WTM/MPB/EFD-1-DRA-IV/89/2017

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of Swarnabhumi Agritech India Ltd.

In respect of:

1. **Swarnabhumi Agritech India Ltd. (CIN: U01403BR2011PLC017479)**
2. **Biswanath Bhattacharya (PAN: AHTPB8323P; DIN: 00596375).**
3. **Sanjoy Kumar Layek (PAN: ABWPL7019B; DIN: 02261065).**
4. **Prakash Mandal (PAN:AUTPM0257E ; DIN: 02261096).**
5. **Hridhi Pratim Neogy (PAN: ABLPN8050H; DIN: 02852980).**
6. **Debenture Trustee, viz. Swarnabhumi Agritech India Debenture Trust (Represented by its Trustee, viz. Gautam Bandopadyay) address- 101, Tollugunge Circular Road, Kolkata, West Bengal- 700053**

1. Swarnabhumi Agritech India Ltd. (hereinafter referred to as "**SAIL**"/ "**the Company**") is a Public company incorporated on September 15, 2011 and registered with Registrar of Companies–Kolkata with CIN: U01403BR2011PLC017479. Its registered office is at Amar Prem Building 4th Floor, Chapra (Sarani) Chapra East Champaran Bihar- 841301.

2. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") received a letter/complaint from some persons against SAIL in respect of issue of Secured Redeemable Non-Convertible Debentures (hereinafter referred to as "**NCDs**") and undertook an enquiry to ascertain whether SAIL had made any public issue of securities without complying with the provisions of the Companies Act, 1956; Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act**") and the Rules and Regulations framed thereunder including the Securities and Exchange Board of India (Issue and Listing of Debt Securities), Regulations, 2008 (hereinafter referred to as "**ILDS Regulations**").

3. On enquiry by SEBI, it was observed that SAIL had made an offer of NCDs to 200 persons

in the financial years 2011-2012 (hereinafter referred to as **"Offer of NCDs"**) and raised an amount of Rs. 24.58 Lakhs from 36 allottees. The number of persons to whom the offer of NCD was made, the number of allottees and funds mobilized has been collated from the documents submitted by the company. It was also observed that SAIL created a charge for an amount of Rs. 10.00 Crores on January 06, 2012 and appointed *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay)* as Debenture Trustee for the Offer of NCDs by that company. Therefore, it was concluded that the actual number of persons to whom NCDs was offered, the number of allottees and amount mobilized could possibly be more than the above indicated figures.

4. As the above said *Offer of NCDs* to 200 persons was found *prima facie* in violation of respective provisions of the SEBI Act, 1992, the Companies Act, 1956 and the ILDS Regulations, SEBI issued Show Cause notice dated August 31, 2015 (hereinafter referred to as "**SCN**") to SAIL and its Directors and , viz. Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy and its Debenture Trustee *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay*) (hereinafter collectively referred to as "**Noticees**").

5. *Prima facie allegations*: In the said SCN, the following *prima facie* allegations were made. SAIL had made an *Offer of NCDs* during the financial years 2011-2012 and raised an amount of Rs. 24.58 Lakhs as shown below:

Year of Issue	**Security Issued**	**Amount raised (Rs.) (in lakh)**	**Number of people to whom *Offer of NCDs* was made**	**Number of application received pursuant to the *Offer of NCDs***	**Number of allottees**
2011-2012	*NCDs*	24.58	200	150	36
	Total	24.58^	200	150	36*

**^ No. of people to whom NCDs were offered, the number of allottees and funds mobilized has been collated from the reply recieved from SAIL. However, actual no. of allottees and amount mobilized could be possibly more than the above indicated figures.*

6. Further, SAIL created a charge for an amount of Rs. 10.00 Crores on January 06, 2012 and appointed *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay)* as Debenture Trustee for the Offer of NCDs by the company. *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay)* was not registered as debenture trustee for the offer of NCDs by that company. It was also alleged that the E-Form 10 filed by the company (date of creation of charge is 06.01.2012) with the RoC, the scrutiny of the Trust Deed attached with the E Form 10 shows that a company named M/s Greentouch Solar Limited (associate company of Swarnabhumi Group) has provided its fixed assets as security for the issue of debentures of Rs.10 Crores by SAIL and the security for issue of debentures has not been provided by SAIL which is highly prejudicial to the interests of the debenture holders.

7. The above *Offer of NCDs* were deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) and sections 117B and 117C of the Companies Act, 1956 and the relevant provisions of the ILDS Regulations were not complied with by SAIL and its directors in respect of the *Offer of NCDs*. Further, the Debenture Trustee viz. *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay* has prima facie violated section 12(1) of the SEBI Act and regulation 7 of the Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993 (hereinafter referred to as **"Debenture Trustees Regulations").**

8. In view of the allegations, SAIL and its Directors were required to show cause as to why suitable directions/prohibitions including direction to refund the money solicited and mobilized through circulation/issuance of forms/brochure with respect to debentures along with interest and the directions to prohibit the company, its promoters and directors from accessing the capital market etc. should not be issued against them under sections 11(1), 11(4), 11A and 11B of the SEBI Act and Regulation 28 of SEBI (ILDS) Regulations, 2008 for alleged violations mentioned above.

9. Similarly *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam*

Bandopadyay) were also advised to show cause as to why suitable directions/prohibitions including restraining it/them from accessing the securities market and further restraining it/them from buying, selling or dealing in securities, in any manner whatsoever, for an appropriate period should not be issued under Sections 11(1), 11(4), 11A and 11B of the SEBI Act read with Regulation 25 of (Debenture Trustees) Regulations, 1993.

10. Vide the said SCN, SAIL, its abovementioned Directors along with its Debenture Trustee were given the opportunity to file their replies, within 21 days from the date of receipt of the said SCN. The SCN further stated the concerned persons may also indicate whether they desired to avail themselves an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

11. *Service of SCN*: The copy of the said SCN was sent to the Noticees vide letter dated August 31, 2015. The SCN was duly served on the company and Gautam Bandopadyay. No proof of service is available for the rest of the noticees. Company vide letter dated October 06, 2015 sought extension of time to file reply, however no reply was submitted thereafter. Gautam Bandopadyay vide letter dated October 05, 2015 filed reply and interalia made the following submissions-

    a) That the undersigned was formerly representing Swarnabhumi Agritech India Debenture Trust.
    b) That the undersigned had resigned from Swarnabhumi Agritech India Debenture Trust, w.e.f. 26.4.2013.
    c) That Swarnabhumi Agritech India Ltd. issued secured non-convertible debenture on private placement to selected persons upto 49 numbers over a period of time during 2011-12 as per approval of the Board of Directors resolution dated 10/11/ 2011.
    d) The Company did not issue any prospectus as required under the Companies Act, 1956 neither the Directors intended to offer the shares to the public as recorded in the Boards Minutes dated. 10/11/2011.
    e) The brochure/application clearly indicated on the face that confidential for private circulation only

f) The company circulated the offer to specific person (and not public at large) over a period of time to less than 50 person in each occasion and thereby not violated the provisions of section 67(3) of the Companies Act, 1956 as alleged by you.

g) That the company ultimately allotted Rs. 24. 58 1acs to 36 number of investors

h) That since the company did not make or intended to make public offering the provision of SEBI (Debenture Trustees) Rules, 1993, SEBI Act, 1992, SEBI (ILDS) Regulations) 2008 are not applicable in the above case.

i) The provisions of section 117 B of the Companies Act 1956 is also not applicable since the Section requires that in the case of the Company issue prospectus/letter of offer to the Public for subscription of shares or debentures the appointment of Debenture Trustee is necessary. Since the Company, till Swarnabhumi Agritech India Debenture Trust acted as Trustee (i.e. upto 26/4/2013), did not issue prospectus nor made public issue, the above provision Section 117B of the Companies Act, 1956, is not applicable n the above case.

j) That the instant appointment as Trustee is not arising out of the Provisions of the Companies Act, 1956, SEBI Act, 1992 or under any of the rules or regulations framed by SEBI or any other applicable 1aws. This is because of the private agreement between the parties.

k) Therefore the undersigned is not responsible under SEBI Act 1992 (Section 12 of the said Act) SEBI (Debenture Trustee) Rules, 1993 SEBI (ILDS) Regulations 2008.

12. Subsequently, vide notification dated August 28, 2016 published in newspaper *Times of India* and notification dated August 28, 2016 published in newspaper *Anand Bazar Patrika* , the Noticees were notified by SEBI that SCN dated August 31, 2015 was issued against them and they were given a final opportunity to submit their reply in the matter.

13. Vide the aforesaid notification dated August 28, 2016 published in newspaper *Times of India* and notification dated August 28, 2016 published in newspaper *Anand Bazar Patrika*, the Noticees were notified by SEBI that they will be given the final opportunity of being heard on October 19, 2016 at the time and the venue mentioned therein. However the hearing was postponed.

14. Thereafter vide notification dated November 05, 2017 published in newspaper *Times of India* and notification dated November 05, 2017 published in newspaper *Anand Bazar Patrika*, the Noticees were notified by SEBI that they will be given the final opportunity of being heard on November 14, 2017 at the time and the venue mentioned therein. The Noticees were advised that in case they failed to appear for the personal hearing before SEBI on the aforesaid date, then the matter would be proceeded *ex-parte* on the basis of material available on record.

15. *Hearing and submissions*: Noticees did not avail the opportunity of hearing held on November 14, 2017, nor sought any adjournment.

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

(1) Whether the company came out with the Offer of NCDs as stated in the SCN.

(2) If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.

(3) Whether appointment of Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay), as the Debenture Trustee by SAIL is in violation of Section 117B of the Companies Act, 1956 and whether Swarnabhumi Agritech India Debenture Trust and Gautam Bandopadyay violated Section 12(1) of SEBI Act and regulation 7 of the Debenture Trustees Regulations

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

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

17. I have perused the SCN dated August 31, 2015 for the allegation of Offer of NCDs. I note that SAIL vide letter dated 23/10/2013 send before issuance of SCN claimed the said Offer of NCDs to be private placement. The company has stated that it circulated 200 application forms for issue of debentures and it has received application from 150 persons for allotment

of debentures on private placement basis. Finally, it allotted debentures to 36 persons and collected an amount of Rs. 24.58 Lakhs and thus it was a private placement.

18. I have also perused the documents/ information available on records. I note that the company invited subscription for "Secured Non-Convertible Redeemable Debentures" ("Offer of Shares/debentures") amounting to Rs.10 Crores (as per copy of prospectus submitted by the complainant and also as per E Form 10 filed by the company with the RoC). The date of opening of the issue has not been printed on the application form and the date of closing of the issue is also not known. However it is also observed from the copy of brochure/application form issued by the company that the company has invited subscription pursuant to the Board of Directors resolution dated 10/11/2011. The terms and conditions contained in the said prospectus/brochure inter alia states that 'Individuals, Trusts, Corporate Bodies, Mutual Funds, Banks, Financial Institutions are eligible to invest in the issue. It is noted that SAIL has passed resolution for final allotment of NCDs through Board Meeting dated February 10, 2012 and thus period of Offer of NCDs and allotment is taken as 2011-2012.

19. The company has issued debentures under the following plans, the details of which are given in the table below:

Category	YA	YB	YC	YD	YE
Minimum Investment (Rs.)	1,000/-	1,000/-	1,000/-	1,000/-	1,000/-
Redemption Period (Years)	3	5 and half	8	11	15
Yield (Rs.)	500/-	1,000/-	2,000/-	4,000/-	9,000/-
Redemption Value (Rs.)	1,500/-	2,000/-	3,000/-	5,000/-	10,000/-

20. It is noted from the letter dated 23/10/2013 received from SAIL and document available on record that SAIL has made an Offer *of NCDs* to at least 200 persons during the financial years 2011-2012 and received application from 150 persons. SAIL had raised at least an amount of

Rs. 24.58 Lakhs from NCDs issued and allotted to at least 36 investors. I also note that the number of person to whom Offer of NCDs were made, the number of allottees and funds mobilized has been collated from the documents submitted by company. Therefore, it is possible that the actual number of offeree of NCDs, the actual number of allottees and amount mobilized could possibly be more than 200 offeree, 36 allottees and Rs. 24.58 Lakhs respectively. *I therefore conclude that SAIL came out with an offer of NCDs as outlined above.*

ISSUE No. 2- If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.

21. The provisions alleged to have been violated and mentioned in Issue No. 2 are applicable to the *Offer of NCDs* made to the public. Therefore the primary question that arises for consideration is whether the offer of NCDs is 'public issue'. At this juncture, reference may be made to sections 67(1) and 67(3) of the Companies Act, 1956:

> *"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-*
>
> *(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or*

invitation; or

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

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

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

22. The following observations of the Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors. v. SEBI (Civil Appeal no. 9813 and 9833 of 2011)* (hereinafter referred to as the ***"Sahara Case"***), while examining the scope of Section 67 of the Companies Act, 1956, are worth consideration:-

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. … Resultantly, 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."

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

24. In this matter the company has submitted that it has circulated 200 application forms. Since no offer document is on record, 200 applications coupled with the fact the offer is in respect of the single Board of Directors resolution dated 10/11/ 2011 evidences that the offer/invitation for subscription has been made to at least 200 persons in the financial years 2011-2012 and were issued by SAIL to at least 36 investors. However, this number is not conclusive as it is based on the documents received from the company and the actual number of offeree could be more than 200 and the actual number of investors could be more than 36. I find that SAIL has mobilized at least an amount of Rs. 24.58 Lakhs over the financial years 2011-2012 which is not a conclusive value as it is based on the documents submitted by company. Further, I find that SAIL has created a charge of Rs. 10.00 Crores on January 06, 2012. The above findings lead to a reasonable conclusion that the *Offer of NCDs* by SAIL was a "public issue" within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.

25. I note that before issuance of SCN dated 31/08/2015, SAIL vide letter dated 23/10/2013

submitted to SEBI that the said Offer of NCDs was a private placement. The company has stated that it circulated 200 application forms for issue of debentures and it has received application from 150 persons for allotment of debentures on private placement basis. Finally, it allotted debentures to 36 persons and collected an amount of Rs. 24.58 Lakhs and thus it was a private placement. Further Gautam Bandopadyay had vide letter dated October 05, 2015 submitted that the brochure/application indicated that it was for private circulation only and the company ultimately allotted Rs. 24. 58 1acs to 36 number of investors and thus it was a private placement. However the discussions in pre-paras and observations of the Hon'ble Supreme Court of India in ***Sahara Case*** leads to a reasonable conclusion that the *Offer of NCDs* by SAIL was a "public issue" within the meaning of the first proviso to section 67(3) of the Companies Act, 1956. Further Gautam Bandopadyay had also submitted that SAIL had offered secured non-convertible debenture on private placement to selected persons up to 49 numbers over a period of time during 2011-12 as per approval of the Board of Directors resolution dated 10/11/ 2011. However I note that none of the noticees have submitted any proof to substantiate that the offer of NCDs was made in tranches. Even if it is assumed that the offer was made in tranches, it is clear that the said offer across all tranches cannot be made to more than 49 persons if the same need to be categoried as private placement. However, in this case even if the offer is assumed to be in tranches, the same has been made to more than 49 persons. In this context reliance may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* wherein while rejecting the contention of the appellant that in any of the tranches the allotment was not made to more than 49 persons, the Tribunal held that the "argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning". In the same spirit of findings of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI,* I do not find merit in the argument of the Noticee that issue was private placement since the company circulated the offer to specific person over a period of time to less than 50 person in each occasion during 2011-12. I thus conclude that the *Offer of NCDs* by SAIL was a "public issue".

26. I find that SAIL has not claimed it to be a Non–banking financial company or public financial

institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that SAIL is covered under the second proviso to Section 67(3) of the Companies Act, 1956.

27. Reference may also be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the "Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged." In respect of the same, the directors have not placed any material that the Offer of NCD was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said Offer of NCDs cannot be considered as private placement.

28. Therefore, in view of the material available on record, I find that the *Offer of NCDs* by SAIL falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offer of NCDs* are deemed to be public issues and SAIL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

29. Further, since the offer of NCDs is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants.

30. The allegations of non-compliance of the above provisions were not denied by SAIL or its directors. However the company and debenture trustee had stated that the issue was private placement. Since the offer being public offer of debenture, the resultant provisions for such public offer have to be complied with. I also find that no records have been submitted to indicate that it has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that SAIL has contravened the said provisions. SAIL has not provided any records to show that the amount collected by

it is kept in a separate bank account. Therefore, I find that SAIL has also not complied with the provisions of section 73(3) which mandates that the amounts received from investors shall be kept in a separate bank account. Therefore, I find that section 73(2) of the Companies Act, 1956 has not been complied with.

31. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), "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. As the offer of NCDs was a deemed public issue of securities, SAIL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that SAIL has not submitted any record to indicate that it has registered a prospectus with the RoC, in respect of the offer of NCDs. I, therefore, find that SAIL has not complied with the provisions of section 60 of the Companies Act, 1956.

32. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Neither SAIL nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, SAIL has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

33. As regards the allegation of section 117C of the Companies Act, 1956, it may be seen that the said provision mandates the company to create a debenture redemption reserve for the redemption of such debentures, to which every year, adequate amounts should be credited out of its profits, until such debentures are redeemed. None of the Noticees denied this

allegation. There is no material on record to show that such debenture reserve was created. Therefore, I hold that the company has violated section 117C of the Companies Act, 1956.

34. ILDS Regulations are applicable to the public issue and listing of debt securities. Regulation 2(e) of the ILDS Regulations defines debt securities to mean non-convertible debt securities which create or acknowledge indebtedness and include debentures. In view of the finding that SAIL has made a public issue of debt securities, the ILDS Regulations is also applicable to the instant offer of NCDs. Therefore, I find that the Company has violated the following provisions of the aforesaid ILDS Regulations, which contain *inter alia* conditions for public issue and listing of debt securities, viz.

i. Regulation 4(2)(a) – Application for listing of debt securities

ii. Regulation 4(2)(b) – In-principle approval for listing of debt securities

iii. Regulation 4(2)(c) – Credit rating has been obtained

iv. Regulation 4(2)(d) – Dematerialization of debt securities

v. Regulation 4(4) – Appointment of Debenture Trustees

vi. Regulation 5(2)(b) – 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 12 – Minimum subscription

xii. Regulation 14 – Prohibition of mis-statements in the Offer Document

xiii. Regulation 15 – Trust Deed

xiv. Regulation 17 – Creation of security

xv. Regulation 19 – Mandatory Listing

xvi. Regulation 26 – Obligations of the Issuer, etc.

35. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of

the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case*, had observed that:

> *"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."*
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> *"SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange"*

36. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, SEBI has to administer Section 67 of that Act, so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed. While interpreting the phrase "intend to get listed" in the context of deemed public issue the Hon'ble Supreme Court in *Sahara Case* observed-

> *"…But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, "intent" has its limitations also, confining it within the confines of lawfulness…"*
>
> *"…Listing of securities depends not upon one's volition, but on statutory mandate…"*
>
> *"…The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant companies could have "intended", what was contrary to the mandatory requirement of law…"*

37. In view of the above findings, I am of the view that SAIL was engaged in fund mobilizing activity from the public, through the offer of NCDs and has contravened the provisions of section 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3) and 117C of the Companies Act,

1956 and above mentioned provisions pertaining to the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008.

ISSUE No. 3- ***Whether appointment of Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay), as the Debenture Trustee by SAIL is in violation of Section 117B of the Companies Act, 1956 and whether Swarnabhumi Agritech India Debenture Trust and viz. Gautam Bandopadyay have violated Section 12(1) of SEBI Act and regulation 7 of the Debenture Trustees Regulations?***

38. Shri Gautam Bandopadyay vide his letter dated October 05, 2015 has submitted that the he had resigned from Swarnabhumi Agritech India Debenture Trust, w.e.f. 26.4.2013. He had also submitted that SAIL had issued secured non-convertible debenture on private placement to selected persons upto 49 numbers over a period of time during 2011-12 as per approval of the Board of Directors resolution dated 10/11/ 2011. He further submitted that the instant appointment as Trustee was not arising out of the Provisions of the Companies Act, 1956, SEBI Act, 1992 or under any of the rules or regulations framed by SEBI or any other applicable 1aws and was because of the private agreement between the parties. Therefore he is not responsible under SEBI Act 1992 (Section 12 of the said Act) SEBI (Debenture Trustee) Rules, 1993 SEBI (ILDS) Regulations 2008. Further Gautam Bandopadyay had also submitted that SAIL had offered secured non-convertible debenture on private placement to selected persons up to 49 numbers over a period of time during 2011-12 as per approval of the Board of Directors resolution dated 10/11/ 2011. However I note that none of the noticees have submitted any proof to substantiate that the offer of NCDs was made in tranches. Even if it is assumed that the offer was made in tranches, it is clear that the said offer across all tranches cannot be made to more than 49 persons if the same need to be categoried as private placement. However, in this case even if the offer is assumed to be in tranches, the same has been made to more than 49 persons. In this context reliance may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in *Neesa*

Technologies Limited vs. SEBI (Appeal No. 311 of 2016) wherein while rejecting the contention of the appellant that in any of the tranches the allotment was not made to more than 49 persons, the Tribunal held that the "argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning". In the same spirit of findings of Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI,* I do not find merit in the argument of the Noticee that issue was private placement since the company circulated the offer to specific person over a period of time to less than 50 person in each occasion during 2011-12. Therefore, I note that the instant Offer of NCD was a public issue and the same has already been dealt in pre-paras 21-27.

39. I noted that the E-Form 10 filed by the company (date of creation of charge is 06.01.2012) with the RoC, the scrutiny of the Trust Deed attached with the E Form 10 shows that a company named M/s Greentouch Solar Limited (associate company of Swarnabhumi Group) has provided its fixed assets as security for the issue of debentures of Rs.10 Crores by this company. The fact that the security for issue of debentures has not been provided by the company which is issuing debentures and by some other entity is highly prejudicial to the interests of the debenture holders.

40. I have perused the copy of the Debenture Trust Deeds dated January 06, 2012. I find that SAIL had created a charge of Rs. 10.00 Crores for the Offer of NCDs by the Company. I further find that SAIL had appointed *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay*) as the debenture trustee by way of trust deed dated January 06, 2012.

41. Section 12(1) of the SEBI Act states that: *"No… trustee of trust deed … shall buy, sell or deal in securities except under and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act"*. Regulation 7 of the SEBI (Debenture Trustees) Regulations, 1993, states that only *a scheduled bank carrying on commercial activity or, a public financial institution within the meaning of section 4A of the Companies Act, 1956 or, an insurance company or, a body corporate alone are eligible to get a certificate of registration as Debenture Trustee.*

42. *Neither Swarnabhumi Agritech India Debenture Trust nor Gautam Bandopadyay)* are eligible to obtain

a certificate of registration since they do not satisfy the eligibility criteria mentioned in Regulation 7 of the SEBI (Debenture Trustees) Regulations, 1993. None of the Noticees claimed that *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz.Gautam Bandopadyay)* had received certificate of registration as per section 12(1) of the SEBI Act. In view of the above, I find that Swarnabhumi Agritech India Debenture Trust and Gautam Bandopadyay have dealt in the impugned Offer of NCDs as debenture trustee, without having a certificate of registration as Debenture Trustee in violation of Section 12(1) of the SEBI Act, 1992.

43. Under section 117B of the Companies Act, 1956 no company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless the company has, before such issue, appointed one or more debenture trustees for such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. I find that SAIL has appointed *Swarnabhumi Agritech India Debenture Trust (represented by its trustee, viz. Gautam Bandopadyay)* who do not have a certificate of registration. Therefore, the appointment of the same is in violation of section 117B of the Companies Act, 1956. Further, since SAIL has not issued a prospectus with the relevant information and therefore, the requirement of stating the consent of the debenture trustee to be so appointed on the face of the prospectus has not been complied with.

ISSUE No. 4- If the findings on Issue No.2 and 3 are found in the affirmative, who are liable for the violation committed?

44. From the documents available on record, I find that the present Directors in SAIL are Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal and Hridhi Pratim Neogy. The details of the appointment and resignation of the directors are as following:

Name of the directors	**Date of appointment**	**Date of cessation**

Biswanath Bhattacharya	September 15, 2011	Continuing
Sanjoy Kumar Layek	September 15, 2011	Continuing
Prakash Mandal	September 15, 2011	Continuing
Hridhi Pratim Neogy	September 15, 2011	Continuing

45. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, SAIL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

46. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

47. From the material available on record and the details of the appointment and resignation of the directors of SAIL as reproduced in paragraph 44 of this Order, it is noted that, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal and Hridhi Pratim Neogy were directors at the time of the Offer of NCDs. Since these persons were acting as directors during the period of Offer of NCDs, they are officers in default as per Section 5(g) of Companies Act, 1956. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified

director of SAIL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the past and present directors of SAIL, as officers in default, are liable to make refund, jointly and severally, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions. None of the directors disputed this legal liability by way of any written or oral submissions, though the Company has impliedly disputed their liability on the ground of its position taken that the issue is a private placement. However the said Offer of NCD is a public issue and the same is already been dealt in pre-paras. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956 and section 27(2) of the SEBI Act. Therefore, I find that SAIL and its Directors, viz., Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal and Hridhi Pratim Neogy are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

48. I note that during the financial years 2011-2012 SAIL through Offer of NCDs, had collected at least an amount of Rs. 24.58 Lakhs from various allottees. I note that Biswanath Bhattacharya has been director of SAIL since financial years 2011-2012 till present date. I note that Sanjoy Kumar Layek has been director of SAIL since financial years 2011-2012 till present date. I note that Prakash Mandal has been director of SAIL since financial years 2011-2012 till present date. I note that Hridhi Pratim Neogy has been director of SAIL since financial years 2011-2012 till present date. Therefore, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that the obligation of the director to refund the amount with interest jointly and severally with SAIL and other directors are limited to the extent of amount collected during his/her tenure as director of SAIL.

49. As far as the liability under sections 117B and 117C of the Companies Act, 1956, is concerned,

the liability is on the company to comply with the said provisions. Therefore, SAIL is liable for the violation of sections 117B and 117C of the SEBI Act. In respect of the liability under section 12(1) of the SEBI Act, the liability is on the Trustee who act as the debenture trustee without the Certificate of Registration from SEBI as debenture trustee. In view of the above, I find that both Swarnabhumi Agritech India Debenture Trust and Gautam Bandopadyay are liable for the violation of section 12(1) of the SEBI Act read with regulation 7 of the Debenture Trustee Regulations.

50. With respect to the provisions of the respective regulations of the ILDS Regulations enumerated on paragraph 34 of this order, the liability is on the Company to comply with the requirements therein.

51. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct SAIL and its Directors, viz., Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal and Hridhi Pratim Neogy to refund the monies collected, with interest to such investors. Further, in view of the violations committed by the Company and its Directors, to safeguard the interest of the investors who had subscribed to such NCDs issued by the Company, to safeguard their investments and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Company and the other Noticees.

52. In view of the discussion above, appropriate action in accordance with law needs to be initiated against SAIL and its Directors and debenture trustee viz. Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy Swarnabhumi Agritech India Debenture Trust and Gautam Bandopadyay.

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

(a) SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal and Hridhi Pratim Neogy shall forthwith refund the money collected by the Company, during their respective period of directorship through the issuance of NCDs including the application money collected from investors during their respective period of directorship, till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.

(b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable" or through any other appropriate Banking channels, with clear identification of beneficiaries and supporting bank documents

(c) SAIL and Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company and their own.

(d) SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy are permitted to sell the assets of the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

(e) SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

(f) SAIL and Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim

Neogy on behalf of company as well as in their personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.

(g) After completing the aforesaid repayments, SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy on behalf of company as well as in their personal capacity shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India **('ICAI')**

(h) In case of failure of SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order, may recover such amounts, from the company and the directors liable to refund as specified in paragraph 53(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.

(i) SAIL, Biswanath Bhattacharya, Sanjoy Kumar Layek, Prakash Mandal, Hridhi Pratim Neogy are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above. The above said directors are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.

(j) Swarnabhumi Agritech India Debenture Trust and Gautam Bandopadyay are restrained from accessing the securities market and are further restrained from buying, selling or dealing in securities, in any manner whatsoever, for a period of 4 (four) years from the date of this order.

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

(l) This Order shall be harmoniously read with the Orders passed by Hon'ble Calcutta High Court in W.P. 3068 (W) of 2016 in the matter of Ajay Roy & Anr. Vs. Union of India & ors.

54. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories and registrar and transfer agents for information and necessary action.

55. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies, for their information and necessary action with respect to the directions/ restraint imposed above against the Company and the individuals.

56. A copy of this Order shall also be forwarded to Local Police/ State Government for information.

DATE: November 16, 2017 **MADHABI PURI BUCH**

PLACE: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA