WTM/MPB/EFD-1-DRA-IV/10692/2021

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of Falkon Industries India Limited

In re Deemed Public Issue Norms

In respect of:

Sl. No.	Name of the Entity	PAN	DIN
1	Akmal Sekh	BZMPS1847R	02502409

Background

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") passed an Order bearing no. WTM/PS/79/ERO/OCTOBER/2015 dated October 21, 2015 (hereinafter referred to as "**Final Order**") against Falkon Industries India Limited (hereinafter referred to as "**Falkon**"/ "**Company**") and its Directors, viz. Shri Manirul Islam, Shri Indraj Singh Jat, Shri Afzal Miah, Shri Biswajit Bhattacharya, Shri Dilwar Hossain, Shri Taslim Ansary, Shri Laxmanbhai Sitarambhai Bhoya, Shri Manglubhai Chilyabhai Dhum and Shri Budhan Chandra Kund.

2. The aforesaid Final Order *inter alia* made the following findings:

   2.1. Falkon was incorporated on October 13, 2009, with the RoC, Kolkata, West Bengal having CIN No. as U19200WB2009PLC138866. Its registered office is at "*F/27, Ground Floor, Katju Nagar, (130/198, Prince Golam Hossain Shah Road), Kolkata– 700032, West Bengal*".

2.2. Falkon had made an offer of Redeemable Preference Shares during the financial year 2009-10 (hereinafter referred to as "**Offer of RPS**") and raised at least an amount of Rs. 48.58 lakh from at least 714 allottees. The number of allottees and funds mobilized has been collated from documents obtained from MCA 21 portal i.e. FORM 2 (Return of allotment).

2.3. The above said *Offer of RPS* was found to be a deemed public issue of securities under the first proviso to Section 67(3) of the Companies Act, 1956. Accordingly, it was held that the resultant requirement under Section 60, Section 56(1) and 56(3), Sections 73(1), (2) and (3) of the Companies Act, 1956 were not complied with by Falkon and its Directors viz. Shri Manirul Islam, Shri Indraj Singh Jat, Shri Afzal Miah, Shri Biswajit Bhattacharya, Shri Dilwar Hossain, Shri Taslim Ansary, Shri Laxmanbhai Sitarambhai Bhoya, Shri Manglubhai Chilyabhai Dhum and Shri Budhan Chandra Kundu.

2.4. In view of the violations committed by Falkon and its aforementioned Directors, to safeguard the interest of the investors who had subscribed to such preference shares issued by Falkon and to further ensure orderly development of securities market, appropriate directions were issued against Falkon and its aforementioned Directors at paragraph 10.1 of the Final Order including a direction to refund the money collected by Falkon through the issuance of RPS, including the money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due to the investors till the date of actual payment.

3. Subsequently, it was noticed that Shri Akmal Sekh (hereinafter referred to as "**Noticee**") who was also a Director of Falkon during the relevant period when *Offer of RPS* was made by Falkon, had not been made a party to the Final order dated October 21, 2015. Therefore, SEBI passed an interim order WTM/SR/SEBI – ERO/IMD/180/11/2015 dated November 20, 2015 (hereinafter referred to as "**interim order**") against the Noticee.

4. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded:

   4.1. SEBI vide an Order bearing no. WTM/PS/79/ERO/OCTOBER/2015 dated October 21, 2015 (hereinafter referred to as "**Final Order**"), passed certain directions as mentioned at paragraph 10.1 thereof, against Falkon and its Directors for violating the provisions of Section 56, Section 60 read with Section 2(36), Section 73 of the Companies Act, 1956 read with Section 27(2) of the SEBI Act, by engaging in fund mobilising activity from the public, through the issue of RPS.

   4.2. As per the findings contained in the Final Order, the offer and allotment of RPS made by Falkon to 714 investors during the financial year 2009–10, has been held to be a public issue of securities in accordance with the first proviso to Section 67(3) of the Companies Act, 1956.

   4.3. It has come to SEBI's notice that the Noticee was earlier a Director of Falkon during the *Offer of RPS*. His directorship in the Falkon was from October 13, 2009 to September 24, 2012.

   4.4. It is observed that the Noticee was also engaged in fund mobilising activity from the public, in his capacity as a Director of Falkon, through the *Offer of RPS* and as a result of the aforesaid activity, has violated Section 56, Section 60 read with Section 2(36), Section 73 of the Companies Act, 1956 read with Section 27(2) of the SEBI Act.

5. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated November 20, 2015 against the Noticee with immediate effect.

   i. The past Director of Falkon, viz. Shri Akmal Sekh (PAN: BZMPS1847R; DIN: 02502409) is 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 Director of Falkon is 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 Director of Falkon shall provide a full inventory of all his assets and properties.*

6. The interim order also show caused the abovementioned past Director of Falkon as to why suitable directions / prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act, Section 73(2) of the Companies Act read with Section 27(2) of the SEBI Act including the following, should not be taken/imposed against him:

   i. *Directing him jointly and severally to refund money collected through the Offer of Preference Shares alongwith interest, if any, promised to investors therein;*

   ii. *Directing him 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 him to refrain from accessing the securities market and prohibiting him from buying, selling or otherwise dealing in securities for an appropriate period.*

7. Vide the said interim order, the abovementioned Director was given the opportunity to file his reply, within 21 days from the date of receipt of the said interim order. The order further stated that he may also indicate whether he desired to avail an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

8. *Service of Interim Order:* The copy of the said interim order was sent to the Noticee vide letter dated November 23, 2015. However, proof of service of the interim order is not available on record.

9. Thereafter, vide notification dated January 12, 2021 published in newspaper *Times of India*, Kolkata edition; notification dated January 12, 2021 published in newspaper *Sanmarg* and notification dated January 12, 2021 published in newspaper *Sangbad Pratidin*, Noticee was notified by SEBI (the aforesaid notifications got published in the respective newspapers on January 18, 2021), that interim order dated November 20, 2015 was issued against him and was advised to download from the website of SEBI (www.sebi.gov.in) or collect the copy of said interim order from SEBI, Eastern Regional Office, Kolkata within ten days from the notification. Further, the Noticee

was also notified by SEBI that he will be given the opportunity of being heard on February 2, 2021 through Webex.

10. It is noted that the Noticee has neither submitted a reply in the matter nor attended the scheduled hearing in the matter.

Consideration of Issues and Findings

11. 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.

    11.1. *Issue No. 1 - Whether the company came out with the Offer of RPS?*

    11.2. *Issue No. 2 - If so, whether the said offer was in violation of Section 56, Section 60 and Section 73 of Companies Act 1956?*

    11.3. *Issue No. 3 - If the findings on the aforesaid issue no. 2 are found in the affirmative, whether the Noticee is liable for the violations committed?*

Issue No. 1- Whether the company came out with the Offer of RPS?

12. I have perused the interim order dated November 23, 2015 and I note that the Noticee has not filed any reply disputing the same.

13. I have also perused the documents/ information obtained from the 'MCA 21 Portal' other documents available on records. It is noted, from the records from MCA, that Falkon has issued and allotted RPS to 714 investors during the financial year 2009-10 and raised an amount of Rs. 48.58 lakh. I also note that the number of allottees and funds mobilized has been collated from the documents collected from the documents / information obtained from the MCA 21 Portal.

14. I therefore conclude that Falkon came out with an offer of RPS as outlined above. The same has also been decided vide Final Order dated October 21, 2015.

Issue No. 2- If so, whether the said offer was in violation of Section 56, Section 60 and Section 73 of Companies Act 1956.

15. The provisions alleged to have been violated and mentioned in Issue No. 2 are applicable to the Offer of RPS made to the public. Therefore, the primary question

that arises for consideration is whether the issue of RPS is a '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 nonbanking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."

16. The following observations of the Hon'ble Supreme Court of India in *Sahara India Real Estate Corporation Limited & Ors.* vs. *SEBI* (Civil Appeal no. 9813 and 9833 of 2011) (hereinafter referred to as the "**Sahara Case**"), while examining the scope of Section 67 of the Companies Act, 1956, 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."

17. 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.

18. In the instant matter, I find that RPS were issued by Falkon to 714 investors in the financial year 2009-10. I find that Falkon has mobilized an amount of Rs. 48.58 lakh over the financial year 2009-10. The above findings lead to a reasonable conclusion that the Offer of RPS by Falkon was a "public issue" within the meaning of the first proviso to Section 67(3) of the Companies Act, 1956.

19. I find that Falkon has not claimed 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 Falkon is covered under the second proviso to Section 67(3) of the Companies Act, 1956.

20. The Noticee has not contended that the *Offer of RPS* does not fall within the ambit of first proviso of Section 67(3) of Companies Act, 1956.

21. 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 (hereinafter referred to as "**SAT**") in *Neesa Technologies Limited* vs. *SEBI* (Appeal No. 311 of 2016) which lays down that "*In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning*".

22. Therefore, in view of the material available on record, I find that the *Offer of RPS* by

Falkon falls within the first proviso of Section 67(3) of Companies Act, 1956. Hence, the *Offer of RPS* are deemed to be public issues and Falkon was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956. The same has also been decided vide Final Order dated October 21, 2015.

23. Further, since the offer of RPS 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 Sections 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.

24. The allegations of non-compliance of the above provisions were not denied by the Noticee. I also find that no records have been submitted to indicate that the company has made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that Falkon has contravened the said provisions. The Noticee has not provided any records to show that the amount collected by Falkon is kept in a separate bank account. Therefore, I find that Falkon has also not complied with the provisions of Section 73(3) of the Companies Act, 1956 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 also been decided vide Final Order dated October 21, 2015.

25. Section 2(36) of the Companies Act, 1956 read with Section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36) of the Companies Act, 1956, “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 RPS was a deemed

public issue of securities, Falkon was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that the Noticee has not submitted any record to indicate that Falkon has registered a prospectus with the RoC, in respect of the offer of RPS. I, therefore, find that Falkon has not complied with the provisions of Section 60 of the Companies Act, 1956. The same has also been decided vide Final Order dated October 21, 2015.

26. 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 Noticee has not produced any record to show that Falkon 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, Falkon has not complied with Sections 56(1) and 56(3) of the Companies Act, 1956. The same has also been decided vide Final Order dated October 21, 2015.

27. 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"

28. 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…"

29. In view of the above findings, I am of the view that Falkon was engaged in fund mobilizing activity from the public, through the offer of RPS and has contravened the provisions of Sections 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3) of the Companies Act, 1956. The same has also been decided vide Final Order dated October 21, 2015.

<u>Issue No. 3</u>- If the findings on Issue No. 2 are found in the affirmative, whether Noticee is liable for the violations committed*?*

30. I note that the Noticee did not make any submissions with respect to his appointment, resignation and tenure of directorship in Falkon.

31. From the MCA records, the details his appointment and resignation is as follows:

Sl. No.	Name of the Director	Designation	Date of Appointment	Date of Cessation
1	Akmal Sekh	Director	October 13, 2009	September 24, 2012

32. Sections 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, the Noticee being the Director of Falkon during the financial year 2009-10 when the *Offer of RPS* was made by Falkon, is liable for the violation of Sections 56(1), 56(3) and 60 of the Companies Act, 1956.

33. 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%.

34. As per Section 5 of Companies Act, 1956, *"officer who is in default"* means (a) the Managing Director/s; (b) the Whole-Time Director/s; (c) the manager; (d) the secretary; (e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; (f) any person charged by the Board with the responsibility of complying with that provision; (g) where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors.

35. In this regard, I note that Hon'ble SAT vide order dated February 14, 2019 in the matter of *Pritha Bag* vs. *SEBI* stated that *"...Unless and until a finding is given that the appellant is an officer in default, the mandate provided under Section 73(2) cannot be*

invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing director, namely, Mr. Indranath Daw and, therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could not be made responsible for refunding the amount under Section 73(2).

Reliance on the judgment of this Court by the respondent in the case of Manoj Agarwal vs. SEBI in Appeal No. 66 of 2016 decided on July 14, 2017 is not applicable and is distinguishable. The Tribunal in the case of Manoj Agarwal found that there was no material to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of the said company was entrusted to discharge the application contained in Section 73 of the Companies Act. In the instant case, there is sufficient material on record to show that there was a managing director and in the absence of any finding that the appellant was entrusted to discharge the application contained in Section 73 of the Companies Act, the direction to refund the amount alongwith interest from the appellant is wholly illegal..."

36. Further, it is pertinent to note the observation of Hon'ble SAT vide Order dated July 14, 2017 in the matter of *Manoj Agarwal* vs. *SEBI*, that:

"... In view of the fact that out of the amount of Rs.99.06 lakh, amount of Rs.59.06 lakh was collected by BREDL after the appellant ceased to be a Director of BREDL, counsel for SEBI fairly stated on instruction that the obligation of the appellant to refund the amount with interest jointly and severally with BREDL and other Directors set out in the impugned order may be limited to Rs.40 lakh only, because, that was the amount collected by BREDL during the period when the appellant was a Director of BREDL...

...Section 5 of the Companies Act, 1956 defines the expression 'officer who is in default' to mean the officers named therein. Section 5(g) provides that where any company does not have any of the officers specified in clauses (a) to (c) of Section 5, then any director who may be specified by the Board in that behalf or where no director is so specified

then all the directors would be "officer who is in default". In the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of BREDL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as per Section 5(g) of the Companies Act, 1956 BREDL and all the directors of BREDL are liable...

Fact that appellant had merely lent his name to be a director of BREDL at the instance of Mr. Soumen Majumder and for becoming a director of BREDL the appellant had neither paid any subscription money to BREDL and the fact that the appellant was not involved in the day to day affairs of BREDL would not absolve the appellant from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956. Admittedly, the appellant was a director of BREDL when amounts were collected by BREDL in contravention of the public issue norms and there is nothing on record to suggest that any particular officer/director was authorised to comply with the public issue norms. In such a case, all directors of BREDL including the appellant would be "officer in default" under Section 73(2) read with Section 5 of the Companies Act, 1956…."

37. In view of Hon'ble SAT Order dated July 14, 2017 in the matter of *Manoj Agarwal* vs. *SEBI*, I am of the view that the obligation of the officer in default to refund the amount with interest jointly and severally with the company and other officer in default, is limited to the extent of amount collected during his/her tenure as officer in default of the company.

38. I note that there is no material available 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 Falkon was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as observed by Hon'ble SAT in the matter of *Manoj Agarwal* vs. *SEBI* and as per Section 5(g) of the Companies Act, 1956, Falkon and all the Directors of Falkon are jointly and severally liable.

39. It is observed that Falkon had issued and allotted RPS to 714 investors during the financial year 2009-10 and had collected Rs. 48.58 lakh. As per MCA records, at the

time of issuance and allotment of RPS in the financial year 2009-10, Shri Akmal Sekh was the Director of Falkon. Further, in view of Hon'ble SAT order in the matter of *Manoj Kumar Agarwal* and *Pritha Bag* and considering the facts and circumstances of case, I note that in the present matter, during the financial year 2009-10, in accordance with Section 5(g) of Companies Act, 1956, Shri Akmal Sekh being the Director of Falkon is the *officer in default* for the period of allotment and issuance of RPS in the financial year 2009-10, along with the other Directors of Falkon against whom already a Final Order dated October 21, 2015 has been passed. Therefore, Shri Akmal Sekh being Director in the financial year 2009-10, who is *officer in default*, is also liable to make refund of the money collected during his tenure in the financial year 2009-10, 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.

40. Since, the liability of the company to repay under Section 73(2) of the Companies Act, 1956 is continuing and such liability continues till all the repayments are made, Shri Akmal Sekh is co-extensively responsible along with the company and its other Directors 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. Therefore, I find that Shri Akmal Sekh is jointly and severally liable along with Falkon and its other Directors (Shri Manirul Islam, Shri Indraj Singh Jat, Shri Afzal Miah, Shri Biswajit Bhattacharya, Shri Dilwar Hossain, Shri Taslim Ansary, Shri Laxmanbhai Sitarambhai Bhoya, Shri Manglubhai Chilyabhai Dhum and Shri Budhan Chandra Kundu, as mentioned in the a Final Order dated October 21, 2015) to refund the amounts collected from the investors for the respective period mentioned in above paragraph, with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

41. It is observed from material available on record that copy of three share certificates for RPS issued by Falkon, submitted by the complainants and a print out of website of Falkon, shows that Mr. Manirul Islam is the Managing Director of Falkon. In this regard I note from the details of Falkon's Directors as per MCA records that there was no Managing Director during the relevant period in the company and Mr.

Manirul Islam is shown as a Director of Falkon with his date of appointment as October 13, 2009. Further from the Form 2 which has been submitted by Falkon to MCA reflecting issue of 4,85,800 preference shares by Falkon along with a list of allottees on March 30, 2010, was digitally signed by Mr. Manirul Islam as a Director of Falkon. Further, from Form 23AC which is a form for filing balance sheet and other documents with Registrar, Mr. Manirul Islam is shown as a Director of Falkon in the Balance Sheet dated March 31, 2010. Moreover, from the Notice dated July 2, 2010 for an AGM to be held on July 28, 2010, issued by Falkon and from the Directors Report dated July 15, 2010 that during the period (2009-10) when Falkon had offered and issued RPS, Mr. Manirul Islam was the Director of Falkon. Thus, from the official records and correspondences of Falkon with MCA, I note that the preponderance of probability of the evidences indicate that Mr. Manirul Islam was the Director of the Falkon and not its Managing Director during the financial year 2009-10 when Falkon had offered and issued RPS.

42. In addition to the power of SEBI to proceed against the officer in default, SEBI, as per Section 27(2) of the SEBI Act, also has the powers to proceed against Directors. In cases where the company is soliciting funds from general public, the role of Directors to ensure that the same is in conformity with the applicable laws, is of utmost importance. They are required not to be neglectful in the affairs of the company which results in the violation of various laws such as deemed public issue in violation of law. In deemed public issue in violation of law, money is collected from innocent, ill-informed and gullible public, without the company giving the statutory protection available to those investors under the law such as, full and necessary disclosures about the company, an exit opportunity by way of listing of the shares. Further, there is no material available on record to show that Shri Akmal Sekh has taken any step to prevent Falkon from offering RPS to public in contravention of the provisions of Companies Act, 1956.

43. Moreover, it is noted that the liability to repay is a statutory liability under Section 73(2) of the Companies Act, 1956, which mandates the repayment to be made forthwith. The present order only enforces the pre-existing liability of the company and other officers in default to repay along with interest. It is an additional liability

of every Director on behalf of the company to ensure that the company complies with the obligation under Section 73(2) of the Companies Act, 1956 forthwith. One may argue that the liability of the company is crystalised only by virtue of an Order by SEBI, therefore, till then there was no liability on the company and therefore, on the Directors. If such argument is accepted, all the legal obligations and compliance requirements pose the risk of being not discharged or postponed on the pretext of non-crystallization. Also, it would make the compliance of regulatory/statutory requirement imposed on the companies bereft of clarity and incentivize delay in compliance of statutory obligation by the companies until such non-compliance is enforced through proceedings such as this. If the Board of Directors of a company cannot be considered to be liable to ensure the legal obligations cast upon a company, there would be no human instrumentality for discharge of such legal obligations on behalf of the company. Considering the fact that Falkon has not complied with its obligation to repay the amounts collected in violation of deemed public issue and such liability is continuing, I find that the same can only be ensured by its Directors. In this context, I note from the material available on record that the Noticee being the Director of Falkon during period of offer and issuance of RPS by Falkon, has neither taken any steps to ensure that Falkon makes the refund to its investors nor has himself taken any steps to ensure his own liability to refund gets discharged. Thus, it is held that Noticee as a Director of Falkon has neglected in taking steps in ensuring the company to replay to the investors.

44. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public by Falkon and making repayments as directed under Section 73(2) of the Companies Act, 1956, is to direct Shri Akmal Sekh to refund the monies collected, with interest to such investors. Also, in order to safeguard the interests of investors, to prevent further harm to investors and to ensure orderly development of securities market, Shri Akmal Sekh becomes liable to be debarred for an appropriate period of time.

45. I also note that, vide the interim order dated November 20, 2015, Shri Akmal Sekh was also directed to provide a full inventory of all their assets and properties. However, I find that no such inventory list has been provided by the Noticee.

46. In view of the discussion above, appropriate action in accordance with law needs to be initiated against Shri Akmal Sekh.

ORDER

47. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11, 11(4), 11A and 11B (1) of the SEBI Act, hereby issue the following directions:

    47.1. Shri Akmal Sekh shall jointly and severally along with Falkon and its other Directors mentioned in the Final Order dated October 21, 2015, forthwith refund, to the investors, the money collected by the company, during his tenure as Director of Falkon, through the issuance of RPS (including the application money collected from investors during his tenure as a Director of Falkon, till date, pending allotment of securities, if any), with an interest of 15% per annum, from the eighth day of collection of funds, till the date of actual payment.

    47.2. 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" or through any other appropriate banking channels with clearly identified beneficiaries.

    47.3. Shri Akmal Sekh is directed to provide a full inventory of his 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.

    47.4. Shri Akmal Sekh is permitted to sell his assets, properties and holding of mutual funds/shares/securities held by him in demat and physical form only 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.

47.5. Shri Akmal Sekh 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.

47.6. After completing the aforesaid repayments, Shri Akmal Sekh shall file a report of such completion with SEBI, within a period of three months from the date of this order coming into effect, 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 holding such certificate.

47.7. In case of failure of Shri Akmal Sekh to comply with the aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order coming into effect, may recover such amounts, from him as specified in paragraph 47.1 of this Order, in accordance with Section 28A of the SEBI Act including such other provisions contained in securities laws.

47.8. Shri Akmal Sekh is 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. Shri Akmal Sekh is also restrained from associating himself with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.

47.9. Needless to say, in view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of the Noticee shall remain frozen.

47.10. The above directions shall come into force with immediate effect.

48. I note that vide Final Order dated October 21, 2015, Falkon and its Directors, namely, Shri Manirul Islam, Shri Indraj Singh Jat, Shri Afzal Miah, Shri Biswajit Bhattacharya, Shri Dilwar Hossain, Shri Taslim Ansary, Shri Laxmanbhai Sitarambhai Bhoya, Shri Manglubhai Chilyabhai Dhum and Shri Budhan Chandra Kundu, were issued directions as mentioned at paragraph 10.1 of the said Final Order including direction to forthwith refund the money collected by the company through the issuance of RPS, including the money collected from investors, till date, pending allotment of securities, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due to the investors till the date of actual payment. Thus, in light of the aforesaid, the directions contained in this Order shall be read together with the directions issued to Falkon and its other Directors in the Final Order dated October 21, 2015.

49. Copy of this order shall be sent to Shri Akmal Sekh.

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

51. 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.

DATE: February 26, 2021 **MADHABI PURI BUCH**

PLACE: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA