BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[**ADJUDICATION ORDER NO: Order/GR/KG/2020-21/10096]**

ORDER UNDER SECTION 15-I OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

In respect of:

Mr. Ajay Kumar Dalmia (PAN: AAIPD2539D) In the matter of GDR Issue by Bhoruka Aluminium Limited

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BACKGROUND IN BRIEF

1. The Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) had conducted investigations into the alleged irregularities in the GDR (**Global Depository Receipts**) Issue by **Bhoruka Aluminium Limited** (hereinafter referred to as **"Company /BAL"**) during the period from November 1, 2010 to December 31, 2010 (hereinafter referred to as **"Investigation Period"**).

2. BAL is a company whose shares were listed on the BSE Ltd. The investigations, *prima facie,* revealed that BAL had issued 1.12 million GDRs (amounting to USD

10.38 million) on December 3, 2010, equivalent to 1,12,26,280 equity shares of Rs. 10 each, and the said issue was subscribed by one entity viz. Vintage FZE (now known as Alta Vista International FZE) (hereinafter referred to as "**Vintage**"). It was observed that the subscription amount was paid by Vintage by obtaining a loan from European American Investment Bank AG (**EURAM Bank**) by entering into Loan Agreement dated November 23, 2010 with EURAM Bank. It was observed that directors of BAL in its board meeting held on September 28, 2010, had passed board resolution *inter alia* authorizing the opening of an account with EURAM Bank for the purpose of receiving subscription money in respect of the GDR issue of BAL and also for using the funds deposited in the said bank account as security in connection with loans, if any. BAL had signed a pledge agreement dated November 23, 2010 with EURAM Bank pledging GDR proceeds as collateral against the loan availed by Vintage, executed by Mr. Ajay Kumar Dalmia (hereinafter referred to as the "**Noticee**"), Chief Financial Officer (hereinafter referred to as "CFO") of BAL. Vide the said loan agreement, BAL had pledged the GDR proceeds against the loan availed by Vintage FZE for subscribing to GDRs of BAL, thus securing Vintage FZE's loan.

3. Therefore, it was alleged that the scheme of issuance of GDRs was fraudulent. It was observed that the Noticee had attended the board meeting dated September 28, 2010, when the resolution as mentioned in the preceding paragraph, was passed. Further, the Noticee had signed the pledge agreement on behalf of BAL

which had acted as the security for the loan taken by Vintage from the EURAM Bank for subscribing to the GDRs of BAL. It was therefore *inter alia* alleged that the Noticee had acted as a party to the fraudulent scheme of self-financing of the GDR issue of BAL.

4. SEBI had, therefore, initiated adjudication proceedings *inter alia* against the Noticee, under Section 15HA of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act, 1992**") for the alleged violation of the provisions of Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations 2003 (hereinafter referred to as "**PFUTP Regulations**").

5. **APPOINTMENT OF THE ADJUDICATING OFFICER**

Earlier, Shri Biju S, Chief General Manager, was appointed as the Adjudicating Officer (**AO)** in the matter, which was communicated to the AO vide communiqué dated May 17, 2018, to inquire into and adjudge under Section 15HA of the SEBI Act, 1992 and Section 23E of the SCRA the aforesaid violations alleged to have been committed *inter alia* by the Noticee. Subsequently, vide Order dated July 06, 2018, Shri Satya Ranjan Prasad was appointed as the Adjudicating Officer in the matter in the place of Shri Biju. S. Thereafter, the undersigned was appointed

as the Adjudicating Officer in the instant case, which was communicated vide communique dated May 22, 2019.These proceedings are therefore been carried forward where they had been left off by the previous AO, and an opportunity of personal hearing was granted as detailed hereinafter.

6. **SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING**

A composite Show Cause Notice No. EAD-4/ADJ/SRP/HKS/OW/P/19755/2/2018 dated July 13, 2018 (hereinafter referred to as "SCN") was issued *inter alia* to the Noticee in terms of Section 15-I of the SEBI Act, 1992 and Section 23I of the SCRA read with Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as "SEBI Adjudication Rules") and Rule 4 of Securities Contracts (Regulation) (procedure for holding Inquiry and Imposing Penalties by Adjudicating Officer) rules, 2005 (hereinafter referred to as "SCRA Adjudication Rules") for the alleged violation of the provisions of Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations.

7. The SCN dated July 13, 2018 had returned undelivered from the address of the Noticee with the postal endorsement "unclaimed". Thereafter, on resumption of the proceedings by the instant AO, an opportunity of personal hearing was sought to be provided to Mr. Ajay Kumar Dalmia vide letter dated August 6, 2019. The said letter was sent along with copy of the SCN. The said letter had also returned

undelivered. Thereafter, a copy of the SCN and the hearing notice was uploaded on the website of SEBI under the heads “unserved summons/notices’ and was also published in various regional and national dailies on October 10, 2019, wherein Mr. Ajay Kumar Dalmia was advised to appear for personal hearing on October 15, 2019. However, no response was received from him.

8. Thereafter, an order dated November 20, 2019 (hereinafter referred to as the “**earlier order**”), was passed against BAL, its Directors and the Noticee, *inter alia* holding that the Directors of BAL and the Noticee had aided and abetted the fraudulent scheme of self- financing of its GDR issue by the company and had *inter alia* imposed a penalty of Rs. Rs.20,00,000/-(Rupees Twenty Lakh) on the Noticee.

9. The Noticee had appealed the aforesaid order before the Hon’ble SAT and vide order dated November 19, 2020, the Hon’ble Tribunal quashed the said order qua the Noticee and remanded the case with a direction to supply a copy of the SCN to the Noticee, grant him an opportunity of personal hearing and to consider the matter afresh based on the pleadings of the Noticee. Accordingly, vide email and letter dated December 4, 2020, a copy of the SCN along with the annexure was provided to the Noticee. The Noticee vide letter dated December 17, 2020, had filed its written submissions in response to the SCN, the contents whereof is summarized as given below:

a. That the Noticee was only an employee of the company and he was doing merely what he was being told to do and he had no choice to decide on behalf of the company.

b. That the Noticee was never involved in the day-to-day running of the company. The Noticee was not a signatory to the board resolution dated 28 September 2010, authorising the issue of GDRs.

c. That the adjudicating officer has failed to appreciate that the Noticee was working only in his professional capacity and not on his own Accord. Further, unlike the other directors of the company who were involved in the decision making process of the GDR issue, the Noticee was not involved in any such role and was professionally under obligation to undertake all such acts which may be necessary for dealing in the said accounts maintained with EUAM Bank.

d. That merely signing of documents as an employee does not create a liability in an artificial manner

e. That all the cost of executing the pledge agreement was borne by the company. The notice did not execute the pledge agreement on his own accord and had merely acted as the agent and an employee on behalf of the

company. He had no knowledge about the fact that he was involved in any fraudulent transaction being undertaken by the company.

f. The Noticee was never a part of any of the documents of the company other than documents related to issuance of GDRs such as pledge agreement, escrow agreement made by the company etc. Therefore it goes on to show that the notice had no knowledge of the fraudulent transaction undertaken by the company.

g. The Noticee has made no pecuniary benefit from issuance of the said GDRs as he merely acted in a professional capacity of a salaried employee.

h. That the Noticee had resigned from directorship of BAF ("Bhoruka Aluminium FZE"), the Dubai-based wholly owned subsidiary of the company in the year 2012. Further, the Noticee never participated in any decision-making activities of the BAF and he had no knowledge about other activities undertaken by BAF or even by the company at any given point of time.

i. That presuming without admitting that even if the notice was involved in the fraudulent issuance of GDR then also there is no additional or any accrual benefit to the notice. there exists no incentive for the notice to be involved in the fraudulent issuance of GDR and hence the allegations made upon the

notice are baseless. the notice she has prayed for setting aside of the show Cause Notice dated issued against the company its directors and the noticee.

j. That the Noticee being the CFO of the company was merely involved as salaried employee in day-to-day activities of the company.

k. The Noticee has referred to several judgments of honorable High courts which lay down the generic rule that by merely being a director of a company, an individual cannot be penalised for an act of the company unless his specific role is brought out in the entire cause of action.

10. Thereafter, vide email dated December 24, 2020, an opportunity of personal hearing was granted to the Noticee on January 5, 2021. The authorized representative of the Noticee appeared before me through web based video conference on the said date and reiterated the submissions already made by the Noticee vide letter dated December 17, 2020. Additionally, he submitted that the legislative intent behind the sections 12A (a), (b), (c) of the Securities and Exchange Board of India Act, 1992, contemplates such cases within its penal ambit where the accused has acted *mala fide* with an intent to defraud. In other words, Sections 12A (a), (b), (c) get attracted only when there is a *mens rea* involved on the part of the accused. In the present case, the Noticee had acted with *bona fide,* only in his capacity as a salaried employee of Bhoruka Aluminium Limited ("company") and he had no authority to take any decision for

the company. Further, the Noticee has made no pecuniary gains out of the impugned conduct of the company. The Noticee neither had any shares or assets on his own name nor he was involved in the day to day activities of the Company which makes it clear that in absence of an intention to defraud and being involved in the fraudulent transactions, the Noticee merely acting as a signatory on behalf of the Company, should not be penalised. The Ld. Advocate also reiterated that the Judicial Precedents relied upon in the Reply to SCN are squarely applicable on the present case and should be considered while passing the order

CONSIDERATION OF ISSUES

11. I have carefully examined the allegations against the Noticee and his replies to the SCN and the documents / material available on record. The issues that arise for consideration in the present case are :

I. Whether the Noticee has violated the provisions of Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations?

II. Does the violation, if established, attract monetary penalty under Section 15HA of the SEBI Act, 1992?

III. If yes, then what should be the quantum of penalty?

OBSERVATIONS AND FINDINGS

12. Before I proceed further with the matter, it is pertinent to mention the relevant provisions of the SEBI Act, 1992 and PFUTP Regulations alleged to have been violated by the Noticee. The same are reproduced herein below:

SEBI Act, 1992:

"***Prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.***

12A. No person shall directly or indirectly –

(a) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the Rules or the Regulations made thereunder;"

PFUTP Regulations, 2003:

3. Prohibition of certain dealings in securities

No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange.

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.

4. Prohibition of manipulative, fraudulent and unfair trade practices

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

<u>Issue I :</u> Whether the Noticees have violated the provisions of Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations?

13. From the material available on record, I note that BAL had issued 1.12 million GDRs (amounting to USD 10.38 million) on December 3, 2010, equivalent to 1,12,26,280 equity shares of Rs.10 each. Summary of the aforesaid GDRs issued by BAL as submitted by BAL vide its letter dated June 23, 2015, is tabulated below.

GDR issue date	**No. of GDRs issued (mn.)**	**Capital raised (USD mn.)**	**Local custodian**	**No. of equity shares underlying GDRs**	**Global Depository Bank**	**Lead Manager**	**Bank where GDR proceeds deposited**	**GDRs listed on**
03-Dec-2010	1.12 (at USD 9.25	10.38	DBS Bank	1,12,26,280 of Rs.10 each	The Bank of New York	Pan Asia Advisors Ltd.	EURAM Bank, Austria	Luxembourg Stock Exchange (LSE)

	each GDR)				Mellon , USA			

14. BAL vide letter dated June 23, 2015 provided list of subscribers to its GDRs to SEBI and the list is tabulated as under:

Sl. No.	Name of the subscriber	No. of GDRs	No. of Shares	Value (USD)
1	Axinite Capital INC	3,22,628	810,000	29,84,309
2	Cruise Waterford Investments Limited	4,50,000	750,000	41,62,500
3	Creative Stone Holdings Limited	3,50,000	720,000	32,37,500
	Total	**11,22,628**	**112,26,280**	**103,84,309**

15. SEBI Investigations had observed that subscription to the GDR was obtained through a loan agreement as well as a pledge agreement, details of which are

discussed in the following paragraphs, and therefore, it was alleged that the GDR issuance was done through a fraudulent arrangement.

16. Investigations had further observed that an entity viz. Vintage FZE (now known as Alta Vista International FZE) (hereinafter referred to as "**Vintage**") had obtained a loan of USD 10.38 million by entering into a Loan Agreement dated November 23, 2010 with EURAM Bank to subscribe to the GDRs of BAL. The aforesaid Loan Agreement was signed by Mr. Arun Panchariya in the capacity of Managing Director of Vintage. On perusal of the Loan Agreement, I note that the following has been *inter alia* mentioned therein –

1. *Currency and the amount of facility: USD 10,384,309.-*

   (The amount is exactly the same amount raised by BAL through the said GDR offering.) (Explanation supplied).

2. *Nature and purpose of facility:*

   To provide funding enabling Vintage FZE to take down GDR issue of 1,122,628 Luxembourg public offering and may only be transferred to EURAM account nr. 580032, Bhoruka Aluminium Limited"

*(*The specific purpose of the loan/ draw down was for the purpose of subscribing to the GDR issue of BAL. 580032 is the client account number of BAL. Exactly,

the amount of USD 10,384,309 was credited to the escrow account of BAL with Euram Bank on the same date of loan being debited to the account of Vintage i.e., December 02, 2010)(Explanation supplied).

6.Security

6.1 *In order to secure all and any of the Bank's claims and entitlements against the Borrower, arising now or in the future out of or in connection with the Loan or any other obligation or liability of the Borrower to the Bank, including without limitation other loans granted in the future , it is hereby irrevocably agreed that the following securities and any other securities which may be required by the Bank from time to time shall be given to the Bank as provided herein or in any other form or manner as may be demanded by the Bank:*

- *Pledge of certain securities held from time to time in the Borrower's account no. 540012 at the Bank as set out in* ***a separate pledgeagreement*** *which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.* (emphasis supplied)

- *Pledge of the account no. 580032 held with the Bank as set out in a separate pledge agreement which is attached hereto as Annex 2 and which forms an integral part of this Loan Agreement.*

17. From the aforesaid Loan Agreement, I note that Vintage had availed a loan facility to the extent of USD 10.38 million from EURAM Bank to subscribe to the GDRs of BAL.

18. From the certified true copy of BAL's Board Resolution dated September 28, 2010 provided by EURAM Bank, and copy of minutes of the board meeting of BAL held on the same date provided by BAL vide email dated October 31, 2017 to SEBI, it is observed that the following resolution was *inter alia* passed in the said meeting–

> "*RESOLVED THAT a bank account be opened with EURAM Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company."*
>
> *"RESOLVED FURTHER THAT Shri Ajay kumar Dalmia, CFO and Authorized Signatory of the Company, be and are hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time, as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required."*

"RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required". [Emphasis supplied]

19. From the aforesaid minutes of the board meeting it is observed that the Board of Directors of BAL had authorized the Noticee to sign, execute any application, agreement and other paper from time to time as may be required by EURAM Bank. For this purpose, the Noticee was *inter alia* authorized to carry and use the seal of BAL. In the said resolution, the Board of Directors had further authorized EURAM Bank to use the funds deposited in the bank account opened with EURAM Bank in the manner of subscription money in respect of the GDR issue of the company, as security in connection with loans, if any.

20. From the copy of the minutes of the meeting, it is observed that the Noticee had attended the Board meeting dated September 28, 2010, a point admitted by the Noticee in his written submissions as well. The aforesaid fact of opening of account with EURAM Bank for such purposes as stated in the Board resolution and reproduced above has also been admitted by BAL and the Noticee in their respective submissions.

21. I note that subsequently BAL has admittedly entered into a Pledge Agreement with EURAM Bank on November 23, 2010. The said Pledge Agreement was signed by the Noticee on behalf of BAL, in the capacity of Chief financial Officer of BAL. The salient Clauses of the Pledge Agreement are *inter alia* as under:

1. *Preamble*

By loan agreement K231110-003 (hereinafter referred to as the "Loan Agreement") dated 23 November 2010, the Bank granted a loan (hereinafter referred to as the "Loan") to Vintage FZE, AAH-213, Al Ahmadi House, Jebel Ali Free Trade Zone, Jebel Ali, Dubai, United Arab Emirates ("the Borrower") in the amount of $ USD 10,384,309.-. ***The Pledgor has received a copy of the Loan Agreement No. K231110-003 and acknowledges and agrees to its terms and conditions."***

2. *Pledge*

2.1 In order to secure any and all obligations, Present and future, whether conditional or unconditional of the ***Borrowe****r towards the bank under the Loan Agreement and any and all respective amendments thereto and for any and all other current or future claims which the Bank may have against the Borrower in connection with the* ***Loan Agreement*** *– including those limited as to condition or time or not yet due – irrespective of whether such claims have originated from the account relationship, from bills of exchange, guarantees and liabilities assumed by the Borrower or by the*

Bank, or have otherwise resulted from business relations, or have been assigned in connection therewith to the Bank ("the Obligations") ***the Pledgor hereby pledges to the Bank the following assets as collateral to the Bank:***

2.1.1. all of its rights, title and interest in and to the securities deposited from time to time at present or hereafter (hereinafter referred to as the "Pledged Securities") and the balance of funds up to the amount of $ USD 10,384,309 existing from time to time at present or hereafter on the ***securities account(s) no. 580032*** *held with the Bank (hereinafter referred to as the "Pledged Securities Account") and all amounts credited at any particular time therein.*

2.1.2. all of its right, title and interest in and to, and the balance of funds existing from time to time at present or hereafter on the account(s) no. 580032 kept by the Bank (hereinafter referred to as the "Pledged Time Deposit Account ") and all amounts credited at any particular time therein. The interest rate on the deposit in the amount of facility amount of the Loan Agreement will be fixed at 1.00% p.a.

(the Pledged securities account and the Pledged Time Deposit account hereinafter referred to as the "Pledged Accounts", the Pledged Securities

and the Pledged Accounts hereinafter collectively referred to as "Collateral")

2. The Pledgor agrees to deposit with the Bank all dividends, interest and other payments, distributions of cash or other property resulting from the Pledged securities and funds……..

6. Realisation of the Pledge:

*6.1 In the case that the **Borrower fails to make payment** on any due amount, or defaults in accordance with the Loan Agreement, The Pledgor herewith grants its express consent and the **Bank is entitled to apply the funds in the Pledged Accounts tosettle the Obligations**. In such case the Bank shall transfer the funds on the Pledged Accounts, even repeatedly, to an account specified by the Bank*

6.2 Notwithstanding the foregoing, in the case that the Borrower fails to make payment on any due amount, or defaults in providing or increasing security, the Pledgor herewith grants its express consent and the Bank is entitled to realize the Pledged Securities (i) at a public auction for those items of Pledged Securities for which no market price is quoted or which are not listed on a recognized stock exchange or (ii) in a private sale pursuant to the provisions of Section 376 Austrian Commercial Code

unless the Bank decides to exercise its rights through court proceedings. The Pledgor and the Bank agree to realize those items of the Pledged Securities for which a market price is quoted or which are listed on a stock exchange through sale by a broker publicly authorized for such transactions, selected by the Bank.

6.3 The Bank may realize the Pledge rather than accepting payments from the Borrower after maturity of the claim if the Bank has reason to believe that the Borrower's payments may be contestable."

22. I note that the Pledge Agreement refers to the Loan Agreement dated November 23, 2010 between the borrower i.e. Vintage, and EURAM Bank, whereby Vintage was granted a loan of USD 10,384,309, and it is stated that the Pledgor i.e. BAL has received a copy of the said Loan Agreement and acknowledges and agrees to its terms and conditions. By signing the Pledge Agreement, the Noticee is deemed to be clearly aware that Vintage was the sole subscriber to the GDR issue and had obtained a loan from EURAM Bank to subscribe to the said GDRs. On perusal of the contents of the Pledge Agreement, it is noted that the Pledgor (i.e., BAL) had agreed to pledge all its rights, title and interest in and to the securities deposited in the Pledge Securities Account and funds in Pledged Time Deposit Account so as to secure the present and future obligations of Vintage. The Pledge Agreement also expressly states that:

"In the case that the Borrower fails to make payment on any due amount, or defaults in accordance with the Loan Agreement, the Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts to settle the Obligations".

Regarding the dates, it is noted that the Pledge Agreement and the Loan Agreement were both dated November 23, 2010. Further, I also note that Clause 6.1 of the Loan Agreement specifies that the Pledge Agreement was an integral part of the Loan Agreement.

23. From the Loan Agreement and the bank account statement of Vintage, I note that Vintage had availed a loan from the EURAM Bank to the extent of USD 10,384,309 to subscribe to the GDRs of BAL. From the statement of Vintage's bank account and the escrow account for the GDR issue, it is observed that Vintage received the loan amount of USD 10,384,309 on December 2, 2010 and the same was then transferred to the escrow account (No. AT961934005800320021) of BAL on the same date. From the above, it is evident that GDR subscription money was received from only one entity i.e. Vintage. Accordingly, it has already been held that the GDR issue of BAL comprising 1.12 million GDRs amounting to USD 10.38 million, was subscribed by only one entity,

i.e. Vintage, and not by the three entities (viz. Axinite Capital INC, Cruise Waterford Investments Limited and Creative Stone Holdings Limited) as claimed in BAL's letter dated June 23, 2015. I further note that the amount was transferred to BAL's retail account (no. AT70193400-580032-0101) held with EURAM Bank on the same day i.e. December 2, 2010, and that BAL's account was pledged with EURAM Bank under the Pledge Agreement.

24. It was observed from Vintage's loan account statement with EURAM Bank that Vintage had repaid the entire loan amount in several installments. Details of repayment of loan by Vintage as provided by EURAM Bank as well as transfer of fund by BAL to its UAE based subsidiary (Bhoruka Aluminum (Dubai) FZE) (hereinafter referred to as "**BAF**") are tabulated below:-

Date	**Repayment By Vintage (A)**	**Payment by BAL (B)**	**Remarks**
1-Feb-11	503,000	500,000	Bank charges upto 1-Feb-11 is USD 2,698.08
28-Mar-11	2,000,000	2,000,000	
7-Apr-11	4,500,000	4,500,000	
15-Apr-11	2,000,000	2,000,000	
26-Apr-11	1,000,000	1,000,000	

26-Apr-11	381,309	4,17,364	Interest earned by BAL (36,055)
	10,384,309	**10,417,364**	**Total**

A. Repayment of loan by Vintage to Euram bank (Repayments by Vintage)

B. Transfer of amounts from BAL to Bhoruka Aluminum (Dubai) FZE

25. From the details of fund transfer stated immediately above, it was held that only after Vintage had repaid the loan installments to EURAM Bank, that BAL could make payments from its account maintained with the same bank and such payments were exactly for the same amount that Vintage repaid to EURAM Bank except for adjustments on account of bank charges/ interest earned by BAL. Therefore, it was held that the amount transferred from BAL's EURAM Bank account was dependent on the repayment of the loan by Vintage to EURAM Bank.

26. BAL, vide its written submissions dated October 4, 2018 had disputed the genuineness of the said pledge agreement and had also stated that the said agreement was in fact never known or executed by it and no such pledge agreement was entered between it and EURAM Bank. It was submitted that the pledge agreement was a fake document. To further support this submission, BAL had pointed out certain purportedly technical deficiencies in the pledge agreement which *inter alia* includes use of a different seal of BAL by the Noticee,

non-mentioning of the date along with the signatures of the signatories etc. I observe that the said pledge agreement was signed by the Noticee in his capacity as the Chief Financial Officer of BAL. From the Board resolution dated September 28, 2010, it is clearly evident that the Noticee was authorized to carry out all such acts which may be necessary for dealing in the said accounts maintained with EURAM Bank. In the said resolution the bank was authorized to use the GDR subscription monies inter alia "*as security in connection with loans if any..*". Therefore, it is inferred from these facts that the Noticee did have the requisite authorization from BAL to enter into the said pledge agreement which related to the subscription to its GDR issue, which is also admitted by the Noticee in his written submissions. Further, the GDR proceeds received by BAL was gradually transferred to its Dubai based wholly owned subsidiary, Bhoruka Aluminium FZE (hereinafter referred to as "**BAF"**) within a span of 3 months between February 2011 and April 2011. From the letter dated June 23, 2015 of BAL, it was observed that during the said period, the Noticee was the Director of BAF. In this context, it is imperative to note that the Noticee has not disputed the aforesaid facts. In fact, the Noticee has explicitly admitted in his written submissions that he was the CFO of BAL at the relevant point of time, that he did have the requisite authorization from BAL for entering into the said pledge agreement and that it was him who had signed the said pledge agreement (thereby leaving no scope for any dispute about the genuineness of his signature). He has also not

denied/disputed any of the findings in the earlier order on the fraudulent scheme executed by the company for self-financing of its own GDR issue.

27. The Noticee has submitted primarily that he had acted only as a salaried employee of BAL, under the instructions of its management, having no power to take decisions on behalf of the company and without having any scope to understand that a fraudulent scheme of self-financing of its GDR issue was being perpetrated by BAL and its Directors.

28. I note that the Noticee has nowhere disputed the fact that he was the CFO of BAL at the relevant point in time when the fraudulent scheme as detailed in the preceding paragraphs was executed by BAL. In this regard, I note that the position of Chief Financial Officer in a listed company having significant paid up capital, is of significance and cannot be taken lightly. Section 27 of the SEBI Act contemplates action for violation of any provision of the SEBI Act or any Regulation framed thereunder for every such person who at the time of the contravention was in charge of and/or responsible to the company for the conduct of the business of the company. In this regard, the contents of section 27 of the SEBI Act is reproduced herein below:

[Contravention by companies.]

27. (1) Where [a contravention of any of the provisions of this Act or any rule, regulation, direction or order made thereunder] has been committed by a company, every person who at the time the [contravention] was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the [contravention] and shall be liable to be proceeded against and punished accordingly: [emphasis supplied]

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the [contravention] was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such [contravention].

(2) Notwithstanding anything contained in sub-section (1), where an [contravention] under this Act has been committed by a company and it is proved that the 169[contravention] has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the [contravention] and shall be liable to be proceeded against and punished accordingly.

Being a CFO, the Noticee cannot say that he was not "*responsible to, the company for the conduct of the business of the company".*

29. Further, the Companies Act, 1956, has defined "*officer who is in default*" in section 5, contents whereof are reproduced herein below:

5. MEANING OF "OFFICER WHO IS IN DEFAULT"

For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :

(a) the managing director or managing directors;

(b) the whole-time director or whole-time directors;

(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:

Provided that the person so charged has given his consent in this behalf to the Board;

(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 :

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.]

In this regard, I note that the position of a CFO includes significant managerial role, i.e., the management of the finance of the company. Cambridge dictionary defines a 'chief financial officer' as "*the most important financial manager in a company or organization, who is the head of the finance department*" [available on its website https://dictionary.cambridge.org/dictionary/english/chief-financial-officer]. Since 2004, the revised Clause 49 of the Listing Agreement considers a CFO as a significant position in a company as is evident from the fact that at 'Explanation 2' to the provision for constitution of Audit Committee, it states that:

"Explanation 2: A member will be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief

executive officer, chief financial officer or other senior officer with financial oversight responsibilities." [explanation supplied]

Thus, the revised Clause 49 of the Listing Agreement considered the position of CFO as one involving "*financial oversight responsibilities*".

Further, in Annexure IA to the revised Clause 49, at serial no. 5, it is stated that:

Information to be placed before Board of Directors:

5. The information on recruitment and remuneration of senior officers just below the board level, including appointment or removal of Chief Financial Officer and the Company Secretary. [emphasis supplied]

Thus, the revised Clause 49 of the Listing Agreement considered the position of CFO as "*just below the board level*", implying the same to be a high managerial position.

Again, at sub clause (V) of Clause 49 of the Listing Agreement, it was mentioned that:

*"**V. CEO/CFO certification***

The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or

<u>any other person heading the finance function</u> discharging that function shall certify to the Board that:" [emphasis supplied]

This too clearly goes to show that CFO, for long, has been considered to be a position equivalent to "*whole-time Finance Director or any other person heading the finance function",* which is an extremely important managerial position in a company.

Subsequently, with the enactment of the Companies Act, 2013, Section 2(51) therein defined "*key managerial personnel*" to include a CFO. Further, section 2(60) of the Companies Act 2013 defines "*officer in default*" to include key managerial personnel, which means a CFO is deemed to be an 'officer in default' in case a default takes place. A CFO has been recognized as a Key Managerial Personnel under Section 203 of the Companies Act, 2013 and his designation is equated with other managerial personnel such as the managing director, the manager or in their absence, the whole time director. The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as the "**LODR Regulations**") defines a CFO as follows:

2(f) "chief financial officer" or "whole time finance director" or "head of finance", by whatever name called, shall mean the person heading and discharging the finance function of the listed entity as disclosed by it to the recognised stock exchange(s) in its filing under these regulations;

Regulation 16(d) of LODR Regulations describes a CFO as a part of the "*senior management*" of a company. Thus, under the Companies Act, the role of a CFO squarely fell under the broad category of "manager" under section 5, whereas the same has been more specifically spelt out in the Companies Act, 2013 *inter alia* at section 2(51) and 2(60). Therefore, the Noticee cannot contend that he was "merely an employee" of BAL. He was the CFO of BAL at the relevant point in time and therefore an "officer in default' for the fraudulent scheme executed by BAL.

30. With respect to the level of proof needed to establish a charge of fraudulent practices in the securities market, it is appropriate to refer to the Hon'ble SAT Order dated July 14, 2006, in the case of *Ketan Parekh vs. SEBI* (Appeal no. 2/2004), wherein, Hon'ble SAT has observed that:

"… in order to find out whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism, will depend upon the intention of the parties which could be inferred from the attending circumstances of the

cases, because direct evidence in such cases may not be available." [Emphasis supplied]

31. Thus, as already detailed in the preceding paragraphs, the obligation of Vintage under the Loan Agreement was secured by BAL through the Pledge Agreement, and accordingly, the subscription of the GDR issue was facilitated in the above manner. I note that due to such pledging of the GDR proceeds, the funds were not available at BAL's disposal. In view of the above, I note that the GDRs were not issued in a genuine manner, but rather through a fraudulent arrangement.

32. The Noticee had signed the pledge agreement knowing fully well that the proceeds of the GDR issue were being provided as security to a third person purportedly unconnected to BAL, in order to ensure that the GDR issue was being fully subscribed to. It cannot now be reasonably accepted that the Noticee did not have any understanding of the transactions entered into by him on behalf of the company, more so due to his high managerial position of CFO in BAL. Being the CFO of BAL, he was reasonably expected to possess this minimum expertise in corporate/ commercial transactions, so as to understand that the pledge agreement was being entered into for ensuring full subscription to the GDR issue of BAL from its own funds, which is in abject violation of the relevant Regulations framed under the SEBI Act. Therefore, I hold that the Noticee being the CFO of BAL at the relevant period of time when the fraudulent scheme was executed, is

deemed to be an "*officer who is in default*" and is responsible for the fraud committed by BAL under section 5 of the Companies Act, 1956 read with section 27 of the SEBI Act, 1992.

33. It has already been held in the earlier order that as and when, loan repayments were made by Vintage, BAL used to transfer funds from its EURAM Bank account to the account of BAF. In view of the above, it has already been noted in the earlier order that every transfer from BAL to its UAE subsidiary was in sync with the date and amount of loan repaid by Vintage to EURAM Bank, which led to the conclusion that the amount transferred from BAL's EURAM account to BAF was dependent on the repayment of the loan by Vintage. It had also established that the purpose of the Pledge Agreement was to facilitate the subscription of GDR issue and securing the loan obtained by Vintage. In this regard, I note that the Noticee has specifically admitted in his written submissions that he was a Director of BAF, till September 3, 2012, i.e, during and even beyond the period when the fraudulent scheme of self-financing of GDR issue was executed by BAL. It is again noted that the Noticee in his written submissions, has nowhere disputed the inferences drawn in the earlier order about the fraud been committed by BAL through the aforesaid scheme of self-financing of its GDR issue. He has merely tried to absolve himself from the liability of the said fraudulent scheme by pleading his ignorance of the same.

34. The submission of the Noticee that he was not aware of the activities being undertaken by BAF, despite being a Director of the entity, is wholly untenable when his role is looked in totality as already narrated above. It could not be reasonably possible that the Noticee who was the head of the financial operations of BAL due to his position as the CFO therein, did not know or understand the fraudulent scheme of BAL, had signed the pledge agreement without understanding the meaning and purport of the same in the arrangement of the GDR subscription and despite being the Director of BAF, which was the recipient of the GDR proceeds from BAL, did not understand the scheme of self-financing of GDRs. The ignorance as sought to be pleaded by the Noticee in all these counts is *per se* unacceptable. I therefore hold that the Noticee was an important part of the aforesaid fraudulent scheme and he had the means and resources to understand the nature of the said scheme and despite that, he had aided and abetted the execution of the said scheme. His pleadings to the effect that he had merely acted in his capacity as an employee also cannot be accepted as participation in a fraudulent scheme related to the securities market, cannot be condoned merely because the concerned person was “acting the capacity of an employee”, despite having the means to understand the fraudulent nature of the transactions being undertaken by BAL, especially when he was holding a senior and significant position in the company and is an “officer in default”.

35. I also note that with regards to the subscription of GDR issues of certain other listed Indian companies through the aforesaid *modus operandi* viz. involving arrangement of Loan Agreement and Pledge Agreement, the Hon'ble Securities Appellate Tribunal ("SAT") in its Order dated October 25, 2016 in Appeal No. 126 of 2013 in the matter of **Pan Asia Advisors Limited vs. SEBI** had observed:

"28.... there can be no dispute that the GDR subscription amounts running into several million US $ were not available to the issuer companies till the loan taken by Vintage for subscribing to GDRs were repaid to Euram Bank. Admittedly, the loans were repaid by Vintage after a long period of time. Therefore, in the facts of present case, findings recorded by SEBI that in reality there was no fund movement after the GDRs were subscribed, cannot be faulted."

Issue II : Does the violation, if established, attract monetary penalty under Section 15HA of the SEBI Act, 1992 and Section 23E of the SCRA?

36. The Hon'ble Supreme Court of India in the matter of **SEBI vs. Shri Ram Mutual Fund** held that:

"*once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such*

violation becomes totally irrelevant. Once the contravention is established, then the penalty is to follow."

37. I note that the Hon'ble Supreme Court, in the matter of *N Narayanan v. Adjudicating Officer, SEBI* (Civil Appeals No. 4112-4113 of 2013) has observed asunder:

"33. Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in Official Liquidator v. P.A. Tendolkar (1973) 1 SCC 602 that a Director may be shown to be placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of business of the company even though no specific act of dishonesty is provided against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially."

38. I find that the Noticee had signed the Pledge Agreement dated November 23, 2010 for and on behalf of BAL and the seal of BAL is also affixed thereon. Vide this pledge agreement, Euram Bank was explicitly authorized to use the funds of BAL as security in connection with loan obtained by Vintage (subscriber of GDR issue of BAL) from the Euram Bank. As such, the Noticee was not only part of the

fraudulent arrangement of BAL but also played an active role in executing the pledge agreement dated November 23, 2010 which actually facilitated the subscription of GDR issue of BAL.

39. Thus, the charge of violation of Section 12A(a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations by the Noticee stand established and make him liable for imposition of penalty under Section 15HA of the SEBI Act, 1992, which reads as below –

SEBI Act, 1992

"Penalty for fraudulent and unfair trade practices.

15HA. *If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty [which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher]."*

The provisions of section 15 HA as it stood prior to its amendment before September 8, 2014, at the time of occurrence of the aforesaid violations is reproduced herein below:

"15HA. *If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher."*

As per the dates of violations, Section 15HA of SEBI Act, as it stood prior to the amendment, is applicable. Nevertheless, guided by the principle of rule of beneficial construction of even *ex post facto* law to mitigate the rigour of law, as was laid by the Hon'ble Supreme Court in *T. Barai vs. Henry Ah Hoe and Ors*. (07.12.1982 -SC): MANU/SC/0123/1982 [(1983)1SCC177], the amended version of section 15HA of SEBI Act is being applied.

Issue III **: If yes, then what should be the quantum of penalty?**

40. In this regard, the provisions of Section 15J of the SEBI Act, 1992, Rule 5 of the SEBI Adjudication Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

41. With regard to the above factors to be considered while determining the quantum of penalty, it may be noted that no quantifiable figures or data is available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of the default of the Noticee. From the documents made available, it is noted that no prior default by the Noticee is on record. In the present case, I note that BAL had issued 1.12 million GDRs worth USD 10.38 million to Vintage on December 3, 2010. However, it had pledged the entire GDR proceeds as collateral against the loan availed by Vintage from EURAM Bank. The same was carried out through a Loan Agreement entered between Vintage and EURAM Bank, and Pledge Agreement entered between BAL and EURAM Bank. It is noted that both the Agreements were executed concurrently i.e. on November 23, 2010, and that the Pledge Agreement was an integral part of Loan Agreement. It is observed that the GDR issue would not have been subscribed had BAL not given such security towards the loan taken by Vintage through the pledge agreement executed by the Noticee. Such facilitation of the GDR issue and its subscription was not known to the public and investors. Therefore, the entire scheme of issuance of GDRs was fraudulent which aided and abetted inter alia by the Noticee.

ORDER

42. After taking into consideration all the facts and circumstances of the case, gravity of violations and the material on record, and also the factors stipulated in Section 15J of the SEBI Act, 1992, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act, 1992 read with Rule 5 of the SEBI Adjudication Rules, hereby impose the following penalty on the Noticee:

Entity	Violation	Penal Provisions	Penalty (Rs.)
Mr. Ajay Kumar Dalmia, Noticee No. 5	Penalty imposed under Section 15HA of the SEBI Act, 1992 for violation of the provisions of Section 12A (a), (b), (c) of SEBI Act, 1992 read with Regulations 3(a), (b), (c), (d) and 4(1) of PFUTP Regulations		**Rs.20,00,000/- (Rupees Twenty Lakh Only)**

43. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the SEBI website www.sebi.gov.in on the following path, by clicking on the payment link.

ENFORCEMENT □ Orders □ Orders of AO □ PAY NOW

44. The Noticee shall forward said Demand Draft or the details / confirmation of penalty so paid to the Enforcement Department – Division of Regulatory Action – I of

SEBI. The Noticee shall provide the following details while forwarding DD/ payment information:

a) Name and PAN of the entity (Noticee)
b) Name of the case / matter
c) Purpose of Payment – Payment of penalty under AO proceedings
d) Bank Name and Account Number
e) Transaction Number

45. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, SEBI may initiate consequential actions including but not limited to recovery proceedings under section 28A of the SEBI Act, 1992 for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties

46. In terms of the Rule 6 of the SEBI Adjudication Rules, copy of this order is sent to the Noticee and also to Securities and Exchange Board of India.

Place: Mumbai **G. Ramar**

Date: January 13, 2021 **Adjudicating Officer**