WTM/MPB/EFD-1-DRA-III/ 56 /2018

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11, 11(4),11A and 11B of the Securities and Exchange Board of India Act, 1992

In the matter of Sahara India Commercial Corporation Limited

In re: Deemed Public Issue Norms

In respect of:

S.No.	Name of the Entity	PAN	CIN/DIN
1.	**Sahara India Commercial Corporation Limited**	**AADCS6118F**	**U70109WB1992PLC053999**
2.	**Shri I.Ahmad**	**ACPPA7639A**	NA
3.	**Shri O.P.Dixit**	**ADDPD1207A**	NA
4.	**Shri A.N.Mukherjee**	**AATPM0220H**	NA
5.	**Shri Asad Ahmad**	**AALPA0819Q**	NA
6.	**Shri C.B.Thapa**	**ABNPT2137K**	NA
7.	**Lt. Col. (Retd) D. S. Thapa**	**ABMPT2119D**	NA
8.	**Shri Subrata Roy Sahara**	**ARKPS3189F**	**00431905**
9.	**Shri O.P.Shrivastava**	**AKHPS7919K**	**00144000**
10.	**Shri J.B.Roy**	**ACQPR6786C**	**00432043**
11.	**Lt.Gen.(Retd.) A.S. Rao**	**AAWPR5550N**	**00248189**
12.	**Shri P.S.Mishra**	**AFAPM4628M**	**00180954**
13.	**Shri Y.N.Saxena**	**ABLPS5692L**	**00097570**
14.	**Shri Ranoj Das Gupta**	**AAPPD4448N**	**00216165**

S.No.	Name of the Entity	PAN	CIN/DIN
15.	**M/s Sahara India (and its constituent partners)**	**AAMFS0216L**	NA

1. Sahara India Commercial Corporation Limited (hereinafter referred to as "**SICCL**"/ "**the Company**") is a Public company incorporated on January 2, 1992 and registered with Registrar of Companies–Kolkata, West Bengal with CIN: U70109WB1992PLC053999. Its registered office is at Sahara India Sadan, 2A Shakespere Sarani, Kolkata, West Bengal- 700071.

2. Two Sahara group entities viz. Sahara India Real Estate Corporation Limited (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL) had issued OFCDs from 2008 and 2009 onwards, respectively. During the course of the investigation of the OFCD issuances of SIRECL and SHICL, it was noticed that another Sahara group entity viz. SICCL has also filed RHP and Prospectus with Registrar of Companies (RoC), West Bengal for raising an Amount of Rs.17,250 crores through an issue of OFCDs.

3. Securities and Exchange Board of India requested RoC, West Bengal to provide the details/information with regard to the OFCD issuances by SICCL. Accordingly, RoC provided copy of the RHP filed by SICCL on June 29, 2001 and copy of final prospectus filed on July 05, 2008. RoC further stated that as per the Balance Sheet of the Company as on March 31, 2009, OFCDs amounting to Rs. 6,922.32 crore was outstanding. MCA had carried out the inspection under Section 209A of the Companies Act, 1956 of the books of SICCL and forwarded to SEBI the extracts of the Inspection Report detailing the violations of Section 73, 63 and 68 of the Companies Act, 1956 and the voluminous redemption/ conversion of approximately Rs. 13,000 crores claimed to have been made by SICCL, requesting SEBI to initiate appropriate action.

4. SEBI undertook an analysis of the information received, to ascertain whether SICCL had made any public issue of securities without complying with the provisions of the

Companies Act, 1956 **(Companies Act);** Securities and Exchange Board of India Act, 1992 (**SEBI Act**) and the Rules and Regulations framed thereunder. It was observed that SICCL had made an offer of OFCDs in the financial years 1998-2009 (hereinafter referred to as **"Offer of OFCDs"**) and raised an amount of at least Rs. 14,106 Crores from at least 1,98,39,939 allottees. As per the Prospectus, the issue remained open from July 6, 1998 till June 30, 2008.

5. As the above said *Offer of OFCDs* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992, the Companies Act, 1956, and Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 **(DIP Guidelines)** read with SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 **(ICDR Regulations)** and SEBI (Merchant Bankers) Regulations, 1992 **("SEBI Merchant Banker Regulations)**, SEBI issued Show Cause Notice dated February 20, 2015 (hereinafter referred to as **"SCN"**) to SICCL, its Directors, promoter, managers, arranger viz. Shri I.Ahmad, Shri O.P.Dixit, Shri A.N.Mukherjee, Shri Asad Ahmad, Shri C.B.Thapa, Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta, M/s Sahara India (and its constituent partners) (hereinafter collectively referred to as "**Noticees**").

6. *Major Allegations*: In the said SCN, the following allegations were recorded. SICCL had made an *Offer of OFCDs* during the financial years 1998-2009 and raised an amount of at least Rs. 14,106 Crores as shown below:

Year of Issue	**Security Issued**	**Amount raised (Rs.) (crores)**	**Number of allottees**
1998-2009	*OFCDs*	14,106	1,98,39,939
Total		14,106	1,98,39,939

7. The above *Offer of OFCDs* and pursuant allotment was public issue of securities in terms of first proviso to section 67(3) read with 67(1) and 67(2) of the Companies Act, 1956. Accordingly, the resultant requirement under sections 56, 62, 63, 68, 73(1), 73(2) and 73(3) and sections 117B and 117C of the Companies Act, 1956 and the relevant provisions of the DIP Guidelines read with ICDR Regulations were not complied with by SICCL in respect of the *Offer of OFCDs*. Further, M/s Sahara India ("arranger"), is a partnership firm belonging to the Sahara Group with Shri Subrata Roy shown as Managing Partner, in the Partnership Deed received from U.P. Co-operative Bank, which firm has acted as "arranger" to the issue and facilitated the issue as Merchant Banker without being a registered intermediary resulting in the violation of Section 12 of the SEBI Act, 1992 read with SEBI Merchant Bankers Regulations read with Clause 5.4.1 of the DIP Guidelines read with ICDR Regulations.

8. In view of the allegations, the Noticees were called upon to show cause within thirty days from the date of the SCN as to why appropriate directions including directions to refund the money solicited and mobilized through the prospectus issued with respect to the impugned OFCDs with interest, directions to prohibit the company, its promoters and directors and Sahara India from accessing the capital market etc., should not be issued against them. The Noticees were given the opportunity to file their replies and indicate whether they desired to avail themselves an opportunity of personal hearing.

9. *Service of SCN***:** The copy of the SCN was sent to the Noticees. Subsequently, vide notification dated November 9, 2016 published in newspaper *Times of India*, notification dated November 8, 2016 published in newspaper *Anand Bazar Patrika* and January 10, 2017 in Times of India and Loksatta, the Noticees were notified by SEBI, that SCN dated February 20, 2015 was issued against them and they were given a final opportunity to submit their reply in the matter.

10. SICCL sought inspection of documents and was provided the same on October 13, 2017.

Hearing Notices dated August 3, 2017, December 4, 2017 were issued, giving hearing opportunities to the Notices on September 15, 2017 and January 4, 2018. However, the Noticees sought adjournment and letter dated January 15, 2018 was issued giving another hearing opportunity on February 7, 2018. Shri Sudeep Seth, Advocate and Shri Shiv Kumar Pandey, Advocate, Authorized Representatives on behalf of all the Noticees had appeared for hearing scheduled on February 7, 2018 and made oral submissions in line with their replies on record. Further, additional reply dated February 6, 2018 was also submitted and it was stated that Lt. Col. (Retd) D. S. Thapa, P.S.Mishra, Y.N.Saxena have expired and the death certificate of P.S.Mishra was already submitted to SEBI and requested time to submit the death certificate of Lt. Col. (Retd) D. S. Thapa and Y.N.Saxena. They also sought time to submit the additional written submission in the matter and were advised to submit the chronological list of events explained by them during the course of hearing alongwith cross reference of the documents submitted. The Noticees were granted 15 days' time to submit the death certificate of Lt. Col. (Retd) D. S. Thapa and Y.N.Saxena, additional written submission in the matter and chronological list of events. Accordingly, hearing in respect of all the Noticees was concluded.

11. The Noticees also sought opportunity of second hearing vide letter dated February 12, 2018. In this regard, I note that the Noticees have made elaborate submissions and have also been given opportunity of hearing, therefore, I find that principles of natural justice are duly complied with and accordingly, no further opportunity of hearing was given.

12. The Noticees made submissions, *inter-alia,* vide letters dated May 21, 2015, December 29, 2016, February 6, 2018, February 12, 2018, March 10, 2018, August 7,2018 and the submissions in brief are as under:

    a) Annexure B contains reference of certain documents which have not been supplied and they have not been provided copy of full inspection report of MCA.
    b) Invocation of regulatory power by SEBI in 2015, after 17 years from the issue made by SICCL in 1998 is bad in law and hit by limitation and if limitation to exercise power

is not provided under the statute, then the interpretation calls for the same to be exercised within a reasonable period.

c) Issue opened on 6.7.1998 while first proviso to section 67(3) of the Companies Act, 1956 was inserted through amendment w.e.f. 13.12.2000 with prospective effect. Even sections 117B and 117C were inserted through amendment w.e.f. 13.12.2000.

d) OFCDs were offered on private placement basis and before amendment w.e.f. 13.12.2000, no presumption of public offer existed though securities were issued to more than 50 persons.

e) When the resolutions dated June 19, 1998 and May 5, 2000 were passed, there was no restriction in law in issuing any number of OFCDs on private placement basis except for in section 67(3)(a) and (b) and bonds issue was in conformity with these provisions. OFCDs issued only to workers, employees, individuals having deposits/association with Group Companies, friends, associates who were eligible to apply for OFCDs and they had to sign a declaration that they were associated with the group companies. OFCDs were issued only to targeted group, as identified by the Company. They submitted that Sahara India group had been maintaining a large database of depositors/agents/associates etc. due to diversified business and social activities of large scale and existing business of deposit mobilization from rural and semi urban areas, SICCL did not face difficulty in private placement of OFCD as subscribers were related either one way or the other. It was not possible for the Company to verify each and individual subscribers, how they are related to Sahara India Group, therefore, Board obtained a declaration from the subscribers. No official material of any nature has been circulated to public at large and the Company never issued any prospectus. Information Memorandum was circulated only to target group and it stipulated that only those individuals could apply for OFCD to whom IM was circulated.

f) Bonds issued on private placement basis, hence section 73 is not applicable, more so when the Company had resolved not to list the securities on any stock exchange and

Company had stated that it does not intend to list the OFCDs on any stock exchange as stated in the RHP and Final Prospectus.

g) They had commenced issue of OFCDs pursuant to Board Resolutions passed in 1998-1999 and filed RHP under Section 60B in 2001 and Final Prospectus in 2008 and further, made redemption of OFCDs.

h) Hon'ble Supreme Court in order dated 31.8.2012 observed that OFCD issue by SICCL made in 1998, before amendment of section 67(3) by Companies Amendment Act, 2000, hence, ROC and not SEBI had jurisdiction in respect of the said OFCDs.

i) OFCDs issued by SICCL were in the nature of bonds convertible into shares, at the option of subscriber at a pre-determined price when such OFCD was issued. In view of Section 28(1) (b), SCRA not applicable to bonds/OFCDs issued by SICCL and is incapable of listing on stock exchange.

j) For companies which do not intend to list, section 55A(c) conferred jurisdiction on Central Government and even residual power for issue of prospectus, etc. were vested with Central Govt.

k) Under section 60 of Companies Act, ROC is under obligation not to register a prospectus unless sections 55, 56, 57 and 58 and 60 were fully complied with and ROC was satisfied while registering the RHP and final prospectus.

l) MCA or any other Authority had never raised any question till filing of the Final Prospectus with RoC upon closure of the issue. Throughout since 1998 till closure of the issue, MCA had been regulating as SICCL was an unlisted public company and did not intend to list its securities on stock exchange. SEBI had knowledge and acquiesced in exercise of regulatory powers of RoC, which can't be questioned by SEBI.

m) DIP guidelines were issued in 2000, and OFCDs issue commenced in 1998 and the then existing SEBI guidelines titled as "SEBI Guidelines for disclosure and investor protection" issued on 13.8.1992 were followed and clarification III of these guidelines

provided that the guidelines were not to apply to issue of securities by existing private/closely held and other unlisted companies.

n) DIP guidelines not applicable since issue was private placement and DIP Guidelines have no statutory force. Further, after repeal of DIP Guidelines and with the ICDR Regulations, no action can be taken now for any alleged violation of DIP Guidelines.

o) As OFCDs were unsecured issue and have been repaid to investors, question of appointing debenture trustee or keeping debenture redemption reserve is irrelevant. Debenture Redemption Reserve is essential when debentures are redeemable and not when debentures are fully convertible into equity shares and relied on MCA General Circular no. 9/2002 dated April 18, 2002 in support thereof.

p) They have filed complete details of shareholders and debenture holders to MCA in the C.D. on 9.3.2012 and 6.3.2013 and copy of acknowledgement was enclosed.

q) No new investigation can be initiated for violation of Companies Act, 1956 after repeal thereof and commencement of operation of Companies Act, 2013

r) Lt. Col. (Retd.) D.S.Thapa expired on 5.9.2005, Shri P.S.Mishra expired on 29.12.2007 and Shri Y.N.Saxena expired on 1.11.2013.

s) Shri C.B.Thapa was never a director of the Company and was only Company Secretary.

t) Shri J.B.Roy resigned as a director on 18.2.2014, Shri Subrata Roy resigned as a director on 19.2.2014, Shri O.P.Srivastava resigned on 31.3.2014, Lt. Retd. A.S.Rao and Shri Ranoj Dasgupta both resigned on 29.9.2008 and 24.3.2015.

u) Shri I. Ahmad, Shri O.P.Dixit and Shri Asad Ahmad are neither manager of the Company nor do they draw any salary from SICCL and can't be regarded as officer in default. Merely by signing declarations in RHP and final prospectus, they do not become 'officer in default' and none of the current directors of the Company are issued show cause notice.

v) SICCL has already discharged all liabilities in OFCDs except for Rs. 57.56 crores as on 30.11.2016 still outstanding towards OFCD liability of 54,804 members. TDS deducted on interest paid has been deposited with Income Tax Department.

w) They are continuously making repayment to investors without fail. The non-redeemed OFCDs is Rs. 18 crores as on 31.10.2017 because OFCD holders did not turn up to receive payment from the Company. The Company has instructed its officials to contact remaining OFCD holders through field workers and an amount of Rs. 1.44 crores is to be deposited in Investor Education and Protection Fund pursuant to section 125 of Companies Act being the amount of OCFD unpaid for more than 7 years since date of maturity. Subsequent to the date of hearing, the Company has paid Rs. 70 lakhs to OFCD holders As per SEBI record during inspection, there were 26 complaints out of which 18 have been solved and 8 are under the process of being resolved.

x) Rate of interest under section 73 is between 4% to 15%, hence, illegal to contend refunds of OFCDs with 15% interest.

y) No concealment or misrepresentation as in the prospectus, fact of demerger process of Amby Valley Project has been mentioned.

z) Sahara India, a partnership firm acted as arranger for the OFCD based on their agreement with SICCL and approval accorded by DCA, Government of India. MCA granted approval to SICCL to appoint Sahara India as arranger of the issue.

13. Before proceeding to deliberate on the main issues for consideration, I take note of the Noticees submissions that they had requested for certain documents and they have not been provided copy of full inspection report of MCA. In this regard, I note that as requested the Noticees were subsequently provided inspection of documents by SEBI in respect of the extracts of the MCA Inspection Report as provided to SEBI by MCA and only this has been relied upon.

14. Further, the Noticees have contended that invocation of regulatory power by SEBI in 2015, after 17 years from the issue made by SICCL in 1998 is bad in law and hit by

limitation and if limitation to exercise power is not provided under the statute, then the interpretation calls for the same to be exercised within a reasonable period. Herein, I note that as contended by the Noticees, there is no limitation prescribed for initiating action by SEBI for violation of SEBI Act, etc. Also, I find that the present case has arisen during the investigation of OFCD issuances of SIRECL and SHICL (from 2008 and 2009). Therefore, as contented by the Noticees it cannot be concluded that the present proceedings are bad in law.

15. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.

    (1) Whether the Company came out with the Offer of OFCDs as stated in the SCN?

    (2) If so, whether the said offer was in violation of Section 56, Section 62, 63, 68, Section 73 and section 117C of the Companies Act, 1956?

    (3) Whether SICCL is in violation of Section 117B of the Companies Act, 1956?

    (4) Whether engagement of M/s Sahara India ("arranger") as "arranger" to the OFCD issue is in violation of Section 12 of the SEBI Act, 1992, SEBI (Merchant Bankers) Regulations, 1992 and DIP Guidelines read with ICDR Regulations?

    (5) *If the findings on Issue No.1,2, 3 and 4 are found in the affirmative, who are liable for the violations committed?*

<u>ISSUE No. 1</u>- Whether the company came out with the Offer of OFCDs as stated in the SCN?

16. I have perused the SCN dated February 20, 2015 for the allegation of *Offer of OFCDs*. I note that none of the Noticees have disputed the same.

17. I have also perused the documents/ information obtained from RoC, MCA and other

documents available on records. It is noted that SICCL has issued and allotted OFCDs to at least 1,98,39,939 investors during the financial years 1998-2009 and raised an amount of at least Rs. 14,106 Crores. The OFCD issue opened on July 6, 1998 and closed on June 30, 2008.

18. *I therefore conclude that SICCL came out with an offer of OFCDs as outlined above.*

19. ***ISSUE No. 2- If so, whether the said offer was in violation of Section 56, Section 62, 63, 68, Section 73 and section 117C of the Companies Act,***

20. The provisions alleged to have been violated and mentioned in Issue No. 2 are applicable to the *Offer of OFCDs made* to the public. Therefore the primary question that arises for consideration is whether the issue of OFCDs was 'public issue'. I propose to deal with the aspect of whether the issue is a deemed public issue post the amendment w.e.f. 13.12.2000 and public issue prior to the amendment. At this juncture, reference may be made to sections 67(1), 67(2) and 67(3) of the Companies Act, 1956:

> *"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided further** that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”*

21. Section 67(3) of Companies Act, 1956 provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

22. Therefore, the question arises whether the instant issues is "public issue" within the meaning of the first proviso to section 67(3) of the Companies Act, 1956. The Noticees have submitted that the issue opened on 6.7.1998 while first proviso to section 67(3) of the Companies Act, 1956 was inserted through amendment w.e.f. 13.12.2000 with prospective effect and that OFCDs were offered on private placement basis and before amendment w.e.f. 13.12.2000, no presumption of public offer existed though securities were issued to more than 50 persons. On perusal of the section 67 of the Companies Act, 1956 I find that first proviso to section 67(3) of the Companies Act, 1956 was inserted through amendment w.e.f. 13.12.2000. The OFCD issue opened on July 6, 1998 and closed on June 30, 2008. Therefore, the issue was open for subscription as on the introduction of first proviso to section 67(3) i.e, on 13.12.2000. Subsequent to the introduction of first proviso to section 67(3), the said proviso applies to any issuance subsequent to that date. It is the not the case of the noticees that the entire allotment was made before the introduction the first proviso. I find the SICCL was continuously alloting OFCDs to more than 50 persons. considering that the issue of OFCDs by SICCL has been made to least 1,98,39,939 persons and money for allotment was received by the company after 13.12.2000, the allotments were continuing after the introduction of the first proviso to section 67 of the Companies Act, 1956.

23. I find that the submissions of the Noticees that the issue of OFCDs was a private placement and issued only to workers, employees, individuals having deposits/association with Group Companies, friends, associates is not tenable, as the domestic concern argument becomes irrelevant as far as the post amendment issues are concerned once the offer/issue has been made to more than 50 persons by the Company. Reference also may be made to another paragraph from the Sahara India Real Estate Corporation Limited & Ors. v. SEBI (Civil Appeal no. 9813 and 9833 of 2011) (hereinafter referred to as the "Sahara Case") which clearly states when a private placement is made to fifty or more persons, it *becomes* an offer intended for public.

" *The 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."*

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

24. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* which lays down that "In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions

of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning".

25. The above findings lead to a reasonable conclusion that the *Offer of OFCDs* by SICCL and pursuant allotments made subsequent to 13.12.2000 was a "public issue" within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.

26. This leads to the second question, whether the issuances before introduction of first proviso to section 67(3) i.e, prior to 13.12.2000 are public issues in terms of section Sections 67(1) and 67 (2) of the Companies Act,1956.

27. On perusal of section 67(1) of the Companies Act, 1956, I note that the said section provides for a rule of construction on offer of shares and debenture to the public. The said provision further subjects the rule of construction to the provisions *of sub-sections (3) and (4)* of 67. Therefore, the test for determining whether an offer is made to public by applying the rule of construction in in section 67(1) needs to be read together with 67(3) and 67(4). There is no case that 67(4) is applicable in the instant case which permits invitation to the members and debenture holders as per section 67(4). Therefore, the rule of construction under section 67(1) needs to be read together with section 67(3). As found earlier, the first proviso to section 67(3) was introduced only on 13.12.2000 and the present question deals with on the offer made prior to the amendment, therefore, the section 67(1) has to be read with the section 67(3) as it stood prior to the amendment dated 13.12.2000. If so read together, the consequence of such interpretation was succinctly phrased by the Hon'ble Supreme court in Sahara's case in the following words

> "*"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.

28. In the instant case the offer has been made to the section of the public as mentioned, therefore, falling within the scope of section 67(1). Therefore, the further question that needs determination is whether circumstances mentioned in clauses (a) and (b) of Section 67(3) are satisfied, so that the offer/invitation would not be treated as being made to the public.

29. It is also the case of Noticee when the resolutions dated June 19, 1998 and May 5, 2000 were passed, there was no restriction in law in issuing any number of OFCDs on private placement basis except for in section 67(3)(a) and (b) and bonds issue was in conformity with these provisions.

30. It was also contended that OFCDs were issued only to workers, employees, individuals having deposits/association with Group Companies, friends, associates who were eligible to apply for OFCDs and they had to sign a declaration that they were associated with the group companies and OFCDs were issued only to targeted group, as identified by the Company. They submitted that Sahara India group had been maintaining a large database of depositors/agents/associates etc. due to diversified business and social activities of large scale and existing business of deposit mobilization from rural and semi

urban areas, SICCL did not face difficulty in private placement of OFCD as subscribers were related either one way or the other and it was not possible for the Company to verify each and individual subscribers, how they are related to Sahara India Group, therefore, Board obtained a declaration from the subscribers and no official material of any nature has been circulated to public at large and the Company never issued any prospectus. Information Memorandum was circulated only to target group and it stipulated that only those individuals could apply for OFCD to whom IM was circulated.

31. Though the company claimed that the issue was made only to the targeted set of persons as been identified by the Company, the company provided no evidence that the offer was only made to the targeted persons. The mere parameter as stated by the company that the offer was resolved to be made only to the directors' friends, associates, and relatives of the directors, group companies, workers, employees, individuals having deposit /association with Sahara India group of companies, is not equivalent to the offer being made to specific targeted persons. The noticee produced no evidence to prove that the offer was made only to specific identified individual while the OFCDs were allotted to 1,98,39,939 persons. The fact that that as per the terms and conditions contained in the OFCD application Form, the applicant was required to sign a declaration confirming that he was associated with the group, clearly indicates on the one hand that the Company has not identified whether the recipient of offer is associated with the group, instead left that verification at the discretion of the recipient of offer. The company itself admits that such a verification was not possible by it. On the other hand, this indicates that the offer could reach any one even if he is not the intended person in the group and thereafter it is the task of the recipient of the offer to verify whether he is connected to the group. This points to the fact that the offer is in the nature of one which is calculated to result, directly or indirectly, in the OFCD becoming available for subscription or purchase by persons other than those intended to receive the offer. Therefore, the offer does not meet

the requirements of section 67(3)(a) of the Companies Act,1956. This leads to the further question of whether the offer is in satisfaction of the other criteria mentioned in section 67(3) (b) of the Companies Act,1956.The finding on this would become affirmative if workers, employees, individuals having deposits/association with Group Companies, friends, associates can be considered to be domestic concern of the Noticee. Firstly, there is no evidence adduced by the Noticee that the issue was made only to this group except for the claim. Secondly, the company itself admits that it has not verified that it has made the offer only to the entities in the group. Therefore, on facts, the Noticee has not established that the offer was made only to this group. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the "Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged." Even assuming that such an offer was made, the offer made to this group would satisfy the requirement of section 67(3) (b) only when this group is a domestic concern of the persons making and receiving the offer. In this regard I refer to the passage from Sahara Judgement, wherein the Hon'ble Supreme court dealing with the phrase domestic concern observed as follows:-

" I may, in this connection, point out that the position in England is almost the same….

13. ….An offer is not regarded as an offer to the public if (1) it can properly be regarded in all circumstances as not being calculated to result, directly or individually, in securities of the company becoming available to persons other than those receiving the offer; or (2) otherwise being a private concern of the person receiving it and the person making it: s 756(3). ***An offer is to be regarded (unless the contrary is proved) as being a private concern of the person receiving it and the person making it if (a) it is made to a person already connected with the company***

and, where it is made on terms allowing that person to renounce his rights, the rights may only be renounced in favour of another person already connected with the company;… For these purposes 'person already connected with the company' means (A) an existing member or employee of the company; (B) a member of the family of a person who is or was a member or employee of the company; (C) the widow or widower, or surviving civil partner, of a person who was a member or employee of the company; (D) an existing debenture holder of the company; or (E) a trustee (acting in his capacity as such) of a trust of which the principal beneficiary is a person within any of heads (A) to (D) above: s756(5)…"

32. Therefore, even if the offer was made to the said group the same does not satisfy the requirement that the issue was the *domestic concern of the persons making and receiving the offer or invitations. Therefore, the offer does not satisfy the other criteria mentioned in section 67(3) (b) of the Companies Act,1956. Hence I conclude that the offer does not satsfy the* circumstances mentioned in clauses (a) and (b) of Section 67(3). Therefore, I hold that the instant offer was a public offer even prior to the amendment of section 67 of Companies Act,1956 as it stood earlier.

33. I find that SICCL has not claimed itself to be a Non–Banking Financial Company or Public Financial Institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that SICCL is covered under the second proviso to Section 67(3) of the Companies Act, 1956.

34. Hence, the *Offer of OFCDs are* public issues and SICCL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

35. The Noticees also contended that Hon'ble Supreme Court in order dated 31.8.2012 observed that OFCD issue by SICCL was made in 1998, before amendment of section 67(3) by Companies Amendment Act, 2000, hence, ROC and not SEBI had jurisdiction in respect of the said OFCDs.

36. The Noticee submitted that Hon'ble Supreme Court in order dated 31.8.2012 observed that OFCD issue by SICCL was made in 1998, before amendment of section 67(3) by Companies Amendment Act, 2000, hence, ROC and not SEBI had jurisdiction in respect of the said OFCDs. I find that the question as to whether SEBI has powers to enforce and administer section 55A of the Companies Act, 1956 for violations committed prior to the Companies Amendment Act, 2000 was not in question before the Hon'ble Supreme Court as the facts of the case in Civil Appeal No. 9813 Of 2011 before the Hon'ble Supreme court was in respect of an issue made subsequent to the introduction of section 55A of the Companies Act and action initiated by SEBI subsequent to the introduction of Section 55A of the Companies Act,1956. The perusal of section 55A indicates the provision provides for the transfer of power from Central Government to SEBI in respect of the matters specified therein. Once the transfer of power from one forum to another forum has been made, no other transitory provision reserving the power to central government in respect of violations committed prior to the introduction of section 55A has been provided for. Therefore, the intention of the legislature is clear that the powers transferred vide section 55A of the Companies Act has been conferred on SEBI even in respect of cases where the violations have been committed prior to the introduction of section 55A of the Companies Act,1956. In this regard, it is apposite to refer to the order passed by Hon'ble Supreme court of India, in SEBI vs Classic Credit Ltd. on 21 August, 2017 dealing with various case laws on the subject of whether any vested right of forum is available. The Hon'ble Supreme court observed *"we are of the view, that the 'forum' for trial earlier vested in the Court of Metropolitan Magistrate (-or, Judicial Magistrate of the first class) was retrospectively amended, inasmuch as, the 'forum' of trial after 'the 2002 Amendment Act' was retrospectively changed to the Court of Session. In this view of the matter, the trials even in respect of offences allegedly committed before 29.10.2002 (-the date with effect from which, 'the 2002 Amendment Act' became operational), whether in respect whereof trial had or had not been initiated, would stand jurisdictionally vested in a Court of Session*.

Since there is no vested right on the forum and absence of transitory provision reserving the power to central government in respect of violations committed prior to the introduction of section 55A, I am not able to accept the contention that, in respect of issues made by it prior to the introduction of section 55A of the Companies Act, 1956, ROC has jurisdiction and SEBI does not have jurisdiction. In view of this, I hold that SEBI has powers to proceed against the Noticee even in respect of issues made by it prior to the introduction of section 55A of the Companies Act, 1956.

37. Further, since the offer of OFCDs is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants.In regards the submissions of the Noticees that bonds were issued on private placement basis, hence section 73 is not applicable, I find that the OFCD issue has already been determined as a public issue in the prior paragraphs, therefore, I do not find these submissions of the Noticees tenable.

38. Further, I note the submissions of the Noticees that SICCL has already discharged all liabilities in OFCDs except the non-redeemed OFCDs of Rs. 18 crores as on 31.10.2017 because OFCD holders did not turn up to receive payment from the Company and the Company has instructed its officials to contact remaining OFCD holders through field workers and an amount of Rs. 1.44 crores is to be deposited in Investor Education and Protection Fund pursuant to section 125 of Companies Act being the amount of OCFD unpaid for more than 7 years since date of maturity. They have also submitted that as per SEBI record during inspection, there were 26 complaints out of which 18 have been solved and 8 are under the process of solving. I note that the SCN had sought details regarding amount refunded, mode of refund and conversion of such OFCDs and in response, the

Company vide letter dated 29.12.2016 has enclosed annexure 20 and 21. On perusal of the said annexures comprising three pages, I find that total amount matured scheme wise and conversion details have been given. Further, the Noticee vide letter dated February 6, 2018 has enclosed a certificate from the Chartered Accountant ("CA"). in regards the repayment amounting to Rs. 14,088 crores till 31.10.2017 and also submitted justification and reason for making majority repayment through cash payment vide letter dated February 12, 2018. However, both the annexures and the CA certificate do not provide documentary evidence in support thereof, therefore, I do not find them adequate in showing that the said repayment has actually been made by SICCL, specifically in light of the Company's own submissions that the repayment have been made in cash. Hence, I find that the Company has not adduced conclusive proof regarding the redemptions claimed to have been made, therefore, I am unable to accept the aforesaid submissions of the Noticees. Further in view of the collection of huge amount of money running atleast Rs. 14,106 crores of rupees, from 1,98,39,939 allottees spanning over a period of 1998 to 2009, given the magnitude, it would be in the interest of the subscribers that SEBI should consider the requirement of repayment fulfilled only when the same has been through verifiable banking channel, individual subscriber wise through Bank Demand Draft or Pay Order both of which crossed as "Non-Transferable. Since there was no such evidence of payment through Bank Demand Draft or Pay Order, I observe that the liability to refund has not been discharged by the Company in the instant case.

39. I also find that no records have been submitted to indicate that it has made an application seeking listing permission from stock exchange. In view of the discussion in the previous paragraphs I find that refund liability has not been discharged by the Company. Therefore, I find that SICCL has contravened section 73(1) and (2) of the Companies Act, 1956. SICCL has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that SICCL has also not complied with the provisions of section 73(3) which mandates that the amounts received from investors shall

be kept in a separate bank account. Therefore, I find, that section 73 of the Companies Act, 1956 has not been complied with.

40. Further, in regards the submissions of the Noticees that the rate of interest under section 73 is between 4% to 15%, hence, it is illegal to contend refunds of OFCDs with 15% interest, I note that liability to repay is different from redemption and since the liability to repay starts from 8th day from the date of collection of the money, and there is no sanctity for the rates offered on the redemptions. Therefore, the interest can be fixed beyond the rate on redemption. I also note Hon'ble Supreme Court in the Sahara case has directed SIRECL and SHICL to refund the amount with 15% interest. Further I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

41. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Neither SICCL nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus.

42. I also find that all the directors of the issuer company need to sign the declaration specified in Part III, Paragraph 22 of Schedule II of the Companies Act, stating that *all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the SEBI have been complied with and no statement made in prospectus is contrary to the provisions of the Companies Act or SEBI Act or rules or guidelines made there-under.* I find that the above-mentioned declaration has not been incorporated in the RHP and Prospectus of the Company and that none of the disclosures as specified by SEBI or the investors protection measures specified for public issues under

the DIP Guidelines had been complied with. Therefore, I find that, SICCL has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

43. One of the main investor protection measures in respect of a public issue is that the investors receive large scale disclosures about the company which would have material bearing on the decision making of those investors. For instance, the prospectus is to contain the credit rating obtained from a Credit Rating Agency and an undertaking by the issuer Company confirming firm arrangements of finance through verifiable means towards seventy five percent of the stated means of finance excluding the amount to be raised through the proposed public issue. However, no such disclosures have been made. Since there was a misstatement that the issue was private placement while it was in fact public issue, the investors have lost the advantage of taking informed decision which an investor in a public issue would have had. Therefore, the investing public did not have the entire gamut of disclosures which the said investor would have had the benefit, if all the disclosures meant for a public issue is made in the RHP/Prospectus, before his investment. Therefore, the entire subscription money of the investor is a loss incurred to those investors in view of the untrue statement in the prospectus/RHP. Against all the important disclosures contemplated, in the columns in the RHP and prospectus for e.g. regarding names of stock exchanges where application for listing is made, minimum subscriptions, declaration regarding refund under section 73(2),& (2A) of the Companies Act, details regarding debenture trustee, declaration regarding utilization of issue proceeds etc. "*Nil/Not applicable/ No listing is envisaged/as decided by the Board*" has been stated. As per section 65 of the Companies Act,1956 which provides for a deeming clause that a statement included in a prospectus shall be deemed to be untrue, if the statement is misleading in the form and context in which it is included and where the omission from a prospectus of any matter is calculated to mislead, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included. Since the above said omission to make disclosures are calculated to mislead, the same would be untrue statements. Therefore, I find that the RHP and Prospectus of the Company

contain untrue statements in terms of section 62 of the Companies Act, 1956. Since the liability under section 63 and 68 of the Companies Act, 1956 are criminal liability, this proceedings would not be appropriate to enter findings regarding the criminal liability.

44. I also find that the declaration specified in Part III, paragraph 22 of Schedule II of the Companies Act has also not been incorporated in the RHP and the Prospectus and none of the disclosure requirements specified by SEBI or the investors protection measures specified for public issues, under the DIP Guidelines have been complied with. In terms of Clause 1.4 of the DIP Guidelines, unless otherwise provided, the guidelines are applicable, *inter alia*, to all public issues and consequent to the repeal of the DIP Guidelines, the ICDR Regulations were made effective from August 26, 2009. The Company filed its RHP and Prospectus with RoC on June 29, 2001 and July 05, 2008 respectively, when the DIP Guidelines were in force. As per Clause 2.1.1 of DIP Guidelines, no issuer shall make a public issue unless a draft offer document has been filed with SEBI through the lead merchant banker, at least thirty days prior to registering the prospectus/red herring prospectus with the RoC. In terms of the DIP Guidelines, I find that SICCL had failed to comply with the following as required under the DIP Guidelines.

    a) failed to file the draft offer document with SEBI;
    b) failed to enter into dematerialization agreement with depository and provide the option to investors to receive the securities in dematerialized form;
    c) failed to mention the risk factors and provide the adequate disclosures that is stipulated, to enable the investors to take a well-informed decision;
    d) denied the exit opportunity to the investors;
    e) failed to contribute for minimum promoters contribution;
    f) failed to lock-in the minimum promoters contribution;
    g) failed to grade their issue;
    h) failed to open and close the issue within the stipulated time limit;
    i) failed to obtain the credit rating from the recognized credit rating agency for their instruments;

j) failed to appoint a debenture trustee registered with SEBI; and

k) failed to create debenture redemption reserve etc.

l) failed to place lock-in of pre-issue share capital of an unlisted company

m) failed to enter into MoU with Lead Merchant Banker.

n) failed to file draft offer document with Stock Exchange

o) failed to have mandatory collection centers

p) failed to appoint authorized collection agents

q) failed to disclose regarding creation of charge

r) failed to make firm arrangement of finance

45. I find that the aforesaid failures by the Company amounts to violation of clauses 2.1.1., 2.1.4., 2.1.5., 2.2, 2.5, 2.8, 4.1.1, 4.11, 4.14, 5.3.1., 5.6.2, 5.9, 5.10, 6.0 to 6.15, 8.8.1, 10.0 to 10.4, 10.6 and 10.9 of the DIP Guidelines read with ICDR Regulations.

46. I have considered the submissions of the Noticees that DIP guidelines were issued in 2000, and OFCDs issue commenced in 1998 and the then existing SEBI guidelines titled as "SEBI (Disclosure and investor protection) Guidelines, 1992"(DIP Guidelines 1992) issued on 13.8.1992 were followed and clarification III of these guidelines provided that the guidelines were not to apply to issue of securities by existing private/closely held and other unlisted companies. In this regard, I note that the OFCD issue by SICCL has already been determined as a public issue, therefore, I find that the OFCD issue by SICCL post DIP Guidelines in 2000 stands in violation thereof. In regards pre issue before DIP Guidelines, 2000, I find the aforesaid submissions of the Noticees unacceptable considering that the OFCD issue by SICCL has already been determined a public issue even prior to the year 2000. Considering the issue was a public offer, DIP Guidelines, 1992 was also applicable therein and I further note the saving clause 17.3.2 of the DIP Guidelines, 2000 which provides that anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer

document, any enquiry or investigation commenced or show cause notice issued in respect of the DIP Guidelines, 1992 shall be deemed to have been done or taken under the corresponding provisions of these guidelines. Therefore, the DIP Guidelines, 1992 was also applicable to the OFCD issue by SICCL prior to the DIP Guidelines, 2000. However, considering that violation of DIP Guidelines, 1992 is not specifically alleged in the SCN and as the same does not have a significant bearing on the present violations and findings, I give benefit to the Noticee in regards violation of DIP Guidelines, 1992. I also note the submissions of the Noticee that DIP guidelines are not applicable since issue was private placement and DIP Guidelines have no statutory force and further, after repeal of DIP Guidelines and with the ICDR Regulations, no action can be taken now for any alleged violation of DIP Guidelines. I do not find the submissions of the Noticee tenable and in this reference, I note Hon'ble Supreme Court's findings in the Sahara case while considering similar submissions that the repeal and savings clause under the ICDR Regulations clearly indicates that the violation under DIP Guidelines was a continuing one and failure to take action by SEBI under DIP Guidelines, in spite of the fact that Saharas did not discharge their statutory obligation would not be a ground to contend that the 2009 Regulations would not apply. Similarly, I do not find the submissions of the Noticees that no new investigation can be initiated for violation of Companies Act, 1956 after repeal thereof and commencement of operation of Companies Act, 2013 tenable in view of section 465 (2)(a) of the Companies Act, 2013 providing for anything done or any action taken or purported to have been done or taken under the Companies Act, 1956 be deemed to have been done or taken under the corresponding provisions of this Act.

47. I also note that the Annual report dated November 4, 2010 indicates that OFCD holders have been allotted 30,00,00,000 equity shares. However, as per annual filling details, the complete details of shareholders and debentures holders has not been filed, instead receipts are available of Form 20B filed for F.Y. 2010 & 2011 with the following note-*"Submit the complete list of share holders, debenture holders separately in a CD with the Concerned RoC office, failing which the filing will not be considered and SRN will remain pending."*

Herein, I note the Noticees submissions that they have filed complete details of shareholders and debenture holders to MCA in CD on 9.3.2012 and 6.3.2013 and enclosed copy of acknowledgment. I also find that the Noticees have submitted acknowledgment by ROC dated 9.3.2012 and 6.3.2013 of CD containing list of debenture holders, list of shareholders and details of transfer of shares/debentures. However, the Noticee has not produced any copy of the CD containing the list of debenture holders in the present proceedings in reply to the SCN. However, copy of two CDs were later sent to SEBI vide letter dated October 12, 2018 by the Company. The said CD does not give the date of allotment of the debentures. In view of the lack of complete information, it is difficult to consider that the CD contains the complete list of the debenture holders.

48. Further, from the extracts of the inspection report of MCA it is also observed that SICCL has made false statements in the prospectus dated July 04, 2008 filed with RoC, West Bengal in respect of its proposed investment in various projects. The discrepancies as observed by MCA, in the said inspection report, are summarised below:

a) (i) As per the prospectus, the company had invested in "Aamby Valley City Project". In the aforesaid prospectus the company had stated to have invested Rs. 33,000 Cr. in the project and would realize Rs. 90,211 Cr. from the same. However, MCA observed that as on the date of filing of the aforesaid prospectus, the company had already filed a petition with the Hon'ble High Courts of Bombay and Calcutta for Scheme of Arrangement for de-merger of the Aamby Valley undertaking to a separate company. MCA further observed that as per the statement of assets and liabilities of the said undertaking as on March 31, 2006 as given in the Scheme of Arrangement, the company was having assets and liabilities amounting to Rs. 7,695.86 Cr. respectively, which were transferred to the resulting company after passing of orders of Hon'ble High Court. The statement of investment, as mentioned in the prospectus were neither invested nor realized.

(ii) MCA has further stated that though the company submitted that the project costs and the receipts are 'estimated' as on the date of the prospectus, which is in line with the requirement of the Companies Act provisions, SICCL, as on the date of filing the prospectus, was aware of the proposal of demerger as well as the position of its assets and liabilities and when once being aware of that, the company makes a statement of investment and realization in the prospectus, which can neither be made or realized, it is nothing but false in material particular. As per MCA, the company was collecting funds for the project for a long time and once an estimated amount of investment and realization is given in the prospectus, the same needed to be adhered to.

b) With regard to other projects, MCA has observed that the company has given statement of investment of Rs. 128836.10 Cr. with realization of Rs. 190826.40 Cr. which has so far neither been made nor realized. MCA has also stated the company has not given details of investment in the projects and realization from said projects in order to justify its claims that the statements given in the prospectus are true. The company has to justify the disclosures made in the prospectus as huge amount of public money has been taken by the company.

c) MCA has therefore taken a view that the statements made in the prospectus with respect to investments in projects and realization are not true and the company has given the said statements knowing it to be false in material particular. Thus, SICCL has contravened Section 63 and 68 of the Companies Act, 1956.

49. I have also noted the submissions of the Noticee that there has been no concealment or misrepresentation as in the prospectus as schedule II, Part I, VII (c) and fact of demerger process of Aamby Valley Project has been mentioned. The Noticees have submitted that the scheme of arrangement for demerger of Aamby Valley Division were filed before Hon'ble High Court of Kolkata on 2.5.2007 and High Court of Mumbai on 15.6.2007 and

first order of Hon'ble High Court of Mumbai was delivered on 23.11.2007 and High Court of Kolkata on 30.1.2008 and copies of the said demerger orders are marked as 'material documents' appearing as Annexure 13 of the prospectus and because of the de-merger of SICCL into two separate companies, namely SICCL and Aamby Valley Limited, the assets and liabilities shown in the scheme of arrangement, as on appointed date, *i.e.* 31.3.2006 is amounting to Rs. 7695.86 crore which is on actual basis. On perusal of the prospectus, I note that the Company has mentioned regarding the demerger of Aamby Valley division. . However, I do not find the explanations of the Noticee acceptable as providing details of investment and realization in Aamby Valley despite being aware of the actual position of assets and liabilities of Aamby Valley undertaking and the proposal of demerger of the said undertaking at the time of filing prospectus, amounts to providing mis-statement in the prospectus and in violation of section 62 of the Companies Act. Further, the Company has also not substantiated as to how realization, even if any, from the investments in Aamby Valley will be obtained by the Company after demerger. The Company has not been able to substantiate the sharp variance between the actual state of investment in Aamby Valley and the estimated receipts given by SICCL in the Prospectus, that too after about 10 years from starting to collect money from the public. SICCL has not been able to substantiate the current status of the investments claimed to have been made by it in the different projects in the prospectus. Further, the Company has stated that the figures of investment and realizable receipts mentioned are on estimated basis, that too when the total project would be developed and because of demerger of SICCL into two companies, assets and liabilities as on appointed date, 31.3.2006 amounting to Rs. 7695 crores is on actual basis. However, the Noticee has still not substantiated as to whether the investment, as mentioned in the prospectus was actually invested or realized . Therefore, I find that SICCL has made false statements in the prospectus.

50. As regards the allegation of section 117C of the Companies Act, 1956, it may be seen that the said provision mandates the company to create a debenture redemption reserve for the

redemption of such debentures, to which every year, adequate amounts should be credited out of its profits, until such debentures are redeemed. Noticees contended that as OFCDs were unsecured issue and have been repaid to investors, question of keeping debenture redemption reserve is irrelevant and debenture Redemption Reserve is essential when debentures are redeemable and not when debentures are fully convertible into equity shares relying on MCA General Circular no. 9/2002 dated April 18, 2002 in support thereof . On perusal of the section 117C of the Companies Act, 1956, I find that the said section does not distinguish between secured and unsecured debentures. The reading of the circular shows that it applies to fully and partly convertible debentures. The circular does not apply to optionally fully convertible securities. It applies to compulsorily convertible securities as those securities would in all eventualities be converted into equity shares. Therefore, creation of debenture redemption reserve was not mandated in that scenario by the above said Circular. However, optionally convertible debentures cannot be equated with mandatorily convertible debentures, as the OFCDs in some eventualities may not be converted, if the holder of the OFCDs chooses not to covert the same. In regards the pre amendment issues, I find that the above said Circular in clause (d) clearly provides that the Section 117C would be applicable to even debentures issued and pending to be redeemed as on the introduction of section 117C of the Companies Act,1956. There is no material on record to show that such debenture reserve was created in respect of pre and post amendment issuances of OFCDs. Therefore, I hold that the company has violated section 117C of the Companies Act, 1956 in respect of both pre and post amendment issues of OFCDs.

51. In regards their submissions that under section 60 of Companies Act, ROC is under obligation not to register a prospectus unless sections 55, 56, 57 and 58 and 60 were fully complied with and ROC was satisfied while registering the RHP and final prospectus, I find that even if these submissions were to be considered, the same can't form the basis for not taking action by SEBI in respect of an OFCD issue by the Company which is otherwise in violation of public issue norms. In this regard, it would be appropriate to

refer and rely on the judgment of Hon'ble Supreme court of India, while summarizing the various pronouncement made by it previously on the promissory estoppel held in M/S Sharma Transport vs Government Of A.P. & dated December,3, 2001 *"It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make. Doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the Government or public authority for having regard to the facts as they have transpired that it would be inequitable to hold the Government or public authority to the promise or representation made by it*. The law laid down above would squarely applicable to the facts of this case even assuming there was a representation by the public authority. In view of this position of law, I am not inclined to accept the submissions of the Noticees that MCA or any other Authority had never raised any question till filing of the Final Prospectus with RoC upon closure of the issue and throughout since 1998 till closure of the issue, MCA had been regulating as SICCL was an unlisted public company and did not intend to list its securities on stock exchange and SEBI had knowledge and acquiesced in exercise of regulatory powers of RoC, which can't be questioned by SEBI.

52. The Noticee has submitted that SEBI had knowledge and acquiesced in exercise of regulatory powers of RoC, which can't be questioned by SEBI. Over here, it would be appropriate to deal with the doctrine of Acquiescence. Hon'ble Supreme Court of India in the matter of *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.* decided on 05/12/2002 described the doctrine of Acquiescence as follows:

"...

The doctrine of Acquiescence may be stated thus: "If a person having right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the

act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." (Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846). this is the proper sense of the term acquiescence, "and in that sense may be defined as acquiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." (De Bussche v. Alt. L.R. 8 Ch. D. 286 (314). Acquiescence is not a question of fact but of legal inference from facts found (Lata Beni Ram v. Kundan Lall. L.R. 261 IndAp 58 (1899).

…"

53. It is noted from the records that the Noticees have not submitted any material /documents based on which a legal inference could be drawn that the Noticee were given an impression by SEBI that SEBI has no jurisdiction on the schemes floated by the Noticees. Further, as noted from Hon'ble SAT Order in the matter of *Sahara India Real Estate Corporation Limited* Vs. *Securities and Exchange Board of India* decided on 18/10/2011 that the RoC ignored the instructions contained in circular no.F.7/91-CL-V dated March 1, 1991 issued by the then Department of Company Affairs, Government of India. Hon'ble SAT observed as follows:

"…As an administrative measure, the Government of India by this circular had directed that a prospectus would not be registered by the Registrar of Companies if Sebi had informed him that the contents of the prospectus contravened any law or rules. As per this circular, it was incumbent upon him to submit to Sebi a draft prospectus for scrutiny. On receipt of the draft, Sebi was required to scrutinise the disclosures made therein to see if it contained adequate information for the investors.

54. In view of the aforesaid, the submission of the Noticees is not tenable. There is yet another reason why the submission of the Noticees is not acceptable. It is noted from *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.* that acquiescence, is no more than an

instance of the law of estoppel by words or conduct. It has been held in a catena of cases by Hon'ble Supreme Court of India viz., *Municipal Corpn. of Greater Bombay v. Hakimwadi Tenants' Assn.,decided on on 24 November, 1987, Tata Chemicals Ltd.* Vs. *Commissioner of Customs (Preventive)* decided on 14/05/2015, *Air India* Vs. *Nergesh Meerza*, AIR 1981 SC 1829 that there can be no estoppel against law. There can be no estoppel against a statute. Therefore, the plea of acquiescence / estoppel would not hold good against the statutory provisions as may be applicable in this present matter.

55. 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"*
>
> Thus it is clear that SEBI has jurisdiction over issuances of debentures to fifty or more without complying with provisions of Section 73(1) of Companies Act,1956.

The Noticees have also contended that OFCDs issued by SICCL were in the nature of bonds convertible into shares, at the option of subscriber at a pre-determined price when such OFCD was issued and in view of Section 28(1) (b), SCRA is not applicable to bonds/OFCDs issued by SICCL and is incapable of listing on stock exchange and for companies which do not intend to list, section 55A(c) conferred jurisdiction on Central Government and even residual power for issue of prospectus, etc. were vested with Central Govt. I find that Hon'ble Supreme Court in the Sahara case has already considered a similar argument and held that OFCDs issued have the characteristics of shares and debentures and fall within the definition of section 2(h) of SCRA and since the definition of securities under section 2(45AA) of the Companies Act includes hybrids, SEBI has jurisdiction over the hybrids like OFCDs issued by Saharas. Hon'ble Supreme Court has further observed that the definition clause in section 2(h) of SCRA is a wide definition, an inclusive one. Therefore, the OFCDs are securities within section 2(h) of SCRA. The Court further held that contention of Saharas that OFCDs issued by them are convertible bonds issued on the basis of the price agreed upon at the time of issue and, therefore, the provisions of SCR Act would not apply, in view of section 28(1)(b) cannot be sustained.

56. In regard to their submissions that the Company had resolved not to list the securities on any stock exchange and Company had stated that it does not intend to list the OFCDs on any stock exchange as stated in the RHP and Final Prospectus, it is pertinent to note that while interpreting the phrase "intend to get listed" in the context of deemed public issue the Hon'ble Supreme Court in *Sahara Case* observed-

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

"…Listing of securities depends not upon one's volition, but on statutory mandate…"
"…The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant companies could have "intended", what was contrary to the mandatory requirement of law…"

57. Further, I note that Hon'ble Supreme Court in the Sahara case has also observed that even prior to the introduction of the proviso to section 67(3), any issue of securities to the public required mandatory applications for listing to one or more stock exchanges.

58. Therefore, in view of the material available on record, I find that the *Offer of OFCDs* by SICCL falls within section 67 of Companies Act, 1956. Hence, the *Offer of OFCDs* are public issues and SICCL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

59. In view of the above findings, I am of the view that SICCL engaged in fund mobilizing activity from the public, through the offer of OFCDs and has contravened the provisions of section 56(1), 56(3), 62, 73(1), 73(2), 73(3), and 117C of the Companies Act, 1956, and above mentioned provisions pertaining to the DIP Guidelines read with ICDR Regulations.

<u>ISSUE No. 3-</u>Whether SICCL is in violation of Section 117B of the Companies Act, 1956?

60. Under section 117B of the Companies Act, 1956 no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless the company has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. From

perusal of the RHP and prospectus of the Company, in the Column for names and address of the debenture trustee it is mentioned as "not applicable, as the bonds issued are unsecured". I have noted the submissions of the Noticees that as OFCDs were unsecured issue and have been repaid to investors, question of appointing debenture trustee is irrelevant and find the same not tenable as section 117B does not make any such exclusion as claimed by the Noticees. I also note the submissions of the Noticees that section 117B was inserted through amendment w.e.f. 13.12.2000. However the requirement imposed by the section 117B is that the company cannot issue a letter of offer to the public for subscription of its debentures, unless the company has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer and stated that the debenture trustee or trustees have given their consent to the company to be so appointed. Admittedly, the debenture trustee is not appointed here even after the introduction of section 117B through amendment w.e.f. 13.12.2000. Therefore, I find that SICCL has not appointed *any Debenture Trustee, hence,* the same is in violation of section 117B of the Companies Act, 1956.

<u>ISSUE No. 4</u>- Whether M/s Sahara India ("arranger") as "arranger" to the issue is in violation of Section 12 of the SEBI Act, 1992, SEBI (Merchant Bankers) Regulations, 1992 and DIP Guidelines read with ICDR Regulations?

61. I note that M/s Sahara India is a partnership firm belonging to the Sahara Group with Shri Subrata Roy shown as Managing Partner, in the Partnership Deed received from U.P. Co-operative Bank, which firm has acted as "arranger" to the issue and facilitated the issue as Merchant Banker.

62. The definition of merchant banker as per the SEBI (Merchant Bankers) Regulations, 1992 ("**Merchant Bankers Regulations")** means any person who is engaged in the business of issue management either by making arrangements regarding selling, buying or subscribing to securities or acting as manager, consultant. On perusal of the agreements between M/s.

Sahara India and SICCL, I note that Sahara India was appointed as arranger to the OFCD issue and to provide services to the persons interested in participating in the private placement of SICCL OFCD issue including making available and collection of application forms to/from the prospective investors and deliver the same to the Company. Section 12 of the SEBI Act mandates a merchant banker to deal in securities only after obtaining a certificate of registration with SEBI. Therefore, I find that M/s. Sahara India has acted as "arranger" to the issue and facilitated the issue as Merchant Banker without being a registered intermediary and therefore, is in violation of Section 12 of the SEBI Act, 1992 read with Merchant Bankers Regulations and clause 5.4.1 of the DIP Guidelines read with ICDR Regulations.

63. In regard to the Noticees submission that Sahara India, a partnership firm acted as arranger for the OFCD based on their agreement with SICCL and approval accorded by DCA, Government of India and MCA to SICCL to appoint Sahara India as arranger of the issue, Even if such an approval was accorded by DCA, I find the same not tenable as it has already been determined that the OFCD issue was a public issue and M/s Sahara India was acting as a merchant banker to the said OFCD issue by SICCL in violation of SEBI Merchant Banker Regulations read with DIP Guidelines, hence, approval given by MCA, if any, shall not dilute the said violation.

<u>ISSUE No. 5</u>- If the findings on Issue No.1, 2, 3 and 4 are found in the affirmative, who are liable for the violation committed*?*

64. I have noted the submissions of SICCL as well as of Shri C.B.Thapa that he was never a director of the Company and was only Company Secretary and the RHP and Prospectus were filed under his signature on behalf of all the directors under their Power of Attorney. I have perused the said Power of Attorney executed by the directors, authorizing Shri C.B.Thapa to sign the RHP and Prospectus as well as the Form 32 showing him to be Secretary. In view thereof and since no evidence to the contrary is brought to my notice, I am inclined to give benefit to the submissions made by Shri C.B.Thapa and find that Shri

C.B.Thapa was not a director of the Company.

65. SICCL has also submitted that Shri I. Ahmad, Shri O.P.Dixit and Shri Asad Ahmad were neither a manager of the Company nor did they draw any salary from SICCL and can't be regarded as officer in default and merely by signing declarations in RHP and final prospectus, they do not become 'officer in default' and none of the current directors of the Company are issued show cause notice.

66. As per section 2(24) of the Companies Act, Manager means an individual (not being the managing agent) who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a Manager, by whatever name called, and whether under a contract of service or not. The SCN has not made any such allegation against the managers in the present case that they had the management of the whole, or substantially the whole, of the affairs of a company. Further, from the available records, I am unable to come to the conclusion that they had the management of the whole, or substantially the whole, of the affairs of a company. In view thereof, I find that Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee are not Managers as defined under section 2(24) of the Companies Act as officers in default. Therefore, I find that there is no refund liability on this basis under section 73 of the Companies Act.

67. However, I note that Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee are managers of the Company in the ordinary sense of the term and Shri C.B.Thapa was Company Secretary of the Company. Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa have signed and given consent to the RHP and/or Prospectus. Further, the directors namely Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt. Col. (Retd) D. S. Thapa, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta have authorized Shri C.B.Thapa to sign the RHP and Prospectus. Therefore, these directors are also signatories

to the DRHP and Prospectus. In this regard I find it apposite to refer and rely upon the section 62 of the Companies Act,1956 which reads as :- *" (1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein, that is to say,-*

…….

……

(d) every person who has authorised the issue of the prospectus: Provided that where, under section 58, the consent of a person is required to the issue of a prospectus and he has given that consent, or where, under 1 sub- section (3) of section 60, the consent of a person named in a pros- pectus is required and he has given that consent, he shall not, by reason of having given such consent, be liable under this sub- section as a person who has authorised the issue of the prospectus except in respect of an untrue statement, if any, purporting to be made by him as an expert.

Since they have given their consent to the prospectus/RHP, they are liable for violation of section 62 of Companies Act for the misstatement and untrue statements in the prospectus as elaborated in paragraphs 43 and 49**.** Therefore, all the above entities are liable to be debarred for the offer of OFCDs in violation of public issue norms.

68. Further, in view of section 62 if the Companies Act,1956, they are also liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein and omissions under section 62(1)(d) of the Companies Act for authorizing the issue of prospectus by giving their consent. As I have already held that there are misrepresentations and omissions in the prospectus/RHP, Shri I. Ahmad, Shri

O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa and directors, namely, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt. Col. (Retd) D. S. Thapa, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta being persons who have signed/authorized the prospectus/RHP through the power of attorney are liable for the misrepresentation in the prospectus/RHP. Since the subscription was made by the subscribers to the issue on the basis of misrepresentation, without the benefit of required disclosures, the entire subscription money is to be considered as loss incurred by the subscribers. Therefore, it would be appropriate that the subscribers to OFCDs be paid back the loss of their subscription with 15% interest as compensation, from Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa and directors, namely, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt. Col. (Retd) D. S. Thapa, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta. An appropriate direction in this regard has been made at the directions portion of the order.

69. I also note the submissions of SICCL that Shri J.B.Roy resigned as a director on 18.2.2014, Shri Subrata Roy resigned as a director on 19.2.2014, Shri O.P.Srivastava resigned on 31.3.2014, Lt. Retd. A.S.Rao and Shri Ranoj Dasgupta both resigned on 29.9.2008 and 24.3.2015.

70. From the documents available on record, I find that, Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta, who were earlier Directors in SICCL, have since resigned. The details of the appointment and resignation of the directors are as following:

Name of the directors	**Date of appointment**	**Date of cessation**
Lt. Col. (Retd) D. S. Thapa	December 22, 1998	September 5, 2005

Lt.Gen.(Retd.) A.S. Rao	November 29, 2001	September 29, 2008
Shri Subrata Roy Sahara	July 20, 1995	February 19, 2014
Shri O.P.Shrivastava	July 20, 1995	March 31, 2014
Shri J.B.Roy	July 20, 1995	February 18, 2014
Shri P.S.Mishra	December 22, 1998	December 29, 2007
Shri Y.N.Saxena	December 22, 1998	November 30, 2012
Shri Ranoj Das Gupta	January 01, 2000	March 24, 2015

71. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. Therefore, SICCL and its directors are held liable for the violation of sections 56(1) and 56(3) Companies Act, 1956.

72. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%. It is clarified that the liability of directors, namely, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Lt. Col. (Retd) D. S. Thapa, Shri

P.S.Mishra, Shri Y.N.Saxena, Shri Ranoj Das Gupta mentioned in paragraph 68 of this order is independent of the liability mentioned in this paragraph (73). It is made clear in case of complete discharge of liability by these directors jointly and severally mentioned in any one of these paragraphs i.e. paragraph 68 or 73, would result in discharge of their liability mentioned in both the paragraphs.

73. From the material available on record and the details of the appointment and resignation of the directors of SICCL as reproduced in paragraph 70 of this Order, it is noted that, Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena and Shri Ranoj Das Gupta, were directors at the time of the issuance of OFCDs. Since these persons were acting as directors during the period of issuance of OFCDs, they are officers in default as per Section 5(g) of Companies Act, 1956. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified director of SICCL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the directors of SICCL, as officers in default, are liable to make refund, jointly and severally, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that SICCL and its Directors, viz., Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena and Shri Ranoj Das Gupta are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

74. I note that the OFCD issue opened on July 6, 1998 and closed on June 30, 2008, therefore, during the financial years 1998-2009, SICCL through Offer of OFCDs, had collected an amount of at least Rs. 14,106 Crores from various allottees. I note that Lt. Col. (Retd) D. S. Thapa has been director of SICCL since financial years 1998-2006. I note that Shri Subrata Roy Sahara has been director of SICCL since financial years 1998-2009. I note that Shri O.P.Shrivastava was director of SICCL during financial years 1998-2009. I note that Shri J.B.Roy was director of SICCL during financial years 1998-2009. I note that Lt.Gen.(Retd.) A.S. Rao was director of SICCL during financial years 2001-2009. I note that Shri P.S.Mishra has been director of SICCL since financial years 1998-2008. I note that Shri Y.N.Saxena was director of SICCL during financial years 1998-2009. I note that Shri Ranoj Das Gupta was director of SICCL during financial years 1999-2009. Therefore, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that the obligation of the director to refund the amount with interest jointly and severally with SICCL and other directors are limited to the extent of amount collected during his tenure as director of SICCL.

75. As far as the liability under sections 117B and 117C of the Companies Act, 1956, is concerned, the liability is on the company to comply with the said provisions. Therefore, SICCL is liable for the violation of sections 117B and 117C of the SEBI Act.

76. I find that Shri Subrata Roy Sahara is promoter of SICCL and therefore, is liable, as promoter for the *Offer of OFCDs* against the norms of deemed public issue. Therefore, the said Noticee is liable to be debarred for an appropriate period of time.

77. 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 SICCL and its Directors, viz., Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena and Shri Ranoj Das Gupta to refund the monies collected, with interest to such investors. Further, in view of the violations

committed by the Company and its Directors, promoter, managers, Company Secretary and arranger, to safeguard the interest of the investors who had subscribed to such OFCDs issued by the Company, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and the other Noticees.

78. In view of the discussion above, appropriate action in accordance with law needs to be initiated against SICCL and its Directors, promoter, managers Company Secretary and arranger, viz. Lt. Col. (Retd) D. S. Thapa, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri P.S.Mishra, Shri Y.N.Saxena and Shri Ranoj Das Gupta and Shri. I.Ahmad, Shri. O.P. Dixit, Shri. Asad Ahmad, Shri. A.N. Mukherjee, Shri C.B.Thapa and M/s. Sahara India.

79. I note the submissions of the Noticees that Lt. Col. (Retd.) D.S.Thapa expired on 5.9.2005, Shri P.S.Mishra expired on 29.12.2007 and Shri Y.N.Saxena expired on 1.11.2013. I have perused the Death certificate of Shri Y.N.Saxena forwarded by SICCL and find that Shri Y.N.Saxena has expired on 1.11.2013. I have also perused the death certificate of Shri P.S.Mishra forwarded by Sari Manu Shanker Mishra and find that Shri P.S.Mishra has expired on 1.7.2012. I also take note of death certificate of Lt. Col. (Retd.) D.S.Thapa forwarded by SICCL and find that Lt. Col. (Retd.) D.S.Thapa expired on 5.9.2005.

80. Now the question arises that whether in view of the death of Lt. Col. (Retd.) D.S.Thapa, Shri P.S.Mishra and Shri Y.N.Saxena, the present proceedings against them would continue or abate. On the question of which causes of action survive and which abate the Hon'ble Supreme Court (SC) in the matter of Melepurath Sankunni Ezhuthassan Vs Thekittil Gopalankutty Nair, (1986 AIR 411) observed as follows:-

"……So far as this country is concerned, which causes of action survive and which abate is laid down in section 306 of the Indian Succession Act, 1925, which provides as follows :

306. Demands and rights of action of or against deceased survive to and against executor or administrator. -

All demands whatsoever and all rights to prosecute or defend any action or special processing existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory……

……Section 306 further speaks only of executors and administrators but on principle the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in better or worse position than executors and administrators and what applies to executors and administrators will apply to other legal representatives also."

81. In an earlier judgment in Girijanandini Vs Bijendra Narain [1967 SCR (1) 93], Hon'ble Supreme Court observed that "……The maxim 'actio personalis moritur cum persona' - a personal action dies with the person has a limited application. It operates in a limited class of actions ex delicto such as actions for damages for defamation, assault or other personal injuries not causing the death of the party……".

82. The Hon'ble Supreme Court had another occasion to deal with the meaning of the words "other personal injuries not causing the death of the party" in M. Veerappa Vs Evelyn Sequeira & Ors (1988 AIR 506). In the said case Hon'ble Supreme Court made a reference to the Full Bench decision of the Madras High Court in Rustomji Dorabji v. W.H. Nurse, (1921) ILR 44 Mad 357 wherein Trotter, J. speaking for himself and Ayling, J. set out the law as follows.

"We are therefore driven to the conclusion that the Act must be supposed to have envisaged a logically coherent class of causes of action, and that result can only be

achieved by construing 'personal injuries' as meaning not 'injuries to the body' merely, but injuries to the person in Blackstone's sense, other than those which either cause death or tangible affect the estate of the deceased injured person or cause an accretion to the estate of the deceased wrong doer. In effect, we think that the words which we have to construe are ejusdem generis not merely with the last preceding word 'assault', but with the two preceding words 'defamation' and 'assault'"

83. In its concluding remarks, the Hon'ble Supreme Court in M. Veerappa vs Evelyn Sequeira & Ors, (1988 AIR 506) observed that "…..Thus it may be seen that there is unanimity of view among many High Courts in the country regarding the interpretation to be given to the words 'other personal injuries not causing the death of the party' occurring in Section 306 of the Indian Succession Act and that the contrary view taken by the Calcutta & Rangoon High Courts in the solitary cases referred to above has not commended itself for acceptance to any of the other High Courts. The preponderant view taken by several High Courts has found acceptance with this Court in its decision in Melepurath Sankunni Ezhuthassan's case….."

84. In subsequent case of Smt. Yallawwa Vs. Smt. Shantavva on October 08, 1996, (MANU/SC/0016/1997) the Hon'ble Supreme Court endorsed its earlier view and held that "……Save and except the personal cause of action which dies withe the deceased on the principal of 'actio personal is moritur cum persona,' i.e. a personal cause of action dies with the person, all the rest of causes of action which have impact on proprietary rights and socio legal status of the parties cannot be said to have died with such a person……"

85. I note that the cause of action regarding the refund liability is not personal in nature. Therefore, considering the above, I am of the view that the proceedings against Lt. Col. (Retd.) D.S.Thapa, Shri P.S.Mishra and Shri Y.N.Saxena shall not be abated as the same survive their death.

86. I note that SEBI has vide two orders both dated February 13, 2013 has already frozen all the bank accounts of Shri Subrata Roy Sahara. Vide the same orders, the movable and

immovable properties standing in the name of Shri Subrata Roy Sahara were also attached. The Hon'ble Supreme Court vide order dated November 21, 2013 passed in Contempt Petition (Civil) No. 412 of 2012 and 413 of 2012 and Contempt Petition (Civil) No. 260 of 2013 directed that the Sahara Group of Companies shall not part with any movable and immovable properties until further orders. Further, Hon'ble Supreme Court of India, vide its order dated July 11, 2016, passed in the aforesaid Contempt Petitions, modified its order dated November 21, 2013 and permitted Saharas to sell the properties owned by them subject to the stipulations mentioned in the order. In view of this, Shri Subrata Roy Sahara can sell his assets as per the order dated July 11, 2016 and deposit the proceeds in the SEBI-Sahara Refund Account. In view of the prohibition on the Sahara Group of Companies vide the order dated November 21, 2013 passed by Hon'ble Supreme court and the subsequent relaxation by the Hon'ble Apex court vide its order dated July 11, 2016, SICCL being the group company of Sahara, the stipulations mentioned in Hon'ble Apex court's order dated July 11,2016 would be applicable to SICCL. Accordingly, the directions in conformity with the Hon'ble Apex court's order dated July 11, 2016 are passed herein.

87. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions:

(a) SICCL, Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa as per applicable law, Legal Representatives of Late Shri P.S.Mishra as per applicable law, Legal Representatives of Late Shri Y.N.Saxena as per applicable law, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, and Shri Ranoj Das Gupta shall jointly and severally, forthwith refund the money collected by the Company (SICCL for money collected till date and directors for the moneys collected during their respective period of directorship) through the issuance of OFCDs including the application money collected from investors, pending

allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.

(b) Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa and directors namely, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa as per applicable law, Legal Representatives of Late Shri P.S.Mishra as per applicable law, Legal Representatives of Late Shri Y.N.Saxena as per applicable law, Lt.Gen.(Retd.) A.S. Rao and Shri Ranoj Das Gupta jointly and severally are directed to deposit the money collected by the Company through the issuance of OFCDs along with the interest on the foresaid amount calculated with an interest of 15% per annum, from the eighth day of collection of funds, till the date of actual payment., in an Escrow Account opened with a nationalized Bank. Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa and directors namely, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa as per applicable law, Legal Representatives of Late Shri P.S.Mishra as per applicable law, Legal Representatives of Late Shri Y.N.Saxena as per applicable law, Lt.Gen.(Retd.) A.S. Rao and Shri Ranoj Das Gupta are directed to compensate from the said deposit the investors in accordance with their subscription money along with interest.

(c) The repayments, compensation amount and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable".

(d) If the Company had repaid the investors as per their submissions as per section 73(2) of the Companies Act, the above directions in (a) and (b) shall be applicable as modified herein, for the amounts claimed to have been returned to the investors: Such prior repayments should have been made by the Company as per the requirements laid down in paragraph 87(c) above and the same shall be certified by peer reviewed

Chartered Accountants, as directed in paragraph 87(j) below.

(e) Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri Ranoj Das Gupta, Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa 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 mutual funds/shares/securities, if held in physical form and demat form. Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa, Late Shri P.S.Mishra, Late Shri Y.N.Saxena as per applicable law are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, inherited from the Late Lt. Col. (Retd) D. S. Thapa, Late Shri P.S.Mishra, Late Shri Y.N.Saxena respectively.

(f) SICCL is directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company.

(g) In view of the order of Hon'ble Supreme court mentioned at paragraph 86, SICCL and Shri Subrata Roy Sahara are permitted to sell the assets of the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in the SEBI Sahara Refund Account. Such proceeds shall be utilized, with the permission of Hon'ble Supreme Court of India, for the purpose of making refund/repayment to the investors of SICCL.

(h) Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri Ranoj Das Gupta Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee and Shri C.B.Thapa are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole

purpose of making refund/repayment to the investors till the full refund/repayment/payment as directed above is made.

(i) SICCL, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri Ranoj Das Gupta, Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad Shri. A.N. Mukherjee, Shri C.B.Thapa, Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa as per applicable law, Legal Representatives of Late Shri P.S.Mishra as per applicable law, Legal Representatives of Late Shri Y.N.Saxena as per applicable law shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.

(j) After completing the aforesaid repayments, SICCL, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri Ranoj Das Gupta, Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee, Shri C.B.Thapa, Legal Representatives of Late Lt. Col. (Retd) D. S. Thapa as per applicable law, Legal Representatives of Late Shri P.S.Mishra as per applicable law, Legal Representatives of Late Shri Y.N.Saxena as per applicable law, shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India **("ICAI")** holding such certificate.

(k) In case of failure of respective entities to repay as per applicable law as per the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from respective entities to repay, in accordance with section 28A of the SEBI Act including such other provisions

contained in securities laws.

(l) SICCL, Shri Subrata Roy Sahara, Shri O.P.Shrivastava, Shri J.B.Roy, Lt.Gen.(Retd.) A.S. Rao, Shri Ranoj Das Gupta are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above. The above said directors are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.

(m) Shri C. B. Thapa, Shri I. Ahmad, Shri O.P.Dixit, Shri. Asad Ahmad and Shri. A.N. Mukherjee are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner till the expiry of 4 (four) years from the date of completion of compensation to investors as directed above. The above said persons are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this order till the expiry of 4 (four) years from the date of completion of compensation to investors as directed above.

(n) M/s Sahara India is directed not to, directly or indirectly, access the securities 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 for a

period of 4 (four) years from the date of this Order. It is also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 4 (four) years from the date of this Order.

(o) The entities who are subject to the order of Hon'ble Supreme Court of India mentioned in paragraph 86 of this order shall, in accordance with the directions of the said order deposit the sale proceeds of the assests in the SEBI Sahara Refund Fund. The said fund shall be utilised for the repayment of the investors of this Company with the prior permission of the Hon'ble Supreme Court.

88. The above directions shall come into force with immediate effect subject to paragraph 86.

89. As noted above, Shri Y.N.Saxena has expired on 1.11.2013, Shri P.S.Mishra has expired on 1.07.2012 and Lt. Col. (Retd.) D.S.Thapa expired on 5.9.2005. However, their legal representatives have not been brought on record. Therefore, the directions against Shri Y.N.Saxena, Shri P.S.Mishra and Lt. Col. (Retd.) D.S.Thapa are made contingent on SEBI serving this order to their legal representatives. Therefore, this order will take effect as final order against Legal Representatives of Shri Y.N.Saxena, Shri P.S.Mishra and Lt. Col. (Retd.) D.S.Thapa only on the expiry of 60 days from the date of service of this order to their Legal Representatives, unless legal representatives of Shri Y.N.Saxena, Shri P.S.Mishra and Lt. Col. (Retd.) D.S.Thapa, file reply or seek, by a written request, personal hearing receivable by SEBI within such period of 60 days from the date of service of this order. If reply/request for personal hearing is filed by legal representatives of Shri Y.N.Saxena, Shri P.S.Mishra and Lt. Col. (Retd.) D.S.Thapa, the directions passed herein against their Legal Representatives shall be made applicable subject to the determination on the objections/reply. In the meantime, the Legal Representatives of Shri Y.N.Saxena, Shri P.S.Mishra and Lt. Col. (Retd.) D.S.Thapa shall not buy, sell or otherwise deal in such manner for creation of any third party rights in

regards the property so inherited, from the date of this order till the disposal of the objections/reply, if such objections or reply are filed, or till the date of discharge of the liability of refund, if no objections/replies are filed.

90. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories and registrar and transfer agents for information and necessary action.
91. 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.
92. A copy of this Order shall also be forwarded to the Local Police/State Government for information.

-Sd-

DATE: October 31, 2018 **MADHABI PURI BUCH**

PLACE: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA