

WTM/AB/EFD-1/DRA-1V/05/ 2018-19

SECURITIES AND EXCHANGE BOARD OF INDIA
BEFORE THE WHOLE TIME MEMBER, SHRI ANANT BARUA
FINAL ORDER

Under sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of GMS Infrastructure Limited

In re: Deemed Public Issue Norms

| Noticee No. | Noticees | DIN/ CIN | PAN |
|--------------------|---|-----------------------|------------|
| 1. | GMS INFRASTRUCTURE LIMITED | U74999WB2010PLC153429 | AAECG0030B |
| 2. | ASHIM MITRA | 2827181 | AKDPM2024K |
| 3. | SANJOY MITRA | 2827205 | AHKPM6164A |
| 4. | LOPAMUDRA BANDYAPADHYAY | 3126747 | AQFPB2001D |
| 5. | BISWAJIT DAS | 5129923 | AMPPD6913J |
| 6. | DINESH CHOWHAN | 5129934 | ANDPC7427M |
| 7. | CHANDAN BISWAS | 5129940 | ALIPB5094L |
| 8. | RAJESH SINGH | 2940521 | CLKPS6324N |
| 9. | TUMPA MITRA DUTTA | 3619975 | BAKPD5407K |
| 10. | SHIB SHANKAR GHOSH | 6737733 | ATKPG5933F |
| 11. | SOUMEN PAUL | 3124217 | BEEPP5894Q |
| 12. | APARNA ROY CHOWDHURY | NOT AVAILABLE | AHOPR4164P |
| 13. | MINA MUKHERJEE | NOT AVAILABLE | ATQPM8850R |
| 14. | GITA KARMAKAR | NOT AVAILABLE | BCLPK7391E |
| 15. | GMS MULTI MARKETING SERVICES PVT. LIMITED (PRESENTLY KNOWN AS ADH FOOD PRODUCTS PVT. LIMITED) | U51909WB2010PTC141110 | AADCG6529L |

(The aforesaid entities are hereinafter referred to by their respective names/serial numbers or collectively as “**the Noticees**”.)

1. SEBI had received an investor complaint dated January 16, 2017 against GMS Infrastructure Ltd. (**‘GMS’/‘the company’**) in respect of issue of Redeemable Preference Shares and examined to ascertain whether GMS 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.
2. On examination, it was observed that GMS had made an offer of redeemable preference shares in the financial years 2010-2011, 2011-2012 and 2012-2013 (hereinafter referred to as **‘Offer of RPS’**) and raised more than Rs. 13,44,500/- from more than 112 allottees. The number of allottees and funds mobilized were collated from the documents/information obtained from the MCA 21 Portal and complaints received from investors.
3. As the Offer of RPS was found prima facie in violation of respective provisions of the Companies Act, 1956, SEBI passed an interim order dated February 23, 2018 and a corrigendum to the said interim order dated February 27, 2018, rectifying certain typographical errors in the said interim order. (for brevity’s sake the interim order and the corrigendum to the interim order are hereinafter collectively referred to as **‘the interim order’**). The interim order contained certain directions mentioned therein against GMS and its directors and promoters, viz. the Noticees to this proceeding.
4. In the interim order, the following prima facie findings were recorded. GMS had made an Offer of RPS during the financial years 2010-2011, 2011-2012 and 2012-2013 and raised an amount of Rs. 13,44,500/- as shown below:

| Financial Year | No. of allottees | Value of Allotment (₹ |
|-----------------------|-------------------------|-------------------------------|
| 2010-2011 | 108 | 12,28,500/- |
| 2011-2012 | 2 | 51,000/- |
| 2012-2013 | 2 | 65,000/- |
| Total | 112 | 13,44,500/- |

5. The Offer of RPS and pursuant allotment 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) of the Companies Act, 1956 were not complied with by GMS in respect of the Offer of RPS.
6. In view of the prima facie findings on the violations, the following directions were issued in the interim order with immediate effect:
 - i. *GMS and its Directors/Promoters, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas; Rajesh Singh; Tumpa Mitra Dutta; Shib Shankar Ghosh; Soumen Paul; Aparna Roy Chowdhury; Mina Mukherjee; Gita Karmakar and GMS Multi Marketing Services Pvt. Limited (presently known as ADH Food Products Pvt. Limited), shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly or indirectly, or associate themselves with any listed company or company intending to raise money from the public;*
 - ii. *GMS and its Directors, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas; Rajesh Singh; Tumpa Mitra Duttaand, Shib Shankar Ghosh, shall neither dispose of, alienate or encumber any of its/their assets nor divert any funds raised from public through the offer and allotment of Redeemable Preference Shares;*
 - iii. *GMS and the above named Directors/Promoters shall co-operate with SEBI and shall furnish all information/documents in connection with the offer and allotment of Redeemable Preference Shares sought vide letters dated March 31, 2017.*
7. The interim order also directed GMS and its directors/promoters to show cause as to why suitable directions/prohibitions under section 11(1), 11(4) and 11B of the SEBI Act, 1992 should not be issued/imposed including the following directions:

- i. *GMS and its Directors, viz. Ashim Mitra; Sanjoy Mitra; Lopamudra Bandyapadhyay; Biswajit Das; Dinesh Chowhan; Chandan Biswas and Rajesh Singh, to jointly and severally refund the money collected through the offer and allotment of Redeemable Preference Shares, 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 till the date of actual payment) within a period of 180 days from the date of receipt of this Order, supported by a Certificate of two independent Chartered Accountants to the satisfaction of SEBI; and*
 - ii. *The Noticees to be restrained/prohibited from accessing the securities market and buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of four years from the date of effecting the refund as directed above.*
8. The Noticees were given 21 days, from the date of receipt of the interim order to file their respective replies. The Noticees were directed to furnish an inventory of their assets along with their reply. Further, it was also advised in the interim order that Noticees who intended to avail an opportunity of personal hearing, may do so by seeking a confirmation in writing from SEBI for the same within 90 days from the date of receipt of the interim order. The interim order also contained a direction that in the event of the respective Noticees failing to file replies or requesting for an opportunity of personal hearing within the said 90 days, the preliminary findings as contained in the interim order shall become final and absolute against the respective Noticees automatically, without any further orders, and consequently, the Noticees shall automatically be bound by the directions contained in paragraph 6 and 7, as applicable.
9. **Service of the interim order:** The copy of the interim order was successfully served upon Noticee no. 5,6,7,10,11,12,13 and 14 by SPAD/RPAD. However, service of the interim order could not be completed by RPAD/SPAD against Noticee no. 1,2,3,4,8,9 and 15 because the posts returned undelivered. Subsequently, in compliance with the principles of natural justice, service of the interim order to Noticee no. 1,2,3,4,8,9 and 15 was completed vide newspaper publication dated July 25, 2018 in The Times of India and Anand Bazar Patrika, I note that vide the said newspaper publications, the

said noticees were notified by SEBI, that an interim order dated February 23, 2018 was issued against them and they were given a final opportunity to submit their reply in the matter.

10. In response to the interim order, Noticee no. 5 filed their undated reply on 19/04/2018, Noticee no. 6 filed their undated reply on 05/07/2018, Noticee no. 7 filed its reply dated 11/04/2018, Noticee no. 10 filed its reply dated 02/05/2018, Noticee no. 11 filed its reply dated 19/04/2018, Noticee no. 13 filed her undated reply on 23/04/2018 and Noticee no. 14 filed her undated reply on 11/05/2018.
11. The aforesaid noticees who had filed their replies in response to the interim order have inter alia raised the following contentions:
 - a. Noticee no. 5 states that he was merely an agent and an investor of GMS and not its director. He further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same. He has also stated that he has lodged a police complaint with Khardah police station against Noticee. no. 2,3 and 9.
 - b. Noticee no. 6 states that he was an employee and investor of GMS and not its director. He further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same.
 - c. Noticee no. 7 states that he was merely an agent and an investor of GMS and not its director. He further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same. He has also stated that he has lodged a police complaint with Khardah police station against Noticee. no. 2,3 and 9.
 - d. Noticee. no. 10 states that he joined GMS as an employee in GMS and he is not its director. He further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same.
 - e. Noticee no. 11 states that he joined as computer operate with GMS and left GMS in early 2014. He was never a promoter of GMS. He further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same.

- f. Noticee no. 13 states that she was an independent representative / agent of GMS. She claims that she was never an office bearer or promoter of GMS.
- g. Noticee no. 14 states that she was never the promoter of GMS. She joined GMS as an insurance agent. She further states that Noticee no. 3 had procured his PAN Card and signature on blank paper and misused the same.

Hearing and Submissions:

12. Since, Noticee no. 5, 6, 7, 10, 11, 13 and 14 had filed their replies pursuant to the interim order, hence in terms of the interim order the said noticees were granted opportunity of personal hearing. The personal hearing was held through Video IP telephony between SEBI ERO at Kolkata and SEBI HO at Mumbai on 15/10/2018. Noticee no. 5,6,7,11 and 13 appeared for the scheduled hearing at SEBI ERO on 15/10/2018, but Noticee no. 14 not being able to attend the same requested for another hearing date and accordingly hearing was conducted for Noticee no. 14 through Video IP telephony on 29/10/2018. All the said noticees reiterate the contentions stated by them in their replies. Further, they were given 15 days time to submit evidences if any to substantiate their contentions that they were not promoters/directors of GMS.
13. The Noticee No. 1, 2, 3, 4, 8, 9, 12 & 15 have not filed any replies and neither have sought any hearing, hence in terms of the interim order the directions as contained in para 6 and 7 (as applicable) have become final against them.
14. After the hearing, Noticee no.7 has made further written submissions dated 14/11/2018, Noticee no. 14 has made further written submissions dated 14/11/2018, Noticee no. 13 has filed further additional written submissions with SEBI on 31/10/2018, Noticee no. 11 has made further additional written submissions dated 19/11/2018, Noticee no. 5 has made further additional written submission dated 19/11/2018 and Noticee no. 6 has made further additional written submissions dated 28/11/2018. I note that all the aforesaid noticees by way of their additional written submissions inter alia have reiterated their earlier claims. Further, Noticee no. 5,6 and 7 in support of their claims in additional submissions, have furnished copies of Notarised purported Agreements executed on 20/05/2014 (hereinafter collectively referred to as the '**Notarised Agreements**') by each of the said noticees individually with Noticee no. 3, wherein Noticee no. 3 undertakes to be held liable for all the liabilities and debts of the company

for the period from 2011-2013 and exonerating the said noticees from any liability in respect of the company. Further, Noticee no. 5,6,7 and 14 alongwith their additional replies, have also furnished copy of purported 'Statement in lieu of Prospectus' which appears to have been signed by Noticee no. 2,3 and 4 and which they claim was filed with the RoC for registration.

Observations on submissions & replies:

15. I have perused through the interim order cum show cause notice, documents/information obtained from the 'MCA 21 Portal' and other documents available on record, to examine whether the allegations of Offer of RPS was in violation of the provisions of Companies Act, 1956 relating to 'public issue' of securities. It is noted, that GMS has issued and allotted redeemable preference shares to 112 investors during the financial years 2010-2011, 2011-2012 and 2012-2013 and raised atleast an amount of Rs. 13,44,500/-. Neither the company, nor its directors/promoters have disputed the same in their replies and submissions. However, during the personal hearing, the said noticees have submitted that the number of allottees and the total amount of funds raised may be to a tune of more than Rs 4 crores. Therefore, the actual number of allottees and amount mobilized could be more than the aforesaid figures.

16. Now, the point for consideration is whether the Offer of RPS was in violation of provisions of section 67(3), section 73, section 56 and section 60 of the Companies Act, 1956. A reference may be made to sections 67(1) and 67(3) of the Companies Act, 1956 which reads as under:

"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 subsection (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 nonbanking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."*

17. 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, observed as under:-

"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.”

18. 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.

19. In the instant matter, I find that, as per the records available at MCA 21 Portal redeemable preference shares were issued by GMS to 112 investors during the financial years 2010-2011, 2011-2012 and 2012-2013. I find that GMS has mobilized an amount

of Rs. 13,44,500/- during the said financial years. Hence, the Offer of RPS by GMS was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.

20. I find that GMS is neither a NBFC or a public financial institution within the meaning of Section 4A of the Companies Act, 1956, nor has GMS claimed to be any one of these. In view of the aforesaid, I, therefore, find that there is no case that GMS is covered under the second proviso to Section 67(3) of the Companies Act, 1956. Neither GMS nor its directors/promoters have contended that the Offer of RPS does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956.
21. In respect of the Offer of RPS, neither GMS nor the directors have placed any material that the allotment 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. Reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the *"Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged."* Therefore, I find that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016), wherein the Hon'ble SAT while dealing with the issue of NCD's observed that *"In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning"*. Hence, I note that the ratio laid down by the Hon'ble SAT in this case is applicable with equal measure and force to the issue of redeemable preference shares as well.
22. In view of the above, I find that the Offer of RPS by GMS falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the Offer of RPS are deemed to be public issues and GMS was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

23. Further, as the Offer of RPS is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. In the present matter, the allegations of non-compliance of the said provisions were not denied by GMS or its directors/promoters. 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. GMS has also not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that GMS 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.
24. 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 RPS was a deemed public issue of securities, GMS was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that GMS has not submitted any record to indicate that it has registered a prospectus with the RoC, in respect of the Offer of RPS. Even though, the Noticee Nos.5, 6 & 7 have furnished copy of 'Statement in lieu of Prospectus', however, no document has been furnished to show that the same was registered with RoC. I, therefore, find that GMS has not complied with the provisions of section 60 of the Companies Act, 1956.
25. 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 GMS nor its promoters/ 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, GMS has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

26. I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in Sahara Case, had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

"SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange."

27. . 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 as under;

“...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...”

28. In view of the above findings, I am of the view that GMS has engaged in fund mobilizing activity from the public, through the Offer of RPS and has contravened the provisions of section 56(1), 56(3), 67, 73(1), 73(2), 73(3), 60 read with 2(36) of the Companies Act, 1956.
29. Noticee no. 5, 6, 7 and 10 have contended that they were not aware of their directorship in GMS and that Noticee no. 3 had taken their signature on blank paper and procured the copy of their PAN Card and misused it to make them the director in GMS. I note that the records at MCA 21 Portal have shown the said noticees as directors during the relevant period of Offer of RPS. I also note that the records at MCA Portal are ‘statutory records’ and I am inclined to rely on its genuineness. It is for the said noticees to get the records rectified and to prove their innocence if there has been an adverse inference drawn against them on the basis of such records. Noticee no. 5, 6 and 7 claim to have individually executed the Notarised Agreements with Noticee no. 3 on 20/05/2014, wherein they had knowledge about their directorship in GMS. Thus, after having knowledge of their directorship in GMS in May 2014 itself, Noticee no. 5, 6 and 7 ought to have taken steps to rectify the said records. However, there appears to be no material on record or any submission by the said noticees that seems to suggest initiation of any such action by the said noticees to rectify the said records. Noticee no. 5 and 7 claim to have filed a police complaint with Khardah Police Station, Barrackpore

Commissionerate on 19/02/2017 against Noticee no. 2, 3 and 9. I note that despite the knowledge of their directorship in GMS in May 2014, the Noticee no. 5 and 7 claim to have filed the police complaint for the first time only in Feb 2017 .i.e. approximately 3 years after the knowledge of the purported fraud. If they were genuinely concerned about their fraudulent association as director in GMS, they would have taken steps immediately after knowledge of such directorship. However, I note that they did not take any steps till date except filing police complaint. Further, it appears that filing of the police complaint was merely a defensive action to evade the liability from any regulatory action pursuant to the Offer of RPS by GMS. I also note that Noticee no. 6 and 10 have failed to show that they have initiated any action against the purported fraudster(s) who have made them the directors of GMS, ever since their knowledge of such directorship. I further note that noticee no. 6 and 10 have also failed to show that they have taken any steps to rectify the records at MCA 21 Portal.

30. Noticee no. 5,6 and 7 in support of their claims in the additional written submissions, have furnished copies of purported Notarised Agreements executed on 20/05/2014 by each of the said noticees individually with Noticee no. 3, wherein Noticee no. 3 undertakes to be held liable for all the liabilities and debts of the company for the period from 2011-2013 and exonerating the said noticees from any liability that may arise in respect of the company. I note that the Notarised Agreement cannot supersede the provisions of law. Hence, the parties to the said Notarised Agreements can never contract out a liability emanating from section 73(2) of the Companies Act, 1956, for refund of money alongwith interest. In this coonection, I note the observations of the Hon'ble High Court of Calcutta in the matter of Universal Petrochemicals Ltd. vs Rajasthan State Electricity Board decided on 17/04/2001:

“49. The proposition that a contract between the parties will prevail over an overriding statutory provision is contrary to basic norms of jurisprudence. A statutory provision is the sovereign will of the legislature and the same binds every one and certainly the parties who are coming under it unless the provision is made subject to contract or the law is repealed or declared unconstitutional by a competent Court. If the proposition laid down in Ganpatrai (supra) is followed the same will lead to disastrous consequences. Any two individuals would be allowed to contract out of a statutory liability. It is well settled that

there can be no contract which could defeat the provision of any law. This is one of the important facets of section 23 of the Contract Act.

.....”

31. From the documents available on record, I find that the present Directors in GMS are Noticee no. 8, 10 and 4. I also note that, Noticee no. 2,3,5,6,7 and 9 who were earlier directors in GMS have since resigned in March/November 2013. The details about the appointment and resignation of directors in GMS are as following:

| Notice e. no. | NAME OF THE PERSON | CAPACITY | DIN | PAN | DATE OF APPT. | DATE OF CESSATION |
|---------------|--------------------------|-----------------------|---------|------------|---------------|-------------------|
| 2. | ASHIM MITRA | DIRECTOR AND PROMOTER | 2827181 | AKDPM2024K | 25.09.2010 | 31.03.2013 |
| 3. | SANJOY MITRA | DIRECTOR AND PROMOTER | 2827205 | – | 25.09.2010 | 31.03.2013 |
| 4. | LOPAMUDRA BANDYAPADH YAY | DIRECTOR AND PROMOTER | 3126747 | AQFPB2001D | 25.09.2010 | – |
| 5. | BISWAJIT DAS | DIRECTOR | 5129923 | AMPPD6913J | 12.01.2011 | 16.11.2013 |
| 6. | DINESH CHOWHAN | DIRECTOR | 5129934 | ANDPC7427M | 12.01.2011 | 16.11.2013 |
| 7. | CHANDAN BISWAS | DIRECTOR | 5129940 | ALIPB5094L | 12.01.2011 | 16.11.2013 |
| 8. | RAJESH SINGH | DIRECTOR | 2940521 | CLKPS6324N | 20.01.2011 | – |
| 9. | TUMPA MITRA DUTTA | DIRECTOR | – | BAKPD5407K | 20.10.2011 | 16.11.2011 |
| 10. | SHIB SHANKAR GHOSH | DIRECTOR | – | ATKPG5933F | 15.11.2013 | – |

32. The Noticee no. 11,12,13,14 and 15 are promoters of GMS. I note that GMS was incorporated as a company on 25/09/2010 and since then the said Noticee no.

11,12,13,14 and 15 are promoters of GMS. However, it is the case of Noticee no. 11, 13 and 14 that, they were not aware that they were the promoters of GMS until they knew about the interim order passed by SEBI against them, and that Noticee no. 3 had taken their signature on blank paper and procured the copy of their PAN Card and misused it to make them the promoters of GMS. I note that Noticee no.11 to 15 are shown as promoters as per the records at MCA 21 Portal and that the records at MCA 21 Portal are 'statutory records' and I am inclined to rely on its genuineness. It is for the said noticees to get the records rectified and to prove their innocence if there has been an adverse inference drawn against them on the basis of such records. In the instant case, except for Noticee no. 13, the other said noticees have neither produced any evidence to prove that they have taken steps to rectify the records at MCA 21 Portal, nor have shown proof of any action that has been initiated by them against Noticee no. 3, who they claim has fraudulently made them the promoter of GMS. Therefore, I find no merit in the contention of Noticee no. 11 and 14, and it appears that the said noticees have denied being the promoter of GMS only to evade the consequences of this proceeding. Noticee no. 13 claims to have lodged a complaint with RoC Kolkatta on 30/10/2018 i.e. approximately 8 months after the passing of the interim order against her and one day before making of the final additional written submissions with SEBI on 31/10/2018. I note that the inordinate delay in taking steps to rectify the records with RoC coupled with the fact that the said complaint with RoC was lodged just one day before the submission of her additional replies to SEBI, apparently appears to be a non-genuine exercise only to evade the consequences of this proceeding.

33. 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, GMS and its past and present directors and promoters are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

34. 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%.

35. From the material available on record and the details of the appointment and resignation of the directors of GMS as explained in the aforesaid paragraph, it is noted that Noticee Nos.2 to 9 were directors at the time of the Offer of RPS. Since these persons were acting as directors during the period of Offer of RPS, 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 GMS 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 GMS, 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. However, 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 GMS and other directors are limited to the extent of amount collected during his/her tenure as director of GMS. I note that Noticee no. 2, 3, 4, 5, 6, 7, 8 and 9 were the directors of GMS during the financial year 2010-11, 2011-12 and 2012-13. Hence, the liability of Noticee no. 2 to 9 to refund the amount with interest jointly and severally with GMS shall be limited to the extent of amount collected during his/her tenure as director of GMS.

36. I find that Noticee no. 11 to 15 are promoters of GMS and therefore, are liable as promoters for the Offer of RPS against the norms of deemed public issue. Noticee no. 11, 13 and 14 have denied being the promoter of the company and allege that they were fraudulently made as the promoters of the company without their consent. However, I

note that none of the said noticees have taken any steps to initiate any action against the purported fraudster(s). Further, notice no. 11 and 14 also fail to show that they have taken any steps to rectify the records of MCA 21 Portal that show them as promoters of GMS. I also note that notice no. 13 have a lodged a complaint with the RoC, but that apparently appears to be a non-genuine exercise (as explained at para 32 above), only to evade the consequences of this proceeding. Hence, plea of the said noticees that they are not promoters of GMS is untenable. I find Noticee no. 11 to 15 to be accountable for their knowledge/connivance/consent in the act/omission which constituted the violation of the provisions of public issues and public interest requires that such persons be made accountable to the investors. Therefore, the said Noticees are liable to be debarred for an appropriate period of time.

37. 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 GMS and its Directors, viz., Noticee no. 2 to 8, to refund the monies collected, with interest to such investors. Further, in view of the violations committed by GMS, its Directors and promoters, to safeguard the interest of the investors who had subscribed to such redeemable preference shares issued by GMS, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against GMS and the other Noticees.
38. I also note that, vide the interim order, GMS was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors/promoters of GMS were also directed to provide an inventory of assets and properties belonging to them. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that no such inventory has been provided either by GMS or the other Noticees despite the notifications of information of issuance of the interim order through newspaper publications as stated in the previous paragraphs of this Order.
39. I note that Noticee no. 9 was the director of the company during the financial year 2011-2012 for a period of approximately 25 days. Further, from the documents available on record, it is noted that funds mobilisation by Offer of RPS during the financial year 2011-

2012 did not take place during the period of his directorship in the company. Hence, Noticee no. 9 may not be liable for refund of any amount to the investors. Further, since Noticee no. 9 has already been subject to restrictive/prohibitive directions in terms of the interim order, I am not inclined to pass any further directions against him.

40. 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. Noticee no. 1 (GMS), Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan Biswas) and Noticee no. 8 (Shri Rajesh Singh) shall jointly and severally, within a period of three months from the date of this order, refund all the money collected by GMS (It is clarified that the liability of directors viz. Shri Ashim Mitra, Shri Sanjoy Mitra, Shri Lopamudra Bandyapadhyay, Shri Biswajit Das, Shri Dinesh Chowhan, Shri Chandan Biswas and Shri Rajesh Singh shall be for the moneys collected during their respective period of directorship) through the issuance of redeemable preference shares including the application money collected from investors, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds from the investors to the date of actual payment. It is further clarified that the present directors of GMS viz. Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 8 (Shri Rajesh Singh) and Noticee no. 10 (Shri Shib Shankar Ghosh) shall ensure and facilitate the compliance of this direction by GMS.
- 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”.
- c. Noticee no. 1 (GMS), Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan

Biswas) and Noticee no. 8 (Shri Rajesh Singh) are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, within 21 days from the date of receipt of this order. It is clarified that the present directors of GMS shall ensure and facilitate the compliance of this direction on behalf of GMS.

- d. Noticee no. 1 (GMS), Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan Biswas) and Noticee no. 8 (Shri Rajesh Singh) 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. It is clarified that the present directors of GMS shall ensure and facilitate the compliance of this direction by GMS.
- e. Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan Biswas), Noticee no. 8 (Shri Rajesh Singh) and Noticee no. 10 (Shri Shib Shankar Ghosh) shall ensure that a public notice is issued, 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. It is clarified that the present directors of GMS shall ensure and facilitate the compliance of this direction by GMS.
- f. Noticee no. 1 (GMS), Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan

Biswas), Noticee no. 8 (Shri Rajesh Singh) and Noticee no. 10 (Shri Shib Shankar Ghosh) shall file a report of completion of such refund with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI") holding such certificate.

- g. SEBI, on the expiry of three months period from the date of this Order, may recover such amounts, from the company and the directors viz.. Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan Biswas) and Noticee no. 8 (Shri Rajesh Singh), who are liable to refund as specified in paragraph 40 (a) of this Order, in accordance with section 28A of the SEBI Act, including such other provisions contained in securities laws.
- h. Noticee no. 1 (GMS), Noticee no. 2 (Shri Ashim Mitra), Noticee no. 3 (Shri Sanjoy Mitra), Noticee no. 4 (Shri Lopamudra Bandyapadhyay), Noticee no. 5 (Shri Biswajit Das), Noticee no. 6 (Shri Dinesh Chowhan), Noticee no. 7 (Shri Chandan Biswas) and Noticee no. 8 (Shri Rajesh Singh) 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 **four** years from the date of completion of refunds to investors as directed above. The aforesaid 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 **four** years from the date of completion of refunds to investors.
- i. Noticee no. 11 (Shri Soumen Paul), Noticee no. 12 (Ms. Aparna Roy Chowdhury), Noticee no. 13 (Ms. Mina Mukherjee), Noticee no. 14 (Ms. Gita Karmakar) and

Noticee no. 15 (GMS Multi Marketing Services Pvt. Limited, presently known as ADB Food Products Pvt. Limited) 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, for a period of **four** years. However, I note that vide the interim order dated February 23, 2018, the aforesaid noticees were directed not to access the securities market or buy, sell or otherwise deal in the securities market, either directly or indirectly, or associate themselves with any listed company or company intending to raise money from the public. In this connection, I note that the aforesaid five noticees have already undergone prohibition for more than 9 months. Hence, the prohibition already undergone by the said five noticees pursuant to the interim order shall be adjusted while computing the period in respect of prohibition imposed vide this order.

j. The directions against Noticee no. 9 (Shri Tumpa Mitra Dutta) and Noticee no. 10 (Shri Shib Shankar Ghosh) in the interim order are hereby revoked.

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

41. Copy of this Order shall be forwarded to the recognised stock exchanges, depositories and RTA's of all Mutual Funds for information and necessary action.

42. 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.

43. A copy of this Order shall also be forwarded to the concerned Local Police and relevant State Government for information.

Date: December 7, 2018

Place: Mumbai

Sd/-

ANANTA BARUA

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA