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CORPORATE LAWS
Case Law Update

Companies Act, 2013

In the matter of Sonasuman Constech Engineers Private Limited (Company)

Adjudication order passed by Registrar of Companies ("ROC") Patna, dated 04.01.2023

Facts of the case

- Section 129(1) of the Companies Act, 2013 ("**the Act**") provides that the financial statements of a company must give a true and fair view of the state of affairs of inthe company.
- Further, it states that financial statements must comply with the accounting standards notified under section 133 of the Act and must be in a form as provided for in Schedule III to the Act.
- Section 143(3)(e) of the Act provides for a requirement that the auditor must state in his report whether, in his opinion, the financial statements comply with the accounting standards;
- As per Section 137 of the Act, a copy of the financial statements along with all documents which are required to be or attached to such financial statements, duly adopted at the annual general meeting ("**AGM**"), must be filed with ROC within 30 days of AGM in e-Form AOC-4.
- ROC Patna, while scrutinising AOC-4 filed by Sonasuman Constech Engineers Private Limited (the "**Subject Company**"), observed that the auditors of the Subject Company have failed to fulfil their duties as required under Section 143 of the Act for the Financial Years ("**FY**") 2017-18, 2018-19 and 2019-20.
- Therefore, ROC Patna issued a show cause notice ("**SCN**") for default under Section 143 of the Act but did not receive any reply from the respective auditors.

Violations Observed by ROC in Show Cause Notice

The Auditor has failed to comment in auditor's report on certain violations made by the Subject Company, as required under section 129 read with section 133 of the Act and Schedule III to the Act, hence affecting the true and fair view of the state of affairs of the Subject Company:

The violations observed were as under:

For F.Y.	Violation	Not complied with
2017- 2018, 2018-2019, 2019-2020	Failed to disclose the name of the Related Party and nature of the related party relationship where control exists irrespective of whether there has been a transaction or not – As per AS-18	Accounting Standard (AS)-18 – Related Party Transaction
2017-2018, 2018-2019	As per the financial statements the Subject Company had long-term Borrowings amounting to ₹ 51,80,000/- and ₹ 1,13,79,970.50 for the F.Y 2017-18 and F.Y 2018-19 respectively but has failed to sub-classify such borrowings as secured or unsecured and also the nature of security of such borrowings has not been disclosed.	Schedule III to the Act
2018-2019	The Subject Company has shown advances to suppliers under the head of short-term loans and advances amounting to ₹ 40,746.28 however the Subject Company has failed to sub-classify such short-term loans and advances as secured/unsecured. Thus, in this case, the auditor has failed to comment on the classification of the trade payables in his audit report.	Schedule III to the Act
2018-2019, 2019-2020	Missed to disclose in notes to accounts – Break-up of each type of share capital – issued subscribed, paid-up/not fully paid up, face value, reconciliation of the number of shares which are outstanding – at the beginning and at the end of the reporting period	Schedule III to the Act
2018-2019, 2019-2020	Shown advances from relatives and customers under the head long-term borrowings in the financial statements amounting to ₹ 1,13,79,970.50/- • Such advances are not separately classified as advances from relatives and others; • Nor sub-classified as secured/unsecured and the nature of security of loans and advance	Schedule III to the Act
2019-2020	The Subject Company has not disclosed for each class of equity share capital, shareholders holding more than 5% of shares specifying the number of shares held.	Schedule III to the Act

Reply on Show Cause Notice by the Subject Company and Officer in default:

- The relevant auditors to whom the SCN was sent have not replied to the SCN dated 05.12.2022 issued by ROC, Patna for explaining such violations.

Held

- ROC held that it has not received any reply to the SCN, issued by it on 05.12.2022, sent to the auditors of the Subject Company.
- It observed that the provisions of section 143 of the Act have been contravened by the auditors and hence they shall be liable for penalty under section 450 of the Act for the FYs 2017-18, 2018-19 and 2019-20.
- As per records, the Subject Company was categorised as a small company and therefore, the benefits of a small company are extended to the auditors while adjudicating the penalty.
- The penalty imposed on the auditor is as follows:

Violation of section	Penalty Imposed on	Period of default	Penalty Imposed Section 450 read with Section 446B of the Act
Section 143	Shri Ravikant Kumar- Kumar Vivek & Associates (auditors of the company for FY 2017-18 and FY 2018-19)	F.Y 2017-18 F.Y 2018-19	[10,000 * 2= ₹ 20,000] reduced to ₹ 10,000/-
	Shri Basant Kumar Jaiswal- Basant Jaiswal & Associates (auditors of the company for FY 2019-20)	F.Y 2019-20	[10,000 * 1= ₹ 10,000] reduced to ₹ 5,000/-

In the matter of Hotel Holy Crest Bodhgaya Private Limited

Adjudication Order passed by Registrar of Companies ("ROC") Patna, dated 23.12.2022

Facts of the case

- M/s Holy Crest Bodhgaya Private limited (the "**Subject Company**") is a company incorporated under the provisions of the Companies Act, 2013 (**the** "**Act**"), having its registered office situated in Patna, Bihar under the jurisdiction of ROC Patna.
- In the given case, the Subject Company has not filed its annual returns since its incorporation in the year 2014. Therefore, ROC Patna did not have any record regarding the number of board meetings taken place.
- ROC Patna issued Show Cause Notice ("**SCN**") to the Subject Company for default under Section 173(1) of the Act vide letter dated 24.11.2022.

Violations Observed by ROC in Show Cause Notice

- Section 92 (1) (f) of the Act imposes a requirement upon every company to prepare and file a return with the ROC in the prescribed form i.e., MGT-7, containing particulars as at the end of the financial year regarding the items mentioned therein – one of such details being the meetings of members or class thereof, board and its various committees along with the attendance details of such meetings.
- In the given case, the Subject Company had not filed its annual returns since its incorporation in the year 2014. Therefore, ROC Patna did not have any record regarding the number of board meetings taken place.

- Further, Section 173(1) of the Act requires that "*every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation and thereafter hold a minimum number of four meetings of its Board of Directors every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board.*"
- Taking a cue from the non-filing of annual returns by the Subject Company over all the years since incorporation, ROC assumed that the Subject Company has not conducted the board meetings and Subject Company contravened the provisions of Section 173 of the Act and accordingly sent the SCN to the Subject Company and its directors.

Reply on SCN by the Subject Company and officer in default

- The Subject Company and its directors have not replied to the SCN dated 24.11.2022 issued by ROC, Patna for explaining such violations.

Held

- The provisions of section 173(1) of the Act has been contravened by the Subject Company and its directors/officers and therefore they are liable for penalty under section 450 of the Act for the Financial Years 2014-2015 to 2021-2022.
- The paid-up capital of the Subject Company on incorporation was Rs 1,00,000/- but since no details of turnover have been provided since incorporation i.e., non-filing of Annual Returns, the benefit of being a small company has not been extended to the Subject Company for adjudicating the penalty.

Nature of Default and violation of section	Penalty imposed on under section 450 of the Act	Penalty prescribed as per section 450 of the Act	Total Penalty imposed
Non-holding of Board meetings in Financial Years 2014-15 to 2021-22 as required u/s 173 (1) of the Act	On Subject Company	₹ 10,000/-	₹ 10,000 * 8 years= ₹ 80,000/-
	Shri Prem Sagar	₹ 10,000/-	₹ 10,000 * 8 years= ₹ 80,000/-
	Smt Prabhawati Devi	₹ 10,000/-	₹ 10,000 * 8 years= ₹ 80,000/-

In the matter of Kosher RealHome Private Limited.

Adjudication order Passed by the Registrar of Companies ("ROC") Delhi dated: 16.11.2022

Facts of the case

Kosher RealHome Private Limited (the "**Subject Company**") is incorporated under the provisions of the Companies Act, 2013 (the "**Act**"), having its registered office situated in Delhi under the jurisdiction of ROC, NCT of Delhi and Haryana.

The Subject Company is having a paid-up share capital of ₹ 1,00,000/- and it's turnover for the Financial Year ("**FY**") 2021-22 was Rs 21,200/-. Hence, the Subject Company was

a small company within the ambit of section 2(85) of the Act.

It appears that it had entered into some scheme of arrangement with another company - IceGlory Communication Private Limited, wherein IceGlory Communication Private Limited was the transferee company.

While scrutinising e-form AOC-4, ROC observed that at the time of filing of form AOC-4, the financial statements of the transferee company were attached instead of the financials of the Subject Company.

ROC issued shown cause notice ("**SCN**") to the Subject Company and the officer in default for adjudication of the matter.

Violations Observed by ROC in SCN

One of the directors of the Subject Company was authorised by the Board of Directors for certification of E-Form AOC- 4.

At the time of filing of form AOC-4, the financial statements of the transferee company were attached instead of the financials of the Subject Company.

Rule 8 of Companies (Registration Offices and Fees) Rules, 2014 deals with the authentication of documents including e-forms.

As per said Rule, the director authorised by the Board of Directors of the Subject Company who is signing the form and the professional who is certifying the form shall be liable for the correctness of the content of thee-Form AOC-4 and ensuring that complete and legible attachments are enclosed to the same.

Reply on the part of the Subject Company and officer in Default

The Subject Company had, at the time of filing e-Form AOC 4 dated 11.10.2022, attached the financial statements of IceGlory Communication Private Limited i.e, its transferee company.

The default was admitted to by the Subject Company and the officer in default in its reply to the SCN dated 18.10.2022.

Held

The violation made was of Rule 8 of the Companies (Registration Offices and Fees) Rules, 2014 i.e., Authentication of Documents it reads as under:

(7) It shall be the sole responsibility of the person who is signing the form and the professional who is certifying the form to ensure that all the required attachments relevant to the form have been attached completely and legibly as per the provisions of the Act and rules made thereunder to the forms or applications or returns filed.

Thus, the penalty is hereby levied on such authorised signatory of the Subject Company who had signed the e-form AOC-4for violation of Rule 8 sub-rule (3) of the Companies (Registration offices and Fees) Rules, 2014 under Section 450 of the Act.

The Subject Company being a small company, there was no certification requirement from a professional.

The Subject Company being a small company, and the benefit of the same is extended for the same while adjudicating the penalty under section 446B of the Act.

Violation of section	Penalty imposed on	Penalty specified under section 450 of the Act	Penalty levied under section 450 read with section 446B of the Act
Rule 8(3) of the Companies (Registration offices and Fees) Rules, 2014	Authorised signatory	Rs 10,000/-	₹ 10,000/- reduced to ₹ 5,000/-

SEBI

Order of the SEBI Adjudicating Officer

Name of the Case: Adjudication order in the matter of RAP Media Ltd

Facts of The case

Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") had carried out thematic/offsite monitoring of RAP Media Limited (hereinafter referred to as "**RML**"/"**the Company**"/"**Noticee**"), a company listed with BSE, for the period January 2021 to December 2021 (hereinafter referred to as the "**Inspection period**"). On investigation, SEBI found that Noticee has a website viz. www.rapmedialtd.co.in and as on March 31, 2022, the Noticee did not disseminate requisite information on the website, except for the following details, "*Annual report till the FY 2018-19, Shareholding pattern till the FY 2018-19, and Quarterly results till March 2021*". SEBI also observed that that details of the new website were not intimated to the exchange. BSE, upon observing that the website of the Noticee was not functional, had issued a warning letter to the Noticee for non-compliance with provisions of Regulation 46 of SEBI Listing Obligations and Disclosure Requirements, 2015 ("**LODR Regulations**") on February 23, 2022, in terms of SEBI circular no SEBI/HO/CFD/CMD/CIR/P/2020/12 dated January 22, 2020, BSE, thereby allegedly violating Regulation 46(1), 46(2)(a), 46(2)(j) to 46(2)(s) and 46(2)(u) to 46(2)(z) of LODR Regulations..

Further, SEBI also found that Noticee did not issue a notice of meetings of the Board of Directors in any of the newspapers, though five Board meetings were held on August 14, 2020, September 5, 2020, October 7, 2020, November 14, 2020, and February 14, 2021, thereby allegedly violating Regulation 47 of the LODR Regulations.

SEBI during the investigation found that BSE had sought clarification on October 14, 2021, from Noticee with reference to significant movement in price in order to ensure that investors have the latest relevant information about the Noticee and to inform the market so that the interest of the investors is safeguarded. The Noticee did not give any response on the same, thereby allegedly violating Regulation 30(10) of the LODR Regulations.

From the audited financial statements for the year ended March 31, 2020, and March 31, 2021, it had been noted that Regulation 24A of the LODR Regulations pertaining to secretarial audit and secretarial compliance report was not applicable to the Noticee. However, the Board of Directors of the Noticee had appointed a secretarial auditor to carry out a secretarial audit under provisions of Section 204 of the Companies Act, 2013. The secretarial auditor had given certain observations in the audit report. SEBI also observed, from the Secretarial audit report dated September 7, 2021, for the FY 2020-21, that the website of the Noticee was not

showing full disclosures as required under the LODR Regulations. The website was not functional for a considerable period of time i.e. at least till March 10, 2022. SEBI further observed that the new website created by the Noticee was not intimated to the Exchange, until the exchange issued an advisory letter to the Noticee on February 23, 2022.

Charges levied

Noticee has failed to comply with the provision of Regulation 46(1), 46(2)(a), 46(2)(j) to 46(2)(s) and 46(2)(u) to 46(2)(z) of the LODR Regulations, Regulation 30(10) of the LODR Regulations and Regulation 47 of the LODR Regulations and hence is subject to penalty under Section 23E of Securities Contract Regulation Act, 1956

Arguments made by Appellant with respect to allegations made by SEBI

1. **Website was attacked by Malware :** Noticee, vide its reply dated March 10, 2022, submitted to the exchange that the official website of the Noticee viz. www.rapmedia.co.in was attacked by malware and therefore the website was discontinued and that a new website of the Noticee viz. www.rapmedialtd.co.in has been made active. The Noticee stated that the management of the Noticee, with the help of an outside consultant was taking necessary steps to update the newly launched website of the Noticee and was in the process of uploading necessary information and other relevant data. Noticee further submitted that due to the malware on the website of the Company, the entire data was erased and hence most of the data was not visible. Noticee further submitted that the Noticee had to build a new website completely and the entire data was collated to be uploaded. It took a certain time to upload the entire data on the website of the Noticee and hence only for an intermittent period, the website of the Noticee had some disclosures lost which was attributable to the malware attack which is a completely technical issue. Noticee further submitted that the Noticee's old website i.e. www.rapmedia.co.in was functional but it came under a malware attack due to which the backend data was lost. During this period the Noticee received a Notice dated February 23, 2022, from BSE Limited, about the non-maintenance of the website. On 10 March 2022, the Noticee replied to the said notice wherein it was abundantly informed to BSE that the website was under malware attack. Further, the Noticee also intimated to BSE in the same mail that a new website www.rapmedialtd.co.in was made active and the management was taking steps to update all the required information on the website. In respect of the Secretarial Auditors Report dated September 07, 2021, the said remarks mention that the website of the Noticee is not showing full disclosure as per the LODR Regulations. The remarks firstly establish the fact that the Noticee had a functional website and only some disclosures were not disclosed. The disclosures which were "not applicable" to the Noticee were not displayed on the website and all other disclosures as mentioned in the table (mentioned in the reply letter) were disclosed.

2. **With respect to clarification sought by BSE on the alleged price movement in the stock price of Noticee :** Noticee submitted that it is alleged that clarification was sought by BSE on October 14, 2021, through email. However, the Noticee did not receive any such email and hence it could not

submit any reply at the relevant time. The Noticee further stated that without prejudice to the same, it is submitted that as a policy the Noticee does not involve itself in any stock price-related matters and does not comment on the market price and the Noticee had nothing to comment on the alleged price movement. In view of the same, Noticee submitted that there was no occasion for the Noticee to revert to the email as the same was not received. Hence there was no non-compliance. Noticee further submitted that due to the difficult market situation the Noticee had not been able to generate any revenues for the last 2 years. Further, the main source of revenue of the Noticee was rent for a property. However, during Covid, due to certain disputes, the rent was discontinued and the Noticee had no cash flow for the last two and half years. The Noticee was facing hardship due to the same even today (as on the date of reply) as the revenue had stopped due to disputes. Despite the same, the Noticee had been compliant with various provisions of the Companies Act, 2013 as well as LODR Regulations. Noticee further submitted that the said non-compliance had not caused any loss to investors nor there had been any gain to the Noticee. Noticee also stated that the Noticee had also taken remedial actions wherever required and was fully compliant.

3. **Non-publication of newspaper advertisement:** In respect of the non-publication of the newspaper advertisement, Noticee submitted that the same was on account of the Covid Period and the sad loss of life of the Company Secretary during those times. Further, in this regard, Noticee placed reliance on the judgement of Hon'ble Securities Appellate Tribunal in *Re Kesar Petro products Limited vs BSE* in Appeal No. 432/2022, dated August 10, 2022; on the judgement of Hon'ble Securities Appellate Tribunal in *Re Sterling Investments vs S.h-73I* in Appeal No. 388/2004, 388A/2004 & 388B/2004 dated September 5, 2005, and on the judgement of Hon'ble Supreme Court in *Hindustan Steel Limited vs State of Orissa* [AIR (1970) SC 523].

Arguments made by SEBI

1. **Website was attacked by Malware:** With regard to the alleged violation of Regulations 46(1) and applicable provisions of 46(2) of LODR Regulations by the Noticee, SEBI noted that the Noticee was having a website viz. www.rapmedia.co.in. SEBI further noted all the submissions made by Noticee. SEBI further stated that from the records available and from the submissions made by the Noticee, the intimation by the Noticee to BSE, vide its letter dated March 10, 2022, regarding the malware attack on the old website and on issues faced by it in maintaining a functional website was made post receiving an advisory letter from BSE dated February 23, 2022. On perusal of the said letter dated March 10, 2022, of the Noticee to BSE, SEBI stated that the Noticee, in its submissions, did not mention the date from when the old website was withdrawn due to the cited malware attack. Further on the functionality of the old website as per the applicable clauses of 46(2)(a), 46(2)(j) to 46(2)(s) and 46(2)(u) to 46(2)(z) of LODR Regulations, SEBI noted that the Noticee in its reply to the Show Cause Notice has made a general submission on the information disseminated on the old website, however, the Noticee has not provided

the relevant documentary evidence of the old website viz. www.rapmedia.co.in being functional with information being disseminated as required under said LODR Regulations. SEBI further noted that the Secretarial audit report of the Company dated September 7, 2021, for the FY 2020-21, states that the website of the Noticee was not showing full disclosures made by the Noticee, as required under the LODR Regulation. SEBI further highlighted that Noticee opted for services of a different provider in this regard and the takeover from the old service provider had delayed the updation of the website for quite some time. Therefore, it is evident that the old website was not updated with full requisite disclosures during the year FY 2020-21. SEBI further highlighted that Noticee has neither provided the date nor the relevant documentary proof from when the new website was fully functional and started disseminating the requisite information. SEBI stated that Noticee has made submissions on the technical difficulties it faced in maintaining a functional website and has stated that the website was not functional only for a short span of time. However, it needs to be noted that the website was not having the requisite disclosures for a considerable period of time both in FY 20-21 and FY 21-22. Further, the Noticee has neither submitted the date nor the evidence to substantiate the submission of maintaining a functional website with requisite disclosures made, even despite the grant of time to submit the proof of documents. Therefore, it is established that the Noticee did not maintain its website, and applicable disclosures were not made, which violated Regulation 46(1), 46(2)(a), 46(2)(j) to 46(2)(s) and 46(2)(u) to 46(2)(z) of the LODR Regulations.

2. **Non-publication of newspaper advertisement:** With regard to the alleged violation of Regulations 47 of the LODR Regulations, SEBI noted submissions made by Noticee. SEBI stated that the provisions pertaining to the publication of newspaper notices have been omitted by SEBI (Listing Obligation and Disclosure Requirements) (Second Amendment) Regulation, 2021, with effect from May 05, 2021. SEBI further stated that the requirement to publish notice of the meeting of the Board of Directors was applicable during the period counting from July 01, 2020, to March 31, 2021. On the basis of the annual report of the Noticee for the FY 2020-21, it was observed that during the period July 01, 2020, to March 31, 2021, five Board meetings were held on August 14, 2020, September 05, 2020, October 07, 2020, November 14, 2020, and February 14, 2021. As per the intimation filed with the exchange by the Noticee, in the meeting dated November 14, 2020, financial results for the quarter and half year ended September 2020 were discussed. However, no publication was made for the same. In view of the above, it is established that the Noticee violated Regulation 47 of LODR Regulations.

3. **With respect to clarification sought by BSE on the alleged price movement in the stock price of Noticee**: With regard to the alleged violation of Regulations 30(10) of LODR Regulations SEBI noted submissions made by Noticee. SEBI also noted that BSE vide letter dated October 14, 2021, had sought clarification by email from the Noticee with reference to significant movement in the price of shares as an Additional Surveillance Measure (ASM) Framework and has also updated the same on its website on October 14, 2021, at 12:09:00 under

the head corporate announcements. The exchange also submitted a copy of an email sent to Noticee. In this regard, from the documents available on file, it is to be noted that SEBI had sought clarification, vide email dated April 06, 2022, on the action taken by the exchange in this matter and advised to submit a report on the price movement to SEBI. BSE, vide email dated April 21, 2022, had replied that, on seeking clarification from the Noticee, no reply was received. Further, it stated that at the end of the day, a market-wide circular was issued and the Noticee's name was included in the list of companies whose reply is awaited. SEBI stated that as per regulation 30(10) of LODR Regulations, it is the responsibility of companies to reply to all the queries raised by the stock exchange. SEBI further stated that proof of delivery of the email to the Noticee has not been provided by BSE. Therefore, it is not clear if the Noticee received the email sent by BSE. However, SEBI stated that it can be seen that BSE had updated the letter sent to the Noticee on the website on October 14, 2021, at 12:09:00 under the head corporate announcements. Further, at the end of the day, a market-wide circular was issued by BSE and Noticee's name was included in the list of companies whose reply is awaited. BSE had communicated through the website and vide a circular that the Noticee has to reply to the query raised by the Exchange on the significant price movement in the price of the security. Even if the benefit of the doubt is extended to the Noticee that the email was not received in the official email id of the Noticee from BSE, the Noticee was required to act on the information provided on the website of BSE and based on the circular issued. In view of the above, violation of regulation 30(10) of LODR Regulations by the Noticee stands established.

Held

Penalty of ₹ 500,000 for violation of Section 23E of the Securities Contract Regulation Act, 1956.

Securities Appellate Tribunal ("**SAT**") vide its order dated 03.05.2021 in ***Suzlon Energy Ltd. and Anr. vs. SEBI (Appeal No. 201 of 2018)*** power of SEBI to levy penalty under Section 23E of the Securities Contract Regulation Act, 1956 was turned down. This SAT order has been challenged by SEBI before the *Hon'ble Supreme Court in Civil Appeal no. 4741 of 2021*. Stay application and appeal is pending before *Hon'ble Supreme Court*. SEBI further stated that in the matter of *M/s NDTV vs. SEBI (Appeal no. 358 of 2015)* dated August 07, 2019, and *Oasis Securities Ltd. & Ors. Vs. SEBI (Appeal no. 316 of 2018)*, dated March 17, 2020, the Hon'ble SAT has upheld the imposition of penalty under Section 23E of of the Securities Contract Regulation Act, 1956on the appellant companies therein for the violation of clauses of the listing agreement. The limited purpose of these proceedings is to determine if Noticee has violated provisions of securities laws and if so impose the penalty. However, the enforcement of this order shall be subject to the outcome of the aforesaid appeal before the *Hon'ble Supreme Court of India*.

Order of Adjudicating Officer of Securities and Exchange Board of India

Name of the Case: In the matter of Vivimed Labs Limited

Facts of the case

1. Securities and Exchange Board of India (hereinafter referred to as

"**SEBI**") on receiving a reference from the National Stock Exchange of India Limited (hereinafter referred to as **"NSE"**) pertaining to Vivimed Labs Ltd (hereinafter referred to as **"Vivimed/ the "Company"/Noticee"**), initiated an examination into the fundraising activities carried out by Noticee in its material subsidiary, Vivimed Labs (Mascarence) Limited (now known as Uquifa Sciences (Mascarence) Ltd) (hereinafter referred to as "**Uquifa Sciences"/"USML"**) between September 25, 2017, to March 2019. The period of the aforementioned examination of SEBI was from September 25, 2017, to November 18, 2020 (hereinafter referred to as the **"Examination Period"**).

2. Noticee had carried out fundraising in its wholly-owned subsidiary USML. The events of fundraising in the USML are as mentioned hereunder:

Sl. no	Date of investment	Amount of investment	Mode of investment	Comments
1	September 25, 2017	USD 42.5 Million	Compulsory Convertible Preference Shares (hereinafter referred to as "CCPS")	A press release was made specifying the investment amount and no further details were specified. The press release mentioned that the investment was made in USML which is a holding entity for the Company's API business entity. UQUIFA according to the press release, accounted for 60% of the Company's total consolidated revenue.
2	December 29, 2017	USD 7.5 Million	CCPS	A press release was made specifying the investment amount and no further details were specified.
3	March 28, 2019	USD 18.5 Million	Optionally Convertible Debentures (hereinafter referred to as "OCDs")	No disclosure was made for the aforesaid transaction.

3. In addition to the above, Noticee entered into:-

Shareholders and Share Subscription Agreement dated September 26, 2017 ("**Shareholder's Agreement**");

(ii) Agreement for additional investment in December 2017; and

(iii) Debenture Subscription agreement dated March 27, 2019.

Thereafter, USML, was disposed off in 2020 due to the triggering of terms of the Shareholders' Agreement. Further to this, Noticee sought approval of shareholders for resultant dilution in shareholding of Noticee in USML and its 8 wholly owned subsidiaries as a result of the intention of investor's (i.e., Orbimed Asia III Mauritius Limited) to convert OCDs. Notice was issued in order to comply with

obligations laid down in Regulation 24(5) and Regulation 24(6) of the LODR Regulations. The said approval was sought from shareholders through a postal ballot notice dated July 25, 2020, and some of the aforementioned details regarding fundraising activities in USML were specified in the said postal ballot notice.

4. Upon receiving the postal ballot notice, a complaint was made by a shareholder of Noticee regarding alleged non-disclosure by the Company with respect to the above-mentioned fundraising. The complaint dated November 11, 2020, *inter-alia*, alleged violation of section 102 of the Companies Act, 2013, by Noticee due to non-disclosure of the following matters in the explanatory statement of resolution:-

   (i) issue price of a share of USML to Orbimed Asia III Mauritius limited and

   (ii) original issue price of share USML to Vivimed Labs Mauritius Ltd.

5. The aforementioned complaint was forwarded to NSE for examination. NSE, after examining the complaint, referred the matter to SEBI vide an exceptional report. NSE had raised reference to the events of fundraising at USML and their non-disclosure or inadequate disclosures in the said report. In this regard, SEBI further sought details from Noticee regarding details of disclosure made in relation to the aforementioned fund-raising activities carried out by Noticee.

6. In light of the above observations, SEBI alleged that USML was a material subsidiary of Noticee. On the basis of the foregoing observations and findings, it was alleged that since USML was a material subsidiary of Noticee, the events and details of fundraising at the material subsidiary including details of the Shareholder's agreements as enumerated above, were needed to be disclosed within 24 hours of the occurrence of the event to the stock exchanges.

Charge

Noticee had violated Regulation 4(1)(d), 4(1)(e) of SEBI Listing Obligations and Disclosure Requirements, 2015 ("**LODR Regulations**") and Regulation 30(2) read with Regulation 30(6) and Regulation 30(9) of the LODR Regulations read with clause 2 of the Listing Agreement and read with SEBI Circular no. CIR/CFD/CMD/4/2015 dated September 09, 2015 ("**SEBI Circular**"), and would be liable for penalty under Section 23E of the Securities Contract Regulation Act, 1956.

Arguments/submissions by Noticee

1. **USML is not a material subsidiary of the Noticee in terms of Regulation 16(1)(c) of the LODR Regulations:** Noticee submitted that USML was incorporated on 29 August 2017. As per the definition of the material subsidiary as stated in Regulation 16(1)(c) of the LODR Regulations, the income or net worth of a subsidiary alone (or income or net worth of the subsidiary calculated independently or on a standalone basis) and not on a consolidated basis of all wholly owned subsidiaries, has to be considered for the immediately preceding accounting year, for determining whether it is a material subsidiary or not. However, through fund-raising events in USML, funds of USD 42.5 million and USD 7.5 million were invested in September 2017 and December 2017 and pertinently USML was incorporated on 29th August 2017. Therefore, it is not possible to determine the income or net worth of the USML as

the company/entity was not even into existence in the immediately preceding accounting year.

2. **Noticee has made disclosures of investment obtained by USML:** Noticee submitted that it has disclosed the investment obtained by USML from the investor and the convertible debt in the Annual Report of Noticee for F.Y.2019. Noticee further stated that it had issued a press release dated 26th September 2017 and 1st January 2018 upon completion of the investment of USD 42.5 million and USD 7.5 million into USML by the investor, respectively. Noticee further submitted that a press release is an act of disclosure to ensure complete transparency to its shareholders, though there was not a mandatory disclosure requirement as per Regulation 30 of the LODR Regulations. Furthermore, it is submitted that investment by investor, was made in the ordinary course of business for furthering the business objectives of USML, as determined commercially by the Board of USML. As this borrowing was obtained by USML in the ordinary course of business, and such borrowing was not a material event as per the policy of the Noticee/Listed Entity or as per the regulations under LODR Regulations, the Noticee said that it was not obligated to make any disclosure as per the extant regulations. Noticee further submitted that there was no requirement for any disclosure at the time when borrowing of 18.5 million was obtained by USML as there was no sale which had arisen at the time of borrowing. Noticee further submitted that the Noticee is only liable to make disclosures upon the occurrence of an event (sale) and therefore the requirements under the SEBI Circular do not even apply to Noticee. All the relevant details regarding the fund-raising activities were made in the said press releases and the contact details of the concerned persons were provided for anyone who wants further information with respect to the same. Hence, it is incorrect to say that the Noticee is in violation/non-compliance with the requirements of the SEBI Circular.

3. **Issuance of CCPS on September 25, 2017, and December 29, 2017, cannot be considered as 'sale or disposal of subsidiary' and control of step down wholly owned material subsidiary was not transferred on the date of investment brought in wholly owned step-down material subsidiary:** Noticee further stated that it is absolutely incorrect to say that due to fundraising activities in the USML, '*the control of the Subsidiary Company was transferred to the investor*'. Noticee mentioned that by virtue of entering into (a) the Shareholders Agreement, the Share Subscription Agreement dated September 26, 2017, for the investment of USD 42.5 million, towards subscription of Series A Preference Shares; or (b) the documentation for the investment of the additional amount of USD 7.5 million in December 2017; or (c) entering into the Debenture Subscription Agreement dated March 27, 2019, for the investment of USD 18.5 million towards Series A OCD, has not affected the management or the control of USML. The reason being, even upon the investment of USD 50 million towards subscription of Series A Preference Shares, and convertible debt in the form of Series A OCD raised by USML, the Noticee still held 100% of the equity and voting shares of USML through its wholly owned

subsidiary, Vivimed Labs Mauritius Limited. Therefore, merely upon the investment by the Investor into Series A Preference Shares or the lending of convertible debt in the form of Series A OCD, has not affected the management or control of USML. Therefore, it is submitted that the Noticee was not liable to disclose unless there was a change in management and control of USML. Therefore, the observation of SEBI in the Show Cause Notice that '*the control of the subsidiary was transferred to the investor*' was erroneous and misconceived.

Arguments by SEBI

1. **USML is not a material subsidiary of the Noticee in terms of Regulation 16(1)(c) of the LODR Regulations:** SEBI stated that having regard to the definition of "material subsidiary" as stated in Regulation 16(1)(c) of the LODR Regulations and considering that the income or net worth of the subsidiary, i.e. USML was not available on account of the subsidiary being not into existence at the time of the end of the financial year of the holding company preceding the issuance of CCPS of USD 42.5 million on September 25, 2017 ("**CCPS1**") and issuance of Compulsorily Convertible Preference Shares of USD 7.5 million on December 29, 2017 ("**CCPS2**"), it is inclined to agree with contention of Noticee that USML was not a material subsidiary of Noticee since USML was not into existence at the end of the financial year of the holding company preceding the issuance of CCPS1 and CCPS2 by the subsidiary.

2. **Noticee has made disclosures of investment obtained by USML:** In this regard, SEBI stated that it is pertinent to examine whether the aforesaid events could be said to be material events or information for the purpose of disclosure by Noticee under the provisions of the LODR Regulations. SEBI stated that issuance of CCPS1, CCPS2 and OCDs of a listed entity in its subsidiary/material subsidiary has not been indicated as material event/information under para A or para B of Part A of Schedule III of the LODR Regulations. However, Regulation 30(12) of the LODR Regulations provides that events other than that given in para A or para B of Part A of Schedule III of the LODR Regulations can also be considered as material. In this regard, SEBI referred to para C of Part A of Schedule III of the LODR Regulations which, *inter alia,* states that any other information which is exclusively known to a listed entity and which may be necessary to enable the holders of securities of listed entity to appraise its position and to avoid the establishment of a false market in such securities can also be considered as material information and would have to be disclosed adequately to the stock exchange. SEBI stated that an investment of USD 42.5 Million and USD 7.5 Million by the investor towards subscription of CCPS1 and CCPS2 respectively, in USML amounts to significant investment in USML. USML was the holding entity of the Noticee's API business; and UQUIFA contributes approximately 60% of the Noticee's total consolidated revenues and a higher proportion of the reported EBITDA. Considering the contribution of USML and its wholly owned subsidiaries to the consolidated income of Noticee, any significant dilution/potential dilution in shareholding of Noticee in USML can

be considered as relevant information to holders of securities of Noticee. Therefore, SEBI held that issuance of CCPS1 on September 25, 2017, and CCPS2 on December 29, 2017, was information exclusively known to the listed entity which was necessary to enable the holders of its securities to appraise its position and to avoid the establishment of a false market in such securities. SEBI further stated that on one hand, Noticee is contending that the aforementioned investment was done in the ordinary course of business and was not material but on the other hand, Noticee considered the event material enough to merit a press release for the attention of its shareholders and potential investors. Considering the above, SEBI held that issuance of CCPS1 and CCPS2 on September 25, 2017, and December 29, 2017, respectively, amounted to material event/information as per Para C of Part A of Schedule III of LODR Regulations.

SEBI further stated that the fact of a subsidiary being a material subsidiary can be considered to be one of the criteria for determining whether an event or information originating out of such a subsidiary is material for the listed entity or not. Noticee has further contended that the borrowing was obtained by USML in the ordinary course of business, and such borrowing was not a material event as per the policy of the Noticee/Listed Entity or as per the LODR regulations and therefore, the Noticee was not obligated to make any disclosure as per the extant regulations. However, due to the conversion option of OCDs, the total shareholding of the investor in UMLS increased to 72.22% on a fully diluted basis, and the shareholding of USML decreased to 27.78% on a fully diluted basis and investor acquired a controlling stake in UMSL and its eight wholly owned subsidiaries. Considering that USML was a material subsidiary of Noticee when its income is calculated on a consolidated basis at the time of issuance of OCDs to investor, SEBI held that any development of this nature, i.e., issuance of debt which if converted could lead to investor potentially acquiring a majority stake in the subsidiary, consequently leading to Noticee's stake being reduced to a minority, would be definitely a material event. Considering the above, SEBI held that issuance of OCDs on March 28, 2019, was information exclusively known to Noticee which was necessary to enable the holders of its securities to appraise its position and to avoid the establishment of a false market in such securities. SEBI further stated that as per Regulations 4(1)(d) and 4(1)(e) of the LODR Regulations, disclosures to be made to stock exchanges need to be adequate and explicit.

In light of the above, SEBI stated that the above disclosures vide press release September 26, 2017, and January 1, 2018, made by Noticee pertaining to CCPS1 and CCPS2, i.e., that it had entered into definitive agreements to facilitate the investment of USD 42.5 million and additional investment of USD 7.5 million in USML were not adequate and explicit and not as envisaged in the principles laid down in the aforesaid the LODR Regulations. SEBI further assailed the point of Noticee that, Noticee cannot escape its obligation to make disclosures of material events simply by stating that contact details of the concerned persons were provided in the aforementioned

press releases for anyone who wants to have further information with respect to the same. Noticee was under an obligation to disclose OCDs and CCPS1 and CCPS2 to exchanges within 24 hours of their issuance. SEBI stated that disclosure of the issuance of OCDs at the time of the Postal Ballot dated July 25, 2020, came at a very last stage. LODR Regulations stress on providing adequate and timely disclosure of the information to recognized stock exchange(s) and investors. Hence SEBI held that the aforementioned postal ballot notice stating that as a result of fundraising activities carried out in USML, Noticee had ceded the controlling stake in USML and its eight wholly owned subsidiaries to investor cannot be considered to be a disclosure in terms of Regulation 30(6) of the LODR Regulations and within the timelines specified therein. In light of the above, SEBI stated that the contention of Noticee cannot be accepted.

3. **Issuance of CCPS on September 25, 2017, and December 29, 2017, cannot be considered as 'sale or disposal of subsidiary' and control of step down wholly owned material subsidiary was not transferred on the date of investment brought in, in the wholly owned step-down material subsidiary**: SEBI stated that due to the issuance of CCPS1 and CCPS2, the investor held 36% and 39.83%, respectively, of the share capital of USML only on a fully diluted basis. Thus, prior to the conversion of CCPS, the investor only had rights associated with a preference shareholder in USML. In light of the above, SEBI held that at the time of issuance of CCPS1 and CCPS2, investor could not be said to have acquired control or management of USML and thus, there was no change of control in UQUIFA at the time of issuance of CCPS1 and CCPS2. Considering the above, SEBI took a view that issuance of CCPS1 and CCPS2 cannot be considered as *"sale or disposal of subsidiary"* within the meaning of Clause 1 of Para A of Part A of Schedule III of LODR Regulations at the respective time periods (i.e., at the time of issuance). Further, since the issuance of CCPS1 and CCPS2 on September 25, 2017, and December 29, 2017, respectively were not *"sale or disposal of subsidiary"*, the provision of Regulation 30(2) of LODR Regulations and SEBI Circular as applicable to "*sale or disposal of a subsidiary*" would not be attracted for the impugned acquisition of CCPS1 and CCPS2 by Investor on September 25, 2017, and December 29, 2017, respectively.

Penalty

Rs 500,000 on Noticee viz. Vivimed Labs Ltd under Section 23E of Securities Contract Regulation Act, 1956

IBC

In the matter of Bankey Bihari Infrahomes Private Limited ("Appellant") vs Mr. Alok Kumar Kuchchal ("Respondent-1"/"Liquidator") and AKJ Realtech Private Limited ("Respondent - 2"/"Successful bidder") at National Company Law Appellate Tribunal ("NCLAT") dated 6 December 2022.

Facts of the Case

- Corporate Insolvency Resolution Process ("**CIRP**") was initiated against Ratandeep Infrastructure Pvt. Ltd – Corporate Debtor ("**CD**") vide order dated 16 April 2019 passed by the National Company Law Tribunal ("**NCLT**"). The order

was passed on an application filed under section 7 of the Insolvency and Bankruptcy Code, 2016, ("**IBC**"/"**Code**") by Nitin Jain & Anr as Financial Creditor ("**FC**").

- Upon unsuccessful completion of CIRP, the liquidation order of the CD was passed on 31 January 2022 and Mr. Alok Kumar Kuchchal was appointed as the Liquidator.
- The Appellant after an unsuccessful CIRP preferred application under section 60(5) of IBC seeking direction to the Resolution Professional ("**RP**") to place the scheme of Compromise and Arrangement ("**Scheme**") submitted by the Appellant under section 230 of the Companies Act, 2013 (the "**Act**") read with regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Process Regulations**").
- This Interim Application ("**IA**"), whereby the Liquidator was directed to consider the Scheme submitted by the Appellant within a period of three weeks was disposed of by the NCLT vide order dated 13 April 2022
- The Appellant further sought details and information for preparing the Scheme but instead of providing such information to the Liquidator through an e-mail dated 20 April 2022, asked the Appellant to submit a confidentiality undertaking which was provided to the Liquidator.
- The requisite information was provided by the Liquidator on 29 April 2022, but since there were some discrepancies in the list of creditors provided by the Liquidator, the Appellant again sent an e-mail on 21 May 2022 repeating the request to provide a correct list of claims. In the meantime, the Liquidator published a public announcement for initiating the auction process of the CD's assets.
- Thereafter, the Appellant submitted a Scheme to the Liquidator on 24 May 2022.
- The Appellant claimed that the Liquidator continued with the auction process, and hence the Appellant was compelled to file IA before NCLT seeking a stay of the auction scheduled on 19 May 2022 and also direction to the Liquidator to place the Scheme before the Stakeholders Consultation Committee.
- The Appellant had further stated that IA was disposed of by NCLT vide order dated 1 June 2022 whereby the above reliefs sought by the appellant were not granted and directions for the auction process were reinitiated.
- The Appellant then filed an appeal before NCLAT challenging the order of NCLT.

Arguments of Appellant

- The Appellant submitted that they were interested in offering scheme under Section 230 of the Act to enable the CD to avoid liquidation, which would have meant definite corporate death of the CD, and in pursuance of this objective, they had obtained an order on 13 April 2022 from the NCLT directing the Liquidator to consider the Appellant's Scheme in respect of the CD.
- Consequent to that order, they sought details and information from the Liquidator for the preparation of the Scheme but instead of providing such

information the Liquidator through an e-mail dated 20 April 2022, asked the Appellant to submit a confidentiality undertaking which was provided to the Liquidator.

- Post submission of the undertaking, they were provided with some incomplete information which also contained discrepancies in the list of creditors/ claims. Thereafter some emails were exchanged among them which resulted in the delay in the submission of the Scheme.

- The requisite information was provided by the Liquidator on 29 April 2022, but since there were some discrepancies in the list of creditors provided by the Liquidator, the Appellant again sent an e-mail and requested provide a correct list of claims.

- The exchange of emails between them indicated that they were genuinely interested in putting forward a Scheme, but due to various unnecessary and irrelevant issues raised by the Liquidator which resulted in the delay in obtaining the required list of claims, they could not submit the said Scheme in time.

- The Liquidator, without considering the Scheme presented by the Appellant and in total disregard of the directions given by the NCLT for consideration of the scheme, issued a public notice dated 19 May 2022, which was published on 20 May 2022, for auction sale of the land of the CD.

- Further, claimed that NCLT refused to intervene in the process of e-auction of the CD`s land, and further directed the Liquidator to act with the view to maximize the value of the CD's land.

- The Appellant sent an email dated 21 May 2022 to the Liquidator seeking a clear list of claims in view of the repetition of certain claims in the list already sent to him and upon receiving a final list of creditors they could finally submit the said scheme on 24 May 2022.

- Further, stated that the unreasonable functioning of the Liquidator in moving forward with the e-auction process and not providing any extension of time for consideration of the Scheme stated that it was beyond the power as a Liquidator to provide additional time. Hence, the Appellant had to file an application seeking direction from the NCLT for a stay of the e-auction process and direction to the Liquidator to consider the scheme.

- Further, claimed that the Liquidator was required to act with a view to maximise the value of the CD and the successful bid found in the e-auction was only ₹ 7.45 crores which was much less than the amount offered by the Appellant through the said Scheme; therefore, the Scheme was worth considering as it would lead to maximisation of value of the assets of the CD, which was one of the primary objectives of the IBC.

Arguments of the Respondent – 1 (Liquidator):

- It was claimed that the Appellant was not really interested in submitting a genuine Scheme and the motivation was to only derail the process of liquidation of the CD.

- Further, submitted that Mr. Rakesh Kumar Agarwal, director of the Appellant had earlier filed a request to NCLT in July 2021 through one of the group companies AIG Infratech Pvt.

Ltd for submission of a resolution plan, which was turned down by NCLT vide order dated 7 December 2021

- Further, it was brought to the notice that another application was made by Mr. Rakesh Kumar Agarwal, wherein by an order dated 13 April 2022, the NCLT had granted three weeks' time for submission and complete consideration of the said Scheme but the Appellant neither submitted the said Scheme nor did they inform the Liquidator about the delay.
- Further, it was stated that it was only after the Liquidator published the auction notice on 20 May 2022 that the Appellant again became active and submitted a half-baked scheme which was in no way better than the value of land discovered through the successful bid.
- It was claimed that they had been absolutely fair and unprejudiced in dealing with various requests of the Appellant, but time and again, the Appellant raised frivolous and irrelevant issues to only buy time and derail the process of liquidation, but they were duty bound to complete the liquidation of the CD in view of the time-lines prescribed in IBC and Liquidation Process Regulations.
- The judgment of the *Hon'ble Supreme Court* in the matter of *Arun Kumar Jagatramka vs. Jindal Steel and Power Limited and Anr* highlighted that a Scheme under section 230 of the Act could not have been filed by someone who is trying to take over the CD through 'backdoor'.
- In seeking directions against them for staying the auction process, it was found that FC was acting in collusion with Mr. Rakesh Kumar Agarwal, a director of the Appellant.
- It was also claimed that they had provided all the necessary information sought by the Appellant in time, but they were completely remiss in submitting a full and complete Scheme within the allotted time i.e. by 2 May 2022.
- They were duty-bound and continued with the e-auction process in which eventually the successful bid of ₹ 7.45 crores was received.
- Further, it was contended that the action of the Liquidator was fully above board and in accordance with the various directions received from the NCLT, and therefore e-auction process should be permitted to culminate and the appeal of the Appellant should be dismissed.

Arguments of Respondent 2/Successful Bidder

- That the e-auction process was a validly undertaken process in consonance with the provisions of IBC and Liquidation Process Regulations where they had participated in the e–auction of the sole asset (CDs land). The vague allegation of collusion to sell the CD's land at a throwaway price, was completely false.
- Also, claimed that the Appellant was not able to establish its bonafide intention by timely submission of the scheme.
- Further, stated that the Scheme did not provide a better value to the legitimate stakeholders, since the Scheme proposed to make payments to a number of unrelated parties, whose claims were not admitted during the CIRP and if such claims were disregarded and taken out from the total payments and then the

Net Present Value (NPV) of the amount offered was considered, it would show that the resulting payments would not be better than the payments the bid offered by them.

- The Appellant was never interested in submitting a serious and meaningful Scheme but to only derail and delay the liquidation process.

Held

- The NCLAT reviewed the whole events in detail and after a thorough examination, it was held that the intention of the Appellant for submitting a scheme was doubtful from the fact that the Appellant neither submitted the Scheme within the stipulated time frame nor applied for any extension of the time limit from NCLT. Hence Liquidator was duty-bound to proceed in accordance with the provisions of IBC and Liquidation Process Regulations.
- It was further noted that the purported Scheme proposed to make payments to a number of related parties/unsecured creditors/not submitted claims up to an extent of 100% of admitted claimed amounts. Another issue in the proposed Scheme was that it proposed to make payments within 90 days of approval of the Scheme whereas in the event of an auction-sale the payments would be made promptly to claims in accordance with the 'waterfall mechanism' under section 53 of IBC
- Observation in the *Arun Kumar Jagatramka judgment (supra)* made it very clear that the promoter or those in the management of the company under liquidation cannot be allowed a 'backdoor entry' into the company and hence, would be considered ineligible to submit a proposal under section 230 of the Act.
- In view of the continuous efforts of Mr. Rakesh Kumar Agarwal in seeking to 'takeover' the CD through various stratagems, and also the finding that he was in 'collusion' or acting in concert with the erstwhile management of the CD, the motive or intention in putting forward a useless scheme in respect of the CD becomes seriously doubtful. The observation of the *Hon'ble Supreme Court* regarding 'backdoor entry' in the CD by the erstwhile management then appears to be very distinct, something that cannot be disregarded.
- It was established that the NCLT provided reasonable and sufficient opportunity to the Appellant to submit a credible scheme and the fact that the Scheme so presented by the Appellant was prima-facie found to inflate the total payments by provisioning payments to creditors who are either related to the CD or for such creditors who had not filed legitimate claims in the liquidation process and thus, the proposed payments were in effect not of greater value than the amount being offered by the successful bidder in the e-auction.
- NCLAT upheld the decision of the NCLT observing that the Appellant was provided a reasonable opportunity to submit a credible scheme and had failed to do so.