BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER No.: Order/SBM/AK/2022-23/17337]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995.

IN RESPECT OF:

Bharti Infratel Ltd
(now known as: Indus Towers Limited)
PAN: AADCB0274F
Building No.10, Tower A, 4th Floor, DLF
Cyber City, Gurugram, Haryana -122002

In the matter of
Bharti Infratel Ltd
(now known as: Indus Towers Limited)

FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as **'SEBI'**), had carried out examination into the surplus shares held by **Bharti Infratel Limited (now known as: Indus Towers Limited)** (hereinafter referred to as '**Company' / 'BIL' / 'Indus'/'Noticee').** BIL is a listed company and has setup an Employee Stock Option Trust (hereinafter referred to as '**ESOP Trust'/ 'Trust')** on January 5, 2015. The Company vide its exemption application letter dated October 23, 2019 informed SEBI that as on March 31, 2017, the Trust was having a surplus of 5,32,862 shares of the Company, which could not be appropriated by them till March 31, 2017, as required under the terms of the provisions of Regulation 3(12) of the SEBI (Share Based Employee Benefits) Regulations, 2014 (hereinafter referred to as '**SBEB Regulations**'). Pursuant to the examination, it was alleged that BIL has violated the provisions of Regulation 3(12) of the SBEB Regulations by, *prima facie*, not appropriating the excess 5,32,862 shares of the Company within the stipulated timeline viz. by March 31, 2017.

2. Based on the above, it was alleged that the Noticee has violated the abovementioned provision of SBEB Regulations. In view of the same, adjudication proceedings have been initiated against the Noticee under the provisions of section 15HB of the SEBI Act.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as the Adjudicating Officer (**'AO'**) vide *communique* dated November 17, 2020 under Section 19 of the Securities and Exchange Board of India Act, 1992 **("SEBI Act")** read with Section 15-I of the SEBI Act and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as **'Adjudication Rules'**), to inquire into and adjudge under the provisions of section 15HB of the SEBI Act, the aforementioned alleged violation of the provisions of law by the Noticee.

SHOW CAUSE NOTICE, REPLY AND HEARING

4. A Show Cause Notice ref No. A&E/EAD-1/SBM-ASR/1536/2021 dated January 19, 2021 (hereinafter referred to as **'SCN'**) was issued to the Noticee under the provisions of Rule 4 of the Adjudication Rules, requiring the Noticee to show cause as to why an inquiry should not be held against the Noticee and why penalty, if any, should not be imposed on it under the provisions of section 15HB of the SEBI Act, for its alleged violation of the provisions of Regulations 3(12) of the SBEB Regulations. The SCN issued to the Noticee *inter alia* mentioned/alleged the following:
   i. *The Company has setup the ESOP Trust on January 5, 2015. The Company vide its exemption application letter dated October 23, 2019, informed SEBI that as on March 31, 2017, ESOP Trust of the Company was having a surplus of 5,32,862 shares of the Company, which could not be appropriated by them till March 31, 2017, as required under the terms of the provisions of Regulation 3(12) of the SBEB Regulations.*
   ii. *It was observed from the aforesaid application letter of BIL that the aforementioned 5,32,862 shares of BIL are the balance shares remaining with the ESOP Trust out of the total shares acquired by the Trust between February and March of 2015, in secondary market against sufficient live options. In terms of the provisions of the Regulation 3(13) of the SBEB Regulations, the Trust is required to hold the shares acquired through secondary acquisition for a minimum period of six months except where they are required to be transferred in the circumstances enumerated in clause (b) of sub-regulation (14) of SBEB Regulations. It was informed by the Company that the said 5,32,862 shares subsequently became unappropriated due to non-utilisation of such shares for transfer to employees, in view of the requirement of mandatory lock-in period of 6 months applicable for secondary acquisition in terms of Regulations 3(13) of SBEB Regulations. Therefore, BIL had to issue fresh shares in FY 2015-16 against the options that were exercised by employees.*

iii. *The Company informed SEBI that the unappropriated shares were parked for sale at a subsequent point in time as SBEB Regulations do not prescribe any specific timeline sale of unappropriated shares held by ESOP Trust.*

iv. The relevant provisions of SBEB Regulations are reproduced below:

"3(12) The un-appropriated inventory of shares which are not backed by grants, acquired through secondary acquisition by the trust under Part A, Part B or Part C of Chapter III of these regulations, shall be appropriated within a reasonable period which shall not extend beyond the end of the subsequent financial year:

Provided that if such trust(s) existing as on the date of notification of these regulations are not able to appropriate the un-appropriated inventory within one year of such notification, the same shall be disclosed to the stock exchange(s) at the end of such period and then the same shall be sold on the recognized stock exchange(s) where shares of the company are listed, within a period of five years from the date of notification of these regulations.

3(13) The trust shall be required to hold the shares acquired through secondary acquisition for a minimum period of six months except where they are required to be transferred in the circumstances enumerated in clause (b) of sub-regulation (14) of this regulation, whether off market or on the platform of stock exchange."

v. *As mentioned earlier, the ESOP Trust was set up on January 5, 2015. Thus the Trust was not in existence on the date of notification of the SBEB Regulations viz. October 28, 2014. Therefore, prima facie, the proviso to Regulation 3(12) of SBEB Regulations is not applicable in the instant matter.*

vi. *As per the submissions of the Company, at the time of acquisition of shares from secondary market in February and March of 2015, the shares were backed by live options/grants. However, due to the fresh issuance of shares in FY 2015-16 by the Company against exercise of options by the employees, the aforesaid 5,32,862 shares are, prima facie, in excess and are no longer backed by options/grants and therefore it is alleged that these 5,32,862 shares were unappropriated as on March 31, 2017.*

vii. *In terms of the provisions of the Regulation 3(12) of the SBEB Regulations, as the abovementioned 5,32,862 shares were without backing of options since FY 2015-16, such shares should have been appropriated by the end of subsequent financial year, viz. by March 31, 2017. The provisions of the Regulation 3(15) of the SBEB Regulations prescribes the sale of such unappropriated inventory of shares in the secondary market.*

viii. *Therefore, in view of the submissions of the Company and the observations in this regard, it is alleged that BIL has violated the provisions of Regulation 3(12) of the SBEB Regulations by, prima facie, not appropriating the excess 5,32,862 shares of the Company within the stipulated timeline viz. by March 31, 2017.*

ix. *The alleged violation of the Regulation 3(12) of the SBEB Regulations by the Noticee, if proved, makes it, liable for penalty under the provisions of section 15HB of the SEBI Act. The text of the said provision of law is mentioned as under:-*

SEBI Act

15HB *Penalty for contravention where no separate penalty has been provided. - Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.*

5. Pursuant to the service of the SCN, vide e-mail/letter dated February 16, 2021, the Noticee sought inspection of the documents. The request of the Noticee was acceded to vide email dated March 8, 2021, and it was provided with opportunity of inspection of relevant documents relied upon by SEBI in SCN on March 15, 2021. However, vide another email dated March 11, 2021, Noticee requested for the inspection of the documents online, and pursuant to the online inspection, the scanned copies of documents as requested by the Noticee were sent to it vide email dated March 16, 2021.

6. Pursuant to the above, the Noticee vide its letters/emails dated March 31, 2021, August 25, 2021 and June 10, 2022 have filed its written replies to the SCN. The Noticee *inter alia* submitted the following:

i. *The allegations in the SCN are an outcome of an out of context reading of specific provisions of the SBEB regulations without reading the entire scheme of the SBEB regulations.*

ii. *It is the outcome of other provisions of law that led to the facts that are alleged to constitute a violation.*

iii. *It is a settled law that the law cannot penalise the non-performance of an action that would in itself constitute a violation of the law- the law cannot force the performance of the impossible.*

iv. *Even if non-adherence to a requirement is concluded, since it is an outcome of the operation of law, and compliance with it would have been impossible, penalty cannot be imposed.*

v. *Regulation 3(12) must not only be read in context but also that it is not to be read as an absolute and "mandatory obligation" whereby even a forced inability to comply with it would automatically lead to penalty. Regulation 3(12) provides a "directory obligation", where obligation must be read in a wider context, without the expectation of absolute obligation emanating from it.*

vi. *Regulation 3(13) provides that, the inventory of shares acquired by way of secondary market should be held on to for a period of at least six months. Thereafter, there may be appropriation of shares towards grants to* *employees (under Regulation 3(14) (a)). If the inventory is not backed by grants, the law stipulates a timeframe for appropriation i.e., a reasonable period of time, which shall not extend beyond the end of next financial year. If the shares are backed by outstanding grants, it would follow that the shares can be held for as long as they are necessary for being transferred upon exercise of grants.*

vii. *Regulation 3(15) makes it clear that Regulation 3(12) does not and was never intended to impose a hard deadline. Regulation 3(15) imposes an obligation not to sell the shares in the open market since that would lead to trading in the shares. However, in case of excess inventory not backed by grants, then a sale would be permitted, provided such sale is aimed at repayment of loan. If there is no loan to repay, there is no question of having a right to sell such shares. Under the SBEB regulation, there is an enabling provision to sell the unappropriated shares under certain circumstances. Selling of shares is neither mandatory, nor is it automatic consequence if appropriation is not done within the stipulated time.*

viii. *Applying the above regulations to the facts, Company has two ESOP schemes i.e., ESOP Scheme 2008 and ESOP Scheme 2014, implemented through Indus Towers Employee Welfare Trust established on January 05, 2015. It acquired 16,52,000 shares from secondary market at the time employees have been granted 38,33,990 options by the Trust. Hence, prior to March 31, 2015, the secondary acquisition shares were covered to outstanding grants. Between April 2015 and September 2015, 81 employees had exercised their options. However, since the secondary acquisition shares were locked in for a period of 6 months under Regulation 3(13), Company issued and allotted 28,97,776 fresh shares to eligible employees. At this stage, the outstanding grants came down by 28,97,776 options, while the secondary acquisition shares locked in under Regulation 3(13) remained at 16,52,000. Thereafter, due to lapse of certain grants during F.Y. 2015-16, ESOP trust continued to hold a surplus of 6,43,347 secondary acquisition shares and upon issuance of 1,10,485 fresh grants during F.Y 2016-17 a surplus of 5,32, 862 shares remained with ESOP trust.*

ix. *The inability to transfer the secondary shares owing to compliance with Regulation 3(13) led to excess shares. The bonafide interpretation is that, Regulation 3(12) is nothing but a provision that requires appropriation within a reasonable period of only those shares which are unappropriated and not backed by grants. If the shares are backed by grants, they can be held until such time they need to be appropriated i.e., when the employee granted exercise their options under the ESOP schemes. It is only when the shares are not appropriated and not backed by grants, that, the obligation to appropriate them further" within a reasonable period" arises, such period is not to be extended beyond the subsequent financial year. Even such shares can be sold in the market only if there is a loan to repay (under Regulation 3(15)). This means that the Regulation*

3(12) does not impose condition to sell before the end of the subsequent financial year as a hard and fast obligation.

x. *Regulation 3(12) therefore is a directory and not a mandatory provision. It does not prescribe a deadline beyond which there would be automatic levy of penalty. A company can appropriate unappropriated shares not backed by grants, by issuing additional grants within the expiry of next financial year. It must be appreciated that additional grants can only be issued in accordance with the existing scheme and plans, annual grant cycle, performance of the employees to whom the options are proposed to be granted etc., and most importantly, performance of the company. A company may appropriate unappropriated shares on a best effort basis but it could never be the intention of law to compel a company to issue grants arbitrarily and randomly when the merits for issuance are not obtained.*

xi. *During the secondary acquisition the outstanding grants were far in excess of the shares acquired, therefore it was not the intention of the company to circumvent the SBEB Regulations, also there was no lapse on the part of the Company under the SBEB Regulations.*

xii. *In this regard, intent of Regulation 3(12) is evidently that, at the time of acquisition of shares in the secondary market, the trust should not acquire shares more than outstanding grants at such time or what it anticipates in the forthcoming financial year. If the intent of Regulation 3(12) would have been contrary, it would have provided that any shares that are not appropriated would have to be disposed of by end of the subsequent financial year. However, it is only to repay loans that such disposal may take place, which means that the shares can be held on for usage against grants to be issued. The only harmonious construction would therefore be that the deadline under Regulation 3(12) is not a mandatory deadline.*

xiii. *In the event the interpretation provided is not agreed upon, then also, penalty would not follow, reliance was placed on the following orders of the Supreme Court:*

(a) Siddharth Chaturvedi [(2016)12 SCC 119]

(b) Bhavesh Pabari [(2019) 5 SCC 90]

xiv. *The Noticee has submitted two propositions of law:*

a. Law does not compel one to do that which one cannot possibly perform;

b. Contemporaneous and attendant provisions of law must be harmoniously construed.

xv. *Reliance was placed on the following orders of the Supreme Court:*

a. Sate of Rajasthanand Anr. Vs Shamsher Singh – 1985 Supp SCC 416

b. Raj Kumar Dey and Ors. V Tarapada Dey and Ors (1987) 4 SCC 398

c. Mohammed Gazi V. State of M.P.and Ors. (2000) 4 SCC 530

d. Standard Chartered Bank and Ors V. Directorate of Enforcement and Ors. (2005) 4 SCC 530 *e. Indore Development Authority V. Shailendra (dead) through its legal representatives (2018)3 SCC 412*

f. M/s Jholei Baba Agency V. State Bank of India AIR 2009 Ori 109; 2008 SCC Online Ori 61

xvi. *It is a settled principle of law that the provisions of a statute must be construed harmoniously. Reliance was placed on the following orders of the Supreme Court:*

a. J.K.Cotton Spinning and Weaving Mills Co. Ltd V State of UP- AIR 1961 SC 1170

b. Sultana Begum V. Prem Chand Jain – (1997) 1 SCC 373

c. Anwar hasan Khan V Mohd. Shafi and Ors.- (2001) 8 SCC 540

d. Chattisgarh State Co-operative Bank Maryadit V. Zila Sahakari Kendriya Bank Maryadit and Ors – (2020) 6 SCC 411

xvii. *No investor complaints have been received against the Company as a consequence of the alleged violation of SEBI (SBEB) Regulations, 2014.*

7. In the interest of natural justice and in terms of the Adjudication Rules, Noticee was provided with an opportunity of personal hearing in the matter on August 10, 2021, through the online webex platform. The personal hearing in the matter scheduled on August 10, 2021, through the online webex platform, was attended by Ms. Samriddhi Rodhe, Mr. Somasekhar Sundaresan, Ms. Yugandhara Ajay Khanwilkar, Mr. Siddharth Khanna and Mr. Pankaj Tewari as the Authorized Representatives (**'ARs'**) on behalf of the Noticee. During the course of hearing, the ARs reiterated the submissions made by the Noticee in its reply dated March 31, 2021 and requested for time to make additional submission. Noticee vide emails dated August 25, 2021 and June 10, 2022 reiterated the earlier submissions and also made additional submissions in the matter which have been taken on record for the purpose of the proceedings.

<u>CONSIDERATION OF ISSUES AND FINDINGS</u>

8. I have carefully perused the allegations levelled against the Noticee in the SCN and the material / documents made available during the course of the proceeding, including the replies furnished by the Noticee. I have also perused the examination report and the various communications exchanged by the Noticee with the concerned department of SEBI in this regard. In order to evaluate the case on its merits, I will now proceed to deal with the following issues arising out of the present proceedings, one by one, as under:

i. **Whether the Noticee has violated Regulation 3(12) of the SBEB Regulations?**

ii. **Whether Regulation 3(12) is merely a directory and not a mandatory provision?**

iii. **Whether the claims of the Noticee are bonafide ?**

iv. **Whether the violation, if any, by the Noticee attract monetary penalty under section 15HB of the SEBI Act?**

v. **If so, what would be the monetary penalty that can be imposed on the Noticee after taking into consideration the factors mentioned in section 15 J of the SEBI Act?**

Whether the Noticee has violated Regulation 3(12) of the SBEB Regulations?

9. It is noted that the Company had two ESOP schemes i.e., ESOP Scheme 2008 and ESOP Scheme 2014, implemented through ESOP Trust established on January 05, 2015. It acquired 16,52,000 shares from secondary market, at the same time employees have been granted 38,33,990 options by the ESOP Trust. Hence, prior to March 31, 2015, the secondary acquisition shares were covered to outstanding grants. Between April 2015 and September 2015, 81 employees had exercised their options. However, since the secondary acquisition shares were locked in for a period of 6 months under Regulation 3(13), Company issued and allotted 28,97,776 fresh shares to eligible employees. At this stage, the outstanding grants came down by 28,97,776 options, while the secondary acquisition shares locked in under Regulation 3(13) remained at 16,52,000. Thereafter, due to lapse of certain grants during F.Y. 2015-16, ESOP trust continued to hold a surplus of 6,43,347 secondary acquisition shares and upon issuance of 1,10,485 fresh grants during F.Y 2016-17 a surplus of 5,32, 862 shares remained with the ESOP trust.

10. The Company vide its own admission in the exemption application dated Oct 23, 2019, informed SEBI, that it has a surplus of 5,32,862 shares of the Company in ESOP Trust as on March 31, 2017, which could not be appropriated in terms of Regulation 3(12) of SBEB Regulations by March 31, 2017. As the shares acquired through secondary market was locked in for a period of 6 months in terms of Regulation 3(13), the Company instead issued fresh shares in FY 2015-16 against options that were exercised by employees. As per the above application, the above shares are the balance shares remaining in the ESOP Trust that were acquired between February and March 2015 in secondary market against sufficient live options. The said shares, however, subsequently became unappropriated due to non-utilisation of such shares for transfer to employees owing to the requirement of mandatory lock-in period of 6 months applicable for

secondary acquisition in terms of Regulations 3(13) of SBEB Regulations. It follows that the Company was required to align its schemes with the SBEB Regulations. It has been established that the Noticee was required to have aligned the scheme for reward of employees as per SBEB Regulations, which they failed to do, the material on record has also established that while implementing the scheme of ESOP, Noticee failed to comply with the aforesaid requirements of SBEB Regulations. Hence, it is clearly established that, the Company failed to appropriate the shares, before the stipulated date, and hence, the provisions of Regulation 3(12) were violated.

Whether Regulation 3(12) is merely a directory and not a mandatory provision?

11. Before moving forward, it is pertinent to refer to the Regulation 3(12) of the SBEB Regulations, which is as follows:

    Implementation of schemes through trust.

    3 (12) The un-appropriated inventory of shares which are not backed by grants, acquired through secondary acquisition by the trust under Part A, Part B or Part C of Chapter III of these regulations, shall be appropriated within a reasonable period which shall not extend beyond the end of the subsequent financial year:

12. A plain reading of the regulation 3(12) shows that, the provision is unambiguous and clear with regards to timelines specified with respect to the compliance desired to be achieved. The regulation nowhere intends to be a mere direction, on the contrary, it provides reasonable time to comply, and only thereafter, places a limitation upon exhaustion of the stipulated timeline. Further, the SBEB Regulation itself under Regulation 29 provides for powers of the Board to relax strict enforcement of the regulations, which are as follows:

    Power to relax strict enforcement of the regulations.

    29. (1) The Board may suo motu or on an application made by a company, for reasons recorded in writing, grant relaxation from strict compliance with any of these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

    (2) A company making an application under sub-regulation (1), shall pay a non-refundable fee of rupees one lakh by way of a banker's cheque or demand draft payable at Mumbai in favour of the Board.

13. In my considered view, had the SBEB Regulations intended regulations to be of directory in nature, there would have been no purpose of incorporating Regulation 29, wherein the Board is

empowered to grant relaxation from strict enforcement of the regulations, after recording reasons in writing, either on its own accord or on an application made by a Company and payment of requisite fees by the Company. The Board in fact intended to have the SBEB Regulations strictly enforced and complied with, and only in specific situations, it may decide upon, on a case to cases basis, relaxing the strict enforcement of the SBEB Regulations. Based on the above, any relaxation from the strict compliance from the SBEB Regulations are to be exceptions, and not the norm, as the Noticee has contemplated it to be. Further, the law is also settled that only that interpretation of law which intend to prevent the mischief and foster the object of legislation should be adopted. Applying the said principle to the legislative objectives of the SBEB Regulations, I find no ambiguity in the charges made in the SCN and Regulation 3(12) of the SBEB regulation and therefore, the attempt of the Noticee to superficially interpret the Regulations erroneously, does not merit any consideration.

14. I have perused the facts and circumstances of the case. I have also examined the scope of the powers of the Board under Regulation 29 of the SBEB Regulations. Under Regulation 29, the Board has the power to relax strict enforcement of the regulations, if it is satisfied that the relaxation is in the interests of the investors in securities and the securities market and while doing so, the reasons for grant of relaxation need to be recorded in writing. This would imply that the Board is empowered to relax the rigors of the requirements under the SBEB Regulations on a case to case basis, upon being satisfied that such relaxation would serve the interest of investors of the company and the securities market as a whole. In view of the above, the argument of the Noticee that the Regulation 3(12) is a merely a directory and not a mandatory provision, does not have any merit and is therefore rejected.

Whether the claims of the Noticee is *bonafide* ?

15. In this regard, it is observed that, the instant SBEB Regulations were notified on October 28, 2014, and the Company has established its ESOP trust on January 05, 2015. Hence, the Company was already aware of the extant provisions of the SBEB Regulation and its nuances. Be it as it may, I have also noted that the company has not submitted any evidence indicating efforts made by it, to comply with the requirements of SBEB. I also note that the ESOP Trust was created in January 2015, and the acquisition from the secondary market was done between February 2015

to Mach 2015 and the timeline for appropriation for the same was in March, 2017. However, despite being aware of the provisions of the SBEB Regulations, the application requesting for relaxation was filed only in October, 2019 belatedly by around 2.5 years. The Application was submitted more than 2.5 years after the deadline provided for appropriation of shares (i.e., March 31, 2017) and the fact that no effort has been shown to be made by the Company in disposing of the said shares. On the contrary, in one of the communications vide email dated November 22, 2019 by the Company to the concerned department of SEBI, The Company informed SEBI that *"These unappropriated shares were parked for sale in secondary market at a subsequent point in time as per the provisions of SBEB Regulations. Basis our understanding, the SBEB Regulations does not prescribe any timelines for sale of unappropriated shares held by the ESOP Trust which was not in existence on the date of the notification of SBEB Regulations. Given that there is no stipulated requirement for a time-bound sale of the said un-appropriated shares, the Company would have taken a considered decision in this regard at an appropriate point in time." do not prescribe any specific timeline sale of unappropriated shares held by ESOP Trust."* The Noticee has not taken the correct interpretation of the SBEB Regulations, and based on such flawed interpretation has intentionally parked the said unappropriated shares for sale at a later time, however, such sale is restricted by the SBEB Regulations. At this stage reference to the provisions of Regulation 3(15) of the SBEB Regulations are drawn, which is reproduced below:

Implementation of schemes through trust.

3 (15) *The trust shall not become a mechanism for trading in shares and hence shall not sell the shares in secondary market except under the following circumstances:*

(a). cashless exercise of options under the scheme covered by Part A of Chapter III of these regulations;

(b).on vesting or exercise, as the case may be, of SAR under the scheme covered by Part C of Chapter III of these regulations;

(c). in case of emergency for implementing the schemes covered under Part D and Part E of Chapter III of these regulations, and for this purpose -

> *(i). the trustee shall record the reasons for such sale; and*
>
> *(ii). money so realised on sale of shares shall be utilised within a definite time period as stipulated under the scheme or trust deed.*

(d).participation in buy-back or open offers or delisting offers or any other exit offered by the company generally to its shareholders, if required;

(e). for repaying the loan, if the un-appropriated inventory of shares held by the trust is not appropriated within the timeline as provided under sub-regulation (12) of this regulation;

(f). winding up of the scheme(s); and

(g).based on approval granted by SEBI to an applicant, for the reasons recorded in writing in respect of the schemes covered by Part A or Part B or Part C of Chapter III of these regulations, upon payment of a non-refundable fee of rupees one lakh along with the application by way of a banker's cheque or demand draft payable at Mumbai in favour of the Board.

16. The limitation under SBEB Regulations are based on the apprehension that some entities may frame ESOP scheme with the purpose of dealing in its own securities with the object of inflating, depressing, maintaining or causing fluctuation in the price of the securities by engaging in fraudulent and unfair trade practices. Such dealing in the company's shares by the trusts may also raise regulatory concerns regarding compliance with SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 and SEBI (Prohibition of Insider Trading) Regulations, 1992. In order to address the concerns over acquisition of shares by employee welfare trusts from the secondary market, such valid restrictions have been placed.

17. Further, the Company vide its email dated November 22, 2019, at para 5 b. has admittedly stated that: *"The intent of the said regulations is to ensure that ESOP trust is not used as a mechanism for trading in shares. Therefore, the selling of the unappropriated shares in the secondary market and simultaneously acquiring the shares from secondary market by ESOP Trust to meet its immediate obligation shall not only cause hardship to the Company, its employees but shall also not be feasible on account of regulatory and governance issues."* This statement clearly establishes that, the Company eventually became aware of the correct interpretation of the SBEB regulations and hence, was exploring its options through Regulation 29 of SBEB Regulations by filing an application for relaxation of strict enforcement of the SBEB Regulations.

18. Another factor limiting the implementation of the ESOP scheme by the Company by its own admission vide email dated November 22, 2019, at para 5 c was *"the Company cannot take the alternative route of allotting fresh shares to the ESOP Trust, due to the existing undertakings submitted by the Company to the Stock Exchanges w.r.t impending merger wherein the Company has undertaken not to issue further shares till the completion of merger."* The said factor was not a result of any limitation arising out of SBEB Regulations, but was an outcome of the Company's own dealings and decisions in its course of business and cannot be attributed to restriction due to SBEB Regulations, hence any consideration to it is out of the scope of present proceedings.

19. The powers conferred on the Board i.e., SEBI under regulation 29 of the SBEB Regulations to relax the enforceability of provisions of the Regulations of 3(12) of the SBEB Regulation, permitting SEBI to waive or relax the strict enforcement of requirements under the SBEB Regulation is indicative of the legislative intent for SEBI to take a pragmatic view of cases, keeping the interest of investors as the predominant consideration. Therefore, there is a need to

balance the interest of the public shareholders vis-à-vis a strict interpretation of Regulation 3(12) of the SBEB Regulations. It is noted that, the Noticee has already explored the remedy available to it under Regulation 29 of the SBEB Regulations, and the competent authority has already taken into consideration the facts and circumstances of the case and refused to accede to the request made by the Noticee. Under the SBEB Regulations, the Company was required to ensure due compliance and cannot at this juncture take the plea that the law was contemplating it to perform an impossible task. The Noticee after utilising the time available and thereafter delaying any action on its part for 2.5 years, at this stage cannot take the plea that, it was prejudiced by regulatory restrictions. Therefore, it is noted that the Noticee is belatedly taking shelter under an assumed limitation of the SBEB Regulations while it had all along known the applicability of the SBEB Regulations and the need for compliance on or before March 31, 2017. In view of the above such claims of the Noticee, does not qualify as *bonafide* claims.

Whether the violation, if any, by the Noticee attract monetary penalty under section 15HB of the SEBI Act?

20. As established in the preceding paragraphs that, the Noticee has violated the provisions of Regulation 3(12) of the SBEB Regulations, which are mandatory provisions and the contentions raised by the Noticee at this stage are not *bonafide*. As the Noticee has violated the above provisions of law, the applicable penalty shall follow. In this context, reliance is placed upon the order of the Hon'ble Supreme Court of India in the matter of *Chairman, SEBI Vs Shriram Mutual Fund* {[2006]5 SCC 361} –wherein the Hon'ble Supreme Court of India held that *"…In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant..."*

21. In view of the above, I conclude that the Noticee is liable for monetary penalty under the provisions of section 15HB of the SEBI Act. In this context, I note that the impugned violations by the Noticee, were after the effective date of the amendment to Section 15HB of the SEBI Act. I note that the amendment to the SEBI Act, w.r.t. "Penalty for contravention where no separate penalty has been provided", was effective from September 8, 2014, whereas the violations of the Noticee took place after the said amendment. Thus, the provisions of Section 15HB of SEBI Act, which is applicable during the relevant period is as under:

SEBI ACT

Penalty for contravention where no separate penalty has been provided.

15HB. *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be [liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.]*

If so, what would be the monetary penalty that can be imposed on the Noticee after taking into consideration the factors mentioned in section 15 J of the SEBI Act?

22. While determining the quantum of penalty under Section 15HB of SEBI Act, the following factors stipulated in Section 15J of the SEBI Act have to be given due regard:

    Factors to be taken into account by the adjudicating officer

    15J.*While adjudging quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors, namely: -*
    a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
    (b) the amount of loss caused to an investor or group of investors as a result of the default;
    (c) the repetitive nature of the default.

23. Having regard to the factors listed in section 15J above and the guidelines issued by Hon'ble Supreme Court of India in *SEBI Vs Bhavesh Pabari Civil Appeal No(S).11311 of 2013* vide judgement dated February 28, 2019, it is noted that from the material available on record, any quantifiable gain or unfair advantage accrued to the Noticee or the extent of loss suffered by the investors as a result of the default by the Noticee in this case cannot be computed. As regards the repetitive nature of the default, I do not find that the examination report has brought on record any regulatory action taken by SEBI in past against Noticee for same violations as those observed in the instant examination. I also observe that there are no investor complaints on record, arising out of failure on account of the Noticee. However, I cannot ignore the fact that Noticee was under an obligation to abide by the provision 3(12) of the SBEB Regulations, which it failed to do. Such disregard shown towards compliance with the provisions of the regulations calls for an appropriate penalty under the provisions of law.

ORDER

24. Having considered all the facts and circumstances of the case, the material available on record and the factors mentioned in the preceding paragraphs, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with rule 5 of the Adjudication Rules, hereby impose a penalty of Rs.1,00,000/- (Rupees One Lakh only) on the Noticee viz. Bharti Infratel Limited (now known as: Indus Towers Limited) under the provisions of section 15HB of the SEBI Act for the violation of Regulation 3(12) of the SBEB Regulations by the Noticee.

I am of the view that the said penalty is commensurate with the default committed by the Noticee in the present proceeding.

25. The Noticee shall remit / pay the said amount of penalty within 45 (forty five) days of the receipt of this order either by way of Demand Draft (DD) in favour of "SEBI -Penalties Remittable to Government of India", payable at Mumbai and the said DD should be forwarded to the Division Chief, Enforcement Department -I (EFD), Division of Regulatory Action -I [EFD1-DRA-1] SEBI Bhavan, Plot No.C4-A,' G' Block, Bandra Kurla Complex (BKC), Bandra (East), Mumbai –400 051 and also send an email to tad@sebi.gov.in with the following details:

1	Case Name	
2	Name of the Payee	
3	Date of Payment	
4	Amount Paid	
5	Transaction No.	
6	Bank Details in which payment is made	
7	Payment is made for (like penalties/disgorgement / recovery/ settlement amount and legal charges along with order details)	

26. Payment can also be made online by following the below path at SEBI website www.sebi.gov.in ENFORCEMENT → Orders → Orders of AO → Click on PAY NOW or at https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html.

27. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia,* by attachment and sale of movable and immovable properties.

28. In terms of rule 6 of the Adjudication Rules, a copy of this order is sent to the Noticee viz. Bharti Infratel Limited (now known as: Indus Towers Limited) and also to Securities and Exchange Board of India.

Date: June 27, 2022 **SURESH B MENON**

Place: Mumbai **ADJUDICATING OFFICER**