WTM/MPB/EFD-1-DRA-IV/ 68/2019

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of Ambitious Diversified Projects Management Limited

In re Deemed Public Issue Norms

In respect of:

Sl. No.	Name of the Entity	PAN	DIN
1	Mr. Rakesh Sharma	CJEPS7584N	06369047

Background

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") passed an Order dated November 13, 2017 *inter alia,* in respect of Mr. Rakesh Sharma (hereinafter referred to as "**Noticee**") in the matter of Ambitious Diversified Projects Management Limited (hereinafter referred to as "**ADPML**"/ "**Company**"). The said Order, *inter alia,* made the following findings qua the Noticee:

"46. From the material available on record and the details of the appointment and resignation of the directors of ADPML as reproduced in paragraph 43 of this Order, it is noted that Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma were directors at the time of the issuance of NCDs. Since these persons were acting as directors during the period of issuance of NCDs, they are officers in default as per Section 5(g) of Companies Act, 1956. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified director of ADPML was entrusted to discharge the obligation contained in Section 73

of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the past and present directors of ADPML, as officers in default, are liable to make refund, jointly and severally, along with interest at the rate of 15 % per annum, under section 73(2) of the Companies Act, 1956 for the non-compliance of the above mentioned provisions…"

…

48. I note that during the financial years 2010-2011, 2011-2012 and 2012-2013 ADPML through Offer of NCDs, had collected at least an amount of Rs 1.63 Crores from various allottees…

Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma were directors only for a day as discused above. Therefore, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, I am of the view that the obligation of the director to refund the amount with interest jointly and severally with ADPML and other directors are limited to the extent of amount collected during his/her tenure as director of ADPML. Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma are liable to refund the money collected,if any, during their short span of one day tenure.

2. In the light of the above, vide the Order dated November 13, 2017, the following directions were issued against the Noticee and other entities:

"ADPML, Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma shall forthwith refund the money collected by the Company, during their respective period of directorship through the issuance of NCDs including the application money collected from investors during their respective period of directorship, 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.

…

Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain and

Shri Rakesh Sharma are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form.

…

ADPML, Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them 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 nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

…

After completing the aforesaid repayments, ADPML, Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain, Shri Rakesh Sharma, Shri Rajkumar Yadav, Shri Pradeep Ojha and Shri Satyendra Singh Bhadouria shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ***("ICAI").***

…

In case of failure of ADPML, Shri Kunaal Tiwary, Shri Onkar Singh, Shri Arshad Hussain, Shri Nimai Kumbhakar, Shri Apurba Kumar Mondol, Shri Pradip Kumar Kundu, Shri Mriganka Sekhar Chakraborty, Shri Mohammad Sohaib, Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order:

i) may recover such amounts, from the company and the directors liable to refund as specified in paragraph 57(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.

ii) may initiate appropriate action against the Company, its promoters/directors and the persons/officers who are in default, including adjudication proceedings against them, in accordance with law.

iii) would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds;

…

Shri Arindam Kundu, Shri Iftekhar Hussain and Shri Rakesh Sharma are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 2 (two) years from the date of this order. The above said directors 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 2 (two) years from the date of this order. The above directions shall come into force with immediate effect. "

3. The Noticee challenged the Order dated November 13, 2017 before the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**SAT**"). Hon'ble SAT vide its Order dated March 6, 2018, restored the matter qua the Noticee to the file of the WTM for passing fresh order on merits and in accordance with law. Hon'ble SAT further observed as follows:

"3. As there is dispute regarding service of the notice and the impugned order is also an ex-parte order qua the appellant, in the facts of the present case in our opinion, it would be just and proper to quash and set aside the impugned order qua the appellant and restore the matter for fresh decision on merits and in accordance with law.

4. Accordingly, we set aside the impugned order dated 13th November, 2017 qua the appellant and direct the WTM of SEBI to pass fresh order in accordance with law after giving opportunity of hearing to the appellant as expeditiously as possible."

4. Pursuant to the Order of Hon'ble SAT, the authorised representative (hereinafter referred to as "**AR**") of the Noticee, Ms. Sapna Rachure, vide her letter dated June 29, 2018 requested for certified copies of entire papers and proceedings in the extant matter. The AR further requested for a personal hearing in the matter.

5. Noticee was granted an opportunity of personal hearing vide hearing notice dated August 9, 2018 on October 4, 2018 at SEBI Bhavan, Mumbai. He was further advised to inform SEBI, the documents for which he required the certified copies.

Hearing and Reply

6. On the day of the scheduled hearing, Mr. Dipyojyoti Banerji appeared as the AR of the Noticee and *inter alia* submitted as follows:

a) Prior to the receipt of the SEBI order, the Noticee had never heard about the company.

b) The DIN mentioned in the SEBI order does not belong to him.

c) He has no records whatsoever relating to the matter.

d) The Noticee had earlier sought for inspection of documents vide a letter which was delivered to SEBI on June 29, 2018. However, no response was provided to the same.

The AR requested that the inspection of documents may now be provided and next hearing in the matter may be fixed after 4 weeks from the inspection date. The request of the AR was acceded.

7. Pursuant to the hearing, vide letter dated October 22, 2018, the Noticee was granted an opportunity of hearing on November 28, 2018 at SEBI Bhavan, Mumbai. The AR vide her letter dated November 28, 2018 requested to permit, Ms. Prachi Kave to conduct the inspection. The file containing all the relevant documents was provided to the representative for carrying out inspection. Due to paucity of time the representative requested for additional time to complete the inspection. The request

of the representative was acceded to and she was grated time on November 29, 2018 to conclude her inspection in the matter. On the completion of the inspection on November 29, 2018, the representative requested for copies of certain documents, for which she asked to collect the same on December 5, 2018. The AR collected the copy of the documents requested by her on December 17, 2018.

8. Subsequent to the inspection, vide hearing notice dated May 14, 2019, the Noticee was granted a hearing on June 11, 2019 at SEBI Bhavan, Mumbai.

9. The Noticee submitted an affidavit-in-reply dated May 28, 2019 wherein *inter alia* he stated as follows:

   9.1. He had no clue or knowledge of any such proceedings and also of the said company i.e., ADPML and further that he had no clue or knowledge that he is alleged to be a Director of the said company. It is only after going through the Order, he came to know about the proceedings, the said company and that he is alleged to be a Director of ADMPL.

   9.2. At no point in time, he has signed any consent letter or appointment letter or any other document in connection with the alleged directorship of the company.

   9.3. After going through the Order, he is able to identify the estranged husband of his sister i.e., Shri Kunaal Tiwary. Shri Kunal Tiwary is the person in the list of Directors, who can be in a position to know his personal details and thereby use the same for making him the alleged Director for the day. He is specifically alleging hereby that his signature has definitely been forged and his personal details were used without his consent or information.

   9.4. After receiving the Order, he has filed a police complaint against Shri Kunaal Tiwary, the company and the Trust at Dispur Police Station, Guwahati on December 11, 2017.

   9.5. The newspapers where the notifications/ Orders were published are not local newspapers of Guwahati or Assam and are published in other languages at other places/ States.

9.6. Signatures in both the undated letter to the company consenting for becoming alleged Director of ADPML and the resignation letter dated December 11, 2012 are not his. He has also not filled any Form 32. The signatures in both the letters are fraudulent signatures.

9.7. He has never applied for a DIN and is also completely unaware (before this proceeding) that there is a DIN number against my name. He does not know who has applied for the said DIN.

9.8. Appointment of a Director for a single day is also not logical. No one would consent to become a Director of the company for a single day. The entire facts only support that some fraud has been played on him.

10. Vide an email dated June 6, 2019, the AR was informed that the Noticee can attend the hearing via tele-conferencing from the nearest SEBI office. The AR vide an email dated June 11, 2019 requested to postpone the scheduled hearing to the month of July, 2019, as she was travelling outside the country. Based on the AR's request, the hearing in the matter was scheduled on July 9, 2019.

11. On the day of the scheduled hearing, Mr. Kabir R. Rachure, Advocate appeared on behalf of the Noticee and sought an adjournment on the ground that the Senior Counsel is not available. The request of the AR was granted. Further, the AR denied the allegations in the interim order dated February 15, 2016 and *inter alia*, submitted as under:

    a. Noticee's sister's husband, Mr. Kunal Tiwary misused his personal details and made him a Director.

    b. The Noticee has filed a police complaint dated December 12, 2017 at Dispur Police Station, Guwahati.

12. The Noticee was granted the next opportunity of hearing on September 18, 2019. Mr. Dibyojyoti Banerji appeared for the hearing as the AR of the Noticee. The AR submitted as follows:

    a. The Noticee has no knowledge of the existence of the company. He can identify Mr. Kunal Tiwary who is one of the Directors of the company and is the

estranged husband of his sister.

b. Mr. Kunal Tiwary has used his personal details without his consent.

c. The signatures on the consent letter to act as the Director of the company and letter dated December 11, 2012, are not his signature. The same has been forged.

d. The Noticee has never applied for DIN.

e. The Noticee has filed a police complaint against Mr. Kunal Tiwary and the company for forgery in December, 2017. The investigating officer is not able to disclose the status of the complaint as it is an ongoing investigation.

The hearing in the matter was concluded.

Consideration and Findings

13. I have considered the allegations and materials available on record including Order dated November 13, 2017 and the oral and written submissions of the Noticee. On perusal of the same, the following issue arises for consideration.

i. *Whether the company came out with the Offer of Non-Convertible Secured Redeemable Debentures (hereinafter referred to as "**NCDs**") as stated in the interim order dated February 15, 2016?*

ii. *If answer to the issue no. 1 is in affirmative, whether the Offer of NCDs by ADPML is in violation of Sections 56, 60 read with 2(36), 73 and 117C of the Companies Act, 1956 read with the relevant provisions of SEBI (Issue and Listing of Debt Securities), Regulations, 2008 (hereinafter referred to as "**ILDS Regulations**")?*

iii. *If the finding on issue no. 2 is in the affirmative, whether any directions under Sections 11(1), 11(4), 11A and 11B of SEBI Act and Regulation 28 of the ILDS Regulation should be issued against the Noticee for the alleged violations of the relevant provisions of the Companies Act, 1956 and ILDS Regulation in respect of offer and issuance of NCDs by ADPML?*

Issue No. 1- *Whether the company came out with the Offer of NCDs as stated in the interim order dated February 15, 2016?*

14. I note from the documents/ information obtained from the MCA 21 Portal, debenture certificates enclosed with investors' complaints and other documents available on record that ADPML has issued debenture certificates to at least 21 allottes during the financial year 2011-2012 and at least 33 debenture certificates during the financial year 2012-2013. Therefore, it is clear that at least 54 certificates were issued to 54 allottees during financial years 2011-2013. I also note that during the financial years 2010-2011, 2011-2012 and 2012-2013, ADPML had raised at least an amount of ₹ 1.63 crore. I also note that the number of allottees and funds mobilized has been collated from the documents submitted with the complaints received by SEBI. Therefore, it is possible that the actual number of allottees and amount mobilized could be more than ₹ 1.63 crore. The Noticee has not contested the allotment of debenture certificates by the company and the money raised through such allotments.

15. In view of the above, I conclude that ADPML came out with an Offer of NCDs as outlined above. The same conclusion was arrived at in the Order dated November 13, 2017.

Issue No. 2 - *If answer to the issue no. 1 is in affirmative, whether the Offer of NCDs by ADPML, is in violation of Sections 56, 60 read with 2(36), 73 and 117C of the Companies Act, 1956 read with the relevant provisions of ILDS Regulations?*

16. To determine whether offer of NCDs is a public issue or not, reference has to be made to Section 67 of the Companies Act, 1956. Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors.* vs. *SEBI* (Civil Appeal no. 9813 and 9833 of 2011) (hereinafter referred to as the "**Sahara Case**"), while examining the scope of Section 67 of the Companies Act, 1956, observed as follows:

"…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."

17. In the instant matter, it has already been held in the preceding paragraphs that ADPML, which is neither a Non–banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956 (absence of any material to state otherwise), has issued NCDs to at least 54 investors (during financial years 2011-12 to 2012-2013). It has at least raised an amount of at least ₹ 1.63 crore over the financial years 2010-2011, 2011-2012 and 2012-2013. However, as noted, though the aforesaid figures are not conclusive but they do lead to a reasonable conclusion that the Offer of NCDs by ADPML was a "public issue" within the meaning of the first proviso to Section 67(3) of the Companies Act, 1956.

18. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, 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 other capacity which they have not discharged."* In respect of those issuances, the Noticee has not placed any material that the allotment was in satisfaction of Section 67(3)(a) or Section 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon'ble SAT in *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 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".*

19. Considering, the Offer of NCDs by ADPML are deemed to be public issues, ADPML was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

20. I find that no material has been submitted on record to indicate that provisions of Section 73 of Companies Act, 1956 (allotment of shares and debentures to be dealt

in on stock exchange), Section 60 of Companies Act, 1956 (registration of prospectus), Section 56 of Companies Act, 1956 (matters to be stated and reports to be set out in prospectus) and Section 117C of Companies Act, 1956 (liability of company to create security and debenture redemption reserve) have been complied with. I also note that the Noticee has neither disputed on the fact of deemed public issue nor the failure of the company to comply with the public issue norms as contained in the Companies Act, 1956. Therefore, I hold that the company has violated the aforesaid provisions of the Companies Act, 1956. The same conclusion was arrived at in the Order dated November 13, 2017.

21. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956. The issue of SEBI's jurisdiction over the provisions of the Companies Act, 1956 has not been challenged by the Noticee and otherwise also, the same has been settled by the Hon'ble Apex Court in the *Sahara's Case*.

22. In view of the finding that ADPML has made a public issue of debt securities, the ILDS Regulations is also applicable to the instant Offer of NCDs. Therefore, I find that the company has violated the provisions of the ILDS Regulations namely, Regulations 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), 4(4), 5(2)(b), 6, 7, 8, 9, 12, 14, 15, 17, 19, 26. The same conclusion was arrived at in the Order dated November 13, 2017.

23. In view of the above findings, I am of the view that ADPML engaged in fund mobilizing activity from the public, through the Offer of NCDs and has contravened the provisions of Sections 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3), and 117C of the Companies Act, 1956, and above mentioned provisions pertaining to the ILDS Regulations.

Issue No. 3- *If the finding on issue no. 2 is in the affirmative, whether any directions under Sections 11(1), 11(4), 11A and 11B of SEBI Act and Regulation 28 of the ILDS Regulation should be issued against the Noticee for the alleged violations of the relevant provisions of the Companies Act, 1956 and ILDS Regulation in respect of offer*

and issuance of NCDs by ADPML?

24. Before dealing with the above issue, it would be appropriate to deal with the submissions/objections of the Noticee. The Noticee has submitted that he is unaware of the fact that he was appointed as the Director of the company. His signature on the consent letter to become the Director of the company and on the resignation letter are forged. He has also never applied for DIN.

25. In this regard, I note that the interim order proceeded on the basis of existence of various circumstances, the existence of which gave rise to a reasonable belief that the Noticee being the Director is *prima facie* liable for collection of money from the investors in violation of deemed public issue norms. Therefore, it needs to be considered, at first, whether the circumstances considered by the interim order still holds good or the explanations and evidences given by the Noticee takes away the incriminating nature of some of the circumstances or materially alter the existence of the circumstances considered in the interim order as basis for the *prima facie* findings. It is noted that in order to test whether there is a reasonable belief, the totality of the circumstances have to be considered, before arriving at a conclusion. In the facts and circumstances of the case, one or a few of the circumstances may have more weightage in view of its degree of influence on the inference to a relevant fact, than others. Therefore, in assessment of inference that has been drawn out of various circumstances, emphasis has to be laid not on the independent assessment of circumstances but on the joint assessment of various circumstances and the collective analysis of those circumstances resulting in a cumulative finding.

26. In this regard, I note that the Noticee has submitted a copy of the FIR filed against the company and his brother-in-law, Mr. Kunal Tiwary, who is the Director of the company. The said FIR was filed by the Noticee, as stated by him, after he became aware of the extant proceedings to take corrective steps. Further, he has submitted that his brother-in-law had knowledge about his personal details and his pattern of signature. Primarily, among other factors, the liability of the Noticee arises out of his position as the Director in the company at the relevant period of money collection. The circumstances enumerated above, make it difficult to render a positive inference

that he was in fact the Director of the company on the basis of preponderance of probability test. I further note in the collective analysis of different circumstances, his being a Director for a day should get a higher degree of inferential value given the allegation of forgery. Thus, taking into consideration that the Noticee was the Director of the company only for a day and other attending circumstances as enumerated above, in the given facts and circumstance of the matter, a benefit of doubt can be given to the Noticee with respect to his liability arising out of failure to comply with the deemed public issue norms.

27. 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 11, 11(4), 11A and 11B (1) of the SEBI Act, hereby revoke the directions issued against Mr. Rakesh Sharma (PAN: CJEPS7584N) issued vide interim order dated February 15, 2016.

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

29. Copy of this Order shall be forwarded to the recognised Stock Exchanges, Depositories and Registrar and Transfer Agents for information and necessary action.

DATE: October 1, 2019 **MADHABI PURI BUCH**

PLACE: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA