs.	6yrs.	9yrs.	13.5yrs.	15.5yrs
Redemption Premium	310	1000	2000	7000	9000
Maturity value	1310	2000	3000	8000	10000
Annualised yield on Investment	9.45%	12.25%	12.96%	16.65%	16%

2.2 MCCL has made an offer of RPS and pursuant allotment collected money to the extent of Rs. 2,51,94,100/- from the public, as shown in the following Table.

Table 2

Year	No. of Securities	Series of allotments (tranches)	Amount Per Share(Rs.)	No. of persons to whom RPS issued	Total Amount Raised(in Rs.)
2005-06	9035	2	100	364	9,03,500
2006-07	24450	6	100	585	24,45,000
2007-08	30347	6	100	586	30,34,700
2008-09	40466	8	100	649	40,46,600
2009-10	59156	12	100	883	59,15,600
2010-11	37721	12	100	407	37,72,100
2011-12	28448	12	100	296	28,44,800
2012-13	22318	11	100	211	22,31,800
Total	251941	69	100	3981	2,51,94,100

2.3 The Offer of RPS was a 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, Section 56(1) and 56(3), Sections 73(1), (2) and (3) of the Companies Act, were not complied with by MCCL.

2.4 In view of the prima facie findings on the violations, the following directions were issued in the said interim order dated December 15, 2014 with immediate effect.

- i. MCCL shall not mobilize funds from investors through the Offer of RPS or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly, till further directions;
- ii. MCCL and its present Directors, viz. Shri Samarjit Mondal, Shri Swapan Kumar Mondal and Shri Sachi Dulal Mondal along with its past Directors viz. Shri Sanjiv Jain and Shri Indranil Chattopadhyay are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;
- iii. MCCL and the abovementioned Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;
- iv. MCCL shall provide a full inventory of all its assets and properties;
- v. The abovementioned Directors of MCCL shall provide a full inventory of all their assets and properties;
- vi. MCCL and its abovementioned Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the *Offer of RPS*, without prior permission from SEBI;
- vii. MCCL and its abovementioned Directors shall not divert any funds raised from public at large through the *Offer of RPS*, which are kept in bank account(s) and/or in the custody of MCCL. However, this direction shall not prohibit the company from redeeming the securities issued to the investors in view of the declaration by them that they have redeemed securities worth Rs. 2.40 Cr. and that only Rs. 11.89 Lacs is still remaining to be redeemed The company shall also file a report regarding all such redemptions along with their reply.

3.1 Vide the said interim order, MCCL and its abovementioned Directors were given

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

- 4.1 *Service of interim order:* The copy of the said interim order was sent to the above mentioned entities by letter dated December 16, 2014 through speed post acknowledgement due. Except for Shri Sachi Dulal Mondal and Shri Indranil Chattopadhyay, the interim orders sent were duly delivered
- 5.1 Subsequently, vide letter dated May 04, 2015 all the persons against whom the above said interim order was passed, were intimated that they shall be given an opportunity of personal hearing on May 21, 2015. The letters sent to Shri Sachi Dulal Mondal and Shri Indranil Chattopadhyay came back undelivered. The letters sent to Shri Samarjit Mondal, Shri Swapan Kumar Mondal and Shri Sanjiv Jain were delivered. The letters sent to others are presumed to be delivered as they have not come back.
- 6.1 Subsequently, vide letter dated May 19, 2015 the Company on its behalf and on behalf of the directors sought for an adjournment of the hearing. SEBI vide letter dated May 21, 2015 intimated the Company and the directors that they would be given another opportunity of personal hearing on July 16, 2015. Thereafter vide letter dated July 8, 2015, SEBI intimated the Company and the directors that the said hearing scheduled on July 16, 2015 is adjourned. SEBI vide letter dated July 09, 2015 intimated the Company and the directors that they would be given another opportunity of hearing on July 29, 2015. The letters dated July 09, 2015 sent to Shri Indranil Chattopadhyay came back undelivered. The letter sent to the Company, Shri Swapan Kumar Mondal, Shri Samarjit Mondal, Shri Sanjiv Jain, got delivered. The letter sent to Shri Sachi Dulal Mondal did not come back undelivered.
- 6.2 *Hearing and submissions:* Ms. Meera Manubhai Patel, Advocate and Mr. Patel Mayur Shailesh appeared on behalf of the Company. Ms. Meera Manubhai Patel undertook to file vakalat on behalf of the directors, Shri Samarjit Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay. The counsels filed written submissions and made oral submissions on the lines of the written submissions. Subsequently, vide letter dated August 10, 2015 the vakalathnama on behalf of Shri Samarjit Mondal, Shri Sachi Dulal Mondal, Shri

Sanjiv Jain and Shri Indranil Chattopadhyay were sent to SEBI. However, in the said Vakalath filed by the counsel, in one of the vakalaths, the name of the persons is written as Indranil Chatterjee and a signature has been made accordingly. It is noted that in the interim order name is mentioned as Indranil Chattopadhyay. Vide the covering letter dated August 10, 2015, the counsel for the noticees stated that Indranil Chatterjee is the correct name instead of Shri Indranil Chattopadhyay. On perusal of the PAN copy of the said persons, I find that the name is shown as Indranil Chatterjee. Therefore, I consider the vakalath has been filed in the name of Indranil Chatterjee properly.

6.3 The written submissions of the Company and the directors in brief are as follows:

- a. SEBI has initiated action against MCCL on the basis of a copy of a show cause notice dated July 31, 2013 forwarded to it by the office of Sub Divisional Magistrate, Sardar, Sub Division, West Tripura. The said show cause notice mentions complaints received by it from several investors, however there is no disclosures of the names and addresses of even one of such persons in the said notice. The copy of its reply dated August 14, 2013 to office of Sub Divisional Magistrate, Sardar, Sub Division, West Tripura was enclosed. MCCL denied each and every contention mentioned in the said notice.
- b. SEBI till date has also never received any complaints from any investors that MCCL has been collecting deposits from the public and / or promising any lucrative returns as alleged in the notice.
- c. MCCL in paragraph 6 of the said reply has categorically stated that the company has redeemable preference share amounting to Rs. 76,57,800/-. Further, it stated in the reply that it has started redeeming preference shares including pre-mature redemption even prior to the receipt of the shown cause notice. This act by itself evidences the MCCL had no intention to defraud its allottees.
- d. SEBI has acted in an arbitrary and coercive manner for wholly extraneous reasons. MCCL has furnished all relevant documents/ information as sought for by SEBI. Further, the interim order dated 15/12/2014 is passed in complete breach of principles of natural justice in as much as no opportunity of hearing was granted before the passing of the order.

- e. No hearing was given before coming to the alleged conclusion that MCCL was involved in collecting of deposits from public and /or promising lucrative returns. There is a complete breach of natural justice since SEBI has proceeded to pass an interim order dated December 15, 2014 based on a copy of this show cause notice and the contents available on MCA 21 portal without giving an opportunity to MCCL to be heard in the matter. The said order is therefore in violation of the principles of natural justice.
- f. MCCL has never issued any pamphlets or brochures of offer of redeemable preference shares. The offer of redeemable preference shares by MCCL cannot be termed as collective investment scheme, and in this context the case of Sahara differs from that of MCCL on factual basis. In any event, in view of its Board Resolution dated March 28, 2014, MCCL had resolved to redeem all preference shares outstanding as on March 31, 2014, irrespective of their maturity / due date of redemption and in view of continuous process of payment, the interim order becomes irrelevant.
- g. So far the emphasis has always been on an 'offer' to 50 or more persons. Further, it is not clear as to what happens when a company does not make an offer or invitation to the public, but only issues its securities to more than 49 persons at their instance.
- h. MCCL is not dealing in any "securities" as defined under the SEBI Act, 1992 or Securities Contract (Regulation) Act, 1956 ("SCRA"), it is therefore, submitted that it is not connected with the securities market in any manner and that its affairs are government by Ministry of Corporate Affairs, Government of India as per the provisions of the Indian Companies Act, 1956. The business operations of the MCCL are not covered by any of the provisions of the SEBI Act, SCRA or CIS Regulations in question. Therefore, no certificate of registration was required to be obtained by MCCL in terms of the above said Acts or the CIS Regulations.
- i. As per the interim order, the issue of Redeemable Preference Shares falls under a Collective Investment Scheme. However the same is denied by it. MCCL has never launched any scheme nor has it made any promises to the investors about the returns. The main business on MCCL is construction of residential and commercial flats. All necessary legal formalities including agreements are duly executed by the MCCL and

the concerned purchasers. Therefore all the ingredients of a 'sale' as defined under the Transfer of Property Act, 1882 are present in the instant case.

- j. MCCL had raised its preference share capital to the extent to Rs.2,51,94,100, MCCL had altered its Memorandum of Association after complying with all necessary formalities for increasing its authorized capital to the extent of Rs. 600 lacs prior to raising its preference share capital in the form of allotment of preference shares. MCCL had allotted preference shares from time to time aggregating to 2,51,941 shares and had filled Form 2 with Registrar of Companies, West Bengal relating to such allotments.
- k. It has never raised any money from public either by issue of preference shares, fixed deposits, selling any products having colour/ characteristics of "Collective Investment Scheme". No prospectus or offer document was filed with the Registrar of Companies as the preference shares allotted were not to be listed in any stock exchange.
- l. Further, it had redeemed most of the preference shares and a sum of Rs. 20,26,800 was the only sum due for redemption. The Board of Directors of MCCL had decided to transfer the said redemption amount to an ESCROW account to be opened in the name of MCCL with ICICI Bank, Chandannagore Branch, and any amount which may be claimed subsequently will be paid out of the ESCROW account. MCCL further informed SEBI that necessary steps are being taken by MCCL to redeem the balance amount in preference shares as early as possible. MCCL accordingly, approached ICICI Bank for opening escrow account which the Bank said it is not possible in the case of MCCL as the Bank needs a mandate from the shareholders. The ICICI Bank, alternatively, helped MCCL to open a separate account for payment of amount due to the investors. MCCL accordingly opened a separate account with the ICICI bank and transferred the balance redemption amount to that Account. Payments on redemption have been made from this Account.
- m. As on 31.03.2014 its net-worth was Rs. 5,56,59,513/- including preference share amounting to Rs. 90,79,400/- whereas as on date, Rs. 9,00,000/- was outstanding for the preference share. MCCL stated that as on March 31, 2014 its paid up capital was Rs. 2,72,77,400/- consisting of 18, 19, 800 equity share capital of Rs. 10 each and

90,794 preference share capital of Rs. 100 each.

- n. As per letter dated March 3, 2015 of the Company to SEBI, it had redeemed an amount of Rs. 2,41,40,600/-. Thus a sum of Rs. 10,53,500/- was pending redemption at that point of time. It further stated that vide its letter dated May 21, 2015 to SEBI, the amount outstanding for redemption is only Rs. 9,85,500/-. MCCL submits that as on date a sum of Rs. 9,00,000/- is outstanding for redemption and MCCL is ready to redeem the shares to the said allottees but it is not in a position to do so, as no allottee is coming forward claiming refund, despite the request from the MCCL.
 - o. The penal action should be in proportion to magnitude of the offence committed. The clean intentions of MCCL and its directors are amply borne out by the fact that amounts so raised have been promptly refunded with interest and even before their maturity period.
 - p. It is further stated that the parallels sought to be drawn by the interim order of Whole Time Member with the SAHARA case also have no factual applicability in the current matter. In that case the promoters of the SAHARA group have neither refunded the money to its investors nor have they obeyed the Apex Court directives with respect to timely payment.
- 6.4 I have considered the allegations, and material 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?
 2. If so, whether the said issues are in violation of Section 60, Section 56(1) and 56(3), Sections 73(1), (2) and (3), the Companies Act, 1956?
 3. If the findings on question No.2 are found in the affirmative, who are liable for the violation committed?
- 7.1 *Whether the company came out with the Offer of RPS?:* I have perused the interim order dated December 15, 2014 for the allegation of Offer of RPS. The Company vide its letter dated March 3, 2015 did not dispute the issuance. The said reply was sent by the Company on behalf of all the directors. SEBI in its letter dated May 04, 2015 while intimating the date of

personal hearing also recorded in the said letter that the reply dated March 3, 2015 was sent by the Company on behalf of all the directors. The said letters got delivered to all the directors except Shri Sachi Dulal Mondal and Shri Indranil Chattopadhyay. Further the written submissions filed on behalf of the company and the directors also did not dispute the issuance of the preference shares as alleged. In view of this, I find that the Company or other directors have not disputed the issuance.

7.2 I have also perused the documents/ information obtained from the 'MCA 21 Portal'. I have perused the available Form 2s filed by the Company and the letter dated December 5, 2014 submitted by the Company on its behalf and on behalf of the directors, I find that the Company has made allotment of RPS as shown in the following table.

Table No.3

Sl. No.	Date of allotment (DD/MM/YYYY)	Amount (Rs.)	As per details submitted by co.
1	31/12/2005	196500	111
2	31/03/2006	707000	253
		903500	364
3	31/05/2006	249500	92
4	31/07/2006	253000	70
5	30/09/2006	481000	112
6	30/11/2006	387000	77
7	31/01/2007	684000	120
8	31/03/2007	390500	114
		2445000	585
9	31/05/2007	598900	116
10	31/07/2007	638000	102
11	30/09/2007	347500	79
12	30/11/2007	494000	76
13	31/01/2008	447300	104
14	31/03/2008	509000	109
		3034700	586
15	31/05/2008	35000	5
16	31/05/2008	479600	79
17	31/07/2008	511000	99

Sl. No.	Date of allotment (DD/MM/YYYY)	Amount (Rs.)	As per details submitted by co.
18	30/09/2008	334000	62
19	30/09/2008	122000	33
20	30/11/2008	1082500	114
21	30/12/2008	151400	28
22	31/01/2009	401000	62
23	28/02/2009	503600	78
24	31/03/2009	426500	89
		4046600	649
25	30/04/2009	390500	61
26	31/05/2009	230900	49
27	30/06/2009	269000	44
28	31/07/2009	202500	33
29	31/08/2009	313200	41
30	30/09/2009	649500	87
31	31/10/2009	462900	61
32	30/11/2009	293000	43
33	31/12/2009	588000	82
34	31/01/2010	730000	59
35	28/02/2010	807500	118
36	31/03/2010	978600	205
		5915600	883
37	30/04/2010	333000	43
38	31/05/2010	953000	72
39	30/06/2010	138500	27
40	31/07/2010	115000	22
41	31/08/2010	167000	27
42	30/09/2010	82000	17
43	31/10/2010	185500	23
44	30/11/2010	98400	18
45	31/12/2010	143000	18
46	31/01/2011	408500	48
47	28/02/2011	498000	39
48	31/03/2011	650200	53
		3772100	407
49	30/04/2011	286000	23
50	31/05/2011	79000	15

Sl. No.	Date of allotment (DD/MM/YYYY)	Amount (Rs.)	As per details submitted by co.
51	30/06/2011	175000	25
52	31/07/2011	155000	26
53	31/08/2011	379000	32
54	30/09/2011	60000	14
55	31/10/2011	305000	29
56	30/11/2011	135000	19
57	31/12/2011	650700	45
58	31/01/2012	140500	28
59	29/02/2012	190000	18
60	31/03/2012	289600	22
		2844800	296
61	30/04/2012	245200	24
62	31/05/2012	352000	31
63	30/06/2012	235000	14
64	31/07/2012	184600	18
65	31/08/2012	173000	18
66	29/09/2012	70000	13
67	31/10/2012	295000	16
68	30/11/2012	253000	15
69	31/12/2012	26000	5
70	31/01/2013	312500	37
71	28/02/2013	85500	20
		2231800	211
	Total	25194100	3981

8.1 *If so, whether the said issues are in violation of Section 60, Section 56(1) and 56(3), Sections 73(1) (2) (3), the Companies Act, 1956?* The provisions alleged to have been violated and mentioned in Issue No.2 are applicable to the offer made to the public. Therefore, the primary question that arises for consideration is whether the issue of preference shares covered in Issue No 1 is a 'public issue'. At this juncture, reference may be made to sections 67(1) & (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)."

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

"84. 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.

85. *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. (Emphasis supplied).*

- 8.3 Section 67(3) 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 {(section 67(3)(a))}, or, if the offer is the domestic concern of the persons making and receiving the offer {(section 67(3)(b))}, 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.
- 8.4 In the instant case, except in the case of allotments in serial number at 15, 21, 27, 28, 29, 32, 37, 39-47, 49-71 in Tabular column 3, the allotments were made to more than 49 persons. As the allotment of RPS has been made by MCCL to more than 49 persons, the said allotments falls within the first proviso of section 67(3) of Companies Act, 1956. With respect to the few allotments made to less than 49 persons, it is observed that the sheer proximity in timing of allotment and the periodicity of splitting the allotments every time at the end of the month, by deliberately keeping the number of allottees below the statutory

minimum, shows that the Company wantonly made repeated allotments to less than fifty persons in order to make a false appearance as if offer and allotment of RPS is a private placement, to evade the process of law and detection. Therefore, I find that the offer and allotment of RPS falls within the first proviso of section 67(3) of Companies Act, 1956. Thereby, such issues are deemed to be public issues and were mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

- 8.5 Even if all the individual 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 Sabaras to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged."* In respect of those issuances, the Company or the directors have not placed any material that the allotment was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement.
- 8.6 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. 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.
- 8.7 The allegation of non-compliance of the above provisions was not denied by the company or directors or the promoters. Neither the company nor the directors or promoters, produced any record to show that MCCL has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or filed a Prospectus with ROC or issued application forms accompanying the abridged prospectus.

- 8.8 However, it was contended by the Company and directors that the issue was not meant to be listed and primarily the allotment and raising of money is not from the public. It also raised the question as to what happens when a company does not make an offer or invitation to the public, but only issues its securities to more than 49 persons at their instance.
- 8.9 In this context it may be mentioned, as per Sahara Judgment, it is not only the offer but also the issue to more than 49 persons attract the obligations of the public issue since they are deemed as public issue. Therefore, I find that, MCCL and its directors and promoters responsible for the failure to issue prospectus, thus having failed to comply with Section 56(1), 56(3) and 60 of the Companies Act, 1956.
- 8.10 Further, by issuing RPS to more than 49 persons, MCCL had to compulsorily list such securities in compliance with 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 within 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.
- 8.11 The allegation of non-compliance of the above provisions was not denied by the company or directors or promoters. I find that no records have been submitted to indicate that it had made an application seeking listing permission from stock exchange nor did it refund the amounts consequent upon such failure. Thus, MCCL has contravened the said provisions. MCCL has not provided any records to show that the amount collected by MCCL are kept in a separate bank account. Therefore, I find that MCCL has also not complied with the provisions of section 73(3) as it has not kept the amounts received from investors in a separate bank account and failed to repay the same in accordance with section 73(2) as observed above.
- 8.12 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"

- 8.13 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 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.
- 8.14 In view of the forgoing findings, I am of the view that MCCL is engaged in fund mobilizing activity from the public, through the offer and issuance of RPS and has contravened the provisions of sections 56, 60 and 73 of the Companies Act, 1956.
- 9.1 *If the findings on question No.2 are found in the affirmative, who are liable for the violation committed:* Section 56(1) and 56(3) read with section 56(4) 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 section.
- 9.2 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 becomes 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.
- 9.3 SEBI, as per section 27(2) of the SEBI Act, has the powers to proceed against directors of such companies. In cases of financial fraud, the role of directors in prevention of the same is of utmost importance. They are required to take diligent measures in preventing the same.

They are also required not to be neglectful in the affairs of the company which results in the violation of various laws such as deemed public issue in violation of law. In deemed public issue in violation of law, money is collected from innocent, ill-informed and gullible public, without the Company giving the statutory protection available to those investors under the law such as, full and necessary disclosures about the company, an exit opportunity by way of listing of the shares. The purpose of refund in such cases as per law, is to protect the investors who have parted their money without having any opportunity of exit and without full disclosures about the Company which deprives their informed consent.

- 9.4 Reference may also be made to the ratio of the Hon'ble High court of Madras in ***Madhavan Nambiar vs Registrar Of Companies*** (2002 108 Comp Cas 1 Mad) which observed "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".
- 9.5 SEBI also has powers under section 11 and 11B of the SEBI Act to pass direction of refund along with interest. The Hon'ble Bombay High court in ***B.P.Plc (Formerly B.P.Amoco Plc) vs SEBI***, (2002 (4) Bom CR 79), held that that SEBI has powers to award interest in exercise its power under section 11 and 11B of SEBI Act, as stated below:-

"Applying the principles regarding award of interest as has been held by the Apex Court in Secretary, Irrigation Department vs. G.C.Roy (supra) to the effect "a person deprived of the use of money to which he is legitimately entitled to has a right to be compensated for the deprivation, call it by any name. It may be called "interest, compensation or damages," the investors are entitled to be compensated by way of interest for delayed payment.

Under these circumstances we find no substance that there is no power to award such an interest."

- 9.6 The Company also stated in the written submissions that it has resolved vide board resolution dated March 28, 2014 that it would redeem the preference shares irrespective of the date of maturity and the repayment has started. It stated that only Rs. 20,26,800/- is only remaining to be redeemed. It stated the said balance amount was transferred to the separate account

opened by the company in ICICI and payments on this account has been made from this bank account. At para 15 of the written submissions, the Company stated that it has redeemed Rs. 2,41,40,600 and only a sum of Rs. 10,53,500 remains to be paid. This was also stated in the reply dated March 3, 2015 of the company. The company stated that it has vide its letter dated May 21, 2015 addressed to SEBI has intimated SEBI that the outstanding amount for redemption is only Rs. 9,85,500 which according to the Company has come down to Rs. 9,00,000 as on the date of written submissions. It is noted that no proof of payments was produced before the SEBI. Further, as submitted by the Company, it has deposited only Rs. 20,26,800 in the ICICI Bank which according to the Company was the then outstanding amount. The Company submitted that though it is willing to make the refund, no investor is willing to receive the payment. However, no copy of the said letter and proof of service was given by the company.

- 9.7 The Company and the directors contended that they were not given opportunity of being heard before the interim order was passed. It is an established position of law that SEBI has powers to interim orders before an opportunity of being heard is given in appropriate cases. In the present case an interim order has been passed in view of the urgent situation of preventing the Company and its directors from further violating the law and preventing them from dissipating the assets so that in case of an order of refund is passed after hearing, the same would not become infructuous.
- 9.8 The Company's submission that MCA Portal 21 documents were relied upon also does not stand since they are public documents and the Company and directors themselves have admitted that they have made allotments.
- 9.9 The Company also raised a defense that it is not dealing in securities. The same does not stand in view of the fact that they issued redeemable preference shares which fall within the definition of 'securities' under the Securities Contract (Regulation) Act, 1956.
- 9.10 It is noted that there is no allegation in the interim order cum show cause notice that there is a violation of CIS regulations or the Company is running collective investment schemes. However, the Company submitted that it is in the business of construction of residential and commercial flats and selling the flats to the purchasers through execution of sale agreement. It is noted that the Company advanced arguments on that basis in its letter dated March 3,

2015 also. The submissions on this basis that it is not running the CIS made in the written submissions of the Company, therefore, are irrelevant to the present proceedings.

- 9.11 From the available information as per the 'Register of directors, managing directors, manager, secretary, etc' dated December 4, 2014, obtained from RoC, Kolkata before passing of the interim order, the details of the appointment and resignation of all the directors are given in the Table 2 below:

Table 4

Name of the Directors	Date of Appointment	Date of Resignation
Shri Samarjit Mondal,	July 01, 2004	-
Shri Swapan Kumaar Mondal	July 01, 2004	-
Shri Sachi Dulal Mondal	September 03, 2012	-
Shri Sanjiv Jain	July 03, 2006	July 23, 2010
Shri Indranil Chattopadhyay	July 23, 2010	September 07, 2012

- 9.12 As per the latest Signatory Details obtained from MCA website on December 28, 2015, it is observed that Shri Sachi Dulal Mondal has resigned from the directorship of the company and Shri Indranil Chattopadhyay joined the company as director on December 23, 2014 (i.e. after passing of interim order).
- 9.13 Shri Samarjit Mondal, Shri Swapan Kumaar Mondal were serving as directors while the impugned issues and allotments were made. Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay (*has been inducted as director again on 23.12.2014 after resigning on 07.09.2012*) were acting as directors at some stages of the raising of money by way of issuance of RPS. Therefore, Shri Samarjit Mondal, Shri Swapan Kumaar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay who acted as directors at the time of impugned issues, are responsible for the refund along with the Company.
- 9.14 Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay resigned on December 23, 2014, July 23, 2010 and September 07, 2012 respectively. The liability of the company to repay under section 73(2) of the Companies Act, 1956 is continuing and such liability continues till all the repayments are made. Reference may be made to the judgment rendered in Hon'ble High court Delhi in Anita Chadha vs Registrar Of Companies {74 (1998)

DLT 537}. The ratio of this judgment would show that the directors who have resigned still can be proceeded against for the violations committed by them. Therefore, the subsequent resignation of Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay will not discharge them of their liability as persons responsible for the issuance of RPS in violation of law.

- 9.15 The liability of the company to repay under section 73(2) of the Companies Act, 1956 is continuing and such liability continues till all the repayments are made. Therefore, the directors who join subsequent to the some instances of the impugned public issuances are also liable if the company does not repay the money collected, as mandated in section 73(2) of the Companies Act, 1956. Therefore, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay also become responsible on this ground also for making refunds along with interest on the basis of their continuing liability. Shri Indranil Chattopadhyay has joined the company again. These directors also have not exercised necessary diligence after joining as directors in the Company. Neither did they make any attempts to report the wrongdoings of the company to appropriate authorities at the time of their joining.
- 9.16 In view of the provisions of law, MCCL and its directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, are responsible for the issue of RPS in violation of law and regulations and hence co-extensively responsible along with the Company for making refunds along with interest. The amounts mobilized through the issue of securities have not been refunded within the time period as mandated under law. It would therefore be appropriate to levy an interest @ 15% p.a. as provided for under the above section read with rule 4D (*which prescribes that the rates of interest, for the purposes of sub-sections (2) and (2A) of section 73, shall be 15 per cent per annum*) of the Companies (Central Government's) General Rules and Forms, 1956 on the amounts mobilized by the Company through its offer and issue of securities from the date when the same was liable to be repaid till date of actual payment to the investors.
- 9.17 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 the MCCL and its Directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil

Chattopadhyay, to refund the monies collected, with interest to such investors. In view of the violations committed by the Company and its directors and promoters, to safeguard the interest of the investors who had subscribed to such preference shares issued by the Company and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and the other noticees.

11.1 In view of the foregoing, I, in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11(1), 11(4), 11A and 11B thereof hereby issue the following directions:

- a) The Company, namely, Mondal Construction Company Limited and its Directors, Shri Samarjit Mondal, Shri Swapan Kumaar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, shall forthwith refund the money collected by the Company through the issuance of RPS, including the money collected from investors, till date, pending allotment, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.
- b) The Company has claimed to have redeemed the securities and made payments to its investors. If the Company has actually made any repayments to its investors of the amounts collected from them along with interest, the above directions shall be applicable for the amounts due to be returned to remaining investors. However, such repayments as claimed to have been already made by the Company, shall be certified by Chartered Accountants, as directed in sub-paragraph (f) below.
- c) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order.
- d) Mondal Construction Company Limited and its present management is permitted to sell the assets of the Company only for the sole purpose of making the repayments including interest, as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank.
- e) The Company, namely, Mondal Construction Company Limited and its Directors,

Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily (in Bengali) with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.

- f) After completing the aforesaid repayments, Mondal Construction Company Limited and its Directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, shall file a report of such completion of repayment 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").
- g) If the Company, Mondal Construction Company Limited had repaid any investors as claimed by it in its written submissions dated July 29, 2015, the Company may include such repayment in the report to be submitted under para 11.1 (e), provided the Company had met with the criteria laid down under para 11.1(b) and provided further that the Company pays interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.
- h) Mondal Construction Company Limited and its Directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of shares/securities, if held in physical form.
- i) In case of failure of Mondal Construction Company Limited and its Directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, to comply with the aforesaid directions, SEBI,

on the expiry of the three months period from the date of this order,-

- i. shall recover such amounts in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
 - ii. may initiate appropriate action against the Company, its promoters/directors and the persons/officers who are in default, including adjudication proceedings against them, in accordance with law.
 - iii. would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and
 - iv. would also make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the Company.
- j) Mondal Construction Company Limited and its Directors, Shri Samarjit Mondal, Shri Swapan Kumar Mondal, Shri Sachi Dulal Mondal, Shri Sanjiv Jain and Shri Indranil Chattopadhyay, 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 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 years from the date of completion of refunds to investors.
- k) The above directions shall come into force with immediate effect.

12.1 This Order is without prejudice to any action, including adjudication and prosecution proceedings that might be taken by SEBI in respect of the above violations committed by the Company, its promoters, directors and other key persons.

- 12.2 Copy of this Order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action.
- 12.3 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 : January 15, 2016
Place: Mumbai

PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA