

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of Neesa Technologies Limited

In re Deemed Public Issue Norms

In respect of:

Sl. No.	Name of the Entity	PAN	DIN
1	Mr. Manoj Kumar Singhal	ARFPS7604E	01830419

Background

1. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) passed a Final Order dated June 2, 2016, *inter alia*, in respect of Mr. Manojkumar Singhal (hereinafter referred to as “Noticee”) in the matter of Neesa Technologies Limited (hereinafter referred to as “Neesa”/ “Company”). The said Order, *inter alia*, made the following findings qua the Noticee:

“...it is noted that Mr. Arvind Gupta, Mr. Yogesh Ghisumal Gemawat, Mr. Girishchandra Mukundram Baluni, Mr. Nimain Charan Biswal, Mr. Sanjay Gupta, Mr. Kamendra Joshi and Mr. Manoj Singhal were the directors of the Company at the time of impugned issues and allotment of NCDs and were responsible for the affairs of the Company at the relevant point of time...”

2. In the light of the above, vide the Order dated June 2, 2016, the following directions were issued against the Noticee and other entities:

“Neesa Technologies Limited [PAN: AABCG5430A], Mr. Arvind Gupta [PAN: AERPG2839N; DIN: 00064391], Mr. Yogesh Ghisumal Gemawat [PAN: ADVPG4051D; DIN: 02550021], Mr. Girishchandra Mukundram Baluni [PAN: AAKPB5408R; DIN: 02745783], Mr. Nimain Charan Biswal [PAN: ACRPB3767C; DIN: 03306090], Mr. Sanjay Gupta [PAN: ABUPG5799B; DIN: 00006361], Mr. Kamendra Joshi [PAN: ABIPJ6029P; DIN: 05356425] and Mr. Manoj Singhal [PAN: ARFPS7604E; DIN: 01830419], jointly and severally, shall forthwith refund the money collected by the Company through the issuance of Non-Convertible Debentures (which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956 and the ILDS Regulations), the investors including the money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.”

...

Neesa Technologies Limited, Arvind Gupta, Yogesh Ghisumal Gemawat, Girishchandra Mukundram Baluni, Nimain Charan Biswal, Sanjay Gupta, Kamendra Joshi and Manoj Singhal are also directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of shares/securities, if held in physical form.

...

Arvind Gupta, Yogesh Ghisumal Gemawat, Girishchandra Mukundram Baluni, Nimain Charan Biswal, Sanjay Gupta, Kamendra Joshi and Manoj Singhal are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, with immediate effect. They are also restrained from issuing prospectus, offer document or advertisement soliciting money from the public and 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. The above directions shall come into force with immediate effect and shall continue to be in force

from the date of this Order till the expiry of four (4) years from the date of completion of refunds to investors, as directed above.

...

3. The Noticee challenged the final order dated June 2, 2016 before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**SAT**"). Hon'ble SAT vide its Order dated March 7, 2018, restored the matter qua the Noticee to the file of the WTM for passing fresh order on merits and in accordance with law. Hon'ble SAT further observed as follows:

"...It is not in dispute that the submissions made by the appellant are neither recorded nor considered in the impugned order. In these circumstances, in our opinion, the impugned order dated 2nd June, 2016 deserves to be quashed and set aside qua the appellant and restored for fresh decision..."

4. Pursuant to the Order of Hon'ble SAT, the authorised representative (hereinafter referred to as "**AR**"), Sahani & Kothari Associates, vide its letter dated March 12, 2018 requested for an opportunity of inspection and personal hearing in the matter.
5. Noticee was granted an opportunity of personal hearing vide hearing notice dated March 22, 2018 on May 2, 2018 at SEBI Bhavan, Mumbai. He was further advised to submit his written submissions, if any, on or before the scheduled hearing. In response to the hearing notice, the Noticee vide his email dated April 30, 2018, requested to adjourn the scheduled hearing by 2-3 months as he was not keeping well and he wanted time to appoint a senior counsel to represent him before SEBI. Vide a hearing notice dated May 16, 2018, Noticee was granted an opportunity of personal hearing on June 12, 2018 at SEBI Bhavan, Mumbai. The Noticee again vide his email dated June 8, 2018, requested to adjourn the scheduled hearing by 2-3 months as he was still in search of a senior counsel to represent him before SEBI.
6. Acceding to the request of the Noticee, the Noticee was granted a final opportunity of hearing in the matter on July 10, 2018 at SEBI Bhavan, Mumbai, vide hearing notice dated June 21, 2018. In response to the said hearing notice, the Noticee vide his letter dated June 30, 2018, authorized Mr. Varun Nathani and Mr. Kirti Kothari to represent

him before SEBI.

Reply & Hearing

7. The Noticee vide his letters dated January 7, 2016 and July 7, 2018 has submitted his reply to SEBI. The submissions of the Noticee are as follows:
- a) It is submitted that SEBI has not taken into consideration the facts that, by virtue of its Ex-Parte Order in the matter, I have already undergone an unwarranted debarment of 3 years and 1 month.
 - b) I was employed to manage the Human Resource and Administrative department of Neesa Group of Companies. I was not in-charge of and was not responsible for managing the affairs of NTL. I am not one of the promoters and/or shareholders of NTL. Having an MBA degree in Human Resources, I was employed to strengthen the human resources and to formulate appropriate Human Resource policies.
 - c) By an email dated 24th May, 2011 labelled as an "Office Order", Mr. Sanjay Gupta (Group Chairman) informed that each employee drawing a CTC of ₹ 1,00,000/- (Rupees One Lakh Only) and above can be appointed as a Director on the Board of Neesa Group of Companies. By another email dated 29th March, 2012 labelled as a "Circular", Mr. Sanjay Gupta informed that since Neesa Group had multiple companies requiring necessary number of directors on the Board, each employee drawing a salary of ₹ 1,00,000/- (Rupees One Lakh Only) per month and working in the organization for more than six (6) months was required to accept employee directorship on various companies of the group as per the decision of the Group Secretarial Department. Pursuant to the aforesaid emails dated 24th May, 2011 and 29th March, 2012, I was called upon and was constrained to be appointed on January 18, 2013 as an Independent Additional Director in NTL.
 - d) As an Independent Additional Director, I was not in-charge of the management of the day to day business affairs of NTL. Since I was appointed in NTL as an Independent Additional Director, I was not involved with the financial affairs and day to day business activities of NTL. I state that I was neither in-charge of nor responsible for

the conduct of the business of NTL. In this context, I state that by an email dated February 21, 2013 addressed by Mr. Sanjay Gupta, labelled as "Office Order", it was noted that accounts, finance and revenue department would function under Mr. Nilesh Gupta. It was also noted that new fund raising (except FD, NCD, OCD, etc.) would be the responsibility of Mr. S.P. Sharma.

- e) On July 15, 2013 i.e. within 6 (six) months of my appointment, I resigned from the directorship of NTL. Given the manner of my appointment as an Independent Additional Director, I did not receive any notice, agenda and minutes to any of the board meetings of NTL. I have not signed any of the financial statements, balance sheets and any documents pertaining to the issuance and allotment of NCDs by NTL.
- f) Without prejudice, by a letter dated June 12, 2017, addressed to the SEBI, the aggrieved investors acknowledge that Mr. Sanjay Gupta, Mr. Arvind Gupta and Mr. Rahul Shah were in charge of full exercise of NCDs. The letter also records that innocent employees were erratically and purposely elevated as Directors by Mr. Sanjay Gupta to victimize them.
- g) I did not attend any of the board meetings, the minutes provided to me erroneously state that I have attended some of the board meetings of NTL. I submit that my presence is wrongly recorded in the board minutes of NIT. None of the minutes have been signed and/or initialled by me.
- h) In its Affidavit in Reply dated April 17, 2017 before the Hon'ble SAT, SEBI has not denied the aforesaid submission advanced on my behalf. SEBI has not refuted the fact that I submitted I did not attend the Board Meetings of NTL.
- i) The Ex-Parte Interim Order/ SCN dated June 3, 2015, does not state the charge or the particulars of allegations. No knowledge, connivance, consent is attributed and/or averred against me in it.
- j) I submit that Section 27 of SEBI Act does not *ipso facto* make every Director of the company liable for any offence allegedly committed by the company.
- k) The Board Resolution authorizing the issue of debentures is dated November 21,

2011. The approval from the shareholders was obtained at an Extra Ordinary General Meeting dated December 14, 2011. The Debenture Trust - Cum - Hypothecation Deed dated August 20, 2013 is admittedly entered into after my resignation as an Independent Additional Director of NTL. The Debenture Deed has been executed on behalf of NTL by Mr. Arvind Gupta.

- l) I submit that the SEBI has, in its various decisions taken inconsistent stand while considering and determining the liability of Independent Directors. In this context, reliance is placed on the decision dated 3rd August, 2017 of the SEBI in matter of *Amazan Capital Limited* (in context of offer and allotment of equity and preference shares in contravention of first proviso to section 67 (3) of the Companies Act, 1956 i.e. allotment to more than 50 persons). The Whole Time Member of, SEBI (holding that the Independent Directors were not vicariously liable for the default of Amazan Capital Limited) while considering the responsibility and liability of Independent Directors has held as follows:

"In terms of Section 73(2) of the Companies Act, 1956, the company and "every director who is an officer in default" is jointly and severally liable for repayment of the money raised in breach of provisions of section 73(1). In this context, I feel it relevant to consider the question as to whether a person in the board of directors falls within the category of "officer-in-default" automatically, by virtue of the definition contained in section 5 of the Companies Act, 1956.

...

The expression 'independent directors' does not find a specific mention in the definition of "officer in default" as provided under Section 5 of the Companies Act, 1956. However, on a broader perspective, an independent director can qualify to be within clauses (f) or (g) of the definition of "officer in default" provided under section 5, depending on the circumstances such as whether the company has a managing/whole time director or whether he has been charged by the board with certain specific responsibility etc. In this connection, I note that there are a number of judicial pronouncements on the liability of directors including K.K Ahuja vs. V.K

Vora (2009) 10 SCC 48; National Small Industries vs. Harmeet Singh Paintal (2010) 3 SCC 330 and S.M.S Pharmaceuticals Ltd. vs. Neeta Bhalla and Anr (2005) 8 SCC 89 generally upholding the position that the liability of any director in a company is restricted to actions of omission or commission committed by the company which had taken place with the knowledge and consent, whether explicit or implied, of such director. The array of judicial pronouncements emphasise the need to examine the role and conduct of the directors before fixing the liability on them in respect of any violation committed by the company. I therefore, am of the view that the broad principle that the liability of a director should flow out of knowledge and consent or connivance in the alleged act is apt to be applied in these situations to test their liability.

..."

- m) Before the Hon'ble SAT, SEBI had placed reliance on the decision of Hon'ble Madras High Court in the matter of *Madhavan Nambiar Vs. Registrar of Companies* (2002 1)8 Comp Cas 1 Mad). I submit that the reliance placed by SEBI is wholly misplaced. The decision of the Hon'ble Madras High Court was delivered in a matter pertaining to the liability of the Chairman/ Managing Director of a company. Further, while holding that the Chairman/ Managing Director was not vicariously liable, the Hon'ble Madras High Court held as follows:

"30. Taking into consideration the totality of the circumstances there being no negligence, there being no want of bona fides, there being no deliberate inaction, there being no wilful omission or commission on the part of the petitioner, who is a full time Government servant in the cadre of Secretary to the Government, this court is of the considered view on the facts that he is entitled to a direction as prayed for. Mere technicalities alone shall not be allowed to prevail and it is the totality of the circumstances and the bona fide conduct which has to be taken into consideration in all such matters. In the circumstances, the company petition is allowed and consequently the petitioner is relieved from the threatened proceedings by the respondents under Section 633(2) of the Companies Act in

respect of the two show-cause notices issued by the respondent/Registrar of Companies."

- n) Before the Hon'ble SAT, SEBI also placed reliance on the decision of the Hon'ble Apex Court in the matter of *N. Narayanan Vs. Adjudicating Officer, SEBI* (2013) 12 SCC 152. I, submit that the reliance placed by SEBI is wholly misplaced and distinguishable on facts. The decision relied upon by SEBI pertains to a Director who was a Promoter and Whole Time Director of the Company. The decision was rendered in the case of a public limited company listed in the stock market.
8. On the day of the scheduled hearing, Mr. Varun Nathani along with Mr. Kirti Kothari appeared on behalf of Mr. Manoj Kumar Singhal and submitted *inter alia*, as under:
- a) No averment in the SCN as to the role, responsibility or any connivance in the default made by the Company with respect to Mr. Manoj Kumar Singhal.
 - b) The SCN erroneously mentioned Mr. Manoj Kumar Singhal as a present Director whereas he has resigned on 15/07/2013.
 - c) He was an employee of the company drawing a salary of ₹ 1 lakh. Since he is an MBA graduate in HR, he was given the charge of administration and Human resources related matters only. He was never involved in the financial matters. Further, as per the e-mail of Mr. Sanjay Gupta dated, one Mr. Nilesh Gupta will be in charge of Finance.
 - d) As per the e-mail/circular of Mr. Sanjay Gupta, the Chairman cum Managing Director of the Company, every employee who draws a salary of more than rupees one lakh needs to be a Director in the company.
 - e) Pursuant to the above circular, he was appointed as an Independent additional non-executive director of the company w.e.f. 18/1/2013. He has not attended any Board meetings of the company and not aware of the affairs of the company.
 - f) Mr. Sanjay Gupta, group Chairman is designated for the affairs of the company hence he is the officer in default. Further, the investors vide investor complaint dated June 12, 2017 mentioned the names of Mr. Sanjay Gupta, Mr. Arvind Gupta and Rahul Shah

were in charge of issuance of NCDs and employees like Mr. Manoj Singhal were made scapegoats by them.

- g) He had sought an inspection of attendance register of the Board meetings of the company which was not given to him.
 - h) The Debenture Trust Deed shows that the entire issue is secured vide immovable assets worth ₹ 11.5 crore. The total issue of NCDs were for an amount of ₹ 5.6 crore. Since the value of securities are double the amount of issue the same may be recovered from the assets of the company.
 - i) As per Section 27 of the SEBI Act makes a person liable if he was in charge of the company and responsible for the conduct of the business of the company.
 - j) The Noticee placed reliance on the decision of Hon'ble Supreme Court in the matter of *K.K.Ahuja Vs. V.K.Vora* with respect to the vicarious liability of the Noticee for the conduct of affairs of the company.
 - k) The Noticee has also relied upon the Order of SEBI in the matter of Amazon Capital Limited and also distinguished *Madhavan Nambiar Vs. RoC* and *N. Narayanan Vs. AO, SEBI* ((2013) 12 SCC 152.
 - l) The ARs sought an opportunity to inspect the relied upon documents mentioned in the SCN and copies of the same.
9. The ARs inspected the documents in the matter on August 6, 2018 and August 23, 2018 and the copy of documents relied upon / referred to in the SCN were provided to them.
10. Pursuant to the hearing and inspection, the Noticee vide his letter dated September 10, 2018 made additional written submissions wherein *inter alia* he submitted as follows:
- a) The SCN fails to consider that Mr. Sanjay Gupta being the Promoter, shareholder holding approximately 97% of the shareholding of NTL (directly and indirectly as per the Information Memorandum provided by the SEBI during inspection) and

Chairman and Managing Director was responsible and in-charge of the conduct of the affairs of the business of NTL.

- b) The fact of my appointment as an Independent Additional Director is not in dispute. Though I did not attend any of the board meetings, the minutes provided to me erroneously state that I have attended some of the board meetings of NTL. Despite repeated requests, I have not been provided with inspection of the attendance register of NTL. The fact that the Board Minutes incorrectly shows my name as an attendee to board meetings of NTL is inter alia evident from the fact that I have not received any sitting fees, reimbursement or any other payment from NTL.

Consideration & Findings

11. I have considered the allegations and materials available on record including Order dated June 2, 2016 and the submissions of the Noticee. On perusal of the same, the following issue arises for consideration.

- i. *Whether the company came out with the Offer of NCDs as stated in the interim order. If so, whether the said issues are in violation of Section 56, Section 60 read with Section 2(36), Section 73 and Section 117C of the Companies Act, 1956 read with the ILDS Regulations?*
- ii. *Whether any directions under Sections 11(1), 11(4), 11A and 11B of SEBI Act and Regulation 28 of the SEBI (Issue and Listing of Debt Securities) Regulation, 2008 should be issued against the Noticee for the alleged violations of relevant provisions of Companies Act, 1956 and SEBI (Issue and Listing of Debt Securities) Regulations, 2008 in respect of offer and issuance of Non-Convertible Debentures by NTL?*

ISSUE No. 1- *Whether the company came out with the Offer of NCDs as stated in the interim order. If so, whether the said issues are in violation of Section 56, Section 60 read with Section 2(36), Section 73 and Section 117C of the Companies Act, 1956 read with the ILDS Regulations*

12. I note from the Order dated June 2, 2016 that NTL had issued and allotted Non-Convertible Debentures (hereinafter referred to as “NCDs”) worth ₹ 5.96 crore to

341 investors during the financial year 2013 – 2014 (April 8, 2013 to August 22, 2013). I note that the said Order had on the basis of material available on record, found that NTL engaged in fund mobilizing activity from the public, through the offer of NCDs and has contravened the provisions of Sections 56, 60, 73 and 117C of the Companies Act, 1956 and various provisions pertaining to the SEBI (Issue and Listing of Debt Securities) Regulations, 2008 (hereinafter referred to as “**ILDS Regulations**”). Noticee has not contested on the fact of deemed public issue and the legal liability arising out of failure to comply with the deemed public issue norms.

***ISSUE No. 2-** Whether any directions under Sections 11(1), 11(4), 11A and 11B of SEBI Act and Regulation 28 of the SEBI (Issue and Listing of Debt Securities) Regulation, 2008 should be issued against the Noticee for the alleged violations of relevant provisions of Companies Act, 1956 and SEBI (Issue and Listing of Debt Securities) Regulations, 2008 in respect of offer and issuance of Non-Convertible Debentures by NTL?*

13. The Noticee has submitted that Mr. Sanjay Gupta being the Promoter, shareholder holding approximately 97% of the shareholding of NTL (directly and indirectly) and Chairman and Managing Director was responsible and in-charge of the conduct of the affairs of the business of NTL. Mr. Sanjay Gupta, group Chairman is designated for the affairs of the company, hence he is the officer in default. Further, the investors vide investor complaint dated June 12, 2017 mentioned the names of Mr. Sanjay Gupta, Mr. Arvind Gupta and Mr. Rahul Shah were in charge of issuance of NCDs and employees of the company were made scapegoats by them.
14. Therefore, the point for consideration is whether there is any material to consider Mr. Sanjay as Chairman and Managing Director of the company or whether he is charged or specified by the Board under Sections 5(f) and (g) of Companies Act, 1956 and therefore, whether he is the officer in default.
15. Before addressing the submissions of the Noticee, it would be appropriate to quote Section 5 and Section 73(2) of the Companies Act, 1956 which reads thus:-

“Meaning of “officer who is in default”.

5. For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :

(a) the managing director or managing directors;

(b) the whole-time director or whole-time directors;

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision:

Provided that the person so charged has given his consent in this behalf to the Board;

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form."

16. It is noted from the Information Memorandum- NCD that NTL has been promoted by Mr. Sanjay Gupta and he holds a majority stake in the company along with his family members and his associate concerns. The said Information Memorandum- NCD shows Mr. Sanjay Gupta as a Director in the company. As per MCA record, Mr. Sanjay Gupta was a Director in the company and the same has already been determined in the Order dated June 2, 2016. The Noticee has submitted that the MoU signed between the company and Neesa NCD core group, was signed by Mr. Sanjay Gupta as CMD of NTL. In this regard, it is noted from a letter dated October 29, 2014 from IDBI

Trusteeship Services Ltd. to Deputy Director, MCA that the said letter mentions the Noticee himself as Managing Director of NTL and Mr. Sanjay Gupta as Neesa Group Chairman. Further, another letter dated April 16, 2014 from IDBI Trusteeship Services Ltd. addresses Mr. Sanjay Gupta as Chairman of NTL. Thus, there are documents available on record which shows Mr. Sanjay Gupta as Chairman of NTL / Neesa Group companies and not CMD of NTL. It is noted that documents are available on record which are contradictory to each other. Whether reliance can be placed on any of the documents for the purpose of entering a finding as to whether any director is a Managing Director depends on the definition of "Managing Director" as stated under Section 2(26) of the Companies Act, 1956 which states as follows:- *"managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or, by virtue of its memorandum or articles of association, is entrusted with [substantial powers of management] which , would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called:*

[Provided that the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within substantial powers of management:

Provided further that a managing director of a company shall exercise his powers subject to the superintendence, control and direction of its Board of directors;]

17. The above definition of Managing Director states that Managing Director is appointed by the modes mentioned therein and he is entrusted with substantial powers of management which, would not otherwise be exercisable by him. There is no evidence on record to indicate any of the Directors have been so appointed as Managing Director and they were holding substantial powers of management. In

view of absence of any such documents, the contradictory documents referred to above cannot be accepted as evidence to indicate that any Director was a “Managing Director”. Noticee has also not submitted any document apart from the aforesaid MoU showing that Mr. Sanjay Gupta was CMD / MD of NTL. Moreover, the reliance placed by the Noticee on investor complaint dated June 12, 2017 is also not factually correct as the said complaint letter mentions, Mr. Sanjay Gupta as Promoting Director and Group Chairman and not as CMD / MD of NTL. Even if the same mentions his designation the same cannot meet the requirement of sufficient evidence in view of the definition of Managing Director discussed above. Further, the assertions made by the complainants that Mr. Sanjay Gupta, Mr. Arvind Gupta and Mr. Rahul Shah were in charge of issuance of NCDs and employees of the company were made scapegoats by them is not backed by any primary or corroborative evidence.

18. Further, I note that “officer who is in default” has been defined under Section 5 of Companies Act, 1956 does not include Chairman as “officer who is in default”. Further, if Mr. Sanjay Gupta was appointed as “officer who is in default” in terms of provisions of Section 5 (f) / (g) of Companies Act, 1956 then as per Rule 4BB of the Companies (Central Government’s) General Rules and Forms 1956 read with Section 5 (f) / (g) of Companies Act, 1956, the company, within thirty days of exercising its powers under Section 5(f) / (g) of the Companies Act, 1956, is required to file with the Registrar of Companies a return in Form 1AA duly signed by the Secretary or, where there is no Secretary by a Director. No material has been brought on record to show that the said Form was filed with the Registrar of Companies. In the absence of any documentary proof, the contention of the Noticee is not acceptable.
19. In view of the above it is held that Mr. Sanjay Gupta was the Director of NTL at the relevant time of impugned issue and allotment of NCDs.
20. Here I would like to quote the observations of Hon’ble SAT in the matter of *Manoj Agarwal Vs. SEBI* dated July 14, 2017 wherein the Hon’ble Tribunal observed as follows:

“...11. Argument of the appellant that he could not be said to be an “officer in default” is without any merit. Section 5 of the Companies Act, 1956 defines the expression ‘officer who is in default’ to mean the officers named therein. Section 5(g) provides that where any company does not have any of the officers specified in clauses (a) to (c) of Section 5, then any director who may be specified by the Board in that behalf or where no director is so specified then all the directors would be “officer who is in default”. 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 or any specified director of BREDL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as per Section 5(g) of the Companies Act, 1956 BREDL and all the directors of BREDL are liable. Therefore, decision of the WTM that all directors of BREDL including the appellant would constitute “officer in default” cannot be defaulted.”

21. In view of the provision of officer in default as interpreted by the Hon’ble SAT, the further point that arises for consideration is whether the Noticee is falling as officer in default under the category of “all directors” under Section 5(g) of Companies Act, 1956.
22. In the extant matter it has already been held vide order dated June 2, 2016 that NTL has failed to follow the public issue norms contained in Section 56 of the Companies Act, 1956 before issuance of NCDs to more than 50 entities. Further, no documentary proof has been submitted to show either that any officer of the company was designated as Managing Director / Whole Time Director / Manager nor that any officer was charged by NTL Board or specified by the Board to comply with the public issue provisions contained in the Companies Act, 1956 including the obligation to refund the amount under Section 73(2) of Companies Act, 1956.
23. Therefore, I proceed to consider whether there are any materials on the status of the Noticee as Director. It is noted from MCA records that the Noticee was a Director in the company since April 28, 2007 and was an Additional Director in the company since January 18, 2013. It is observed from the consent letter dated April 28, 2007 written by the Noticee to the Board of Directors of Gujarat Sysport Services Pvt. Ltd.,

former name of NTL and a consent letter dated January 18, 2013 that the Noticee has given his consent to be the “Director” of NTL. The resolution passed at the meeting of Board of Directors of NTL held on January 18, 2013 shows that he was appointed as an Additional Director in the company. He had resigned from the directorship of the company on July 15, 2013. The same is borne out from his resignation letter. Thus, it is held that the Noticee was the Director of the company and not an Independent Director as claimed by him. Admittedly, the Noticee was a Director of NTL when amounts were collected by the company in contravention of the public issue norms and there is nothing on record to suggest that any particular officer/Director was charged by the Board to comply with the public issue norms. In such a case, all the Directors of NTL including the Noticee would be “officer in default” under Section 73(2) read with Section 5 of the Companies Act, 1956. The liability of Noticee to refund ₹ 5.96 crore is joint and several with the company and its other officers in default. 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 Government's) General Rules and Forms, 1956 read with Rule 3(c) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the rate of interest prescribed in this regard is fifteen per cent. Therefore, I find that Noticee is jointly and severally liable with NTL, Mr. Arvind Gupta, Mr. Yogesh Ghisumal Gemawat, Mr. Sanjay Gupta, Mr. Kamendra Joshi and Mr. Suresh Kumar (Company and other Directors have been already been directed vide order dated June 2, 2016) to refund the amounts collected from the investors with interest at the rate of

15 % per annum, for the non-compliance of Sections 56, 60 read with 2(36), 73 and 117C of Companies Act, 1956 read with relevant provisions of ILDS Regulations.

24. The submission of the Noticee that he was employed to manage the human resources and administration department or that he was not in charge of the management of the day to day business affairs of NTL would not absolve the Noticee from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956. In this regard, I would like quote the observations of Hon'ble SAT in the matter of *Manoj Agarwal Vs. SEBI* dated July 14, 2017 wherein, the Hon'ble Tribunal observed as follows:

"Fact that appellant had merely lent his name to be a director of BREDL at the instance of Mr. Soumen Majumder and for becoming a director of BREDL the appellant had neither paid any subscription money to BREDL and the fact that the appellant was not involved in the day to day affairs of BREDL would not absolve the appellant from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956..."

25. Noticee has submitted that vide an email dated February 21, 2013 addressed by Mr. Sanjay Gupta, labelled as "Office Order", it was noted that accounts, finance and revenue department would function under Mr. Nilesh Gupta. It was also noted that new fund raising (except FD, NCD, OCD, etc.) would be the responsibility of Mr. S.P. Sharma. It is noted that Mr. Nilesh Gupta and Mr. S.P. Sharma are neither the Directors of the company nor officers in default in terms of Section 5 of Companies Act, 1956. Therefore, for any liability arising out of failure to follow the public issue norms specified under the Companies Act, 1956, the Directors of the company will be responsible in terms of Section 5 (g) of Companies Act, 1956 and not the employees of the company.
26. I further note that terms and conditions stipulated under the said Office Order and Circular, are terms and conditions which are extraneous to the provisions of the Companies Act, 1956. The Noticee has not submitted any documentary proof to show

that the said conditions were in the Article of Association of the company or were ratified in the company's annual general meeting. The Noticee holding a Master's degree in Business Administration should know that the terms and conditions of the said Office Order and Circular were not sacrosanct and he need not have joined the Board of the company as the same was not mandatory under the relevant provisions of law. Further, the Noticee has not submitted anything to demonstrate that he had registered his protest with the company to be inducted as a Director on the Board of the company in that manner.

27. Further, the Noticee has submitted that since he was appointed in NTL as an Independent Additional Director, he was not involved with the financial affairs and day to day business activities of NTL. The Noticee has submitted that he was not in-charge of and was not responsible for managing and conduct of the affairs of NTL. He was employed to strengthen the human resources and to formulate appropriate human resource policies.
28. It may be pointed out that the fact that the noticee has been appointed as Additional Director does not alter his rights and liabilities as Director as an Additional Director is also a director within the meaning of Section 2(13) of the Companies Act, 1956 which defines Director as any person occupying the position of Director, by whatever name called.
29. Though the Noticee claimed that he has been appointed as Independent Additional Director, as discussed in paragraph 23 of this order, there is no evidence in the form of consent letter or Board resolution to state that he has been appointed as an Independent Director. In this regard the mentioning of his name as Independent Director in one of the rows in the Form 32 uploaded by the company cannot be adequate evidence to indicate that he has been appointed as an Independent Director as the documents uploaded along with the Form -32 viz., consent letter of the Noticee and Board Resolution appointing him does not state him as an Independent Director, the same being the primary documents of his appointment as a Director in the company.

30. Noticee has placed reliance on the decision of Hon'ble Supreme Court in the matter of *K.K.Ahuja Vs. V.K.Vora* with respect to the vicarious liability of the Noticee for the conduct of affairs of the company. In this regard it is noted that the said matter dealt with the issue of persons who can be said to be "in charge of and was responsible to the company for the conduct of business of the company" as referred to in Section 141 of the Negotiable Instruments Act, 1881. The Apex Court observed that to be vicariously liable under sub Section (1) of Section 141 of the Negotiable Instruments Act, 1881, a person should fulfil the "legal requirement" of being a person in law (under the statute governing the companies) responsible to the company for the conduct of the business of the company and also fulfil the "factual requirement" of being a person in charge of the business of the company. The said observation of Apex Court was in terms of the express provision / language of the Section 141 of the Negotiable Instruments Act, 1881. In the instant matter, the liability of the Noticee stems from Section 73 (2) of Companies Act, 1956 which states that for non-compliance of Section 73 (2) of Companies Act, 1956, obligation to refund the amount with interest is jointly and severally on the company and every Director of the company who is an officer in default. Expression "officer in default" used in Section 73(2) of Companies Act, 1956 has to be read with Section 5 of Companies Act, 1956 which defines the expression "officer who is in default". The legal requirement and factual requirement as observed by Apex Court in the aforesaid matter is not there under Section 73(2) of Companies Act, 1956 read with Section 5 of Companies Act, 1956, in view of the express language of the said Sections of the Companies Act, 1956.

31. In this regard, I would like to quote the observations of Hon'ble SAT in the matter of *Manoj Agarwal Vs. SEBI* dated July 14, 2017 wherein the Hon'ble Tribunal observed as follows:

"19. Reliance was also placed by the counsel for the appellant on a decision of the Supreme Court in case of S.M.S. Pharmaceuticals Ltd. (supra). That decision dealt with the expression "officer in default" referred to in Section 141 of the Negotiable

Instruments Act, 1881. In the present case we are concerned with the expression “officer who is in default” as defined under Section 5 of the Companies Act, 1956. Since the expression “officer in default” defined under Section 5 of the Companies Act, 1956 is not pari materia with that expression defined under the Negotiable Instruments Act, the Apex Court decision in the case of S.M.S. Pharmaceuticals Ltd. (supra) would have no relevance to the fact of the present case.”

32. The above discussion clearly shows that in order to fall in the category of officer in default under Section 5 of the Companies Act, 1956, the said person need not be “in charge of and be responsible to the company for the conduct of business of the company”. Therefore, the argument that noticee was not in charge of and was not responsible to the company for the conduct of business of the company has no merit in view of the definition of officer in default as defined under Section 5 of the Companies Act, 1956.
33. Section 27 of SEBI Act is similar to that of Section 141 of the Negotiable Instruments Act, 1881. Section 27 of SEBI Act also deals with situations where Directors of the company are liable for the offences by the company. The obligations under SEBI Act are in addition to and not in derogation of the obligations under the Companies Act, 1956. As observed by Hon’ble Supreme Court of India in the *Sahara Case*, “*I only want to highlight the fact that both the Acts will have to work in tandem, in the interest of investors, especially when public money is raised by the issue of securities from the people at large.*” It is noted that one of the situations in which the liability of Directors spring up under Section 27 of the SEBI Act is when the offence committed is attributable to the neglect of the Director or knowledge of the Director of the violation. Therefore, even under Section 27 of the SEBI Act, Noticee as a Director would have liability if acts of neglect can be found against him. While dealing with the acts of neglect and knowledge, it is observed from the Board Minutes dated April 8, 15, 25, 30 of 2013, May 20, 2013, June 15, 2013 and July 10, 2013 that the Noticee was present in the said meetings where issue of NCDs was discussed and approved. The Noticee however, submitted that he did not receive any notice, agenda and

minutes to any of the board meetings of NTL. Noticee submitted that none of the minutes of the Board meetings were signed / initialed by him. He has also submitted that he had not signed any of the financial statements, balance sheets and any documents pertaining to the issuance and allotment of NCDs by NTL including Debenture Trust - Cum - Hypothecation Deed. I note that there is no requirement under the relevant law that minutes of Board meetings, financial statements, balance sheets and any documents pertaining to the issuance and allotment of NCDs by NTL including Debenture Trust - Cum - Hypothecation Deed has to be signed by all the Directors of the company and as such the submission of the Noticee does not strengthen his case. Noticee has submitted that his presence has been wrongly recorded in the said meetings and his request to inspect the attendance register of the Board meetings was not acceded. The submissions of the Noticee are not tenable as he has not demonstrated any steps taken by him to rectify the same viz., complaints made to the company, Registrar of Companies. Further he has also not submitted any documentary proof to show that he had made a request to the company to inspect the attendance register of the Board meetings. Therefore, in view of the record of participation in the board meetings, there is material to indicate that the Noticee has knowledge of the deemed public issue and violation of it thereof. Even assuming that he has not participated in any of the board meetings as contented by the Noticee, being a Director, the Noticee should be aware that as per Section 285 of the Companies Act, 1956 at least four Board meetings should be conducted in every year and one such meeting has to be conducted at least once in three months of every year. The fact that the Noticee was an Additional Director for around 6 months when the money was raised by the company from the public, would require him to make enquiry on why two such board meetings were not organized. It is not the case of the Noticee that he had made relevant enquiry to discharge his due diligence. The fact that no evidence of such enquiry is on record shows the element of "neglect" by the Noticee. If such neglect was not there on the part of the Noticee, it would have raised the red flags making it possible for him to know the deemed public issue violations. Therefore, even on the ground of knowledge or neglect, the

Noticee has liability under Section 27 of the SEBI Act for violations of the deemed public issue norms. It may be noted the liability discussed under Section 27 of SEBI Act is independent of the liability arising out of Section 5 of the Companies Act, 1956 as an officer in default.

34. Noticee has submitted he has not received any sitting fees, reimbursement or any other payment from NTL. The said submission of the Noticee is also not acceptable in light of the Hon'ble SAT's order in the matter of *Manoj Agarwal Vs. SEBI* dated July 14, 2017, as once it is established that the company has not followed public issue norms, every Director of the company who is an "officer in default" shall refund jointly and severally the amount with interest. Therefore, even if it is accepted that the Noticee did not receive any sitting fees, reimbursement or any other payment from NTL, the same does not absolve him of his obligations as a Director including to refund the amount collected from the investors with interest.

35. The reliance placed by the Noticee on the matter of *Amazan Capital Ltd.* is also not relevant to the present proceedings, as the same was in the context of Independent Directors and it has already been held in preceding paragraphs that the Noticee was never an Independent Director of the company. He was the Director / Additional Director in the company. Further the case involves the element of knowledge or neglect as established in preceding paragraph 32, which distinguishes it from the matter of *Amazan Capital Ltd.* In that sense the facts of the present case cannot be compared with the *Amazan Capital Ltd.* as brought out in that order.

36. Noticee's submission that the ex-parte interim order dated June 3, 2015 does not state the charge or allegations is not factually correct as it clearly states under paragraphs 4.9 and 5 that :

"...Upon a consideration of the aforementioned paragraphs, I am of the view that NTL is prima facie engaged in fund mobilising activity from the public, through the Offer of NCDs and as a result of the aforesaid activity has violated the aforementioned provisions of the Companies Act, 1956 (Section 56, Section 60 read with Section 2(36), Section 73, Section 117C) read with the Debt Securities Regulations.

... Steps therefore, have to be taken in the instant matter to ensure that only legitimate fund raising activities are carried on by NTL and no investors are defrauded. In light of the facts in the instant matter, I find that there is no other alternative but to take recourse through an interim action against NTL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the Offer of NCDs.

..."

37. The Noticee has submitted that the Debenture Trust Deed shows that the entire issue is secured vide immovable assets worth ₹ 11.5 crore. The total issue of NCDs were for an amount of ₹ 5.6 crore. Since the value of securities are double the amount of issue the same may be recovered from the assets of the company. In this regard, I note that the scope of the present proceedings is to determine whether the Noticee is liable to refund the money to investors or not in view of deemed public issue norms and consequential liabilities.

38. The Noticee has also contended that the reliance placed by SEBI on the matter of *Madhavan Nambiar Vs. Registrar of Companies* is misplaced as the same deals with liability of the Chairman / Managing Director of the company. I am not inclined to agree with the contention of the Noticee. The reliance is placed on the aforesaid order of the Hon'ble High Court of Madras with respect to the breach of law and duty by a Director of a company, wherein it was observed as follows:

" 13. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956.

Though the case pertains to the liability of Chairman cum Managing Director, the Hon'ble High Court while laying down the liability in clear terms as bought out in para 14 of the judgment equated that liabilities are same for all directors in respect of violation of the statutory provisions of the Act and the rules. Therefore, it is immaterial that the law of liabilities of Directors was laid down in the context of determining the liability of Chairman-cum Managing Director. On application of law, the Hon'ble High Court granted the relief sought by the petitioner does not mean that the law laid down in the context of Chairman cum Managing Director is not applicable.

39. A person cannot assume the role of a Director in a company in a casual manner. The position of a 'Director' in a public company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such Director or face the consequences for any violation or default thereof. The Noticee cannot therefore wriggle out from liability. A Director who is part of a company's board shall be responsible and liable for all acts carried out by a company. Accordingly, the Noticee is obligated to refund of the money collected by the company to the investors during his tenure of directorship with the company as per the provisions of Section 73 of Companies Act, 1956. In view of the failure to discharge the said liability of refund, the Noticee is liable to be debarred for an appropriate period of time.
40. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public is to direct the Noticee to refund the monies collected, with interest to such investors. Also, in order to safeguard the interest of the investors and to further ensure orderly development of securities market, the Noticee becomes liable to be debarred for an appropriate period of time. *Therefore, appropriate directions under Sections 11(1), 11(4), 11A and 11B of SEBI Act and Regulation 28 of the SEBI (Issue and Listing of Debt Securities) Regulation, 2008 should be issued against the Noticee for the alleged violations of relevant provisions of Companies Act, 1956 and SEBI (Issue and Listing of Debt Securities) Regulations, 2008*

in respect of offer and issuance of Non-Convertible Debentures by NTL?

41. 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. Mr. Manoj Kumar Singhal jointly and severally with NTL, Mr. Arvind Gupta, Mr. Yogesh Ghisumal Gemawat, Mr. Sanjay Gupta, Mr. Kamendra Joshi and Mr. Suresh Kumar (Company and other Directors have been already been directed vide order dated June 2, 2016) shall forthwith refund the money collected by the company, during their respective periods of directorship through the issuance of NCDs including the application money collected from investors during their respective period of directorship, till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.
- b. The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable".
- c. Mr. Manoj Kumar Singhal is directed to provide an updated full inventory of all his assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form.
- d. Mr. Manoj Kumar Singhal is permitted from selling his assets, properties and holding of mutual funds/shares/securities held by him 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.
- e. Mr. Manoj Kumar Singhal in his personal capacity to make refund, if not already

done by NTL, Mr. Arvind Gupta, Mr. Yogesh Ghisumal Gemawat, Mr. Sanjay Gupta, Mr. Kamendra Joshi and Mr. Suresh Kumar, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.

- f. After completing the aforesaid repayments, Mr. Manoj Kumar Singhal in his personal capacity shall file a report of such completion with SEBI, within a period of three months, from the date of service 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 holding such certificate.
- g. In case of failure of Mr. Manoj Kumar Singhal to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of service of this Order, may recover such amounts from him as he is liable to refund as specified in paragraph 23 of this Order, in accordance with Section 28A of the SEBI Act including such other provisions contained in securities laws.
- h. Mr. Manoj Kumar Singhal is directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and is 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. He is also restrained from associating himself 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.

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

33. Copy of this Order shall be forwarded to the recognised Stock Exchanges, Depositories and Registrar and Transfer Agents for information and necessary action.

34. 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.

DATE: November 29, 2018

PLACE: Mumbai

-Sd/-

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA