

SECURITIES AND EXCHANGE BOARD OF INDIA
ORDER

UNDER SECTIONS 11B and 11(4) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 IN THE MATTER OF VAISHNO DEVI DAIRY PRODUCTS LIMITED

In respect of :

Noticee No.	Name of Noticee	PAN	DIN
1.	Nandkishor Harikishan Attal	ADBPA2424J	00120538
2.	Mayura Nandkishor Attal	AESPA3803P	00120857
3.	Mahesh Brij Gopal Bhattad	AIWPB7345K	02358078
4.	Vasant Narayan Pinjan	ARNPP9853A	07583533
5.	Sahindra Jagannath Bhawale	AIAPB7130Q	07352920
6.	Arati Sahindra Bhawale	AMDPB7441B	07352922

(The aforesaid entities are hereinafter individually referred to by their respective names / noticee numbers and collectively as 'Noticees', unless the context specifies otherwise).

BACKGROUND OF THE CASE

1. The Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"), received a complaint against Vaishno Devi Dairy Products Limited (**'VDDPL'** / **'company'**) earlier also known by other names viz Shubhi Agro Industries Private Limited / Sahindra Vaishno Devi Dairy Products Ltd (**SVDDPL**) with regard to the issuance of Non-Convertible Debentures (**NCDs**) issued by the company during the financial year 2013-14 and default thereon.
2. It was observed that the above mentioned NCDs of the company was not listed on any of the exchanges. SEBI sought the details from the company vide various letters. SEBI visited the registered office of the company as no reply was received. The company then provided certain documents related to the issuance

of NCDs viz, copies of Information Memorandum (IM), Debenture Trustee Agreement (DTA), pricing supplements, application forms etc. Information was also sought from the Registrar of Companies (ROC), Pune. SEBI thus undertook an examination to ascertain whether VDDPL had raised funds in violation of the Companies Act, 1956 and SEBI (Issue of Listing of Debt Securities) Regulations 2008 (hereinafter referred to as ‘**ILDS Regulations**’).

SHOW CAUSE NOTICE, REPLY AND HEARING

3. A common Show Cause Notice dated 28.03.2024 (hereinafter referred to as “**SCN**”) was issued to the Noticees calling upon them to show cause as to why suitable directions under Sections 11B and 11(4) of the SEBI Act, 1992 including direction of restraint and prohibition from accessing the securities market should not be issued against the Noticees for the alleged violations. The following documents were enclosed as annexures to the SCN:-

Table A

Annexures to SCN	
Annex. No.	Particulars
1	Documents available on MCA-21 Portal and information provided by ROC Pune.
2	Copy of complaint received by SEBI
3	Copy of various replies received from VDDPL
4	Copy of various replies received from Karvy Capital Ltd (KCL)
5.	Copy of Debenture Trustee Agreement
6.	Copy of statement of the bank account indicating transfer of funds from KCL to SVDDPL for subscription of debentures.
7.	Copy of demat transaction statement of KCL for the relevant period.
8.	Copy of statement of collection of funds from the public.
9.	Copy of Vistra ITCL (India) Ltd. emails
10.	Copy of Order of Hon’ble National Company Law Tribunal (NCLT),

4. The SCN has *inter alia* alleged the following which is summarized hereinbelow:-
- 4.1 SEBI sought information w.r.t the issuance of NCDs by VDDPL vide various letters sent to ROC Pune and the company. VDDPL vide its letter dated 02.11.2017 requested for more time to submit the requisite information. However, no further communication was received from the company despite various reminders i.e letters dated 08.11.2017, 08.12.2017, 16.01.2018 and email dated 21.01.2019.
- 4.2 As the company did not provide the information that was sought, SEBI officials visited the registered office of the company on 11.03.2019 and met Shri Nandkishor Harikishan Attal, Managing Director of the company (**i.e Noticee 1**). The Noticee 1 vide letter dated 11.03.2019 handed over various documents i.e. letter dated 23.01.2019, IM related to the issuance, copy of debenture trustee agreement, copy of one application form and copy of written submissions of the company made before NCLT, Mumbai Bench w.r.t the insolvency application filed by the debenture trustee.
- 4.3 Thereafter, additional information / clarifications related to the allotment of NCDs were sought from the company and the company provided various replies vide emails dated 29.03.2019, 17.10.2019 and 14.12.2020.
- 4.4 From the replies provided by the company, it was *inter-alia* observed that during 04.02.2014 to 31.03.2014, VDDPL had issued NCDs initially to Karvy Capital Ltd. (**KCL**) and raised fund of Rs.25 crore. KCL further down-sold the NCDs allotted to it to 185 investors.
- 4.5 KCL vide email dated 07.06.2019 informed SEBI that Vistra ITCL (India) Ltd. (Vistra) (earlier IL&FS Trust Company) who was the Debenture Trustee for the issuance of NCDs of VDDPL had filed application before NCLT, Mumbai Bench, for initiation of insolvency proceedings against the company. Hon'ble NCLT vide its order dated 03.09.2019 had admitted the insolvency petition and has appointed an Interim Resolution Professional in terms of the Insolvency & Bankruptcy Code (IBC).

- 4.6 Based on the examination by SEBI, it was observed that VDDPL had made issuance of NCDs to more than 49 persons in the F.Y. 2013-14 in violation of the public issue norms laid out in the Companies Act, 1956 and SEBI (Issue of Listing of Debt Securities) Regulations, 2008.
- 4.7 The Information Memorandum (IM) dated 13.01.2014 was issued by VDDPL for issuance of debentures on private placement basis. In terms of the IM, KCL was specified to act as Sole Book Runner and Lead Arranger and Karvy Computershare Private Limited as the Registrar to the issue. The IM, *inter alia*, provided the following :-
- Page 39 of IM provided the following disclaimer clause : ‘*The issue is being made strictly on private placement basis and is not intended to be circulated to more than 49 persons nor intended to be listed on a stock exchange at any time.*’
 - The role of the sole Arranger in the assignment is confined to marketing and placement of the NCD on the basis of the IM. The IM also provides for use of IM by the sole arranger for the purpose of soliciting subscription from qualified institutional investors in the NCD.
 - Minimum number of NCDs to be applied for were to be 10 and in multiple of 1 NCD thereafter.
- 4.8 The IM contained a disclaimer clause, which, *inter alia*, prohibited circulation to more than 49 persons. However, NCDs were issued to more than 49 persons in contravention to the terms set out in the IM.
- 4.9 The company had filed Form 20B (Form for Annual Return) for the financial year ending 31.03.2014 with the ROC which was digitally signed by the Managing Director i.e. Noticee 1. The Form 20 B enclosed a list of 185 debenture holders who were allotted the NCDs of the company during the year which *inter alia* contained the details of the series, date of agreement with the investors, total investments and DP ID of the investors.
- 4.10 KCL vide its email dated 07.06.2019, *inter alia*, indicated that BENPOS statements reflecting the transfers to the buyers and recording the beneficial ownership of the debentures as on any particular date was regularly being submitted to VDDPL.

4.11 Further, in the reply dated 23.01.2019 VDDPL has, *inter alia*, stated that the company was planning to opt for a public issue of securities to meet its fund requirements as well as timely redemption of the series of debentures thus allotted.

4.12 As per the submissions, VDDPL has issued NCDs to KCL and raised Rs.25 crores in 2013-14 that were down-sold by KCL to 185 investors (i.e more than 49 persons) during the F.Y.2013-14 which is deemed public issue in terms of Section 67(3) of the Companies Act, 1956. Further, as per Section 25(2) of Companies Act, 2013 , if any offer or sale of shares and debentures is made to public within six months from the date of original allotment, then the original allotment will be termed as a public issue.

4.13 As the above said offer of NCDs was deemed to be public issue, it was alleged that the company and its directors by issuing NCDs to more than 49 persons in F.Y. 2013-14 violated the provisions of Section 56 (1), (3), Section 60 read with Section 2(36), Section 67(3), Section 73 of the Companies Act, 1956 (r/w corresponding Section 40 of Companies Act 2013 which became effective from 12.09.2013) r/w with Section 5 of the Companies Act, 1956, Section 25(2) of the Companies Act, 2013 and Section 117C of the Companies Act 1956 alongwith various provisions of the regulations of the SEBI (Issue of Listing of Debt Securities) Regulations, 2008.

5. The SCN dated 28.03.2024 was attempted to be delivered through Speed Post with Acknowledgment Due (SPAD). The SCN was delivered to all the noticees except Noticee 3 (i.e. Mahesh Brij Gopal Bhattad). An attempt to serve the SCN through affixture at the latest known address for Noticee 3 was made. However it was stated in the affixture report that “*Mr.Mahesh Brij Gopal Bhattad, does not stay at the said Premises*”. Thus, affixture of SCN was also not allowed. Hence the SCN was finally served through newspaper publication in the Hyderabad edition of the Times of India, Daily Hindi Milap and Andhra Jyoti on 05.07.2024. The SCN was delivered to Noticees 5 & 6 (i.e Sahindra Jagannath Bhawale and Arati Sahindra Bhawale) vide email which was acknowledged by them. The

Noticees 5 and 6 provided their reply vide email dated 13.06.2024. The Noticee 4 did not submit any reply to the SCN.

6. Noticees 1 and 2 also sought for inspection of documents which was undertaken by their authorized representatives on 04.07.2024 and further documents sought by the noticees were provided vide letter dated 08.07.2024.
7. Thereafter, an opportunity of hearing was scheduled for the noticees on 24.07.2024 which was informed to all the noticees vide hearing notice dated 16.07.2024. The hearing notice for Noticee 3 was served through newspaper publication and to Noticee 4 on 22.07.2024 as per the India Post consignment tracking. However, Noticee 4 did not appear for the hearing on the scheduled date nor has he provided his reply. The Noticees 5 and 6 vide their email dated 22.07.2024 replied that they have already provided their reply vide email dated 13.06.2024 and have no further submissions and hence attendance at the hearing would not be necessary. The Authorised Representative (AR) of Noticees 1 and 2 made repeated requests for deferment of the personal hearings. Finally, the AR for Noticee 1 and 2 appeared for the hearing scheduled on 26.08.2024 through Webex and made submissions in line with the reply to the SCN submitted vide email dated 26.08.2024. During the hearing the noticees were also informed of the refund directions that could be issued against the noticees in case the allegation was established that the issuance of NCDs was a public issue of securities.
8. I note that although the SCN and hearing notice were delivered to Noticees 3 and 4, no response is received from them. I am of the view that they have nothing to submit and the matter is being proceeded ex-parte on the basis of material available on record. In this regard, it is pertinent to note that the Hon'ble Securities Appellate Tribunal (SAT) in the matter of *Classic Credit Ltd. vs. SEBI* (Appeal No. 68 of 2003 decided on December 08, 2006 has, *inter alia*, observed that, "*.....the appellants did not file any reply to the second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show cause notice were admitted by them*". Therefore, it can be presumed that

the noticees 3 and 4 have admitted to the charges levelled against them as they did not file any reply to the SCN.

9. Further, the Hon'ble SAT in the matter of *Sanjay Kumar Tayal & Others vs SEBI* (Appeal No. 68 of 2013 decided on February 11, 2014), has also, *inter alia*, observed that: *"..... appellants have neither filed reply to show cause notices issued to them nor availed opportunity of personal hearing offered to them in the adjudication proceedings and, therefore, appellants are presumed to have admitted charges leveled against them in the show cause notices..."*. Additionally, the same position has been reiterated by the Hon'ble SAT in the matter of *Dave Harihar Kirtibhai vs SEBI* (Appeal No. 181 of 214 dated December 19, 2014), wherein the Hon'ble SAT observed as under: *"...further, it is being increasingly observed by the Tribunal that many persons/entities do not appear before SEBI (Respondent) to submit reply to SCN or, even worse, do not accept notices/letters of Respondent and when orders are passed ex-parte by Respondent, appear before Tribunal in appeal and claim non- receipt of notice and do not appear and/or submit reply to SCN but claim violation of principles of natural justice due to not being provided opportunity to reply to SCN or not provided personal hearing. This leads to unnecessary and avoidable loss of time and resources on part of all concerned and should be eschewed, to say the least. Hence, this case is being decided on basis of material before this Tribunal..."*
10. Considering the aforesaid, I am of the view that the principles of natural justice have been adhered to, as the SCN and the Hearing Notices were duly served upon the Noticees and sufficient opportunity has been granted to them to reply to the SCN and appear for the personal hearing. As the Noticees 3 and 4 have neither replied to the allegations in the SCN nor have they availed the opportunity of personal hearing which was granted to them, I deem it appropriate to proceed against Noticees 3 and 4 ex-parte, based on the material available on record.

11. Replies from the Noticees

11.1 The AR for Noticees 1 and 2 submitted reply vide letter dated 25.08.2024 which was received on the day of the personal hearing i.e. 26.08.2024. A summary of the submissions of the noticees are as under:-

11.1.1 The Company entered into Debenture Trustee Agreement dated 13.01.2014 (“DTA”) with KCL as “Debenture Holder Representative”, Vistra as “Trustee” and Noticees as “Promoters” by way of an undertaking by KCL to raise funds to the tune of Rs.75 Crores i.e. Rs.50 Crores and Green Shoe Option of Rs.25 Crores by way of an allotment of Secured Unrated Unlisted NCDs against a security of 51% shareholding of the company and other securities. The said DTA was subsequently amended vide Amendment dated 30.01.2014 and an Addendum to DTA dated 24.03.2014.

11.1.2 An Information Memorandum (“IM”) dated 13.01.2014 was issued by Company for issuance of debentures on a private placement basis. In terms of the IM, KCL was specified to act as Sole Book Runner and Lead Arranger and Karvy Computershare Private Limited (“KCPL”) as Registrar to the issue. The IM, inter-alia provided a Disclaimer Clause which stated that the issue was being made strictly on a private placement basis and was not intended to be circulated to more than 49 persons nor intended to be listed on a stock exchange at any time. Since the Issue was made on a private placement basis, a copy of the IM was not filed with the RoC.

11.1.3 As per the IM, the role of KCL was confirmed to marketing and placement of the NCDs. KCL had neither scrutinized nor vetted or conducted any due diligence for verification of the contents of the IM. KCL was to use the IM for the purpose of soliciting subscription(s) from qualified institutional investor(s) in the NCDs to be issued.

11.1.4 The Company issued and allotted from time to time NCDs during financial year 2013-14 and 2014-15 of Rs.52.5 Crores to KCL on receipt of the funds from KCL at the minimum issue size of minimum 10 debentures and at price of Rs.1,00,000/- per lot of ten Non-Convertible Debenture.

11.1.5 KCL did not adhere to the Clauses of the IM and DTA and without any information or knowledge of the Company, KCL down sold 2500 NCDs to 185 investors during FY 2013-14.

11.1.6 The amount received from NCDs was deposited in the Escrow Account created for the purpose of issuance of NCDs. Thereafter, Company was

planning to come up with an Initial Public Offer (IPO) for the purpose to arrange the required capital for the Company and also to repay the existing debenture holders of the Company (as bridge funding). When the due diligence of the Company was conducted by the Law Firm, the team pointed out certain requirements regarding the issuance of NCDs.

- 11.1.7 Accordingly, the Company requested KCL to furnish the list of debenture holders to whom the NCDs have been issued. The Company didn't receive any communication regarding the same from KCL from time to time. The main intention behind this action was to suppress the fact that KCL has contravened the provisions of IM and DTA .
- 11.1.8 Later, when Company was undergoing audit for its annual return, it came to know from KCL about down selling and transfer of NCD's by KCL to 185 debenture holders, and therefore, the Company after conducting its AGM on September 30, 2014 filed its Annual Return (in Form 20B) for the financial year ending March 31, 2014 with Registrar of Companies ('ROC') alongwith enclosed list of 185 debenture holders.
- 11.1.9 Since KCPL (being the group company of KCL) was the Registrar to the Issue, the Company was not informed of the said down selling and transfer of NCD's by KCL at that point of time.
- 11.1.10 The Debenture Holders purchased the debentures of the Company from KCL for consideration, which was not communicated to the Company by either parties. Thereafter, the said debenture holders were shifted to the discretionary Portfolio Management Account with KCL, again without the consent or knowledge of the Company in the year 2015. Hence, the Company, did not have the knowledge regarding the money paid by the Debenture holders to KCL.
- 11.1.11 Similarly, Vistra filed a petition before the National Company Law Tribunal, Mumbai ("NCLT") against the Company in the year 2018.
- 11.1.12 The Company filed its Reply before NCLT opposing the said Petition of Vistra. However, NCLT vide Order dated 03.09.2019 appointed Interim Resolution Professional to carry out the functions as mentioned under the IB Code and imposed moratorium.
- 11.1.13 There is an inordinate delay of more than ten years in initiating the current proceeding which has caused severe prejudice to the noticees and thus not maintainable and liable to be dropped.

- 11.1.14 SEBI based on the information provided by KCL vide email dated 07.06.2019 that, BENPOS statement reflecting transfer of NCD to buyers, was regularly submitted to Company, has alleged that the Company has made issuance of NCDs to more than 49 persons in FY 2013-14 in violation of public issue norms laid out in Companies Act, 1956 and ILDS Regulations 2008. The noticees deny that KCL had informed the company /noticees about their intention to down sell the NCDs to more than 49 investors.
- 11.1.15 Further, it can be observed from the Adjudication Order dated 27.04.2022 that KCL has admitted that the debentures were issued by the company to KCL only and KCL subscribed to such debentures through its own funds. The provisions of the Companies Act and ILDS Regulation 2008 do not apply to down selling. The fact that KCL has down sold the debentures, does not change the character of the transaction i.e. the investors are transferees and not allottees and such transfer cannot be construed as a deemed public issue.
- 11.1.16 Company has not sent any direct communication to any investor except KCL, it is deemed that the Company has not issued or down-sold NCD to any other investor.
- 11.1.17 The contravention of down selling the NCDs to more than 49 investors, which was prohibited under Disclaimer clause in IM, was done by KCL without consent or knowledge of the company or the noticees. Hence, no adverse inference can be drawn against the noticees.
- 11.1.18 Later when company was undergoing audit for its annual return, it came to know from KCL about down selling and transfer of NCDs by KCL to 185 debenture holders. Therefore, company after conducting its AGM on 30.09.2014 filed its Annual Return (in Form 20B) for financial year ending 31.03.2014 with ROC alongwith the enclosed list of 185 debenture holders.
- 11.1.19 NCDs were issued for a short period of two years with a disclaimer clause as aforesaid, entire control with respect to NCDs was with KCL and the Company did not have any access to Benpos, and KCL had also not provided certain signed documents obtained from Company, at the signing of DTA, IM etc.
- 11.1.20 BENPOS is not an advance information from which Company could have been known about the said second sale before it is done, so as to take decision / steps to avoid contravention of Disclaimer clause and provisions of the Companies Act by KCL.

11.1.21 BENPOS data cannot be considered as constructive notice, as the same would amount to creation of an independent onerous obligation which is absent from the applicable law. The noticees have made a reference to the order of Hon'ble SAT in the matter of *Avenue Supermarkets Limited v. SEBI* (Appeal No. 298 of 2020 decided on 17.01.2022) and *Kundal Lal v SEBI & Anr.* (Appeal No. 132 of 2021 decided on 08.02.2022) wherein it has been stated that imputing constructive notice based on receipt of BENPOS data is patently erroneous.

11.1.22 The Noticees have neither gained any type of benefit out of the said issue and allotment of NCDs or the alleged second sale by KCL, and also by allegedly circumventing the regulatory requirement.

11.2 Noticees 5 and 6 have both sent similar replies vide letter dated 11.06.2024 which was sent vide email dated 13.06.2024 from email id sahindrabh@gmail.com. The reply of the Noticees is summarized hereinbelow:-

11.2.1 Noticee joined VDDPL on 02.04.2018. Due to some reasons they could not arrange funds for VDDPL in specified time. As they could not arrange for funds, VDDPL asked them to resign on 08.05.2018

11.2.2 Total duration / tenure was only 36 days.

11.2.3 They have not signed any documents pertaining to VDDPL, nor attended any meeting or resolution and was not part of the decision making

11.2.4 They were not aware about the NCD allotment made by VDDPL in 2023-14

11.2.5 They were not part of the day to day business activities and any kind of decision made prior to his appointment and after his resignation.

11.2.6 They were not on board during the NCD allotment period.

CONSIDERATION OF ISSUES AND FINDINGS

12. Before proceeding with the consideration of issues, there is a need to address the preliminary issues raised by Noticees 1 and 2 stating delay of almost 10 years in initiation of the proceedings, since the date of transaction in February-March 2014. I note that SEBI received a complaint with regard to the issuance

and default of the NCDs in July 2017. Further to the receipt of complaint in July 2017 only, SEBI started examining the details related to issue of NCDs. Thereafter, SEBI sought information from the company vide its letters dated 13.09.2017 and 24.10.2017. The company vide their letter dated 02.11.2017 sought additional time to submit the requisite information. However, no further communication was received from it despite various reminders vide letters dated 08.11.2017, 08.12.2017, 16.01.2018 and email dated 21.01.2019 which were sent by SEBI. Whereas the information from the company was not forthcoming, the SEBI officials visited the registered office of the company on 11.03.2019 and met the Noticee 1 who was the Managing Director of VDDPL. The Noticee 1 vide letter dated 11.03.2019 handed over reply vide letter dated 23.01.2019, Information Memorandum related to the issuance, copy of Debenture Trustee Agreement, copy of one application form and copy of written submission of the company made before NCLT, Mumbai Bench w.r.t insolvency application filed by the Debenture Trustee. Vide the said reply, the company/Noticee 1 has acknowledged receipt of all the aforesaid letters of SEBI. Therefore, I note that although SEBI was constantly sending reminders to the company, no reply was forthcoming. Thus, the company has delayed in providing the preliminary information sought by SEBI during the examination of the matter. It was only after SEBI undertook a site visit, the company provided certain information. Hence, the company did not cooperate in providing the information initially, which has caused delay in the examination to begin with.

13. In this regard it is pertinent to note that the Hon'ble SAT in the matter of *Girraj Kumar Gupta HUF v/s. SEBI (Appeal no. 424/2019)* dated August 11, 2021, has, *inter-alia*, observed that....*"We find that the investigation started in the year 2015 which involved examining several entities in the order logs, trade logs, off market transactions and gathering evidence from the Stock Exchange and accordingly we find that there is no inordinate delay in the initiation of the proceedings."* In the instant matter, based on replies / documents received from various entities involved in the issuance of the NCDs of VDDPL, SEBI had to conduct detailed examination against the entities who were involved with VDDPL in the raising of funds and has accordingly passed orders in April 2022 against

KCL for violating the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 and against Vistra for violating the provisions of the SEBI (Debenture Trustees) Regulations, 1993. Further, as VDDPL was also under the Corporate Insolvency Resolution Process (CIRP), there was no one available to furnish the requisite information on behalf of the company. Therefore, I note that the delay in issuance of SCN was unavoidable and thus does not vitiate the current proceedings.

14. Having dealt with the preliminary objection, I now proceed to consider the allegations made in the SCN and the documents available on record. I note that the issue for consideration is;

- (I) Whether the company came out with the Offer of NCDs in violation of the provisions of Section 56, Section 60 read with Section 2(36), Section 67(3), Section 73 of the Companies Act, 1956 (r/w corresponding Section 40 of Companies Act, 2013 which became effective from 12.09.2013) read with Section 5 of the Companies Act, 1956, Section 25(2) of the Companies Act, 2013 and Section 117C of the Companies Act 1956 alongwith various provisions of the regulations of the SEBI (Issue of Listing of Debt Securities) Regulations, 2008?
- (II) If the findings are found to be affirmative, who shall be liable for the violations committed?

15. Before moving forward, it is pertinent to refer to the relevant provisions of the Companies Act, 1956:-

Companies Act, 1956

“56. MATTERS TO BE STATED AND REPORTS TO BE SET OUT IN PROSPECTUS

(1) Every prospectus issued –

(a) by or on behalf of a company, or

(b) by or on behalf of any person who is or has been engaged or interested in the formation of a company, shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2)

(3) No one shall issue any form of application for shares or debentures of a company, unless the form is accompanied by a memorandum containing such salient features of a prospectus as may be prescribed] which complies with the requirements of this section:”

[Provided that a copy of the prospectus shall, on a request being made by any person before the closing of the subscription list, be furnished to him:]

Provided [further] that this sub-section shall not apply if it is shown that the form of application was issued either –

(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or

(b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be punishable with fine which may extend to [fifty] thousand rupees.”

“60. REGISTRATION OF PROSPECTUS

(1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto –

(a) any consent to the issue of the prospectus required by section 58 from any person as an expert; and

(b) in the case of a prospectus issued generally, also –

(i) a copy of every contract required by clause 16 of Schedule II to be specified in the prospectus, or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof ; and

(ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.....”

“Section 2(36)

(36) "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or

inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate.”

“67. Construction of References to Offering Shares or Debentures to the Public, etc.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances –

- (a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or
- (b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation:

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

Provided further that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”

73. ALLOTMENT OF SHARES AND DEBENTURES TO BE DEALT IN ON STOCK EXCHANGE

(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

[(1A)] Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists :

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

- (2) *Where the permission has not been applied [under sub-section (1)], or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.*

.....

- (3) *All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in subsection (2) ; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.”*

Companies Act, 2013

“25. Document containing offer of securities for sale to be deemed prospectus.

- (1) *Where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in subsections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.*
- (2) *For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to the securities being offered for sale to the public if it is shown—*

- (a) that an offer of the securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or
- (b) that at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

.....”

“40. Securities to be dealt with in stock exchanges

- (1) Every company making public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.
- (2) Where a prospectus states that an application under sub-section (1) has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.
- (3) All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—
 - (a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or
 - (b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

.....”

Issue 1: Whether the company came out with the Offer of NCDs in violations of Sections 56, 60, 67(3) and Section 73 and Section 117C of the Companies Act, 1956 read with Section 25(2) and Section 40 of the Companies Act, 2013 read with ILDS Regulations?

16. Before proceeding further with the issue, I note that the Companies Act, 1956 empowers SEBI to take action in matters related to issue and transfer of securities. Section 55A of the Companies Act, 1956 states the following :

“55A. POWERS OF SECURITIES AND EXCHANGE BOARD OF INDIA

The provisions contained in sections 55 to 58, 59 to 81 (including sections 68A, 77A and 80A), 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall, -

- (a) in case of listed public companies ;

(b) in case of those public companies which intend to get their securities listed on any recognised stock exchange in India, be administered by the Securities and Exchange Board of India ; and
(c) in any other case, be administered by the Central Government.

Explanation. - For the removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, the Tribunal or the Registrar of Companies, as the case may be. ”.

17. During the examination, SEBI sought information with respect to the issuance of NCDs from the company i.e. VDDPL. From the replies provided by the company, it was observed that during the period 04.02.2014 to 31.03.2014, VDDPL had issued NCDs initially to KCL and raised Rs. 25 crore. KCL further downsold the NCDs to 185 investors as given below:-

Financial Year	Date of Allotment	Type	Initial Allotment	Down-sold to No. of Investors	Amount in Rs. Crores
2013-14	04.02.2014 To 31.03.2014	NCD	NCDs were initially allotted by VDDPL to KCL	KCL downsold these NCDs to 185 investors	Rs. 25 Crores

18. Details of the down selling of NCDs by KCL in F.Y. 2013-14 is as under:-

Sr.No.	No. of NCDs allotted by KCL to investors	No. of Investors	Date of allotment by VDDPL to KCL	Dates of down selling by KCL to the investors
1	650	47	February 4, 2014	February 10 & 19, 2014
2	619	49	February 10, 2014	February 26, 2014
3	408	35	February 24, 2014	March 3, 10, 11 & 13, 2014
4	252	22	March 10, 2014	March 18, & 19, 2014
5	571	32	March 19, 2014	March 24 & 31, 2014
TOTAL	2500	185		

19. An Information Memorandum (IM) dated 13.01.2014 was issued by VDDPL for issuance of debentures on private placement basis. In terms of the IM, KCL was

specified to act as Sole Book Runner and Lead Arranger and Karvy Computershare Private Limited as the Registrar to the issue. The IM *inter alia* provided the following : -

- Page 39 of the IM provided the following Disclaimer Clause : *“The issue is being made strictly on a private placement basis and is not intended to be circulated to more than 49 persons nor intended to be listed on a stock exchange at any time.”*
- The role of the Sole Arranger in the assignment is confined to marketing and placement of the NCDs on the basis of the IM. The IM also provides use of IM by the Sole Arranger for the purpose of soliciting subscription from qualified institutional investors in the NCDs.
- Minimum number of NCDs to be applied for were 10 (ten) and in multiples of 1 (one) NCD thereafter.

20. It is observed that although the IM contained a disclaimer clause, which, *inter alia*, prohibited circulation of the IM to more than 49 persons, NCDs were issued to more than 49 investors in contravention of the terms set out in the IM.

21. VDDPL (*earlier also known as Shubhi Agro Industries Private Limited*) with CIN U15203PN2007PLC130147 had filed Form 20B (form for Annual Return) for financial year ending 31.03.2014 with the Registrar of Companies (ROC) which was digitally signed by the Managing Director i.e. Noticee 1 i.e. Nandkishor Harikishan Attal. The Form 20B enclosed a list of 185 debenture holders who were allotted NCDs of the company during the year which, *inter alia*, contained the details of the series, date of arrangement with investors, total investments and Depository Participant ID of the investors. Therefore, the company /Noticee 1 knew that the NCDs of the company were allotted to 185 debenture holders. However, in their reply the noticees 1 and 2 have at various places stated that they were not aware of the down selling of the NCDs by KCL.

22. Moreover, KCL vide its email dated 07.06.2019, inter alia, indicated that the BENPOS statements reflecting the transfers to the buyers and recording the beneficial ownership of the debentures as on any particular date was regularly being submitted to VDDPL. The noticees, while responding to the SCN vide reply dated 25.08.2024 have denied the submission of KCL. They have stated that since the NCDs was issued for a short period of two years and there was a disclaimer clause in the information memorandum, entire control with respect to the NCDs was with KCL and the company did not have access of BENPOS. The noticees have further referred to various submissions made by KCL in their reply before the adjudicating officer and have not provided their own independent submissions refuting the allegation made against them. Instead they have merely relied on the submissions of KCL before AO. However, I have perused the said AO Order dated 22.04.2022 against the proceedings of KCL wherein the AO had, *inter alia*, stated “*I note that in the instant matter, both Noticee and SVDDPL have adopted a schematic approach to circumvent the regulatory framework for public issue which is explained in above paragraphs. Therefore, SVDDPL and Noticee have thus, acted in a fraudulent manner to avoid regulatory purview and thereby violated the provisions of Regulation 3(a) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003.*” The AO has accordingly levied a penalty on KCL.

23. Further, w.r.t reliance on the BENPOS report, the Noticees have referred to the decision of Hon’ble SAT in the matter of *Avenue Supermarkets Limited v SEBI (Appeal No 298 of 2020 decided on 17.01.2022)* and *Kundal Lal vs SEBI (Appeal No. 132 of 2021) decided on 08.02.2022* to say that reliance on BENPOS report is patently erroneous. I have perused these decisions. These decisions referred by the noticees are related to disclosure related violation by the company wherein SAT was of the opinion that it was not practical for the company to scan the BENPOS report for the purpose of making a possible disclosure under the Regulations and hence was of the view that reliance on Benpos report is erroneous. In the current proceedings, the Noticees 1 and 2 have argued that reliance cannot be placed on the BENPOS as the source of information for the downselling by KCL.

24. In this context, I would like to take note of the decision of the Hon'ble SAT in the matter of *Man Industries (India) Ltd. vs SEBI (Appeal No. 95 of 2020)* dated 08.04.2022, wherein while referring to the decision in the matter of *Avenue Supermarkets Limited v SEBI* had also stated that company could get relevant information from other sources apart from BENPOS and had accordingly dismissed the appeal.
25. The Noticees 1 and 2 have disputed that the Benpos should not be considered as the source of the information of debenture holders of the company, but the fact remains that the company was aware that the debentures of the company were allotted to 185 investors as the company has provided the details of these debenture holders in Form 20B while filing annual return of the company with ROC. I also note that the list provides the names of the debenture holders while stating KCL is 'Representative of Debenture in the market'. Hence it is evident that KCL was not the debenture holder as disputed by the noticees. The same is also brought out in the reply of the noticees wherein they have stated *inter alia* "Later, when Company was undergoing audit for its annual return, it came to know from KCL about the down selling and transfer of NCDs by KCL to 185 debenture holders, and therefore, the Company after conducting its AGM on September 30, 2014 filed its Annual return (in Form 20B) for the financial year ending March 31, 2014 with Registrar of Companies (ROC) alongwith the enclosed list of 185 debenture holders." Hence, even if the benefit of doubt is given that the company was not aware of the down selling of the debentures by KCL as the BENPOS statement reflecting the transfers to the buyers was not made available to the company, the company / noticees have not demonstrated as to what legal recourse was taken by them on becoming aware of the violation of the IM / DTA by KCL when the list of 185 debenture holders was made available. Instead, it has only made a bald assertion that KCL did not furnish the list of debenture holders to whom the NCDs were issued. It is thus evident that KCL was just a conduit between the investors and the company and it was pre determined by the company and KCL to sell NCDs to a large public. Hence the contention of the Noticees that KCL was responsible for the breach is not

acceptable. Further, the NCDs were pertaining to VDDPL, the company who was responsible for its issuance.

26. VDDPL appointed KCL as a 'Debenture Holder Representative' which is not a recognised intermediary either under the SEBI Act or any of the Regulations or the Companies Act, 1956/2013. Thus, the onus of ensuring that the number of allottees in a private placement does not breach the number prescribed in the Companies Act lies with the company issuing the NCDs i.e VDDPL. Further, VDDPL has also received the funds from KCL for the NCDs.

27. Further, VDDPL vide its reply dated 23.01.2019, *inter alia*, has also acknowledged that the company was planning to opt for public issue of securities to meet its fund requirements as well as timely redemption of the series of debentures thus allotted.

28. VDDPL had issued NCDs to KCL and raised INR 25 crores which were then down-sold by KCL to 185 investors (i.e. to more than 49 persons) during F.Y.2013-14. It is noted that KCL had offered the shares to the public within six months from each allotment by VDDPL to KCL as mentioned u/s 25 of the Companies Act, 2013 (equivalent to Section 64 of the Companies Act, 1956). Hence the issue of NCDs by VDDPL is an issue of debentures, with a view of it being offered to the public. Accordingly, this provision in the Companies Act contemplates a scenario, as in the instant case, wherein the primary allotment is made by the issuer company to a subscriber, who in turn, will offer the securities to the public at large. The subsequent transfer of securities may appear to be merely 'a transfer of securities' from the original allottee to the public at large but in effect it is an 'offer of securities to the public' and part of a larger design to circumvent the deemed public issue norms. The fact is further corroborated wherein it is noted that KCL received money from the investors, in most cases, even before the series dates which further strengthens the alleged violation that NCDs were issued by VDDPL with a view to ultimately offer them to the public through the intermediation of KCL as an allottee. Further from the demat statement it is clearly noted that KCL transferred these debentures to the

investors within six months from the date of allotment of the debentures by the company.

29. Thus, the companies do adopt different modus operandi and allot shares to a large number of persons in the garb of private placement. The intention of the company can be inferred from the conduct / deeds of it and there is no need to express / depict the same in clear words. The Hon'ble Supreme Court in the matter of *Sahara India Real Estate Corporation Ltd. & Ors. Vs. SEBI & Anr* (2013) 1 SCC 1, inter alia, held as under '95 *The maxim 'acta exterior indicant interiora secreta' (external action reveals inner secrets) applies with all force in the case of Saharas, which I have already demonstrated on facts as well as on law. Conduct and actions of Saharas indicate their intention, we have to judge their so called intention from their subsequent conduct. Subsequent illegality shows that Saharas contemplated illegality. A person's inner intentions are to be read and understood from his acts and omissions. Whenever, in the application of an enactment, a person's state of mind is relevant, the above maxim comes into play.*

30. In this regard, it is pertinent to note the following observations of the Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors. v. SEBI* (Civil Appeal No.9813 and 9833 of 2011), while examining the scope of Section 67 of the Companies Act, 1956:-

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses

(1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public. The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ... Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation."

31. Further, I also note from the material available on record that VDDPL is not a non-banking financial company or public financial institution within the meaning of Section 4 of the Companies Act, 1956. In view of the aforesaid, I find that VDDPL is not covered under the exception mentioned at second proviso to Section 67(3) of the Companies Act, 1956.

32. Even in cases where the allotments are considered separately, reference may be made to *Sahara Case* (supra), wherein it was held that under Section 67(3) of the Companies Act, 1956, the "*Burden of proof is entirely on Saharas to show that the investors are/were their employees / workers or associated with them in any capacity which they have not discharged.*" Moreover, reference may also be made to the order of the Hon'ble SAT dated 28.04.2017 in the matter of *Neesa Technologies Limited vs. SEBI* (Appeal No. 311 of 2016) which lays down that "*In terms of Section 67(3) of the Companies Act any issue to 50 persons or more is a public issue and all public issues have to be comply with the provisions of Section 56 of the Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning.*"

33. In light of above, I note that in the F.Y.2013-14, VDDPL allotted NCDs amounting to INR 25 crores to KCL which were down sold to the public (i.e 185 investors) by

KCL within six months from various dates of allotment by VDDPL. The extant modus / scheme adopted by VDDPL which is a part of a design to circumvent the regulatory framework, is a deemed public issue of securities in terms of Section 25 of Companies Act, 2013 read with Section 67 (3) of the Companies Act, 1956.

34. In terms of Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of the Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. There is no material to show that VDDPL has issued prospectus containing the disclosures mentioned in Section 56(1) of the Companies Act, 1956 or issued application forms accompanying the abridged prospectus. In view of above, I find that VDDPL has not complied with Sections 56(1) and 56(3) of the Companies Act, 1956.

35. Section 2(36) of the Companies Act read with Section 60 thereof, mandates a company to register its prospectus with the Registrar of Company (RoC), before making a public offer / issuing the prospectus. As per aforesaid Section 2(36), 'prospectus' means *any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate*. As the offer of NCD was a deemed public issue of securities, VDDPL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that there is no material on record to indicate that VDDPL has registered a prospectus with the RoC, in respect of the offer of NCD. Therefore, I find that VDDPL has not complied with the provisions of Section 60 of the Companies Act, 1956.

36. Further, the offer of NCD being a public issue of securities, such securities also have to be listed on a recognised stock exchange, as mandated under Section 73 of the Companies Act, 1956. As per Section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognised

stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been sought for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. I do not find any material on record to indicate that VDDPL had made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that VDDPL has also not complied with the provisions of Section 73 of the Companies Act, 1956.

37. The public companies, whether listed or unlisted, when they issue and transfer securities, the jurisdiction of SEBI is governed by the provisions of Section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in the *Sahara Case* (supra) has observed that :

"We, therefore, hold that so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognised stock exchange in India."

"SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of the SEBI Act and Regulation 107 of the ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognised stock exchange."

38. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, SEBI has to administer Section 67 of the Act, in so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed. While interpreting the phrase 'intend to get listed' in the context of deemed public issue, the Hon'ble Supreme Court in the matter of *Sahara Case* (supra) observed the following:-

“....But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law.

Obviously, therefore, “intent” has its limitations also, confining it within the confines of lawfulness.....”

“...Listing of securities depends not upon one’s volition, but on statutory mandate..”

“.... The appellant-companies must be deemed to have “intended” to get their securities listed on a recognised stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant companies could have “intended”, what was contrary to the mandatory requirement of law....”

39. The Company has also contravened Section 117C of the Companies Act, 1956 w.r.t “Liability of Company to create Security and Debenture Reserve”

“(1) Where a company issues debentures, it shall create a debenture redemption reserve for the redemption of such debentures, to which adequate amounts shall be credited, from out of its profit every year until such debentures are redeemed.”

40. Further, ILDS Regulations are also applicable to the public issue and listing of debt securities. Regulation 29(e) of the ILDS Regulations defines debt securities to mean non convertible debt securities which create or acknowledge indebtedness, and include debentures. In view of the finding that VDDPL has made a public issue of debt securities, the ILDS Regulations is also applicable in the instant offer of NCDs. Therefore, I find that the Company has violated the following provisions of the aforesaid ILDS Regulations which contain *inter alia*, conditions for public issue and listing of debt securities viz;

- i) Regulation 4(2)(a) – Application for listing of debt securities
- ii) Regulation 4(2)(b) – In-principle approval for listing of debt securities
- iii) Regulation 4(2)(c) – Credit rating has been obtained.
- iv) Regulation 5(2)(b) – Disclosure requirements in the offer document
- v) Regulation 6 – Filing of draft offer document
- vi) Regulation 7 – Mode of disclosure of offer document

- vii) Regulation 8 – Advertisement for Public Issues
- viii) Regulation 9 – Abridged Prospectus and application forms
- ix) Regulation 12 – Minimum Subscription
- x) Regulation 14 – Prohibition of mis-statements in the Offer Document
- xi) Regulation 15 – Trust Deed
- xii) Regulation 16(1) – Debenture Redemption Reserve
- xiii) Regulation 17 – Creation of security
- xiv) Regulation 10 – Mandatory Listing
- xv) Regulation 26 – Obligations of the Issuer , etc.

41. The Companies Act, 1956, has been repealed by the Companies Act 2013 and anything done or any action taken or purported to have been done or taken under the Companies Act, 1956, is deemed to have been done or taken under the corresponding provisions of the Companies Act, 2013, by virtue of Section 465(2) of the Companies Act, 2013 and is therefore saved regardless of the repeal of the Companies Act, 1956.

42. In view of the above, I find that VDDPL engaged in fund mobilising activity from the public, through the offer of NCDs and has contravened the provisions of Section 56, Section 60 read with Section 2(36), Section 67(3) and Section 73 of the Companies Act, 1956 r/w Section 25(2) and Section 465 (2) of the Companies Act, 2013 and Section 117 C of the Companies Act, 1956 read with the aforesaid provisions of the ILDS Regulations.

Issue No. 2 : If the findings on Issue No.1 are found in the affirmative, who shall be liable for the violations committed?

43. The debenture trustee i.e. Vistra has filed an application before the Hon'ble National Company Law Tribunal (NCLT), Mumbai Bench for initiation of insolvency proceedings against the company. In this regard, VDDPL and KCL vide emails dated 17.10.2019, inter alia, have informed that the Hon'ble NCLT vide its Order dated 03.09.2019 has admitted the insolvency petition and has

appointed an Interim Resolution Professional to carry out the functions as mentioned under the Insolvency and Bankruptcy Code (IBC).

44. Section 14 of the IBC, *inter alia*, states that the companies which are under IBC and where moratorium period has been declared by NCLT, no suit can be instituted and enforced. In terms of Section 17 and Section 23(2) of IBC, the management of the affairs of the corporate debtor (i.e the company undergoing corporate insolvency resolution process viz VDDPL) vests with the Interim Resolution Professional / Resolution Professional (IRP/RP). Further in terms of Section 25 of IBC, it shall be the duty of RP to preserve and protect the assets of the corporate debtor. As VDDPL is under the CIRP and an RP has been appointed in the case and as the moratorium period has been declared by NCLT vide its Order dated 03.09.2019, the order directing the company to refund the investors cannot be enforced.

45. It is noted that as the IRP/RP has control over the management and the assets of the company and NCLT has power to decide on questions of priorities of refund and the company is under CIRP, SEBI had issued a letter dated 08.09.2023 to the RP stating, *inter alia*, the facts that the issuance of NCDs by VDDPL in F.Y. 2013-14 is in violation of public issue norms of the Companies Act, 1956 and these debentures are *void-ab-initio* and the same needs to be cancelled and refunded to the investors as funds were raised in an unlawful manner without following public issue norms. It is noted from NCLT's Order dated 18.10.2023 that this letter to the RP has been taken on record.

46. It is also noted that although a company is a juristic person, depending upon the circumstances of the case, it is sometimes necessary to lift the corporate veil and to examine the roles of the natural persons acting as directors in the company, who are actually guilty of the violations. In this case, although the company is currently under CIRP, I find that the directors of VDDPL are responsible for the commissions and omissions of the company, as they were the persons in charge of the company's affairs. Here, I would also like to quote the observations of the Hon'ble Supreme Court of India in the matter of *Shri N. Narayanan vs.*

SEBI[(2013) 12 SCC 152] decided on 26.04.2013, wherein it was observed 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." Hence, in the instant case, although the proceedings against the company cannot be pursued, I find the directors liable for the acts of the company.

47. It is noted that even in a case where a company is dissolved, the liabilities of the directors of the company still continue. Section 248(7) of the Companies Act, 2013 provides that *"The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved."* Further, Section 250 of the Companies Act, 2013 provides that where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice under sub-section (5) of that section cease to operate as a company and the certificate of incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company. Thus it is noted that the liabilities of the directors of the company still continue even after the company is dissolved. Hence, I note that although VDDPL is currently under CIRP and IRP/RP has been appointed in the matter, the liability of the directors still continues.

48. From the RoC filings, I note that VDDPL had the following directors/promoters:-

Sr.No.	Director Name & (Noticee No)	Designation	Date of appointment	Date of cessation
1.	Nandkishor Harikishan Attal (Noticee 1)	Managing Director/ Promoter	15.11.2007*	-
2.	Mayura Nandkishor Attal (Noticee 2)	Director / Promoter	15.11.2007	01.10.2010
			01.11.2013	27.07.2016
			08.03.2017	02.04.2018

3.	Navneet Lal Kakani	Managing Director	18.05.2007	15.11.2007
4.	Mahesh Brij Gopal Bhattad (Noticee 3)	Director	01.10.2010	01.11.2013
			30.09.2015	02.04.2018
5.	Nilesh Shankar Indani	Not available	01.10.2010	01.11.2013
6.	Vasant Narayan Pinjan (Noticee 4)	Director	27.07.2016	08.03.2017
7.	Sahindra Jajannath Bhawale (Noticee 5)	Director	02.04.2018	08.05.2018
8.	Arati Sahindra Bhawale (Noticee 6)	Director	02.04.2018	08.05.2018

*From one of the filings I note that Noticee 1 was appointed as Director on 18.5.2007 and as Managing Director on 15.11.2007.

Directors at Sr. Nos. 3 and 5 above were directors before the fund raising and down selling period and have hence been excluded.

49. Sections 56(1) and 56(3) read with Section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, in the instant matter the noticees who were directors are held liable for the violations of Section 56(1), 56(3) and 60 of the Companies Act, 1956.

50. The funds were raised by the company through the issuance of NCDs during F.Y. 2013-14. Section 73(2) of the Companies Act, 1956 requires the Company to keep all the money collected by it in a separate account till the permission is granted by the stock exchange and where the permission has not been applied for or has not been granted, the money collected be repaid within the time and in the manner specified in subsection (2). Any default in the compliance of the repayment within eight days would result in fine for the company and every officer of the company who is in default. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable,

to repay all the money with interest at prescribed rate. In this regard, I note that in terms of Rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

51. Thus, responsibility is cast upon the directors and the company for the adherence of obligations under Section 73(2). In this regard, reference is made to Section 5 of the Companies Act, 1956. As per the said provision,

“5. 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.

52. In this regard, I note that Hon'ble Securities Appellate Tribunal (SAT) vide order dated February 14, 2019 in the matter of Pritha Bag Vs. SEBI stated that *“12.....Unless and until a finding is given that the appellant is an officer in default, the mandate provided under Section 73(2) cannot be invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing director, namely, Mr. Indranath Daw and,*

therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could not be made responsible for refunding the amount under Section 73(2).

13. Reliance on the judgment of this Court by the respondent in the case of Manoj Agarwal vs. SEBI in Appeal No. 66 of 2016 decided on July 14, 2017 is not applicable and is distinguishable. The Tribunal in the case of Manoj Agarwal found that there was no material to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of the said company was entrusted to discharge the application contained in Section 73 of the Companies Act. 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 alongwith interest from the appellant is wholly illegal....”

53. I note from records that Noticee 1 i.e. Nandkishor Harikishan Attal was the Promoter and the Managing Director since 15.11.2007 and was the Managing Director of VDDPL during the fund raising and downselling period in 2013-14. He was also a signatory to the IM, DTA and the addendum to the DTA. Noticee 1 has also digitally signed the Form 20B as Managing Director while filing the annual return with ROC for F.Y. 2013-14 wherein the list of 185 debentures were disclosed. Thus placing reliance on Section 5 (a) of the Companies Act, 1956, I find that the Noticee 1 being Managing Director of VDDPL is the officer in default for the issuance of NCDs during the year 2013-14 and is hence liable to make refund alongwith interest at the rate of 15% per annum under Section 73(2) of the Companies Act, 1956 read with Rule 4D of the Companies (Central Government's) General Rules and Forms, 1956.

54. Further, from the material available on record and the details of the appointment and resignation of the directors of VDDPL as can be seen at Para 48, except for Noticees 1 and 2, the other noticees i.e 3,4,5 and 6 were appointed as directors in VDDPL subsequent to the issuance and allotment of NCDs i.e they were not directors in VDDPL during the period of issuance and down selling of NCDs.
55. The directors of VDDPL had the responsibility to ensure that refund of money was made to the investors as prescribed in law. A person cannot assume the role of a director in a casual manner. The position of a 'director' in a public company / listed company along with the responsibilities and compliances under law associated with such position which have to be fulfilled by such director or face the consequences for any violation or default thereof.
56. With respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies (2002) 108 Comp Cas 1 (Mad)*:
- "13.... A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.*
- 14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956."*
57. Hon'ble Supreme Court of India in the matter of *Shri N. Narayanan vs. SEBI* [(2013) 12 SCC 152] decided on 26.04.2013, wherein it was observed 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."*

58. A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company / listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. The director cannot wriggle out from the liability. A director who is part of the company's board shall be responsible and liable for all acts carried out by a company. Accordingly, Noticees 2 to 6 were responsible for all the deeds / acts of the Company including ensuring compliance of the refund during the period of their respective directorship.
59. Noticees 5 and 6 have stated that they were directors for only a short period i.e 34 days and have not attended any board meeting or resolution, have not participated in any kind of business decision making, not signed any paper of the company.
60. It is further noted that Noticee 2 i.e Mayura Nandkishor Attal was a director / promoter in VDDPL alongwith Noticee 1 during the fund raising and down selling of the NCDs. Both Noticees 1 and 2 were the promoters and directors as also stated in the IM. The DTA dated 13.01.2014 was signed by Noticee 1 for self and on behalf of Noticee 2. Further the DTA which was amended by an agreement dated 30.01.2014 and the Addendum to the DTA dated 24.03.2014 were signed by both the noticees i.e. Noticee 1 and 2.
61. It is noted and established from the foregoing paragraphs that VDDPL and Noticee 1 have not followed the norms mandated for the issuance of securities to the public and are liable for the refund. However, as liability of the directors is a continuing liability in terms of Section 73(2) of the Companies Act, 1956, Noticees 3 to 6 who joined subsequent to the issuance and allotment of NCDs and Noticee 2 who was director during the fund raising period and down selling of NCDs, are also liable to be debarred from the securities market for appropriate period of time.

62. In view of foregoing and considering that the company is under CIRP, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under Section 73(2) of the Companies Act, 1956 is to direct the Noticee 1 the director, to refund the monies collected with interest to such investors. Also, in order to safeguard the interests of investors, to prevent further harm to investors and to ensure orderly development of securities market, all the noticees become liable to be debarred for an appropriate period of time. I also note that SEBI had issued a letter dated 08.09.2023 to the RP stating, *inter alia*, the facts that the issuance of NCDs by VDDPL in F.Y. 2013-14 is in violation of public issue norms of the Companies Act, 1956 and these debentures are *void-ab-initio* and the same needs to be cancelled and refunded to the investors as funds were raised in an unlawful manner without following public issue norms. It is also noted from NCLT's Order dated 18.10.2023 that this letter to the RP has been taken on record.

DIRECTIONS

63. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11B and 11(4) of the SEBI Act, hereby issue the following directions :

- a. The noticee viz Nandkishor Harikishan Attal shall forthwith refund to the investors, the money collected by the Company through the issuance of NCDs in FY 2013-14 including the application money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.

However, the said direction of refund shall be subject to the resolution plan as and when passed in the proceeding before NCLT, Mumbai Bench, C.P. (IB) - 4230/MB/2018 providing for refund to the investors. In case, the resolution plan does not provide for refund, the refund shall be done by Noticee 1 as stated above.

- b. The Noticee viz Nandkishor Harikishan Attal shall issue a public notice in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact person such as names, addresses and contact details, within 15 days of coming into force of this direction.
- c. The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order or electronic fund transfer or through any other appropriate banking channels, which ensures audit trails to identify the beneficiaries of repayments.
- d. The noticee viz Nandkishor Harikishan Attal is prevented from selling the assets, properties and holding of mutual funds / shares / securities held by him in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised bank. Such proceeds shall be utilised for the sole purpose of making refunds to the investors till full refund as directed above is made. Further, the banks are directed to allow debit only for the purpose of making refunds to the investors of the issuance of NCDs, as directed in this order, from the bank accounts of the noticees.
- e. After completing the aforesaid refunds, the Noticee viz Nandkishor Harikishan Attal, shall file a report of such completion with SEBI addressed to the “Division Chief, Department of Debt and Hybrid Securities (SEC) , SEBI Bhavan, G Block, Bandra Kurla Complex, Bandra (East) Mumbai –400051”, within a period of 15 days, after completion of three months from the coming into force of the directions at Paras 63 (a) and (b) above, duly certified by an independent Chartered Accountant and the direction at Para 63 (d) above shall cease to operate upon filing of such report on completion of refunds to the investors.
- f. In case of failure of the Noticee viz viz Nandkishor Harikishan Attal to comply with the aforesaid directions in sub-paragraphs 63 (a) and (e), SEBI, on the

expiry of the stipulated time period therein from the date of coming into force of this order, may recover such amounts, from the Noticee, in accordance with Section 28A of the SEBI Act, 1992 including such other provisions contained in securities laws;

- g. The Noticees 1 and 2 viz Nandkishor Harikishan Attal and Mayura Nandkishor are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document and are restrained from accessing the securities market, issuing prospectus, offer document or advertisement soliciting money from the public, directly or indirectly and are restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in any manner whatsoever, for a period of **two (2) years** from the date of this order or till the expiry of two (2) years from the date of completion of refunds to the investors as directed in Para 63 (a) above, whichever is later.
- h. The Noticees 1 and 2 are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of **two (2) years** from the date of this order or till the expiry of two (2) years from the date of completion of refunds to the investors as directed in Para 63 (a) above, whichever is later.
- i. The Noticees 3, 4, 5 and 6 viz Mahesh Brij Gopal Bhattad, Vasant Narayan Pinjan, Sahindra Jagannath Bhawale and Arati Sahindra Bhawale are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document and are restrained from accessing the securities market, issuing prospectus, offer document or advertisement soliciting money from the public, directly or indirectly and are restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in any manner whatsoever, for a period of three (3) months from the date of this order or till the expiry of three (3) months from the date of

completion of refunds to the investors as directed in Para 63 (a) above, whichever is later.

64. It is hereby clarified that if the Noticees viz Nandkishor Harikishan Attal , Mayura Nandkishor Attal, Mahesh Brij Gopal Bhattad, Vasant Narayan Pinjan, Sahindra Jagannath Bhawale and Arati Sahindra Bhawale have any open position in any exchange traded derivative contracts, as on the date of this order, they can close out/ square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. The Noticees are permitted to settle the pay in and pay out obligations in respect of transactions, if any, which have taken place before the close of trading on the date of this order.

65. The direction for refund, as given in Para 63(a) above, does not preclude the investors to pursue the other legal remedies available to them under any other law, against the Noticee for refund of money or deficiency in service before any appropriate forum of competent jurisdiction.

66. This order shall come into force with immediate effect.

67. A copy of this order shall be sent to all the noticees, recognized Stock Exchanges, banks, depositories and Registrar and Transfer Agents of mutual funds to ensure that the directions given above are strictly complied with.

68. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies and the Interim Resolution Professional, for their information and necessary action.

Date : September 25, 2024

Place: Mumbai

DR. ANITHA ANOOP

CHIEF GENERAL MANAGER

SECURITIES AND EXCHANGE BOARD OF INDIA