

WTM/AB/NRO/NRO/10720/2020-21

**SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER**

**UNDER SECTIONS 11(1), 11(4) AND SECTION 11B OF THE SECURITIES AND
EXCHANGE BOARD OF INDIA ACT, 1992**

In respect of:

S. No.	Name of the Noticees	PAN
1.	Channel Nine Entertainment Limited	AABCC8801H
2.	Gaj Raj Singh	BEKPS1235N
3.	Kirti	BBAPK7304P
4.	Neena Sood	AUGPS4373N
5.	Dinesh Kumar Jindal	AAIPJ3373K

– In the matter of Channel Nine Entertainment Limited.

The aforesaid entities are hereinafter referred to individually by their respective names/Noticee numbers and collectively as “the Noticees”

1. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) had conducted an inspection of a Merchant Banker – Guinness Corporate Advisors Pvt. Ltd. in August, 2014, during which it was revealed that Channel Nine Entertainment Limited (hereinafter referred to as “**CNEL**” or “**Company**”), which was one of the Companies whose Initial Public Offering (hereinafter referred to as “**IPO**”) was handled by the Merchant Banker, had 107 shareholders in the financial year 2012-13. It was further observed that CNEL was a Small and Medium Enterprise (SME), and had filed prospectus with SEBI in February 2013. The share of CNEL were listed on the SME Segment of BSE on March 12, 2013.
2. Based on the same, an examination was carried out by SEBI, wherein, it was observed that:

- (i) CNEL was incorporated on July 25, 2002. The Company is having its registered office at 3/12, Ground Floor, Asaf Ali Road, New Delhi – 110002.
- (ii) Details of the promoters/director of CNEL during the year 2012-13 (period of raising money), as gathered from the Annual Return filed by the Company on MCA21 portal, are as under:

S. No.	Director Name	Address	Designation	PAN	DIN
1	Gaj Raj Singh	House no. 62, Dhakka Village, GTB Nagar, Delhi-110009	Whole-Time Director	BEKPS1235N	02925387
2	Neena Sood	329, Asola Fatherpur Beri, Mehrauli, Delhi-110074	Director	AUGPS4373N	06395848
3	Kirti	62, Dhakka Village, GTB Nagar, Delhi-110009	Director	BBAPK7304P	06403097
4	Dinesh Kumar Jindal	1/14, Shalimar Park, Shahdara, Delhi-110032	Director	AAIPJ3373K	01249766

- (iii) CNEL had allotted equity shares to 100 persons on a continuous basis from November 01, 2012 to November 10, 2012 on 3 instances through preferential allotment during the Financial year 2012-13.

- (iv) The list of allottees as per filings on MCA 21 portal is as mentioned below:

Date of allotment of shares	No. of Allottees	Number of Equity shares allotted.	Nominal Value of allotment
01/11/2012	40	9,38,000	93,80,000
08/11/2012	40	4,73,500	47,35,000
10/11/2012	20	4,98,500	49,85,000
Total	100	19,10,000	1,91,00,000

- (v) It is further observed that the Company made an IPO in the year 2013 and consequently its equity shares were listed on SME segment of BSE.

3. Since, it was observed that CNEL has issued equity shares to more than 49 persons but less than 200 persons, the option to CNEL to avoid penal action if they provide the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money paid along with 15% interest p.a. thereon or such higher return as promised to investors, as stipulated in SEBI Circular dated December 31, 2015, was given to CNEL vide letter dated December 06, 2017. Thereafter, reminders were sent to CNEL and its directors advising them to complete the same and certify compliance with SEBI Circulars dated December 31, 2015 and May 03, 2016, within 3 months from the date of receipt of the letter dated December 06, 2017. Since no response was forthcoming from the Company or the directors for availing the option to refund the investors in terms of SEBI Circular dated December 31, 2015, SEBI initiated proceedings against CNEL and its directors for violation of the Companies Act, 1956 and ICDR Regulations.

Issue of SCN and Supplementary Show Cause Notice, Inspection, Hearing and Replies/Written submissions:

4. In view of the above, a show cause notice was issued on September 19, 2018 (hereinafter referred to as "**SCN**"), alleging that the Company has made preferential allotment of equity shares to a total of 100 persons on 3 instances from November 01, 2012 to November 10, 2012, and the number of allottees were above the limit prescribed under Section 67 of the Companies Act, 1956. It was alleged that there was an obligation to file prospectus in connection with the issue of securities and comply with provisions of the Companies Act, 1956 and provisions of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "**ICDR Regulations**"). Accordingly, it was alleged that the Company and its directors had violated Section 56(1)&(3), 60, 73(1),(2)&(3) read with Section 67(1),(2)&(3) of the Companies Act, 1956 and Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of the ICDR Regulations.

5. Pursuant to the service of the SCN dated September 19, 2018 on the Noticees, the matter was placed before me on October 24, 2019 for hearing in the matter and accordingly, an opportunity of personal hearing was granted to the Noticees on November 21, 2019. The Notice for hearing for November 21, 2019 was delivered to Noticees no. 2, 3 and 5 through hand delivery and to Noticees no. 1 and 4 through affixture. However, none of the Noticees appeared for the hearing on November 21, 2019 despite service of notice and neither did they file for adjournment, except for Noticee no. 5 who filed a request for adjournment.

6. Subsequently, a Supplementary show cause notice dated November 21, 2019 was issued to correct para 11(a) of the SCN dated September 19, 2018. Accordingly, the SCN read with the supplementary show cause notice dated September 19, 2018, called upon the Noticees to show as to why appropriate directions should not be issued against all of them including but not limited to the following:
 - (i) Directions against Noticee no. 1 to 5 for refund of all subscription money in terms of Section 73 of the Companies Act, 1956
 - (ii) Restraining Noticee no. 1 from issuing any further securities and from accessing the capital market for a period as deemed appropriate.
 - (iii) Restraining Noticees no. 2 to 5 from accessing the capital market for a period as deemed appropriate.

7. Since supplementary show cause notice was issued to the Noticees on November 21, 2019, another opportunity of personal hearing was granted to the Noticees on December 13, 2019. Vide letter dated December 11, 2019, Noticees no. 1, 2 and 3 requested for inspection of documents and also for adjournment for the hearing scheduled on December 13, 2019. Vide letter dated December 03, 2019, Noticee no. 5 also sought for an adjournment for the hearing scheduled on December 13, 2019. Accordingly, another opportunity of hearing was granted to all the Noticees on March 20, 2020. In the interim, opportunity for inspection was granted to Noticees no. 1, 2 and 3 on January 10, 2020. On January 10, 2020, authorised representatives of Noticees no. 1, 2 and 3 appeared and undertook inspection of documents. Thereafter, vide letter dated March 04, 2020, Noticee no. 5 also sought for inspection of documents. Accordingly, inspection of documents was

granted to Noticee no. 5 on March 13, 2020. On March 13, 2020, the authorised representative of Noticee no. 5 appeared and undertook inspection of documents. During the inspection the Authorised representative of Noticee no. 5 also sought for copy of inspection report of Guinness Corporate Advisors Pvt. Ltd. and for the documents relied upon by SEBI for approving the preferential documents. I note that the said documents have been provided by SEBI to Noticee no. 5 vide letter dated November 06, 2020 after obtaining the same from Noticee no. 1, who submitted the same to SEBI vide letter dated October 19, 2020 and received by SEBI on October 29, 2020. In view of the lockdown due to Covid-19, hearing scheduled for March 20, 2020 was adjourned to August 17, 2020. On August 17, 2020, the advocates for Noticee no. 1 and 5 appeared vide video conferencing and made their submissions. Noticee no. 1 sought time to file its written submissions and accordingly, 2 weeks' time was granted to Noticee no. 1 to file its written submissions. During the hearing, Noticee no. 5 had sought for the relevant documents of Board Meetings and Annual General Meetings of the Company held in the financial years 2011-12 and 2012-13. Accordingly, Noticee no. 1 was also advised to provide the said documents as sought by Noticee no. 5. Noticees no. 2, 3 and 4 did not appear for the hearing scheduled on August 17, 2020 and neither have they filed any letter seeking adjournment.

8. Thereafter, SEBI vide its emails dated September 28, 2020, October 13, 2020 and October 16, 2020, had sent reminders to Noticee no. 1 to submit the relevant documents pertaining to the Company. Noticee no. 1 vide its letter dated October 16, 2020 sought for extension of time to submit the relevant documents of Board Meetings and Annual General Meetings held in the financial years 2011-12 and 2012-13 of the Company. Subsequently, vide letter dated October 19, 2020 (received by SEBI on October 29, 2020), Noticee no. 1 submitted the relevant documents of Board Meetings and Annual General Meetings held in the financial years 2011-12 and 2012-13 of the Company. The said documents received from Noticee no. 1 was provided by SEBI to Noticee no. 5 vide email dated November 06, 2020. Noticee no. 5 then vide its letter dated December 11, 2020 sought for extension of time till December 24, 2020 to file its additional submissions.

Subsequently, Noticee no. 5 has vide letter dated December 30, 2020 filed its reply to the SCN.

9. I note that Noticees no. 1, 2 and 3 had filed a joint letter dated December 11, 2019 as preliminary reply to the SCN. Subsequently, Noticees no. 1, 2 and 3 filed written submissions vide its joint letter dated October 24, 2020. I note that Noticee no. 4 (Neena Sood) has neither availed the opportunity for personal hearing nor has she filed any reply to the SCN.

Submissions of the Noticees:

10. The brief of various submissions made by the Noticees, are as under:

- (i) **Noticees no. 1, 2 and 3 (Channel Nine Entertainment Ltd, Gaj Raj Singh and Kirti)** vide joint letters dated December 11, 2019 and October 24, 2020 have submitted the following:

a) Inordinate delay on issuance of SCN and Supplementary SCN: The present SCN is issued after a gap of almost 6 years from the date of preferential allotment by the company. However, no reasons have been mentioned in the SCN for belatedly initiating present proceedings after an unexplained delay of almost 6 years. Importantly, no query was/is raised by SEBI or stock exchange during preferential allotment by the Company. Hence, great prejudice is caused to the company since post issuance of preferential shares, there are large number of material developments which has taken place in the company and on this ground only SCN deserves to be dismissed at the threshold itself.

b) Further, we would like to place reliance on the following judgements passed by the Hon' Supreme Court of India and Hon'ble Securities Appellate Tribunal pertaining to inordinate delay in initiation of proceedings in support of aforesaid contention

- i. SEBI vs Bhavesh Pabari Order dated 28/02/2019 in Civil Appeal no. 11311 of 2013.*

- ii. Anilkumar Nandkumar Harchandani & Ors vs. SEBI (Order dated 05.12.2019 in Appeal no. 75 of 2019)*
 - iii. Ashok Shivilal Rupani & Anr. Vs. SEBI (Order dated 22.08.2019 in Appeal no. 417 of 20180)*
 - iv. Rakesh Kathotia and Ors vs. SEBI (Order dated 27.05.2019 in Appeal no. 07 of 2016)*
 - v. H.B. Stock Holding vs. SEBI (Order dated 27.08.2012 in Appeal no. 114 of 2012)*
 - vi. SEBI Order dated 13.04.2017 in the matter of Gangotri Textiles Ltd in respect of ISF Securities Ltd.*
- c) Submission wrt to SEBI Circular dated 31.12.2015: We respectfully state that, while issuing supplementary SCN dated 21.11.2019, Enforcement Department did not consider SEBI's circular dated 31.12.2015 reference bearing no. CIR/CFD/DIL3/18/215 whereby, inter alia procedures are laid down to deal with cases prior to 01.04.2014 involving offer/allotment of securities to more than 49 up to 200 investors in a financial year, considering the higher cap provided in the Companies Act, 2013 so that penal action is avoided.*
- d) It is pertinent to mention that we had not made allotment to more than 49 persons at any point of time. Further, we would also like to submit that we had not made the allotment to more than 200 persons during the financial year 2012-13. Besides, as stated in SEBI Circular dated 31.12.2015 "SEBI has initiated penal action on receipt of specific complaints against the companies offering such securities without complying with the relevant provisions of the Companies Act, 1956 and applicable SEBI Guidelines/Regulations governing a public issue". In this regard we state that no complaint is filed against the company in respect of the allotment made during the financial year 2012-13.*
- e) The company has passed made following three preferential allotment after complying with provision of Section 81A of the Companies Act, 1956. 9,38,000 shares allotted on 01/11/2012, 4,73,500 shares allotted on 08/11/2012 and 4,98,500 shares allotted on 10/11/2012.*

- f) BSE also vetted the equity capital issues history of the company and no mention of violation of 67(3) or any other section than those already covered by Exchange when it asked for details pertaining to preferential allotment. A copy of the prospectus was filed with BSE at the time of IPO containing the equity capital history of the company since incorporation and got to approval from the BSE without mention of any violation of Section 67(3) of the Companies Act, 1956 or any other sections of Companies Act, 1956. Copy of approval attached.*
- g) Further a copy of the Prospectus dated February 16, 2013 was filed with Registrar of Companies, NCT of Delhi and Haryana at the time of IPO containing the equity capital history of the company since incorporation and got approval from the Registrar of Companies, NCT of Delhi and Haryana on Feb 18, 2013 without mention of any violation of Section 67(3) of Companies Act, 1956 or any other sections of the Companies Act, 1956.*
- h) Further we would also like to submit that a copy of the prospectus was also filed with SEBI at the time of the IPO containing the equity capital history and we had not received any objection from the SEBI at the time of IPO.*
- i) There are many public companies which do not raise capital through public issues because they consider their fund requirement is not huge and secondly the cost of raising funds through public issue is prohibitive. Such companies raise funds through private placements i.e. friends and relatives of the promoters contribute to the capital/securities of the company. The modus operandi adopted by such companies is that these companies pass a special resolution under section 81(IA) of the state that the company is permitted to offer shares to persons other than but including the existing shareholders and the resolution specifies the number of shares, the premium, if any, and also other relevant details.*
- j) Small unlisted public companies never issued any offer or invitation to attract section 67. Since these companies have not made any offer or invitation, there cannot be any deeming fiction as mentioned in section 67(3). Allotment of shares to 50 persons or more is a different issue. The term "offer" has not been defined under the Companies act, 1956. The*

prospectus is an invitation for an offer to the public for the subscription or purchase of any securities. When the invitation is accepted, the offer is made to the company. When an offer is made through an application, the company allots the shares, which is acceptance of the offer. Once the shares are allotted, contracts are concluded. Since these unlisted companies have not issued any prospectus, there was no invitation to the public to subscribe for the shares of the company.

- k) Further, we would like to submit that CNEL had allotted equity shares to 100 persons on a continuous basis from November 01, 2012 to November 10, 2012 on 3 instances through preferential allotment during financial year 2012-13. As on date 41 allottees out of 100 are no longer shareholders of the company because they have already got exit from the company by selling their shares on a very good return.*
- l) Further we would like to submit that the allotment of equity shares to a total of 100 persons on 3 instances from November 01, 2012 to November 10, 2012 was made under Companies Act, 1956.*
- m) Further we state that we have not made the allotment to more than 49 persons at a time and in total we have not made the allotment to more than 200 persons in a financial year, we had made the allotment to less than 49 person at a time and in total to 100 person during the financial year 2012-2013 as mentioned in your notice.*
- n) Section 67(1) provides that any offer of shares or debentures to any section of the public or clients of the issuer shall be deemed to be an offer to the public. In the same way, section 67(2) provides that any invitation to subscribe for the shares or debentures to any section of the public or clients of the issuer shall be deemed to be an offer to the public. It is immaterial whether the issuer selects such offeree [Section 67(1)] or the invitee [Section 67(2)] as a member or debenture holder of the issuer or not. The provisions of Section 67(1) and 67(2) are subject to the provisions contained in section 67(3). To put it differently, section 67(3) carves out an exception to the principle mentioned in section 67(1) and (2) that an offer or invitation to a section of the public or clients is a public issue. Section 67(3) provides that an offer or invitation to a section of the public*

or clients is a public issue. Section 67(3) provides that an offer or invitation is not treated as public offer if any one of the following is satisfied:

- i. If the offer or invitation can be regarded 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 such offer or invitation; or
- ii. If the offer or invitation can be regarded otherwise as being domestic concern of the persons making or receiving the offer or invitation.

The Companies (Amendment) Act, 2000 with effect from 13.12.2000 inserted first proviso to section 67(3) which reads as under:

“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 50 persons or more.”

o) The Ministry of Corporate Affairs on 4.12.2003 promulgated Unlisted Public Companies (Preferential Allotment) Rules, 2003 attached as Annexure-12 providing for certain disclosures to be made in the explanatory statement issued pursuant to section 173(2) of the Act. These rules were amended on 14.12.2011 providing that in ‘preferential allotment’, offer shall not be made to 50 persons or more is attached as Annexure-13.

p) On account of the amendment by the insertion of the first proviso to section 67(3), there is a wrong notion that any allotment of shares by any unlisted public company to 50 or more persons in a financial year between 2000 to 2013 is in violation of section 67(3) and section 73. The main thrust in section 67 for the determination of the question as to whether there a public offer or not, is offer or invitation. When there is an offer or invitation to subscribe for the shares, section 67 is triggered. There are three important ingredients in section 67 to treat a private placement as a public offer.

- i. There has to be an offer or invitation
- ii. Such offer/invitation has to be made by the company
- iii. It has to be made to 50 or more persons.

If any one of these three condition is not satisfied, such 'private placement' cannot be regarded as 'public offer' by way of deeming fiction under the first proviso to section 67(3). When there is no offer or invitation, section 67 is not at all attracted and much less section 67(3) and 73.

q) As per section 2(36) of the Companies Act, 1956, 'Prospectus' is defined to mean 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. Section 2(a) of SEBI (ICDR) Regulations, 2009 "Advertisement" is said to include notices, brochures, pamphlets, show cards, catalogues, hoardings, placards, posters, insertions in newspaper, cover pages of offer documents, pictures and films in any print media or electronic media, radio, television programme. Section 2(p) of ICDR Regulations, 2009 "Initial Public Offer" is defined to mean an offer of specified securities by an unlisted issuer to the public for subscription and includes an offer for sale of specified securities to the public by any existing holders of such securities in an unlisted issuer. Section 2(x) of ICDR Regulations, 2009 "Offer document" means a red herring prospectus, prospectus or shelf prospectus and information memorandum in terms of section 60A of the Companies Act, 1956 in case of a public issue and letter of offer in case of a rights issue. Section 2(z) of ICDR Regulations "preferential issue" means an issue of specified securities by a listed issuer to any select person or group of persons on a private placement basis and does not include an offer of specified securities made through a public issue, rights issue, bonus issue, employee stock option scheme, employee stock purchase scheme or qualified institutions placement or an issue of sweat equity shares or depository receipts issued in a country outside India or foreign securities. Section 2(zc) of ICDR Regulations "Public issue" means an initial public offer or further public offer. Section 2(n) of ICDR Regulations "Further Public Offer" means an offer of specified securities by a listed issuer to the public for subscription and includes an offer for

sale of specified securities to the public by any existing holders of such securities in a listed issuer.

- r) All the definitions such as prospectus, advertisement, etc. indicated above refer to a written communication from the company in order to treat the same as an 'offer'. In other words, if there is no written or visual communication by or on behalf of the company, there cannot be any offer or invitation and the provisions of section 67 have no application under such circumstances. It is true that the offer or invitation by a company has to be in writing because a company being a juristic person cannot communicate verbally and the same has to be only through written communication. In the cases of such unlisted companies where there were no written communications, there was no document or written communication to offer the shares or to invite the public to subscribe the shares of the company. In the absence of any such written document, section 67 has no applicability.*
- s) Further the company has made the preferential allotment from November 01, 2012 to November 10, 2012 after complying with the provisions of Section 81(1A) of the Companies Act, 1956.*
- t) Reference order passed by Hon'ble Supreme Court of India in case of Sahara and its inapplicability in our case:*
- i. Sahara issued securities through friends, associates, group companies, workers/employees and other individuals associated/affiliated or connected in any manner with Sahara group of companies.*
 - ii. There was a network of around 2900 branch officer, 10 lac agents and other people involved in fund raising. Sahara circulated information memorandum along with application forms to various persons. Sahara had approximately 3 crores of investors and a collection of Rs. 24,000/- crores. SEBI received private complaint alleging violation of various statutory requirements by Sahara group companies. In light of the above facts, the apex court delivered its judgement, the substance of which is as under:*

- iii. Section 67(3) is an exception to section 67(1) and 67(2). As a result of proviso to section 67(3), if an offer of shares or debentures is made to 50 or more persons, it would be deemed to be a public issue even if the requirements of section 67(3)(a) or section 67(3)(b) are met.*
- iv. Optionally/fully convertible debentures are also securities and covered by section 67. SEBI has the jurisdiction in respect of such issues because these securities fall within the purview of section 55A of the Act.*
- v. The argument that the Rules were amended only in 2011 restricting the number of investors to 49 in the definition of 'preferential allotment' and hence, offers made prior to that date were in order, was turned down by the Apex Court stating that the Rules are subordinate legislation and they cannot supersede the express provision i.e. section 67(3).*
- vi. Non-provision of information demanded by SEBI amounted to avoidance and hence, the issue was a public issue.*
- vii. Though Sahara's case was considered to be within the jurisdiction of SEBI and offer by Sahara to 50 or more persons was considered to be a public offer, the same ratio was arrived at on the basis of facts enumerated in para viii. It cannot apply invariably to each and every allotment of shares to 50 persons or more in a year by any unlisted public company.*
- viii. The Supreme Court in the said judgment relied on the intention of Sahara to determine whether the issue of securities was a public issue or not. The Supreme Court observed that the "acta exterior indicant interior secreta" (external action reveals inner secret) applies with all force in Sahara's case. The court observed that the intention of Sahara was known by its action of offering shares to more than 50 persons and hence was liable to get its shares listed. In the case of such unlisted companies where there were no offers, there was no action of offering shares at all to the public and hence, the action of*

such companies does not justify an inference of intention being drawn as was done in Sahara case by the apex court.

- u) It is pertinent to mention that Noticee no. 3 viz. Ms. Kirti had resigned from the directorship of the company w.e.f. 31.05.2014, notice no. 4 viz. Ms. Neena Sood, had resigned from the directorship of the company w.e.f. 25.05.2018 and Noticee no. 5 viz. Mr. Dinesh Kumar Jindal had resigned from the directorship of the company w.e.f. 27.06.2013. In our humble and respectful submissions, any directions issued to the past directors of the company would be travesty of justice since presently they are not associated with the Company hence are not in a position to carry out or enforce any directions, if any, issued against the company.*
- v) It is pertinent to mention that post issuance of shares through preferential issue, we had come out with the initial public offer of shares. On successful completion of our IPO, shares of our company got listed on 12.03.2013 at BSE under SME segment. Pertinently, as on quarter ending 31.03.2020, public holding is around 18.50 crore shares (around 80% of total paid up capital) which is held by 910 public shareholders. Hence any adverse directions issued against us could cause and result into great harm, loss and damage to the present public shareholders of our company. Consequently great prejudice would be caused to the innocent investors of our company. For ready references, shareholding pattern for the quarter ending March 2020 as downloaded from BSE website is enclosed hereto as Annexure-A.*
- w) As stated hereinabove, in due compliance of statutory provisions of law, we had come out with an IPO which got listed at BSE-SME segment on 12.03.2013. At the relevant time, we had appointed Guinness Corporate Advisors Pvt. Ltd. (Formerly known as Guinness Merchant Bankers Pvt. Ltd.) as a "Lead Managers" to carry out all Manager legal procedure and compliances for purpose of IPO. The Lead Manager of the Company has carried out proper due diligence in respect of the IPO of the company and lead manager also did not mention about any alleged violation of Section 67(3) of Companies Act, 1956 or any other sections of the Companies Act, 1956 or any other sections of the Companies Act, 1956.*

- x) *It is pertinent to mention that investigation was conducted by SEBI to ascertain the role of Merchant Banker w.r.t the disclosures made in the prospectus of the IPOs of the four scrips including our scrip and pursuant thereto adjudication proceeding were initiated against the lead merchant banker viz. Guinness (Ref. Para 1 on internal page no. 1, last three line of the adjudication order dated 04.12.2019). The findings with regard to us is summarised under para 11 on internal page no. 18 to 20 of the adjudication order. On perusal of the same, it is submitted that no findings about any non-compliance on issuance of preferential shares in mentioned therein. In out humble submission, if the issuance of preferential shares was in non-compliance of any statutory provision of law, the same ought to have been disclosed in the prospectus by the lead merchant banker viz. Guinness and non-disclosure, if any, would have triggered non-compliances on the part of Lead Manager viz. Guinness. Since there are no adverse findings made against the Lead Manager, necessarily Ld. Investigation Officers and Ld. Adjudicating Officer of SEBI had not found any adversity on issuance of preferential shares by us. In view thereof, the present proceedings as initiated against us be dropped and we may be discharged at the earliest.*
- y) *Besides it is pertinent to mention that SEBI had conducted investigation interalia into the alleged price manipulation in our scrip wherein role of shareholders who were allotted shares on preferential basis were also looked and examined systematically into. Importantly, on completion of the said investigation, no adverse findings were observed against those preferential allottees of our company. The relevant portion from the order dated 06.09.2017 passed by Ld. Whole Time Member, SEBI is reproduced. Pertinently, no adverse findings wrt issuance of preferential shares by us are observed in the said investigation conducted by SEBI and accordingly issuance of preferential shares allotted to the persons are considered as in compliance of statutory provision of law. Therefore in our humble submissions, adverse findings and the directions as proposed to be issued against us are unwarranted and unjustifiable.*

z) On perusal of yearly price volume chart as downloaded from BSE website, we state that trading in our shares have been quite liquid and therefore every preferential allottees had adequate and sufficient opportunity to exit, if required, by them.

(ii) Noticee no. 5 (Dinesh Kumar Jindal) vide letters dated August 17, 2020 and December 30, 2020, has submitted the following:

a) At the further outset, our client submits that he was an Independent Director of Channel Nine Entertainment Ltd from April 4, 2011 to April 27, 2013 (the company for reasons best known to them has shown date of resignation as June 27, 2013). During the said period, our client was not involved in the day to day affairs of the company.

b) The company was incorporated on July 25, 2002 under the provisions of the Companies Act, 1956 and is engaged into the business of media and entertainment and is a part of Indian Cinema for more than a decade now and has in its portfolio moves from Bollywood as well as Hollywood like Chameli, Agnipankh, Fun2ssh, Insomnia etc. Subsequent to its maiden public issue the company got listed on the SME exchange of BSE on March 11, 2013. Our client was introduced to Mr. Vijay Jhindal, Chartered Accountant and one of the promoters of the company, by one of his professional colleagues during a professional development programme. Our client was invited to join the board as an Independent Director in 2011 and he did so on April 04, 2011. However, after the shares of the company were listed on BSE in 2013, our client felt that he could not do justice to the increased compliance and other requirements of the company and hence resigned as a Director in April 2013, however the Company had filed the relevant Form DIR 12 showing resignation effective in June 2013.

c) The Noticee submits that, a perusal of the record made available to him vide the Company's letter dated October 19, 2020 demonstrates that the Noticee did not attend or participate in any Board Meeting relating to the preferential allotment of shares or the initial public offer. The records thus substantiate the submissions made by the Noticee vide his reply dated

August 17, 2020 and submissions made during the hearing held on August 17, 2020.

- d) Our client submits that he had prudently and diligently performed his duties and obligations as an independent director of the company. There was no material on record which could have indicated any suspicion in his mind about any potential irregularity by the promoters and whole time directors. Our client, being merely an Independent Director, was never involved in the day to day affairs and management of the company.*
- e) It is further submitted that neither our client nor any of his family members or relatives had financial interest whatsoever in the company as preferential allottee, Pre-IPO transferee, IPO allottee or otherwise. Further, there was no financial transaction of our client or his family members or relatives with the company or its promoters or directors.*

Consideration of submissions and findings:

11. I have perused the show cause notice dated September 19, 2018, along with its annexures, the replies filed by the Noticees, the Appeal Memo and submissions made during the course of personal hearing and written submissions filed thereafter. The issue for consideration in these proceedings is whether CNEL has mobilized funds through the public issue of equity shares without complying with the provisions of the SEBI Act, 1992, the Companies Act, 1956 and the ICDR Regulations or not and the liability of the Noticees no. 2 to 5 for such violations as being the directors of the Company.

12. Before considering the above issue and dealing with the various contentions raised by the Noticees, the relevant provisions of law which are necessary to advert to are extracted hereunder:

Relevant extract of provisions of Companies Act, 1956:

“Matters to be stated and reports to be set out in prospectus

56. (1) Every prospectus issued - (a) by or on behalf of a company, or (b) by or on behalf of any person who is or has been engaged or interested in the formation of a company, shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule ; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

(2)

(3) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied 1 [by a memorandum containing such salient features of a prospectus as may be prescribed] which complies with the requirements of this section :

Registration of Prospectus

60. (1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto –

(a) any consent to the issue of the prospectus required by section 58 from any person as an expert ; and

(b) in the case of a prospectus issued generally, also - (i) a copy of every contract required by clause 16 of Schedule II to be specified in the prospectus, or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof ; and (ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

Construction of reference to offering shares or debentures to the public, etc.

67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

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

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation. **Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

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

“Allotment of shares and debentures to be dealt in on stock exchange.

73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) ...

(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, 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, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in subsection (2) ; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.”

Relevant provisions of the ICDR Regulations, 2009:

- (i) Regulation 4(2)(d) – Application for listing of specified securities on one or more recognised stock exchange
- (ii) Regulation 4(2)(e) – Agreement with a depository for dematerialisation of specified securities already issued or proposed to be issued
- (iii) Regulation 5 – Appointment of merchant banker and other intermediaries
- (iv) Regulation 6 – Filing of Offer Document
- (v) Regulation 7 – In-principle approval from recognised stock exchanges
- (vi) Regulation 25 & 26 – Conditions for initial public offer
- (vii) Regulation 36 – Lock-in of specified securities held by promoters
- (viii) Regulation 37 – Lock-in of specified securities held by persons other than promoters
- (ix) Regulation 46 – Period of subscription
- (x) Regulation 47 – Pre-issue advertisement for public issue
- (xi) Regulation 57 – Manner of disclosures in the offer document
- (xii) Regulation 59 – Prohibition on payment of incentives

13. I note that Noticees no. 1 to 3 have made a preliminary contention that there has been inordinate delay on issuance of SCN and Supplementary show cause notice. The Noticees no. 1 to 3 have submitted that the SCN has been issued after a gap of almost 6 years from the date of preferential allotment by the Company. However, that no reasons have been mentioned in the SCN for belatedly initiating the present proceedings after an unexplained delay of almost 6 years. In this regard, reliance has been placed on the various judgments passed by the Hon'ble Supreme Court of India and Hon'ble Securities Appellate Tribunal pertaining to inordinate delay in initiation of delay, such as *SEBI vs Bhavesh Pabari Order dated 28/02/2019 in (SC Civil Appeal no. 11311 of 2013)*, *Anilkumar Nandkumar Harchandani & Ors vs. SEBI (SAT Order dated 05.12.2019 in Appeal no. 75 of 2019)*, *Ashok Shivilal Rupani & Anr. Vs. SEBI (SAT Order dated 22.08.2019 in Appeal no. 417 of 2018)*, *Rakesh Kathotia and Ors vs. SEBI (SAT Order dated 27.05.2019 in Appeal no. 07 of 2016)* and *H.B. Stock Holding vs. SEBI (SAT Order dated 27.08.2012 in Appeal no. 114 of 2012)*.

14. In this regard, I note that SEBI had conducted an inspection of Guinness Corporate Advisors Pvt. Ltd. (Merchant Banker) on August 21 to 28, 2014, to *inter alia* examine its level of due diligence in all the public issues handled by the Merchant Banker. From the inspection report, it was observed that CNEL, which was one of the Companies whose IPO was handled by the Merchant Banker, had issued

shares to more than 49 persons in the Financial Year 2012-13. Accordingly, the same was informed to the concerned department in SEBI, pursuant to which a preliminary examination was conducted and letter dated June 14, 2016 was sent to CNEL seeking information/documents with regard to the issue and allotment of shares in the Financial Year 2012-13. I note that the letter was delivered on June 20, 2016. However, CNEL did not respond to the SEBI letter. Since, it was observed that CNEL has issued equity shares to more than 49 persons but less than 200 persons, CNEL was given an option to avoid penal action by providing the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money paid along with 15% interest p.a. thereon or such higher return as promised to investors, as stipulated in SEBI Circular dated December 31, 2015. Accordingly, vide letter dated December 06, 2017, CNEL was advised to give an option to the investors to get refund in terms of the SEBI Circular dated December 31, 2015 and to complete the same within a period of three months from the date of the letter dated December 06, 2017. The letter dated December 06, 2017 was delivered to the Company. However, since no reply was received from the Company, a reminder vide letter dated January 31, 2018 was sent to the Company. However, the letter dated January 31, 2018 returned undelivered. Accordingly, letter dated March 01, 2018 was sent to CNEL and also its directors advising them to complete the same and certify compliance with SEBI Circulars dated December 31, 2015 and May 03, 2016 within 3 months from the date of receipt of the letter dated December 06, 2017. I note that the said letter dated March 01, 2018 addressed to the Company and directors returned undelivered. Since, the letter dated March 01, 2018 could not be delivered, a letter dated March 13, 2018 was sent for affixture at the last known addresses of the Company and directors. Affixture was done for Noticees no. 2, 3 and 5. However, I note that affixture could not be done for the Company and Noticee no. 4. Since, no response was received from the Company or the directors for availing the option in terms of SEBI Circular dated December 31, 2015, SEBI proceeded to initiate proceedings against CNEL and its directors for violation of the Companies Act, 1956 and ICDR Regulations. Accordingly, SCN dated September 19, 2018 was issued to the above Noticees. From the above facts and circumstances of the case, it cannot be said that there was inordinate

delay in the matter, as contended by the Noticees. I note that the Noticees in furtherance of their contention of inordinate delay in the matter, have relied upon various orders of the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "Hon'ble SAT"). In this regard, I note that in *Ravi Mohan & Ors. v. SEBI* and other connected appeals decided on August 27, 2013, the Hon'ble SAT while referring to its own decision in *HB Stockholdings Ltd. v. SEBI* (Appeal no. 114 of 2012 decided on August 27, 2003) and decision of Hon'ble Supreme Court in *Collector of Central Excise, New Delhi v. Bhagsons Paint Industry (India)* reported in 2003 (158) ELT 129 (S.C.), held as under:

"...Based on decision of this Tribunal in case of HB Stockholdings Ltd. vs. SEBI (Appeal no. 114 of 2012 decided on 27.08.2013) it is contended on behalf of the appellants that in view of the delay of more than 8 years in issuing the show cause notice, the impugned order is liable to be quashed and set aside. There is no merit in this contention, because, this Tribunal while setting aside the decision of SEBI on merits has clearly held in para 20 of the order, that delay itself may not be fatal in each and every case. Moreover, the Apex Court in case of Collector of Central Excise, New Delhi vs. Bhagsons Paint Industry (India) reported in 2003 (158) ELT 129 (S.C) has held that if there no statutory bar for adjudicating the matter beyond a particular date, the Tribunal cannot set aside the adjudication order merely on the ground that the adjudication order is passed after a lapse of several years from the date of issuing notice...."

15. Further, it would also be appropriate to refer to the judgement of the Hon'ble Supreme Court of India in the matter of *Adjudicating Officer, SEBI vs. Bhavesh Pabari* (2019) SCC Online SC 294, which has also been relied upon by the Noticee no. 1 to 3, wherein, the Hon'ble Supreme Court held that:

"There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc."

16. In view of the facts and circumstances of the present case, I find that the proceedings have been initiated within reasonable time and there has been no

inordinate delay, as contended by the Noticees. Further, with regard to the issuing of the supplementary show cause notice, I note that in para 11 of the SCN, the Noticees were called upon to show cause as to why appropriate directions should not be issued against them including but not *inter alia* limited to “a. directions against Noticee no. 1 to 5 to provide an option to exit to the investors in terms of Section 73 of the Companies Act, 1956, (modalities of refund may be as per SEBI Circular CIR/CFD/DIL3/18/2015 dated December 31, 2015)”. Since, Section 73 of the Companies Act, 1956 provides only for refund and providing option is not stipulated, it was necessary to rectify the same and accordingly, the inadvertent error was appropriately corrected by the Supplementary show cause notice dated November 21, 2019. The supplementary show cause notice merely seeks to modify the directions proposed from directions to give options to investors to exit to directions to make refund to investors. It does not change the facts and allegations in the SCN and this does not prejudicially affect the Noticees and they have been given an opportunity to respond to the same. Further, I note that Noticees have merely contested delay, however the Noticees have not contended that their defence has been prejudiced by such delay. I note that the Noticees have thereafter, filed detailed replies and written submissions to the SCN. Hence, I find the contention of the Noticees no. 1 to 3 that there has been inordinate delay in issuing the SCN as untenable.

17. The Noticees no. 1 to 3 have also submitted that SEBI, while issuing the supplementary SCN dated November 21, 2019, did not consider SEBI's circular dated December 31, 2015 with reference no. CIR/CFD/DIL3/18/2015 whereby, *inter alia* procedures are laid down to deal with cases prior to April 01, 2014 involving offer/allotment of securities to more than 49 persons but up to 200 persons in a financial year. In this regard, as stated in the para 14 above, I find that ample opportunity and reminders were sent to the Noticees to avail the option to refund investors in terms of SEBI circular dated December 31, 2015. However, none of the Noticees responded to the letters and reminders sent to them. Hence, I find the submissions of Noticees no. 1 to 3 that while issuing SCN and Supplementary show cause notice, SEBI Circular dated December 31, 2015 has not been considered, is untenable.

18. It has been alleged in the SCN that CNEL had allotted equity shares to 100 persons on a continuous basis from November 01, 2012 to November 10, 2012 on 3 instances through preferential allotment during the Financial year 2012-13. The details of allotment as per filings on MCA 21 portal is as mentioned below:

Date of allotment of shares	No. of Allottees	Number of Equity shares allotted.	Nominal Value of allotment
01/11/2012	40	9,38,000	93,80,000
08/11/2012	40	4,73,500	47,35,000
10/11/2012	20	4,98,500	49,85,000
Total	100	19,10,000	1,91,00,000

19. Accordingly, it has been alleged in the SCN that CNEL has issued equity shares through preferential allotment to more than 49 persons in F.Y. 2012-13, without complying with the provisions of the SEBI Act, 1992, the Companies Act, 1956 and the ICDR Regulations. In this regard, Noticees no. 1 to 3 have contended that they have made the preferential allotment from November 01, 2012 to November 10, 2012 after complying with the provisions of Section 81(1A) of the Companies Act, 1956 and since, they have made a private placement and not made any offer or invitation to the public, Section 67(3) of the Companies Act, 1956 is not attracted.

20. Regarding the contention of Noticee based on the applicability of Section 67 of the Companies Act, 1956 to preferential issue made under Section 81(1A) of Companies Act, 1956, it would be appropriate to refer to the judgement of the Hon'ble Supreme Court of India in **Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (2013) 1 SCC 1** (hereinafter referred to as the "**Sahara Case**"), where the Hon'ble Supreme Court dealt with similar contention and held as under:

"101. Section 81(1A), it may be noted, is only an exception to the said rule, that the further shares may be offered to any persons subject to passing a special resolution by the company in their general meeting. Section 81(1A) cannot, in any view, have an overriding effect on the provisions relating to public issue. Even if armed with a special

resolution for any further issue of capital to person other than shareholders, it can only be subjected to the provisions of Section 67 of the Company Act, that is if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. A public issue of securities will not become a preferential allotment on description of label. Proviso to Section 67(3) does not make any distinction between listed and unlisted public companies or between preferential or ordinary allotment."

21. Hence, the Hon'ble Supreme Court in the Sahara case has made it clear that a special resolution for any further issue of capital to person other than shareholders, as provided under Section 81(1A), is subject to the provisions of Section 67 of the Companies Act, and if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. Hence, I find the contention of the Noticees no. 1 to 3 that they have made a preferential placement after complying with the provisions of Section 81(1A) of the Companies Act and have not made any offer or invitation to the public, as untenable.

22. Regarding the contention of the Noticees that their offer of securities was a private placement, I note that an offer or invitation of shares or debentures made in accordance with Section 67(3) of the Companies Act, 1956, is generally understood as private placement. Section 67(3) is in the form an exception to sub-sections (1) and (2) of Section 67 which provide that any reference in the Companies Act, 1956 or in the articles of a company, to offering shares or debentures to the public, shall be construed as including a reference to offering them to any section of the public. Section 67(3) provides that 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 offer or invitation shall not be treated as made to public. However, first proviso to Section 67(3) provides that nothing contained in Section 67(3) shall apply in a case where the offer or invitation to subscribe to shares of debentures is made to 50 persons or more. Meaning thereby that even a private placement made in terms of Section 67(3) cease to be a private placement if it made to 50 person or more. In this regard, observation made by Honble Supreme Court in Sahara case, may be referred to which are as under:

"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, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. ... I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. ..."

23. In the present case, shares were offered and allotted to 100 persons, thus, in terms of first proviso to Section 67(3), to such offer, Section 67(3) was not applicable. Therefore, such offer of shares by Noticee no. 1 to 100 subscribers falls under sub-sections (1) and (2) of Section 67 and being made to a section of public (100 persons) has to be construed as made to public. Therefore, the contention of Noticees in this regard are not tenable.

24. As the issue of shares by the Company was a public issue in terms of first proviso to Section 67(3) of the Companies Act, 1956, therefore, Section 73 of the Companies Act, 1956 was attracted in the case, which provides as under:

“Allotment of shares and debentures to be dealt in on stock exchange.

73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) ...

(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, 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, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in subsection (2) ; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty thousand rupees.”

25. In terms of Section 73(1), the Company was required to make an application for listing of such shares or debentures on one or more recognised stock exchanges. In Sahara Case, Hon'ble Supreme Court of India also examined Section 73 of the Companies Act, 1956, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under

sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons."

26. In the present case, I find that no such application to a stock exchange for listing of its securities was made by CNEL. I note that Section 56 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. Further, 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 Section. As mentioned above, since the allotment of equity shares were made to fifty persons or more, the issue of equity shares by CNEL in the financial year 2012-13 has to be construed as a public offer. Having made a public offer, CNEL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. However, based on the material available on record, I find that the Company has not filed a prospectus with the RoC and has failed to comply with the provisions of Section 56 and 60 of Companies Act, 1956.

27. Further, it has been alleged in the SCN that CNEL has not complied with the following provisions of the ICDR Regulations, in respect of the issuance of equity shares:

- (i) *Regulation 4(2)(d) – Application for listing of specified securities on one or more recognised stock exchange*
- (ii) *Regulation 4(2)(e) – Agreement with a depository for dematerialisation of specified securities already issued or proposed to be issued*
- (iii) *Regulation 5 – Appointment of merchant banker and other intermediaries*
- (iv) *Regulation 6 – Filing of Offer Document*
- (v) *Regulation 7 – In-principle approval from recognised stock exchanges*
- (vi) *Regulation 25 & 26 – Conditions for initial public offer*
- (vii) *Regulation 36 – Lock-in of specified securities held by promoters*
- (viii) *Regulation 37 – Lock-in of specified securities held by persons other than promoters*

- (ix) *Regulation 46 – Period of subscription*
- (x) *Regulation 47 – Pre-issue advertisement for public issue*
- (xi) *Regulation 57 – Manner of disclosures in the offer document*
- (xii) *Regulation 59 – Prohibition on payment of incentives*

28. I note that the Noticees no. 1 to 3 have not made any submission that they have complied with the said provisions of the ICDR Regulations with respect to the issue of equity shares to the public in the FY 2012-13. Further, I find that there are no documents or evidence before me to prove that the Company has complied with any of the various provisions of the ICDR Regulations in respect of the issuance of the equity shares, as alleged in the SCN. Hence, I find that the Company has failed to comply with the various provisions of the ICDR Regulations, as enumerated above.

29. I note that as per Section 73(2) of the Companies Act, 1956, the obligation to refund the amount with interest that was collected from investors under the offer of equity shares, is fastened on the Company and the director who is officer in default. I note that CNEL has collected a total of Rs. 1,91,00,000/- from 100 persons, during the FY 2012-13 from November 01, 2012 to November 10, 2012. In this regard, the Noticees no. 1 to 3 have submitted that as on date 41 allottees out of 100 are no longer shareholders of the Company because they have already got exit from the Company by selling their shares on a very good return. The Company has not submitted any proof in support of the said contention. Assuming that the contention of the Company is correct, exit of 40 shareholders by selling their shares does not mean that the Company has made refund to these shareholders with interest, which is the mandate of Section 73 of the Companies Act, 1956, as applicable in the present case. I find that there is no evidence available on record, to indicate that CNEL has repaid any amount along with interest to the investors within 8 days as mandated under Section 73(2) of the Companies Act, 1956.

30. I also note that the Noticees no. 1 to 3 have submitted that investigation was conducted by SEBI to ascertain the role of Merchant Banker w.r.t the disclosures made in the prospectus of the IPOs of the four scrips including the scrip of CNEL and pursuant thereto adjudication proceeding was initiated against the lead

merchant banker viz. Guinness Corporate Advisors Pvt. Ltd. (Formerly known as Guinness Merchant Bankers Pvt. Ltd.). Further, that in the Adjudication order dated December 04, 2019 against the Guinness Corporate Advisors Pvt. Ltd., there is no findings about any non-compliance on issuance of preferential shares mentioned therein. That since there are no adverse findings made against the Merchant Banker, necessarily the Investigation Officer and Adjudicating Officer of SEBI had not found any adversity on issuance of preferential shares by CNEL. In this regard, I find that the aforesaid submissions made by Noticees no. 1 to 3 to be untenable as the said adjudication proceedings which resulted in adjudication order dated December 04, 2019, were initiated against Guinness Corporate Advisors Pvt. Ltd. for violation of Securities and Exchange Board of India (Merchant Banker) Regulations, 1992 and ICDR Regulations alleged to have been violated by Guinness Corporate Advisors Pvt. Ltd. and not CNEL, and neither do they pertain to the alleged violation of CNEL, as alleged in the SCN in the present proceedings. Any findings on the alleged issuance of preferential shares by CNEL would *inter alia* require separate examination for violation of the Companies Act, 1956 by the CNEL. Accordingly, separate examination was conducted in this regard and the present proceedings are separate proceedings initiated against the CNEL for violation of the Companies Act, 1956 and ICDR Regulations, as alleged in the SCN. Hence, I find the above submissions of Noticees no. 1 to 3 as untenable.

31. Further, I also note that Noticees no. 1 to 3 have submitted that the Company had come out with an initial public offering and the equity shares of the Company were listed on SME segment of BSE on March 12, 2013. That a copy of the prospectus dated February 16, 2013 containing the equity capital history of the Company since incorporation was filed with BSE and also with Registrar of Companies, NCT of Delhi and Haryana. Noticees no. 1 to 3 have submitted that they got approval from BSE and the Registrar of Companies without mention of any violation of Section 67(3) of the Companies Act, 1956 or any other Sections of the Companies Act, 1956. They have also submitted that a copy of the prospectus was also filed with SEBI at the time of the IPO and they did not receive any objection from SEBI at the time of the IPO. In this regard, I note that when a draft offer document is filed with SEBI, SEBI issues its observations with an objective of ensuing

compliance with the disclosure requirements laid down in the relevant Regulations. While issuing observations the objective is not to find out the past violations, though such violations may also come to notice. However, in the present case, I note that in terms of Regulations 106-O of the ICDR Regulations, draft offer document is to be filed with SEBI but no observations shall be issued by SEBI. Further, as stated in the foregoing paras, I note that it has been stated in the SCN that SEBI had conducted an inspection of Guinness Corporate Advisors Pvt. Ltd., who I note was the Merchant Banker of CNEL for its IPO in 2013, and during this inspection it was observed that CNEL had 107 shareholders in the Financial Year 2012-13. Accordingly, pursuant to the observations in the said inspection, SEBI conducted an examination, on the basis of which the present proceedings have been initiated against the Noticees.

32. Further, with regard to the purported approval given by BSE, I note from the BSE letter dated February 15, 2013, submitted by the Noticees with their reply dated December 11, 2019, that BSE had made it very clear in its letter that BSE *inter alia* does not in any manner warrant, certify or endorse the correctness or completeness of any of the contents of the offer document, take any responsibility for the financial or other soundness of the company, its promoters, its management or any scheme or project of the company and that it should not for any reasons be deemed or construed that the offer document has been cleared or approved by BSE. In this regard, I find that the said BSE letter does not require any further explanation. Nonetheless, approval of the prospectus, if any, granted by BSE or the Registrar of Companies, does not vitiate the present proceedings initiated against the Noticees which are separate and independent proceedings initiated by SEBI for the alleged violations of the Companies Act, 1956 and ICDR Regulations, and therefore, I find the submissions of the Noticees no. 1 to 3 in this regard as untenable.

33. In view of the above, I find that the CNEL has mobilized funds through the offer and allotment of equity shares to 100 persons in F.Y. 2012-13, without complying with the provisions of the Companies Act, 1956 and the ICDR Regulations. Thus, I find that CNEL (Noticee no. 1) has violated Section 56(1)&(3), 60, 73(1),(2)&(3) read with Section 67(1),(2)&(3) of the Companies Act, 1956 and Regulations

4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of the ICDR Regulations, as alleged in the SCN.

34. Since the alleged violations of the Companies Act, 1956 and the ICDR Regulations have been found against CNEL for the issue and allotment of equity shares to more than 49 persons in F.Y. 2012-13, I shall now proceed to examine the alleged violations and liability of the other Noticees, who are the directors of CNEL. In this regard, I note that under Section 73(2) of the Companies Act, 1956, where permission for listing of the share or debenture on one or more recognised stock exchanges has not been granted under Section 73(1), the company is mandated to repay without interest all moneys received from applicants in pursuance of the prospectus, and if any such money is not repaid within a period of 8 days after the company becomes liable to repay it, then the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate as may be prescribed. In this regard, I note that CNEL has collected a total of Rs. 1,91,00,000/- from 100 persons, during the FY 2012-13 and I note that no repayment as envisaged under Section 73 of the Companies Act has been made by the Company till date in this regard. Hence, I find that the Company has failed to repay the applicants within eight days after the Company became liable to repay it and therefore, the Company and every director of the Company who is an officer in default shall be jointly and severally liable to repay the money and interest at such rate as may be prescribed. I note that "Officer in default" has been defined under Section 5 of the Companies Act, 1956 as 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.”*

35. From the above, an “Officer in default” would mean the following officers, namely, the managing director or managing directors, whole time director or whole time directors, the manager, the secretary or any person in accordance with whose directions or instructions the Board of Directors of the company accustomed to act and would also include any person charged by the Board of responsibility of compliance with the provisions of the Act. Section 5(g) of the Companies Act, 1956 further stipulates that where the company does not have any of these officers specified in clauses (a) to (c) in which case all the directors would be deemed to be an officer in default.

36. In this regard, I note from the Annual Returns for the year 2012-13 filed by the Company on MCA21 portal, that Noticee no. 2 (Gaj Raj Singh) was the Whole Time Director of CNEL. I note that there is nothing on record to suggest that the other directors were whole time directors or a person in accordance with whose directions or instructions the Board of Directors of the Company are accustomed to act or a person charged by the Board of responsibility of compliance with the provisions of the Companies Act, as given in Section 5 of the Companies Act, 1956 and hence, only the Whole Time Director is responsible as the Officer in Default of the Company. I note that the Hon’ble SAT in its order dated August 09, 2019 in the matter of **Sayanti Sen vs. SEBI (Appeal No. 163 of 2018)** had observed that:

“13. As per Section 5 of the Companies Act it becomes clear that a managing director, whole time director, manager, secretary and any person who has been authorized by the board or by any director are now officers in default. Section 5(g) of

the Companies Act makes it apparently clear that if there is a managing director appointed in a company, he would be an officer in default. Further, in the absence of any managing director, if the board has specified any particular director or manager or any other person as an officer in default in which case only that specified director or manager etc. as the case may be would be an officer in default.”

37. Therefore, I find that Noticee no. 2, as the Whole Time Director of CNEL (Noticee no. 1) is the director who is “Officer in Default” under Section 73(2) of the Companies Act, 1956, and as the director who is officer in default, the Noticee no. 2 (Gaj Raj Singh) is jointly and severally liable with the Company to repay the money collected from investors through issue of equity shares and interest thereon, at such rate as may be prescribed.

38. With regard to the role and liability of the other Noticees who are not Officers in Default of the Company, but were directors of CNEL during the period when the equity shares were issued to more than 49 persons, I note that the following were the directors of the Company during the year 2012-13 when the equity shares were issued to more than 49 persons:

Noticee no.	Director Name	Designation	Date of appointment	Date of resignation
3	Kirti	Director	04.04.2011	31.05.2014
4	Neena Sood	Director	04.04.2011	25.05.2018
5	Dinesh Kumar Jindal	Director	04.04.2011	27.06.2013

39. In this regard, CNEL has submitted that Noticee no. 3 viz. Kirti had resigned from the directorship of the Company w.e.f. May 31, 2014, Noticee no. 4 viz. Neena Sood, had resigned from the directorship of the Company w.e.f. May 25, 2018 and Noticee no. 5 viz. Dinesh Kumar Jindal had resigned from the directorship of the Company w.e.f. June 27, 2013. Further, that any directions issued to the past directors of the Company would be travesty of justice since, presently, they are not associated with the Company hence, are not in a position to carry out or enforce any directions, if any, issued against the Company.

40. In this regard, I note that Noticees no. 3 and 4 were directors of CNEL and that CNEL had issued equity shares to 100 persons during the financial year 2012-13, i.e. during their tenure as director in CNEL. I note that the Noticee no. 3 in his joint reply with the Company has not made any submissions denying his involvement in the issue of equity shares to more than 49 persons during his tenure in the Company as director in the financial year 2012-13. I note that the Noticee no. 3 has not made any submissions with regard to his non-participation or involvement in the Board Meetings or resolutions taken by the Company with regard to the said public issue of equity shares. Further, I note from the minutes of the meeting of the board of directors of CNEL on November 01, 2012, November 08, 2012 and November 10, 2012, during when the decision was taken for allotment of equity shares, that Noticees no. 2, 3 and 4 were present. I note that Noticee no. 3 has only submitted that he has resigned and is no more concerned in any manner with the Company. Further, with regard to Noticee no. 4, I note that Noticee no. 4 has neither filed any reply to the SCN nor has she availed the opportunity of hearing granted to her. From the records/documents available before me, I note that Noticee no. 4 was a director during the year 2012-13 when the equity shares were issued to more than 49 persons and I also note that Noticee no. 4 was present in the meeting of the board of directors of CNEL on November 01, 2012, November 08, 2012 and November 10, 2012, during when the decision was taken for allotment of equity shares. Since, the issue of equity shares by CNEL was made to the public, a prospectus containing the disclosures as specified under Section 56 of the Companies Act, 1956 had to be registered with the RoC under Section 60 of the Companies Act, 1956. However, I find that no prospectus was issued by the Company in compliance with the provisions of Section 56 and was not registered with the RoC under Section 60 of the Companies Act, 1956. Further, none of the provisions of the ICDR Regulations were complied with for the issue of the equity shares to the public by CNEL. In view of the above, I find that the Noticees no. 3 and 4, as directors of CNEL, are liable for the alleged violations of Section 56 and 60 of the Companies Act, 1956, and are also liable for failing to comply with the provisions of ICDR Regulations.

41. Noticee no 5 (Mr. Dinesh Kumar Jindal) vide his letters dated August 17, 2020 and December 30, 2020 has submitted that he was an independent director of CNEL from April 4, 2011 to April 27, 2013 and during this period, was not involved in the day to day affairs of the Company. The Noticee no. 5 has submitted that he did not attend or participate in any board meetings relating to the preferential allotment of shares or the initial public offer. In this regard, from the records available before me, I note that the Noticee no. 5 was an independent director and has not participated in any of the board meetings related to the preferential allotment during the FY 2012-13. Hence, from the documents/records available before me, I find that there is no evidence to show that Noticee no. 5, as an independent director, was involved in the day to day affairs of the Company or in the said preferential allotment during the FY 2012-13, in violation of the provisions of the Companies Act and ICDR Regulations, as alleged in the SCN.

42. In view of the above findings, I find that:

- (i) As discussed in paras 36 to 37 above, Noticee no. 2 (Gaj Raj Singh) is liable for the violation of Section 56(1)&(3), 60, 73(1),(2)&(3) read with Section 67(1),(2)&(3) of the Companies Act, 1956 and Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of the ICDR Regulations, as alleged in the SCN.
- (ii) As discussed in paras 39 to 40 above, I find that Noticees no. 3 and 4 as the directors of the Company are liable for filing the abridged prospectus containing the required disclosures and registering of the prospectus with the RoC and also complying with the provisions of the ICDR Regulations for the issue of equity shares to the public by CNEL. Thus, I find that the said Noticees no. 3 and 4 are liable for the violation of Section 56(1)&(3) and 60 of the Companies Act, 1956 and Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37, 46, 47, 57 and 59 of the ICDR Regulations, as alleged in the SCN.

43. I note that Noticees no. 1 to 3 have submitted that post issuance of shares through preferential issue, the Company had come out with the initial public offer of shares.

On successful completion of the IPO, shares of the Company got listed on March 12, 2013 at BSE under SME segment. Further, that as on quarter ending March 31, 2020, public holding is around 18.50 crore shares (around 80% of total paid up capital) which is held by 910 public shareholders. Noticees no. 1 to 3 have submitted that any adverse directions issued against the Company could cause and result into great harm, loss and damage to the present public shareholders of the Company and great prejudice would be caused to the innocent investors of the Company. In this regard, I note that SEBI had conducted an investigation into the said IPO of CNEL, wherein, the shares of the Company got listed on March 12, 2013 at BSE under SME segment, and vide SEBI Order dated December 22, 2020, it was *inter alia* held that CNEL had achieved the threshold of minimum subscriptions in its IPO only through fraudulent scheme deployed in connivance with other entities, in violation of the SEBI Act, 1992 and the SEBI (Prohibition of Unfair Trade Practices relating to Securities Market) Regulations, 2003. I note that vide the said SEBI Order dated December 22, 2020, the following directions have *inter alia* been passed against CNEL:

- "i. Noticee no. 2 and 3 (the promoters of the Company) are directed to make a public offer through a merchant banker to acquire shares of the Company from public shareholders by paying them the value determined by the valuer in the manner prescribed in Regulation 23 of the SEBI (Delisting of Equity Shares) Regulations, 2009 and acquire the shares offered in response to the public offer, within three months from the date of this Order.*
- ii. BSE to facilitate valuation of shares to be purchased as directed at (i) above, and compulsorily delist the Company, if the public shareholding reduces below the minimum level in view of aforesaid purchase."*

44. In view of the Order dated December 22, 2020 and the directions passed therein, I find the submissions of Noticees no. 1 to 3 that any adverse directions issued against the Company could cause and result into great harm, loss and damage to the present public shareholders of the Company and great prejudice would be caused to the innocent investors of the Company, as erroneous and untenable. Having regard to the nature of violations and conduct of the Company (Noticee no. 1) and its directors (Noticees no. 2, 3 and 4), I find that issue of regulatory directions under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992, against the said Noticees are called for in the present matter.

DIRECTIONS:

45. In view of the foregoing, I, in exercise of the powers conferred upon me in terms Sections 11, 11(4) and Section 11B read with of Section 19 of the SEBI Act, 1992, hereby issue the following directions:

- (i) CNEL (Noticee no. 1) and Gaj Raj Singh (Noticee no. 2), shall jointly and severally refund the money collected through the offer and allotment of equity shares, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment), within a period of 90 days from the date of receipt of this Order; However, the investors who are entitled for refund of their money in terms of this direction and also entitled to delisting offer in terms of SEBI Order dated December 22, 2020, be given higher of the price computed in terms of present direction and the directions given under SEBI Order dated December 22, 2020.
- (ii) The repayments to the 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.
- (iii) CNEL (Noticee no. 1) and Gaj Raj Singh (Noticee no. 2) are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.
- (iv) CNEL (Noticee no. 1) 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.

- (v) After completing the aforesaid repayments, CNEL (Noticee no. 1) shall file a report of such completion with SEBI addressed to the Division Chief, Division of Regulatory Action - IV, Enforcement Department - 1, SEBI Bhavan, Plot No. C4 A, G Block, Bandra Kurla Complex, Bandra (East) Mumbai – 400051, within a period of three months from the date of receipt of this order, certified by two independent Chartered Accountants who are in the panel of any public institution or public sector undertaking or auditor of listed company.
- (vi) The above direction for refund does not preclude the investors to pursue legal remedies available to them under any other law, against the Company for refund of money.
- (vii) CNEL (Noticee no. 1) and Gaj Raj Singh (Noticee no. 2) are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner for a period of 2 (two) years from date of this order or till the completion of refund to investors as directed above, whichever is earlier. The above said persons are also restrained from associating with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 2 (two) years from date of this order or till the completion of refund to investors as directed above, whichever is earlier.
- (viii) Kirti (Noticee no. 3) and Neena Sood (Noticee no. 4) are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, for a period of 1

(One) year from date of this order. The above said persons are also restrained from associating with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of 1 (One) year from date of this order.

(ix) The SCN against Dinesh Kumar Jindal (Noticee no. 5) is disposed of in accordance with findings recorded in para 41 above.

46. This Order comes into force with immediate effect.

47. A copy of this order shall also be sent to all the Noticees, recognized Stock Exchanges, the relevant banks, Depositories and Registrar and Transfer Agents of Mutual Funds to ensure that the directions given above are strictly complied with.

Place: Mumbai

Date: March 03, 2021

Sd/-

ANANTA BARUA

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA