BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

ADJUDICATION ORDER NO. Order/GR/KG/2021-22/11512

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

In respect of

Birla Power Solutions Limited,

(PAN: AAACB5253D)

BACKGROUND OF THE CASE

1. Securities and Exchange Board of India ('SEBI') had conducted investigation into the Global Depository Receipts (GDRs) issued by Birla Power Solutions Limited (in short "**BPSL**"). The investigation, revealed that on January 27, 2010, BPSL issued 58,50,000 GDRs (USD 20.01 million, approximately Rs.92.63 crore at RBI exchange rate of Rs.46.29 per USD on January 27, 2010), (hereinafter referred to as "**GDR issue one**") underlying 29,25,00,000 equity shares of Rs.1 each of BPSL and on July 09, 2010, BPSL issued 2,12,43,847 GDRs (USD 53.53 million, approximately Rs.250.27 crore at RBI exchange rate of Rs. 46.75 per USD on July 09, 2010), (hereinafter referred to as "**GDR issue two**") underlying 1,06,21,92,350 equity shares of Rs.1 each of BPSL. Vintage FZE, presently known as Alta Vista International FZE (hereinafter referred to as "**Vintage**") was the only entity who subscribed to both the GDR issues of BPSL i.e. 5.85 million GDRs (amounting to USD 20.01 million) for GDR issue one and 21.24 million GDRs (amounting to USD 53.53 million) for GDR issue two. The subscription amount was paid by Vintage by obtaining two loans from European American Investment Bank AG (hereinafter referred to as "**EURAM Bank**") through loan agreements dated December 21, 2009 and July 05, 2010 respectively. BPSL provided security towards the loans obtained by Vintage, through two Pledge Agreements dated December 21, 2009 and July 05, 2010 signed between BPSL

and EURAM Bank, wherein BPSL pledged the GDR proceeds against the loans availed by Vintage for subscription of two GDR issues of BPSL.

Summary of the aforesaid two GDR issues of BPSL is tabulated below.

GDR issue date	No. of GDRs issued (mn.)	Capital raised (USD mn.)	Local custodian	No. of equity shares underlying GDRs	Global Depository Bank	Lead Manager	Bank where GDR proceeds deposited	GDRs listed on
27 Jan, 2010	5.85 (at USD 3.42 per GDR)	20.01	HSBC Mumbai	29,25,00,000	The Bank of New York Mellon	Pan Asia Advisors Limited	EURAM Bank, Austria	Luxembourg Stock Exchange
09 July, 2010	21.24 (at USD 2.52 per GDR	53.53		1,06,21,92,350				

2. The examination had *prima facie* revealed that BPSL had financed the subscription of its own GDR issue by providing security for a loan obtained by one Vintage FZE from EURAM Bank, which in turn had used the loan amount to subscribe to the GDR issue of BPSL. Vintage was the sole subscriber to the said GDR issue of BPSL and the proceeds of the GDR issue was held as a security by EURAM Bank for the loan obtained by Vintage, under a pledge agreement signed by the authorised signatory of BPSL securing the loan obtained by Vintage. In view thereof, SEBIhad initiated adjudication proceedings against BPSL, its 4 Directors and the Company Secretary.

APPOINTMENT OF ADJUDICATING OFFICER

3. Earlier, Shri Biju S. (Chief General Manager) was appointed the Adjudicating officer ("**AO**") in the proceedings with respect to BPSL vide communication dated May 15, 2018. Subsequent to his transfer, the undersigned has been appointed as the AO vide order dated May 17, 2019 conveyed vide communique dated May 22, 2019.

SHOW CAUSE NOTICE, REPLY AND HEARING

4. A Show Cause Notice (hereinafter referred to as "SCN") bearing ref. EAD-4/ ADJ/BS/HKS/OW/18538/1/2018 dated June 29, 2018, was issued to BPSL, its

two Directors and the company secretary under Rule 4 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 and Rule 4 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005, to show cause as to why an inquiry be not held against it and penalty be not imposed under Section 15HA of the SEBI Act, 1992 and under section 23E of the Securities Contracts (Regulation) Act, 1956, for the violations alleged to have been committed by them. Copy of the said SCN however could not be delivered upon BPSL. Thereafter a copy of the said SCN along with the annexure was uploaded on the website of SEBI. On resumption of the proceedings subsequent to the transfer of the case to the undersigned, a public notice was issued in the newspapers on February 9, 2021 *inter alia* in English dailies having national circulation (Times of India, Kolkata, Indore and Surat edition and Hindusthan Times, Mumbai edition)and two vernacular dailies having circulation at the place of registered office of BPSL (Navbharat Times and Maharashtra Times, Mumbai edition). I note that BPSL has not responded to the said SCN till date.

5. From the 'company master data' obtained from the porta of the Ministry of Corporate Affairs, I note that BPSL is 'under liquidation'. Further, I note that in terms of the order dated August 28, 2014, Hon'ble High Court of Bombay directed that BPSL should be wound up and appointed Official Liquidator of Bombay High Court as the liquidator to the Company.

CONSIDERATION OF ISSUES

6. I have carefully perused the charges levelled against the Noticees and the documents / evidence available on record. I note that the status of the Noticee is mentioned as *'Under Liquidation'* on the website of Ministry of Company Affairs. The copy of the orders of the Hon'ble NCLT as already mentioned above, also clearly shows that the process of liquidation has begun for BPSL. Before proceeding further in the matter on its merit, it would be in the fitness of the thing to first decide the preliminary issue as to whether the Adjudication proceedings initiated by SEBI against BPSL would continue.

7. In this regard, it will be appropriate to refer to provisions of Section 446 of the Companies Act, 1956 and corresponding provisions of Section 279 of the Companies Act, 2013. The said provisions are reproduced as under:

Section 446 of the Companies Act, 1956 Suits stayed on winding up order.

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India) ;

(c) any application made under section 391 by or in respect of the company ;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company; whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court

Section 279 of the Companies Act, 2013
Stay of suits, etc., on winding up order.—

(1) When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at

the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose: Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

(2) Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

8. According to Black's Law Dictionary, Sixth Edition, the term 'Legal Proceedings' includes "all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of remedy." Further, the term 'Proceedings' means, "any action, hearing, investigation, inquest or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."

9. In the "Guide to the Companies Act" by A Ramaiya, (17th Edition Reprint 2010, page 4929 & 4930), it is stated that the object of winding up of a company by the court is to facilitate the protection and realization of its assets with a view to ensure an equitable distribution thereof among those entitled and to prevent the administration from being embarrassed by a general scramble among creditors and others. Consequently, once the court has taken the assets of a company under its control or has passed an order for its being wound up, it will not be proper to allow proceedings to be started or continued against the company.

   "Section 446 is wide in its terms and is not restricted to any category of suits or any class of plaintiffs. It is wide enough to cover all suits and other legal proceedings who-ever may be plaintiff." {Murgan Oil Industries (P.) Ltd. Re, (1970) 40 Com. Cases 77, 82 (Mad)}

10. I note that the provisions of Section 279 of the Companies Act, 2013 are *parimateria* the provisions of Section 446 of the Companies Act, 1956 in so far as

the commencement or continuation of any 'other legal proceedings', after appointment of official liquidator, are concerned. In this regard, I note the observations of Hon'ble High Court of Bombay, in the case of *Deutsche Bank v. S.P. Kala* {(1990) 67 Com. Cases}, wherein it was held that –

> *"Section 446 of the Companies Act provides that, when a winding up order is made or the official liquidator is appointed as provisional liquidator, no suit or legal proceedings should be commenced or if pending on the date of the winding-up order, shall be proceeded with, against the company, except with the leave of the court and subject to such terms as may be imposed. Subsection (2) further lays down that the court which is winding-up the company shall, notwithstanding anything contained in any other law in force, have jurisdiction to entertain or dispose of, inter alia, any suit or proceeding by or against the company, whether such suit or proceeding has been instituted or is instituted. A careful examination of these provisions of law makes it clear that once a winding-up order is made or the official liquidator is appointed as provisional liquidator, no proceedings can continue or be instituted against the company without the permission of the court. It is further clear that jurisdiction to entertain or dispose of any suit or proceeding by or against the company is vested in the company court without any kind of restriction……………. The expression "any suit or proceeding by or against the company" is wide enough to bring within its sweep any kind of suits."*

11. I note from above that it is mandatory and a pre-condition to obtain the leave of Hon'ble Court / Tribunal for commencing the instant proceedings against the Noticee, which is under liquidation. I note that there is no material on record to suggest that leave of Hon'ble Court has been taken to initiate adjudication proceedings with respect to BPSL, which have been initiated subsequent to the order of liquidation passed by the Hon'ble NCLT.

<u>ORDER</u>

12. In view of the facts mentioned in the preceding paragraphs, I am of the view that the adjudication proceedings initiated against Noticee vide SCN dated June 29, 2018, cannot be proceeded with. The matter is, accordingly, disposed of.

13. In terms of the provisions of Rule 6 of the SCR Adjudication Rules and SEBI Adjudication Rules, a copy of this order is being sent to the liquidator, Hon'ble Bombay High Court and to the SEBI.

Date: April 27, 2021 **Shri G. Ramar**
Place: Mumbai **Adjudicating Officer**