

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 of the Securities and Exchange Board of India Act, 1992

In the matter of MBK Business Development (India) Limited

In respect of:

Sl. No	Name of the entity	PAN	DIN
1.	Shri Saikat Brahmachari	AJVPB3616M	02717147
2.	Shri Tanmoy Kundu	AXAPK0924E	02750213
3.	Shri Sadhan Chandra Brahmachari	ACXPB0872A	02717150

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1. MBK Business Development (India) Limited (hereinafter referred to as “**MBK**”/ “**the Company**”) is a Public company incorporated on September 01, 2009 and registered with Registrar of Companies–Kolkata with CIN: U52390WB2009PLC138103. Its registered office is at C – 3, Pritilata Waddedar Bithi, City Centre, Durgapur, West Bengal – 713216, India.
 2. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) received a letter/complaint from some persons against MBK in respect of issue of Secured Redeemable Non-Convertible Debentures (hereinafter referred to as “**NCDs**”) and undertook an enquiry to ascertain whether MBK had made any public issue of securities without complying with the provisions of the Companies Act, 1956; Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act**”) and the Rules and Regulations framed thereunder including the Securities and Exchange Board of India (Issue and Listing of Debt Securities), Regulations, 2008 (hereinafter referred to

as “**ILDS Regulations**”).

3. On enquiry by SEBI, it was observed that MBK had made an offer of NCDs in the financial years 2010-2011, 2011-2012 and 2012-2013 (hereinafter referred to as “**Offer of NCDs**”) and raised an amount of Rs. 9.06 Crores from 4,518 allottees. The number of allottees and funds mobilized has been collated from the documents submitted by the Company.
4. As the above said Offer of NCDs was found *prima facie* in violation of respective provisions of the SEBI Act, 1992, the Companies Act, 1956, and the ILDS Regulations, SEBI passed an Order dated February 04, 2016 and issued certain directions including debarment and refund to investors against MBK and its Promoters/Directors viz., Shri Prafulla Kumar Kundu, Shri Saikat Roy and Shri Anshuman Ghosh and its Debenture Trustees Shri Ram Sundar Bhattacharya and Smt. Pratima Roy. On account of failure to comply with the Directions contained in the Final Order dated February 04, 2016, SEBI is in the process of initiating Recovery Proceedings.
5. It has come to the notice of SEBI that Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari were earlier directors of MBK during the Offer of NCDs. By virtue of their Directorship in the Company during the Offer of NCDs which was found to be a deemed public issue, SEBI, *prima facie*, found that Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari also engaged in the fund mobilising activity thereby violated the respective provisions of the SEBI Act, 1992, the Companies Act, 1956, and the ILDS Regulations. In view of the same, SEBI passed an interim order dated November 20, 2015 (hereinafter referred to as “**interim order**”) and issued directions mentioned therein against the past directors of MBK viz., Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari (hereinafter collectively referred to as “**Notices**”).
6. *Prima facie findings/allegations:* In the said interim order, the following *prima facie* findings were recorded. MBK had made an *Offer of NCDs* during the financial years

2010-2011, 2011-2012 and 2012-2013 and raised an amount of Rs. 9.06 Crores as shown below:

Year of Issue	Security Issued	Amount raised (Rs.) (in Crores)	Number of allottees
2010-2011	NCDs	9.06	386
2011-2012			1,772*
2012-2013			2,360*
Total		9.06	4,518*

* No. of allottees as per the interim Order which was collated on the basis of documents submitted by the Company. However, it is noted from the Final Order dated February 04, 2016 that after passing the interim order against the Company, MBK had submitted the list of debenture holders. As per the same, number of allottees for the financial year 2010-2011 and 2011-2012 were 2,663 and 5,853 respectively. In view of the same, the Company had admittedly offered and allotted NCDs to 8,516 persons.

7. The above *Offer of NCDs* and pursuant allotment were deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirements under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) and section 117C of the Companies Act, 1956 read with section 27(2) of the SEBI Act and the relevant provisions of the ILDS Regulations were not complied with by the past directors of MBK viz., Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari in respect of the *Offer of NCDs*.
8. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated November 20, 2015 with immediate effect.
 - i. “The past Directors of MBK, viz. Shri Saikat Brahmachari (PAN: AJVPB3616M; DIN: 02717147), Shri Tanmoy Kundu (PAN: AXAPK0924E; DIN: 02750213) and Shri Sadhan Chandra Brahmachari (PAN: ACXPB0872A; DIN: 02717150), are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;

- ii. *The abovementioned past Directors of MBK are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;*
 - iii. *The abovementioned past Directors of MBK shall provide a full inventory of all their assets and properties.”*
9. The interim order also directed the abovementioned past Directors of MBK to show cause as to why suitable directions/prohibitions under sections 11(1), 11(4), 11A and 11B of the SEBI Act, and section 73(2) of the Companies Act, 1956 read with section 27(2) of the SEBI Act should not be passed against them:
- i. Directing them jointly and severally to refund money collected through the Offer of NCDs alongwith interest, if any, promised to investors therein;
 - ii. Directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;
 - iii. Directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.”
10. Vide the said interim order, abovementioned past directors of MBK were given the opportunity to file their replies, within 21 days from the date of receipt of the said interim order. The order further stated the concerned persons may also indicate whether they desired to avail themselves an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.
11. *Service of interim order:* The copy of the said interim order was sent to the Noticees vide letter dated November 23, 2015. In response to the interim order, the Noticees viz., Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari replied vide identical letters dated nil received on December 21, 2015 (copy of the same received through fax on December 18, 2015). Vide the said letters, Noticees submitted that at present they are not holding any post in the Company and sought a personal

hearing preferably in Kolkata.

12. Vide notification dated October 15, 2017 published in newspaper *Times of India* and notification dated October 15, 2017 published in newspaper *Anand Bazar Patrika*, the Noticees were notified by SEBI that an interim order has been passed against them and they will be given the final opportunity of being heard on December 06, 2017 at the time and the venue mentioned therein. The Noticees were advised that in case they failed to appear for the personal hearing before SEBI on the aforesaid date, then the matter would be proceeded *ex-parte* on the basis of material available on record.
13. *Hearing and submissions*: Noticees did not avail the opportunity of hearing held on December 06, 2017. Considering the request of the Noticees made vide identical letters dated nil received on December 21, 2015, another opportunity of personal hearing has been granted to the Noticees on February 01, 2018 at SEBI's Eastern Regional Office at Kolkata through video conference.
14. The Noticees appeared in person before me and made oral submissions. The details of the same are as under:
 - i. Shri Saikat Brahmachari S/o Shri Sadhan Chandra Brahmachari submitted that he was a Director of the Company and he was managing the projects, resorts, etc. of the Company. He has resigned from the Company 4 years back to start some other business. They had collected money from the investors and invested the same in projects. It is also submitted that he was not aware of the violations of the laws but did not deny the violation of applicable laws. Shri Saikat Brahmachari has also agreed to refund the money collected from the investors.
 - ii. Shri Tanmoy Kundu submitted that he was a director of the Company from 2009 but became active only in 2012. He has submitted that the Chairman of the Company Shri Prafulla Kumar Kundu, his father made him a director of the Company. Since he was facing some issues in his other businesses he had resigned from the Company. Shri Tanmoy Kundu also admitted the collection of

money from the investors and agreed to refund the same.

- iii. Shri Sadhan Chandra Brahmachari submitted that he was a sleeping director in the Company and he did not know anything about the Company. He was an employee of Durgapur Steel Company and now retired. He is a relative of the Chairman of the Company Shri Prafulla Kumar Kundu who made him a director in the Company. He denied the knowledge of collection of money from the investors by the Company. However, he has agreed to refund the money mobilised.

15. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.

- (1) *Whether the company came out with the Offer of NCDs as stated in the interim order.*
- (2) *If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.*
- (3) *If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?*

ISSUE No. 1- Whether the company came out with the Offer of NCDs as stated in the interim order.

16. I have perused SEBI's order dated February 04, 2016, interim order dated November 20, 2015, documents/ information obtained from the 'MCA 21 Portal' for the allegation of *Offer of NCDs*. I note that neither the company nor the directors filed any reply disputing the same.

17. I have also perused the documents/ information obtained from the 'MCA 21 Portal' and other documents available on records including the reply of the Company dated October

09, 2014. It is noted, from the interim order that MBK has issued and allotted NCDs to 4,518 investors during the financial years 2010-2011, 2011-2012 and 2012-2013 and raised an amount of Rs. 9.06 Crores. However, I note that the number of allottees was collated on the basis of documents submitted by the Company prior to interim order. However, it is noted that after passing the interim order against the Company, MBK had submitted the list of debenture holders. As per the same, number of allottees for the financial years 2010-2011 and 2011-2012 were 2,663 and 5,853 respectively. Therefore, I find that the Company had admittedly offered and allotted NCDs to 8,516 persons and collected an amount to the tune of Rs. 9.06 Crores.

18. *I therefore conclude that MBK came out with an offer of NCDs as outlined above. The same has already been found in the final order.*

ISSUE No. 2- *If so, whether the said issues are in violation of Section 56, Section 60 read with section 2(36), Section 73 and section 117C of the Companies Act, 1956 read with the ILDS Regulations.*

19. The provisions alleged to have been violated and mentioned in Issue No. 2 are applicable to the *Offer of NCDs* made to the public. Therefore the primary question that arises for consideration is whether the issue of NCDs is 'public issue'. At this juncture, reference may be made to sections 67(1) and 67(3) of the Companies Act, 1956:

"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 sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation ...

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

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

20. The following observations of the Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors. v. SEBI (Civil Appeal no. 9813 and 9833 of 2011)* (hereinafter referred to as the “**Sahara Case**”), while examining the scope of Section 67 of the Companies Act, 1956, are worth consideration:-

“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.”

21. Section 67(3) of Companies Act, 1956 provides for situations when an offer 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, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act,

1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

22. In the instant matter, I find that NCDs were issued by MBK to 8,516 investors in the financial years 2010-2011, 2011-2012 and 2012-2013. I find that MBK has mobilized an amount of Rs. 9.06 Crores over the financial years 2010-2011, 2011-2012 and 2012-2013. I also note that the number of allottees and funds mobilized has been collated on the basis of information submitted by the Company. The above findings lead to conclusion that the *Offer of NCDs* by MBK was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.
23. I find that the past directors of MBK has not claimed MBK to be a Non-banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that MBK is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
24. 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 directors have not placed any material that the allotment was in satisfaction of section 67(3)(a) or 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 Securities Appellate Tribunal 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”.

25. Therefore, in view of the material available on record, I find that the *Offer of NCDs* by MBK falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offer of NCDs* are deemed to be public issues and MBK was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956. The same has already been found in the final order dated February 04, 2016.
26. Further, since the offer of NCDs is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more 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.
27. The allegations of non-compliance of the above provisions by the Company were not denied by the Noticees. I also find that no records have been submitted to indicate that it has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that MBK has contravened the said provisions. The same has already been found in the final order dated February 04, 2016. The Noticees have not provided any records to show that the amount collected by MBK is kept in a separate bank account. Therefore, I find that MBK 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. Therefore, I find, that section 73(2) of the Companies Act, 1956 has not been complied with. The same has already been found in the final order dated February 04, 2016.
28. Section 2(36) of the Companies Act 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 the offer of NCDs was a deemed public issue of securities, MBK was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that the Noticees have not submitted any record to indicate that MBK has registered a prospectus with the RoC, in respect of the offer of NCDs. I, therefore, find that MBK has not complied with the provisions of section 60 of the Companies Act, 1956. The same has already been found in the final order dated February 04, 2016.

29. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. The Noticees have not produced any record to show that MBK has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, MBK has not complied with sections 56(1) and 56(3) of the Companies Act, 1956. The same has already been found in the final order dated February 04, 2016.
30. As regards the allegation of section 117C of the Companies Act, 1956, it may be seen that the said provision mandates the company to create a debenture redemption reserve for the redemption of such debentures, to which every year, adequate amounts should be credited out of its profits, until such debentures are redeemed. None of the Noticees denied this allegation. There is no material on record to show that such debenture reserve was created. Therefore, I hold that the company has violated section 117C of the Companies Act, 1956. The same has already been found in the final order dated February 04, 2016.
31. ILDS Regulations are applicable to the public issue and listing of debt securities. Regulation 2(e) of the ILDS Regulations defines debt securities to mean non-convertible

debt securities which create or acknowledge indebtedness, and include debentures. In view of the finding that MBK 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 following provisions of the aforesaid ILDS Regulations, which contain *inter alia* conditions for public issue and listing of debt securities, the same has already been found in the final order dated February 04, 2016:

- i. Regulation 4(2)(a) – Application for listing of debt securities
- ii. Regulation 4(2)(b) – In-principle approval for listing of debt securities
- iii. Regulation 4(2)(c) – Credit rating has been obtained
- iv. Regulation 4(2)(d) – Dematerialization of debt securities
- v. Regulation 4(4) – Appointment of Debenture Trustees
- vi. Regulation 5(2)(b) – Disclosure requirements in the Offer Document
- vii. Regulation 6 – Filing of draft Offer Document
- viii. Regulation 7 – Mode of disclosure of Offer Document
- ix. Regulation 8 – Advertisements for Public Issues
- x. Regulation 9 – Abridged Prospectus and application forms
- xi. Regulation 12 – Minimum subscription
- xii. Regulation 14 – Prohibition of mis-statements in the Offer Document
- xiii. Regulation 15 – Trust Deed
- xiv. Regulation 17 – Creation of security
- xv. Regulation 19 – Mandatory Listing
- xvi. Regulation 26 – Obligations of the Issuer, etc.

32. 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. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case*, had observed that:

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

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

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

“...But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, “intent” has its limitations also, confining it within the confines of lawfulness...”

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

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

34. In view of the above findings, I am of the view that MBK engaged in fund mobilizing activity from the public, through the offer of NCDs and has contravened the provisions

of section 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 Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008.

35. It is pertinent mention here that considering the fact that MBK and its promoter/directors and Debenture Trustees violated the aforesaid provisions of law, SEBI passed an Order dated March 03, 2016 and issued certain directions (including debarment and refund to investors) against MBK and its promoters/directors viz., Shri Prafulla Kumar Kundu, Shri Saikat Roy and Shri Anshuman Ghosh and its Debenture Trustees Shri Ram Sundar Bhattacharya and Smt. Pratima Roy. On account of failure to comply with the Directions contained in the final Order dated February 04, 2016, SEBI is in the process of initiating Recovery Proceedings. The current order is in respect of the Noticees only.

ISSUE No. 4- If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?

36. Before dealing with the above issue, it would be appropriate to deal with the submissions of the Noticees. I note that Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari admitted that they were directors of the Company. Shri Saikat Brahmachari and Shri Tanmoy Kundu also admitted that they were aware of the collection of money from the investors by the Company and they are willing to make refund to the investors. However, Shri Sadhan Chandra Brahmachari denied the knowledge of any fund mobilisation by the Company and claimed that he was a sleeping director. In this regard, I note that though Shri Sadhan Chandra Brahmachari resigned from the Company on April 10, 2013, he was nonetheless a director of the Company during the period when NCDs were issued by the Company. Hence, I find that he cannot wriggle out of his responsibility as the director of the Company and plead ignorance of the affairs of the Company. In this regard, it is pertinent to mention the Hon'ble Securities Appellate Tribunal (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, wherein Hon'ble SAT has considered the contentions similar to that

of these directors that merely lending name to be a director and non involvement in the day to day affairs of the Company and has held that this would not absolve the directors from their obligation to refund the amount to investors in view of specific provisions of the Companies Act.

37. From the documents available on record, I find that Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari, who were earlier directors in MBK, have since resigned. The details of the appointment and resignation of the directors are as following:

Name of the directors	Date of appointment	Date of cessation
Shri Saikat Brahmachari	September 01, 2009	May 02, 2013
Shri Tanmoy Kundu	September 01, 2009	May 02, 2013
Shri Sadhan Chandra Brahmachari	September 01, 2009	April 10, 2013

38. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, Noticees are also held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956 by the Company.

39. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest

at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

40. From the material available on record and the details of the appointment and resignation of the past directors of MBK as reproduced in paragraph 37 of this Order, it is noted that Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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 MBK 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, the Noticees being the directors of MBK at the relevant time, 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. None of the Noticees disputed this legal liability by way of any written or oral submissions. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that the past directors of MBK, viz. Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari are jointly and severally liable to

refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

41. I note that during the financial years 2010-2011, 2011-2012 and 2012-2013, MBK through Offer of NCDs, had collected an amount of Rs. 9.06 Crores from various allottees. I note that Shri Saikat Brahmachari was director of MBK during financial years 2010-2011, 2011-2012 and 2012-2013. I note that Shri Tanmoy Kundu was director of MBK during financial years 2010-2011, 2011-2012 and 2012-2013. I note that Shri Sadhan Chandra Brahmachari was director of MBK during financial years 2010-2011, 2011-2012 and 2012-2013. 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 aforementioned directors to refund the amount with interest jointly and severally with MBK and other directors are limited to the extent of amount collected during his tenure as director of MBK.
42. With respect to the provisions of the respective regulations of the ILDS Regulations enumerated on paragraph 31 of this order, the liability is on the Company to comply with the requirements therein.
43. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct the past directors of MBK, viz. Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari to refund the monies collected, with interest to such investors. Further, in view of the violations committed by the past directors of the Company, to safeguard the interest of the investors who had subscribed to such NCDs issued by the Company, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Noticees.
44. I also note that, vide the interim order dated November 20, 2015, past directors of MBK were directed to provide a full inventory of all the assets and properties belonging to the

Company. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that no such inventory has been provided by the Noticees despite the receipt of the interim order as stated in paragraph 11 of this Order.

45. In view of the discussion above, appropriate action in accordance with law needs to be initiated against the past directors of MBK, viz., Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari.
46. 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 of the SEBI Act, hereby issue the following directions:
- (a) Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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.
 - (b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as “Non-Transferable”.
 - (c) Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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.
 - (d) Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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.

- (e) Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari in their personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.
- (f) After completing the aforesaid repayments, Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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") holding such certificate.
- (g) In case of failure of Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari to comply with the aforesaid directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from the aforesaid directors liable to refund as specified in paragraph 46(a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
- (h) Shri Saikat Brahmachari, Shri Tanmoy Kundu and Shri Sadhan Chandra Brahmachari 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 4 (four) years from the date of completion of refunds to investors as directed above. 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 4 (four) years from the date of completion of refunds to investors.

(i) The above directions shall come into force with immediate effect.

47. Copy of this Order shall be forwarded to the recognised stock exchanges and depositories and registrar and transfer agents for information and necessary action.

48. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs / concerned Registrar of Companies, for their information and necessary action with respect to the directions/ restraint imposed above against the Noticees.

DATE: February 08, 2018

PLACE: Mumbai

**MADHABI PURI BUCH
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**