WTM/AB/DDHS/DIV2/28/2020-21

SECURITIES AND EXCHANGE BOARD OF INDIA
EX-PARTE AD-INTERIM ORDER CUM SHOW CAUSE NOTICE

UNDER SECTIONS 11(4) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH SECTION 73 OF COMPANIES ACT, 1956 AND SECTION 42 OF THE COMPANIES ACT, 2013

In respect of:

	NOTICEES	**CIN/DIN**	**PAN**
COMPANY –			
1.	Sitaram Maharaj Sakhar Karkhana (Khardi) Limited	U1542PN1999PLC013656	AAOCS0492B
DIRECTORS –			
2.	Vilas Vasantrao Kale	02373942	ALQPK2357M
3.	Dilip Pralhad Kale	02496057	AIFPK3164N
4.	Nana Narayan Kale	02495898	AGAPK8515C
5.	Shankar Kisan Bagal	02529528	Not Available
6.	Baban Sadashiv Sonawale	02484205	APGPS2196N
7.	Gorakh Narhari Tad	03144254	AAIPT4907F
8.	Shobha Rupesh Pawar	02484233	APPPP2546K
9.	Mahadev Mallikarjun Dethe	03092257	AUZPD4131A
10.	Shahaji Namdeo Shendge	03103151	CUWPS2796B
11.	Ganesh Mohanrao Thigale	03103084	ACKPT7370A
12.	Uttam Ramchandra Naiknavare	03144279	AKPPN7345E
13.	Jayashree Vilasrao Kale	03198678	BRPPK7489C

(The aforesaid entities are hereinafter referred to by their respective names / Noticee numbers and collectively as “the Noticees”)

In the matter of Sitaram Maharaj Sakhar Karkhana (Khardi) Limited (Issue of Non-Convertible Redeemable Preference Shares)

1. On the basis of a complaint received from an investor organization, SEBI had conducted an examination into the issuance and allotment of Non-Convertible Redeemable Preference Shares (‘**NCRPS’**) by Sitaram Maharaj Sakhar Katkhana (Khardi) Ltd. (‘**SMSKL’/’the Company’**).

2. During examination, information was sought from the Company in respect of issuance of NCPRS by it. A letter dated July 26, 2019 was sent to SMSKL requesting to furnish, inter-alia, the information regarding mobilization of funds from public. SMSKL vide its letter dated August 12, 2019 had sought 8 weeks' time to submit the information on the premise that the board of directors had recently been restored with the management and control of SMSKL, since the withdrawal of CIRP which was initiated by the bankers to the Company. The Company furnished its reply vide its letter dated September 7, 2019, *inter-alia*, furnishing the information pertaining the allotments of NCRPS.

3. On examination of submission of the Company and RoC-Pune, it is *prima facie* observed that SMSKL has issued NCRPS during the FY 2009-10, 2010-11, 2011-12, 2012-12013-14 and 2014-15.

3.1. <u>Details of NCRPS issuance as per RoC records:</u>

From the information provided by RoC-Pune, the details of allotment of NCRPS is as under:

Financial Year	No. .of Allottees	Amount Raised (Rs. in crore)
2009-10*	43	0.86
2010-11	158	0.31
2011-12	280	0.59
2012-13	1648	4.95
2013-14	2303	7.75
2014-15	516	0.73
Total	**4948**	**15.20**

From the above table, it is observed that the Company had allotted NCRPS to more than 49 investors during the financial years 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 and raised Rs.14.34 Crores during the aforesaid financial years.

3.2. Details of NCRPS issuance as per the Company:

The details of allotment of NCRPS as per information provided by the Company is as under:

Financial Year	No. of Allottees	Amount Raised (Rs.in crore)
2002-03*	7	0.03
2010-11	201	1.18
2011-12	280	0.59
2012-13	1412	4.25
2013-14	3051	9.66
2014-15*	0	0.00
2015-16*	1	8.72
Total	**4952**	**24.41**

From the above table, it is observed that the Company had allotted NCRPS to more than 49 investors during the financial years 2010-11, 2011-12, 2012-13 and 2013-14 and raised Rs.15.66 crores during the aforesaid financial years.

4. A comparison of the data received from the RoC-Pune and the Company indicates difference in the data pertaining to the number of allottees and the amount raised. Importantly, I note that, in 2014-15, the Company claims to have not raised any capital through issue of NCRPS. However, the data from RoC-Pune indicates that SMSKL had raised Rs.0.73 crore from 516 allottees which is *prima-facie* in violation of the public issue norms under the Companies Act, 2013 as the allotments have been made to more than 200 allottees. In view of the same, since SMSKL is the ultimate source for both the aforesaid 2 sets of data (*i.e.* from RoC-Pune and the Company), the following number of investors and amount raised during the financial years has been arrived at after examination:

Financial Year	No. of Allottees	Amount Raised

		(Rs.in crore)
2010-11	201	1.18
2011-12	280	0.59
2012-13	1648	4.95
2013-14	3051	9.66
2014-15	516	0.73
Total	**5696**	**17.10**

Re: Whether the Company has violated Deemed Public Issue Norms in contravention of the provisions of Companies Act, 1956, Companies Act, 2013 and SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations 2013?

5. In view of the aforesaid, examination by SEBI found that the Noticees have prima facie violated provisions of Sections 56, 60, 67 and 73 of the Companies Act, 1956, Sections 26, 33, 40 and 42 of Companies Act, 2013 and Reg. 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), 4(5), 5, 6, 7, 8, 9, 13, 15, 16, 16(B)(1) and 22 of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations 2013 ('**SEBI (NCRPS) Regulations, 2013'**).

Relevant extracts of the provisions of law:

Companies Act, 1956:

*"**56. Matters to be stated and reports to be set out in Prospectus***

(1) Every prospectus issued - (a) by or on behalf of a company, or (b) by or on behalf of any person who is or has been engaged or interested in the formation of a company, shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule. (2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any of the requirements of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

(3) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a memorandum containing such

salient features of a prospectus as may be prescribed which complies with the requirements of this section:

Provided that a copy of the prospectus shall, on a request being made by any person before the closing of the subscription list, be furnished to him:
Provided further that this sub-section shall not apply if it is shown that the form of application was issued either –

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or
(b) in relation to shares or debentures which were not offered to the public.
If any person acts in contravention of the provisions of this sub-section, he shall be punishable with fine which may extend to fifty thousand rupees.

(4) A director or other person responsible for the prospectus shall not incur any liability by reason of any noncompliance with, or contravention of, any of the requirements of this section, if –

(a) as regards any matter not disclosed, he proves that he had no knowledge thereof; or
(b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or
(c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial, or was otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused:

Provided that no director or other person shall incur any liability in respect of the failure to include in a prospectus a statement with respect to the matters specified in clause 18 of Schedule II, unless it is proved that he had knowledge of the matters not disclosed.
……..
60. Registration of Prospectus
(1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto –

(a) any consent to the issue of the prospectus required by section 58 from any person as an expert; and
(b) in the case of a prospectus issued generally, also –
(i) a copy of every contract required by clause 16 of Schedule II to be specified in the prospectus, or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof; and
(ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(2) Every prospectus to which sub-section (1) applies shall, on the face of it, -
(a) state that a copy has been delivered for registration as required by this section; and
(b) specify any documents required by this section to be endorsed on or attached to the copy so delivered, or refer to statements included in the prospectus which specify those documents.

(3) The Registrar shall not register a prospectus unless the requirements of sections 55, 56, 57 and 58 and subsections (1) and (2) of this section have been complied with and the prospectus is accompanied by the consent in writing of the person, if any, named therein as the auditor, legal adviser, attorney, solicitor, banker or broker of the company or intended company, to act in that capacity.

(4) No prospectus shall be issued more than ninety days after the date on which a copy thereof is delivered for registration; and if a prospectus is so issued, it shall be deemed to be a prospectus a copy of which has not been delivered under this section to the Registrar.

(5) If a prospectus is issued without a copy thereof being delivered under this section to the Registrar or without the copy so delivered having endorsed thereon or attached thereto the required consent or documents, the company, and every person who is knowingly a party to the issue of the prospectus, shall be punishable with fine which may extend to fifty thousand rupees. sign the prospectus depending on the circumstances of each case.

***67. Construction of reference to offering shares or debentures to the public, etc**.*

(*1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in*

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

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances –
(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation:

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

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

73. Allotment of shares and debentures to be dealt in on stock exchange.
73(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of

such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) 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.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 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.

SEBI (NCRPS) Regulations, 2013:

(i) Regulation 4(2)(a) – Application for listing of NCRPS
(ii) Regulation 4(2)(b) – In-principle approval for listing of NCRPS
(iii) Regulation 4(2)(c) – Credit rating has been obtained
(iv) Regulation 4(2)(d) – Dematerialization of NCRPS
(v) Regulation 4(5) – Appointment of Merchant Banker
(vi) Regulation 5 – Disclosure requirements in the Offer Document
(vii) Regulation 6 – Filing of draft Offer Document
(viii) Regulation 7 – Mode of disclosure of Offer Document
(ix) Regulation 8 – Advertisements for Public Issues
(x) Regulation 9 – Abridged Prospectus and application forms
(xi) Regulation 13 – Minimum subscription
(xii) Regulation 15– Prohibition of mis-statements in the Offer Document

(xiii) Regulation 16– Mandatory Listing
(xiv) Regulation 16B.(1) – Security Deposit
(xv) Regulation 22 – Obligations of the Issuer, etc.

Companies Act, 2013:

Offer or Invitation for Subscription of Securities on Private Placement.

42. (1) Without prejudice to the provisions of section 26, a company may, subject to the provisions of this section, make private placement through issued of a private placement offer letter.

(2) Subject to sub-section (1), the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, (excluding qualified institutional buyers, and employees of the company being offered securities under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62), in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.

Explanation I.—If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.]

Explanation II.—For the purposes of this section, the expression—

(i) "qualified institutional buyer" means the "qualified institutional buyer" as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirments) Regulations, 2009 as amended from time to time.

(ii) "private placement" means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section.

(3) No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company.

(4) Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall be required to be complied with.

(5) All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.]

(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixty day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

(7) All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.]

(8) No company offering securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an offer.

(9) Whenever a company makes any allotment of securities under this section, it shall file with the Registrar a return of allotment in such manner as may be prescribed, including the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

(10) If a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.

Securities to be Dealt with in Stock Exchanges

40. (1) Every company making public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

(2) Where a prospectus states that an application under sub-section (1) has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

(3) All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—

(a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or
(b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

(4) Any condition purporting to require or bind any applicant for securities to waive compliance with any of the requirements of this section shall be void.

Matters to be Stated in Prospectus

26. (1) Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed

(a) state the following information, namely:—

(i) names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed;

(ii) dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

(iii) a statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner;

(iv) details about underwriting of the issue;

(v) consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed;

(vi) the authority for the issue and the details of the resolution passed therefor;

(vii) procedure and time schedule for allotment and issue of securities;

(viii) capital structure of the company in the prescribed manner;

(ix) main objects of public offer, terms of the present issue and such other particulars as may be prescribed;

(x) main objects and present business of the company and its location, schedule of implementation of the project;

(xi) particulars relating to—

(A) management perception of risk factors specific to the project;

(B) gestation period of the project;

(C) extent of progress made in the project;

(D) deadlines for completion of the project; and

(E) any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;

(xii) minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;

(xiii) details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and

(xiv) disclosures in such manner as may be prescribed about sources of promoter's contribution;

(b) set out the following reports for the purposes of the financial information, namely:—

(i) reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed;
(ii) reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed:
Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in such manner as may be prescribed, the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;
(iii) reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus:
Provided that in case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out in the prescribed manner, the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of its business on the last date before the issue of prospectus; and
(iv) reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly

(c) make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules and regulations made thereunder; and

(d) state such other matters and set out such other reports, as may be prescribed.

(2) Nothing in sub-section (1) shall apply—
(a) to the issue to existing members or debenture-holders of a company, of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant has a right to renounce the shares or not under sub-clause (ii) of clause (a) of sub-section (1) of section 62 in favour of any other person; or
(b) to the issue of a prospectus or form of application relating to shares or debentures which are, or are to be, in all respects uniform with shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

(3) Subject to sub-section (2), the provisions of sub-section (1) shall apply to a prospectus or a form of application, whether issued on or with reference to the formation of a company or subsequently.

Explanation.—The date indicated in the prospectus shall be deemed to be the date of its publication.

(4) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

(5) A prospectus issued under sub-section (1) shall not include a statement purporting to be made by an expert unless the expert is a person who is not, and has not been, engaged or interested in the formation or promotion or management, of the company and has given his written consent to the issue of the prospectus and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.

(6) Every prospectus issued under sub-section (1) shall, on the face of it,—
(a) state that a copy has been delivered for registration to the Registrar as required under sub-section (4); and
(b) specify any documents required by this section to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents*.*

6. I note that Section 67(3) of the Companies Act, 1956 provides for situations when an offer or invitation is not considered as offer or invitation made to public even though it has been made to a section of public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same is not considered as public offer. Under such circumstances, in ordinary parlance, such offer or invitation is considered as private placement of shares or debentures. The scheme of Section

67(3) envisages the raising of funds by a company, privately, from informed and sophisticated investors or relatives/friends of promoters, who are capable of taking informed decisions on the basis of Letter of Offer or Information Memorandum issued by the company. The overarching intent of Section 67(3) is not to burden such private placements with regulatory supervision and compliances, since, the number of investors involved is restricted to 49 known/ pre-identified persons and the public at large is not involved. However, first proviso to Section 67(3) restricts this private placement only to 49 persons and once, the offerrees or invitees exceeds 49 persons, then such a private placement is also deemed as public issue. In such case, the regulatory supervision becomes more stringent and hence, the requirement in respect of contents of prospectus, filling of draft prospectus with SEBI, registration of prospectus with RoC, mandatory listing of securities on stock exchange etc. come into picture. In this regard, it would be appropriate to refer to the judgment of Hon'ble Supreme Court of India in Sahara *Real Estate Corporation and Others Vs. SEBI (2013) 1 SCC1,* wherein while examining the scope of Section 67 of the Companies Act, 1956, it was observed as follows:

> *"85. The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more.*
> *….*
>
> *86. Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation.*
> *….*
> *90. I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …"*

7. Similarly, Explanation 1 to sub-section (2) of section 42 of the Companies Act, 2013, as it then existed, read with Rule 14(2) of Companies (Prospectus and Allotment of Securities) Rules, 2014, stipulates that if an offer or allotment of securities is made to more than 200 persons in a financial year, then the same shall be construed as a deemed public issue.

8. Once an offer or invitation is a public offer, then the provisions relating to public issue such as prospectus, listing etc. including Section 73 of the Companies Act, 1956 and Section 40 of Companies Act, 2013, come into play and the company making such offer or invitation to public is required to make application for listing of shares or debentures offered to the public, to one or more recognized stock exchanges. Section 73 further provides that where the permission has not been applied or, such permission, having been applied for, has not been granted, 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, becomes jointly and severally liable to repay that money with interest. A company making a public issue of shares or debentures is also required to comply with provisions of SEBI Act, 1992 and the regulations/guidelines made thereunder, in this regard.

9. As observed in the previous paragraphs, SMSKL is found to have issued NCRPS to at least 201, 280, 1648, 3051 and 516 persons during the financial years 2010-11, 2011-12, 2012-13, 2013-14 **and** 2014-15 respectively, and raised Rs. 17.10 Crores. I find that such offers of NCPRS would *prima facie* qualify as a deemed public issue under the first proviso to Section 67(3) of the Companies Act, 1956 and Explanation 1 to sub-section (2) of section 42 of the Companies Act, 2013 (w.e.f. April 1, 2014). SMSKL in its reply dated September 7, 2019 has stated that the Company has always made a private placement of preference shares and that the preference shares were issued to known and identified individuals, at their request, who were mainly the relatives of promoters/ shareholders or sugar cane suppliers. I note that the first proviso to section 67(3) of the Companies Act, 1956 makes it abundantly clear that regardless of the offer or invitation being limited to pre-identified individuals or being made on request basis, however if it results into issue to more than 49 persons, the same shall be construed as a public issue of securities. The judgement of the Hon'ble Supreme Court of India in the Sahara *Real Estate Corporation and Others Vs. SEBI (2013) 1 SCC1,* also fortifies the aforesaid interpretation. The underlying object behind this provision is to prevent large scale mobilization of funds from the public under the garb of private placement.

10. I note that in accordance with Section 60(1) of the Companies Act, 1956 and Section 26(4) of Companies Act, 2013 (w.e.f. September 12, 2013), a company needs to register its prospectus with the RoC, before making a public offer or issuing the prospectus. As per Section 2(36) of Companies Act, 1956, "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. I note that SMSKL vide its reply dated September 07, 2019 has stated that since the Company did not make any public issue of NCRPS, the Company was not required to file prospectus under the Companies Act 1956. However, as observed in the previous paragraphs, the issue of NCRPS in the financial years 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15, by SMSKL, is prima facie deemed to be a public issue. Therefore, the Company should have registered a prospectus with Registrar of Companies under Section 60(1) of the Companies Act, 1956 and Section 26(4) of Companies Act, 2013, which it failed to do so.

11. I note that NCRPS Regulations, 2013 (effective from June 12, 2013) are applicable to the public issue of NCRPS. I find that the issue of NCRPS by SMSKL in the financial 2013-14 and 2014-15, is prima facie found to be deemed public issue. I find that the Company has prima facie also violated the following provisions of the NCRPS Regulations, 2013, which contain inter alia requirement for credit rating of NCRPS, appointment of merchant banker before the issue, standards for disclosures in offer document, mandatory listing requirement etc.

(i) Regulation 4(2)(a) – Application for listing of NCRPS
(ii) Regulation 4(2)(b) – In-principle approval for listing of NCRPS
(iii) Regulation 4(2)(c) – Credit rating has been obtained
(iv) Regulation 4(2)(d) – Dematerialization of NCRPS
(v) Regulation 4(5) – Appointment of Merchant Banker
(vi) Regulation 5 – Disclosure requirements in the Offer Document
(vii) Regulation 6 – Filing of draft Offer Document
(viii) Regulation 7 – Mode of disclosure of Offer Document
(ix) Regulation 8 – Advertisements for Public Issues
(x) Regulation 9 – Abridged Prospectus and application forms
(xi) Regulation 13 – Minimum subscription
(xii) Regulation 15– Prohibition of mis-statements in the Offer Document
(xiii) Regulation 16– Mandatory Listing
(xiv) Regulation 16B.(1) – Security Deposit
(xv) Regulation 22 – Obligations of the Issuer, etc.

12. I find that no listing has been obtained by SMSKL for the NCRPS issued by it, hence, prima facie SMSKL is also found to have violated Section 73(1) of Companies Act, 1956 and Section 40(1) of Companies Act, 2013. In terms of Section 73(2) of the Companies Act, 1956, upon failing to procure listing on any of the recognised stock exchange for the issue of NCRPS, SMSKL was forthwith liable to repay the amounts collected through these issues and if such refund was not made within eight days, the Company and every director of the Company who is an 'officer in default' was jointly and severally liable to repay the amount raised with interest.

13. After observing the prima facie violations of deemed public issue norms in the issue of NCRPS by SMSKL, SEBI had advised SMSKL, vide email dated May 29, 2020 and July 06, 2020, to offer an option to the investors to surrender the NCRPS and pay the refund amount, along with the interest @15% per annum to the investors. SMSKL was also advised to file compounding application with NCLT for the violations of the provisions of Companies Act and submit a Certificate from the peer reviewed Chartered Accountant confirming that the amount has been refunded to the investors those who have opted for the exit option.

14. SMSKL, vide its letter July 08, 2020 has submitted that due to COVID-19 the operations of the factory were closed and likely to be resumed from August 01, 2020 and requested time for submitting the information. SEBI had written several communications to SMSKL, viz. emails dated August 11, 2020, November 26, 2020 and letters dated December 16, 2020, January 18, 2021, and March 10, 2021, seeking information from the Company about the status of the exit option whether provided to the investors, the peer reviewed CA Certificate and the status of filling of compounding application before NCLT, if any. I note that SMSKL has failed to respond to any of the aforesaid communications.

15. Therefore, I find that SMSKL has stopped co-operating with SEBI and prima facie it appears that the Company has failed to provide any exit opportunity to the investors of NCRPS. I note that SMSKL has raised 17.10 Crores in aggregate, by issuing NCRPS to 201 investors in FY 2010-11, 280 investors in FY 2011-12, 1648

investors in FY 2012-13, 3051 investors in FY 2013-14, 516 investors in FY 2014-15, in violation of public issue norms as stipulated under Companies Act, 1956, Companies Act, 2013 and SEBI (NCRPS) Regulations, 2013. I note that the facts of the present case warrant the issuance of ex-parte interim directions against Noticee no. 1 and Noticee no. 2 to 13 – who were the directors of SMSKL at the time of issuance of NCRPS, since interest of large number of investors is involved. I also note that in accordance with Section 73(2) of the Companies Act, 1956, the Company and the directors who are 'officers in default' in terms of Section 5 of the Companies Act, 1956 are jointly and severally liable for refund to the investors. From the submissions of SMSKL and the records of RoC Pune, I find that except for the FY 2014-15, the Company did not have any Managing Director or Whole Time Director for the FY 2010-11, FY 2011-12. FY 2012-13 and FY 2013-14. I also note from the said records, the board of SMSKL has not assigned any particular director with the specific responsibility of compliance with section 73 of the Companies Act, 1956. Therefore, for the FY 2010-11, 2011-12, 2012-13 and 2013-14, in terms of Section 5(g) of the Companies Act, 1956 read with Section 73(2) of the Companies Act, 1956, all the directors of the board shall be jointly and severally liable for refund alongwith the Company, .Further, in terms of the decision of Hon'ble SAT in its order dated July 17, 2017 passed in ***Appeal No. 66 of 2006 -Manoj Agarwal Vs. SEBI*** the liability under Section 73(2) of the Companies Act, 1956 of the director would be restricted to refund the amount which was collected during the period of his directorship in the company, jointly and severally with the company and other directors during his tenure. In view of the above, based on the tenure of each director and on the basis of the provision of Section 73(2) read with Section 5 of Companies Act, 1956, and on the basis of information obtained from SMSKL and RoC-Pune, the prima facie liability of directors for refund has been ascertained as under:

Sr No.	Name of the promoter and/or Director	Designation	Duration of directorship	Fund raised during the tenure of the directors by allotting NCRPS to more than 49/ 200 persons					Total Liability
				2010-11	2011-12	2012-13	2013-14	2014-15	
Amt. of funds raised by SMSKL during the FY (Rs. in Cr.)				1.18	0.59	4.95	9.66	0.73	17.10

No. of Investors (during the yr.)				201	280	1648	3051	516	5696
Tenure of Directors				Whether the Director is liable for the refund along with SMSKL?					
1	Vilas Vasantrao Kale	Managing Director	05/06/2014 to 31/07/2017	No	No	no	No	Yes	0.73
2	Dilip Pralhad Kale	Non-Executive Director	01/02/2000 to 15/03/2014	Yes	Yes	Yes	Yes	No	16.37
3	Nana Narayan Kale	Non-Executive Director	01/02/2006 to 15/03/2014	Yes	Yes	Yes	Yes	No	16.37
4	Shankar Kisan Bagal	Non-Executive Director	01/02/2006 to 18/03/2011	Yes	No	No	No	No	1.18
5	Baban Sadashiv Sonawale	Non-Executive Director	01/02/2006 to 05/03/2015	Yes	Yes	Yes	Yes	No	16.37
6	Shobha Rupesh Pawar	Non-Executive Director	01/02/2006 to till date	Yes	Yes	Yes	Yes	No	16.37
7	Mahadev Mallikarjun Dethe	Non-Executive Director	18/03/2011 to till date	No	Yes	Yes	Yes	No	15.20
8	Shahaji Namdeo Shendge	Non-Executive Director	18/03/2011 to till date	No	Yes	Yes	Yes	No	15.20
9	Ganesh Mohanrao Thigale	Non-Executive Director	18/03/2011 to till date	No	Yes	Yes	Yes	No	15.20
10	Uttam Ramchandra Naiknavare	Non-Executive Director	18/03/2011 to till date	No	Yes	Yes	Yes	No	15.20
11	Gorakh Narhari	Non-Executive Director	18/03/2011 to 15/03/2014	No	Yes	Yes	Yes	No	15.20
12	Jayashree Vilasrao Kale	Non-Executive Director	18/03/2011 to till date	No	Yes	Yes	Yes	No	15.20

Note: Directors mentioned at sr. no. 1 to 12 are jointly and severally liable along with SMSKL for the issue of NCRPS. Their liability is restricted to the issuance and allotment of NCRPS that took place during their respective tenure.

16. Section 55A of the Companies Act, 1956, confers the jurisdiction on SEBI to administer provisions specified therein, inter alia in relation to public issue of securities. Section 11(4) of the SEBI Act, 1992 lists measures that SEBI may take, by an order in writing, either pending or on completion of investigation or inquiry, in the interest of investors in the securities market. Section 11B of SEBI Act, 1992 empowers SEBI to issue such directions as may be appropriate, in the interest of

investors in securities and the securities market, inter alia, to any company in respect of issue of capital, transfer of securities etc.

Directions:

17. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11(4) and 11B of the SEBI Act, 1992 hereby issue, with immediate effect, the following directions, which shall remain in force until further orders:

    i) SMSKL i.e. Noticee no. 1, shall cease to mobilize fresh funds from investors through the offer and allotment of any securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly;

    ii) SMSKL and its directors i.e. Noticee no. 2 to 13, shall not buy, sell or otherwise deal in the securities (including units of mutual funds), either directly or indirectly, or associate themselves with securities market, any listed company or company intending to raise money from the public in any manner whatsoever;

    iii) SMSKL and its directors i.e. Noticee no. 2 to 13 shall not dispose of, alienate or encumber any of its/their assets or divert any funds raised from public either through the offer and allotment of NCRPS;

    iv) SMSKL and its directors i.e. Noticee no. 2 to 13, shall co-operate with SEBI and shall furnish all information/documents in connection with the offer and allotment of NCRPS.

18. The above-mentioned directions contained in para 17 comes into force with immediate effect and shall remain in force till passing of any further order by SEBI or coming into force of the direction given in para 19 below.

19. The *prima facie* observations contained in this order are made on the basis of the material available on record, information obtained from RoC-Pune, MCA 21 Portal and reply of SMSKL. SMSKL and its abovementioned directors i.e. Noticee no. 2 to 13, are also called upon to show cause as to why suitable directions/prohibitions under Sections 11, 11(4), and 11B of the SEBI Act, 1992, should not be issued/imposed, including the following directions, namely:

i) SMSKL and Noticee no. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, shall jointly and severally refund money collected through the offer and allotment of NCRPS, including the application money collected from investors, pending allotment of securities, if any, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment), within a period of 180 days from the date of this direction becoming effective, supported by a certificate from a peer reviewed Chartered Accountant. It is clarified that the restraint imposed on the sale of assets at para 17 (iii) and sale of securities at para 17(ii), shall not operate if the sale of assets is made for the sole purpose of making refund to the investors by depositing the proceeds of sale in an Escrow Account with a nationalized bank. It is further clarified that the liability of directors viz. Noticee no. 2 to 13, shall be for the moneys collected during their respective period of directorship. It is further clarified that the present directors of SMSKL shall ensure and facilitate the compliance of this direction on behalf of SMSKL;

ii) SMSKL and its directors i.e. Noticee no. 2 to 13, shall be restrained /prohibited from accessing the securities market by issue of prospectus/offer document/advertisement or advertisement soliciting money from the public and shall be restrained/ prohibited from buying, selling or otherwise dealing in securities (including units of mutual funds) in any manner whatsoever, directly or indirectly, from the date of this direction being effective, till the expiry of a period of three years from the date of effecting the refund as directed in para 19(i) above; and

iii) Noticee no. 2 to 14 shall also be restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this direction becoming effective till the expiry of a period of three years from the date of completion of refunds to investors as directed at 19(i).

20. The Noticees, may, within 30 days from the date of this interim order -cum-show cause notice, file their respective replies. The Noticees are also directed to furnish an inventory of their assets in their reply. In the event the aforementioned persons intend to avail an opportunity of personal hearing, they may do so by seeking a confirmation in writing from SEBI for the same, within 90 days. In the event of the Noticees failing to file replies or requesting for an opportunity of personal hearing, within the said 90 days, the *prima facie* findings regarding the violations at paragraphs 4 to 15 of this order shall become final and absolute, without any further orders. Consequentially, the directions/prohibitions contained in para 19 shall automatically become effective.

21. Copy of this order shall be forwarded to the all the Noticees, the recognized stock exchanges and depositories, the RTA's of mutual funds for information and necessary action. A copy of this order may also be forwarded to MCA/ RoC Pune for their information and necessary action with respect to the directions imposed on the Noticees.

22. All communications with regards to the present order, including the replies/ objections, if any, being filed by the Noticees, shall be addressed to The Division Chief, Department of Debt and Hybrid Securities – Division 2, SEBI Bhavan, Plot C4-A, G Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

Sd/-

Date: March 31, 2021
Place: Mumbai

ANANTA BARUA
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA