

WTM/AB/ERO/ERO/19717/2022-23

SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER

Under Sections 11(1), 11(4), 11A and 11B(1) of the Securities and Exchange Board of India Act,1992

Noticee No.	Noticees	DIN/ CIN	PAN
1.	GCM SECURITIES LIMITED	L67120WB1995 PLC071337	AABCG1469K
2.	INDER CHAND BAID	00235263	ACXPB4769Q
3.	MANISH BAID	00239347	ADWPB8817D
4.	SAMIR BAID	00243521	AEIPB5692K
5.	ALOK KUMAR DAS	00243572	ADWPD5317L
6.	AMITABH SHUKLA	00978503	AIWPS5518B
7.	ASHOK BOTHRA	01734863	AADPB5818Q
8.	URMI BOSE	07245298	ATEPB1505C
9.	LAXMI NARAYAN SHARMA	00356855	AJVPS7669F
10.	GLOBAL CAPITAL MARKET & INFRASTRUCTURE LIMITED	L51109WB1989 PLC046292	AAACG9360Q
11.	SAROJ BAID	N/A	AEDPB3177Q

In the matter of GCM Securities Limited

(The aforesaid entities are hereinafter referred to by their respective names/noticee numbers or collectively as “the Noticees”.)

1. Securities and Exchange Board of India (hereinafter referred to as ‘**SEBI**’) issued a Show Cause Notice dated January 28, 2021 (hereinafter referred to as ‘**SCN**’), to GCM Securities Ltd. (hereinafter referred to as ‘**GCM**’ / ‘**Company**’) and other Noticees, as mentioned hereinabove, calling upon them to show cause as to why appropriate directions should not be issued to them including the direction to refund the money mobilized through issue of equity shares under Sections 11(1), 11(4), 11A and 11B(1) of the Securities and Exchange Board of India

Act, 1992 (hereinafter referred to as '**SEBI Act**') for the violations of the provisions of Companies Act, 1956 (since repealed) and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as '**ICDR Regulations, 2009**') (since repealed)

2. The SCN contains, *inter alia*, the following allegations against the Noticees:

- i. During the period February 05-16, 2013 (hereinafter referred to as '**issue period**'), GCM made deemed public issue of equity shares and raised funds through issuance of equity shares to 251 persons amounting to INR 19,14,00,000 without complying with the specific provisions of the Companies Act, 1956 and ICDR Regulations, 2009 read with Regulation 301 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (hereinafter referred to as '**ICDR Regulations, 2018**');
- ii. Noticee Nos. 2 to 4 were directors cum promoters of the Company during the issue period;
- iii. GCM and Noticee Nos. 2 to 4 who are present directors of the Company are alleged to have violated Section 56(1), 56(3), 60, 62, 67(1), 67(2), 67(3), 73(1), 73(2) and 73(3) of the Companies Act, 1956 and Regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of ICDR Regulations, 2009 read with Regulation 301 of ICDR Regulations, 2018;
- iv. Noticee Nos. 5-7 were directors of the Company during the issue period and alleged to have violated Section 56(1), 56(3), 60, 67(1), 67(2), 67(3), 73(1), 73(2) and 73(3) of the Companies Act, 1956 and Regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of ICDR Regulations, 2009 read with Regulation 301 of ICDR Regulations, 2018;
- v. Noticee Nos. 8 and 9 who became directors of the Company post issue period but resigned on September 28, 2015 and alleged to have violated Section 73 of the Companies Act, 1956; and
- vi. Noticee Nos. 10 and 11 are promoters of the Company and alleged to have violated Section 62 of the Companies Act, 1956.

3. By the SCN, the Noticees were asked to file their reply to the SCN, if any, within 21 days from the dated of receipt of the SCN.
4. The SCN was served on all the Noticees and was delivered to Noticees except Noticee Nos. 8 and 9 through speed post. SCN was delivered to Noticee Nos. 8 and 9 through email.
5. Vide email/letter dated March 02, 2021, GCM, writing on behalf of all the Noticees, confirmed receipt of SCN and sought extension for filing of reply in the matter. Vide email/letter dated April 02, 2021, GCM requested for further extension of time to file reply in the matter. The matter was placed before WTM for granting date of hearing in the matter.
6. The Noticees were granted opportunity of hearing on April 28, 2021. I note that all the Noticees who were/are promoters/directors of the Company have given authority letters in favour of Noticee No 3, who is the managing director of GCM (Noticee No. 1), to file reply or represent on their behalf in the present proceedings. It is noted that replies in the matter have been filed by Noticee No 3, who is the managing director of Noticee No. 1 and authorised representative of all other Noticees. The replies filed by Noticee No. 3 are therefore being considered to be filed on behalf of all the Noticees.
7. The Noticees, vide letter dated April 23, 2021 sought inspection of the relevant documents in order to file detailed reply or come for personal hearing in the matter. The Noticees further submitted that the Company has initiated a process of giving exit offer to all the existing preferential allottees who were allotted shares in the month of February 2013 and submitted a sample copy of the exit offer letter given by the promoter of the Company and a proof of dispatch of such letters to the said preferential allottees. The Noticees also referred to a purported internal policy of SEBI to deal with deemed public issue cases which has been followed in several cases viz. RBL Bank Limited, Security Intelligence Service Limited, Malabar Institute of Medical Sciences and Vishwaraj Sugars Limited, to contend that benefit of the said policy should be afforded to them also and also made a reference to SEBI order dated April 19, 2021 in the matter of Babanraoji

Shinde Sugar Allied Industries Limited to contend that as Noticees have not been given benefit of the said policy, order similar to the order passed in the matter of Babanraoji Shinde Sugar Allied Industries Limited should be passed in their matter. The Noticees submitted that in several similar cases, the issuer company has been advised by SEBI to give an exit offer to the investors and file a compounding application with Hon'ble NCLT, however, no such letter has been issued by SEBI to the Company. The Noticees submitted that they would like to follow the SEBI internal policy in this regard and requested that similar letter be issued by SEBI to the Company. The Noticees also submitted that in another case viz. RBL Bank Limited, the exit offers availed by the concerned holders of the securities through the IPO process has been considered as a sufficient compliance and the same has been recorded in the internal policy. The Noticees requested for adjournment of the hearing by two months.

8. On request of the Noticees, the matter was adjourned to June 22, 2021. The Noticees also sought inspection of documents in their correspondences on May 14, 2021 and May 17, 2021. Inspection of the documents relied upon in the SCN was granted on May 24, 2021.
9. The submissions made by the Noticees vide their common reply dated June 18, 2021 are summarised as follows:
 - i. During February 2013, seven separate preferential allotments were made by the Company in which allotments were made to 251 different persons, who all were known to the Company. The details of the said preferential allotments are as follows:

Sr. No.	Date of Allotment	Shares Allotted	No. of Allottees
1	February 5, 2013	4560000	5
2	February 2, 2013 (correct date being February 11, 2013)	708000	30
3	February 12, 2013	732000	34
4	February 13, 2013	738000	44

5	February 14, 2013	744000	40
6	February 15, 2013	1056000	49
7	February 16, 2013	1032000	49
Total		9570000	251

- ii. In the allotment made on February 5, 2013, all the allottees were promoter entities and in the remaining allotments the allottees were non-promoters. None of the allotments were in excess of 49 allottees. All these allotments were made in consonance with and after complying with the applicable provisions of Companies Act, 1956 and rules made thereunder. Further, all the said allotments were made at a price of Rs. 20/- per share.
- iii. On February 18, 2013, the Company had filed draft prospectus with BSE with regard to its proposed public issue of 60,90,000 equity shares on SME platform of BSE Ltd. The IPO of the Company opened on March 18, 2013 and closed on March 20, 2013. The shares of the Company got listed on April 05, 2013.
- iv. The shares allotted in the pre-IPO period were locked-in for a period of one year from the date of listing. As on April 09, 2021 more than 90% of the shares have been sold by non-promoter shareholders of the pre-IPO period while promoters have not sold any shares till date.
- v. The impugned proceedings suffer from laches. The alleged violations related to allotments made in 2013 and the notice has been served after almost 7 years in January 2021. The said inordinate delay has not been explained by SEBI. Post the preferential allotment of shares in 2013, host of material developments have taken place. The shares of the Company have been traded in the securities market. Third party rights have been created in the shares of the Company over the years. The proposed directions will severely prejudice not only the Company, but also its shareholder and investors.
- vi. Even though there is no period of limitation prescribed in the SEBI Act and Regulations for the completion of investigations or for the issuance of a show cause notice, the authority is required to exercise its powers within a reasonable period. Facts of the present case will show that the

powers have not been exercised by SEBI within a reasonable period and therefore, the proceedings need to be discontinued and dropped. Reference to various judgements/orders of Hon'ble Supreme Court, Hon'ble Securities Appellate Tribunal have been made in support of the submission.

- vii. The request for inspection of all relevant documents was also repeated.
- viii. While providing an interpretation of the provisions of Section 67(1), (2) and (3) of the Companies Act, 1956, it was submitted that on account of the amendment by insertion of first proviso to Section 67(3) with effect from December 13, 2000, there is a wrong notion that any allotment of shares by an unlisted public company to 50 or more persons in a financial year between 2000 to 2013 is in violation of Section 67(3) and Section 73. In terms of Companies Act, 1956 and ICDR Regulations 2009, the definitions such as prospectus, advertisement, etc. refer to a written communication from the company in order to treat the same as an offer. If there is no written or visual communication by or on behalf of the company, there cannot be any offer or invitation and the provision of Section 67 have no application under such circumstances. Any mobilisation of funds from a group of investors, fifty or more in number, would be classified as a 'public issue', only if it is preceded by 'offer or invitation' to subscribe for shares or debentures. Absent any 'offer or invitation' by a company to subscribe for shares or debentures, issues of same being a 'public issue' cannot and does not arise.
- ix. Section 73 is applicable only to a company intending to offer shares or debentures to the public for subscription by issue of a prospectus. Since, the Company never offered shares or debentures to the public for subscription by issue of a prospectus, the issue of attracting the provisions of Section 73 of the Companies Act cannot and does not arise. In any case, the shares in question did get listed.
- x. Plain reading of the provision of Companies Act makes it very clear that there is no prescription as regards to the number of investors to whom a company can offer securities in one financial year. It is only mandated that in one single offer invitation to subscribe to securities cannot be extended to more than 50 persons. Since there was no limit on the

number of persons to whom offer was allowed to be extended in one financial year, the Company has not violated Section 67(3) of the Companies Act, 1956 unless it can be proved that one single offer was extended to more than 50 persons.

- xi. The Company had disclosed, *inter alia*, the aforesaid seven allotments in the Prospectus issued while making public issue of shares. The prospectus was filed with BSE, Registrar of Companies, Kolkata and SEBI. None of them had alleged violation of Section 67 of the Companies Act, 1956.
- xii. Out of abundant caution, the Company/promoters has initiated a process of giving exit offer to all the existing preferential allottees who were allotted shares in the month of February 2013. In response, eight shareholders have responded and have not opted for refund. Considering the COVID situation reminder letters have been issued to remaining 35 shareholders to respond by June 30, 2021.
- xiii. That the Company has filed a compounding application before Hon'ble NCLT for violation of Section 56, 60, 60B, 64, 68B, 67(3) and 72 of the Companies Act, 1956.
- xiv. The Noticees have denied that the Company has violated the provisions of Sections 56(1), 56(3), 60, 62, 67(1), 67(2), 67(3), 73(1), 73(2), and 73(3) of the Companies Act or Regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of ICDR Regulations 2009 read with Regulation 301 of ICDR Regulations, 2018.
- xv. Without prejudice to their submission that the Noticees have not violated the provisions of Companies Act or the ICDR Regulations, as alleged, the Noticees have submitted that even if it is assumed that there was violation of Section 67(3) of the Companies Act, then also nothing turns on it since the shares of the Company were listed on BSE in close proximity by virtue of the public issue. Following of the process for the public issue, should be construed as compliance of the process as stipulated under the Companies Act and ICDR Regulations for the impugned preferential allotments. Therefore, in the facts and circumstances of the present case, the alleged violation of Section 67(3) of the Companies Act is at the highest a technical infraction.

- xvi. Till date no investor/shareholder has filed any complaint with regard to the alleged preferential allotments, including the allottees in the impugned preferential allotments. As a consequence of the alleged preferential allotments nobody's interest has been affected in any manner. The alleged violation, if at all any, is highly technical and procedural violation.
- xvii. The proceeds of the allotments have already been fruitfully deployed by the Company in its business operations. Public shareholding in the Company is 58.46% which is held by body corporates and individual public shareholders.
- xviii. There are no allegation of manipulation of share price or fraudulent practices, financial irregularities etc. against the Company. Apart from the present proceedings no action or proceedings have been initiated against the Company by SEBI.
- xix. Therefore, at this juncture, given the facts and circumstances of the case, it would be in the fitness of things and also in consonance with the well settled principles of proportionality and fairness, that no directions be issued against the Company and its directors.

10. The hearing dated June 22, 2021 was adjourned at the request of the Noticees, dated June 22, 2021. Hearing was again scheduled for July 27, 2021. However, due to impending end of tenure of the then WTM, the hearing scheduled on July 27, 2021 could not be held. Subsequently, on August 03, 2021 the file was placed before me for granting a hearing in the matter. Accordingly, hearing in the matter was fixed for December 21, 2021. On the said date Authorised Representative of the Noticees attended the hearing and made submissions on behalf of the Noticees.

11. The Noticees vide letter dated December 21, 2021, *inter alia*, made additional submissions which are summarised as follows:

- i. The Noticees requested that the decision to give inspection be taken up by the quasi-judicial authority.
- ii. The Noticees also repeated the submissions regarding delay in initiation of the present proceeding. Reference to various orders of Hon'ble

Securities Appellate Tribunal have been made in support of the submission.

- iii. The Noticee also repeated the submission regarding preferential allotments made in February 2013 and subsequent listing of shares of the Company pursuant to public issue in March 2013.
- iv. That SEBI's interpretation of the limit of 50 persons in one financial year is incorrect as the word financial year does not find mention in law and the relevant provision of the Companies Act, 1956 talks about a particular offer and not number of allottees in one financial year. Even the limit of 50 for one offer is not applicable in cases where the offer is made to a domestic concern.
- v. That there is distinction between offer and allotment. An offer means an act of solicitation to subscribe to securities. Every offer may not result into allotment. Offer is preceded by approval by shareholders or by the Board, as the case may be. Offer is followed by receipt of application and application money from subscribers. Allotment is the act of allocation of new securities to the concerned subscriber. Allotment is pursuant to the board approving the same and is preceded by offer, receipt of application for subscription and receipt of application money.
- vi. That in respect of each of the offers and allotments were made on a different date and we have made separate ROC filings for the same. All offers have been made well within the limit prescribed in the Companies Act, 1956 on separate days. Thus, each offer falls under the category of private placements and not public issue. The cap of 200 on the number of persons to whom offer/allotment can be made in one financial year was introduced only after the enactment of Companies Act, 2013. Hence in respect of the offers made before 31st March, 2014, no such limit is applicable.
- vii. The Noticees have repeated their earlier submissions regarding the internal policy of SEBI to deal with deemed public issues and that the policy has been followed in several similar cases earlier.
- viii. Without prejudice to their stand that in their matter there is no violation of the provisions of the Companies Act as alleged, the Noticees have submitted that action has been taken by the Company as per the SEBI

policy and have already given exit offer to the concerned investors and have also filed compounding application in this regard with NCLT. A certificate given by peer reviewed Chartered Accountant (issued by Pawan Gattani, Membership No. 144734 for Maheshwari & Co., FRN: 105834W, UDIN: 21144734AAAAJK2752 dated 11-11-2021) and an acknowledgement showing compounding application filed with NCLT have also been filed with the reply.

- ix. That in matters where similarly placed companies have provided a CA certificate, SEBI has purely on that basis and at that stage itself dropped proceedings against these companies. The Noticees have requested that on the based on the CA certificate filed by them, the present proceedings be dropped.

12. In the CA certificate mentioned above, it has been certified that Manish Baid is one of the promoters of the Company and an exit offer was made at the instance of the promoters. Company had allotted equity shares to 251 entities on seven different allotment dates. Out of these 251 allottees, five entities belonged to the promoter group. Out of the remaining 246 applicants, 203 of the applicants have sold their holding in the open market and the same has been verified from the BENPOS position of the Company. The open offer was extended to the remaining 43 investors and the exit offer letter dated April 06, 2021 was dispatched on April 7, 2021. The second reminder for the exit offer was made to 35 people as 8 shareholders had already responded to the original exit offer and did not opt for the exit offer. Reminder to the exit offer was dispatched on June 18, 2021. Out of those shareholders, three opted to accept the exit offer and the remaining declined the offer and wishes to remain invested. The promoters were authorised by the Company pursuant to a board resolution passed on March 22, 2021 by the Company, to provide the offer for exit to such shareholders. Such shareholders have been granted an option by the promoters to transfer their respective equity shares for a consideration worked out on the basis of face value of their investment plus interest rate of 15% per annum thereon. The working of purchase consideration is examined and found correct. Payment of consideration to shareholders who have opted for transfer of shares has been made through banking channels.

13. Post hearing in the matter held on December 21, 2021, the Noticees requested inspection of relevant documents in the matter vide email dated March 09, 2022 while placing reliance on the Hon'ble Supreme Court order dated February 18, 2022 in the matter of T. Takano v. SEBI & Anr. Based on the request of the Noticees and in view of the Hon'ble Supreme Court Order dated February 18, 2022, inspection of relevant documents was given to the Noticees on April 04, 2022.

14. Vide letters dated April 08, 2022 and April 27, 2022, the Noticees have raised contentions regarding not being given the inspection of certain docs, which may not be related to the present proceedings. The Noticees have also contended that inspection of documents is a quasi-judicial process and hence the decision on whether inspection should be given or not is a quasi-judicial decision and cannot be taken by anyone else apart from the quasi-judicial authority. In support of its contention, reference has been made to order of Hon'ble Securities Appellate Tribunal in the matter of Pooja Wadhawan v. SEBI.

Consideration of issues and findings

15. I have perused the allegations made in the SCN and considered the submissions made by the Noticees in their replies as well as at the time of hearing. The Noticees have been charged *inter alia* for violating the provisions of Sections 67(1), 67(2) and 67(3) of the Companies Act, 1956 with respect to the preferential allotment of equity shares made by the Company to 251 persons in the issue period.

16. In this regard, a reference may be made to Sections 67(1), 67(2) and 67(3) of the Companies Act, 1956 which reads as under:

"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-Sections (3) and (4), be construed as including a reference to offering them to any Section of the public, whether selected as members or debenture holders

of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any Section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of subSection (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 nonbanking financial companies or public financial institutions specified in Section 4A of the Companies Act, 1956 (1 of 1956)."*

17. The Hon'ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. v. SEBI (2013) 1 SCC 1, while examining the scope of Section 67 of the Companies Act, 1956, observed as under: -

"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.”

18. Section 67(3) of Companies Act, 1956 provides for situations when an offer/invitation is not considered as offer to public. As per the said sub Section, if the offer is one which is not 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, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the first proviso to Section 67(3) Companies Act, 1956 inserted w.e.f. December 13, 2000, such private placement of shares or debentures was restricted to 49 persons. In other words, if offer /invitation is made to 50 or more persons, it ceases to be a private placement and becomes public issue attracting the requirement of compulsory listing under Section 73 of the Companies Act, 1956.

19. I note that as per the available records and by the Noticees' own admission, equity shares were allotted by the Company to 251 persons in the issue period

through preferential allotment. However, the Noticees have contested the alleged violations and submitted that the Company had made allotment in seven tranches and allotment to more than 49 persons was not made in any of the allotments made in the issue period. Further, that the cap on the number of persons to whom offer/allotment can be made on one financial year was introduced only after the enactment of the Companies Act, 2013 (effective from April 01, 2014) and was, therefore, not applicable on the allotments made in the issue period.

20. In this regard, reference may be made to the order dated April 28, 2017 of Hon'ble Securities Appellate Tribunal in Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016), wherein the Hon'ble SAT while dealing with the issue of NCD's observed 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 comply with the provisions of Section 56 of 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"*. I note that the ratio laid down by the Hon'ble SAT in the said case is applicable with equal force to the issue of equity shares made by the Company as well during the issue period. In the instant matter, I find that as per the available records and as per the admission of the Noticees themselves, equity shares were issued by the Company to 251 investors during the issue period and the Company had mobilized an amount of Rs. 19,14,00,000/-. In view of the same, Section 67 of the Companies Act, 1956 is applicable to the preferential allotment of equity shares made by the Company during the issue period. I find that the preferential allotment of equity shares by the Company during the issue period falls within the first proviso of Section 67(3) of Companies Act, 1956. Hence, the offer of equity shares is deemed to be public issues and the Company was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956 and ICDR Regulations, 2009.

21. For making public issue of equity shares, a company is required to make application for listing of such securities with a recognised stock exchange(s), as

mandated under Section 73 of the Companies Act, 1956. As per Sections 73(1) and 73(2) of the Companies Act, 1956, a company is required to make an application to one or more recognized 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 applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. As per Section 73(3) of the Companies Act 1956, a company is required to keep the money received in a separate bank account until the permission to list has been granted. In the present matter, the Noticees have contended that since the Company never offered shares or debentures to the public for subscription by issue of a prospectus, the issue of attracting the provisions of Section 73 of the Companies Act cannot and does not arise. In this regard, as discussed in para 18, an offer/invitation made to 50 or more persons is treated as made to public and all requirements of public issue viz. issuing prospectus, making application with recognised stock exchanges, becomes applicable to it. If any issuer does not follow these requirements, then he is in violation of law and cannot use the violation as a defence to applicability of Section 73. It does not mean that Section 73 ceases to be applicable to such persons as he has not issued prospectus. I note that Section 2(36) of the Companies Act, 1956 read with Section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the 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, in the present case, the offer of equity shares was a deemed public issue of securities, the Company was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. Therefore, the contention of the Noticees that since the Company did not issue any prospectus and therefore, the provisions of Section 73 are not attracted, is untenable. In view of the above and the admission of the Noticees that no prospectus was issued for offer of equity shares allotted in the issue period, I find that the Company has not complied with the provisions of Section 60 and 73(1), 73(2) of the Companies Act, 1956. The Company has also not provided any records to show that the amount collected by it was kept in a

separate bank account. Therefore, I find that the Company has also not complied with the provisions of Section 73(3) which mandates that the amounts received from investors shall be kept in a separate bank account. Further, as the Company did not comply with the public issue norms, it also did not comply with the various provisions of the ICDR Regulations, 2009, as alleged in the SCN.

22. Thus, I find that, -

- i. Noticee no. 1 to 4 have violated Section 56(1), 56(3), 60, 62, 67(1), 67(2), 67(3), 73(1), 73(2) and 73(3) of the Companies Act, 1956 and Regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of ICDR Regulations, 2009 read with Regulation 301 of ICDR Regulations, 2018;
- ii. Noticee Nos. 5-7 have violated Section 56(1), 56(3), 60, 67(1), 67(2), 67(3), 73(1), 73(2) and 73(3) of the Companies Act, 1956 and Regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of ICDR Regulations, 2009 read with Regulation 301 of ICDR Regulations, 2018;
- iii. Noticee Nos. 8 and 9 who became directors of the Company post issue period but resigned on September 28, 2015 have violated Section 73 of the Companies Act, 1956; and
- iv. Noticee Nos. 10 and 11 who are promoters of the Company have violated Section 62 of the Companies Act, 1956.

23. The Noticees have submitted that in several similar deemed public issue cases, the respective issuers were dealt with by SEBI in terms of its internal policy on handling deemed public issue cases whereunder, no direction to refund/debarment is issued and only adjudication proceedings are to be initiated, if –

- i. The issuer has given an option to take refund of the investments alongwith 15% interest to all the concerned investors;

- ii. If an application for compounding for alleged violation of Companies Act, 1956 has been filed with NCLT.

24. In support of the aforesaid contention, the Noticees have also relied upon SEBI order dated April 19, 2021, in the matter of Babanraoji Shinde Sugar Allied Industries Limited, wherein Whole Time Member, ordered to examine the request of the company therein i.e. Babanraoji Shinde Sugar Allied Industries Limited, for parity with similar cases of deemed public issue which were dealt with by SEBI in terms of its internal policy. The Noticees submitted that they also intend to follow the aforesaid policy of SEBI as they have provided exit option to the existing shareholders who were allotted equity shares in the issue period and also submitted a certificate from a Chartered Accountant and an acknowledgement of filing of compounding application before NCLT in this regard.

25. I note that SEBI's internal policy with respect to deemed public issues involving allotment of securities to more than 200 persons in a financial year in non-compliance of the Companies Act, 1956, essentially provides that if an issuer has given an option to exit to the investors and has also filed an application before NCLT for compounding of offences under the Companies Act, then in such a case SEBI may only initiate adjudication proceedings against the company and its directors for violation of ICDR Regulations.

26. In the present case, I note that Noticees have submitted that they have given exit to the investors who were allotted securities during the issue period and are still holding shares in the Company and attached a certificate from a Chartered Accountant in support of their claim. They have also filed a copy of the acknowledgement for filing of compounding application before NCLT. While noting the claims made by the Noticees, I also note that the number of investors to whom the impugned issue of the shares was made during the issue period is 251. I also note that there are no allegations of making any subsequent issue of shares in violation of the Companies Act, 1956. Further, I also note that the Company made a public issue of shares in March 2013 and the shares of the Company were listed on stock exchange i.e. BSE Ltd. on April 05, 2013. By

virtue of the listing of its shares on recognised stock exchange, all the shares of the Company, including those issued during the issue period, were listed w.e.f. April 05, 2013. Post listing, the shares of the Company were freely available for trading and consequently, the original allottees would have got opportunity to exit from the Company and if not they still have the opportunity to exit from the Company by selling their shares in the market.

27. With respect to the exit option provided to the investors, the Noticees have submitted that out of the 251 persons to whom allotment of equity shares was made in the issue period, five were promoter entities. Further, out of the remaining 246 persons, 203 persons have sold their holdings in the open market and 43 non-promoter investors were holding shares in the Company. The Noticees have also submitted that in terms of the SEBI policy on deemed public issue cases, the Company through its promoters gave an exit option to the said 43 investors. Out of the 43 investors, three investors have exercised the option and sought refund. Payment to the said three investors has been made through banking channels. The Noticees have also filed an application for compounding of offences under Companies Act with NCLT, which is also a precondition prescribed under the said SEBI policy. I also note that the SEBI policy on deemed public issue cases provides for initiation of adjudication proceedings against the parties involved for levying of penalties for violation of the provisions of ICDR Regulations.

28. The Company in the present case has given exit option to the investors and has made refund to those investors who wished to exit. Further, the Company has made an application for compounding of the violations of the provisions of the Companies Act, 1956 before NCLT. In view of these facts, the policy of SEBI in such cases as discussed in para 25 above which provides for adjudication in such cases and the fact that the shares of the Company have been listed on the SME platform of BSE Ltd., I find that directions under Sections 11(1), 11(4), 11A and 11B (1) of the SEBI Act, 1992, for refund and debarment, are not called for in the present matter. However, SEBI may consider initiating adjudication proceedings for violation of ICDR Regulations, as per SEBI's internal policy.

Direction:

29. In view of the above and in the facts and circumstances of the case, I, in exercise of the powers conferred upon me under Sections 11(1), 11(4), 11A and 11B (1) of the SEBI Act, 1992 read with Section 19 thereof, hereby direct that Noticee no. 1 and 3 shall make refund to any of the 40 investors (as referred in para 27 above) alongwith interest of 15% per annum, who approaches them for refund within a period of 12 months from the date of this order. Present directors of the Company are directed to ensure compliance of said direction by the Company.

30. This order comes into force from the date of this order.

31. The present order does not preclude the investors of the Company to pursue other legal remedies available to them under any other law, against the Noticees for refund of money before any appropriate forum of competent jurisdiction.

32. The order shall be served upon all the Noticees.

sd/-

ANANTA BARUA

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA

Date: September 27, 2022

Place: Mumbai