BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/SM/AD/2022-23/22236]

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

D S Kulkarni Developers Pvt. Ltd.
[PAN: AAACD6431H]

In the matter of D S Kulkarni Developers Pvt. Ltd.

FACTS OF THE CASE IN BRIEF

1. D S Kulkarni Developers Pvt. Limited (hereinafter referred to as **'Noticee /By name/ DSKDL/Company'**) is a public listed company having its shares listed on both BSE Ltd. (hereinafter referred to as '**BSE'**) and National Stock Exchange of India Ltd (hereinafter referred to as "**NSE**"), since September 25, 2000. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') received a reference/letter dated March 09, 2020 from Central Economic Intelligence Bureau (hereinafter referred to as "**CEIB**") relating to the affairs of Noticee. Pursuant to the aforementioned letter, SEBI conducted an examination, *inter alia*, into the matter of public issue of Non-Convertible Debentures (hereinafter referred to as "**NCDs**") amounting to Rs 111 crore made by Noticee in August, 2014. The NCDs were listed on BSE only. During the aforementioned examination, SEBI observed certain violations of provisions of Regulation 16(1) of SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (hereinafter referred to as '**ILDS Regulations'**) read with Rule 18(7)(c) of Companies (Share Capital and Debenture) Rules, 2014 by Noticee.

2. Thereafter, SEBI initiated adjudication proceedings under Section 15HB of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') for the aforementioned violations observed against Noticee.

APPOINTMENT OF ADJUDICATING OFFICER

3. Vide Order dated March 01, 2021, SEBI appointed the undersigned as the Adjudicating Officer under Section 19 read with Sub-section (1) of Section 15I of 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 SEBI Act, the aforementioned violations by Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. A show-cause notice dated March 29, 2022 (hereinafter referred to as '**SCN**') was issued to Noticee under Rule 4 of the Adjudication Rules to show-cause as to why an inquiry should not be initiated against Noticee and penalty, if any, not be imposed upon it under the provisions of Section 15HB of SEBI Act for the aforesaid violations alleged to have been committed by it.

5. The allegations levelled against Noticee in the SCN are as under:

   a. Noticee had raised over Rs.111 crore in August, 2014 by making public issue of NCDs. Under the said issuance, Noticee had issued 4 series of NCDs of Rs. 51.72 crore, Rs. 23.42 crore Rs.2.12 crore and Rs. 34.43 crore. Debenture Trustee of Noticee viz., Catalyst Trusteeship Limited ("**CTL/DT**"), in its email dated November 23, 2020 to SEBI stated that Noticee had created Debenture Redemption Reserve (hereinafter referred to as "**DRR**") in FY 2015-16 and in the FY 2016-17, the year in which Noticee incurred losses. The details of DRR created by Noticee are as under:

Series	ISIN	Amount of Issue (Rs. In Cr.)	DRR required to be created	Date of Redemption	DRR created for FY	DRR created for FY 2016-17

			at 25% (Rs. In Cr.)		2015-16(Rs. In Cr)	(Rs. in Cr.)
I	*INE891A07011*	*51.72*	*12.98*	*September 06,2017*	*4.31*	*4.31*
II	*INE891A07037*	*23.42*	*5.86*	*March 06,2020*	*1.06*	*1.06*
III	*INE891A07045*	*2.12*	*0.53*	*September 06,2020*	*0.08*	*0.08*
IV	*INE891A07029*	*34.43*	*8.61*	*September 06,2021*	*1.23*	*1.23*

b. Vide email dated November 23, 2020, DT submitted to SEBI that Noticee defaulted in payment of interest due on its NCDs on July 01, 2017. DT, vide the aforementioned mail, also stated that DRR was not utilized by Noticee for repayment of its NCDs. As per DT's further submissions, the amount marked towards DRR was continuously reflected in the provisional financial statement of Noticee.

c. It was noted that Corporate Insolvency Resolution Process (CIRP) under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC) was initiated against the Noticee. In view of the above, the Resolution Professional (RP) appointed by National Company Law Tribunal in the matter of Noticee was asked vide email dated January 11, 2021 to explain as to '*why the DRR was not utilized towards the repayment NCDs'*. In this regard, RP vide email dated January 13, 2021 has, inter alia, submitted the following:

    i. Noticee is under Corporate Insolvency Resolution Process. (CIRP) with effect from September 26, 2019.
    ii. A moratorium under section 14 of IBC has been declared.
    iii. All the details/documents/records/information/ of the company are in- custody of Economics Offence Wing.
    iv. The DRR created by Noticee was a book reserve and therefore cannot used for the redemption of the NCDs.

v. As per available records, the Noticee had not invested/deposited 15% of amount of its debentures maturing during the year as required under Companies (Share Capital and Debenture) Rules, 2014.

d. From the above, SEBI observed that Noticee had not invested/deposited 15% of amount of its debentures maturing during FY 2017-18 before April 30, 2017 as required under Rule 18(7)(c) of Companies (Share Capital and Debenture Rules, 2014.

e. Since Noticee did not comply with aforementioned provision of Rule 18(7)(c) of Companies (Share Capital and Debenture Rules, 2014, It is alleged that Noticee has violated provisions of Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014.

6. The SCN was sent to Noticee through Speed Post Acknowledgement due (hereinafter referred to as '**SPAD**') to two of the addresses of Noticee available on record as well as through digitally signed email dated March 31, 2022. The SCN sent to one of the addresses of Noticee through SPAD returned undelivered, however SCN served on other address was duly delivered to Noticee. Further, SCN send through digitally signed email was also duly served on Noticee. Noticee, through Resolution Professional (RP), Mr. Manoj Kumar Agarwal, filed its reply to the SCN vide letter dated April 11, 2022.

7. In the interest of natural justice, vide hearing notice dated May 12, 2022, Noticee was granted an opportunity of personal hearing before the undersigned on May 27, 2022 through video conferencing. The aforesaid hearing notice was sent to Noticee through SPAD and also through digitally signed email on May 12, 2022 and the same was duly served on it. Due to technical difficulties faced by Noticee in attending hearing, the hearing scheduled on May 27, 2022 was postponed to May 30, 2022. On the scheduled date of hearing, the Authorised Representatives of Noticee (ARs), Advocate Namrata Zaveri and Advocate Shyam Kapadia, appeared on behalf of Noticee and made the following submissions:

a. *ARs of Noticee reiterated the contents of Noticee's earlier reply dated April 11, 2022.*
b. *ARs of Noticee in support of their contentions also placed reliance on decision of Hon'ble Securities Appellate Tribunal in Dewan Housing Finance Corporation Ltd v SEBI, (Appeal No. 206 of 2020, Decision dated October 09, 2020), decisions of Hon'ble Supreme Court in*

Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited , (2018) 16 SCC 94, Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr, (2020) 12 SC and decision of National Company Law Appellate Trubunal in Anju Agarwal R.P for Shree Bhawani Paper Mills Ltd. vs. Bombay Stock Exchange & Ors.

8. Further, vide email dated May 30, 2022, ARs of Noticee also submitted a compilation of judgments relied on by them during the hearing conducted on May 27, 2022. Since more than 6 months had elapsed since last date of hearing, an opportunity of filing additional written submissions was granted to Noticee to file the same on or before December 12, 2022. However, no further submissions have been received from Noticee till the date of this order.

9. The relevant extract of reply filed by Noticee vide letter dated April 11, 2022 is reproduced hereunder:

- *D.S. Kulkarni Developers Limited ('DSKDL") has been under Corporate Insolvency Resolution Process ("CIRP") w.e.f. September 26, 2019 pursuant to an order ("Admission Order") of the National Company Law Tribunal ("NCLT") at Mumbai.*

- *Pursuant to the Admission Order, Section 14 of the Insolvency and Bankruptcy Code, 2016 ("IBC") prohibits the following actions against a company which is in CIRP:*
    a. *Institution of suits or continuation of pending suits or proceedings, including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
    b. *Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
    c. *Any action to foreclose, recovery or enforce any security interest created by such Company in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
    d. *Recovery of any property by an owner or lessor where such property is occupied by or in possession of such Company.*

- *It is not denied that the Company had failed to deposit 15% of the amount towards its debentures which were maturing during FY 2017-18 before April 30, 2017, or that the Company may have been in violation of the provisions of Companies (Share Capital and Debenture) Rules, 2014, or for that matter, the SEBI (Issue and Listing of Debt Securities) Regulations, 2008. However, the Company which is now in CIRP, cannot at this stage be penalized under Section 15HB of the SEBI Act on account of the prohibitions under Section 14 of the IBC, set out hereinabove*

- *Please note, any proceedings under the provisions of the SEBI Act, or its regulations would be considered institution of legal proceedings against the Company which is presently in CIRP, and is expressly barred under the provisions of Section 14 of the IBC.*

- *Noticee also has placed reliance on the decision of Hon'ble Securities Appellate Tribunal (SAT) in Dewan Housing Finance Corporation Ltd vs SEBI (Appeal No. 206 of 2020; Decision dated October 09, 2020), the decisions of Hon'ble Supreme Court of India in Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited and Ors.[(2018) 16 SCC 94; Civil Appeal No. 16929 of 2017 ; decided on October 23, 2017; Rajendra K Bhutta Vs Maharashta Housing and Are Development Authority & Anr; [(2020) 13 SCC 208; Civil Appeal No. 12248 of 2018; decided on February 19, 2020], decision of National Company Law Appellate Tribunal in the matter of Anju Agarwal, R.P for Shree Bhawani Paper Mills Ltd. vs Bombay Stock Exchange & Ors. (Company Appeal (AT) (Insolvency) No. 734 of 2018 [Order dated November 28, 2018] ; Mr. Bohar Singh Dhillion vs. Mr. Rohit Sehgal (Company Appeal (AT) (Insolvency) No. 665 of 2018) (Order dated May 09, 2019)*

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

10. I have carefully perused the charges levelled against Noticee, replies/submissions filed by Noticee and other documents/ evidence available on record. The issues that arise for consideration in the present case are:

I. Whether Noticee has violated Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014?

II. Does the violation, if any, attract monetary penalty under Section 15HB of SEBI Act?

III. If the answer to issue no. 2 is in affirmative, then what should be the quantum of monetary penalty?

11. Before moving forward, it is pertinent to refer to the relevant provisions of ILDS Regulations and Companies (Share Capital and Debentures) Rules, 2014, which was in force at the time of impugned transactions, which are reproduced as under:

Relevant provisions of ILDS Regulations:

Debenture Redemption Reserve

16. (1) For the redemption of the debt securities issued by a company, the issuer shall create debenture redemption reserve in accordance with the provisions of the Companies Act, 1956 and circulars issued by Central Government in this regard.

Relevant provisions of Companies (Share Capital and Debentures) Rules,2014

18(7): The company shall create a Debenture Redemption Reserve for the purpose of redemption of debentures, in accordance with the conditions given below—

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……………

(c) every company required to create Debenture Redemption Reserve shall on or before the 30th day of April in each year, invest or deposit, as the case may be, a sum which shall not be less than fifteen per cent, of the amount of its debentures maturing during the year ending on the 31st day of March of the next year, in any one or more of the following methods, namely:—

(i) in deposits with any scheduled bank, free from any charge or lien;

(ii) in unencumbered securities of the Central Government or of any State Government;

(iii) in unencumbered securities mentioned in sub-clauses (a) to (d) and (ee) of section 20 of the Indian Trusts Act, 1882;

(iv) in unencumbered bonds issued by any other company which is notified under subclause (f) of section 20 of the Indian Trusts Act, 1882;

(v) the amount invested or deposited as above shall not be used for any purpose other than for redemption of debentures maturing during the year referred above:

Provided that the amount remaining invested or deposited, as the case may be, shall not at any time fall below fifteen per cent of the amount of the debentures maturing during the year ending on the 31st day of March of that year;

12. Before proceeding to examine the case on its merits, it is pertinent to deal with preliminary objection raised by Noticee in the present matter. Noticee in its reply to the SCN has submitted that it has been under Corporate Insolvency Resolution Process (CIRP) w.e.f September 26, 2019 and Hon'ble National Company Law Tribunal vide its order dated September 26, 2019, had imposed moratorium under Section 14 of The Insolvency and Bankruptcy Code, 2016 (IBC) with respect to Noticee. I also note from submission of Noticee that Mr. Manoj Kumar Agrawal was appointed as Resolution Profession (RP) of Noticee. Noticee in its reply to the SCN has contended that institution/continuation of present adjudication proceedings during the moratorium period is expressly barred by provisions of Section 14 of IBC. In support of its contentions, Noticee has placed reliance on the decision of Hon'ble Securities Appellate Tribunal (SAT) in Dewan Housing Finance Corporation Ltd vs SEBI (Appeal No. 206 of 2020; Decision dated October 09, 2020), the decisions of Hon'ble Supreme Court of India in Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited and Ors.[(2018) 16 SCC 94; Civil Appeal No. 16929 of 2017 ; decided on October 23, 2017; Rajendra K Bhutta Vs Maharashta Housing and Are Development Authority & Anr; [(2020) 13 SCC 208; Civil Appeal No. 12248 of 2018; decided on February 19, 2020], decision of National Company Law Appellate Tribunal in the matter of Anju Agarwal, R.P for Shree Bhawani Paper Mills Ltd. vs Bombay Stock Exchange & Ors. (Company Appeal (AT) (Insolvency) No. 734 of 2018 [Order dated November 28, 2018] ; Mr. Bohar Singh Dhillion vs. Mr. Rohit Sehgal (Company Appeal (AT) (Insolvency) No. 665 of 2018) (Order dated May 09, 2019).

13. I note from the material available on record that Noticee has been under CIRP w.e.f September 26, 2019 pursuant to an Order of the Hon'ble National Company Law Tribunal ("NCLT"). I further note that NCLT vide its aforementioned Order had also declared moratorium under Section 14 of IBC with respect to Noticee. The relevant extracts of the aforementioned order of NCLT is reproduced hereunder:

"This petition filed under Section 7 of I&B Code, 2016, filed by Bank of Maharashtra against D.S. Kulkarni Developers. Ltd., for initiating corporate insolvency resolution process is at this moment admitted. We further declare moratorium u/s 14 of I&B Code with consequential directions as mentioned below:

I. That this Bench as a result of this prohibits:

a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any activity under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

d) the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

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III. That the provisions of sub-section (1) of Section 14 of I&B Code shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

IV. That the order of moratorium shall have effect from the date. Of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 of I&B Code or passes an order for the liquidation of the corporate debtor under section33 of I&B Code, as the case may be.

V. That the public announcement of the corporate insolvency resolution process shail be made immediately as specified under section 13 of I&B Code.

VI. That this Bench at this moment appoints Mr. Manoj Kumar Agrawal, a registered Insolvency Resolution Professional having Registration Number [IBBI/IPA-001/1P-P00714/2017-18/11222} as Interim Resolution Professional to carry out the functions as mentioned under I&B Code. The fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard."

14. In this context, I also find it pertinent to refer to Section 14 of IBC. The text of the aforementioned provision is reproduced hereunder:

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

15. I have taken note of the contentions of Noticee and decisions cited by Noticee in its contentions. With regard to the contention of Noticee that present proceeding is barred by Section 14 of IBC, which has been supported with abovementioned judgements, I find it pertinent to refer to the decision of Hon’ble Supreme Court in Sundaresh Bhatt v.Central Board of Indirect Taxes and Customs, 2022 SCC Online SC 1101, where Hon’ble Supreme Court citing its earlier decision in decision in S.V. Kondaskar v. V.M. Deshpande, AIR 1972 SC 878, had observed as under:

"*46. Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.*

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56. On the basis of the above discussions, following are our conclusions:

i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act. ii) After such assessment, the respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority..."

16. From the aforesaid judgment of the Hon'ble Supreme Court, I note that SEBI, as a statutory authority, can take steps to determine penalty, if any, with regard to its matters relating to the corporate debtor. Therefore, I find that at this juncture, the limited purpose of present adjudication proceeding against Noticee is to determine if Noticee has violated any of the provisions of securities laws and if so, to assess and determine the penalty, in order to enable SEBI to crytallise its claim.

17. I also note that Hon'ble Securities Appellate Tribunal in Dewan Housing Finance Corporation Ltd v. SEBI (Appeal No. 206 of 2020 decided on October 09, 2020) has held that "*17. In addition to the aforesaid in M/s. Innoventive Industries Ltd. vs. ICICI Bank Ltd. (2018) 1 SCC 407 the Supreme Court held that any proceedings under any law against a corporate debtor cannot be proceeded once moratorium is in effect. It is apparently clear that once moratorium has been declared under section 14, SEBI/AO cannot proceed under the SEBI laws against a corporate debtor."*

18. With regard to the above, I note that the order passed by the Hon'ble SAT in the matter of Dewan Housing Finance Corporation Ltd v SEBI (*supra)*, has been challenged by the SEBI before the Hon'ble Supreme Court and the same is pending. <u>Therefore, the enforcement of</u>

penalty in this order, if any, shall be subject to the outcome of the appeal before the Hon'ble Supreme Court of India in the matter of SEBI Vs. Dewan Housing Finance Corporation Ltd. (Civil Appeal No. 3963/ 2020)

19. I now proceed to deal with case on merits.

Issue No. I - Whether Noticee has violated Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014?

20. I note that the SCN has alleged that Noticee had not invested/deposited 15% of amount of its debentures, i.e., NCDs bearing ISIN "INE891A07011", maturing during FY 2017-18 before April 30, 2017, as required under Rule 18(7)(c) of Companies (Share Capital and Debenture Rules, 2014.

21. I note from the material available record that Noticee had raised Rs.111.69 crore by making public issue of Non-Convertible Debentures (NCDs) in 2014. I also note that under the said issuance, Noticee had issued 4 series of NCDs bearing ISINs INE891A07011, INE891A07037, INE891A07045 and INE891A07029 amounting to Rs. 51.72 crore, Rs. 23.42 crore Rs.2.12 crore and Rs. 34.43 crore respectively. The aforementioned details have not been disputed by Noticee in its submissions.

22. I note that vide its email dated November 23, 2020, Debenture Trustee of Noticee viz., Catalyst Trusteeship Limited ("**CTL/DT**"), informed SEBI that Noticee had created Debenture Redemption Reserve (hereinafter referred to as "**DRR**") in Financial Year (FY) 2015-16 and in the FY 2016-17. The details of DRR created by Noticee are as under:

Series	ISIN	Amount of Issue (Rs. In Cr.)	DRR required to be created at 25% (Rs. In Cr.)	Date of Redemption	DRR created for FY 2015-16(Rs. In Cr)	DRR created for FY 2016-17 (Rs. in Cr.)

I	INE891A07011	51.72	12.98	September 06,2017	4.31	4.31
II	INE891A07037	23.42	5.86	March 06,2020	1.06	1.06
III	INE891A07045	2.12	0.53	September 06,2020	0.08	0.08
IV	INE891A07029	34.43	8.61	September 06,2021	1.23	1.23

23. I also note that DT in its aforementioned email stated that Noticee defaulted in payment of interest due on its NCDs on July 01, 2017. DT also informed that the DRR was not utilized by Noticee for repayment of its NCDs. In this regard, I note that vide email dated November 25, 2020, DT informed SEBI that the amount marked towards DRR created in FY 2015-16 and 2016-17 continued to be reflected in the books of account of Noticee till then.

24. I note that during the examination in the matter, Noticee was asked by SEBI, vide an email dated January 11, 2021, to explain the DRR was not utilized towards the repayment of NCDs. In this regard, I note that RP of Noticee, vide his letter dated January 13, 2021, *inter alia,* submitted that Noticee had defaulted in the payment of interest due on July 01, 2017 and had not redeemed the NCDs on 06th September 2017, 06th March 2020 and 06th September 2020 i.e. when the redemptions were due. Further, RP, in his aforementioned letter, also stated that Noticee had not invested/deposited 15% of amount of its debentures maturing during the FY 2017-18 before April 30, 2017, as required under Companies (Share Capital and Debenture) Rules, 2014. The same has also been admitted by Noticee (through RP) in its reply to the SCN.

25. At this juncture, it is pertinent to refer to relevant provisions of law. I note that Regulation 16(1) of ILDS Regulations provides that *"For the redemption of the debt securities issued by a company, the issuer shall create debenture redemption reserve in accordance with the provisions of the Companies Act,1956 and circulars issued by Central Government in this regard*." Further, in terms of Regulation 18(7)(c) of Companies (Share Capital and Debenture) Rules, 2014 "*The company shall create a Debenture Redemption Reserve for the purpose of redemption of debentures, in accordance with the conditions given below—*

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(c) "every company required to create Debenture Redemption Reserve shall on or before the 30th day of April in each year, invest or deposit, as the case may be, a sum which shall not be less than fifteen per cent, of the amount of its debentures maturing during the year ending on the 31st day of March of the next year, in any one or more of the following methods, namely……………………….

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26. I note from the reading of Regulation 16(1) of ILDS Regulations that DRR has to be created in accordance with conditions laid down in Companies Act, 1956 and relevant circulars issued by Central Government. In this regard, I note that the cause of action in the present matter arose during the FY 2017-18 and by that time Companies Act, 1956 was repealed and was replaced with Companies Act, 2013. In this context, I note that Section 8 of General Clauses Act provides that " *8. Construction of references to repealed enactments.—Where this Act, or any Act made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."* In light of the aforementioned provision of General Clauses Act, I am of view that for the cause of action in the present matter which arose in the FY2017-2018, the reference in Regulation 16(1) of ILDS Regulations to Companies Act, 1956 should be read to mean Companies Act, 2013 and the rules made thereunder. I note that Companies (Share Capital and Debenture) Rules, 2014 was enacted in exercise of powers conferred to Central Government under Companies Act 2013 and is also applicable to listed company.

27. On combined reading of Regulation 16(1) of ILDS Regulations and Regulation 18(7)(c) of Companies (Share Capital and Debenture) Rules, 2014, I note that Noticee was under an obligation to create the DRR in terms of the conditions laid down therein. One of the conditions was that it had to deposit at least 15% of amount of NCDs bearing ISINs "INE891A07011" maturing on September 06, 2017 (during the financial year 2017-2018) on or before April 30, 2017. From the RP's letter dated January 13, 2021, I find that RP had admitted that Noticee had not invested/deposited 15% of amount of its debentures maturing during FY 2017-18, before the stipulated time frame, i.e., April 30, 2017. Therefore, I find

that Noticee had not invested/deposited 15% of amount of its NCDs bearing ISIN "INE891A07011" maturing during the year 2017-2018 as required under Companies (Share Capital and Debenture) Rules, 2014.

28. Thus, I conclude that Noticee, by not depositing 15% of amount of NCDs bearing ISIN "INE891A07011" maturing during financial year 2017-2018, before April 30, 2017, had not created the required DRR in accordance with Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014. Therefore, I find that allegation in the SCN that Noticee has violated provisions of Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014 stands established.

Issue No. II- Does the violation attract monetary penalty under Section 15HB of SEBI Act?

29. I note that the Hon'ble Supreme Court of India in the matter of SEBI v/s Shri Ram Mutual Fund [2006] 68 SCL 216(SC) 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...…".*

30. Therefore, in view of the above judgment of Hon'ble Supreme Court and considering that Noticee violated Regulation 16(1) of ILDS Regulations read with Rule 18(7)(c) of Companies (Share Capital and Debentures) Rules, 2014., as established in the foregoing paragraphs, I find that Noticee would be liable for monetary penalty under Section 15HB of the SEBI Act. The text of Section 15HB of the SEBI Act is reproduced below:

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.

Issue No.III - What should be the quantum of monetary penalty?

31. While determining the quantum of penalty under Section 15HB of the SEBI Act, it is important to consider the factors as stipulated in Section 15J of the SEBI Act, which reads as under:-

<u>SEBI Act</u>

Factors to be taken into account by the adjudicating officer.

Section 15J *- While adjudging quantum of penalty under section 15-I or section 11 or section 11B, the Board or 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.

Explanation*- For the removal of doubts, it is clarified that the power to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.*

32. In view of the charges established and the facts and circumstances of the case, the quantum of penalty would depend on the factors referred in Section 15-J of the SEBI Act, stated as above. In the instant case, it is not possible from the material on record to quantify the amount of disproportionate gain or unfair advantage resulting from the default of Noticee or the consequent loss caused to investors as a result of the default. Further, I note that the evidence available on record does not indicate that default of Noticee is repetitive in nature. However, it is pertinent to note that the concept of DRR was introduced for protection of debenture holders by reducing the risk as well as the impact of default by company in repayment of its debt securities. Thus, I find the default by Noticee, i.e., not creating a DRR as per the conditions stipulated under extant laws, indicates its disregard for placing a safety net for the NCD holders which may jeopardize the interests of these investors and therefore deserves an appropriate penalty.

ORDER

33. Having considered all the facts and circumstances of the case, the material available on record, the submissions made by Noticee and also the factors mentioned in Section 15J of the SEBI Act, as enumerated above, 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. 2,00,000/- (Rupees Two Lakh only) on Noticee i.e., **D S Kulkarni Developers Pvt. Ltd.** under the provisions of Section 15HB of SEBI Act. I am of the view that the said penalty is commensurate with the lapse/omission on the part of Noticee.

34. Payment of penalty can be either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the website of SEBI, i.e., www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -> Orders of AO -> PAY NOW. In case of any difficulties in payment of penalties, Noticee may contact the support at portalhelp@sebi.gov.in.

35. The Noticee shall forward the said Demand Draft or the details/ confirmation of payment made in the format as given in table below to "The Division Chief, EFD – DRA - IV, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051" and also to e-mail id:- tad@sebi.gov.in

1. Case Name:	
2. Name of 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)	

36. As mentioned earlier in the Order, the instant proceedings are only meant to determine as to whether Noticee has violated any provisions of securities law and if so, to assess and determine the penalty in order to enable SEBI to crystallise its claim. However, the enforcement of this order is subject to the outcome of the appeal filed by SEBI before the Hon'ble Supreme Court in the matter of Securities and Exchange Board of India Vs. Dewan Housing Finance Corporation Ltd.

37. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to Noticee, **D S Kulkarni Developers Pvt. Ltd** as well as the RP, Mr Manoj Kumar Agarwal and also to SEBI.

Place: Mumbai **SOMA MAJUMDER**
Date: December 19, 2022 **ADJUDICATING OFFICER**