BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

ADJUDICATION ORDER NO. Order/GG/VV-AS/2022-23/16082

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

In respect of:

S No	Name of Noticee	PAN
1	R. C. Sinha	AABPS0276P
2	Deepak Dasgupta	ABDPG4178P
3	H. P. Jamdar	ADQPJ4146F
4	Arun K. Saha	AAIPS3352F

In the matter of IL&FS Transportation Networks Limited

A. BACKGROUND OF THE CASE

1. IL&FS Transportation Networks Limited (hereinafter referred to as **"ITNL"**) was formed in 2000, as a wholly owned subsidiary of Infrastructure Leasing and Financial Services Limited (hereinafter referred to as **"IL&FS"**). It is listed on the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE). SEBI received an investigation report from Serious Fraud Investigation Office (hereinafter referred to as **"SFIO"**), in the matter of IL&FS Financial Services Ltd (hereinafter referred to as **"IFIN"**) which *inter alia* stated various instances of indirect funding by IFIN to ITNL, one of the equity listed companies of the IL&FS group. IFIN gave loans to other IL&FS group companies which in turn transferred the loans to ITNL. ITNL was the borrower of these loans. It was also observed that some of the loans/deposits borrowed by ITNL from the group entities / related parties were in turn loans/deposits borrowed by the related parties from IFIN on the same day or within one day.

2. The SFIO report mentioned that if the loans borrowed by ITNL, (which were routed through related parties and external parties) were borrowed by ITNL directly from IFIN, the same would have crossed the materiality threshold under Regulation 23(1) of LODR for FYs 2015-16 and 2017-18. Therefore, instead of directly borrowing funds from IFIN, ITNL borrowed loans from IFIN through eight IL&FS group companies (hereinafter referred to as "**the related parties**") in the financial years 2015-16, 2016-17 and 2017-18 (hereinafter referred to as "**the period of examination**") through certain related party transactions (hereinafter referred to as "**RPTs**"). SFIO observed that, as per SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as **"LODR Regulations"**), all RPTs shall require prior approval of the audit committee. Based on the observations in the SFIO report on the RPTs of ITNL, SEBI took up the matter, for further analysis and examination on compliance by ITNL, with the provisions of the LODR Regulations.

3. SEBI, examined the matter, to ascertain if RPTs of ITNL was in compliance with the provisions of the LODR Regulations and if whether the members of the Audit Committee of ITNL, have fulfilled their roles and responsibilities as stipulated under LODR Regulations and the erstwhile Equity Listing Agreement ("**ELA**"), during the period 2015 -18.

4. Subsequent to the examination of SEBI, it was observed that members of the Audit Committee viz. Mr R. C. Sinha (**Noticee no: 1**), Mr Deepak Dasgupta (**Noticee no: 2**), Mr H. P. Jamdar (**Noticee no:3**) and Mr Arun K. Saha (**Noticee no:4**) (hereinafter collectively referred to as **"Noticees"**) were in violation of certain provisions of LODR Regulations and the same is the subject of the present adjudication proceedings.

B. APPOINTMENT OF ADJUDICATING OFFICER

5. SEBI initiated adjudication proceedings and appointed me as the Adjudicating Officer under Section 23-I of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the "**SCRA**") read with Rule 3 of the SCR(R) (Procedure for Holding Inquiry and Imposing Penalties) Rules, 2005 (hereinafter referred to as the "**Adjudication Rules**"), vide communication dated November 17, 2021 to inquire into and adjudge under Section 23H of the SCRA, with respect to the allegations against the Noticees.

C. SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

6. A common Show Cause Notice dated January 03, 2022 (typographical error in the year *corrected*) (hereinafter referred to as "**SCN**") was issued against the Noticees. The SCN was issued under Rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be initiated against the Noticees and penalty should not be imposed under Section 23H of the SCRA. The primary allegation in the SCN was that the Noticees, as the members of the Audit Committee of ITNL, failed to grant approval to transactions of ITNL with related parties during the period from April 1, 2015 to November 09, 2017, as per the mandate under LODR Regulations. The allegations have been elaborated and considered along with the replies of the Noticees, in the latter part of this order; after narration of the preliminary dates and events.

7. The details of delivery of SCN to the Noticees is as follows:

Table no:1

S No	Noticee	Details of delivery of SCN
1	Noticee no: 1	Vide SPAD and digitally signed email dated January 03, 2022.
2	Noticee no: 2	Vide SPAD and digitally signed email dated January 03, 2022.
3	Noticee no: 3	Vide SPAD and digitally signed email dated January 03, 2022.
4	Noticee no: 4	Vide SPAD. SCN was also sent to Taloja Central Jail for serving on Noticee.

Further, Noticee no: 2 and 3 availed of opportunity of inspection through their Authorized Representative (AR) viz. Trilegal on March 04, 2022, and Noticee no: 4 availed of the said opportunity through their AR viz. Rajani Associates on April 04, 2022.

8. The details of replies received from Noticees are as follows:

Table no: 2

S No	Noticee	Details of replies received on merits
1	Noticee no: 1	Email and letter dated March 21, 2022.
2	Noticee no: 2	Emails dated March 21, 2022.
3	Noticee no: 3	Emails dated March 21, 2022.
4	Noticee no: 4	Email and letter dated April 12, 2022

9. The details of personal hearing conducted are as follows:

Table no:3

S No	Noticee	Details of personal hearing conducted	Details of Authorized Representatives (ARs)
1	Noticee no: 1	Conducted on March 22, 2022 via video conferencing	Mr Somasekhar Sundaresan, Counsel
2	Noticee no: 2	Conducted on March 22, 2022 via video conferencing	Mr Anubhav Ghosh, Counsel instructed by Trilegal
3	Noticee no: 3	Conducted on March 22, 2022 via video conferencing	Mr Anubhav Ghosh, Counsel instructed by Trilegal
4	Noticee no: 4	Conducted on March 22, 2022 and April 13, 2022, via video conferencing	Mr Amrut Joshi, Counsel instructed by Rajani Associates

10. The details of post-hearing submissions are as follows:

Table no:4

S No	Noticee	Details of post hearing submissions
1	Noticee no: 1	Not received.
2	Noticee no: 2	Email dated April 08, 2022
3	Noticee no: 3	Email dated April 08, 2022
4	Noticee no: 4	Email and letter dated April 15, 2022

D. FACTUAL MATRIX

11. As seen from the facts narrated under the heading 'BACKGROUND OF THE CASE', the SCN was based on SEBI's analysis and examination of compliances by ITNL with the provisions of LODR Regulations, based on the observations made by SFIO in connection with the RPTs of ITNL. The Noticees herein were the Audit Committee members during the relevant point of time as well as directors (independent/ non-independent) of the board of ITNL. As stated above, SEBI carried out examination with respect to compliance by ITNL with the provisions of LODR Regulations and in this connection, examined the role of the Noticees.

12. It was observed during the said examination, that following directors were the members of the audit committee of ITNL during FYs 2015 – 2018:

Table no: 5

S. No.	Audit Committee Members	Designation (former)
1	Mr. R. C. Sinha (Chair)	Non-Executive, Independent Director
2	Mr. Deepak Dasgupta	Non-Executive, Independent Director
3	Mr. H. P. Jamdar	Non-Executive, Independent Director
4	Mr. Arun K. Saha	Non-Executive, Non-Independent Director

13. Further, the minutes of Audit Committee meetings for successive quarters were perused and it was observed that the Audit Committee reviewed details of RPTs

approved in each quarter during the examination period as per the following details:

Details on the audit committee meetings of ITNL held every quarter during the FYs 2015-18

Table no: 6

Year of the Examination period	**RPTs during the examination period for the quarter ended**	**Date of the audit committee meetings held (**where RPTs pertaining to the related quarter were reviewed/approved)
2015 -16	June 30, 2015	August 10, 2015
2015 -16	September 30, 2015	November 05, 2015
2015 -16	December 31, 2015	February 10, 2016
2015 -16	March 31, 2016	May 12, 2016
2016 -17	June 30, 2016	September 13, 2016
2016 -17	September 30, 2016	December 01, 2016
2016 -17	December 31, 2016	January 13, 2017
2016 -17	March 31, 2017	May 29, 2017
2017 -18	June 30, 2017	August 08, 2017
2017 -18	September 30, 2017	November 09, 2017

It was observed from the minutes of the meetings (*Annexure 8 of the SCN*) held for every quarter of the examination period that, the transactions undertaken with the related parties in the previous quarter had been placed before the Audit Committee for their review, which also indicates that the members of the Audit Committee were aware of the RPTs being undertaken for every quarter. It was further observed that the audit committee had provided omnibus approval for RPTs undertaken after November 09, 2017. However, it was observed that the Audit Committee had failed to grant approval to transactions of ITNL with related parties, which they were aware of, during the period April 01, 2015 to November 09, 2017. Therefore, it was alleged that members of the Audit Committee i.e. the Noticees, had violated the provisions of Regulation 18(3) of LODR Regulations read with point no. 8 of para A of Part C of Schedule II of LODR, and Regulation 4(2)(f)(iii)(3) of LODR Regulations, read with clause 2(i) of Uniform Listing Agreement dated November 24, 2015 entered into between NSE and ITNL read with clause 8(b) of Chapter IV of NSE's Bye-Laws **(**Point no. 8 of Clause 49(III)(D) and sub-point (c) of point no. 3 of Clause 49(I)(D) of the erstwhile ELA, effective till November 30, 2015, read with clause 8(b) of Chapter IV of NSE's Bye-Laws, leading to violation of said provisions.

E. SUMMARY OF REPLIES OF THE NOTICEES

14. The contentions submitted by the Noticee as regards alleged violations have been summarized in *seriatim* below:

    (i) R. C. Sinha (Noticee no:1)

    - Noticee joined Indian Administrative Services in 1962 in the Maharashtra cadre and has worked in various roles during and after his tenure as an IAS officer in public service. After retirement in the year 1997, Noticee was appointed as the Vice Chairman and Managing Director, Maharashtra State Road Development Corporation Ltd, the world class Mumbai-Pune Expressway was built and 55 flyovers were built in the Mumbai metropolitan region. Noticee retired as Additional Chief Secretary, Government of Maharashtra in 1996 after getting permissible extension under the All India Service Act.
    - Minutes of meeting of the Audit Committee show that in fact the RPTs had been approved.
    - SCN is vague and does not identify the specific RPTs which the Audit Committee was required to approve.
    - SCN falls short of the legal standard required to be met for making the relevant allegations, as it does not explain how the Noticee, being an independent director, could have been aware that ITNL would execute RPTs without prior approval of the Audit Committee, unless they were brought to the attention of Audit Committee through Board processes.
    - As an independent director, Noticee had exercised due diligence, and further, auditor reports, as tabled before the audit committee, explicitly confirmed that the RPTs were compliant with applicable law.
    - Once the RPTs were brought to Noticee's knowledge, they were subject to periodic oversight and quarterly review and were approved

on the understanding that these transactions were contracted on an arm's length basis and in the ordinary course of business.

- The violation, if any, of not pre-approving the relevant RPTs, is technical and venial in nature, which does not warrant imposition of penalty.
- As an independent director in ITNL, the Noticee was not involved in day to day functioning of ITNL. He was not an expert in the field of financial sector laws or regulations. He was paid a sitting fee for the board meetings he would attend, and he relied on advice of auditors of ITNL only.
- Audit Committee approved RPTs after they had been contracted, during the quarterly meetings spanning 8 quarters and 9 meetings. Therefore, the allegation that RPTs were not approved in the relevant period is erroneous.
- As per the provisions of Regulation 18(3) of LODR Regulations, there is no requirement of prior approval as regards RPTs, so that approvals could be granted post-facto as well. Further, ITNL's RPT policy provided that RPTs, if entered without appropriate approval of the competent authority, may be approved by the said authority within three months from the date of execution. Noticee relied upon the judgement of the Hon'ble Supreme Court in the matter of Bajaj Hindustan Ltd vs State of UP (2016) 12 SCC 613, wherein it was *interalia* held that "*As is clear from the above, the dictionary meaning of the word 'approval' includes ratifying of the action, ratification obviously can be given ex-post facto approval. Another aspect which is highlighted is a difference between approval and permission by Assessing Authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the Assessing Authority. The Court also pointed out that if in those cases where prior approval is required, expression 'prior' has to be in the particular provision. In the proviso to sub-section (1) of Section 3-A word 'prior' is conspicuous.*

For all these reasons, it was not a case for levying any penalty upon the appellant."

- It was not possible for Noticee, who was an independent director, to know about RPTs if not intimated by ITNL and/or its auditors. Further, the auditor and the management in the Annual Reports for the FY 2015-16 and 2016-17 have *interalia* stated that ITNL had complied with all provisions governing RPTs.
- SCN is vague and ambiguous as it does not bring out the RPTs which required prior approval, identity of the contracting party, does not distinguish between pre- existing and prospective RPTs etc.
- ITNL had approved a RPT policy and shareholders had granted omnibus approval of RPTs upto Rs 10,000 Crores per annum at the Annual General Meeting dated August 26, 2015. Said policy constitutes the omnibus approval and each of the RPTs executed by ITNL was within scope of ITNL's policy on RPTs and in accordance with resolution passed by shareholders of ITNL.
- Regulation 4 of the LODR Regulations, which have been alleged to be violated are not standalone charging provisions which can be breached.
- Liability of independent directors or non-executive directors could only be in respect of such acts or omissions by the company which had occurred with their consent or where such directors had not acted diligently. In the instant matter, the Noticee was not involved in day to day business of ITNL, and could not be expected to be aware of relevant RPTs or the fact that ITNL would enter into RPTs without prior approval. In this regard, the Noticee relied upon the provisions of Companies Act, 2013, LODR Regulations, MCA Circular and certain case laws.
- None of the factors in Section 15J of the SEBI Act are attracted in the instant matter. Further, there is no allegation that RPTs in question caused any loss to ITNL's shareholders. Further, instant SCN is the

first time that regulatory proceedings have been initiated against the Noticee, considering that the Noticee has served government for several decades.

(ii) Deepak Dasgupta and HP Jamdar (Noticee no: 2 and 3)

- Noticee no:2 and 3 are a highly reputed and experienced ex-civil servants. Noticee no:2 had retired from the IAS, and had held very senior posts with the Government of India, as also that of the Chairman, National Highways Authority of India, in the rank of Secretary to the Government. Noticee no:3 was an officer from Gujarat Service of Engineers, and he had headed the Roads and Building Department of Government of Gujarat for more than 11 years as Secretary and Principal Secretary.
- The SCN has been issued after an inordinate delay, which places Noticee in a gravely disadvantageous position. In this regard, Noticee relied upon judgement of the Hon'ble Securities Appellate Tribunal (hereinafter referred to as **"SAT"**) in the matters of HB Stockholdings Ltd vs SEBI and Shri Ashok Chaudhary vs SEBI, wherein the Tribunal had set aside impugned Orders on grounds of delay of more than 12 years and 6 years respectively.
- Allegations made in the SCN are not supported by cogent evidence and are based on surmises and conjectures. Further, the SCN is vague and ambiguous. In this regard, Noticee relied upon judgements of the Hon'ble Supreme Court in the matter of Canara Bank vs Debasis Das and UMC Technologies Pvt Ltd vs FCI and of the Hon'ble SAT in the matter of Dhanalakshmi Bank vs SEBI. Vide said judgements, it was *interalia* held that to serve the principles of natural justice, the SCN must be precise and unambiguous.
- SCN does not throw any light on role of internal auditor of ITNL and the Management Committee, who provided approvals for non-material RPTs, and Deloitte, on whose expert advice, policy on RPTs was framed.

- The record does not show how ITNL continued to conduct its business given the alleged want of approvals by the Audit Committee.
- Audit Committee had in fact provided approval to RPTs explicitly in all but one case i.e. that pertaining to the quarter ending June 30, 2015. Even in case of the said quarter, approval had been given, which is evident from the attending facts i.e. meeting of the Audit Committee on August 13, 2015 in which RPT policy was approved, that ITNL continued with its business operations for the subsequent accounting periods, the transaction in said quarter were continuing and were approved in subsequent quarters by the Audit Committee etc.
- The liability for the failure to record the approval must be fixed with the relevant departments, and not with the independent directors of the company.
- The RPT policy reveals that the approval for non-material RPTs could be granted by the Management Committee in terms of the powers delegated to it by the Audit Committee. However, the SCN does not go into the role of the Management Committee, which was supposed to function for according the approvals under the regulation of Audit Committee.
- The Noticee contended that the settled legal standard for due diligence is premised on whether the entity concerned did everything reasonable to discharge its legal obligation and not everything possible. The instant SCN does not state how due diligence was not carried out in the matter. In this regard, Noticee relied upon the judgement of the Hon'ble Supreme Court, wherein it was *interalia* held that due diligence means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge a obligation. Noticee also placed reliance on the judgements of the Hon'ble SAT in the matters of Almondz Global Securities Ltd vs SEBI and Sharedeal Financial Consultants Pvt Ltd vs SEBI, wherein it was interalia held that due diligence means doing *"everything reasonable, not everything possible"*.

- The Noticee, as the independent director, was not concerned with day to day affairs of the company.
- The notice suffers from lackadaisical approach, evident from incorrect dating of Notice, non-appreciation of language and purport of extracts of minutes of meeting etc. Imposition of penalty in such case would be antithetical to the principles of fair play.
- Imposition of penalty would irreparably prejudice the Noticee's reputation. Further, the SFIO report does not mention the Noticee as a person of interest.
- The notice does not allude to any adverse effect that relevant transactions had on the interest on investors or integrity of the securities market.
- The Noticee has not defrauded any investor/ market participant, nor made any unlawful gains or advantages.
- The Noticee contended that minimal role of the Noticee in the execution of the relevant transactions might be appreciated and accordingly, the Noticee be discharged from the charges in the SCN. The Noticee relied upon the judgment of the Hon'ble SAT in the matter of Piramal Enterprises Ltd vs SEBI, wherein it was interalia held that remedial measures must precede punitive measures. The Noticee also relied upon the judgement of the Hon'ble Supreme Court in the matter of Bhavesh Pabari vs SEBI, wherein it was *interalia* held that factors others than that mentioned in Section 15J of the SEBI Act, 1992 or Section 23J of the SCRA, 1956, can be considered in the mitigating the quantum of penalty.

(iii) Arun K. Saha (Noticee no: 4)

- SEBI relied upon half-baked information provided by ITNL and did not seek / peruse relevant documents required to form an opinion and ask for clarifications forming part of SCN. For instance, SEBI never sought complete set of the minutes of the meetings of the Audit Committee along with the notices, relevant documents etc. Further, the Noticee needed copies of minutes of all Audit Committee meetings held during the period under question.

- Audit Committee had reviewed, approved and authorized the RPTs on a quarterly basis, except for the quarter ending June 30, 2015.
- SCN is unclear and vague, as it does not specify the exact nature of non-compliance conducted by the Audit Committee.
- The referred transactions were not RPTs. Said transactions involved taking loans by ITNL from related parties of the IFIN group, which did not fall in the definition of RPTs as per Section 188 of the Companies Act or Regulation 2(zc) of LODR Regulations. Instead, provisions of Section 177 of the Companies Act apply in the instant matter, which have been complied with by the Audit Committee. The said provisions of Section 177 do not require a prior approval or any omnibus approval.
- The SFIO Report was not credible as the Hon'ble Bombay High Court in Criminal Writ Petition No 4144 had quashed the FIR. Subsequently, the Hon'ble Supreme Court has stayed the order passed by the Union Government on the basis of the said report. Therefore, the said report must not be considered at all.

F. ISSUES

15. I note that the first issue herein is, whether the Noticees in their capacity as Audit Committee members of ITNL, by not granting approval to transactions of ITNL during April 01, 2015 to November 09, 2017, have violated the provisions contained in Regulation 18(3) of LODR Regulations read with point no. 8 of para A of Part C of Schedule II of LODR Regulations. Regulation 18(3) of the LODR Regulations lays down the role of the Audit Committee and the information to be reviewed by the Audit Committee as specified in Part C of Schedule II thereof. Schedule II-Part C titled 'Role of the Audit Committee" in para A at Point no 8 provides that "role of the Audit Committee includes grant of approval or any subsequent modification of transaction of listed entities with related parties". In

other words, the main issue is whether the Noticees can be stated to have violated the aforesaid provisions contained in Regulation 18 and the Schedule, as quoted above, by not granting approval to the transactions of ITNL with related parties during the period April 01, 2015 to November 09, 2017. In this connection, the SCN has also relied on provisions contained in Point no 8 of Clause 49(III)(D) read with Point no 3(c) Clause 49(I)(D) of ELA, which was effective till November 30, 2015. The relevant Clause 49(III)(D) of ELA provides that the role of Audit Committee shall include granting approval or any subsequent modification of transaction of the company with related parties. Point no 3(c) of Clause 49(I)(D) of ELA provides that the Company agrees to comply with provisions of Clause 49, and that the Board members should act on a fully informed basis, in good faith, with due diligence and care, in best interest of the company and the shareholders.

16. The second issue is whether Noticee Nos. 1 to 3, in their capacity as non-executive independent directors, and Noticee No. 4 as a non- executive non-independent director during FYs 2015 to 2018, were in violation of Regulation 4(2)(f)(iii)(3) of LODR Regulations. Regulation 4(2)(f)(iii)(3) mandates that the members of the Board shall act on fully informed basis, in good faith, with due-diligence and care, and in the best interest of the listed entity and the shareholders. In this connection, the SCN has also relied on provisions contained in Clause 2(i) of the Uniform Listing Agreement entered by ITNL with NSE and Clause 8(b) of Chapter IV of NSE bye-laws, which essentially provides that ITNL as a listed entity shall comply with all applicable laws including the provisions of LODR failing which they shall be liable to pay fine as prescribed by the Exchange or SEBI for such non-compliances.

G. SCHEME OF LODR REGULATIONS, 2015

17. Before proceeding with consideration of the issues on merits, I would like to analyze the scheme of LODR Regulations, which consolidated and streamlined the provisions of listing agreements that existed for different segments of the capital market. The said Regulations came to be notified on September 02, 2015,

thereby repealing all circulars stipulating or modifying the provisions of listing agreements, which were in vogue until then. The LODR Regulations contains 12 chapters such as (I) Preliminary; (II) Principles Governing Disclosures and Obligations of Listed entity; (III) Common Obligation of Listed Entities; (IV) Obligations of a Listed Entity which has Listed its Specified Securities and Non-Convertible Debt Securities (NCDs); (V) Obligations of Listed Entity which has Listed its NCDs; (VI) Obligations of Listed Entity which has Listed its Specified Securities and Either NCDs or Non-Convertible Redeemable Preference Shares or Both; (VII) Obligations of Listed Entity which has Listed its Indian Depository Receipts; (VIII) Obligations of Listed Entity which has Listed its Securitized Debt Instruments; (VIIIA) Obligations of Listed Entity which has Listed its Security Receipts; (IX) Obligations of Listed Entity which has Listed its Mutual Fund Units; (X) Duties and Obligations of the Recognized Stock Exchanges; (XI) Procedure for Action in case of Default; (XI-A) Power to Relax Strict Enforcement of the Regulations and (XII) Miscellaneous Provisions. From the layout of the Regulations, it is seen that Chapter IV deals with obligations of a listed entity which has listed its specified securities and NCDs. Under Chapter IV, Regulation 17 deals with Board of Directors, Regulation 18 deals with Audit Committee, Regulation 19 deals with Nomination and Remuneration Committee, Regulation 20 deals with Stakeholders Relationship Committee, Regulation 21 deals with Risk Management Committee and Regulation 23 deals with Related Party Transactions. The provisions of Regulations 18 to 21 dealing with separate committees of listed companies are self-contained provisions intended to be read along with their roles as detailed under Parts C and D of Schedule II. I have noted that Part C of Schedule II is titled 'Role of the Audit Committee and review of information by Audit Committee'. Regulation 18 falls under the Chapter IV titled 'Obligations of a Listed Entity which has Listed its Specified Securities and NCDs'. "Specified securities" is defined in the Regulations to mean equity shares and convertible securities as defined under the SEBI ICDR Regulations. Regulation 18 provides for the obligation of the listed entity to constitute a qualified and independent Audit Committee by laying down the constitution norms, the qualification of the members of the committee as well as the

Chairman; and deals with the conduct of Audit Committee meetings by prescribing the frequency/quorum and powers of the Audit Committee to investigate any activity within its terms of reference, seek information from any employee, obtain outside legal or other professional advice and secure attendance of outsiders with relevant expertise, if considered necessary. Sub-regulation (3) of Regulation 18 specifically deals with the role of Audit Committee and provides that "the information to be reviewed by the Audit Committee shall be as specified in Part C of Schedule II". Part C of Schedule II lists the role and the information to be reviewed by the audit committee in Paras A and B respectively. Para A deals with the role of the Audit Committee and has enlisted certain functions assigned to the Audit Committee and Para B deals with certain information enlisted therein which the Audit Committee has to mandatorily review. Para A provides that "the role of the Audit Committee shall include **approval** or any subsequent modification of transactions of the listed entity with related parties" (Clause 8). Further, Regulation 23 of the LODR Regulations titled Related Party Transactions provides in sub regulation (2) that all RPTs would require **'*prior'*** approval of the Audit Committee. Sub regulation (3) of Regulation 23 provides that the Audit Committee could also grant omnibus approvals in respect of repetitive RPTs, subject to the conditions enlisted therein.

H. CONSIDERATION OF ISSUES

18. As regards the categorization of the subject loan transactions of the listed entity as RPTs, the Counsel for Noticee no: 4, Mr Amrut Joshi submitted that these do not fall within the list of RPTs defined under Section 188 of the Companies Act, 2013. He also tried to distinguish between RPTs and "transactions with related parties" by relying on Section 177 of the Companies Act, 2013, which uses the said expression. He submitted that the subject transactions required approval by the Audit Committee only in terms of Regulation 18(3) of the LODR Regulations, and that the obligation of granting ***'prior'*** approval did not apply. A Guidance Note of ICSI published in its magazine issued in March, 2019 was also relied upon, in this connection. In my view, Regulation 2(zc) of the LODR defines RPTs as "a transaction involving a transfer of resources, services or obligations

between a listed entity's subsidiary and its other subsidiary". I note that the said definition carries a broader definition of the term, as has also been stated by the Guidance Note of ICSI referred by Noticee no: 4 at Para 3 (Page No. 26) which reads as *"As per Regulation 2(1)(zc) of the Listing Regulations, the term 'related party transaction' means a transfer of resources, services or obligations between a listed entity and a related party, regardless of whether a price is charged and a 'transaction' with a related party shall be construed to include a single transaction or a group of transactions in a contract. Thus, the term "related party transaction" under the Listing Regulations and as defined under the Act has different meanings. The Listing Regulations contains a much broader definition of the term.".* Further, ITNL had disclosed the said transactions as RPTs in the relevant Annual Reports. Also, the minutes of meetings of Audit Committees for the relevant quarters have each recorded the transactions as RPTs, wherein the said RPTs have been reviewed or approved. I find that the subject transactions are RPTs and therefore, the obligations on the Audit Committee in this regard would follow.

19. I note that for the eight quarters, viz. the quarter ending September 30, 2015 to the quarter ending September 30, 2017, the following is *interalia* recorded in the 'Extract of Minutes of the Meeting of Audit Committee":

"The Committee reviewed the statements and approved the same". Further, as regards the quarter ended June 30, 2015, I note from the relevant minutes recorded that the Audit Committee 'reviewed', and the words *"approved the same"* are missing. The Noticees have *interalia* contended in this regard, that even in case of the said quarter, the review amounts to implicit approval and cited various attending facts to substantiate the same viz. meeting of the Audit Committee on August 13, 2015 in which RPT policy was approved, continuation of ITNL's business operations for the subsequent accounting periods and the fact that the transactions in said quarter were continuing and were approved in subsequent quarters by the Audit Committee. By "approval", it is seen that the Audit Committee has granted ex post facto approval to the RPTs or ratified the same. "Review" would mean a preliminary stage before according approval. If

the RPTs are reviewed in a quarter and if no objections are recorded thereafter, it can very well be deemed as an 'approval' and the records before me do not indicate anything to the contrary.

20. In terms of LODR Regulations, the Audit Committee is supposed to "approve" subsequent modification of transactions with related parties. Further, the RPTs shall be executed by the listed entities by complying with the conditions/ parameters set out in Regulation 23. Therefore in my view, the larger issue is whether the members of the Audit Committee have violated the substantive requirement of granting approval to RPTs and not whether the word "approval" is recorded in the minutes of one quarterly meeting out of the eight quarters, after review of the RPTs.

21. On a plain reading of Regulation 18(3) along with part C of Schedule II of the LODR Regulations, I do not find the mention of the word *'prior'* preceding the word approval. What is contemplated is that the role of the Audit Committee should include the approval or any subsequent modification of transactions of the listed entity with related parties. Now the question is whether the general provisions laid down with respect of RPTs in Regulation 23 of the LODR Regulations can be relied upon to allude that it was the obligation of the Audit Committee members to have granted *'prior'* approval to the RPTs. The question of grant of 'prior approval' arises only when the RPTs are placed before the Audit Committee prior to the fructification of the transactions. If a listed entity has not placed the RPTs for such prior approval, then the question is whether the Audit Committee members can be held responsible for the same. I note that the Regulations have defined the specific role of the Audit Committee in as much as it has defined the specifities of role of other Committees, as discussed earlier in this order. When the scheme of the Regulations defines specific obligations of the Audit Committee, the Audit Committee members can reasonably be expected to be bound by the explicit language contained in Part C of Schedule II, while granting approval to RPTs. Counsel for Noticee No: 1, Mr Somasekhar Sundaresan had placed reliance on the Hon'ble Supreme Court in the matter of

Bajaj Hindustan Ltd vs State of U.P., (2016) 12 SCC 613, wherein it was *interalia* held that "*In the instant case, the action was approved by the Assessing Authority. The Court also pointed out that if in those cases where prior approval is required, expression 'prior' has to be in the particular provision. In the proviso to sub-section (1) of Section 3-A word 'prior' is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant.*" I find that the facts in the instant case fall well within the ratio laid down by the Apex Court in the said judgment. In view of this, the expression 'approval' in Point No. 8 of Para A of Part C Schedule II of the LODR Regulations cannot mean 'prior' approval.

22. The general obligation with respect to RPTs contained in Regulation 23 is cast on the listed entity as indicated in the title of Chapter IV viz. 'Obligations of a Listed Entity which has Listed its Specified Securities and NCDs' and the language of the provision itself. The general provisions in Regulation 23 also deal with omnibus approval, which one of the Noticees, viz. Arun K. Saha has relied upon. It was his contention that the RPT policy approved in August 2015 as approved by shareholders in the Annual General Meeting dated August 26, 2015 constituted the omnibus approval as per Regulation 23(3) of the LODR Regulations. I do not agree with this contention as a policy level approval cannot be asserted to constitute an actual approval of RPTs, unless it is substantiated that all the specific RPTs containing details of names of parties/ period/ amounts etc., were covered under the omnibus approval or the shareholder approval. However, this issue is not relevant for consideration, in view of the finding given in the preceding paragraph.

23. In this connection, one cannot lose sight of the fact that as contended by the Noticees, ITNL was a transport network company which was engaged in the development, operation and maintenance of National and State highways, roads, flyovers and bridges primarily in India. Most of the RPTs were on an ongoing basis and if the transactions were not being modified subsequently, the approval

of the Audit Committee accorded post the quarter should suffice, in terms of Regulation 18(3).

24. As regards the violation of Regulation 4(2)(f)(iii)(3) of LODR Regulations, the question is whether as members of the Company's board of directors, the Noticees acted on an informed basis, in good faith, with due diligence and in the best interest of the listed entity and the shareholders. The examination done by SEBI, which has led to the issuance of the SCN, has not brought out any motive of the Noticees which is prejudicial to shareholders or the listed entity. Thus, the only aspect that remains to be considered is whether the Noticees acted with 'due diligence' and on an 'informed basis'.

25. As such, Regulation 4 applies to all board members and not only to the Audit Committee members. I note that Noticee Nos. 1 to 3 were non-executive independent members and Noticee No. 4 was a non-executive non-independent director. Since the other directors are not part of the proceedings, it appears that the Noticees have been alleged to have violated Regulation 4(2)(f)(iii)(3), as part of the primary violation of Regulation 18(3) of the LODR Regulations, in their capacity as Audit Committee members, and therefore is intended to be complementary and not a standalone violation in itself.

26. In this connection, the issue for consideration is whether the Noticees by being aware of the RPTs as members of the Board of directors (non-executive/ independent director etc), have exercised due diligence and acted on informed basis in this regard. As per the requirements of the LODR Regulations, the Audit Committee members ought to be independent directors on the Board of the listed entity. Therefore, the dual role of the Noticees is emanating out of the prescription of law and not otherwise. Since there is no identified act of non-exercise of due diligence or of not acting on informed basis, that has been brought out against the Noticees, I do not find any merit in the allegation.

27. Enforcement of security market laws is crucial for the protection of interest of investors. At the same time, when minute procedural non-compliances are alleged against professionals forming part of designated Committees, then such requirements of ‘prior’ approval ought to be explicitly provided. I note from the records that the Audit Committee members have substantively complied with the requirements of review/ approval of the RPTs for all the quarters forming part of the relevant period i.e. April 01, 2015 to November 09, 2017, as contemplated under Regulation 18(3) of the LODR Regulations read with Part C of Schedule II thereof. Thus, the allegation in the SCN in this regard fails. Further, the allegation of violation of Regulation 4(2)(f)(iii)(3) of the LODR Regulations, which *interalia* mandates that the board of directors shall act with due diligence and on an informed basis also fails as a consequence, for the reasons stated in the preceding paragraph.

28. Considering the facts and circumstances of the case as stated above, I am of the view that no monetary penalty is warranted in respect of the allegations levelled in the instant matter. The Show Cause Notice ref no EAD-6/GG/VV/0097/2021 dated January 03, 2022 issued against the Noticees is accordingly disposed of.

29. In terms of Rule 6 of the Adjudication Rules, copies of this order are being sent to the Noticees and also to SEBI.

Date: April 22, 2022 **GEETHA G**

Place: Mumbai **ADJUDICATING OFFICER**