BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER Ref No.: Order/SS/VS/2019-20/6309-6313]

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 AND SECTION 23-I OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 5 OF SECURITIES CONTRACTS (REGULATION) ACT (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 2005.

In respect of:

1. **ABG Shipyard Limited** (PAN No. AACCA2731P)
2. **Major Arun Pathak** (PAN No. AAHPP6384P)
3. **Major Syed Abdi** (PAN No. AIKPA0714H)
4. **Mr. S Muthuswamy** (PAN No. AADPM4543K)
5. **Mr. Dhananjay Datar** (PAN No. AAGPD0957K)

In the matter of
ABG Shipyard Limited

1. ABG Shipyard Limited (hereinafter referred to as "ABG"/ "the 'Notice No. 1"), is a company having its share listed on the Bombay Stock Exchange Limited (BSE). Securities and Exchange Board of India ('SEBI') had received a reference from Income Tax Department ('ITD'), vide letter dated October 24, 2013, whereby it was informed that ABG) along with its promoter group entity Second Land Developers Pvt. Ltd. ('SLDPL') currently known as 'ABG Resources Private Ltd.' had approached Income Tax Settlement Commission ('ITSC') and in the proceedings before the ITSC, ABG had submitted that it had debited bogus purchases to its accounts and the money so taken out was applied towards purchase of land through number of companies including SLDPL. Thus, the funds to the tune of ₹101 Cr had been admittedly diverted by ABG for making investments in other companies controlled by its promoters. The ITSC had accepted the submissions and passed the settlement order on April 10, 2013. From ITSC order dated April 10, 2013 SEBI observed that:-

   A. Funds to the tune of ₹101 Crore were diverted for undue benefit to the promoter group entity thereby creating financial loss to the stakeholders of ABG:

   a. ABG had entered into transactions with three entities viz. Arvind Pipes, Modern Tubes and Pratibha Steels for obtaining bogus purchase bills worth ₹1,01,54,392/- during the Financial Years 2007-09 and paid approximately 1% commission for generating net cash of ₹100.02 Crore (Approximately) utilized towards removal of illegal encroachers and cash component for land belonging to SLDPL

b. ABG admitted that generation of cash by way of accommodation of purchase bills cannot be denied and it has to accumulate and arrange funds for a period of time to settle the payment of ₹100.02 Crore to the illegal occupants.

c. ABG vide its reply letter to the Summons confirmed that there is no connection from between SLDPL and the three entities. Payment to the tune of ₹100.02 Crore were made only by ABG directly to the illegal occupants encroaching SLDPL's land.

d. Order passed by ITD against such entity Modern Tube Industries was obtained which *inter alia* specifically mentions that "*sales of ₹30.69 Crores represents the issuance of accommodation sales bill to one M/s. ABG Shipyard Ltd.*"

B. ABG had mislead its stakeholders by publishing false and mis-stated financial results during the Financial Years 2008-14 as true and fair:

a. From the financial statements for the Financial Year 2009-10, it is noted that SLDPL has accounted for an income of ₹71.33 Crore as Gain on Forfeited Rights. Expenses incurred for ₹71.33 Crore in clearing encroachment to the land have been capitalized as an addition to land and sufficient details are not available with ABG.

b. Before presenting the settlement application on February 09, 2012, ABG had disclosed additional undisclosed income and fully paid tax and interest amounting to ₹15.38Crore.

c. From the financial statement for the FY 2012-13, it is noted that SLDPL had submitted that ₹100.02 Crore were actually incurred towards expenses in clearing encroachments to the land sourced by a group company i.e., ABG.

d. Pursuant to ITSC order, SLDPL capitalized amount of ₹100.02 Crore towards removal of illegal occupants on the land and credited the equivalent amount as payable to ABG. SLDPL reversed ₹71.33 Crore wrongfully credited as income during FY 2009-10 by charging the same as an extra-ordinary item during the FY 2012-13.

e. From the ITSC order, it is seen that, during the FYs 2008-10, ABG had accented for an amount of ₹62 Crore and ₹38.93 Crore as revenue expenditure (ship making expenses) and capital expenditure [fixed assets (yard/dock)] respectively. ABG by disclosing such reversal of such revenue expenses and depreciation claimed on the said fixed assets as an additional income pursuant to search by ITD and paying tax on the same before making application to ITSC establishes that such purchases are paying tax on the same before making application to ITSC establishes that such purchases are fictitious and depreciation has been wrongly claimed on non-existing assets.

f. From the financial statement for the FY 2013-14, it was noted that as a consequence of ITSC order, an amount of ₹38.72 Crore has been debited to SLDPL, a related party, the impact of which is as – (i) Deletion in building ₹21.23 Crore, (ii) corresponding, effect of depreciation of ₹5.72 Crores and (iii) deduction in CWIP of ₹17.49 Core. Further, ABG vide its reply to summons confirmed that an amount of ₹ 62 Crore is debited to SLDPL and adjusted against the change in inventories-work in progress.

g. The adjustment entries passed during FY 2013-14, after payment of tax on February 2012, establishes that ABG has been carrying fictitious fixed assets and claiming depreciation on the same even during FY 2012-13 apart from the depreciation claimed right from the initial year of capitalization. i.e., 2008-09/2009-10 as the case may be. The adjustment entries passed by ABG has camouflaged the true nature of such transactions viz. non-disclosure of payment to SLDPL, avoiding disclosure of extraordinary income and decapitalizing fictitious fixed assets.

2. It was noted that:

a. ABG had failed to disclose order dated April 10, 2016 passed by IT Department, to which ABG is a party, a material price sensitive information, to the stock exchanges as required under clause 36 of the Equity Listing Agreements (hereinafter referred to as 'ELA") read with section 21 of the SCRA.

b. ABG was responsible for publishing incorrect and misstated financial results over the years leading to violation of the spirit of principles enshrined under clause 41 read with clause 50 of ELA and for violation of the spirit of principles laid down for Corporate Governance as enshrined under clause 49 of ELA.

c. Major Arun Pathak and Major Syed Abdi were the signatory to the certification on compliance with Code of Conduct of ELA during the FY 2012-13 and FY 2013-14, respectively. The Noticees No. 2 and 3 have violated the provisions of clause 49(I) D(ii) read with clause 41 and clause 50 of ELA and given an incorrect declaration that all Board members and senior management personnel of the Company have complied with the company's code of conduct in spite of various non-compliances such as:

- By diverting the funds of ₹101 Cr. (approx.) from ABG, a publicly listed entity, for undue benefit of SLDPL, a promoter group entity, the directors who were also promoters were engaged in an activity which is in prejudicial to the interest of the company and compromise their responsibility to the company;

- The board of directors by not exercising proper due diligence and approving incorrect and mis-stated financial results declared by the company over the period 2008-14 had engaged in an activity which is prejudicial to the interest of the company.
- The diversion of funds has created financial loss to the company and had resulted into not safeguarding and protecting the company's assets from misappropriation;
- By avoiding disclosure of payment of ₹100.02 Cr. made to SLDPL and by passing inappropriate reversal / adjustment entries passed during the FY 2013-14, the company had published incorrect related party disclosures during the entire period 2008-14.

d. It is noted that the Major Arun Pathak and Major Syed Abdi were the members of the audit committee of the company who had failed to diligently perform the role entrusted upon them as prescribed under clause 49 (II) of ELA read along with the facts as mentioned hereinabove regarding mis-stated financial results during the FYs 2008-14. In view of the same, they have been alleged to have violated the provisions of clause 49 (II) (C), (D) and (E) read with Clause 41 and 50 of ELA.

e. It is noted that the Mr. Dhananjay Datar, Major Arun Pathak and Major Syed Abdi were the signatories to the CEO/CFO certification, who diligently did not performed their role and have misled the shareholders of ABG by not disclosing the true state of affairs of it on account for following:

- Wrongly certifying that they have reviewed financial statements and the same do not contain any materially untrue statement or contain statements that might be misleading
- Wrongly certifying that no transactions entered into by the company are fraudulent, illegal or violative of the company's code of conduct
- Wrongly certifying that the financial statements present a true and fair view of the Noticee No. 1's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

In view of the same, the Noticees No. 2, 3 and 5 have been alleged to have violated the provisions of clause 49 (V) read with Clause 41 and 50 of ELA.

f. It is noted that the ABG (the Noticee No. 1) and its non-independent directors (NIDs) and executive directors (EDs) including Major Arun Pathak (the Noticee No. 2), Major Syed Abdi (the Noticee No. 3), Mr. S Muthuswamy (the Noticee No. 4) and Mr. Dhananjay Datar (the Noticee No. 5) were responsible for misleading the stakeholders of the company by approving financial results published over the years which were false and mis-stated as they had failed to perform the role entrusted upon them to protect the interests of the stakeholders of ABG.

3. In view of the above, the Noticee No. 1 and its NIDs and EDs have been alleged to have violated the provisions of (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as "the PFUTP Regulations") and ELA as described in the following table:- .

Table: Alleged violations by the Noticees

Sr. No.	Name of Noticee	Provision of law / regulation violated	Charging Provisions
1	ABG Shipyard Ltd.	Section 12A(a),(b) and (c) of SEBI Act read with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations Clause 36, 41, 49 and 50 of ELA read with section 21 of SCRA	Section 15HA of SEBI Act Section 23A(a) and 23E of SCRA*
2	Major Arun Pathak	Section 12A(a),(b) and (c) of SEBI Act read with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations Clause 49(I)(D)(ii), 49(II) (C), (D), (E) & 49(V) read with 41 and 50 of ELA	Section 15HA of SEBI Act Section 23H of SCRA
3	Major Syed Abdi	Section 12A(a),(b) and (c) of SEBI Act read with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations Clause 49(I)(D)(ii), 49(II) (C), (D), (E) & 49(V) read with 41 and 50 of ELA	Section 15HA of SEBI Act Section 23H of SCRA
4	Mr. S Muthuswamy	Section 12A(a),(b) and (c) of SEBI Act read with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations	Section 15HA of SEBI Act
5	Mr. Dhananjay Datar	Section 12A(a),(b) and (c) of SEBI Act read with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations Clause 49(V) read with 41 and 50 of ELA	Section 15HA of SEBI Act Section 23H of SCRA

*Note: *SCRA is meant for Securities Contracts (Regulation) Act, 1956*

The relevant provisions of SEBI Act, PFUTP Regulations and SCRA are reproduced as follows:

PFUTP Regulations, 2003

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b)……..

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.

4. Prohibition of manipulative, fraudulent and unfair trade practices

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:—

(e) any act or omission amounting to manipulation of the price of a security;

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(r) planting false or misleading news which may induce sale or purchase of securities.

SEBI Act, 1992

Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

12A. *No person shall directly or indirectly-*

(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;

SCRA, 1956

Conditions for listing.

21. *Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.*

4. SEBI felt *prima facie* satisfied that there are grounds to inquire and adjudicate upon the alleged violations of the provisions of the SEBI Act, the PFUTP Regulations and ELA, by the Noticees and by a *communication-order* dated October 31, 2018, the undersigned has been appointed as the Adjudicating Officer to inquire into and adjudge under section 15HA of the SEBI Act and section 23A(a), 23E and 23H, of the SCRA and the alleged violations by the Noticees.

5. After the receipt of the records, the notice to show cause (SCN) no. EAD-2/SS/VS/33514/2018 dated December 06, 2018 was issued to the Noticees in terms of rule 4(1) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as 'SEBI Adjudication Rules') read with section 15I of the SEBI Act and rule 4(1) of the Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 ("SCRA Adjudication Rules") read with section 23I of the SCRA with regard to alleged violations of the provisions of regulations as mentioned hereinabove in the table by the respective Noticees. The SCN was duly served upon the respective Noticees through several alternative modes such as speed post, hand delivery, affixture and paper publication in terms of rule 7 of the Adjudication Rules.

6. Vide letter dated December 20, 2018 Mr. Sundaresh Bhat, the Resolution Professional appointed under the provisions of the Insolvency and Bankruptcy Code 2016 (IBC), informed that with effect from August 01, 2017 the Noticee No. 1 was admitted into Corporate Insolvency Resolution Process (CIRP) under provisions of the IBC. Mr. Sundaresh Bhat vide his letter dated July 08, 2019 further informed that Hon'ble National Company Law Tribunal, Ahmedabad Bench (NCLT), vide order dated April 25, 2019 is admitted the Noticee No. 1 for liquidation and appointed him as the Liquidator of the Noticee No. 1. While The Noticees No. 2 and 3 have not filed their replies to the SCN despite sufficient opportunities provided to them, the Noticee No. 4, after availing the opportunity of inspections of documents on February 25,

2019, submitted his reply vide his letter dated June 13, 2019 wherein he *inter alia* submitted as following:

a. The Noticee was working as salaried employee with ABG and deputed to its subsidiary company M/s. Western India Shipyard Ltd. Goa from July 2007 to November 2013. Hence, he was not handling day-to-day matters of ABG.
b. Due to his seniority in the organization he was appointed as Director of the ABG on November 13, 2013 and not as promoter Director.
c. Upon attaining his superannuation age, he retired from the position and as well as resigned as a Director from ABG on September 6, 2017.

7. Similarly, the Noticee No. 5 submitted his reply on July 30, 2019 after availing the inspection of documents on June 24, 2019. In his reply he has submitted *inter alia* as follows:
   a. The Notice No. 5 denied the alleged violations upon him and submitted that all the allegations are bald charges and there is no foundation in the SCN against him, to demonstrate as to how he was responsible for contravention of any of the alleged provisions.
   b. He has not bought, sold or dealt with the securities of the Company and no such allegation is even made against him. He had not used or employed any device scheme, artifice, not engaged in act, practice, course of business and has also not engaged or indulged in a fraudulent or an unfair trade practice in securities.
   c. The Noticee has contended that the present SCN is issued after gross delay and put reliance on the judgement of Hon'ble Securities Appellate Tribunal in *HB Stockholding Limited V. SEBI.*
   d. He joined ABG as Chief Financial Officer (CFO) in November 2006 and his role was limited to raising long term resources for ABG, maintaining investor relations and liaising with investors, fund housing and representing the ABG in various conferences etc.
   e. During the period 2007-2009, he was not in charge of day-to-day affairs of the ABG. In 2012, he was designated as an Executive Director of ABG and thereafter, he retired from ABG in year 2015.
   f. He was unaware about the application made before ITSC and its order dated April 10, 2013. He was kept in the dark about the application filed before the ITSC and the submission made before them by/on the instructions of the Managing Director of the ABG.

8. The Noticee No. 5 availed the opportunity of hearing on July 30, 2019, when his Authorised Representatives appeared before me and reiterated the submission made in the reply dated July 30, 2019. The Noticee No. 1, 2, 3 and 4 did not avail the opportunity of personal hearing despite service of notice upon them.

9. I have considered the allegation levelled in the SCN, the aforesaid submission of the Noticees No. 1, 4 and 5 and the relevant material available on record and in accordance with rule 4(7) of the SEBI Adjudication Rules and rule 4(7) of the SCRA Adjudication Rules in respect of the Noticees. It is noted that the Noticees No. 2 and 3 have neither filed any reply nor availed the opportunities of personal hearing despite service of Notices as aforesaid. In the facts and circumstances of this case, I am of the view that the Noticees have nothing to submit and in terms of rule 4(7) of the Adjudication Rules, the matter can be proceeded *ex-parte* on the basis of material available on record.

10. While deciding the case, I cannot lose sight of settled position of law that the charge should be established with valid reasons and charges of contravention of PFUTP Regulations should be established based upon higher degree of preponderance of probability as compared to other civil compliance obligations and proceedings should conclude in accordance with law. I, therefore, deem it necessary to examine the charge and the supporting material.

11. In this case, the allegation against the Noticees is that they being listed company, NIDs and EDs, respectively, have failed to perform the role entrusted upon them to protect the interests of the stakeholders of Noticee No. 1. The charges on the Noticees are of two folds; such as- violations of PFUTP Regulation and ELA. The first charge has been based upon the misuse of books of accounts, publishing incorrect and misstated financial results over the years and supporting material as provided in the SCN. In this regard, the documents relied upon in the case are ITSC's Order dated April 10, 2013 against the Noticee No. 1, Income Tax Appellate Tribunal's order dated May 02, 2014 against Modern Tube Industries Ltd., financial statements of SLDPL etc. I also note that the discrepancy observed in respect of transactions reported in the financial statement and the actual amount reflected in bank statement, raises suspicion on probable misuse of books of accounts. It is a case involving the tax related violation for which settlement order has already been passed by ITSC. The investigation does not clearly and specifically show any link or bearing of such transactions so as to attract violation of PFUTP regulations as alleged in SCN nor demonstrate violations of specific provisions such as sections 12A (a), (b) and (c) of SEBI Act and Regulation Section 12A(a), (b) and (c) of SEBI Act read

with regulations 3(a), 3(c), 3(d), 4(1), 4(2) (e), 4(2)(k) and 4(2)(r) of PFUTP Regulations. Therefore, the allegation with respect to PFUTP Regulation on the Noticees No. 1 to 5 is not established on the basis of desired preponderance of probability. Therefore, the case does not deserve of monetary penalty on this count.

12. With regard to the second charge it is noted that for alleged non –compliance of clauses of ELA, the penalty provision of Sections 23A (a) and 23E of SCRA both have been invoked against the Noticee No. 1. Further, for the same alleged charges the penalty provision of section 23H has been invoked against the Noticees No. 2, 3 and 5 in SCN. In this regard, it is clear from the bare perusal of section 23H that the same contains a residuary penal provision when a specific penal provision is not available. Further, from the plain reading of section 23H of the SCRA, it is noted that the residuary provision therein applies in case of failures in compliance of provisions of: -
   a) SCRA,
   b) the rules or articles or byelaws or the regulations of the recognised stock exchange or
   c) directions issued by SEBI

13. The non-compliance of listing agreement is not covered in this section 23H. It is also noteworthy that the same violation may not be covered in two such separate penal provisions of section 23A(a) and 23E both since the violations in this case are covered within the scope of section 23A(a) which provides as under:-

    "Penalty for failure to furnish information, return, etc.

    23A. *Any person, who is required under this Act or any rules made there under,—*

    (a) to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefore ***in the listing agreement*** *or conditions or bye-laws of the recognised stock exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less for each such failure;"*

14. In this case, it is established that the Noticee No. 1 had failed to disclose order dated April 10, 2016 passed by IT Department, wherein the Noticee No. 1 is a party, a material price sensitive information, to the stock exchanges. Further, the Noticee No. 1 was responsible for publishing incorrect and misstated financial results over the years leading to violation of the spirit of principles enshrined under clause 41 read with clause 50 of ELA and also for violation of the spirit of clause 49 of the ELA. The Noticee No. 2 and 3 were the signatory to the certification on compliance with Code of Conduct of ELA during the FY 2012-13 and FY 2013-14,

respectively and they had given a false declaration regarding the compliance of code of conduct by all Board members and senior management personnel of the company as required under provision of clause 49(I) D(ii) read with clause 41 and clause 50 of ELA. It is noted that the Noticee No. 2 and 3 were the members of the audit committee of the company who had failed to diligently perform the role entrusted upon them as prescribed under clause 49 (II) of ELA read along with the facts as mentioned hereinabove regarding mis-stated financial results during the FYs 2008-14. It is further noted that Noticees No. 2, 3 and 5 were the NIDs who had signed the CEO/CFO certification during the FY 2012-2014 and failed to provide proper oversight of the entire financial reporting process, they diligently did not reviewed the financial statements with the management. The Noticees No. 2. 3 and 5 did not ensure that the disclosures in the financial information forming part of the financial statement is true, correct, sufficient and credible. I note that the Noticee No. 5 has denied the charges of ELA without any substantial material to support to his claim. In absence of any substantial proof from Noticee No. 5 and no reply from the Noticees No. 2 and 3, the charges as alleged on the Noticees 1, 2, 3 and 5 are established. I, therefore, find that the Noticees No. 1, 2, 3 and 5 have been insensitive to the responsibility of promptly disclosing material price-sensitive information to stock exchanges as established in this case and contravened the respective provisions of ELA. I further find that the acts and omissions of the Noticees as described above is inimical to the interests of investors in the securities market.

15. However, it is pertinent to note that the Noticee No. 1 is under the process of liquidation. In terms of section 33(5) of IBC when a liquidation order has been passed, no suit or 'other legal proceeding' shall be 'instituted' by or against the corporate debtor. The expression *"other legal proceedings"* are not defined in the IBC. In the similar context in respect of section 446 of the old Companies Act , 1956 Hon'ble High Court of Bombay, in the case of *Deutsche Bank v. S.P. Kala* {*(1990) 67 Com. Cases*} held that –"…………. *The expression "any suit or proceeding by or against the company" is wide enough to bring within its sweep any kind of suits."* Thus, it is implied that other legal proceedings may include instant adjudication proceedings which may result in creating a civil liability to pay the adjudicated quantum of amount as monetary penalty. However, this section 33(5) of IBC is silent upon bar on continuance of pending adjudication proceedings unlike the provisions of said sections 446 and 279 of the Companies Acts of 1956 and 2013, respectively which in case of winding up of the companies under the said Companies Acts, specifically bar continuance of pending adjudication proceedings, except with the leave of the NCLT. The

Liquidator appointed by NCLT for the Noticee No. 1, vide letter dated July 08, 2019 , has represented as under:-

"…, please note that pursuant to Section 33(5) of the Insolvency Code, when a liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the Company, provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the Company, with the prior approval of the Adjudicating Authority.

Further, please note that as per Section 238 of the Insolvency Code and as per the directions of the Hon'ble Supreme Court of India in the matter of Innoventive Industries Limited v. ICIC Bank and Another (Cvil Appeal Nos. 8337-8338 of 2017) vide its order dated August 31, 2017, the provisions of the Insolvency Code have force and effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Therefore, I hereby request you to please take due cognizance of the aforesaid facts an circumstances and to please refrain and /or desist from taking any adverse action against the Company in this regard, in consideration of the aforesaid facts and circumstances."

16. It is noted that the law as it is legislated under section 33(5) IBC does not require permission or leave of NCLT for continuing the adjudication proceedings under the SEBI Act and there is no such bar. Further there is in inconsistency with section 33(5) of IBC in the sections charged in this case. Thus, there is no bar of continuance of adjudication proceedings for the violations under the securities law, even though liquidation proceedings under section 33(5) IBC are pending. However, in this case, I am face with a peculiar situation that by an order passed by Adjudicating Officer of SEBI on November 11, 2019, the adjudication proceedings against the Noticee has been dropped on the ground that no leave of NCLT has been obtained for commencing the adjudication proceedings against the Noticee No. 1, which is under liquidation pursuant to NCLT order dated April 25, 2019. It is matter of record that no further action under section 15I (3) of the SEBI Act has been initiated in respect of said order. Thus, it would be improper to take an independent view and proceed to impose penalty on the Noticee No. 1, in this case, as no intelligible differentia exist to treat, differently, the same entity. In these peculiar facts and circumstances, the charge against Noticee No.1 is disposed of accordingly.

17. However, the Noticees No. 2, 3 and 5 being the NIDs and EDs of the Noticee No. 1 cannot escape the liability under section 23A(a) of the SCRA for defaults of Noticee No. 1 and their

own defaults as found in this case. Therefore, considering the aforesaid facts and circumstances, in my view in this case the Noticees No. 2, 3 and 5 deserves imposition of penalty under section 23A(a) of the SCRA.

18. For the purpose of adjudication of penalty it is relevant to mention that in terms of section 23I of the SCRA, while adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having due regard to the factors specified in section 23J. The factors stipulated in Section 23J, which reads as follows:-

Factors to be taken into account while adjudging quantum of penalty.

23J. *While adjudging the quantum of penalty under section 12A or section 23-I, the Securities and Exchange Board of India 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 of an adjudicating officer to adjudge the quantum of penalty under sections 23A to 23C shall be and shall always be deemed to have exercised under the provisions of this section

19. Having regard to the factors listed in section 23J, it is noted that from the material available on record, any quantifiable gain or unfair advantage accrued to the Noticees or the extent of loss suffered by the investors as a result of the default in this case cannot be computed. However, timely disclosures to the stock exchange as required under the ELA and adhering to code of conduct and obligations as cast on the Noticees, are of significant importance from the point of view of the investors and regulators.

20. Considering all the facts and circumstances of the case as above and exercising the powers conferred upon me under section 23I of the SCRA read with rule 5 of the SCRA Adjudication Rules, I hereby impose the monetary penalty upon the Noticees No.2, 3 and 5 as per following table under section 23A(a) of the SEBI Act. In my view, the said penalty is commensurate with the violations committed by these Noticees in this case.

Sr. No.	Name of Noticee	Amount of Penalty (₹)
1	Major Arun Pathak (Noticee No. 2)	₹ 3,00,000./- (Rupees three lakh only)
2	Major Syed Abdi (Noticee No. 3)	₹ 3,00,000./- (Rupees three lakh only)
3	Mr. Dhananjay Datar (Noticee No. 5)	₹ 2,00,000./- (Rupees two lakh only)

21. The Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order in either of the way of demand draft in favour of "*SEBI - Penalties Remittable to Government of India*", payable at Mumbai, or by following the path at SEBI website www.sebi.gov.in, ENFORCEMENT > Orders > Orders of AO > PAY NOW; OR by using the web link https://siportal.sebi.gov.in/intermediary/AOPaymentGateway.html. In case of any difficulties in payment of penalties, the Noticees may contact the support at portalhelp@sebi.gov.in

22. The Demand Draft or details and confirmation of e-payment made in the format as given in table below shall be sent to "The Division Chief, EFD-DRA-III, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C-4 A, "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 the 'Payer/Noticee'	
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)	

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

24. Copies of this order are sent to the Noticees and also to SEBI in terms of rule 6 read with rule 7 of the Adjudication Rules.

Date: December 27 , 2019
Place: Mumbai

Santosh Shukla
Adjudicating Officer