

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 Bharatiya Real Estate Development Limited

In respect of:

1. Bharatiya Real Estate Development Limited [PAN: AAECB3300K ],
2. Mr. Soumen Majumder [PAN: BCVPM0899M],
3. Mr. Pankaj Upadhyay [PAN: AAWPU0874E],
4. Mr. Sekh Abdul Ajim [PAN: APQPA9380J],
5. Mr. Subhas Koley [PAN: ARLPK9557A],
6. Mr. Manoj Agarwala [PAN: ADBPA3455H],
7. Mr. Tarunkumar Das [DIN: 06391049] and
8. Ms. Shipra Banerjee [PAN: AKKPB3858M].

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Date of hearing: April 22, 2015 and July 30, 2015

Appearance:

**For Noticees:** Mr. Manoj Agarwal, Director,  
Mr. Soumen Majumder, Director,  
Mr. Uday Shankar Das, father of Mr. Tarunkumar Das  
Mr. Shounak Mitra, Advocate,  
Mr. Debnath Ghosh, Advocate,  
Mr. Satyajit Roy Choudhury, Advocate,  
Mr. Chandrajit Mitra, Advocate.

**For SEBI:** Ms. Soma Majumder, General Manager,  
Mr. N. Murugan, Assistant General Manager,  
Mr. T. Vinay Rajneesh, Assistant General Manager,  
Ms. Nikki Agarwal, Assistant Manager.

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1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI'), vide an *ex-parte interim* Order dated December 02, 2014 (hereinafter referred to as 'the *interim*

order’) had observed that the company, **Bharatiya Real Estate Development Limited** (hereinafter referred to as ‘BREDL’ or ‘the Company’) is *prima facie* engaged in fund mobilising activity from the public, by making offer and issuing Redeemable Preference Shares (hereinafter referred to as ‘RPS’) and had allegedly violated the provisions of Sections 56, 60 (read with Section 2(36)), 67, 73 of the Companies Act, 1956 read with the Companies Act, 2013. In order to protect the interest of investors and to ensure that only legitimate fund raising activities are carried on by the Company and its directors, SEBI had issued the following directions:

“... ..

7. *In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions –*
  - i. *BREDL shall not mobilize funds from investors through the Offer of Redeemable Preference Shares or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;*
  - ii. *BREDL and its Directors, viz. Shri Soumen Majumder (PAN: BCVPM0899M; DIN: 03110276), Shri Pankaj Upadhyay (PAN: AAWPU0874E; DIN: 06464504) and Shri Sekh Abdul Ajim (PAN: APQPA9380J; DIN: 06768119) alongwith it past Directors, viz. Shri Subhas Koley (PAN: ARLPK9557A; DIN: 05267757), Shri Manoj Agarwala (DIN:00089312), Shri Tarunkumar Das (DIN: 06391049) and Smt. Shipra Banerjee (DIN: 03061691), 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. *BREDL and its abovementioned past and present 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. *BREDL shall provide a full inventory of all its assets and properties;*
  - v. *The abovementioned past and present Directors of BREDL shall provide a full inventory of all their assets and properties;*
  - vi. *BREDL and its abovementioned present 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 Redeemable Preference Shares, without prior permission from SEBI;*
  - vii. *BREDL and its abovementioned present Directors shall not divert any funds raised from public at large through the Offer of Redeemable Preference Shares, which are kept in bank account(s) and/or in the custody of BREDL;*
  - viii. *BREDL and its abovementioned present Directors shall furnish complete and relevant information in respect of the Offer of preference shares (as sought by SEBI letters dated June 17, 2014 and June 18, 2014), within 21 days from the date of receipt of this Order.*

8. *The above directions shall take effect immediately and shall be in force until further orders.*

...

9. *This Order is without prejudice to the right of SEBI to take any other action that may be initiated against BREDL and its abovementioned past and present Directors in accordance with law."*

2. The *interim* order observed that the *prima facie* observations made therein were on the basis of the correspondences exchanged between SEBI and the Company, information obtained from the 'MCA 21 Portal' and the complaints received by SEBI. The *interim* order advised the Company and its directors (past and present) that they may file their replies within 21 days from the date of receipt of the order and also to seek an opportunity of personal hearing.
3. The *interim* order forwarded to the Company and its directors Mr. Soumen Majumder and Ms. Shipra Banerjee returned undelivered. Other directors of the Company were served with the copy of the *interim* order.
4. The directors of the Company namely Mr. Manoj Agarwala and Mr. Subhas Koley vide separate letters both dated December 24, 2014, replied to the *interim* order. Ms. Shipra Banerjee also vide her letter dated February 02, 2015, submitted the reply to the *interim* order and said that she became aware of the order from Mr. Manoj Agarwala. Before proceeding further, an opportunity of personal hearing was granted to the Company and its directors on April 22, 2015 and the same was communicated to the noticees vide letters dated March 20, 2015. The same was also communicated vide the public notice dated April 14, 2015 published in the newspaper 'Ananda Bazar Patrika' and notification dated April 15, 2015 published in newspaper 'Times of India'.
5. On the date fixed, the director of the Company namely **Mr. Manoj Agarwala** appeared for the personal hearing along with Mr. Debnath Ghosh, Advocate and Mr. Shounak Mitra, Solicitor and reiterated the submissions made vide letter dated December 24, 2014. Mr. Satyajith Roy Choudhury, Advocate and Mr. Chandrajit Mitra, Advocate appeared for **Ms. Shipra Banerjee** and submitted a letter dated April

22, 2015, requesting for the copy of the complaint based on which the enquiry was initiated. The representatives also requested for an opportunity to file the submissions on the complaint and for another opportunity of personal hearing.

The director namely **Mr. Soumen Majumder** also appeared for the personal hearing and requested for an adjournment on the ground that he intends to engage an advocate. On behalf of another director namely **Mr. Tarun Kumar Das**, his father Mr. Uday Shankar Das appeared for the personal hearing and requested for another date of personal hearing on the ground of the illness of Mr. Tarun Kumar Das.

6. The request of the directors of the Company was considered and another opportunity of personal hearing was granted on July 17, 2015. In the meantime, one Mr. Subhabrata Moulik, Advocate while writing on behalf of Mr. Tarun Kumar Das vide letter dated July 14, 2015 (received by fax on July 15, 2015) confirmed his presence for the personal hearing. Vide this letter he also submitted that Mr. Tarun Kumar Das is not related to the Company and is a law abiding citizen of India. The advocate for Ms. Shipra Banerjee vide letter dated June 30, 2015, acknowledged the copy of the complaint and requested for an adjournment for the date fixed for July 17, 2015. He also requested for copies of two other complaints as referred in the *interim* order.

The date of personal hearing was later rescheduled to July 30, 2015. On the date fixed, no one had turned up for the personal hearing. Considering that reasonable opportunities of personal hearing have already been afforded to the directors of the Company for making the submissions in the matter, I proceed further on the basis of the material available on record. Later, the advocate for Ms. Shipra Banerjee submitted the written submission dated August 03, 2015, which were taken on record.

7. The submissions made by Ms. Shipra Banerjee (one of the directors) vide her letters dated February 02, 2015 and August 03, 2015, in brief as under:

- a. SEBI has erred in assuming jurisdiction over the Company only based on the complaints received by it and adjudicated the matter without verifying the bonafide of the complainants who are claiming themselves as investors.
- b. In the audited statement of affairs of the Company and audit report given by the auditor as required by the Companies (Auditor's Report) Amendment Order, 2003 as amended, it has been noted that '*the Company has not issued any money by way of public issue and the share capital was raised by private placement which included parties covered under register maintained u/s 301 of the company Act. ...*'. As per the audited report there has been no violation of the SEBI Act and the Companies Act. As per the audited balance sheet of the Company as on March 31, 2012, the paid up share capital of the Company during the year was more than 10 lakh.
- c. The mobilization of funds from the public through issuance of the RPS, as alleged by the complainants or the Company having accepted deposits as alleged from more than 50 persons cannot be adjudicated without calling for the information or production of the books or registers/ documents or records including registers maintained under Section 301 of the Companies Act, 1956.
- d. The allegations against the Company cannot be adjudicated without calling for the information or production of the books or registers. She has applied for the certified copy of certain documents from RoC. She sought opportunity for filing of the additional written submission.
- e. She had not attended Annual General Meeting for the financial year ending March 31, 2012. To incur liability she must either be a party to the wrongful act or gave consent to it. During her directorship, she was rarely entrusted with the official work and the same was performed by her without any malafide.
- f. As per the Memorandum of Association, she had taken 10,000 equity shares and the percentage of her holding in the financial year 2010-2011 and 2011-2012 was 19.05%. She was the ordinary director if the Company. She had resigned from the post of director of the Company with effect from December 03, 2012 and her shares were transferred in the name of Mr. Tarun Kumar Das.

- g.** During and after her tenure of directorship, she had no knowledge about the Company indulging in mobilization of funds from the public through the issue of RPS. She was neither in-charge nor responsible to the Company for the conduct of its business.
- h.** Mr. Soumen Majumder whose percentage of holding in the Company in the financial year 2010-2011 and 2011-2012 was 25.71%, had managed the affairs and business of the Company. The same is also evident from the annual return of the Company and the list of allottees dated March 28, 2013, which bears the signature of Mr. Soumen Majumder.

I note that Ms. Shipra Banerjee has not submitted any other written submission after August 03, 2015.

- 8.** Mr. Subhas Koley (one of the directors) vide his letter dated December 24, 2014, submitted that:
  - a.** He is a land broker and was approached by one of the executives of the Company for joining and selling its new products, which were to be launched in future.
  - b.** Upon joining, the Company had offered him the post of director, with a monthly target to sell products of the Company for certain commission. It was said to him that the products will have better coverage and returns than other policies available in the market. He was told that the post of directorship was given to enhance the profile of the Company as he had a good reputation in local area as a land broker.
  - c.** As he was not able to sell the products of the Company, he was asked to resign and the same was done on March 14, 2013.
  - d.** He has no other clue on any matters relating to the Company.
- 9.** Mr. Manoj Agarwala (one of the directors) vide his letter dated December 24, 2014, submitted as under:
  - a.** He had bought an insurance product from Mr. Soumen Majumder during the year 2009-10. During the year 2010-11, Soumen Majumder visited him with a proposal of floating a real estate company. On insistence, he gave his name for the proposed company and agreed to subscribe to the incorporation documents of BREDL.

- b.** The documents on record shows that the shares in the Company were issued to him. However, neither any shares were issued to him nor he paid any subscription money for the same.
- c.** He was not involved in the day to day management or control of BREDL. The management and policy decisions of BREDL were taken by Soumen Majumder. He was never informed about the issue of preference shares affairs of BREDL. He had no occasion to peruse the balance sheet of BREDL or sign the same. He had also not received any notice/ attended any of the board or shareholders meeting of the Company. As he was absent without obtaining leave of absence from the board of BREDL, in terms of Section 283(1)(g) of the Companies Act, 1956, his directorship got vacated automatically by operation of law.
- d.** He had resigned from the board of BREDL on and from May 01, 2012. A public announcement of such resignation was also made in English and Bengali newspaper on May 16, 2012. Since the date of resignation, he has no relationship with BREDL or any person related to/ connected with BREDL.
- e.** On receipt of the *interim* order, he had made an application to RoC, Kolkata for obtaining necessary information and documents relating to BREDL. From the annual report so obtained, he noticed that 12,500 shares allotted to him had been transferred to Mr. Pankaj Upadhaya on March 14, 2013. Such transfer of shares had happened without any notice or his knowledge and the same suggest that his signature were forged for giving effect to the purported transfer.
- f.** On December 17, 2014, he had received a copy of a Writ Petition filed before the Hon'ble Calcutta High Court by certain investors, who had invested in the preference shares of BREDL. A preference share certificate attached with the said writ petition bears his signature as director of BREDL. The said certificate is dated April 05, 2013, which is much after the date of his resignation. The same shows that his signature on the preference share certificate were also forged.
- g.** No specific averment has been made against him in the *interim* order. There is no evidence that the violations committed by BREDL were with the connivance of, or was attributable to, any neglect on his part. A director simpliciter as such cannot be

said to be the person in charge of and/ or responsible to the Company for the conduct of its business.

- h.** On the date of issue of the *interim* order, Section 465 of the Companies Act, 2013, was not effective and the same was yet to come into force and therefore the issue of the *interim* order based on Section 465 of the Companies Act, 2013 is untenable in law and invalid.
- 10.** I have considered the *interim* order, the submissions of Mr. Subhas Koley, Mr. Manoj Agarwala, Ms. Shipra Banerjee and Mr. Tarun Kumar Das, the documents furnished and the material available on record. The following are the observations from the *interim* order:

“ ...

- i.* BREDL was incorporated on September 3, 2010, with the ROC, Kolkata with CIN No. as U70102WB2010PLC152773. BREDL's Registered Office is at 180 G. T. Road (S), Shibpur, Howrah – 711102, West Bengal, India.
- ii.* The present Directors in BREDL are Shri Soumen Majumder, Shri Pankaj Upadhyay and Shri Sekh Abdul Ajim.
- iii.* Shri Subhas Koley, Shri Manoj Agarwala, Shri Tarunkumar Das and Smt. Shipra Banerjee, who were earlier directors in BREDL, have since resigned.
- iv.* Form 2 (Form for Return of Allotment – filed by SDL with the ROC, Kolkata, in accordance with the provisions of the Companies Act, 1956), reveals that BREDL issued “Redeemable Preference Shares” (“**Offer of Redeemable Preference Shares**”) to investors during the Financial Years 2011–12 and 2012–13, details of which are provided below -

Type of Security	Year	No. of persons to whom preference shares were allotted	Total Amount (₹ in Lakhs)
Redeemable Preference Shares	2011–12	245	40.00
	2012–13	**49	59.06
<b>Total</b>		<b>294</b>	<b>99.06</b>
** From the complaints mentioned at paragraph 2.5 of page 2, it is observed that there were 12 individuals/investors/allottees/complainants as appearing in the Redeemable Preference Share Certificates submitted by them, whose names did not appear in the list of 49 persons attached with E-Form 2 (filed by BREDL for the Financial Year 2012–13). Hence, prima facie it appears that issue of Redeemable Preference Shares has been made to more than 49 persons in the Financial Year 2012-13 as well.			

...”

11. I note that the Company has not disputed the allegations made in the *interim* order. The *interim* order alleged that the Company had issued and allotted RPS during the Financial Years 2011-12 and 2012-13 and had raised ₹ 99.06 lakh from at least 294 persons/ investors, without complying with the ‘public issue’ norms stipulated under Sections 56, 60 read with Section 2(36) and 73 of the Companies Act, 1956. The *interim* order had also alleged that the Company, by issuing shares to more than 49 persons, had made a public issue of RPS in terms of the first proviso to Section 67(3) of the Companies Act, 1956.
12. In order to ascertain whether an issue of securities is a ‘public issue’ or done on ‘private placement’, it is necessary to make a reference to Section 67(3) of the Companies Act, 1956, which reads as under:

*“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) ...*

*(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).”***

In terms of Section 67(3), as amended by the *Companies (Amendment) Act, 2000*, with effect from December 13, 2000, no offer or invitation shall be treated as made to the public by virtue of sub-sections (1) or (2), as the case may be, if the offer or invitation can properly be regarded, in all 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. More importantly, in terms of the first *proviso* to the aforesaid section, the provisions of Section 67(3) shall **not** apply in a case where the **offer or invitation to subscribe for shares or debentures** is made to **fifty persons or more**. Therefore, the number of subscribers becomes relevant to conclude whether an issue of shares are for public or on a private placement basis. In view of the same, if an offer of securities are made to fifty or more persons, it would be deemed to be a public issue. I now place my reliance on the order of Hon'ble Supreme Court of India in the matter of *Sahara India Real Estate Corporation Limited & Others Vs. SEBI and another* (Civil Appeal Nos. 9813 and 9833 of 2011; decided on August 31, 2012) ('the Sahara case') had *inter alia* held that -

*“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, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. ...*

*I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. ...”*

13. It is noted from the 'Form 2' i.e. 'return of allotment' (obtained from 'MCA 21' portal) that the Company had made allotments of RPS on December 13, 2011 to 245 investors and on March 28, 2013 to 49 investors. I also note the observation made in the *interim* order that “*From the complaints ..., it is observed that there were 12 individuals/investors as appearing in the Redeemable Preference Share Certificates submitted by the complainants therein, whose names did not appear in the list of 49 persons attached with E-Form 2 (filed by BREDL for the Financial Year 2012-13). Hence, prima facie it appears that issue of Redeemable Preference Shares was made to more than 49 persons in the Financial Year 2012-13 as well.*” I note that the Company has not submitted any reply to this allegation. I note that the Company has failed to reply to the allegations and submit the complete and relevant information as sought vide the *interim* order. In the absence of any reply/ defense, it can be said that the number of investors who were allotted RPS in the year 2012-13 were more than 49. Based on the material available on record, I note that monies were mobilised by the Company by issuing RPSs, to more than 49 persons. Therefore, it can be concluded that the Company had made a public issue of RPS in terms of the first *proviso* to Section 67(3) of the Companies Act, 1956 where the “offer” or “invitation to subscribe for shares or debentures” is made to fifty persons or more, then it has to be construed as a public offer.
14. By making a public issue of RPS, as discussed above, the Company was mandated to comply with all the legal provisions that govern and regulate public issue of such securities, including the Companies Act, 1956 and the SEBI Act and regulations. In this context, I refer and rely on the below mentioned observation made by the Hon'ble Supreme Court of India in the matter of *Sabara case*:
- “... .. that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. ...”
15. In view of the above observations, by virtue of Section 55A(a) and (b), SEBI has jurisdiction and would govern the issue of RPS as the same was clearly made to more than 49 persons. As alleged in the *interim* order, the Company was mandated to comply with the provisions of Sections 56, 60, 67 and 73 of the Companies Act, 1956, in

respect of its offer and issue of RPS. 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, contain 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'.

16. The *interim* order has alleged that the Company failed to comply with Section 73 of the Companies Act, 1956, in respect of its issuance of RPS. By issuing RPS to more than 49 persons, the Company had to compulsorily list such securities in compliance with Section 73(1) of the Companies Act, 1956. As per Section 73(1) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange. There is no material on record to say that the Company has filed an application with a recognised stock exchange to enable the RPS to be dealt with in such exchange. Therefore, the Company has failed to comply with this requirement.
17. Section 73(2) of the Companies Act, 1956 states that "*Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money*". As the Company failed to make an application for listing such RPS, the Company had to forthwith repay such money collected from investors. If such repayments are not made within 8 days after the Company becomes liable to repay, the Company and every

director of the Company, who is an officer in default, is jointly and severally liable to repay with interest at a rate indicated in the Section 73(2) of the Companies Act, 1956. There is no material on record to say that the Company has complied with the provisions of Section 73(3).

18. As per the available details, the Company had mobilized atleast ₹ 99.06 lakh from the public under its offer and issue of RPS and in doing so it has failed to comply with the provisions of the Companies Act, 1956.

9. **Liability of Directors:** The *interim* order was issued against the directors of the Company namely Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Sekh Abdul Ajim, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee.

a. The details of their appointment and resignations are as under:

Name	Date of Appointment	Date of Cession
Mr. Soumen Majumder	03/09/2010	-
Mr. Pankaj Upadhyay	14/03/2013	-
Mr. Sekh Abdul Ajim	17/10/2013	-
Mr. Subhas Koley	01/05/2012	14/03/2013
Mr. Manoj Agarwala	03/09/2010	01/05/2012
Mr. Tarunkumar Das	03/12/2012	01/11/2013
Ms. Shipra Banerjee	03/09/2010	03/12/2012

b. I note that the Company had commenced the offer and issuance of RPS from 2011-2012 and continued with it in the financial year 2012-13 (the date of allotment being March 28, 2013). Section 56 of the Companies Act, 1956 imposes the liability for the compliance, on the company, every director, and persons responsible for the issuance of the prospectus. The liability of the Company to repay under Section 73(2) of the Companies Act, 1956 read with Section 27 of the SEBI Act, is continuing and the same continues till all the repayments are made to the investors/ public. Therefore, the directors who were present during the period when the Company had made the offer and allotted RPS shall be liable for violation of Sections 56, 60 and 73 of the

Companies Act, 1956 including the default in making refunds as mandated therein. As the liability to make repayments under Section 73(2) of the Companies Act read with Section 27 of the SEBI Act is a continuing liability, the persons who joined the Company's Board pursuant to the offer and allotment of RPS shall also be liable if the Company and the concerned directors have failed to make refunds, as mandated under the discussed provisions of law.

- c. It is noted that Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee were the directors of the Company at the time of impugned issue and allotment of RPS. Mr. Soumen Majumder and Mr. Pankaj Upadhyay continue to be the directors of the Company and have not responded to the *interim* order. I note that Mr. Soumen Majumder had appeared for the personal hearing on April 22, 2015 and had sought an adjournment. Further, he failed to appear for the personal hearing on July 30, 2015.

The persons namely Mr. Manoj Agarwala, Mr. Subhas Koley, Ms. Shipra Banerjee and Mr. Tarunkumar Das have responded to the *interim* order. The arguments/ contentions made by these are discussed below:

- i. Mr. Manoj Agarwala and Ms. Shipra Banerjee have argued that they were not in-charge and responsible for the affairs and conduct of the business of the Company. They have also said that Mr. Soumen Majumder was the main person who was responsible for the conduct of the business of the Company. I note that both these persons had given their consent to become the directors of the Company and were on the board of the Company for the respective tenures as stated in the table above. I also note that Mr. Manoj Agarwala and Ms. Shipra Banerjee had resigned from the Company on May 01, 2012 and December 03, 2012 respectively. As discussed above, the directors of the company who were present during the period when the Company had made the offer and had allotted RPS, shall be liable for the violation of Section 56, 60 and 73 of the Companies Act, 1956, and the same is a continuing liability.

- ii.** I also note the argument taken by Mr. Manoj Agarwala that he had not received any notice for any board or shareholder meeting and as he was absent without obtaining leave of absence from the board of BREDL, in terms of Section 283(1)(g) of the Companies Act, 1956, his directorship got vacated automatically by the operation of law. In this regard, I note the admission of Mr. Manoj Agarwala that he had agreed to give his name to the Company and also agreed to subscribe to the incorporation documents of BREDL. He has also narrated his grievance against the transfer of his shares to Mr. Pankaj Upadhaya. These facts hints that Mr. Manoj Agarwala had consented to become the director of the Company and was aware about the role and legal obligations of the directors of the Company.
- iii.** Mr. Manoj Agarwala has also argued that his signatures were forged for giving effect to the transfer of his shares to Mr. Pankaj Upadhaya and on the preference share certificate issued by the Company. I note that mere public announcement of resignation in the newspapers may not be sufficient In this regard, I note that although Mr. Manoj Agarwala has stated in his reply that he has made an application to RoC for obtaining necessary information, however, no document has been submitted by him to show that he has initiated any action relating to his forged signatures as against the alleged persons. In the absence of any such action against the Company and on considering the fact that Mr. Manoj Agarwala's name was available in the record of RoC as a director during the period of allotment of RPS.
- iv.** It is observed from the extract of minutes of the meeting of the Board of Directors of the Company dated May 01, 2012, that the same bears the signature of Ms. Shipra Banerjee, wherein the resignation of Mr. Manoj Agarwala was accepted and Mr. Subhas Koley was appointed as director. The same shows that she was very much involved in the affairs of the Company. Even the 'Return of Allotment' for

the allotment of RPS on December 13, 2011, bears her Director Identification Number (DIN) for the digital signatures.

- v. Mr. Manoj Agarwala has argued that Section 465 of the Companies Act, 2013 was not effective and the same is still to come into force. I have considered his argument and note that the same does not cause any deficiency in the proceedings as the relevant provisions of the Companies Act, 1956 (i.e. Sections 56, 60 (read with Section 2(36)), 67, 73) quoted in the *interim* order were in force and the same have also been alleged against the Company and its directors.
- vi. Mr. Subhas Koley has argued that he was approached by one of the executives of the Company for joining the Company and as he was unable to sell the products of the Company, he was asked to resign from the post. These submissions of Mr. Subhas Koley confirms that he had given his consent to become the director of the Company.
- vii. On behalf of Mr. Tarun Kumar Das, it has been submitted that he is not related to the Company. In this regard, I note that he became the director of the Company on December 03, 2012 and had resigned on November 01, 2013. The same shows that he had been a director in the Company during the relevant period of time when the issue of RPS was made.

As regards the argument of Mr. Manoj Agarwala and Ms. Shipra Banerjee that they were not in-charge and responsible for the affairs and conduct of the business of the Company, I note that the role of directors in a Company is of utmost importance and they are required to take diligent steps for preventing financial fraud in the Company they are associated with. The directors are also required not to neglect the affairs of the company which results in the violation of various laws such as the instant 'deemed public issue' matter wherein the money is collected from the innocent and gullible public/ investors, without the statutory compliances, i.e. necessary disclosures about the company, exit opportunity, etc.

If the argument that Mr. Soumen Majumder was the main person and liable for violation is considered then the companies and the directors intending to defraud the public/ investors would attempt to deceive the gullible public/ investors by not signing the minutes of meeting or other document and will go scot free. The same will also go against the collective responsibility of the Board of Directors imposed under the law. I note that the provisions of law cannot be interpreted in order to result in the consequence that violators go without legal accountability. I note that SEBI having the statutory mandate to protect the interests of investors in the securities market is obligated not to create such situations. The public interest requires that such violators who had the knowledge or consent or connivance in the act or omission which constitutes violation of the provisions of the 'deemed public issue' or who have neglected in preventing such illegalities be made accountable to the investors by way of refunding the money collected from them. In this regard, I also place my reliance on the order of Hon'ble High Court of Madras in the matter of *Madhavan Nambiar Vs. Registrar of Companies* [2002 108 Comp Cas 1 Mad] wherein it was observed that "*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.*".

Considering the same, I hold Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee, responsible for the issue of RPS in violation of law and regulations and hence jointly and severally responsible with the Company for making refunds along with interest as mandated under Section 73(2) of the Companies Act, 1956 read with Section 27 of the SEBI Act. The resignation of Mr. Manoj Agarwala, Mr. Subhas Koley, Ms. Shipra Banerjee and Mr. Tarunkumar Das, does not take away their liability for the violations committed during the respective tenure. In this regard, I place my reliance on the order

of Hon'ble High Court of Delhi in the matter of *Anita Chadha Vs. Registrar Of Companies* (74 (1998) DLT 537) which reads as “*It was urged that the petitioner after the resignation would no longer come under the expression "officer who is in default" as contemplated by Sections 5,159 and 220 of the Act. A reading of Section 5 shows that even after the retirement of the petitioner, she would come under the definition of an officer in default.*” In view of the same the resignation of Mr. Manoj Agarwala, Mr. Subhas Koley, Ms. Shipra Banerjee and Mr. Tarunkumar Das, does not affect their liability as officers in default.

- d. I note that Mr. Sekh Abdul Ajim was appointed as director of the Company on October 17, 2013 i.e. after the available dates of impugned issues. He is also one of the present directors of the Company. It is observed that he has not exercised necessary diligence after becoming the director in the Company. The inaction by him against the management (for violating the public issue norms as stipulated under the Companies Act, 1956), even after the receipt of the *interim* order, leads one to conclude on a possible collusion with the Company and its management. Mr. Sekh Abdul Ajim has also not taken any steps to remedy the violations committed. As discussed earlier, the liability to refund is a continuous liability and would be discharged only when the repayments are done. Therefore, I hold Mr. Sekh Abdul Ajim liable for the same.
10. The persons being the directors at the time of impugned issues and allotment are liable for repayment. The liability of the Company and its directors to repay under Section 73(2) read with Sections 11, 11B and 27 of the SEBI Act is continuing and such liability continues till all the repayments are made. Therefore, the directors who joined subsequent to the impugned public issuance are also responsible for not making the refund, if the Company does not repay the money collected. It can therefore be concluded that all these persons being the persons in-charge of and responsible to the Company for the conduct of the business, are responsible for the contraventions committed by the Company as found above. For such violations, appropriate directions need to be issued to the above directors.

11. I note that Bharatiya Real Estate Development Limited, Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Sekh Abdul Ajim, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee were required to provide full inventory of the assets and properties within 21 days from the date of receipt of *interim* order. However, except Mr. Manoj Agarwala none has submitted the said details till date. In view of the discussion above, appropriate action in accordance with law needs to be initiated against the Company and the directors/ promoters in charge of the affairs of the Company during the relevant period.
12. Therefore, 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 and 11B thereof hereby issue the following directions:
- a. The Company, **Bharatiya Real Estate Development Limited [PAN: AAECB3300K], Mr. Soumen Majumder [PAN: BCVPM0899M], Mr. Pankaj Upadhyay [PAN: AAWPU0874E], Mr. Sekh Abdul Ajim [PAN: APQPA9380J], Mr. Subhas Koley [PAN: ARLPK9557A], Mr. Manoj Agarwala [PAN: ADBPA3455H], Mr. Tarunkumar Das [DIN: 06391049] and Ms. Shipra Banerjee [PAN: AKKPB3858M]** jointly and severally, shall forthwith refund the money collected by the Company through the issuance of Redeemable Preference Shares (which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956), to the investors including the money collected from investors, till date, pending allotment of RPS, 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 repayments to investors shall be effected only in cash through Bank Demand Draft or Pay Order.

- c. The Company and the above directors are permitted to sell the assets of the Company only for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised Bank.
- d. The Company and the above directors 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 details of contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.
- e. After completing the aforesaid repayments, the Company and its directors shall file a certificate of such completion with SEBI, within a period of three months from the date of this Order, from 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').
- f. In case of failure of **Bharatiya Real Estate Development Limited**, Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Sekh Abdul Ajim, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee in complying with the aforesaid directions, SEBI, on expiry of three months 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.
  - g. The **Company** is directed not to, directly or indirectly, access the capital market by issuing prospectus, offer document or advertisement soliciting money from the public and is 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 four (4) years from the date of completion of refunds to investors, made to the satisfaction of SEBI, as directed above.
  - h. The **directors** of **Bharatiya Real Estate Development Limited**, Mr. Soumen Majumder, Mr. Pankaj Upadhyay, Mr. Sekh Abdul Ajim, Mr. Subhas Koley, Mr. Manoj Agarwala, Mr. Tarunkumar Das and Ms. Shipra Banerjee are restrained from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, with immediate effect. They are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, with immediate effect. This restraint shall continue to be in force for a further period of four (4) years on completion of the repayments, as directed above.
  - i. The above directions shall come into force with immediate effect.
13. 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.
14. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories for information and necessary action.

15. 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 21<sup>st</sup>, 2016**  
**PLACE : Mumbai**

**PRASHANT SARAN**  
**WHOLE TIME MEMBER**  
**SECURITIES AND EXCHANGE BOARD OF INDIA**