WTM/RKA/EFD/123/2016

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 read with regulation 107 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 in respect of:

1) **Shivalik Cotex Limited,**
2) **Mr. Subhash Chand Gupta,**
3) **Mr. Summit Gupta,**
4) **Ms. Shakshi Gupta,**
5) **Ms. Sunita Gupta,**
6) **Mr. Saurabh Gupta,**
7) **Mr. Jawahar Lal Goyal,**
8) **Mr. Om Prakash Gupta,**
9) **Mr. Yatender Kumar,**
10) **Mr. Navin Gupta and**
11) **Ms. Noorie Goel.**

In the matter of issuance of equity shares by Shivalik Cotex Limited

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1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') conducted a preliminary examination into the issuance of equity shares by Shivalik Cotex Limited (hereinafter referred to as 'SCL' or 'the company') with a view to ascertain the possible violations of the public issue norms stipulated under the Companies Act, 1956 and other applicable laws pertaining to SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("DIP Guidelines"). Pursuant to the examination, SEBI passed an *interim* order dated March 27, 2015 (hereinafter referred to as "*interim order*") against SCL and its promoters/ directors namely Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Jawahar Lal Goyal (in his submissions to SEBI he has mentioned his name as Jawahar Lal Goel), Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel (hereinafter collectively referred to as "the Noticees" and individually by their respective names) in view of the following:

   "9. …the Company had made allotments of equity shares to 247, 36 and 51 investors on February 20, 2007, February 26, 2007 and March 31, 2007 respectively. Further, even if the submission of the Company (that it issued equity shares to only 172 persons) is accepted then also the allotments of equity shares on February 20, 2007 i.e. in five tranches (as provided vide letter dated December 15, 2014 and noted at Table B above), indicates that the Company had issued

equity shares to more than 49 persons in a series of transactions as detailed in Table B, above. As per the first proviso to Section 67(3) of the Companies Act, 1956, where the "offer" or "invitation to subscribe for shares or debentures" is made to fifty persons or more, then it has to be construed as a public offer. The offer and issue of equity shares by the Company through three allotments made during the year of 2007 to 334 investors was public offer of securities."

2. The following directions were issued against the Noticees vide the *interim order*:

"*a. The Company, namely, Shivalik Cotex Limited [PAN: AAICS3938E] and its promoters/ directors including Mr. Subhash Chand Gupta [DIN: 00408910], Mr. Summit Gupta [DIN: 02723192], Ms. Sakshi Gupta [DIN: 02858545], Ms. Sunita Gupta [DIN: 02398883], Mr. Saurabh Gupta [DIN: 01129964], Mr. Jawahar Lal Goyal [DIN: 00408860], Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel are restrained from mobilizing funds through the issue of equity shares or through any other form of securities, to the public and/ or invite subscription, in any manner whatsoever, either directly or indirectly till further directions.*

b. Shivalik Cotex Limited and its promoters/ directors including the above named persons 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.

c. Shivalik Cotex Limited and its promoters/ directors including the above named persons shall not dispose off any of the properties or alienate the assets of the Company or dispose off any of their properties or alienate their assets.

d. Shivalik Cotex Limited and its promoters/ directors including the above named persons shall not divert any funds raised from public at large through the issuance of the impugned equity shares, kept in its bank accounts and/ or in the custody of the Company without prior permission of SEBI until further orders.

e. Shivalik Cotex Limited and its promoters/ directors including the above named persons are restrained from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, either directly or indirectly, till further directions.

f. Shivalik Cotex Limited and its promoter/ directors including the above named persons shall co-operate with SEBI and shall furnish all the documents.

g. Shivalik Cotex Limited, its promoters/ directors including the above named persons 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."

3. Vide the *interim order*, the Noticees were also called upon to show cause as to why suitable directions/ prohibitions, under sections 11(1), 11(4), 11A and 11B of the Securities and

Exchange Board of India Act, 1992 ("SEBI Act") read with the applicable provisions of ICDR Regulations, including the following, should not be taken/ imposed against them :

"*a. directing them jointly and severally to refund the money collected through the issue of equity shares that are impugned in this Order, along with interest at 15% per annum from the date when the refunds became due to the investors till the date of repayment;*

b. directing them to not to issue 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, for an appropriate period;

c. directions restraining them from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period;

d. directing them and other companies in which their directors hold substantial or controlling interest, to not access the capital market for an appropriate period."

4. The *interim* order advised the Noticees to file their replies within 21 days from the date of its receipt and also to seek an opportunity of personal hearing. The Noticees except Mr. Jawahar Lal Goel and Ms. Noorie Goel filed their common reply vide letter dated May 24, 2015, *inter-alia*, submitting the following:

i. The company was incorporated in the year 2004 under the Companies Act, 1956, as an unlisted public company and does not directly come under the purview of SEBI.

ii. On the date of reply, the company had 352 shareholders. These 352 shareholders are largely related to or well known to the promoters and directors of the company.

iii. Mr. Om Prakash Gupta, Mr. Yatendra Kumar and Mr. Navin Gupta were never the directors of the company. They neither held any fiduciary position in the Company nor had any control thereof. Mr. Yatendra Kumar and Mr. Navin Gupta at present are not even the shareholders of the company. Mr. Om Prakash Gupta holds only 2,84,500 equity shares in the company and is one of the minority shareholders.

iv. Mr. Sumeet Gupta and Ms. Shakshi Gupta became the directors of the company w.e.f. December 16, 2009. They were not the directors during the financial year 2006-2007. During the financial year 2006-2007, Ms. Shakshi Gupta was not even the shareholder in the company.

v. The matter is instigated on a frivolous complaint of Mr. Jawahar Lal Goel who had got into dispute with Mr. Subhash Gupta (the promoter of the company) during the year 2013 and since then he is trying to harm the company as well as its directors and promoters.

vi. The complainant Mr. Jawahar Lal Goel together with his family holds merely 3% shareholding in the company and is a distant relative of the existing director. Due to certain family dispute, he had started creating problems in the company and also made frivolous complaints at different forums to create hurdles in the routine work of the

company. He also filed a petition before the Hon'ble Company Law Board ('CLB'). Wherein the Hon'ble CLB had instructed the complainant to come with clean facts and dismissed the petition and held that the petitioner cannot be permitted to pursue the petition as a pressure tactics for extorting money.

vii. Since the incorporation of the company, its operations were expanding fast, due to the efforts and hardwork of its then existing directors namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Saurabh Gupta. As for the growing operations, the company needed additional funds. Hence, in the Board of Directors meeting held on March 01, 2006, a committee was formulated to oversee the funding needs of the company, either by way of equity or loans. In the board meeting, the directors also recommended the approval of up to 50,00,000 shares of ₹10/- each and further delegated the powers to the 'Financing and Fund Raising Committee' (FFR Committee) to come out with offer for allotments on private and confidential basis, from time to time, as per the needs of the company, subject to the limit of 50 lakh equity shares. The Noticees also submitted copy of the Board Resolution passed in the board meeting held on March 01, 2006.

viii. Subsequently, six separate committee meetings were held on April 04, 2006, April 10, 2006, May 15, 2006, October 10, 2006, November 27, 2006 and January 31, 2007. In the meetings so held, it was observed that there was need of ₹1.92 crore, ₹7.25 lakh, ₹24 lakh, ₹1.06 crore, ₹25 lakh and ₹1.01 crore for investment respectively, for the purposes of setting up plants and machinery to undertake the operations at expanded level. It was further decided in the said FFR committee meetings that the said amount to be raised by way of fresh issue of equity shares and the opportunity be discussed with only the relatives and friends closely known to the directors along with the other employees of the company as well as its customers.

ix. According to the fund requirement in the company six different offers were made for raising the funds through private placements and accordingly six separate board meeting were held and allotments were made to the people who had accepted the offer. The offers so made to these relatives, friends, employees and customers as well as existing shareholders, were purely private and confidential and on non-transferable basis. Neither the allotment nor the offer was made to more than 49 investors at a time. The offers and allotments by the company had been privately placed not attracting the provisions of public offer.

x. The observation in the *interim order* with respect to the allotment to 247 allottees on February 2007 is not correct. The figure of 247 pertains to the number of share certificates which were issued to the shareholders to whom allotments were made in previous board meetings and the same cannot be said to be the number of allottees. Allotment as on March 31, 2007, was only to 49 allottees and that 51 is the number of certificates issued. The figure of 334 is the number of share certificates issued and not the number of allottees.

xi. Only 32,82,000 equity shares were issued (in four different offers and allotments in four trenches) as on February 20, 2007. In the meeting held on February 20, 2007 at 11:30 P.M., 247 share certificates were issued to the shareholders to whom allotments were made in previous board meetings.

xii. It is erroneous to club allotments pursuant to separate offers and in separate board meetings together. All the allotments are fully complaint to the provisions under section 67(3) of the Companies Act, 1956.

xiii. The *proviso* to Section 67(3) of the Companies Act, 1956 refers to 'the offer or invitation' thus making the intention of the legislature clear, namely that the sub-section and the *proviso* would apply to any single offer or invitation. The said *proviso*, does not provide for any time period and the same further substantiates the contention that it speaks about 'each offer or invitation'. In the present case, the company had made 6 separate offers, each of the offer was to less than 50 people, the offer was directly made to only known entities in a private and confidential basis, hence these are private placements under Section 67.

xiv. The said offers/ allotments have not impacted the interests of any investor or stakeholder. Further, no loss was caused to any investor, nor any undue advantage accrued due to said offers and allotments. The investors are satisfied with the performance of the company and wants to continue with their investment in the company.

5. Vide another letter dated October 15, 2015, the company filed certain additional submissions, which were taken on record. The same in brief are as follows:

i. There is recession in the textile industry in the past two years and the company is in heavy losses from the past 1.5 years. In the past 1.5 years, the directors of the company have infused funds to the tune of around two crores by disposing off their assets to save the Company. Despite the same the company is in deep losses.

ii. Therefore, the shareholders of the company, in AGM dated September 30, 2015, had decided to dispose of the plant, machinery and other assets of the company to avoid further losses and to safeguard the interest of the shareholders.

iii. The Banker (Oriental Bank of Commerce) have also served a recall notice dated October 01, 2015 under section 13 (2) of SARFAESI Act, 2002 for discharging the full liability of the bank as per the notice with interest up to date at the earliest. As per the said notice, in case the company fails to abide by the terms of the notice, the bank shall be empowered to take necessary action for enforcement of the secured assets to realize its dues.

iv. The secured assets with the bank contain hypothecation of inventories, book debts and entire plant and machinery of the company. Apart from these, the other immovable properties of the directors are also mortgaged with the Bank against the term loan and

cash credit limit. The value of collateral securities with Bank is much higher than the loan amount.

v. The company requested permission for the sale of immovable properties. It was submitted that if the permission is not granted, the banker will auction the entire assets along with the assets of directors and only stress value or less value will be recovered.

vi. It was submitted that the other assets of the company and its directors are sufficient to discharge the liability mentioned in the *interim order*.

6. While making such submissions the company requested permission for disposal of the plant and machinery on an urgent basis and requested to vacate the directions i.e. "*Restraining us from disposing off any of the properties or alienate the assets of the Company or dispose off any of our properties or alienate our assets"*.

7. An opportunity of personal hearing was given to the Noticees for November 26, 2015. The company vide its letter dated November 13, 2015, requested to re-schedule the personal hearing on November 26, 2016 to 04:00 PM. Considering the request, the personal hearing was re-scheduled to December 23, 2015. However, the Noticees namely Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Om Prakash Gupta, Mr. Yatender Kumar and Mr. Navin Gupta vide respective letters dated December 15, 2015 and e-mail dated December 21, 2015, requested to adjourn the proceedings of the case, for a month. The request was acceded to and another opportunity of personal hearing was granted in the matter for February 02, 2016. However, the same was re-scheduled to March 01, 2016 and then to March 10, 2016, due to certain administrative exigencies. In the meantime, the Noticee namely Mr. Jawahar Lal Goel vide his email dated February 17, 2016, requested for scheduling the personal hearing at Delhi. The said request of Mr. Jawahar Lal Goel was not acceded to. Mr. Jawahar Lal Goel and Ms. Noorie Goel vide e-mail dated March 09, 2016, once again requested to schedule the personal hearing at Delhi. Other Noticees also requested to adjourn the personal hearing due to the non-availability of their advocate namely Mr. Prakash Shah, due to certain unavoidable reasons. The requests of the Noticees were rejected and the personal hearing in the matter was concluded. The Noticees were granted liberty for submitting the written submissions. The Noticees filed the written submission, *inter alia* submitting as under:

i. The company vide its letter dated March 28, 2016, mainly reiterated the submissions made vide letter dated May 24, 2015. The additional submission made vide this letter are as under:

   a. SEBI had adjourned the personal hearing on three occasions, however, when the company sought an adjournment of the hearing due to non availability of counsel, the same was not granted. The same is in gross violation of principles of natural justice, equity and fair play.

b. It was requested that the company and its directors may be granted personal hearing for proper dispersion of justice.
c. All existing shareholders of the company in corresponding to the three alleged allotments are interested to continue their investment in the company.

ii. Mr. Yatinder Kumar, Mr. Navin Gupta and Mr. O.P. Gupta vide respective letters dated March 28, 2016, made common submissions. The same in brief are as under:
a. They were only the subscribers to the Memorandum of Association ('MoA') of the company at the time of its incorporation. By virtue of the same, they became the shareholders of the company since incorporation.
b. Mr. Yatinder Kumar and Mr. Navin Gupta had transferred all their shareholding and on the date of reply they are not the shareholders of the Company.
c. They were neither the directors nor held any official/ fiduciary position in the company. They were merely the minority shareholders having no role in the management or control of the company since its incorporation.
d. Though the shareholders have the ownership in the company but without having any managerial position, they cannot be said to be involved in the day to day affairs of the company.
e. Section 5 of Companies Act, 1956 which deals with the concept of 'officer in default' lays down an inclusive list of persons who are presumed to be in default whenever there is a breach of statutory provision on the part of the company and may be prosecuted, punished and penalized in case of default by a company. The persons who have been listed out in the said provision either hold any office in the company or are authorized by the Board of directors of the company to do some act or discharge some responsibility. However, they have not held any office in the Company or exercised control on its board of Directors.

iii. Ms. Sunita Gupta and Mr. Saurabh Gupta vide respective letters both dated March 28, 2016, submitted as under:
a. She was the first subscriber to MoA and director of the company since its incorporation i.e. from May 10, 2004 to December 28, 2009. She was never the active director of the company and had not participated in any activity of the Company.
b. Mr. Saurabh Gupta was the director of the company from March 01, 2007 to December 28, 2009. During his association with the company, his intentions were not *mala fide*.
c. As directors of the company they had discharged duties in good faith and exercised all due skill, care and diligence as man of ordinary prudence.

iv. Ms. Shakshi Gupta and Mr. Summit Gupta vide respective letters both dated March 28, 2016, submitted as under:

a. They were appointed as Directors on the Board of company on December 16, 2009 and before such appointment as director they had not held any office or managerial position in the company.
b. Ms. Shakshi Gupta submitted that she had no interest in the company before her marriage on March 03, 2008 with Mr. Saurabh Gupta
c. Ms. Shakshi Gupta and Mr. Summit Gupta are the shareholders of the company since 2010 and 2005 respectively and had no say in the management or control of the company.
d. It is well settled rule of law that only officers/ directors who are knowingly and intentionally guilty of an offence can be punished. In the present case the allotments in question had happened during the financial year 2006-07. They cannot be alleged for any violation under section 73(2) since the said section puts the onus on the company and its directors who is 'officer in default'.
e. As a director of the company, they had discharged their duty in good faith and exercised due skill, care and due diligence as a person of ordinary prudence and ensured that company follows all the applicable rules/ regulations applicable.

v. Mr. Subhash Gupta vide letter dated March 28, 2016, submitted that he was appointed as director of the company since its incorporation i.e. May 10, 2004. It has also been submitted that he is the active director of the company and had taken part in all the activities of the company.

vi. Mr. Jawahar Lal Goel vide his letter dated December 21, 2015, submitted the following:
a. Mr. Jawahar Lal Goel and his brother in law (Mr. Subhash Chand Gupta) had established the company. They both became the main promoters and first directors of the company.
b. Mr Subhash Chand Gupta had appointed persons namely Mr. Pankaj Kumar, C.A. and Ms. Poonam Wadhwa in the company, who were near to him.
c. Mr. Subhash Chand Gupta had limited his work to look after the production. The other affairs in the company like accounts, bank related work, loans, tax related work, work relating to Registrar of Companies, allotment of shares, etc. were retained by Mr. Subhash Chand Gupta.
d. Mr. Subhash Chand Gupta had directed him to sign on blank printed forms. He had signed on such forms because of his relationship.
e. After two years, Mr. Subhash Chand Gupta appointed his son namely Mr. Sumeet Gupta and daughter-in-law namely Ms. Shakshi Gupta as directors of the company. Subsequently, they all had indulged in unlawful activities. When such activities came to his knowledge, he had attempted to stop them but his efforts had failed.
f. Later he resigned from the directorship of company form December 28, 2009.

g. In August 2013, at the website of Registrar of Companies, he noticed that Mr. Subhash Gupta, Mr. Sumeet Gupta and Ms. Shakshi Gupta had filed shareholder lists on his behalf on February 20, 2007, February 26, 2007 and March 31, 2007. These shareholder lists and Form 2, had his forged signatures.

h. Subsequently, he lodged a F.I.R. against Mr. Subhash Gupta, Mr. Sumeet Gupta, Ms. Shakshi Gupta, Mr. Saurabh Gupta, Mr. Pankaj Kumar and Ms. Poonam Wadhwa under sections 420, 467, 468, 471, 120B of the Indian Penal Code 1860. Along with this a complaint in this regard was also forwarded to SEBI.

i. As the investigating officer had not done the investigation properly, he had filed a protest petition before the Chief Judicial Magistrate, Saharanpur. The Chief Judicial Magistrate, Saharanpur accepted the petition and had rejected the final report. The Court had converted the case into a complaint and not sent the same for further investigation at the police station.

j. Against such order of Chief Judicial Magistrate, Saharanpur he filed a Criminal Revision petition, which is still pending for hearing.

k. SEBI upon considering his complaint, passed the *interim order*. Vide this order the Noticees were directed not to sell or remove any property of the company but while ignoring the *interim order* Mr. Subhash Chand Gupta and his family has sold the machines of the company with the help of bank officials.

l. Ms. Noorie Goel is his wife and is not concerned with the affairs of the company.

8. I have considered the SCN, the replies/ written submissions of the Noticees and the material available on record. The company has raised certain preliminary contentions, which needs consideration before proceeding on the merits of the matter. It has been contented that SEBI had adjourned the personal hearing on three occasions, however, when the company sought an adjournment of the hearing due to non-availability of counsel, the same was not granted. The company has argued that same is in gross violation of principles of natural justice, equity and fair play. I have considered the contention of the company and find no merits in the same, for the reason that reasonable opportunities of personal hearing were granted in the matter to the Noticees (on December 23, 2015 and March 10, 2016) for appearance and making submissions. Further, even after conclusion of the hearing proceedings, the Noticees were granted reasonable time for making written submissions. In reply, the Noticees have submitted respective written submissions, which have been taken on record and the same are being duly considered in the present proceedings.

9. Another contention raised by the company is that the matter is instigated on the complaint of Mr. Jawahar Lal Goel is also of no merits as SEBI on receipt of the complaint had conducted an independent examination in the matter. Further, on finding the *prima facie* violations in the matter, SEBI had proceeded further and issued the *interim* directions.

10. For the purpose of dealing with the submissions of the Noticees in respect of the *prima facie* findings in the *interim order,* I find it important to mention that all the controversies with regard to questions such as whether an offer to 50 persons or more is a public issue, SEBI's jurisdiction in respect of issuance of securities, intention/ obligation of the issuer to list such securities, etc. have been settled by the Hon'ble Supreme Court in its judgment and order dated August 31, 2012, in matter of *Sahara India Real Estate Corporation Limited & Ors. Vs SEBI & Anr. - Civil Appeal No. 9813 and 9833 of 2011 [(2013) 1 SCC 1]* (hereinafter referred to as "the *Sahara Order*").

11. The Noticees in the respective submissions have not disputed the fact of allotment of equity shares. However, they have argued that the number of allottees in each of such allotments were below 49. The particulars of allotment of equity shares as detailed in the *interim order* are as under:

Table - A

S.No.	Date	No. of Allottees	Amount Mobilized (₹)
1.	20/02/2007	247/ 172*	3,28,20,000
2.	26/02/2007	36	1,00,20,000
3.	31/03/2007	51	24,70,000
Total		334/ 251#	4,53,10,000

** As per the details submitted by the Company on February 12, 2014, the equity shares were allotted to 247 allottees on February 20, 2007. However, vide the details submitted on December 15, 2014, the Company has claimed to have allotted equity shares to 172 allottees vide different board resolutions on the same day i.e. February 20, 2007.*

 # 334 is the number of allottees, if, 247 allottees are considered for February 20, 2007, otherwise the number is 251 with 172 allottees on February 20, 2007. For proceeding further, the figures of 247 and 334 are being considered.

12. From the table above, it is noted that there were certain variations in the details submitted by the company regarding the number of allottees of equity shares on February 20, 2007. The company along with its submissions has submitted a detailed list (reproduced in the table below) mentioning therein the dates of committee meetings for making offer, date and time of board meetings for allotment and number of allottees in such offers. The same is being reproduced herein below for reference:

Table - B

S.No.	Date of FFR Committee Meeting for offer	Amount of Offer (in ₹)	Date of Board meeting for allotment	Time of Board Meeting	No. of people to whom allotment made
1	04/04/2006	1.92 crore	20/02/2007	02:00 P.M.	45
2	10/10/2006	1.06 crore		04:30 P.M.	45
3	10/04/2006	7.25 lakh		06:00 P.M.	45
4	15/05/2006	24 lakh		08:00 P.M.	37
5	31/01/2007	1.01 crore	26/02/2007		34
6	27/11/2006	25 lakh	31/03/2007		49

13. The company in its reply has submitted that the figure of 334 as stated in the *interim order* is the number of share certificates issued and not the number of allottees. It has been contended that four allotments were made on February 20, 2007 to 45, 45, 45 and 37 allottees. The company has submitted that the offers for these issues were made on four different dates i.e. April 04, 2006, October 10, 2006, April 10, 2006 and May 15, 2006. The company in support of its contentions has relied upon the extracts of the resolutions passed in the respective meeting of the 'Financing and Fund Raising Committee' of Board of directors. The company has also submitted that in the meeting held on February 20, 2007 at 11:30 PM, 247 share certificates were issued to the shareholders to whom allotments were made in previous board meetings and the said number does not refer to the number of allottees.

14. I have considered the documents submitted by the company in support of its claim that the offers were made on four different dates and note that these are mere photocopies certified by the Noticee namely Mr. Subhash Chand Gupta and the same do not mention the number of allottees. Further, I note that the company has not submitted any third party/ independent document like the application form of the allottees or the document with which the company had approached the investors, in support of its contention of making offers on different dates.

15. The contention of the company that different offers were made for raising funds through private placement and six separate board meetings were held and allotments were made to the people who had accepted the offer is not supported by any plausible explanation as to why the company had waited for almost 9-10 months for allotting the shares to allottees who had accepted the offer made during April – May, 2006. It is an admitted fact that the company on February 20, 2007 had allotted equity shares to a total of 172 allottees during 02.00 P.M. - 08:00 P.M. There is no reason cited by the company to make four allotments within a gap of few hours on the same day i.e. on February 20, 2007. Considering the same, the defence submitted by the company that the allotments made on February 20, 2007 were pursuant to four different offers is rejected. Having considered the above, I conclude that the company had offered and issued equity shares to more than 50 persons and the same is 'public issue' in terms of the first *proviso* to section 67(3) of the Companies Act, 1956.

16. As per the submissions of the company, the number of allottees who were allotted equity shares on February 26, 2007 and March 31, 2007 were 34 and 49 respectively. The stated figures are different from the figures as alleged in the *interim order* i.e. 36 and 51 on February 26, 2007 and March 31, 2007, as also stated in table A above. I note that the observation in the *interim order* were made on the basis of the details of allotment of shares as submitted by SCL. I note that the company has not submitted any document to

explain this difference in the number of allottees. In absence of any supporting documents in this regard, it is difficult to accept the contention of the company and the figure of 36 and 51 are being considered for proceeding further in the matter.

17. The company has also sought to distinguish the facts of the instant case from that of the *Sahara order* on the grounds of number of investors, intention of the issue and *modus operandi*. As held by the Hon'ble Supreme Court in *Sahara Order*, by virtue of the first *proviso* to section 67(3) of the Companies Act, 1956, the issuance of shares to more than 49 persons would become an offer to the public. It is also to be kept in mind that the first *proviso* was inserted in section 67(3) vide the Companies (Amendment) Act, 2000, with effect from December 13, 2000, in order to curb the companies from offering shares and debentures to a wider group of people by disguising it as "domestic concern". In my view, the intention of the Legislature, as envisaged in the said Amendment Act is that any mobilization of funds from a group of investors, fifty or more in number, should be classified as a 'public issue'. This limit of 49 allotees cannot be breached or bypassed by making multiple allotments which individually may fall within the limit but cumulatively exceed 49 in number as was done by SCL on February 20, 2007 by making four allotments of 45, 45, 45 and 37 within a short time gap. Similarly, the company could not bypass the operation of the first *proviso* to section 67(3) of the Companies Act, 1956 by making consecutive allotments on February 20, 2007 and February 26, 2007 for the reasons stated above. It is mandatory for every company to comply with the aforesaid *proviso* both in letter and spirit. Accordingly, the provisions of section 67(3) and other applicable provisions of law apply to such issues of securities irrespective of the number of allotees, their relationship with the company and the quantum of allotment, etc. I, therefore, find that all the aforesaid allotments made by SCL i.e. the allotments made on February 20, 2007, February 26, 2007 and March 31, 2007 were "public issue". In view of the above, I reject the contentions of the Noticees in this regard.

18. The company in its reply has also contended that the allotees were the relatives, friends, employees, customers, existing shareholders of SCL. However, the company in support of such claim has not submitted any list/ document to depict the relationship with the respective allottees. I note that the company has not submitted any document to show how it had approached the allottees for the issue of its equity shares. Further, I also place reliance on the observation of Hon'ble Supreme Court in *Sahara Order*, that once the number of allotees exceeds 49, it becomes irrelevant whether the allotees were friends, relatives or kith and kin, as has been claimed by the company in the present case.

19. As the issuance of equity shares by SCL were public issues, it ought to have complied with the applicable provisions of the Companies Act, 1956 and DIP Guidelines read with the

corresponding provisions of the ICDR Regulations, as found in the *interim order*. In the present case, there is no dispute as to the fact that SCL while making the aforesaid "public issues" has not complied with the provisions of section 60 read with sections 2(36), 56(1), 56(3), 60B and 73 of the Companies Act, 1956 and clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3, 5.3.5, 5.3.6, 5.4, 5.6, 5.6A, 5.7, 5.8, 5.9, 5.10, 5.12.1, 6.0 to 6.15, 6.16 to 6.34, 8.3, 8.8.1 and 9 of the DIP Guidelines. Since the requirements of these applicable provisions and the relevant observations of the Hon'ble Supreme Court in the *Sahara Order* have been clearly stipulated in the *interim order*, I do not deem it necessary to reiterate the same and burden this order with the same findings.

20. The *interim order* was issued against the directors/ promoters of the company namely Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Jawahar Lal Goel, Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel. The details of the appointment and resignations of directors of the company are as under:

Table C

Name	**Date of Appointment**	**Date of Cession**
Mr. Subhash Chand Gupta	10/05/2004	Continuing as director
Mr. Summit Gupta	16/12/2009	Continuing as director
Ms. Sakshi Gupta	16/12/2009	Continuing as director
Ms. Sunita Gupta	10/05/2004	28/12/2009
Mr. Saurabh Gupta	01/03/2007	28/12/2009
Mr. Jawahar Lal Goel	10/05/2004	28/12/2009

21. I note that the company had offered and issued equity shares in the financial year 2006-07 (the date of first allotment being February 20, 2007 and the last date being March 31, 2007). Section 56 of the Companies Act, 1956 imposes the liability for the compliance, on the company, every director, and persons responsible for the issuance of the prospectus. The liability of the company to repay under Section 73(2) of the Companies Act, 1956, is continuing and the same continues till all the repayments are made to the investors/ public. Therefore, the directors who were present during the period when the company had made the offer and allotted equity shares shall be liable for violation of Sections 56, 60 and 73 of the Companies Act, 1956 including the default in making refunds as mandated therein. As the liability to make repayments under Section 73(2) of the Companies Act, 1956 is a continuing liability, the persons who joined the company's Board pursuant to the offer and allotment of equity shares shall also be liable if the company and the concerned directors have failed to make refunds, as mandated under the discussed provisions of law.

22. From the *interim order* it is noted that the Noticees namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta, Mr. Om Prakash Gupta, Mr. Jawahar Lal Goel, Mr. Yatender Kumar, Mr.

Navin Gupta and Ms. Noorie Goel were the original subscribers to the MoA/ promoters of the company. The Noticees namely Mr. Om Prakash Gupta, Mr. Yatender Kumar and Mr. Navin Gupta have contended that they were never the directors of the company and had no role in the management or control of the company. It has been submitted that they were only the subscribers to the MoA of the company, at the time of its incorporation. Further, it has also been submitted that Mr. Yatender Kumar and Mr. Navin Gupta had transferred all their shareholding and now they are not even the shareholders of the company.

23. I note that the names of the Noticees namely Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel were mentioned as shareholders in the annual return of the company for the year 2006-2007. Mr. Yatender Kumar and Mr. Navin Gupta have not submitted the dates on which they transferred their shareholding in the company. Being the original subscribers to the MoA/ promoters of the company, Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel cannot deny their connection with the company. These persons have also not submitted anything to say that they were not instructing the Board of directors of SCL, in view of the same, it is difficult to grant any relief to these persons. Further, the public interest requires that the persons who had knowledge/ consent/ connivance in the act/ omission which constitutes violation of the provisions of the public issue or who neglected in preventing such issue be made accountable to the investors.

24. The other promoters namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Jawahar Lal Goel became the first directors of the company on May 10, 2004. I note that Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Jawahar Lal Goel were the directors of SCL at the relevant point of time and had authorised the issuance of shares. From the copy of 'minutes of the meeting of the Board of directors of SCL' held on February 20, 2007 and February 26, 2007, it is noted that the meeting was attended by the Noticees namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Jawahar Lal Goel. Further, the meeting of March 31, 2007 was attended by the Noticees namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta, Mr. Jawahar Lal Goel and Mr. Saurabh Gupta.

25. Mr. Subhash Chand Gupta (the promoter and director of SCL) in his submission has accepted that he was the active director of the company and had taken part in all its activity. Ms. Sunita Gupta (the promoter and director of SCL) in her submissions has contended that she was not the active director and had not participated in any activity of the company. This submission of Ms. Sunita Gupta is not correct in light of her presence in the board meetings held on February 20, 2007 and February 26, 2007, as seen from the minutes of these meetings. Further, the company in its submissions has stated that the

operations of the company were expanding fast 'due to the efforts and hardwork of its then existing directors namely Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Saurabh Gupta'. The same suggests that Ms. Sunita Gupta was playing an important role in the affairs of the company, at the relevant time.

26. Mr. Jawahar Lal Goel (the promoter and director of SCL) in his submission has contended that his signature on the shareholder lists and Form 2 are forged and he has lodged a FIR in this regard. I have considered the submissions of Mr. Jawahar Lal Goel and note that his complaint is still pending consideration before the respective Court and there is no final decision on the same. Considering the same and his presence in the meetings held on February 20, 2007, February 26, 2007 and March 31, 2007, it is difficult to grant any relief to him. However, he is at liberty to take recourse to the remedies available under law.

27. As found hereinabove, the issues of shares were "public issues" and in respect thereof, the applicable provisions of the Companies Act and DIP Guidelines/ ICDR Regulations were not complied by SCL. The board of directors of SCL at the time of the above mentioned issues of shares (consisting of Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Jawahar Lal Goel), being in control of the affairs of SCL, was under an obligation to ensure that the issues were in compliance with all the applicable provisions of the Companies Act, 1956, SEBI Regulations and other applicable laws. In my view, these persons as on the date of the above mentioned issuances of shares are also '*officers in default*' as defined under section 5 of the Companies Act, 1956 read with section 2(60) of the Companies Act, 2013. I, therefore, find that Mr. Subhash Chand Gupta, Ms. Sunita Gupta and Mr. Jawahar Lal Goel are responsible for the acts and omissions of SCL in this case.

28. Mr. Saurabh Gupta became the director of the company on March 01, 2007. In his submissions he has stated that he had discharged the duties in good faith and had exercised all due skill, care and diligence as man of ordinary prudence. I note that he was present in the meeting held on March 31, 2007, wherein allotment had happened to 51 allottees. The other directors of the company were Mr. Summit Gupta and Ms. Sakshi Gupta who became the directors on December 16, 2009 i.e. after the last available date of impugned issues of equity shares. Mr. Summit Gupta and Ms. Sakshi Gupta are also the present directors of the company along with Mr. Subhash Chand Gupta. I note that Mr. Saurabh Gupta, Mr. Summit Gupta and Ms. Sakshi Gupta have not exercised necessary diligence after becoming the directors in the company. The inaction by these against the management (for violating the public issue norms as stipulated under the Companies Act, 1956), leads one to conclude on a possible collusion with the company and its

management. Mr. Saurabh Gupta, Mr. Summit Gupta and Ms. Sakshi Gupta have not taken any steps to remedy the violations committed. It is also noted that the liability to refund is a continuous liability and the same would be discharged only when the repayments are done. In view of the same, Mr. Saurabh Gupta, Mr. Summit Gupta and Ms. Sakshi Gupta are also '*officers in default*' as defined under section 5 of the Companies Act, 1956 read with section 2(60) of the Companies Act, 2013.

29. Having considered the above, I also place reliance on the order of Hon'ble High Court of Madras in the matter of *Madhavan Nambiar* Vs. *Registrar of Companies* [2002 108 Comp Cas 1 Mad] wherein it was observed that "*In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956*."

30. In this regard, it is pertinent to note that the allotment of equity shares by SCL forming the subject matter of these proceedings were public issues and were made without compliance with the aforesaid provisions of Companies Act, 1956, DIP Guidelines and ICDR Regulations. The consequence of the aforesaid non-compliance/ violations is refund/ repayment of subscription money to the allotees with interest as provided in clause 17 of DIP Guidelines/ regulation 18 of ICDR Regulations read with section 73 and section 56 of the Companies Act, 1956. The mandatory requirement of listing of securities under section 73 of the Companies Act, 1956 is intended at facilitating the trading of securities by the public and providing exit to them on the stock exchange platform.

31. With regard to liability to pay interest on the subscription money, I note that as per section 73 (2) of the Companies Act, 1956 read with section 40(3)(b) of the Companies Act, 2013, 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 further note that in terms of rule 4D of the Companies (Central Government's) General Rules and Forms, 1956 read with rule 3(c) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the rate of interest prescribed in this regard is 15%. Accordingly, the company and its directors namely Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Jawahar Lal Goel are liable to pay interest to the subscribers at such statutory rate of interest.

32. In view of the foregoing, I, in exercise of the powers conferred under sections 11(1), 11(4), 11A and 11B read with section 19 of the Securities and Exchange Board of India Act, 1992 and regulation 107 read with regulation 111 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, hereby issue the following directions:

(i) The Noticees i.e. Shivalik Cotex Limited [PAN: AAICS3938E] and its directors namely Mr. Subhash Chand Gupta [DIN: 00408910], Mr. Summit Gupta [DIN: 02723192], Ms. Sakshi Gupta [DIN: 02858545], Ms. Sunita Gupta [DIN: 02398883], Mr. Saurabh Gupta [DIN: 01129964] and Mr. Jawahar Lal Goel [DIN: 00408860] shall within a period of three months from the date of this order, jointly and severally refund the money collected through the issue of equity shares to the allottees with interest at the rate of 15% per annum from the date of receipt of money till the date of such refund.

(ii) Such refund shall be made only in cash through a Demand Draft or Pay Order.

(iii) Shivalik Cotex Limited and its directors shall within fifteen days from the date of this Order submit to SEBI complete details of their assets (alongwith proofs thereof) certified by a peer reviewed Chartered Accountant.

(iv) Shivalik Cotex Limited and its directors are permitted to sell assets of the company and deposit the sale 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 allottees of equity shares till the full refund/ repayment as directed above is made.

(v) Shivalik Cotex Limited and its directors shall issue a public notice, in all editions of one English national daily and one vernacular 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.

(vi) Within seven days of completion of refund/ repayment as directed hereinabove, Shivalik Cotex Limited and its directors shall file a certificate of such completion with SEBI from two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. Such certificate shall be issued by the Chartered Accountants after verifying the relevant documents including bank accounts of the Noticees and satisfying themselves that the refund has actually been made.

(vii) 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.

(viii) Shivalik Cotex Limited and its promoters/ directors namely Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Jawahar Lal Goel, Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel are restrained from, directly or indirectly, accessing the capital market by issuing prospectus, any offer document or advertisement soliciting money from the

public and are further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly, in whatsoever manner for a period of four years or till the date of refund of money to the allottees of the equity shares, whichever is later.

(ix) Mr. Subhash Chand Gupta, Mr. Summit Gupta, Ms. Sakshi Gupta, Ms. Sunita Gupta, Mr. Saurabh Gupta, Mr. Jawahar Lal Goel, Mr. Om Prakash Gupta, Mr. Yatender Kumar, Mr. Navin Gupta and Ms. Noorie Goel are also restrained from associating themselves, with any listed public company and any public company which intends to raise money from the public, for a period of four years or till the date of refund of money to the transferees/ holders of equity shares, whichever is later.

(x) For the purposes of sub-paragraphs (viii) and (ix) the period of restraint shall be counted from the date of the *interim order*.

33. The *interim order* cum show cause notice dated March 27, 2015, is disposed off accordingly. The above directions are without prejudice to the right of SEBI to take any other appropriate action for the violations found in this case or to initiate any action in case of failure to comply with the above directions, in accordance with the provisions of applicable laws including the proceedings under the provisions of section 28A of the SEBI Act.

34. The order shall come into force with immediate effect. A copy of the order shall be served on the Noticees to ensure compliance with the above directions. A copy of this Order shall also be forwarded to the recognised stock exchanges and depositories for information and necessary action.

35. 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

DATE : SEPTEMBER 20th, 2016 **RAJEEV KUMAR AGARWAL**
PLACE : MUMBAI **WHOLE TIME MEMBER**
SECURITIES AND EXCHANGE BOARD OF INDIA