BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/SM/DD/2023-24/26801]

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

In respect of

Mr. Balbir Singh

(PAN: AAAPS5463P)

In the matter of Alchemist Infra Realty Limited

FACTS IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) initiated adjudication proceedings against Alchemist Infra Realty Ltd. (hereinafter referred to as '**AIRL/Company/Alchemist'**) and its directors viz. Mr. Brij Mohan Mahajan, Mr. Narayan Madhav Kumar), Mr. Balvir Singh (hereinafter referred to as '**Balvir'/ 'Noticee'**), Mr. Chandra Sekhar Chauhan and Mr. Sunil Kanti Kar, for alleged violation of Section 12(1B) of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**,') read with Regulation 3 of the SEBI (Collective Investment Scheme) Regulations, 1999 (hereinafter referred to as '**CIS Regulations'**) by them and appointed Mr. K. Saravanan as an Adjudicating Officer (hereinafter referred to as "**erstwhile AO"**) vide communique dated January 28, 2020, under Section 19 read with Section 15-I(1) of the SEBI Act read with Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as **'Adjudication Rules'**) to inquire into and adjudge under Section 15D(a) of the SEBI Act, the violation of Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations alleged to have been committed by the Company and its directors including Noticee.

2. A Show Cause Notice dated February 14, 2020 (herein after referred to as "**SCN"**) was issued by the erstwhile AO to the company and its directors including Noticee under the provisions of Rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be initiated against them and penalty, if any, be not imposed on them under the provisions of Section 15D(a) of the SEBI Act, for the aforesaid alleged violations by them. The erstwhile AO, vide Adjudication Order dated February 22,2021, concluded that the company and its directors, including Noticee, were engaged in fund mobilising activity from public through investment contracts by floating / sponsoring / launching collective investment schemes as defined in section 11AA of the SEBI Act without obtaining registration from SEBI as mandated under Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations for sponsoring / launching collective investment schemes. The erstwhile AO imposed a monetary penalty of Rs. 1,00,00,000/- (Rupees One crore only) on the company and its aforesaid directors including Noticee, jointly and severally.

3. Thereafter, an appeal, Appeal No. 1026/2022, was filed before Hon'ble Securities Appellate Tribunal ("**SAT**") by Noticee. Vide order dated January 04, 2023, Hon'ble SAT set aside the aforesaid Adjudication Order dated February 22,2021 against Noticee, passed by the erstwhile AO and restored the matter to the file of AO for passing fresh order on merits and in accordance with law. In its aforesaid order, Hon'ble SAT directed that: -

   "*In view of the aforesaid, the impugned order cannot be sustained and is quashed. The appeal is allowed. The matter is remitted to AO to pass a fresh order in accordance with law after serving the show cause notice and after giving an opportunity of hearing.*

   4. In this regard the appellant shall appear before the AO on January 20, 2023 on which date the AO will serve a show cause notice to the appellant and the matter will proceed from their onwards in accordance with law. All the miscellaneous applications are disposed of.

APPOINMENT OF ADJUDICATING OFFICER

4. Pursuant to the aforementioned order of Hon'ble SAT, vide order dated January 04, 2023, the undersigned was appointed as Adjudicating Officer (**AO**) in the matter under Section 19 of SEBI Act read with Section 15I (1) and Rule 3 of Adjudication Rules by SEBI to inquire and adjudge under the provisions of Sections 15D(a) of SEBI Act, the alleged

violation of Section 12(1B) of SEBI Act read with Regulation 3 of CIS Regulations by Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. As per the aforesaid direction of Hon'ble SAT, the Authorised Representative (**AR**), appeared before the undersigned on January 20, 2023 and was provided a copy of the SCN along with its Annexures as well as a copy of the communique dated January 11, 2023, appointing the undersigned as Adjudicating Officer in the matter and Noticee was given 15 (fifteen) days' time for filing his reply, if any, to the SCN.

6. AR of Noticee, vide its email as well as letter dated February 03,2023, requested for inspection of documents and also sought certain additional documents. As the information/documents sought by AR of Noticee was not available on record, the same was sought from SEBI. Based on the information/documents provided by SEBI, the relevant documents were provided to AR of Noticee vide email dated April 13, 2023. Vide the said email, Noticee was also granted an inspection of documents on April 20, 2023. On the scheduled date of inspection, AR of Noticee carried out the inspection. During the inspection, AR of Noticee was advised to submit reply to the SCN on or by May 04, 2023 and an opportunity of personal hearing was also granted to Noticee on May 08, 2023. On May 05, 2023, AR of Noticee submitted reply to the SCN. On May 08, 2023, AR of Noticee attended the hearing and reiterated the earlier submissions made. Post hearing, Noticee submitted copy of Form 20B filed by Alchemist with Ministry of Corporate Affairs (**MCA**).

7. The relevant extracts of the submission made by Noticee vide its email dated May 05, 2023, are given below:

"….

4. .The SCN in its para 3 states that "on the basis" of a direction enumerated by SEBI Whole Time Member (WTM) in its order dated June 21, 2013 "adjudication proceedings have been initiated against the Noticees by SEBI." The said direction of WTM in its order dated June 21, 2013 ("WTM Order"), as enumerated in the SCN is as below:

> *"SEBI would initiate prosecution proceedings under section 24 and adjudication proceedings under Chapter VI of the Securities and Exchange Board of India Act, 1992 against Alchemist Infra Realty and its directors"*

5. The SCN further in para 11 alleges that AIRL has not obtained registration under SEBI (Collective Investment Scheme) Regulations, 1999 ("SEBI CIS Regulations") from SEBI and that the Noticees, by operating an unregistered CIS, have violated the provisions of Section 12(1B) of the SEBI Act, 1992 ("SEBI Act") read with Regulation 3 of the CIS Regulations.

6. Accordingly, the said SCN has called upon Our Client to show cause as to why an appropriate action under the SEBI Act should not be taken under Section 15D (a) of SEBI Act against Our Client for non-compliance with provisions of Section 11AA read with Section 12(1B) of SEBI Act and Regulation 3 of SEBI CIS Regulations, 1999.

7. At the outset, it is submitted that the SCN is perverse in fact as well as in law. The SCN as far as it arrays Noticee 4 is patently erroneous and upon complete non-application of mind. This is demonstrated in further paragraphs.

8. Noticee 4 denies the SCN in toto and specifically the liability sought to be fastened upon him. Noticee 4 reserves the right to supplement this response with further submissions, if necessary.

II ADJUDICATION PROCEEDINGS HAVE BEEN INITIATED AGAINST NOTICEE 4 WITH COMPLETE LACK OF APPLICATION OF MIND BY SEBI AND CONTRARY TO WTM ORDER DATED 21.06.2013 WITHOUT ESTABLISHING FOUNDATIONAL FACTS AND WIHOUT DISCHARGING BURDEN OF PROOF

The SCN, admittedly, has been issued for the sole reason as stated in its para 3. The SCN miserably fails to consider the following:

DIRECTORS' LIABILITY NOT CONSIDERED BY SCN

(i) The SCN fails to consider that the WTM Order clearly lays down the liabilities of the directors of AIRL. The SEBI WTM order clearly holds Mr. Brij Mohan Mahajan (Noticee No. 2), Mr. Sunil Kanti Kar (Noticee No. 6) and Mr. Narayan Madhav Kumar (Noticee No. 3) liable for the violation committed by AIRL in not obtaining registration to offer / launch CIS and not Noticee 4. The relevant portion of WTM Order is reproduced below for ready reference:

"49. As regards the liability of the directors, I note that the information provided by the company that Mr. Brij Mohan Mahajan, Mr. Sunil Kanti Kar and Narayan Madav Kumar

*are its present directors. Therefore, they are liable for violation committed by the Company in not obtaining registration to offer /
launch collective investment schemes….."*

(Emphasis supplied)

DISTINCTION IN DIRECTIONS ISSUED BY WTM ORDER

(ii) The SCN fails to consider that the WTM Order also distinguished and directed that AIRL and Noticee No. 2, Noticee No. 3 and Noticee No. 6 shall wind up the existing collective investment schemes and refund the money collected by AIRL under the schemes with returns which are due to its investors as per the terms of offer within a period of three months from the date of this order and submit a winding up and repayment report to SEBI, in accordance with the SEBI CIS Regulations. However, no such responsibility was imposed on Noticee 4.:

"50. Therefore, I, in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 and sections 11 and 11B thereof and regulations 65 and 73 of the SEBI (Collective Investment Schemes) Regulations, 1999, hereby issue the following directions to safeguard the interest of the investors:

a) Alchemist Infra Realty Limited shall not collect any money from investors or launch or carry out any scheme which has been identified as a collective investment scheme in this Order.

b) Alchemist Infra Realty Limited and its directors including Mr. Brij Mohan Mahajan, Mr. Sunil Kanti Kar and Mr. Narayan Madhav Kumar shall wind up the existing collective investment schemes and refund the money collected by the said company under the schemes with returns which are due to its investors as per the terms of offer within a period of three months from the date of this Order and submit a winding up and repayment report to SEBI in accordance with the SEBI (Collective Investment Schemes) Regulations, 1999, failing which the following actions shall follow:

   i. SEBI would initiate prosecution proceedings under section 24 and adjudication proceedings under Chapter VI of the Securities and Exchange Board of India Act, 1992 against Alchemist Infra Realty and its directors;

   ii. SEBI would make a reference to the State Government/Local Police to register a civil/criminal case against Alchemist Infra Realty Limited and its directors and its managers/persons in-charge of the business and its *schemes for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and*

iii. SEBI would make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the company, Alchemist Infra Realty Limited.

*c) Alchemist Infra Realty Limited and its directors Mr. Brij Mohan Mahajan, Mr. Narayan Madhav Kumar, **Mr. Balvir Singh**, **Mr. Chandra Shekhar Chauhan** and Mr. Sunil Kanti Kar **are restrained from accessing the securities market and are prohibited from buying, selling or otherwise dealing in securities market till all the collective investment schemes are wound up by the Company** and **all the monies mobilized through such schemes are refunded to its investors with returns which are due to them**."*

(Emphasis Supplied)

DIFFERENCES IN RESPONSIBILITY OF NOTICEES IN WTM ORDER

*(i) The SCN neglects to acknowledge that in Paragraphs 49 and 50(b) of the Whole Time Member (WTM) Order, Mr. Brij Mohan Mahajan, Mr. Sunil Kanti Kar, and Mr. Narayan Madhav Kumar were held responsible and "**liable for violation committed by the Company in not obtaining registration to offer / launch collective investment schemes"** considering their involvement factually, while in Paragraph 50(c), the individual roles and responsibilities of Mr. Balvir Singh and Mr. Chandra Shekhar Chauhan were taken into account and limited directions were issued against the later.*

NOTICEE 4'S LIMITED TENURE AS ADDITIONAL DIRECTOR

*(ii) The SCN fails to consider that the tenure of Noticee 4 in AIRL was merely 10 months during 02.04.2008 to 09.02.2009 and that too as an additional director, and not a director. In terms of Section 260 of the Companies Act, 1956 an additional director is appointed for a temporary period, unless revised or confirmed by the shareholders. It is a matter of record that Noticee 4 only held the position of the additional director for a limited period and even resigned from the same prior to the next AGM. A copy of resignation letter of Noticee 4 and filing made by AIRL on MCA Website is annexed herewith as **Annexure A Colly**. The liability of Additional Director ends upon cessation of office as held in **G.N. Sridharan v. Registrar of Companies.**[1]*

[1] 2012 SCC OnLine Mad 5268.

<u>NOTICEE 4 NOT A DIRECTOR/ DIRECTOR-IN-CHARGE</u>

(iii) Noticee 4 was an additional director and not the directors / directors-in-charge unlike Noticee No. 2, 3, 5 and 6.

<u>NOTICEE 4'S NON-INVOLVEMENT IN AIRL OPERATIONS</u>

(iv) The SCN fails to consider that Noticee 4 was not involved in the operations of AIRL in any manner and / or capacity whatsoever since the date of his resignation. The same was even noted by the SEBI WTM order dated 21.06.2013.

<u>NOTICEE 4'S ROLE AND RESPONSIBILITIES NOT MENTIONED IN SCN</u>

(v) There is no whiff whatsoever in the SCN for role and responsibilities of Noticee 4 or his actions or omissions.

<u>NO EVIDENCE TO SHOW NOTICEE 4 RESPONSIBLE FOR AIRL'S CONDUCT</u>

(vi) The SCN has presented no evidence to provide that Noticee 4 was in charge and responsible for the conduct of the business of AIRL. In fact, the WTM Order has specifically held Noticees 2, 3 and 6 liable for non-registration as well as refund of the funds raised, and not Noticee 4.

<u>SCN FAILS TO PROVE NOTICEE 4 WAS "OFFICER IN DEFAULT"</u>

(vii) The SCN fails to discharge the burden that Noticee 4 was in charge of, and responsible for the conduct of business of the company. The SCN fails to discharge the burden that the Noticee 4 was “Officer in Default”. This is on the face of it contrary to various settled rulings including in ***S.M.S Pharmaceutical Ltd. v. Neeta Bhalla & Anr.***[2] *and* ***SEBI v. Gaurav Varshney***.[3]

<u>SAT ORDER IN AMIT MISHRA CASE NOT CONSIDERED IN SCN</u>

(viii) The SCN fails to consider that the Hon’ble SAT in the matter of ***Amit Mishra v. SEBI***[4] *held below:*

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[2] SC Appeal (crl.) 664 of 2002, dated 20.02.2007.

[3] 2016 SCC Online SC 706.

[4] SAT Appeal No. 410 of 2019, order dated March 09, 2021.

*"7…the **mere fact that a person is a director of a company cannot be held responsible** for the acts of the Company **unless it is found that the said person was responsible in some way for the alleged violation.**"*

(Emphasis Supplied)

HISTORY LIKELY TO REPEAT - PENALTY IMPOSED ON NOTICEE 4 SET ASIDE BY HON'BLE SAT

(ix) Previously, a SEBI AO Order EAD/KS/AS/AO/10490-10494/2020-21 dated 22.02.2021 imposed a penalty of Rs. 1,00,00,000 (Rupees One Crore) jointly and severally on the Company and all noticees, including Noticee 4. However, this penalty was set aside by Hon'ble SAT (in regards lack of service to Noticee 4) through its order dated 04.01.2023, which also nullified the SEBI communication dated 30.05.2022 instructing All Banks in India to remit Rs. 1,16,01,000/- (Rupees One Crore Sixteen Lakhs and One Thousand) from the bank accounts and lockers of all noticees, including Noticee 4, as far as Noticee 4 is concerned. The SCN repeats the same legal and factual errors by failing to consider Noticee 4's lack of involvement in running a CIS painting everyone with the same broad brush and imposing a penalty on Noticee 4 based on "joint and several" liability without any basis and without determining foundational facts.

DOCUMENTS CITED IN ANNEXURE 7 AND 8 DO NOT BEAR NOTICEE 4'S SIGNATURE

*(x) The SCN issued fails to take into account that the documents cited in Annexure 7 or Annexure 8 do not bear the signature of Noticee 4 on any of the land-related documents that have been deemed as a scheme of CIS. Additionally, the record provided with the SCN itself indicates that it was Mr. Brij Mohan Mahajan who signed forms filed with the MCA on behalf of the Managing Director/Director, as also can be seen in multiple instances in documents filed by the Company with the MCA, annexed herewith as **Annexure B Colly**. Thus, Noticee 4 cannot be considered an officer in default as per facts.*

SCN LACKS EVIDENCE OF NOTICEE 4'S INVOLVEMENT IN AIRL'S CIS AND THERE IS PUBLICLY AVAILABLE EVIDENCE IN MCA FILINGS WHERE NOTICEE 2 SIGNED AS MANAGING DIRECTOR

(xi) *The SCN does not adduce any evidence that AIRL mobilized funds as CIS under the decisions of Noticee 4. The documents of AIRL including registered sale deeds, filled up application forms and certificate of properties issued to the purchasers of land do not carry a signature of Noticee 4 or further any evidence that Noticee 4 was person in charge of AIRL. In fact, all the property certificates have been signed by Noticee 2, who as submitted above had also signed MCA Forms where signature of Managing Director was required.*

(xii) *Reliance is placed on Hon'ble Tribunal's order in* **Dr. Venkadasamy Venkataramanujan v. SEBI**[5] *wherein it was held as follows:*

> *"7…the mere fact that the company had mobilized certain funds under the CIS during the short period when the appellant was inducted as an independent director will not by itself make the appellant liable for the misfeasance committed by the company* ***unless it is shown that he was also involved in the decision-making process or in the collection of the funds. Neither of the two elements are present in the instant case****."*
>
> *(Emphasis supplied)*

(xiii) *It is also a matter of record that Noticee 2 (Mr. Brij Mohan Mahajan) was a director right from incorporation, i.e. 02/04/2008 till 05/08/2021.*

NOTICEE 4 CANNOT BE HELD RESPONSIBLE WITHOUT SPECIFIC EVIDENCE

(xiv) *If there is a Managing Director or a Whole Time Director or a Director then an additional director (Noticee 4) cannot be held responsible as person in charge or officer in default, without specific evidence in the SCN of involvement in a broad-brush manner by any authority.*[6]

I. ADJUDICATION PROCEEDINGS RAISES CONCERNS OF UNFAIRNESS AND LACK OF EVIDENCE: NOTICEE 4'S DEFENSE UNDERMINED BY EXTREME

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[5] SAT Appeal No. 254/2019, dated 07.02.2020.

[6] *Pritha Bag* v. *SEBI,* 2019 SCC OnLine SAT 110; *Sayanti Sen* v. *SEBI,* 2019 SCC OnLine SAT 132; *Subhra Jyoti Sardar* v. *SEBI,* 2021 SCC OnLine SAT 85; *Shailesh Kumar Mishra* v. *SEBI,* SAT Appeal No. 800 of 2021, dated 29.03.2022; *Chandrasen Ganpatrao Bhise* v. *SEBI,* SAT Appeal No. 424 of 2020, dated 02.03.2022.

DELAY, INCOMPLETE DOCUMENTATION, AND INCORRECT APPLICATION OF LAW

REQUEST TO WITHDRAW SCN

10. The SCN is a gross abuse of the adjudication process which if allowed to continue beyond the stage it has already reached shall degenerate itself into a weapon of undue harassment and persecution and as such the same is liable to be withdrawn forthwith for the ends of justice.

UNFAIRNESS AND FATAL DELAY OF 15 YEARS IN THE SCN PROCESS

11. The SCN fails to consider the fairness principle and principles of natural justice expected in a quasi-judicial proceeding. Ld. AO is adjudicating factual issues based on observations made by WTM 10 years before for transactions of the company that transpired at least 15 years back. Noticee 4 is handicapped to defend itself without complete documentation and he has not been associated with Company in last 14 years. Extreme delay, not attributable to Noticee 4 has caused grave prejudice and affecting the ability to defend himself, vitiating the entire proceedings.

INCOMPLETE DOCUMENTATION AND INSUFFICIENT EVIDENCE

12. The necessary documents are not available on record with Ld. AO and partial documents available on record fails to discharge the burden in law to impose penalty on Noticee 4. The Inspection letter dated February 03, 2023, SEBI email providing inspection opportunity dated April 03, 2023, and the Minutes of Inspection are annexed herewith as ***Annexure C Colly****.*

LD. AO'S INDEPENDENCE AND REFERENCE BY WTM

13. The SCN fails to consider the various rulings that Ld. AO is an independent authority expected to undertake independent assessment of facts and evidence, and not a mouthpiece or an execution authority of WTM. A reference by WTM in order ipso facto cannot lead to imposition of penalty, without appreciating any facts and evidence.

JOINT AND SEVERAL LIABILITY CONCERNS

14. It is submitted that 'Joint and several liability' cannot be imposed casually especially in a matter where noticees have had different tenures, different designations and different roles and responsibilities. 'Joint and several liability' is premised on the theory that the parties involved are in the best position to apportion damages / liabilities amongst themselves, which is completely missing in this case. Ld. AO also needs to consider the recovery already made, if any, from the other noticees.

<u>NO GROUNDS FOR PENALTY UNDER SECTION 15D(A) OF SEBI ACT</u>

15. No penalty can be imposed on Noticee 4 under Section 15D (a) of SEBI Act as Noticee 4 is not a "person who is required …to obtain a certificate of registration from the Board for sponsoring or carrying on any collective investment scheme…".

<u>NOTICEE 4 NOT OFFICER IN DEFAULT AND SCN NOT ISSUED UNDER SECTION 27</u>

16. As submitted above, Noticee 4 was not a person in charge of AIRL and cannot be considered an officer in default. Even otherwise the SCN itself has not been issued under Section 27 of the SEBI Act and it is an established principle of law that a person cannot be penalized under a section in which he has not been charged.

<u>15J FACTORS IN FAVOR OF NOTICEE 4 AND ABSENT FOUNDATIONAL FACTS</u>

17. Factors enumerated in Section 15J of SEBI Act are squarely in favour of Noticee 4. WTM order itself had not held Noticee 4 responsible for the registration under SEBI CIS Regulations, refund of funds raised or winding up of AIRL.

18. Further, SCN itself has not provided foundational facts such as disproportionate gain or unfair advantage made by Noticee 4, funds raised during the tenure of Noticee 4 and role of Noticee 4 for the same other than being an additional director. Therefore, Noticee 4 cannot be penalized at all.

<u>REQUEST FOR DISPOSAL OF SCN WITHOUT PENALTY</u>

19. The SCN needs to be disposed of without any penalty whatsoever, as far as it relates to Noticee 4…….”

CONSIDERATION OF ISSUES, EVIDENCE AND FINDINGS

8. 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 the Noticee in the capacity of director has violated Section 12(1B) of the SEBI Act read with Regulation 3 of CIS Regulations?
   II. Does the violation, if any, on the part of the Noticee attract monetary penalty under Section 15D(a) of the SEBI Act?
   III. If the answer to issue no. II is in affirmative, then what should be the quantum of monetary penalty?

9. Before proceeding to the merits of the matter, I find it pertinent to deal with the preliminary objection raised by Noticee. Noticee in his reply has contended that the present adjudicating proceedings is based on observations made by WTM 10 years before for transactions of the company that transpired at least 15 years back and he is unable to defend himself without the complete documentation and he has not been associated with the company in last 14 years. Noticee has also raised objection w.r.t. incomplete documentation and insufficient evidence and in this regard, has relied on his letter dated February 03, 2023, email sent by undersigned to Noticee on April 13, 2023 and the minutes of the inspection. I note that vide letter dated February 03, 2023, Noticee requested for inspection of certain documents.

10. In this regard, I note the following chronology of events in the matter from available records:

    a. SEBI, upon receipt of an anonymous letter on May 25, 2011 alleging that AIRL was operating scheme and mobilizing funds from investors/public, conducted examination in the dealings of AIRL to find out if the activities of AIRL would fall within the ambit of the CIS Regulations or not. On the basis of the said examination, a Show Cause Notice dated November 20, 2012 was issued to the Noticees alleging that they were running an unregistered collective investment scheme (CIS) and, therefore, have violated the provisions of Section 11AA read with Section 12(1B) of SEBI Act read with Regulation

3 of CIS Regulations. Whole Time Member of SEBI (hereinafter referred to as '**WTM**'), after examining the material available on record and the replies submitted by the Noticees, passed an order dated June 21, 2013 (herein after referred to as "**WTM Order**"), wherein he, *inter-alia,* issued the following directions:

"SEBI would initiate prosecution proceedings under section 24 and adjudication proceedings under Chapter VI of the Securities and Exchange Board of India Act, 1992 against Alchemist Infra Realty and its directors"

b. I also note from the Adjudicating Order dated February 22, 2021 by erstwhile AO that subsequent to passing of WTM Order, AIRL filed various appeals before Hon'ble SAT and Hon'ble Supreme Court and the matter was sub-judice for considerable period of time. The relevant extract from Adjudication Order dated February 22,2021, depicting the aforesaid is reproduced below:

"*3. Alchemist being aggrieved by the said order filed an appeal in the Hon'ble Securities Appellate Tribunal (hereinafter referred to as 'SAT'), wherein by an order dated July 23, 2013, the Hon'ble SAT upheld the findings of SEBI and allowed Alchemist 18 months' time to refund the money collected from the investors. Alchemist being aggrieved by the order of the Hon'ble SAT dated July 23, 2013 filed a Civil Appeal before the Hon'ble Supreme Court of India (hereinafter referred to as 'SC'). This appeal was dismissed as withdrawn by an order dated September 5, 2014 by the Hon'ble SC, so that the order of SEBI holding that the operations of Alchemist as a CIS without obtaining a certificate of registration were illegal and the consequential direction to stop the scheme and refund the amount to the investors became final. Based on the order of the Hon'ble SAT dated July 23, 2013, Alchemist filed an application dated January 22, 2015 seeking extension of time in order to complete the process of refund and also sought permission to circulate an information memorandum in terms of Regulation 73 of the CIS Regulations, 1999. This application was rejected by SEBI by an order dated May 27, 2015 declining the request for extension of time and also refusing permission to circulate an information memorandum. Alchemist challenged the order dated May 27, 2015 passed by SEBI before the Hon'ble SAT in Appeal No. 298 of 2015. The Hon'ble SAT by an order dated June 15, 2015 set aside the order of SEBI dated May 27, 2015 and directed SEBI to verify the claim made by Alchemist regarding refund to investors, and further directed Alchemist to furnish the* *particulars demanded by SEBI vide its various letters for the purpose of verifying the said claim.*

4. Thereafter, Alchemist again made a fresh representation dated August 7, 2015 seeking permission to circulate an information memorandum under Regulation 73 of the CIS Regulations, 1999. Further, pursuant to the requisite information submitted by Alchemist, SEBI appointed an independent auditor dated August 6, 2015 in order to verify the payments made by the appellant to the investors. Since the appellant was not cooperating with the auditor, SEBI issued a show cause notice dated November 20, 2015 to show cause as to why the order of SEBI dated May 27, 2015 should not be revived. Based on reply submitted by Alchemist, an interim audit report dated May 28, 2016 submitted to SEBI and other extenuating circumstances, vide order dated June 14, 2016, the WTM rejected the application of Alchemist seeking further extension of time to implement the SEBI's order of June 21, 2013 for refund of money to the investors and rejected the request to circulate an information memorandum under Regulation 73 of the CIS Regulations, 1999. Alchemist being aggrieved by the said order filed appeal, so that the Hon'ble SAT vide order dated August 13, 2019 upheld the order of SEBI dated June 14, 2016."

c. SEBI initiated Adjudicating Proceedings against Alchemist and its directors including Noticee and appointed Mr. K. Saravanan vide communique dated January 28, 2020. In this regard, as mentioned earlier in the order, Adjudication Order was passed by the erstwhile AO on February 22, 2021. Noticee challenged the said order before the Hon'ble SAT and Hon'ble SAT, vide its order dated January 04, 2023, remitted the matter back to the file of AO of SEBI.

11. The above chronology clearly indicates that Alchemist had been contesting SEBI's decision repeatedly and the matter was sub-judice for a large part of the intervening period i.e. from the WTM order dated June 21, 2013 till August 2019, when the matter was finally decided by Hon'ble SAT. Thus, I note that there has been no delay in the issuance of SCN in the instant proceedings and the SCN has been issued within a reasonable period of time. I observe that after the issuance of SCN vide letter dated January 20, 2023, in accordance with the direction of Hon'ble SAT, adequate opportunities were granted Noticee to represent his case and an opportunity of personal hearing was also granted to him. I note that Noticee, through his AR, requested for inspection of the documents and requested certain additional documents vide email dated February 03, 2023. Considering

his request, inspection of relevant documents was duly granted to him and the documents which were relied upon and relevant for the present proceedings were provided to Noticee. I also note that Noticee filed his reply along with the certain documentary proof with regard to the allegations levelled against him in the SCN. Thus, looking at the material available at the disposal of Noticee, I find that Noticee has been provided with all material that would have been abundantly adequate to facilitate the recollection of events or collection of relevant data, thereby enabling him to form a definite defense to the charges in the SCN, which Noticee has provided through his individual reply/ submissions. I also note that Noticee has not provided any reasons or justification as to a how non-supply of any documents, as sought by him, has caused him any prejudice for defending his case on merits. Therefore, I do not find any merit in the contention raised by Noticee.

12. Having dealt with the preliminary objections, I now proceed to deal with the matter on merits. Before proceeding to examine the matter, I find it pertinent to reproduce the relevant provisions of the SEBI Act and the CIS Regulations, which read as under:

<u>SEBI Act</u>

Section 11AA

(1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme:

(2) Any scheme or arrangement made or offered by any company under which, —

(i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.

(3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement—

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;

(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);

(v) under which deposits are accepted under section 58A of the Companies Act, 1956 (1 of 1956);

(vi) under which deposits are accepted by a company declared as a Nidhi or a mutual benefit society under section 620A of the Companies Act, 1956 (1 of 1956);

(vii) falling within the meaning of Chit business as defined in clause (d) of section 2 of the Chit Fund Act, 1982 (40 of 1982);

(viii) under which contributions made are in the nature of subscription to a mutual fund;

shall not be a collective investment scheme.

Section 12(1B)

No person shall sponsor or cause to be sponsored or carry on or caused to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations….

CIS Regulations

No Person Other than Collective Investment Management Company to Launch scheme

3. No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme.

Issue I: Whether Noticee as a director has violated Section 12(1B) of the SEBI Act read with Regulation 3 of CIS Regulations?

13. It has been alleged in the SCN that the company and its directors namely Mr. Brij Mohan Mahajan, Mr. Narayan Madhav Kumar, Mr. Balvir Singh i.e. Noticee and Mr. Chandra Sekhar Chauhan, by operating an unregistered CIS, have violated the provisions of Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations. In this regard, I note that it has already been established in SEBI Adjudication order dated February 22, 2021 that Alchemist was in violation of Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations for sponsoring / launching collective investment schemes. The relevant extract of the aforesaid Adjudication Order dated February 22, 2021 is reproduced below:

    "*I, therefore, find that Noticees were engaged in the fund mobilising activity from public through investment contracts by floating / sponsoring / launching collective investment schemes as defined in section 11AA of the SEBI Act without obtaining registration from SEBI as mandated under Section 12(1B) of the SEBI Act, 1992 read with Regulation 3 of the CIS Regulations, 1999 for sponsoring / launching collective investment schemes.*

14. I note that Noticee has not disputed the conclusion drawn in the aforesaid order that the fund raising activity by Alchemist was through unregistered CIS and no arguments on this aspect have been put forth by Noticee in his reply. The only contention raised by Noticee is that he was not responsible for Alchemist's conduct since he was an additional director of Alchemist for a short period of time i.e. from April 02, 2008 to February 09, 2009 and that he was not handling Alchemist's operations and he was not an officer in default. Noticee has further contended that it was the Managing Director who had signed the property documents as well as MCA forms where signature of Managing Director was required.

15. I note from the Memorandum of Association (**MOA**) and Articles of Association (**AOA**) of Alchemist that the following people were the subscribers to the MOA and AOA of Alchemist: -.
    a. Praveen Kumar Rathee
    b. Brij Mohan Mahajan
    c. Balvir Singh i.e. Noticee

d. Sunil Kanti Kar
e. Hariharan Veeraraghavan
f. Chandra Shekhar Chauhan
g. Madhav Kumar Narayan

16. I also note from the letter dated September 15, 2011, submitted by Alchemist that the directors of Alchemist since incorporation were as follows:

Sr. No.	**Name of director(s)**	**Date of appointment**	**Date of resignation**
1	Mr. Balvir Singh	02-04-2008	09-02-2009
2	Mr. Brij Mohan Mahajan		
3	Mr. Sunil Kanti Kar		
4	Mr. Chandra Shekhar Chauhan	04-02-2009	20-02-2009
5	Mr. N. Madhav Kumar	20-02-2009	

17. Thus, I find that Noticee was the director of Alchemist from April 02, 2008 to February 09, 2009 and was also the subscriber to the MOA and AOA of Alchemist.

18. Noticee in his reply has contended that the WTM Order clearly lays down the liabilities of the directors of AIRL and the order clearly holds Mr. Brij Mohan Mahajan, Mr. Sunil Kanti Kar and Mr. Narayan Madhav Kumar liable for the violation committed by Alchemist in not obtaining registration to offer / launch CIS and not the Noticee. Further, Noticee has contended that the SCN fails to consider that the WTM Order also distinguished and directed that Alchemist, Brij Mohan Mahajan, Narayan Madhav Kumar and Mr. Sunil Kanti Kar shall wind up the existing collective investment schemes and refund the money collected by AIRL under the schemes with returns which are due to its investors as per the terms of offer within a period of three months from the date of this order and submit a winding up and repayment report to SEBI, in accordance with the SEBI CIS Regulations, but no such responsibility was imposed on Noticee.

19. I have perused the WTM Order and I note that the said order has been passed in respect of Alchemist and all its directors from its inception till the date of the order i.e. past and present directors. The title of the WTM order reads as under:

"*Under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 read with regulations 65 and 73 of the Securities and Exchange Board of India Act (Collective Investment Schemes) Regulations, 1999 in the matter of Alchemist Infra Realty Limited*

In respect of Alchemist Infra Realty Limited and its present and past directors, Mr. Brij Mohan Mahajan, Mr. Balvir Singh, Mr. Sunil kantiKar, Mr. Chandra Shekhar Chauhan and Mr. Narayan Madhav Kumar."

20. It is noted that the title of the WTM order mentions the name of the Noticee and thus, the said order is against Noticee also. Vide the aforesaid order, the directors of Alchemist including Mr. Brij Mohan Mahajan, Mr. Sunil Kantikar and Mr. Narayan Madhav Kumar were, *inter* alia, directed to windup the existing CIS and refund the money collected by the Alchemist. Thus, I note that WTM order is inclusive in nature and not exhaustive. Further, in para 50(c) of the WTM order, Noticee, along with other directors, were restrained from accessing the securities market and certain other prohibitions were also imposed on them. It is also a matter of record that the aforesaid WTM order has not been challenged by Noticee. Therefore, it is observed that the aforesaid WTM order, which fastened the liability of Noticee in his role as a director of the Alchemist for the conduct of the company, became final and binding on Noticee. Therefore, I find that the aforesaid contention of Noticee is not tenable.

21. Noticee, in his reply, has contended that he was an additional director in Alchemist for the period April 02, 2008 to February 09, 2009 and not the director/ directors-in charge. Noticee has further contended that in terms of Section 260 of the Companies Act, 1956, an additional director is appointed for a temporary period, unless revised or confirmed by the shareholders. Noticee has further stated that he only held the position of the additional director for a limited period and even resigned from the same prior to the next AGM and therefore, the liability of Additional Director ends upon cessation of office. In support of his contention, Noticee has provided his resignation letter and Form No.20B filed with MCA. Noticee has further placed reliance on the judgement of G.N. Sridharan v. Registrar of Companies (2012 SCC online Mad 5268) in this regard.

22. I have perused Form No.32 along with the resignation letter uploaded on the MCA website by Alchemist. On perusal of the Form No. 32 which was provided to Noticee as part of Annexure as well as submitted by Noticee, I note that Noticee ceased to act as director of Alchemist w.e.f. February 09, 2009. On perusal of Form No.20B, I note that designation of Noticee is mentioned as an Additional Director. Therefore, I find merit in the contention raised by Noticee to the extent that he was an additional director in Alchemist for the period

from April 02, 2008 to February 09, 2009 and resigned from Alchemist on February 09, 2009.

23. Noticee has contended in his reply that there was no whiff whatsoever in the SCN for role and responsibilities of Noticee or his actions or omissions. In addition to this, Noticee has also contended that there is no evidence to provide that he was in charge of and responsible for the conduct of the business of Alchemist and that the WTM Order had specifically held Mr. Brij Mohan Mahajan, Mr. Narayan Madhav Kumar and Mr. Sunil Kanti Kar liable for non-registration as well as refund of the funds raised, and not Noticee. Noticee has further contended that if there is a Managing Director or a Whole Time Director or a Director, then an additional director cannot be held responsible as person in charge or officer in default, without specific evidence in the SCN of his involvement. In this respect, Noticee has placed reliance on the judgments of Hon'ble Sat in of Pritha Bag v. SEBI, 2019 SCC OnLine SAT 110; Sayanti Sen v. SEBI, 2019 SCC Online SAT 132; Subhra Jyoti Sardar v. SEBI, 2021 SCC Online SAT 85; Shailesh Kumar Mishra v. SEBI, SAT Appeal No. 800 of 2021, dated 29.03.2022; Chandrasen Ganpatrao Bhise v. SEBI, SAT Appeal No. 424 of 2020, dated 02.03.2022.

24. W.r.t. the said contentions raised by Noticee, I find it pertinent to refer the Section 291 of the Companies Act,1956, the provisions of which are reproduced as under: -

"Section 291 of the Companies Act,1956: General powers of Board.

(1) Subject to the provisions of this Act, the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do: Provided that the Board shall not exercise any power or do any act or thing which is directed or required, whether by this or any other Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting: Provided further that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulation made by the company in general meeting.

(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

25. As noted earlier in the order, Noticee was one of the subscribers to the MOA and AOA of the company. I note that Alchemist is a company limited by shares and is an artificial legal person and all the acts of the company are carried out by the directors of the company. I note that Section 291 of the Companies Act, 1956 empowers the Board of Directors to do all acts and things which a company can do. When powers are vested in the Board of Directors, naturally, the Board is to shoulder all responsibilities also. Therefore, I am inclined to the view that as per Section 291 of the Companies Act, 1956, the responsibilities for the conduct of the business of Alchemist lies on its directors including Noticee by virtue of their being on the Board of Directors of Alchemist. I also note that an additional director has not been treated differently from other directors in Section 291 of the Companies Act, 1956 and neither does it carve out any exemption to additional directors in this respect. At this juncture, it is pertinent to refer the judgement of Hon'ble Supreme Court of India in the matter of Shri N. Narayanan vs. SEBI decided on 26.04.2013, wherein it was held that - *"... Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence*."

26. In view of the foregoing observations and placing reliance on the aforesaid judgment, I find that by virtue of being on the Board of Directors of the company, Noticee was responsible for the acts of the company during his tenure as a director of the company. Thus, I find the aforesaid contention of Noticee to be devoid of merit.

27. In his reply, Noticee has further contended that SCN fails to consider that he was not involved in the operations of Alchemist in any manner and /or capacity whatsoever since the date of his resignation. As mentioned earlier in the order, Noticee was the director of Alchemist from April 02, 2008 till February 09, 2009. Therefore, I note he cannot be held liable for any violations committed by Alchemist subsequent to his resignation. However, records show that Alchemist was raising funds from the public through unregistered CIS and raised funds to the tune of Rs. 54.1 crore during the Financial Year 2008-2009 from such activity which also coincided with the tenure of Noticee as a director of Alchemist. In view of the foregoing, I do not find any merit in the aforesaid contention raised by Noticee.

28. Noticee has further contended that SCN issued fails to take into account that the documents cited in Annexure 7 or Annexure 8 do not bear the signature of Noticee on any of the land-related documents that have been deemed as a scheme of CIS and that the documents which were provided with the SCN indicate that it was Mr. Brij Mohan Mahajan who signed forms filed with the MCA on behalf of the Managing Director / Director. Noticee has also contended that SCN does not adduce any evidence that AIRL mobilized funds as CIS under the decisions of Noticee and that the documents of AIRL, including registered sale deeds, filled up application forms and certificate of properties issued to the purchasers of land, do not carry a signature of Noticee or further any evidence that Noticee was person in charge of AIRL. Noticee has stated that all the property certificates have been signed by Mr. Brij Mohan Mahajan who had also signed MCA forms where signature of Managing Director was required. In this regard, Noticee has also placed reliance on the judgement of Hon'ble SAT in the matter of Dr. Venkadasamy Venkataramanujan v. SEBI (SAT Appeal No. 254/2019, dated 07.02.2020). I have perused the various forms provided by Noticee such as Form 20B, Form No. 23AC etc. and I note that the said forms were digitally signed by Mr. Brij Mohan Mahajan in the capacity of a director of the company and not as a Managing Director of the company, as being claimed by Noticee. In any case, non-signing of documents does not absolve Noticee from his liability as a director who is responsible for the conduct of the company during his tenure. Therefore, I do find any merit in this contention raised by Noticee. I have perused the judgement of Dr. Venkadasamy Venkataramanujan v. SEBI (SAT Appeal No. 254/2019, dated 07.02.2020), as relied upon by Noticee. In this regard, I note that the said judgement deals with the role of an independent director by a company. In the present matter, Noticee was appointed as an additional director from the inception of the company i.e. from April 02, 2008 and as mentioned earlier in the order, Noticee was one of the subscribers to the MOA and AOA. Therefore, I find that the aforesaid judgement quoted by Noticee is not relevant. Therefore, the said contention of Noticee is devoid of merit.

29. In his reply, Noticee has contended that SCN fails to discharge the burden that Noticee was not an officer in default and has placed the reliance on judgements of Hon'ble SAT in

the matter of Amit Mishra vs. SEBI (SAT appeal no. 410 of 2019, order dated march 09, 2021) and S.MS. Pharmaceutical Ltd. vs. Neeta Bhalla & Anr (SC Appeal (crl.) 664 of 2002, dated 20.02.2007) and SEBI vs. Gaurav Varshney 2016 SCC Online SC 706 in this regard.

30. Before dealing with the aforesaid contention of Noticee, I find it pertinent to refer the provisions of Section 5 of Companies Act, 1956. The text of aforesaid Section is reproduced below: -

Section 5 of Companies Act, 1956*: - Meaning of" officer who is in default*

"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."

31. Thus, as per the aforesaid section, if 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 would be considered as "officers in default". In the instant case, from a perusal of different forms filed with MCA including

Form 20B filed with MCA for the year 2008-09, as well as documents placed on record, I observe that the company did not have a Managing Director nor Whole Time Directors, Secretary, or Manager during the period from April 02, 2008 till February 09, 2009, when Noticee served as a director of the company. Accordingly, in the facts and circumstances of the present matter, all directors of the Alchemist would be considered as officers in default as per the section 5 of the Companies Act, 1956. In this regard, I place reliance on the judgement of Hon'ble SAT in the case of Manoj Agarwal v/s. SEBI (Appeal no. 66 of 2016) wherein it was held that*, "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."* In view of the aforesaid provisions and the aforementioned judgement of Hon'ble SAT, I find that this contention of Noticee is not tenable.

32. At this juncture, I find it pertinent to quote the judgement of Hon'ble High Court of Madras in Madhavan Nambiar v/s. Registrar of Companies (2002 108 Comp Cas 1 Mad) wherein it has been held that – *"... Section 5 of the Companies Act defines the expression "officer who is in default". The expression means either (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 ; (g) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors…...*

Section 29 of the Companies Act provides the general power of the board and such power has been exercised by the petitioner as a member of the board or the chairman of the board with respect to the affairs of the company. Therefore, it follows there cannot be a blanket direction or a blanket indemnity in favour of the petitioner or other directors who have been nominated by the Government either ex officio or otherwise. Hence the second point deserves to be answered against the petitioner.

…..

There may be a delegation, but ultimately it comes before the board and it is the board and the general body of the company which are responsible..."

33. I also place reliance on the judgement of Hon'ble SAT dated March 07, 2023, in the matter of Soumen Ghosh (Appeal No. 171 of 2020), wherein Hon'ble SAT has also placed reliance on the judgement of Hon'ble Supreme Court in the matter of Official Liquidator vs. PA. Tendolkar, [(1973) 1 SCC 602] wherein it had been held that, "*It is certainly a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for* misfeasance*, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company*." Accordingly, Hon'ble SAT has held that, "*In view of the aforesaid decision, a director who is closely connected and associated with the management of the Company would be deemed liable for the fraud in the conduct of the business of a Company. Thus, it is irrelevant for this Tribunal to go into the issue as to whether any personal benefit was derived by the appellants in the scheme floated by the Company. The contention that the interim order dated April 10, 2013 cannot be made part of the show cause notice is patently erroneous. We are of the opinion that a reference to the interim order in the show cause notice does not vitiate the show cause notice. It only highlights that the Company was carrying out an unregistered CIS activity which has become final and conclusive insofar as the Company was concerned. Through the impugned show cause notice an opportunity was given to the appellants to contest this finding if so required. But in the instant case, the appellants have not disputed the fact that the Company was running a scheme which comes under the category of the CIS and was also not registered."*

34. Considering the aforementioned judgments, I find that the Noticee, being a director of the company, albeit for limited period, and being associated with the management of the Company, would be deemed liable for the conduct of the business of Alchemist during his

tenure as its director. In view of the foregoing, I do not find any merit in the contention raised by Noticee that he was not an officer in default during his tenure as director of Alchemist.

35. I have also perused the judgements referred by Noticee, namely Pritha Bag v. SEBI, 2019 SCC Online SAT 110; Sayanti Sen v. SEBI, 2019 SCC Online SAT 132; Subhra Jyoti Sardar v. SEBI, 2021 SCC Online SAT 85; Shailesh Kumar Mishra v. SEBI, SAT Appeal No. 800 of 2021, dated 29.03.2022; Chandrasen Ganpatrao Bhise v. SEBI, SAT Appeal No. 424 of 2020, dated 02.03.2022, Amit Mishra vs. SEBI (SAT appeal no. 410 of 2019, order dated March 09, 2021) and S.MS. Pharmaceutical Ltd. vs. Neeta Bhalla & Anr (SC Appeal (crl.) 664 of 2002, dated 20.02.2007) and SEBI vs. Gaurav Varshney 2016 SCC On Line SC 706.

36. W.r.t. reliance placed by Noticee in the judgement of SMS Pharmaceutical Ltd. vs. Neeta Bhalla & Anr (SC Appeal (crl.) 664 of 2002, dated 20.02.2007, I note that Hon'ble SAT in the case of Manoj Agarwal v/s. SEBI(Supra) held that, ""*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*.". Therefore, I find that the said judgement as quoted by Noticee is not relevant in the present proceeding.

37. W.r.t. the judgement of Pritha Bag v. SEBI, 2019 SCC Online SAT 110, , I note that in the said case, after considering the material available on record, Hon'ble SAT has held that*, " In the instant case, there is sufficient material on record to show that there was a managing director and in the absence of any finding that the appellant was entrusted to discharge the application contained in Section 73 of the Companies Act, the direction to refund the amount along with interest from the appellant is wholly illegal."* As mentioned in the earlier part of the order, there was no Managing Director, Whole Time Director, Secretary or Manager during the period from April 02, 2008 till February 09, 2009, when Noticee served as a director of the company. Therefore, the judgement referred by Noticee is not relevant in the facts and circumstances of the present matter.

38. I have also perused the other judgements, namely, Shailesh Kumar Mishra v. SEBI, SAT Appeal No. 800 of 2021, dated 29.03.2022, Chandrasen Ganpatrao Bhise v. SEBI, SAT Appeal No. 424 of 2020, dated 02.03.2022, SEBI vs. Gaurav Varshney 2016 SCC Online SC 706, Sayanti Sen v. SEBI, 2019 SCC Online SAT 132, and Subhra Jyoti Sardar v. SEBI, 2021 SCC Online SAT 85, *Amit Mishra vs. SEBI (SAT appeal no. 410 of 2019, order dated March 09, 2021)*. On perusal of the same, I find that facts of the aforesaid cases are different from the facts and circumstances of the present matter and therefore, I do not find it worthwhile to dwell into these judgements.

39. In view of the foregoing, I find that Noticee, being a director of Alchemist during the period from April 02, 2008 to February 09, 2009, was responsible for the conduct of Alchemist which engaged in fund mobilising activity from public through investment contracts by floating / sponsoring / launching collective investment schemes as defined in section 11AA of the SEBI Act without obtaining registration from SEBI as mandated under Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations, during his aforesaid tenure. Therefore, the allegation that Noticee has violated Section 12(1B) of the SEBI Act read with Regulation 3 of the CIS Regulations stands established.

Issue II: <u>Does the violation on the part of the Noticee attract monetary penalty under Sections 15D(a) of the SEBI Act?</u>

40. It has been established that Noticee has violated Section 12(1B) of SEBI Act read with Regulation 3 of the CIS Regulations. In context of the above, I refer to the observations of Hon'ble Supreme Court in the matter of Chairman, SEBI vs. Shriram Mutual Fund {[2006] 5 SCC 361} wherein the Hon'ble Court had 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......*"

41. Therefore, in view of the violations as established and placing reliance on the above judgment of Hon'ble Supreme Court, I find that the aforesaid violations committed by Noticee would attract monetary penalty under Section 15D(a) of the SEBI Act. The said provision of the SEBI Act reads as under:

Penalty for certain defaults in case of mutual funds.

15D. If any person, who is—

(a) *required under this Act or any rules or regulations made thereunder to obtain a certificate of registration from the Board for sponsoring or carrying on any collective investment scheme, including mutual funds, sponsors or carries on any collective investment scheme, including mutual funds, without obtaining such certificate of registration, he shall be liable to a penalty of one lakh rupees for each day during which he sponsors or carries on any collective investment scheme including mutual funds, or one crore rupees, whichever is less;*

Issue III: <u>If so, what would be the quantum of monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of the SEBI Act?</u>

42. While determining the quantum of penalty under section 15D(a) of the SEBI Act, it is important to consider the factors stipulated in section 15J of the SEBI Act which reads as under: -

15J-Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely: -

a. *the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
b. *the amount of loss caused to an investor or group of investor/s as a result of the default;*
c. *the repetitive nature of the default*

43. 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. I note that the material available on record has not quantified the amount of disproportionate gain or unfair advantage made by the Noticee and the loss suffered by the investors as a result of the non-compliance committed by the Noticee. As regards the repetitive nature of the default, I do not find the SEBI has brought on record any regulatory action taken by SEBI in the past against the Noticee for same violations as observed in the present matter.

44. However, I find it relevant to note the following decision by the Hon'ble SAT vide order dated August 13, 2019 in the same matter, *"In the light of the aforesaid, we are of the view that the appellant resorted to all kinds of dilatory tactics in not getting the repayments verified, namely, whether the appellant had actually refunded the amount to the investors. The WTM also took note of the income tax report in which it was indicated that monies have not been refunded to the investors and have been diverted to a sister company of the appellant. In the light of the conduct of the appellant, we are of the <u>opinion that admittedly the entire amount has not been repaid to the investors and whatever has been alleged by the appellant to have been repaid has not been verified</u>………... <u>It may be stated here that more than Rs. 1900 crores were collected which till date has not been refunded in spite of the order being passed by SEBI on June 21, 2013.</u> Thus, no relief can be granted to the appellant."*

45. Further, I note from the Balance Sheet of Alchemist that it had mobilized funds to the tune of Rs 54.1 Crore, as on March 31, 2009. The aforesaid balance sheet figures on records establish with certainty that Alchemist was carrying out CIS activities at least in the financial years 2008-09 while Alchemist was incorporated in the year 2008 and Noticee, in the capacity of a director, was responsible for conduct of the company, which was carrying out such CIS activities without necessary registration. However, I note that Noticee has already been restrained from accessing the securities market till all the CIS is wound up by Alchemist and all the monies mobilized through such schemes are refunded to its investor with returns which were due to them. Further, I note that Noticee was a director of the company for the limited period, i.e., from April 08, 2008 to February 09, 2009 when the fund mobilization was Rs 54.1 crores in that financial year whereas the total fund mobilization by Alchemist in the Financial Year 2009-10 was Rs. 449.1 crore and Rs. 1087.68 crores for the Financial Year 2010-11. Therefore, he cannot be held liable for the acts of the company subsequent to his cessation as a director of the company.

<u>ORDER</u>

46. 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.15,00,000/- (Rupees Fifteen Lakh)** on Noticee i.e. Balvir Singh,

under the provisions of Section 15D(a) of SEBI Act. I am of the view that the said penalty is commensurate with the lapse/omission on the part of Noticee.

47. Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order 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.

48. The said confirmation of e-payment made in the format as given in table below should be sent to "The Division Chief, EFD – DRA - VI, 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)	

49. 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 for realization of the said amount of penalty along with interest thereon, *inter alia*, by attachment and sale of movable and immovable properties of Noticee.

50. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to Noticee and also to SEBI.

Place: Mumbai **SOMA MAJUMDER**

Date: May 29, 2023 **ADJUDICATING OFFICER**