WTM/PS/21/IMD-ERO/MAY/2016

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

ORDER

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

In respect of –

1. **GBC Enterprise Limited (PAN: AACCG5669G) and its Directors,**
2. **Mr. Krishnendu Das (DIN: 02240156; PAN: AEVPD1072L),**
3. **Smt. Sugata Bal Das (DIN: 02240157; PAN: ALOPB4676N),**
4. **Mr. Pramathes Dutta (DIN: 05236527; PAN: APFPD4625L),**
5. **Mr. Basab Dasgupta (DIN: 01179877; PAN: AJQPD5126R) and**
6. **Mr. Sujoy Nandi (DIN: 01179933; PAN: ABIPN1070A).**

Date of hearing: April 23, 2015
Mr. Triptimoy Talukdar appeared for the **Company, Mr. Krishnendu Das and Smt. Sugata Bal Das**. Other noticees did not appear.

For SEBI: Ms. Soma Majumdar, General Manager, Mr. N. Murugan, Assistant General Manager and Ms. Nikki Agarwal, Assistant Manager.

Date of hearing: August 21, 2015
Noticee, **Mr. Sujoy Nandi** appeared along with his Advocate, Mr. Aniruddha Roy.
Mr. Triptimoy Talukdar, Advocate appeared for the **Company**.
Sugata Bal appeared in-person.

For SEBI: Dr. Anitha Anoop, Deputy General Manager, Mr. T. Vinay Rajneesh, Assistant General Manager and Ms. Nikki Agarwal, Assistant Manager.

Date of hearing: November 23, 2015
Mr. Triptimoy Talukdar, Advocate appeared on behalf of **Mr. Krishnendu Das**.

For SEBI: Mr. Prasanta Mahapatra, General Manager, Mr. T. Vinay Rajneesh, Assistant General Manager and Ms. Nikki Agarwal, Assistant Manager.

---

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"), vide an ex-parte interim Order dated February 20, 2015 (hereinafter referred to as "the **interim order**") had observed that the company, **GBC Enterprise Limited** (hereinafter referred to as "**GEL**" or "the **Company**") was *prima facie* engaged in fund mobilizing activity from the public through its offer and issue of Redeemable Preference Shares (hereinafter referred to as "**RPS**s") and allegedly violated the provisions of sections 56, 60 read with section 2(36), 73 of the Companies Act, 1956 read with the Companies Act, 2013 and the SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013 (the 'RPS Regulations").

2. In order to protect the investors who have subscribed to the impugned offer and issue of RPS and to ensure that the Company and its directors are restrained from carrying on with their fund mobilizing activity, SEBI had issued the following directions:

i. "*GEL (PAN: AACCG5669G) shall not mobilize funds from investors through the Offer of Redeemable Preference Shares or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;*

ii. GEL and its past and present Directors, viz. Shri Krishnendu Das (DIN: 02240156; PAN: AEVPD1072L), Smt. Sugata Bal Das (DIN: 02240157; PAN: ALOPB4676N), Shri Pramathes Dutta (DIN: 05236527; PAN: APFPD4625L), Shri Basab Dasgupta (DIN: 01179877; PAN: AJQPD5126R) and Shri Sujoy Nandi (DIN: 01179933; PAN: ABIPN1070A), are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;

iii. GEL and its abovementioned past and present Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;

iv. GEL shall provide a full inventory of all its assets and properties;

v. The abovementioned past and present Directors of GEL shall provide a full inventory of all their assets and properties;

vi. GEL and its abovementioned present Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the Offer of Redeemable Preference Shares, without prior permission from SEBI;

vii. GEL and its abovementioned present Directors shall not divert any funds raised from public at large through the Offer of Redeemable Preference Shares, which are kept in bank account(s) and/or in the custody of GEL".

3. The interim order came into force with immediate effect. The interim order contained *prima facie* observations made on the basis of the correspondences exchanged between SEBI and the Company alongwith information contained therein, information obtained from the Ministry of Corporate Affairs' website i.e. *'MCA 21 Portal'* and the complaints received by SEBI.

4. The interim order advised the Company, Mr. Krishnendu Das, Smt. Sugata Bal Das, Mr. Pramathes Dutta, Mr. Basab Dasgupta and Mr. Sujoy Nandi (collectively referred to as "the **noticees**") to file their replies and also to inform whether they desire to avail an opportunity of personal hearing.

5. The copies of the interim order were forwarded to the noticees vide SEBI letters dated February 23, 2015. The same was delivered on the noticees except Mr. Pramathes Dutta.

6. **Mr. Sujoy Nandi**, vide letter dated March 12, 2015, *inter alia* made the following submissions:

(a) One Mr. Basab Dasgupta, who was the managing director of the Company, had in or about 2005 represented that the Company was engaged in the business of manufacturing diverse components of personal computer and assembling thereof. It was also represented that the Company would shortly do a joint venture business with a Chinese company for manufacturing of personal computers. The noticee was asked to make a short-term investment in the Company.

(b) Pursuant to such representation and assurance of the said managing director, the noticee paid a sum of Rs.50,000/- to the Company in February 2006.

(c) At the request of Mr. Basab Dasgupta made on or about May 15, 2006, the noticee accorded consent and was appointed as a director of the Company.

(d) The noticee made further investment of Rs.1,21,775/- during February 2006 and August 2006 at the request of the said managing director.

(e) During the end of 2007, Mr. Basab Dasgupta informed that the Company would not be able to return the investments of the noticee and proposed to allot 1000 equity shares of Rs.100/- each of the Company in his name against the investment of Rs.1,00,000/- and that the balance of Rs.71,775/- was to be returned. The noticee was also assured that the equity shares shall be bought back and the sum of Rs.1 lakh would also be returned.

(f) The noticee accepted the proposal and on January 15, 2008, 1000 equity shares bearing distinctive nos. 5791 to 6790 were allotted to him. The Company returned Rs.71,775/- vide a cheque on April 11, 2008 to the noticee.

(g) The noticee vide letter dated November 24, 2008 requested the board of directors of the Company to buy back the said 1000 shares. Thereafter, vide letter dated December 05, 2008 the noticee had submitted his resignation from the board of directors.

(h) The Company paid Rs.1 lakh on December 06, 2008 and Mr. Basab Dasgupta purchased the shares. Necessary transfer deeds were also handed over.

(i) On December 11, 2008, the Company accepted his resignation and paid a sum of Rs.25,000/- as a gesture towards the noticee's services rendered for the Company.

(j) The said Mr. Basab Dasgupta vacated the office of managing director and remained a director of the Company. He passed away on November 17, 2009.

(k) After acceptance of the noticee's resignation letter, Mr. Basab Dasgupta had assured the noticee that necessary Form-32 would be filed with the RoC. On believing such representation and assurance that necessary Form was uploaded indicating his resignation, the noticee did not make any enquiry regarding filing of Form-32.

(l) The noticee did not sign any document at any point in time on behalf of the Company during his tenure as a director of the Company. He was also not a signatory to the Company's bank accounts. He did not sign a single cheque. He never looked after the affairs or business of the Company.

(m) Only on the basis of the request of Mr. Basab Dasgupta, the noticee was a director and shareholder for a short period of time. The day to day affairs of the Company was all along

looked after by Basab Dasgupta and other directors. The noticee was not called upon to attend any board meeting or any AGM/General Meeting of the Company.

(n) On receipt of SEBI notices dated August 1, 2014 and August 13, 2014, the noticee had contacted Mr. Krishnendu Das (director of the Company) when the noticee was specifically and repeatedly assured that the Company would take steps against the said noticees as the Company had also received such notices.

(o) On further enquiry with the RoC, the noticee came to know that Form-32 regarding his resignation was not submitted though his resignation was accepted on December 11, 2008.

(p) The noticee took immediate steps, whereby the Company submitted Form DIR-11 and DIR-12 on August 26, 2014 with the RoC along with necessary documents giving effect of his resignation with effect from December 05, 2008.

(q) The noticee was again served with notices dated October 24, 2014 and November 10, 2014 by SEBI. The noticee again took up the matter with the Company when Mr. Krishnendu Das assured that the Company would take necessary steps. On further enquiry, the managing director Mr. Krishnendu Das informed that the Company had already filed reply to SEBI including a prayer for expunging the name of the noticee. However, despite the same, the interim order was passed against this noticee also.

(r) Regarding the contents of the interim order, the noticee submitted the following –

i. The documents were available with the Company.

ii. He resigned in the year 2008 and therefore was not aware of the illegal mobilization of funds as alleged in the writ petition.

iii. The periods mentioned in the interim order were subsequent to his resignation.

iv. With respect to the alleged violation of provisions of the SEBI Act/regulations, the noticee submitted that the said provisions were not applicable to him and would make submissions during the personal hearing.

v. From the observations made in the interim order, it appeared that all such incidents were subsequent to his resignation in December 2008. He was therefore not a party to such violations. The fiduciary liability owed by him,

if any, as a director was for a limited period and cannot be extended to bring him within the scope of proceedings of the interim order.

vi. The noticee never caused any breach of trust and fiduciary duties owed to the Company. He did not commit illegality during his tenure.

(s) In view of his submissions, the noticee submitted that the observations made in the interim order were not binding on him and requested SEBI to remove his name from the proceedings. The noticee requested for an opportunity of personal hearing and stated that he reserved his right to produce all records and documents and make submissions.

7. The Company, vide letter dated March 12, 2015, made the following submissions;

(a) Some of Company's agents and associates purportedly filed a writ petition before the Hon'ble High Court at Calcutta praying inter alia to direct the CBI and other investigative agencies to investigate the affairs of the Company. After hearing the parties, the Hon'ble High Court directed SEBI to investigate the affairs of the Company and also directed the Company to furnish list of assets to the Investigating Officer, Kandi Police Station. The Company had produced the list to the Investigating Officer and has been informed that the proceedings were dropped as there was no criminal breach of trust or fraud.

(b) The Company had responded to the SEBI notices and had informed that it was duly authorized by the RoC to issue RPS to its associates on private placement basis without issuing Prospectus. The Company did not invite the public at large but had issued RPS to 49 persons against each offer or invitation. Therefore, there is no violation of section 67 and 73 of the Companies Act, 1956.

(c) SEBI had proceeded on the basis of allegations made in the writ petition that the Company raised money from public.

(d) The Company is still doing business without mobilizing funds by issuing RPS. However, due to present scenario, the Company could not discharge its liabilities to the investors and accordingly filed an application under section 391 of the Companies Act, 1956 for sanction

of scheme of arrangement and deferred payments to the investors. After hearing the petition, the Hon'ble Court was pleased to direct the Company to hold a meeting of its preference shareholders on publication of notice to consider the proposed scheme.

(e) The Company published an advertisement in the newspaper and held its meeting on August 19, 2014. The meeting was conducted by Mr. Somnath Saha, Advocate of the Hon'ble Calcutta High Court. After prolonged discussion, the proposal was put for voting. Consent to the scheme was accorded by more than 80% investors who voted either in person or by proxy.

(f) The Company Petition praying for sanction of the scheme was pending before the Hon'ble High Court for approval.

(g) The Company has not defrauded its investors as it also provided for paying interest at bank rates.

(h) The Sahara case was not applicable in this matter as the Company had on its own approached the High Court for payment to investors in a deferred manner.

(i) The Company requested for an opportunity of personal hearing.

8. The noticees were afforded an opportunity of personal hearing on April 23, 2015. The schedule of the same was informed to the noticees vide SEBI letter dated March 30, 2015. SEBI also made a public notice in the '*The Times of India*' dated April 15, 2015 and '*Ananda Bazar Patrika'* dated April 14, 2015, regarding the instant proceedings pursuant to the interim order and the above fixed schedule of personal hearing.

9. In the personal hearing held on April 23, 2015, Mr. Triptimoy Talukdar appeared for the Company, Mr. Krishnendu Das and Smt. Sugata Bal Das. The learned advocate submitted that the Company had filed an application before the Hon'ble Calcutta High Court for a scheme under section 391 of the Companies Act, 1956 in respect of the RPS covered in the interim order. He submitted a copy of the report of the chairman of the meeting of preference shareholders and submitted that C.P. No.830/2014 was filed before the Hon'ble High Court for approval of the scheme.

The other noticees failed to appear despite the SEBI notices and public notice in newspaper.

10. As the afore-referred scheme to make deferred payments to the investors is against the mandate under section 73 of the Companies Act, SEBI filed necessary application before the Hon'ble Calcutta High Court for impleading itself in the company petition/application preferred by the Company and to seek necessary orders from the Hon'ble Court. Subsequently, the Hon'ble High Court had dismissed the company petition filed by the Company seeking approval of the proposed scheme.

11. Thereafter, the noticees were afforded another opportunity of personal hearing on July 17, 2015. The schedule of this hearing was intimated vide SEBI notices dated June 30, 2015. These notices were received by the Company, Mr. Krishnendu Das, Mr. Sujoy Nandi and Smt. Sugata Das. However, the letters were not delivered on Mr. Pramathes Dutta and Mr. Basab Dasgupta (returned with remark '*deceased*'). The personal hearing was adjourned to July 30, 2015 and thereafter to August 21, 2015 (pursuant to a request made by Mr. Sujoy Nandi).

12. In the personal hearing held on August 21, 2015, Mr. Triptimoy Talukder, Advocate appeared for the Company. Smt. Sugata Das was also present. As authority letter of Mr. Pramathes Dutta and Krishnendu Das authorizing the advocate was not filed, the advocate's representation for the said noticee was not considered. The advocate submitted a C.D. stating to contain the list of investors. As requested, liberty was granted to file written submissions along with documents, if any.

Mr. Sujoy Nandi appeared along with his Advocate Mr. Anirudha Roy. The learned advocate made submissions on the lines of the reply filed by the noticee. The advocate also filed copies of documents including resignation letter and form no. DIR-11 and DIR- 12.

13. Meanwhile, noticee Mr. Pramathes Dutta, vide letter dated August 19, 2015, *inter alia* made the following submissions:

(a) He had joined the Company in the year 2006 as an agent.

(b) He was assigned to contact investors for investing money in the schemes of the Company. On depositing the monies with the Company, he used to get commission.

(c) The noticee never withheld any amount collected from investors and used to deposit the same as early as possible.

(d) In appreciation of his services, he was asked to deposit two copies of his photograph and his signature on a blank paper in the year 2012 for his 'promotion'. He believed these representation and submitted the same.

(e) All of a sudden he received a copy of the writ petition and came to know that he was made a director of the Company.

(f) The noticee never consented to be a director in the Company.

(g) He was never present in any board meetings and has not signed in any minute book or resolution book maintained by the Company. Even if his signature appears in any document, the same has been forged by persons not known to him.

(h) The noticee stated that in view of his personal difficulties, he is not able to appear in the personal hearing on August 21, 2015 in Mumbai and requested for a hearing in Kolkata office of SEBI.

14. In the interest of justice, another opportunity of personal hearing was afforded to Mr. Pramathes Dutta and Mr. Krishnendu Das (*as his advocate's representation was not considered as authority was not filed in the previous hearing*) on November 23, 2015. In the hearing, Mr. Krishnendu Das was represented by his advocate Mr. Triptimoy Taklukder who stated that this noticee adopts the submissions of the Company.

Though the SEBI notice dated October 30, 2015 informing the schedule of personal hearing was sent to the address mentioned in the reply of Mr. Pramathes Dutta, the same returned undelivered with remark "*insufficient address return to sender*". Thereafter, the said notice was pasted in the last known address. In view of the same, I proceed to consider the submissions made by the noticee in his reply.

15. I have considered the interim order, the submissions made by the concerned noticees, the documents submitted by them and other material available on record. The interim order had alleged that the Company, in pursuance of its fund mobilizing activity from the general public, had made a public offer and issue of RPS without complying with the provisions of sections 56, 60 and 73 of the Companies Act, 1956. The interim order had relied upon the submissions/documents of the Company to SEBI and the information available on the MCA-21 portal along with complaints received in the matter.

16. It would be relevant to note the following observations made in the interim order before proceeding to consider the allegations:

i. *"GEL was incorporated on May 22, 1992, with the ROC, Kolkata with CIN as U24119WB1992PLC055518. GEL's Registered Office is at Stephen House, Room No. 106, 6th Floor, 4 B. B. D. Bag (East), Kolkata – 700001, West Bengal, India.*

ii. *The present Directors in Shri Krishnendu Das, Smt. Sugata Bal Das and Shri Pramathes Dutta.*

iii. *Shri Sujoy Nandi and Shri Basab Dasgupta, who were earlier Directors in GEL, have since resigned.*

iv. *From the information submitted by GEL, the following details regarding the Redeemable Preference Shares issued by that company ("**Offer of Redeemable Preference Shares**") was observed –*

Type of Security	***Year***	***Date of allotment***	***No. of persons to whom preference shares were allotted***	***Total Amount (₹ in Crores)***
Redeemable Preference Shares	*2012–13*	*15.03.2013*	*73432*	*53.30*
	2013–14	*17.03.2014*	*7764*	*7.29*
TOTAL			***81196***	***60.59***

17. With the above factual information, it is to be considered whether the Company made a public issue of RPS during the relevant period. In order to determine whether an issue of securities is a 'public issue' or done on 'private placement', a reference to section 67(3) of the Companies Act, 1956 needs to be made:

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

(2) ...

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

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

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

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

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

In terms of section 67(3), as amended by the *Companies (Amendment) Act, 2000, with effect from December 13, 2000*, no offer or invitation shall be treated as made to the public by virtue of sub-sections (1) or (2), as the case may be, if the offer or invitation can properly be regarded, in all circumstances – (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation ; or (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. More importantly, in terms of the first *proviso* to the aforesaid section, the provisions of section 67(3) shall **not** apply in a case where the **offer or invitation to subscribe for shares or debentures** is made to **fifty persons or more**. Therefore, the number of subscribers becomes relevant to judge whether an issue of shares are for public or on a private placement basis, in the light of the above said provision. Therefore, if an offer of securities are made to fifty or more persons, it would be deemed to be a public issue. Non-Banking Financial Companies (NBFCs) and Public Financial Institutions (PFIs) are exempted only from the first *proviso* to section 67(3). Therefore, NBFC or PFI do not have any restriction on the number of

allottees as imposed on a company which is not an NBFC or PFI. However, such companies also need to prove that its offer falls either under clause (a) or (b) of section 67(3) to claim such issuance to be a private placement. The Company is not an NBFC or PFI.

18. The Company has allotted RPS to 73432 persons on March 15, 2013 (FY 2012-13) and raised Rs.53.30 crore. The Board of Directors in their meeting held on March 15, 2013 had resolved to allot 5,32,97,010 preference shares of Rs.10/- each in physical form. The Company also issued RPS on March 17, 2014 (FY 2013-14) and raised Rs.7.29 crore. In this regard, I note that the board of directors in their meeting on March 17, 2014 resolved to allot 72859400 preference shares of Rs.10/- each in physical form. Return of allotment (Form no. PAS-3) were also filed with the RoC with respect to the above allotments. Accordingly, in aggregate, the Company admittedly raised Rs.60.59 crore by issuing RPS to 81196 persons. The same would prove that the Company had made offer and allotted RPS to more than 49 persons during each of the above said allotments.

19. The interim order had also observed that as per the Balance sheet for the year ended March 31, 2009, the Company had issued RPS for Rs.17.39 crore (including Share Premium amounting Rs.10.20 crore) and had not filed Form-2 for such allotment. Further, as per the Balance Sheet as on March 31, 2010, the Company has shown Rs. 31.90 crore as 'share application money received pending allotment' as against Rs.17.39 crore as on March 31, 2009.

20. The interim order also observed the following with respect to the complaints and preference share certificates enclosed therein:

> "*From the copies of Redeemable Preference Shares certificates submitted by 12 complainants (submitted at SEBI on various dates during the period November – December, 2013), it is observed that GEL issued such Redeemable Preference Shares during the Financial Years 2008–09. Further, from the copies of Redeemable Preference Shares certificates submitted by 29 complainants (submitted at SEBI on November 18, 2014), it is observed that GEL issued Redeemable Preference Shares on various dates between the period March 26, 2010 and March 30, 2013. However, as stated in paragraph 3(iv) above, the dates of allotment of Redeemable Preference Shares (as submitted by GEL) were only 15.03.2013 and 17.03.2014*".

I also note that the Company had produced the extract of resolution of minutes of meeting of committee for allotment of preference shares held on various dates. These extracts run into many pages. On a perusal of such extracts, I note that the allotments were confined to 49 persons. However, in many instances, there were multiple allotments on a single day. On calculating the number of persons (i.e. the allottees) contained in those extracts, I note that the figure is **81,392 persons** to whom the Company had allotted RPS. Therefore, it can be said that the offer and allotment cannot be said to be on a 'private placement basis'.

21. Therefore, considering the above observations, I conclude that in terms of the first *proviso* to section 67(3), the Company has definitely made a public issue of RPS and raised atleast Rs.60.59 crore. The Company has merely contended that the RoC had permitted the Company to issue RPS under private placement. However, it should be appreciated that the Company, having made a public offer, had to necessarily comply with the public issue norms under the Companies Act and SEBI Regulations governing such issuances. I also note that the Company had proposed to make deferred payments to its investors. However, SEBI impleaded itself in the proceedings before the Hon'ble Calcutta High Court and the petition seeking sanction of such a scheme of deferred payments, was dismissed.

22. By making a public issue of RPSs, the Company was mandated to comply with all the legal provisions that govern and regulate public issue of such securities, including the Companies Act, 1956 and the SEBI Act and regulations. In this regard, I note that in terms of section 55A of the Companies Act, 1956, SEBI shall administer various provisions (*as mentioned therein*) of the said Act with respect to issue and transfer of securities by listed companies, companies that intend to list and also those companies that are required to list its securities while making offer and issue of securities to the public. 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*".

Under section 11A of the SEBI Act, SEBI is also empowered to regulate, by regulations/general or special orders, the matters pertaining to issue of capital, transfer of securities and matters related thereto. Accordingly, the Company, having made a public offer and issue of securities, as observed above, is under the jurisdiction of SEBI.

23. The interim order has alleged that the Company failed to comply with sections 56, 60 and 73 of the Companies Act, 1956. In this regard, I observe the following:

a. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, contain disclosures as specified. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. There is no Prospectus produced by the Company with respect to its offer of RPS. Accordingly, I find that the Company has failed to comply with sections 56 and 60.

b. By making a public issue of RPS, the Company had to compulsorily list such securities in compliance with section 73(1) of the Companies Act, 1956. As per section 73(1) Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange. There is no material to say that the Company has filed an application with a recognized stock exchange

to enable the RPSs to be dealt with in such stock exchange. Therefore, the Company has failed to comply with this requirement.

c. Section 73(2) states that "*Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money*".

As the Company failed to make an application for listing such securities, the Company had to forthwith repay such money collected from investors, through allotment of RPS and also those kept in the Company's possession pending allotment. If such repayments are not made within 8 days after the Company becomes liable to repay, the Company and every director is liable to repay with interest at such rate. The liability of the Company to refund the public funds collected through offer and allotment of the impugned RPSs is continuing and such liability would continue till repayments are made. There is no record to suggest that the Company made the refunds as per law. Further, SEBI is in receipt of complaints from investors alleging default by the Company in making repayments.

The Hon'ble Supreme Court of India in the Sahara case has examined section 73 and made the following observations:

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing

starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons."

In view of the above observations, I find that the Company has not complied with the mandate under section 73(2) of the Companies Act, 1956.

d. Section 73(3) states that - *All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 1 [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub- section (2)]; and if default is made in complying with this sub- section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees."* . As found above, the Company had not applied and obtained listing permission. The Company is therefore in non-compliance with this provision also.

e. As the amounts mobilized through the issue of securities have not been refunded within the time period as mandated under law, it would therefore be appropriate to levy an interest @ 15% p.a. as provided for under section 73(2) of the Companies Act, 1956 read with rule 4D (*which prescribes that the rates of interest, for the purposes of sub-sections (2) and (2A) of section 73, shall be 15 per cent per annum*) of the Companies (Central Government's) General Rules and Forms, 1956, on the amounts raised by the Company through its offer and issuance of RPS including preference share application money pending allotment collected by the Company, due to be repaid by the Company. As stated above, the liability of the Company to refund the public funds collected through offer and allotment of the impugned RPSs is continuing

and such liability would cease only if the repayments are made in accordance with the relevant provisions of law.

24. The Company was also mandated to comply with the RPS Regulations (which came into effect from June 12, 2013) with respect to its offer and issue of RPS to the public. The Company has not complied with the following requirements of the said Regulations:

i. Regulation 4(2)(a) – Application for listing of securities
ii. Regulation 4(2)(b) – In-principle approval for listing of securities
iii. Regulation 4(2)(c) – Credit rating has been obtained
iv. Regulation 4(2)(d) – Dematerialization of securities
v. Regulation 4(2)(e) – Minimum tenure
vi. Regulation 4(3) – Capital Redemption Reserve
vii. Regulation 4(5) – Appointment of Merchant Banker
viii. Regulation 5 – Disclosures in the offer document
ix. Regulation 6 – Filing of draft offer document
x. Regulation 7 – Mode of disclosure of offer document
xi. Regulation 8 – Advertisements for Public Issues
xii. Regulation 9 – Abridged Prospectus and application forms
xiii. Regulation 13 – Minimum subscription
xiv. Regulation 15 – Prohibition of mis-statements in the offer document
xv. Regulation 16 – Mandatory Listing
xvi. Regulation 22 – Obligations of the Issuer, etc.

25. In view of the above observations, I conclude that the Company made a public offer of RPS during FYs 2012-2013 and 2013-14 and had mobilized funds to the tune of Rs.60.59 crore and failed to comply with the provisions of sections 56, 60 and 73 of the Companies Act, 1956 read with the Companies Act, 2013 and the aforesaid requirements mandated under the RPS Regulations.

26. The interim order has been issued against the following –

(a) The **present** directors-

a. Krishnendu Das (appointed on 10.07.2008 (original date of appointment as per 'Register of directors etc' from RoC/MCA);
b. Sugata bal Das (appointed on 10.07.2008)' and
c. Pramathes Dutta (appointed on 21.03.2012)

(b) The **former** directors-

a. Sujoy Nandi (appointed on 15.05.2006 and resigned on 05.12.2008, as per Forms enclosed with reply);
b. Basab Dasgupta (appointed on 15.05.2006 and resigned on 17.11.2009). Though a postal remark and a director had stated that this noticee had deceased, there is no death certificate on record to conclusively hold so.).

In the light of the above facts, I observe the following:

(i) In terms of section 291 of the Companies Act, 1956, the board of directors of a company shall be entitled to exercise all such powers and do all such acts and things as the company is authorized to exercise and do. Therefore, the board of directors shall be responsible for the conduct of the business of a company and liable for any non-compliance of law and such liability shall be upon the individual directors also.

(ii) With respect to the culpability of a director for breach of law by a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs Registrar Of Companies* (2002 108 Comp Cas 1 Mad):

> *"13. It may be that the petitioner may not be a whole-time director, but that does not mean he is exonerated of the statutory obligations which are imposed under the Act and the rules and he cannot contend that he is an ex officio director and, therefore, he cannot be held responsible. There is substance in the contention advanced by Mr. Sridhar, learned counsel since the petitioner a member of the Indian Administrative Service and in the cadre of Secretary to Government when appointed as a director on the orders of the Government to a Government company or a joint venture company, he is expected not only to discharge his usual functions, but also take such diligent care as a director of the company as it is expected*

of him not only to take care of the interest of the Government, but also to see that the company complies with the provisions of the Companies Act and the rules framed thereunder. Therefore, the second contention that the petitioner cannot be proceeded against at all as he is only a nominee or appointed director by the State Government, cannot be sustained in law. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956.

15. Section 5 of the Companies Act defines the expression "officer who is in default". The expression means either (a) the managing director or managing directors ; (b) the whole-time director or whole-time directors ; (c) the manager ; (d) the secretary ; (e) any person in accordance with whose directions or instructions the board of directors of the company is accustomed to act; (f) any person charged by the board with the responsibility of complying with that provision ; (g) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors.

16. Section 29 of the Companies Act provides the general power of the board and ……... Therefore it follows there cannot be a blanket direction or a blanket indemnity in favour of the petitioner or other directors who have been nominated by the Government either ex officio or otherwise. Hence the second point deserves to be answered against the petitioner.

17. As regards the first contention, it is contended by Mr. Arvind P. Datar, learned senior counsel appearing for the petitioner that the company or its board had resolved that Thiagaraj S. Chettiar shall be the director in charge of the company of all its day-to-day affairs and, therefore, the petitioner, an ex officio chairman and director, cannot be expected to attend to the affairs on a day-to-day basis. This contention though attractive cannot be sustained as a whole. There may be a delegation, but ultimately it comes before the board and it is the board and the general body of the company which are responsible."

{Emphasis supplied}

(iii) A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof.

(iv) The Company has been found to have violated sections 56, 60 and 73 of the Companies Act, 1956 with respect to its public offer and issue of RPS during FY 2012-13 and 2013-2014.

(v) Section 56(1) and 56(3) read with section 56(4) imposes the liability for the compliance of the said provisions, on the company, every director, and other persons responsible for the issuance of the prospectus. The liability for non-compliance of section 60 of the Companies Act is on the Company, and every person who is a party to the non-compliance of issuing the prospectus as per the said section.

(vi) The liability of the company and directors to repay under section 73(2) of the Companies Act, 1956 and section 27 of the SEBI Act, is a continuing liability and the same continues till all the repayments are made. Such liability is a joint and several liability on them. Therefore, the directors (*irrespective of whether they continue or resign*) who were present during the period when the Company made the offer and allotted RPSs shall be liable for violation of sections 56, 60 and 73 of the Companies Act, including the default in making refunds as mandated therein.

(vii) The Company and its directors during the period when the offer and issue of RPS was made are responsible for complying with the mandatory requirements under the RPS Regulations.

(viii) In view of the above reasons and observations, noticees, **Krishnendu Da, Sugata Bal Das and Pramathes Dutta** are liable, as directors of the Company during the period of offer and issue of RPS, for the violation of sections 56, 60 and 73 of the Companies Act, 1956 as found in this Order and would also be liable to make refunds in terms of section 73(2) of the Companies Act read with section 27 of the SEBI Act, as ordered herein.

Mr. Pramathes Dutta had submitted that he joined the Company as an agent and was made a director without his knowledge. He contended that he did not attend any board meeting and was not in-charge of the affairs of the Company. As per the records of the

RoC, he is a present director. Further, he has not informed of any action taken by him against such action by the Company/management in deceitfully inducting him as a director. However, this noticee is at liberty to seek remedies available to him under law.

(ix) As regards **Mr. Sujoy Nandi**, it is seen from the documents of RoC that he resigned as a director on December 05, 2008 though the relevant Form was filed much later with the RoC. The interim order has observed "*From the copies of Redeemable Preference Shares certificates submitted by 12 complainants (submitted at SEBI on various dates during the period November – December, 2013), it is observed that GEL issued such Redeemable Preference Shares during the Financial Years 2008–09*". Further, on scrutinizing these 12 complaints, it was observed that dates of issue of these certificates were - 11/11/2008, 21/10/2008, 24/10/2008, 05/09/2008, 04/10/2008, 17/10/2008, 29/08/2008, 08/08/2008, 21/08/2008, 04/10/2008, 09/09/2008 and 09/09/2008. This would infer that the Company was issuing RPS even during the year 2008. Accordingly, this noticee who was a director in the Company from May 2006 to December 2008 shall also be liable for the violations committed by the Company in respect of the offer and issuance of RPS.

(x) Similarly, **Mr. Basab Dasgupta** who was a director in the Company from 15.05.2006 to 17.11.2009 shall also be liable for the violations committed by the Company in respect of the offer and issuance of RPS.

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

(a) **GBC Enterprise Limited, Mr. Krishnendu Das, Smt. Sugata Bal Das, Mr. Pramathes Dutta, Mr. Sujoy Nandi and Mr. Basab Dasgupta**, jointly and severally, shall forthwith refund the money collected by the Company through the issuance of Redeemable Preference Shares (*which have been found to be issued in contravention of the public issue*

norms stipulated under the Companies Act, 1956), to the investors including the money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (*in terms of Section 73(2) of the Companies Act, 1956*) to the investors till the date of actual payment.

(b) The repayments to investors shall be effected only in cash through Bank Demand Draft or Pay Order.

(c) The Company/its present management are permitted to sell the assets of the Company only for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised Bank.

(d) **The Company and its directors** shall issue public notice, in all editions of two National Dailies (*one English and one Hindi*) and in one local daily with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.

(e) After completing the aforesaid repayments, the **Company** shall file a certificate of such completion with SEBI, within a period of three months from the date of this Order, from two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI").

(f) **GBC Enterprise Limited, Mr. Krishnendu Das, Smt. Sugata Bal Das, Mr. Pramathes Dutta, Mr. Sujoy Nandi and Mr. Basab Dasgupta**, are also directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of shares/securities, if held in physical form.

(g) In case of failure of **GBC Enterprise Limited, Mr. Krishnendu Das, Smt. Sugata Bal Das, Mr. Pramathes Dutta, Mr. Sujoy Nandi and Mr. Basab Dasgupta**, in complying

with the aforesaid directions, SEBI, on the expiry of the three months period from the date of this order, -

i. shall recover such amounts in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
ii. may initiate appropriate action against the Company, its promoters/ directors and the persons/ officers who are in default, including adjudication proceedings against them, in accordance with law.
iii. would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and
iv. would also make a reference to the Ministry of Corporate Affairs to initiate action against the Company and directors as deemed fit.
v. would also make a reference to the Ministry of Corporate Affairs to flag the names of notice directors in its database so that information may be perused by RoC or any other regulatory authority.

(h) **GBC Enterprise Limited** is directed not to, directly or indirectly, access the capital market by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order till the expiry of 4 years from the date of completion of refunds to investors as directed above.

(i) **Mr. Krishnendu Das, Smt. Sugata Bal Das, Mr. Pramathes Dutta, Mr. Sujoy Nandi and Mr. Basab Dasgupta**, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, with immediate effect. They are also restrained from issuing prospectus, offer document or advertisement soliciting money from the public and 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. The

above directions shall come into force with immediate effect and shall continue to be in force from the date of this Order till the expiry of 4 years from the date of completion of refunds to investors, as directed above.

(j) The above directions shall come into force with immediate effect.

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

29. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories for information and necessary action.

30. 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.

PRASHANT SARAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Date: May 06, 2016
Place: Mumbai