

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

ORDER

UNDER SECTIONS 11, 11(4), 11A AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 IN THE MATTER OF NEESA TECHNOLOGIES LIMITED

IN RESPECT OF MR. GIRISHCHANDRA MUKUNDRAM BALUNI.

[PAN: AAKPB5408R; DIN: 02745783]

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1. Securities and Exchange Board of India ("SEBI") passed an order dated June 02, 2016 (Ref. No. WTM/PS/46/WRO/JUN/2016) against Neesa Technologies Limited (NTL) and its directors including Mr. Girishchandra Mukundram Baluni. It has been held in the order that the company had offered and allotted Non-Convertible Debentures (NCDs) to 341 persons during the financial year 2013-2014 and mobilized Rs. 5.96 crore and in doing so, the company and its directors failed to comply with the various provisions of the Companies Act, 1956 and the Securities and Exchange Board of India Act, 1992 (SEBI Act). The order, *inter alia*, directed the company and its directors to, jointly and severally, refund the money collected by the company through issuance of NCDs to the investors with an interest at the rate of 15% per annum compounded at half yearly intervals. The company and its directors were also restrained from dealing in securities from the date of the order till expiry of 4 years from the date of completion of refund of the monies collected from the investors.
 2. Mr. Girishchandra Mukundram Baluni filed an appeal against the aforesaid order before Securities Appellate Tribunal (Appeal No. 260 of 2016). SAT vide order dated June 20, 2017 set aside the SEBI order dated June 02, 2016 qua the appellant and restored the matter to file of

WTM for passing a fresh order on merits and in accordance with law. Relevant paragraphs of the SAT order are as under:

“...

2. *The decision of the Board of Directors for issuing the NCDs was taken on November 21, 2011 though the actual issue was done in multiple tranches between April 8, 2013 and August 22, 2013.....The learned counsel for the appellant stated thatin the present appeal the question raised is, why all Directors of the Company including the appellant are held responsible for refund of the monies collected from the investors. The appellant herein was a Director from January 21, 2014 to March 30, 2014, for less than three months. Though he was a Director earlier during September 12, 2011 – April 24, 2012 he did not participate in the meeting wherein decision to issue NCDs was taken. Further, when NCDs were issued and money collected between April 8, 2013 to August 22, 2013 the appellant was not a Director in the company. Though he rejoined the Company on January 21, 2014, he resigned on March 30, 2014. Accordingly, the appellant herein had no role in the collection of money though issue of NCDs.*

3. *The learned counsel for the appellant further argued that in the case of a similarly placed Director, Shri Nimain Charan Biswal, this Tribunal had remanded the matter to SEBI to pass a fresh order vide order dated July 14, 2016 (Appeal No. 204 of 2016). SEBI vide its order dated September 7, 2016 held that Shri Nimain Biswal was not liable for the violations committed by the company and certain Directors because he was not a Director when the NCDs were issued and therefore discharged him from any liabilities. Since the present appellant's case is similar to that of Shri Biswal, he should also get the same benefit.*

4. *Learned counsel for SEBI Shri Aditya Chitale submitted that in the case of the appellant, unlike the case of Shri Biswal, there is a prior period of Directorship during September 12, 2011 – April 24, 2012 during which approval for issue of NCDs was done on November 21, 2011. Moreover, though it is stated by the appellant that he resigned from the second stint of Directorship on March 30, 2014 as per records available with the Registrar he continues to be a Director and as such it is continuing liability.*

5. *The impugned order has not clearly stated whether the appellant has been found guilty on account of his role as Director during earlier period (i.e. September 12, 2011 – April 24, 2012) or subsequent to his rejoining on January 21, 2014. We also note from the statement given by the*

appellant relating to the tenure of various Directors including the appellant herein that many Directors would join for a short period then resign and thereafter rejoined again after sometime. Whether this is a part of a strategy also needs to be considered. Therefore, in the facts and circumstances of the matter we set aside the impugned order dated June 2, 2016 qua the appellant and direct SEBI to consider the matter afresh and pass fresh order on merit as expeditiously as possible and in any event within a period of three months from today.

3. Pursuant to the directions of Hon'ble SAT, an opportunity of hearing was provided to Mr. Girishchandra Mukundram Baluni(Mr. Baluni) on July 18, 2017 when he appeared in person and made submissions in line with his reply dated July 18, 2017 which he submitted during the course of hearing. Thereafter, vide his letter dated July 21, 2017, he filed additional reply in support of his submissions. The submissions of Mr. Baluni in brief are as under:

- i. That he was associated with the Company from September 12, 2011 to April 29, 2012 as an Additional, Professional and Non-Executive Director and resigned as it is without any regularization by company.
- ii. That during this period of September 12, 2011 - April 29, 2012 neither he was invited nor did he attend any board meeting. He was not involved in the decision making process nor in the conduct of business.
- iii. That thereafter he rejoined NTL on January 21, 2014 as an Additional, Professional and Non-Executive Director, and subsequently he again resigned from the same on March 30, 2014 as it was his unilateral right.
- iv. That he was never involved in the control or management or day to day operation or business of the Company in any manner or at all during his tenure of 2 months and 9 days (January 21, 2014 to March 30, 2014) as Non-Executive, Professional and Additional directorship, which was not regularized.
- v. That the issue and allotment of NCD by NTL was completed on August 22, 2013 i.e. before he became a director of the NTL and therefore, he cannot be held responsible for violation of NTL regarding offer, issue and allotment of NCD.
- vi. That he did not attend any board meeting during his directorship tenure with NTL, nor did he receive any notice regarding any board meeting from NTL. During his

tenure with NTL , he was not a part of the decision making process related to the NCDs of NTL and did not sign any board resolution/ decision relating to the matter of NCDs.

- vii. That since he had not attended any board meeting of NTL during his association with NTL thus by virtue of Section 283(1) (g) of the Companies Act, 1956 his directorship with NTL automatically stands vacated if he remains absent from all the meetings.
- viii. That he does not fall in the category of Officer in Default or Key Managerial Personnel or Interested Directors of NTL in terms of provisions of Companies Act, 1956.
- ix. That his arrival in the company as an Additional, Professional and Non-executive Director was theoretical, incidental and accidental and without any intention of defrauding any investor and public. That was neither part of any strategy nor any intention to defraud.
- x. That SEBI vide final order June 02, 2016 exonerated Mr. Suresh Kumar, who was the director before the issuance of Non-Convertible Debentures (NCDs) and during the time when decision of the Board of Directors for issuing of NCDs was taken on November 21, 2011.
- xi. That SEBI vide order dated September 07, 2016 exonerated Mr. Nimain Charan Biswal, who was the director after the issuance of NCDs.
- xii. That he was the director before and after the issuance of NCDs and not at the time of issuance of NCDs. Hence, his case is similar to Mr. Suresh Kumar and Mr. Nimain Charan Biswal.
- xiii. That Hon'ble WTM may direct NSE/BSE and all concerned authorities to defreeze his and his wife's demat account held jointly by them so that they can trade or use the money for their treatment.
- xiv. That all proceedings against him and his ailing wife may be dropped and punitive action be quashed.

4. I have considered the reply/submissions of Mr. Baluni, the allegations against him in the interim order cum show cause notice dated June 03, 2015 and other material on record. The question for consideration before me is *whether in the facts and circumstances of the case, Mr Baluni as Director of NTL is liable to refund the money raised through issue of NCD to the investors with interest, or otherwise liable in any other manner, and if so, what should be the nature of the directions for any such liability.*
5. It is observed that in the order dated June 02, 2016 it has been held that Neesa Technologies Ltd. had offered and allotted NCDs to 341 persons during the financial year 2013-2014 (April 8, 2013 to August 22, 2013) and in the process it mobilized Rs. 5.96 crore without complying with the 'public issue' norms stipulated under sections 56, 60, 73 and 117C of the Companies Act, 1956 and the provisions of ILDS Regulations. It has been held that as the company raised money from the public without following public issue norms and it failed to make refund to the investors within the stipulated time, in terms of section 73(2) of the Companies Act, 1956, the company and its every director, who was an officer in default, is jointly and severally liable to refund the money raised through issue of NCD to the investors with interest.
6. The expression "officer in default" used in Section 73(2) of Companies Act, 1956 has to be read with Section 5 of Companies Act, 1956 which defines the expression "officer who is in default". Section 5 of the Companies Act, 1956 defines the expression 'officer who is in default' to mean the officers named therein. Section 5(g) provides that where any company does not have any of the officers specified in clauses (a) to (c) of Section 5, then any director who may be specified by the Board in that behalf or where no director is so specified then all the directors would be "officer who is in default". 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 NTL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as per Section 5(g) of the Companies Act, 1956 NTL and all the directors of NTL are liable wherever liability of refund is imposed on them.
7. The submission of Mr Baluni, in short, is that he is not liable for the violations committed by the company as he was Additional, Professional and Non-Executive Director of the company (during period of September 12, 2011 - April 29, 2012 and thereafter during the period of January 21, 2014 to March 30, 2014), his tenure was only before and after the issuance of NCDs by NTL and even during his tenure neither did he attend any board meeting of the company nor did he

receive any notice regarding any board meeting from NTL, hence Mr. Baluni cannot be said to be officer in default under Section 73(2) of the Companies Act, 1956.

8. In this regard it is noted that Mr. Baluni's first stint was as an Additional Director of NTL from September 12, 2011 to April 29, 2012 and thus admittedly, Mr. Baluni was a director of NTL on November 21, 2011 when the decision of Board of Directors for issuing NCD was taken.
9. Thereafter during the financial year 2013-2014, NTL had offered and allotted NCDs to 341 persons and raised the amount to the tune of Rs. 5.96 crore. It is noted that Mr. Baluni rejoined NTL in his second stint on January 21, 2014, i.e. after NTL has raised the amount to the tune of Rs. 5.96 crore between April 8, 2013 to August 22, 2013 and he was not the Director of NTL during the time when the aforesaid amounts were collected. In view thereof, I find that since Mr. Baluni was not a director of NTL during the period of offer, issue and allotment of NCDs by NTL and in such a case, in light of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of Manoj Agarwal vs. SEBI, he cannot be held as an 'officer in default' specifically with regard to offer, issuance and allotment of NCDs by NTL and thus obligation to refund the money mobilized cannot be fastened on him.
10. As noted earlier Mr. Baluni rejoined NTL in his second stint on January 21, 2014. In the instant proceedings, with regard to his second tenure of directorship, Mr. Baluni has contended that he rejoined NTL on January 21, 2014 and thereafter resigned from NTL on March 30, 2014. In this regard Mr. Baluni has submitted the resignation letter dated March 30, 2014. However on perusal of the same it is noted that though the resignation letter is addressed to Nessa Technologies Ltd. at Ahmedabad, the company stamp of Neesa Leisure Ltd. at Gandhinagar is placed thereon. In view of the same this resignation letter cannot be considered as an evidence of communication of his resignation to Nessa Technologies Ltd. Mr. Baluni has also not submitted copy of Form 32, if any, to substantiate his claim. Further, I note that Mr. Baluni vide his own Statement under oath to the Regional Director, ROC has submitted that he has resigned from Nessa Technologies Ltd., on March 04, 2015. It is evident that there is inconsistency/discrepancy in the submission of Mr. Baluni and thus the submission of Mr. Baluni that he resigned from NTL on March 30, 2014 cannot be accepted. Even assuming that he resigned on March 04, 2015 as per the submission, he has not submitted any proof by way of the copy of his resignation on March 04, 2015, the copy of which is mandatorily, under proviso to section 168(1) of Companies Act, 2013, to be sent to Registrar of Companies. He is also required to file DIR 11 to the Registrar of

Companies. In view of lack of evidence on this score, it is difficult to accept his admission as to the date of resignation. On the contrary, as per the MCA records available on MCA website he is still shown as a director of NTL since January 21, 2014. Thus I consider Mr. Baluni to be present and continuing director of NTL since January 21, 2014. Further it is noted that it is well known to Mr. Baluni that he is considered as Director of NTL on the basis of MCA Records as observed in SEBI's Order dated June 02, 2016 and SAT Order dated June 20, 2017. However despite knowing the aforesaid fact, neither Mr. Baluni has made any efforts to rectify his records with ROC nor has he submitted any evidence of communication of his claimed resignation to Nessa Technologies Ltd. Therefore, I am inclined to go as per the records of MCA portal and consider Mr. Baluni to be present and continuing director of NTL since January 21, 2014.

11. I note that during his second tenure of Directorship, NTL continued to be liable to refund the public funds collected through issuance of NCDs pursuant to its failure to comply with public issue norms for issuance of NCDs. A company is a legal entity and can act only through natural persons to run its affairs and since Company acts through its Directors and Directors are responsible for the conduct of the business of a company. In view of the same Mr. Baluni being Director of NTL was indeed liable to ensure that refund is made by NTL during his tenure of directorship which as per our finding is a continuing directorship. However even if he would have resigned on March 30, 2014 or March 04, 2015, he would still have been liable to ensure that refund is made by NTL during his tenure of directorship.
12. It may be noted that there is nothing on record to suggest that any particular officer/director was authorized and made responsible to ensure compliance of refund obligation and thus in light of the continued noncompliance of refund liability by NCL, Mr. Baluni who joined the Company's Board subsequent to the offer and allotment of NCDs is also obligated to ensure compliance of the refund. The fact that Mr. Baluni was one of the directors of NTL when NTL was in continued violation of its refund obligation, it needs to be stated that Mr. Baluni as a director was indeed responsible to ensure that NTL makes refund to the allottees with interest.
13. The fact that Mr. Baluni was not involved in the day to day affairs of NTL would not absolve him from his obligation. Argument advanced by Mr. Baluni that he had not attended any board meeting of NTL and therefore, he is deemed to have vacated the office under Section 283(g) of the Companies Act, 1956 and consequently no action could be taken against him is also without any merit. Section 283(g) of the Companies Act, 1956 applies only to a director who inspite of

notice absents himself from three consecutive meetings of the Board of Directors or absents himself from all the meetings of the Board for a continuous period of three months. In the present case, it is the case of Mr. Baluni that no notice of Board meeting was issued to him. In such a case, in view of Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, the question of him remaining absent from the Board meetings does not arise and consequently question of applying Section 283(g) of the Companies Act, 1956 to the case of the Mr. Baluni does not arise.

14. I further note that the earlier order of SEBI dated September 07, 2016, has exonerated Nimain Charan Biswal, who was the director after the issuance of NCDs. Mr. Nimain Charan Biswal had argued that he had neither received any notice nor attended any board meeting of NTL during his tenure of 4 months and by virtue of section 283(1)(g) of the Companies Act, 1956, his directorship with NTL stood automatically vacated. The decision of SEBI in the earlier order dated September 07, 2016 was on this primary basis. It may be noted that the order of SEBI dated September 07, 2016 of Mr. Nimain Charan Biswal does not deal with the duty of director for ensuring refund as director of NTL. In view of this, the present matter stands in different footing from the earlier proceeding in respect of Mr. Nimain Charan Biswal culminating in the order dated September 07, 2016. Further as held by Hon'ble SAT in *Manoj Agarwal vs. SEBI* “Argument advanced on behalf of the appellant that the appellant had not attended any board meeting of BREDL and therefore, the appellant is deemed to have vacated the office under Section 283(g) of the Companies Act and consequently no action could be taken against the appellant is also without any merit”. In view of the decision of Hon'ble SAT in *Manoj Agarwal vs. SEBI*, the proposition that the directorship, by virtue of not attending the board even without notice of board meeting, would result in vacation of directorship does not hold good.
15. With respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies* (2002 108 Comp Cas 1 Mad):

“13. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956."

16. Thus, a director who is part of a company's board shall be responsible and liable for acts carried out by a company. Mr. Baluni cannot therefore wriggle out from liability by merely stating that he was not involved in the affairs of the Company or was not aware of issuance of securities. Mr Baluni is obligated to ensure during his tenure that refund is made by NTL to the investors as per the provisions of Section 73 of Companies Act, 1956.
17. It is noted that during the course of proceedings, vide letters dated November 6, 2014, SEBI sought information relating to issuance of NCDs from Mr. Baluni, the then director of NTL. However no reply was received from him. Thereafter vide Interim Order dated June 03, 2015 Mr. Baluni was asked to furnish the said information within 14 days from the receipt of the Order. Further vide the aforesaid Interim Order Mr. Baluni was also directed to provide a full inventory of all of the company's assets and properties and details of all NTL's bank accounts, demat accounts and holdings of shares/securities, if held in physical form. However Mr. Baluni failed to do so. Thereafter vide letter dated June 24, 2015 and January 19, 2016, Mr. Baluni stated that he did not reply to SEBI as he was not an authorized person/ executive director/ whole time director of the Company and has no control over the day to day management and affairs of the Company or in any manner responsible for the finance of the Company. The submissions made by Mr. Baluni that he has no control over the day to day management and affairs of the Company or in any manner responsible for the finance of the Company does not absolve him from the duty as a Director of NTL.
18. I also note that Hon'ble SAT has also asked SEBI to consider whether Directors joining for a short period then resigning and thereafter rejoining again after sometime is a part of a strategy as has been adopted by Mr. Baluni. In this regard I note that at the time of personal hearing before me when asked about the reason for joining, resigning and rejoining as a Director of NTL, Mr. Baluni stated that he at first joined as an employee of NTL and was made to join Director of Neesa Group Companies including NTL in 2012. Thereafter on account of conflict with Mr. Sanjay Gupta, he resigned from NTL. However in 2014 he rejoined NTL as he was seeking job for his son. He has made the similar submission of joining NTL pursuant to seeking job for his son in his own Statement under oath to the Regional Director, ROC dated May 29, 2015. In the

said Statement he further stated that he continued in the company as Director as he was given assurance from the CMD of NTL that he will not be made responsible for any liability-statutory/non statutory of the company. It is evident for his own submission that he did not join as a Director of NTL to discharge his onerous duty as a Director of NTL but to secure a job for his son and it appears that he accepted the position of Director with the assurance that he will not be responsible as a director for the affairs of the company. In view of the same, it appears that strategy for joining in such way by Directors such as Mr. Baluni is that they lend their name in the company as a Director for their own personal gains without any intention to discharge their onerous duty as Director of NTL. It may be noted that a person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. In this regard I would also like to refer to the decision of Hon'ble SAT in *Manoj Agarwal vs. SEBI* wherein it was observed that lending name to be a director of the company and not being involved in the day to day affairs of the company would not absolve any director from his obligation to refund the amount to the investors. In the present case since liability of Mr. Baluni is to ensure that refund is being made by NTL, in view of SAT decision of *Manoj Agarwal vs. SEBI*, his lending name will not absolve him from the said liability.

19. In view of findings above, I hold that Mr. Baluni was obligated to ensure that the refund is made by NTL to the investors as per the provisions of Section 73 of Companies Act, 1956 which he failed to do. Since he has failed to ensure the company makes the refund, he is liable for an appropriate period of debarment.
20. I note that Mr. Baluni has also submitted that proceedings against him and his wife may be dropped and the demat account held by him individually and jointly with his wife may be defroze so that they can use the money to trade or for their treatment. In this regard it may be noted that the directions were issued against Mr. Baluni with respect to restraining him from accessing the securities market and prohibiting from buying, selling or otherwise dealing in the securities market, directly or indirectly. Thus all demat accounts held by him individually and jointly were frozen. I note that Ms. Usha Baluni has not been restrained by the aforesaid final order. In this regard Ms. Usha Baluni should produce certification by Chartered Accountant that shares held by her in joint names with Girishchandra Mukundram Baluni (as first holder) are

owned by and belong to Ms. Usha Baluni and the payments for purchase of shares are by Ms. Usha Baluni from her own sources of funds / accounts. The certification shall be on the basis of date of purchase of shares and the corresponding bank statements and Income tax returns to demonstrate that the shares are indeed owned by and belong to her and the payments for the same are made by her from her own sources of funds / accounts. The said certification will thereafter be considered and necessary intimation via letter will be made to Ms. Usha Baluni.

21. For the reasons cited above, I, in exercise of the powers conferred upon me under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11(1), 11(4), 11A and 11B thereof and regulation 28 of the SEBI (Issue and Listing of Debt Securities) Regulation, 2008 hereby direct Mr. Girishchandra Mukundram Baluni [PAN: AAKPB5408R; DIN: 02745783] as follows:

- a Mr. Girishchandra Mukundram Baluni shall ensure that the refund is made by Neesa Technologies Limited with respect to the money collected by the Company through the issuance of Non-Convertible Debentures (which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956 and the ILDS Regulations), to the investors including the money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (*in terms of Section 73(2) of the Companies Act, 1956*) to the investors till the date of actual payment.
- b Mr. Girishchandra Mukundram Baluni is permitted to sell the assets of the Company only for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised Bank.
- c Mr. Girishchandra Mukundram Baluni shall ensure that all the directions issued to Neesa Technologies Limited as mentioned in order dated June 06, 2016 are complied by the Company.
- d Mr. Girishchandra Mukundram Baluni is directed to provide a full inventory of all NTL's assets and properties and details of all bank accounts, demat accounts and holdings of shares/securities of NTL, if held in physical form.
- e In case of failure of Mr. Girishchandra Mukundram Baluni in complying with the aforesaid directions, SEBI, on the expiry of the three months period from the date of

this order SEBI may initiate appropriate action against him, including adjudication proceedings against him, in accordance with law

- f Mr. Girishchandra Mukundram Baluni is restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, with immediate effect. Mr. Girishchandra Mukundram Baluni is also restrained from issuing prospectus, offer document or advertisement soliciting money from the public and associating himself with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI. The above directions shall come into force with immediate effect and shall continue to be in force till the expiry of four(4) year period from the date of this Order.
- 22 This Order is without prejudice to the right of SEBI to take any other action that may be initiated against Mr. Girishchandra Mukundram Baluni in accordance with law.
- 23 The above directions shall come into force with immediate effect.

DATE: SEPTEMBER 20, 2017

PLACE: MUMBAI

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA