**WTM/MPB/EFD-DRA-III/113/2020**

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**

**CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER**

**ORDER**

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

**In the matter of Trinity Tradelink Limited (Earlier Known as "Omnitech Petroleum Limited")**

**In re: Deemed Public Issue Norms**

**In respect of:**

| Sr. No. | Name of the Entity | DIN/ CIN | PAN |
|---|---|---|---|
| 1 | Trinity Tradelink Limited (Earlier Known as "Omnitech Petroleum Limited") | L11103MH1985PLC035826 | AAFCS8117C |
| 2 | Mr. Vikrant Kayan | 00761044 | AFJPK8437M |
| 3 | Ms. Shaleni Kayan | 00761119 | AFZPK1051R |
| 4 | Ms. Girija Banerjee | 06702931 | AJWPB1941Q |
| 5 | Mr. Akhtar Khan | 06710464 | ASPPK4388L |
| 6 | Mr. Bhaskar Paul | 06545416 | AXTPP1047Q |
| 7 | Mr. Vikash Dubey | 06548810 | APCPD7488N |
| 8 | Devansh Kayan Beneficiary Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Not applicable | AABTD6118R |
| 9 | Tanvi Kayan Privilege Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Not applicable | AACTT0064B |
| 10 | Dunhil Healthcare Private Limited | U85100WB2009PTC137714 | AADCD3324Q |
| 11 | Mr. Sukumar Das | 00760908 | AEJPD0435R |
| 12 | Mr. Sharad Jhunjhunwala | 00032879 | ACVPJ0763C |

1. Trinity Tradelink Limited (CIN No. U51909MH2007PLC243684) (hereinafter referred to as "**Trinity**"), was an unlisted company and was incorporated on May 01, 2007. Trinity was merged with a listed company, namely, Omnitech Petroleum Limited (registered on March 30, 1985, and earlier known as Sharp Trading and Finance Ltd.), through a scheme of arrangement/ amalgamation, which was sanctioned vide order dated January 10, 2014, passed by the Hon'ble High Court of Bombay. The name of Omnitech Petroleum Limited (hereinafter referred to as "**Omnitech**") was later changed to Trinity Tradelink Limited (CIN No. - L11103MH1985PLC035826) vide RoC certificate dated March 28, 2014 (hereinafter referred to as "**TTL**" or "**the Company**"). TTL is having its registered office at 16 & 17, Washington Plaza, Dispensary Road, Goregaon, Mumbai – 400062.

2. The Securities and Exchange Board of India (hereinafter referred to as SEBI) had received a complaint on August 20, 2014, referring to rigging of the share price of the scrip of TTL. During the examination of this complaint, it was observed that the erstwhile Trinity, prior to its merger/ amalgamation with Omnitech, had made allotment of equity shares to more than 49 persons during 2011-12. SEBI, vide letter dated October 16, 2015, had sought information from TTL regarding the issuance of equity shares and/or convertible securities by erstwhile Trinity during the financial year 2011-12. From the details submitted by TTL, vide its letter dated November 02, 2015, it was observed that the erstwhile Trinity had allotted equity shares on a continuous basis on 23 instances (48/49 persons on each instance) from December 13, 2011 to March 28, 2012. In total, the erstwhile Trinity had allotted equity shares to around 978 allottees aggregating up to approximately Rs. 25,99,30,550/-.

3. Accordingly, a Show Cause Notice (SCN) dated August 16, 2017, was issued to the directors/ promoters of the erstwhile Trinity during financial year 2011-12 i.e., the period during which the money was raised through issuance of equity shares. The SCN was served on all these entities through speed post/ hand delivery. In the interests of natural justice, opportunity of personal hearing was granted to all these entities on January 17, 2018. These entities appeared for the personal

hearing and made their submission during the same and subsequently made additional submissions post the hearing.

4. Since the aspect of amalgamation and consequent effect of this amalgamation on the liability regarding the deemed public issue was not taken into account in the earlier SCN dated August 16, 2017, a new SCN dated April 04, 2019, which superseded the earlier SCN, was issued to all the Noticees i.e., the directors/ promoters of the erstwhile Trinity during the period the money was raised and to the directors/ promoters of TTL (earlier known as Omnitech), the remaining entity.

5. The charges laid down in the SCN dated April 04, 2019, are as below:

5.1. The erstwhile Trinity had allotted shares on a continuous basis on 23 instances (48/49 persons on each instance) from December 13, 2011 to March 28, 2012. In total, Trinity had allotted shares to around 978 allottees aggregating up to approx. Rs. 25,99,30,550/-

5.2. Considering the fact that the erstwhile Trinity had merged with Omnitech, which was a listed company, the liabilities of the erstwhile Trinity got transferred to Omnitech (presently known as TTL). In view of the same, the applicants in the deemed public issue of erstwhile Trinity had become shareholders of the Omnitech (presently known as TTL), which is a listed company at present. As per Clause 6.1(a) of the Scheme of Arrangement, all the liabilities of the erstwhile Trinity stood transferred to Omnitech with effect from the appointed date. Section 394 (4) (a) of the Companies Act, 1956 clarifies that “liabilities” include duties of every description.

5.3. In view of the above, it is alleged that Omnitech (presently known as TTL) bears the liability under Section 73(2) of the Companies Act, 1956, and is allegedly liable to reduce the share capital raised through the said Deemed Public Issue. The requirement under the Deemed Public Issue norms can otherwise be defeated by entities by virtue of scheme of amalgamation.

5.4. In view of the above, it is alleged that there was an obligation on the Noticees, to file prospectus in connection with the issue of securities and comply with provisions of Section 56(1), 56(3), 60 (1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956, and Section 465 (2) of the Companies Act, 2013, and Regulations 4(2)(d), 4(2)(e), 5(1), 5(2), 5(5), 5(7), 6(1) 7, 26(1), 26(2), 26(6), 32(1), 36, 37,46(1), 47(1), 49(1), 57(1), 58(1), 58(2), 63 and 115(2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations, 2009") read with Regulation 301 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR Regulations, 2018").

5.5. Further, there could be two scenarios for the purpose of compliance of repayment liability of Omnitech and directors of erstwhile Trinity in the present facts of the case:

5.5.1. In the first scenario, there are applicants/ shareholders covered in the deemed public issue and who continue to be the shareholders holding the shares of Omnitech. The repayment liability of Omnitech and the directors of erstwhile Trinity is a continuing liability. In respect of first category of shareholders, Omnitech and the directors of erstwhile Trinity Tradelink Limited would be required to repay the first category of shareholders, the subscription money along with interest. If the entire deemed public issue shareholders are falling in the first category, the payment would be required to be made accordingly. On payment, the share capital in Omnitech to that extent would stand reduced.

5.5.2. In the second scenario, in case some of the shareholders in the first category have exited, then the equal number of shares of Omnitech (in tune with the swap ratio), held by them would require to be bought back by the Company (Omnitech/ TTL) at the price equal to the subscription money with 15 percent interest thereon to be calculated as on the date

of the buyback offer. Since the repayment liability of the directors (Officers in default) of erstwhile Trinity Tradelink Limited is a continuing liability, they would be required to ensure the buy back by the Company from the second category of shareholders (pro-rata in case there is over response) in discharge of their repayment liability. The share capital to that extent would stand reduced thereafter.

6. The SCN also required the Noticees to further show cause as to why appropriate directions, should not be issued against them including but not limited to the following:

6.1. Buy back the shares of Trinity, from the shareholders of present TTL, who were the subscribers to the deemed public issue of erstwhile Trinity and continue to be shareholders of present TTL, at the price of subscription value at deemed public issue with 15 percent interest till payment, to the extent of their initial holding in present TTL post-merger corresponding to the subscription at deemed public issue, and if such initial holding is partly sold, to the extent of balance holding and/or;

6.2. To buy back, if some or all the shareholders in paragraph 6.1 have sold all or part of their shares issued post-merger corresponding to subscription in the deemed public issue, equal number of shares which were issued post-merger corresponding to the shares issued in deemed public issue in tune with swap ratio and sold, from the shareholders of present TTL, on pro-rata basis in case of over response, at the price equal to the subscription money with 15 percent interest till payment.

6.3. Directing the Company and Directors of TTL to provide an option to exit to the investors in terms of Section 73 of the Companies Act, 1956.

6.4. Restraining the company from issuing any further securities and from accessing the capital market for a period as deemed appropriate.

6.5. Restraining Noticees No. 2 to 12 from accessing the capital market for a period as deemed appropriate.

7. This SCN was delivered to all the Noticees and few of the Noticees replied to the SCN vide letters dated May 29, 2019, while a few sought additional time to make submissions. Thereafter, the Noticees were granted an opportunity of personal hearing on September 17, 2019, which they attended through their Authorized Representatives and made their oral submissions. Time was given till October 10, 2019, to make additional submissions, if any, and additional submissions of the Noticees have been received in SEBI on November 25, 2019. I note that replies/ additional submissions have been received from the following Noticees:

7.1. Mr. Vikrant Kayan vide letter dated November 10, 2019, received in SEBI on November 25, 2019, and

7.2. Ms. Shaleni Kayan, Mr. Akhtar Khan, Mr. Sukumar Das, Mr. Sharad Jhunjhunwala, Mr. Bhaskar Paul, Ms. Girija Banerjee and Mr. Vikash Dubey vide letters dated November 10, 2019, received in SEBI on November 27, 2019.

I note that Noticees Nos. 1, 8, 9 and 10 have not made any submissions post the personal hearing.

8. A perusal of the submissions of the Noticees shows that common submissions have been made by them, which are mentioned below:

8.1. Mr. Vikrant Kayan had good business reputation in the market and people approached him to participate in his business venture. That was the reason why even today the shareholders are continuing with him. Mr. Vikrant Kayan, who is the promoter of Trinity, along with their group companies and family

members took over management control of Omnitech through open offer under the SAST Regulations, 2011.

8.2. The Boards of Trinity and Omnitech (now known as TTL) had hired professionals to look after every work and compliance required under the Companies Act, Listing Agreement, SEBI, etc. The Board members were never personally involved into any activities of the company related to compliance issues. The Board, based on advise of professionals, allotted the shares and the allotment was successful and the funds were received which was confirmed by the Statutory Auditor including proper utilization.

8.3. Allotment of shares carried out by Trinity was in compliance with Section 67 of the Companies Act, 1956.

8.4. Trinity made application to BSE for obtaining in-principle approval under Clause 24F of the Listing Agreement and after due deliberation and verification, BSE, vide letter dated August 28, 2012, accorded permission for merger. BSE was fully aware of the allotments as the capital built up with detailed summary of the allotments made between January 09, 2012 and March 31, 2012, were provided to BSE.

8.5. The RoC and MCA, after verification, took on record the allotments as full compliance of Section 67 of the Companies Act, 1956. No SCN has been received against these allotments. SEBI now does not have the jurisdiction to decide that these allotments are in contravention of Section 67 of the Companies Act, 1956. The appropriate authority lies with MCA and not SEBI.

8.6. As allotment was in order, no consequential violations follow. The company followed the proposed listing route through scheme of arrangement after obtaining necessary in-principle approval from the stock exchange. The permission of the stock exchange for listing was approved on receipt of the limited review permission from SEBI.

8.7. The company for purpose of scheme of merger by absorption/ amalgamation of Trinity with Omnitech has not acted on basis of in-principle approval given by BSE as at that time SEBI issued two circulars dated Feb 04, 2013 and May 21, 2013. The company, in fact, after completion of share allotment intended to make an application for listing through a scheme of arrangement of amalgamation and made necessary application under Clause 24(f) of the Listing Agreement and submitted all relevant papers. A set of respective

papers were also handed over to SEBI for the purpose of comments from SEBI.

8.8. BSE and SEBI, after proper verification of all papers (as per their checklist), which includes the capital built up papers of both the transferor and transferee company which clearly mentions the sequence of allotments before the approval. These details, shareholders list, swap ratio and all other details were placed before the stock exchange and SEBI while seeking listing permission. The undertaking given by the Director of the Company was duly checked and verified by the stock exchange/ SEBI. BSE accorded their consent to the scheme of arrangement of merger vide letter dated July 22, 2013.

8.9. Since there is no violation of Section 67 of the Companies Act, 1956, at the time of granting permission, SEBI cannot say that there is a violation of other related provisions as mentioned in the SCN.

8.10. The allotment is not a deemed public issue. Listings of these shares were done at stock exchange after obtaining necessary approval from shareholders of the company, stock exchange and Hon'ble High Court through the scheme of arrangements. The Hon'ble High Court also sought necessary objections from Central government/ ROC. If there was any violation of Section 67, MCA could have pointed out the same and might have directed the company for compounding the offence under Section 621A.

8.11. From the record, it appears that none of the allotment and invitation to subscribe the shares ever exceeded more than 50 persons. In the Companies Act, 1956, there was no cap relating to how many allotments can be carried out by the company in any financial year. The Act only specifies that the allotment should be offered to not more than 50 persons and by way of private circulation. SEBI has not provided any record that the offer or invitation to subscribe ever exceeded 50 persons or the invitation was ever opened to public. The subscribers have never complained in this regard and the Company received the subscription money and utilized the same for its commercial business.

8.12. Further, as per Section 55A, all powers relating to all other matters including the matters related to prospectus, statement in lieu of prospectus, return of

allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, Tribunal or RoC, as the case maybe. Hence, SEBI has no jurisdiction to decide whether the allotment is right or wrong. In the matter of Sahara vs. SEBI, the Hon'ble Supreme Court has held that provisions of Section 55A can be administered by SEBI in case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange. SEBI can exercise its jurisdiction over public companies who have issued shares/ debentures to fifty or more, but not complied with the provisions of Section 73(1).

8.13. In case of Trinity, the RoC, Central Government and Liquidator, while according their consent to the scheme of arrangement, never ever stated that the allotment was in violation of Section 67.

8.14. The question relating to what constitutes a public issue is also clarified in the order of Sahara: "…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…" In the matter of Toubro Infotech and Industries Limited vs. SEBI, the Hon'ble SAT has observed that an invitation to subscription made to 50 or more persons ceases to be a private placement.

8.15. The first proviso to Section 67(3) says that if an offer of securities is made to more than 49 persons then, it will not be a private placement and such offer is a public offer. However, second proviso to Section 67(3) provides an exemption from this rule. This proviso states that "Provided further that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in Section 4A of the Companies Act, 1956." Therefore, no entity other than NBFC/ public financial institutions is exempt from the rule of 50.

8.16. The Supreme Court has also observed in the Sahara matter that the companies have elicited public demand for the OFCDs through issue of Information Memorandum under Section 60B of the Companies Act, 1956, which is only meant for public issues. Thus, the Supreme Court has concluded that the actions and intentions on the part of the two companies clearly shows that they wanted to issue securities to the public in the garb of a private placement to bypass the various laws and regulations.

8.17. In the matter of Sahara vs. SEBI, the Hon'ble Supreme Court has held the following:

8.17.1. 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. The emphasis in these sections is on "section of the public".

8.17.2. Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of sub-sections (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.

8.18. Hence, Section 67(3) is 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. Following situations are generally not regarded as an offer made to public:

8.18.1. Offer of securities made to less than 50 persons

8.18.2. Offer made only to the existing shareholders of the company (Rights Issue)

8.18.3. Offer made to a particular addresses and be accepted only persons to whom it is addressed

8.18.4. Offer or invitation being made and it is the domestic concern of those making and receiving the offer

8.19. 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/ debentures are not available for subscription or purchase by persons other than those received the offer or invitation.

8.20. Further, as per Chapter VII of the ICDR Regulations, 2009, Chapter VIII is not applicable in cases where preferential issue of equity shares is made pursuant to a scheme approved by a High Court under Section 391-394 of the Companies Act, 1956. Hence, ICDR provisions are not applicable in this

matter as the Company has followed the laid down procedure in due spirit and the Hon'ble High Court of Bombay has approved the same.

8.21. Applicable Section 67 and related provisions mainly revolve around listing and we have listed all the shares and the referred allotments have also been listed in the stock exchange. The company made an application to the stock exchange for listing of the un-listed shares of Trinity through a scheme of arrangement under Section 391-393 of the Companies Act, 1956. Both stock exchange and SEBI duly verified the papers before granting permissions for listing under Section 55A(2) of the Companies Act, 1956, read with Sections 391-394 of the Companies Act, 1956 and applicable ICDR provisions, to the extent applicable, like pricing. We have not only intended but also listed the shares.

8.22. Once the company after merger dissolved and shares of the Transferor company got listed, then where is the violation and existing promoter need to give any kind of open offer. After shares of Transferor company got listed in the stock exchange, all the members got adequate opportunity to exit through the exchange platform. The shares of the company at the relevant time were very much active and the prices were very much more than that of the subscription prices. Then why there is need for buy back of the shares by the promoters.

8.23. We have complied with Section 73. Application was made to BSE for listing of shares and the allotment was not void and the exchange granted listing of the shares. Hence, there is no question of refund of money. The details of the allotment was available on the MCA site which itself gives every person a constructive notice of information and proper disclosures. The details of capital built up, shareholder list, swap ratio and all other details were placed before the stock exchange and SEBI, while seeking permission for listing.

8.24. No specific charge has been attributed to the Noticee or his/ her role in the entire matter. The SCN is silent as to how allotment and subsequent allotment was prejudicial to the security market or any investor.

8.25. SEBI is referring to Section 394(4)(a) of the Companies Act, 1956, to include duties of every description as part of liabilities transferred from Trinity to Omnitech. SEBI has failed to justify what duties the company, promoter or

director violated.

8.26. Allotment was made because of the personal approach of the shareholders. Seven years after the allotment there is no complaint from the shareholders or stakeholders about the allotment or company dealings. Many shareholders exited by sale of shares in the stock exchange.

8.27. In Companies Act, 2013, it was made clear that in any financial year the number of issues and number of allottees were restricted to 200. Even SEBI has extended amnesty and allowed each and every company who violated allotted of more than 50 person in a single allotment, while each and every allotment of Trinity was less than 50.

8.28. SEBI should direct all those entities who exited from the market to return the funds to the company so that the company may refund the same to the investors. Since the listing is void according to SEBI, they cannot hold the profits with them and it belongs to the company. Because of performance of company or trust in the management, the prices stood shoot up. Hence, it is right of the company to get the profit back to meet the directions.

8.29. SEBI should initiate action against officers of stock exchange, ROC, MCA and SEBI who gave in-principle approval despite knowing that there were alleged violation of Section 67 of the Companies Act, 1956.

8.30. SEBI has not given any reason at the time of hearing why there were inordinate delay in this matter and the matter of 2011-12 they are adjudicating today.

9. The following additional submissions have also been made by the Noticees:

9.1. Mr. Vikrant Kayan has submitted that during 2011-12, he was a Director in Trinity and presently he is a Director and Promoter in TTL.

9.2. Mr. Bhaskar Paul has submitted that he was not a Director in Trinity in 2011-12. He was appointed as a non-executive professional Director in TTL on 24/08/2013 and that during 2011-12, he was not associated with TTL.

9.3. Ms. Girija Banerjee has submitted that she was not a Director in Trinity in 2011-12. She was appointed as a non-executive professional Director in TTL

on 06/05/2016 and that during 2011-12, she was not associated with TTL.

9.4. Mr. Sharad Jhunjhunwala has submitted that he was Director in Trinity in 2011-12. He was appointed as the Independent Director of TTL on 28/06/2012 and resigned on 24/08/2013.

9.5. Mr. Sukumar Das has submitted that he was Director in Trinity in 2011-12. He was a promoter Director in Dunhil Healthcare Private Limited and was appointed as the executive Director of TTL on 28/06/2012 and resigned on 20/05/2015.

9.6. Mr. Akhtar Khan has submitted that he was not a Director in Trinity in 2011-12. He was appointed as a non-executive professional Director in TTL on 13/08/2016 and that during 2011-12, he was not associated with TTL.

9.7. Ms. Shaleni Kayan has submitted that she was a Director and Promoter of TTL post open offer. She was not a Director and Promoter in any of the company (Trinity) during the relevant period. She is the wife of Mr. Vikrant Kayan and as per prevalent practice and being is wife, she is promoter of all the companies (as per definition of relative). She acted under the instruction of her husband without any involvement in day to day activities of TTL and was an ornamental director to the Board of TTL from 28/06/2012 and resigned on 07/08/2014. She was a director in Trinity during 2011-12.

9.8. Mr. Vikash Dubey has submitted that he was not a Director in Trinity in 2011-12. He was appointed as a non-executive professional Director in TTL on 24/08/2013 and that during 2011-12, he was not associated with TTL.

10. In view of the above mentioned submissions, the Noticees have prayed that the SCN dated April 04, 2019, may be set aside.

**Issues for Consideration and Findings:**

11. I have considered the allegations of the SCN, submissions made by the Noticees and the material available on record. Before I finalize the issues for consideration that have arisen, as per the SCN, I note the following details of the Directors/ Promoters of the erstwhile Trinity and the present TTL:

11.1. Details of Directors/ Promoters of the erstwhile Trinity during 2011-12 i.e., during the period the allotment of shares was done to raise money:

**Table**

| Sr. No. | Name of Director/ Promoter | Designation |
|---|---|---|
| 1 | Vikrant Kayan | Promoter Director |
| 2 | Sukumar Das | Promoter Director |
| 3 | Sharad Jhunjhunwala | Director |
| 4 | Tanvi Kayan Privilege Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Promoter |
| 5 | Devansh Kayan Beneficiary Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Promoter |
| 6 | Dunhil Healthcare Private Limited | Promoter |

11.2. Details of the Directors/ Promoters of present TTL (earlier known as Omnitech):

**Table**

| Sr. No. | Name of Director/ Promoter | Designation |
|---|---|---|
| 1 | Vikrant Kayan | Promoter Director |
| 2 | Akhtar Khan | Director |
| 3 | Girija Banerjee | Director |
| 4 | Vikash Dubey | Director |
| 5 | Bhaskar Paul | Director |
| 6 | Tanvi Kayan Privilege Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Promoter |
| 7 | Devansh Kayan Beneficiary Trust (Trustees: Vikrant Kayan and Shaleni Kayan) | Promoter |
| 8 | Dunhil Healthcare Private Limited | Promoter |
| 9 | Shaleni Kayan | Promoter |

12. The following issues arise for consideration. Each question is dealt with separately under different headings.

12.1. ***Issue No. 1:*** *Whether the allotment of equity shares by the erstwhile Trinity in 2011-12 is a deemed public issue?*

12.2. ***Issue No. 2:*** *If finding on Issue No. 1 is affirmative, is there a violation of the provisions of Sections 56(1), 56(3), 60(1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956, and Section 465(2) of the Companies Act, 2013, and Regulations 4(2)(d), 4(2)(e), 5(1), 5(2), 5(5), 5(7), 6(1), 7, 26(1), 26(2), 26(6), 32(1), 36, 37, 46(1), 47(1), 49(1), 57(1), 58(1), 58(2), 63 and 115(2) of the ICDR Regulations, 2009, read with Regulation 301 of the ICDR Regulations, 2018?*

12.3. ***Issue No. 3:*** *If the findings on Issue No. 2 are affirmative, then does Omnitech (presently known as Trinity Tradelink Limited) along with the Directors of erstwhile Trinity bear the liability of refund under Section 73(2) of the Companies Act, 1956?*

12.4. ***Issue No. 4:*** *If the findings on Issue Nos. 2 & 3 are affirmative, then who are liable for appropriate directions for the violations committed?*

12.5. ***Issue No. 5:*** *Whether the subsequent merger of the erstwhile Trinity with Omnitech has any effect on the refund liability under Section 73(2) of the Companies Act, 1956?*

12.6. ***Issue No. 6:*** *Whether appropriate directions, as mentioned in the SCN dated April 04, 2019, should be issued against the Noticees?*

**Issue No. 1:** ***Whether the allotment of equity shares by the erstwhile Trinity in 2011-12 is a deemed public issue?***

13. The Noticees have contended the following:

13.1. The allotment of shares carried out by erstwhile Trinity was in compliance with Section 67 of the Companies Act, 1956. Further, the RoC and MCA, after verification, have taken on record the allotments as full compliance of Section 67 of the Companies Act, 1956, and no SCN has been received against these allotments.

13.2. SEBI does not have the jurisdiction to decide that these allotments are in contravention of Section 67 of the Companies Act, 1956, and the appropriate authority lies with MCA and not SEBI.

13.3. In the Companies Act, 1956, there was no cap relating to how many allotments can be carried out by the company in any financial year. The Act only specifies that the allotment should be offered to not more than 50 persons and by way of private circulation.

13.4. 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. Offer of securities made to less than 50 persons is generally not regarded as an offer made to public.

13.5. In Companies Act, 2013, it was made clear that in any financial year the number of issues and number of allottees were restricted to 200. Even SEBI has extended amnesty and allowed each and every company who violated allotted of more than 50 person in a single allotment, while each and every allotment of erstwhile Trinity was less than 50.

14. I note here that the Noticees have not disputed the fact that equity shares were issued by erstwhile Trinity on a continuous basis in 23 instances (48/49 investors on each instance) between December 2011 and March 2012, and by virtue of the same have raised Rs. 25.99 crores from 978 allottees.

15. At this juncture, reference may be made to Sections 67(1) and 67(3) of the Companies Act, 1956:

*"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary*

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

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

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

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

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

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

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

16. Reference may be made here to the order dated April 28, 2017, of the Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* which lays down that *"In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these*

*provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning".*

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

*"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.*

*The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. … Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation."*

18. Therefore, I note that Section 67(3) of Companies Act, 1956, provides for situations when an offer is not to be considered as an offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

19. In the instant case, I note that erstwhile Trinity has made allotment of equity shares to 978 allottees and has raised Rs. 25.99 crores as a result and the Noticees have not denied this fact. I find that the Noticees have also not claimed that the erstwhile Trinity was a Non-banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that erstwhile Trinity was covered under the second proviso to Section 67(3) of the Companies Act, 1956.

20. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the *"Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged."* In the instant case, the Noticees have not placed any material on record that the allotment made by the erstwhile Trinity was in satisfaction of Section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement.

21. Further, I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956, in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case*, had observed that:

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

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

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

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

*"…Listing of securities depends not upon one's volition, but on statutory mandate…"*

*"…The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot*

*be presumed that the appellant companies could have "intended", what was contrary to the mandatory requirement of law…"*

23. The contention of the Noticees that SEBI has given amnesty to those companies who have allotted shares to more than 50 persons in a single allotment pursuant to the provisions of the new Companies Act, 2013, wherein in any financial year the number of issues and number of allottees has been restricted to 200, cannot be accepted. I note here that the instant case does not fall within this criteria as the erstwhile Trinity has allotted equity securities to 978 allottees in a single financial year.

24. Therefore, in view of the material available on record, I find that the allotment of equity shares by the erstwhile Trinity falls within the first proviso of Section 67(3) of the Companies Act, 1956. Hence, the same is deemed to be a public issue and erstwhile Trinity was mandated to comply with the 'public issue' norms, as prescribed under the Companies Act, 1956.

**Issue No. 2:** ***If finding on Issue No. 1 is affirmative, is there a violation of the provisions of Sections 56(1), 56(3), 60(1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956, and Section 465(2) of the Companies Act, 2013, and Regulations 4(2)(d), 4(2)(e), 5(1), 5(2), 5(5), 5(7), 6(1), 7, 26(1), 26(2), 26(6), 32(1), 36, 37,46(1), 47(1), 49(1), 57(1), 58(1), 58(2), 63 and 115(2) of the ICDR Regulations, 2009, read with Regulation 301 of the ICDR Regulations, 2018?***

25. As held above, the allotment of equity shares by erstwhile Trinity was a public issue of securities. I note here that Section 2(36) of the Companies Act, 1956, read with Section 60(1) thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), 'prospectus' means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the

subscription or purchase of any shares in, or debentures of, a body corporate. Section 60(1) of the Companies Act, 1956, states as below:

*"60. REGISTRATION OF PROSPECTUS*

*(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"*

As the offer of equity shares by the erstwhile Trinity is a deemed public issue of securities, Trinity was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that the Noticees have not submitted any record to indicate that the erstwhile Trinity has registered a prospectus with the RoC, in respect of the offer of its equity shares. I, therefore, find that erstwhile Trinity has not complied with the provisions of Section 60(1) of the Companies Act, 1956.

26. In terms of Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of the Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. These Sections are reproduced as below:

*"56. MATTERS TO BE STATED AND REPORTS TO BE SET OUT IN PROSPECTUS*

*(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.*

*…*

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

*Provided that a copy of the prospectus shall, on a request being made by any person before the closing of the subscription list, be furnished to him*

*Provided [further that this sub-section shall not apply if it is shown that the form of application was issued either –*

*(a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or*

*(b) in relation to shares or debentures which were not offered to the public. If any person acts in contravention of the provisions of this sub-section, he shall be punishable with fine which may extend to fifty thousand rupees."*

27. I note here that TTL, vide reply dated November 02, 2015, has categorically stated that at the time of the issuance of equity shares by the erstwhile Trinity, there was no need of filing any Prospectus/ Red Herring Prospectus/ Statement in lieu of Prospectus/ Information Memorandum with the RoC for the issuance of the equity shares by the erstwhile Trinity, as the number of allottees was less than 50 and accordingly, only application forms along with Information Memorandum were circulated to only those investors who had shown interest to subscribe. Pursuant to personal hearings as well, the Noticees have not produced any record to show that the erstwhile Trinity had issued a Prospectus containing the disclosures mentioned in Section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, erstwhile

Trinity has not complied with Sections 56(1) and 56(3) of the Companies Act, 1956.

28. As mandated under Section 73 of the Companies Act, 1956, every company intending to offer shares to the public for subscription shall also ensure that such securities are listed on a recognized stock exchange. The provisions of Section 73 are reproduced below for the sake of convenience:

*"73. Allotment of shares and debentures to be dealt in on stock exchange.*

*(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 recognised 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.*

*(2) Where the permission has not been applied under sub- section (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 sub- section (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 five thousand rupees."*

29. In this regard, I note that the Noticee has submitted the following:

29.1. The company, after completion of share allotment, intended to make an application for listing through a scheme of arrangement of amalgamation and made necessary application under Clause 24(f) of the Listing Agreement. The company followed the proposed listing route through scheme of arrangement after obtaining necessary in-principle approval from the stock exchange.

29.2. Listings of these shares were done at stock exchange after obtaining necessary approval from shareholders of the company, stock exchange and Hon'ble High Court through the scheme of arrangements. The Hon'ble High Court also sought necessary objections from Central government/ ROC. If there was any violation of Section 67, MCA could have pointed out the same and might have directed the company for compounding the offence under Section 621A.

29.3. The company made an application to the stock exchange for listing of the un-listed shares of Trinity through a scheme of arrangement under Section 391-393 of the Companies Act, 1956. Both stock exchange and SEBI duly verified the papers before granting permissions for listing under Section 55A(2) of the Companies Act, 1956, read with Sections 391-394 of the Companies Act, 1956 and applicable ICDR provisions, to the extent applicable, like pricing. We have not only intended but also listed the shares.

29.4. Hence, the company has complied with provisions of Section 73 and the allotment is not void as the exchange has granted listing of the shares.

30. I note here that the Noticees have claimed compliance with provisions of Section 73 by virtue of amalgamation of erstwhile Trinity, which allotted the equity shares, with Omnitech, a listed entity and pursuant to the said amalgamation, the allotted shares were listed on the stock exchange. The Noticees have submitted that the said scheme of arrangement has been approved by the Hon'ble High Court of

Bombay under Section 391-394 of the Companies Act, 1956, and in-principle approval was obtained from the Bombay Stock Exchange for listing of shares. As per submissions of the Noticee, the application under Clause 24(f) of the Listing Agreement was first made in 2012 to the Bombay Stock Exchange (BSE), which granted its 'No-Objection', vide letter dated August 28, 2012. The Noticees have further submitted that in February 2013 and May 2013, SEBI came out with circulars which prescribed the revised requirements for listed companies desirous of getting their equity shares listed after merger/de-merger/amalgamation etc., and a fresh application was made to BSE, which accorded its consent to the scheme of arrangement vide letter dated July 22, 2013.

31. Section 73(1) states that every company which intends to offer shares/ debentures to the public for subscription by the issue of a prospectus shall, before such issue, apply to one or more recognized stock exchange for permission for the listing of these shares/ debentures. I note here that the obligation to comply with Section 73(1) lay with the erstwhile Trinity. The Noticees have not furnished any documents to show that the erstwhile Trinity had made an application to a recognized stock exchange for listing of the allotted shares. Further, prior to subscription of these shares, a detailed prospectus has to be issued to the public and the application for listing has to be made prior to the offer document, i.e., much before the allotment of the shares and the fact that such an application has been made has to be stated in the prospectus and the shares allotted to public have to be listed on a stock exchange. It has already been held above that the erstwhile Trinity has not issued any such prospectus to the public or made any listing application before issuing the shares.

32. The intent of Section 73 is to ensure that public who have been allotted the shares by the company are provided with an opportunity to trade in the shares of the company in which they have invested and if permission to list such securities is denied then the funds so raised have to returned to the public with interest. In a nutshell, the purpose and intent of Section 73 is to protect the interests of investors who are subscribing to an issue of shares by a body corporate. The prospectus so issued in this regard should contain details, such as, capital structure of the company, terms and particulars of the present issue, terms of payment, rights of

the instrument holders, tax benefits, if any, objectives of the issue, details of the project, etc., and it is meant to ensure that the public, which intends to subscribe to the shares/ debentures, are able to take an informed decision regarding their investment.

33. In the instant case, the shares of the erstwhile Trinity were never listed on the stock exchange. Instead the erstwhile Trinity has amalgamated itself with a listed entity, Omnitech, and by virtue of the same, the applicants in the deemed public issue of erstwhile Trinity became shareholders in Omnitech and these shares got listed on the stock exchange. I note here that Section 73 does not provide for such a mechanism, wherein the body corporate that has issued securities can merge itself with a listed entity and then list the allotted shares. I note that the intent of the Noticees in entering into a scheme of arrangement was to circumvent the process envisaged under Section 73 and to avoid the disclosures required to be made when filing a prospectus and applying to the stock exchanges for listing permission. If such a scheme of arrangement is considered as a valid form of listing for compliance with provisions of Section 73, then the entire purpose and intent of Section 73, which is to safeguard investor interests, would be defeated.

34. In view of the above, I hold that the erstwhile Trinity has not complied with Section 73(1) of the Companies Act, 1956. Since no application seeking permission for listing of the securities has been made to any stock exchange, the question of grant/ denial or appeal against the denial of permission does not arise. As such in terms of Section 73(2) and 73(3), the erstwhile Trinity and its every director, who is an officer in default, have incurred a liability to repay jointly and severally the money raised through the share subscription with applicable interest rate and the funds so raised were also required to be kept in a separate bank account maintained with a Scheduled Bank. I note that no such repayment has been made in discharge of their liability so far and no record has been provided to show that the money raised through the issuance of securities was kept in a separate bank account.

35. I note that SEBI has framed the ICDR Regulations and all public issues are required to comply with these regulations. The ICDR Regulations operate as safeguards for the investors who subscribed or intend to subscribe in the public issues of securities. Further, I also note that the allotment of equity shares was made in 2011-12 during which the ICDR Regulations, 2009, were in force. I note here that the erstwhile Trinity falls within the definition of "issuer" as per Regulation 2(r) of the ICDR Regulations, 2009. Further, the equity shares issued by the erstwhile Trinity also fall within the definition of "specified securities" as per Regulation 2(zj) of the ICDR Regulations, 2009.

36. I note that the Noticees have not provided any record/ document to show that the erstwhile Trinity has complied with the above mentioned provisions of the ICDR Regulations, 2009. However, the Noticee has submitted that as per Chapter VII of the ICDR Regulations, 2009, Chapter VIII is not applicable in cases where preferential issue of equity shares is made pursuant to a scheme approved by a High Court under Section 391-394 of the Companies Act, 1956. Hence, ICDR provisions are not applicable in this matter.

37. As per the ICDR Regulations, 2009, Regulation 2(z) defines "preferential issue" as:

*(z) "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;*

38. I note here that the offering of equity shares by the erstwhile Trinity does not fall within the definition of "preferential issue", as mentioned above. It has already been held to be a deemed public issue and as such the erstwhile Trinity was also required to comply with the following Regulations of the ICDR Regulations, 2009:

38.1. Regulation 4(2): No issuer shall make a public issue of equity securities:

38.1.1. 4(2)(d): Unless it has made an application to one or more recognised stock exchanges for listing of specified securities on such stock exchanges and has chosen one of them as the designated stock exchange.

38.1.2. 4(2)(e): Unless it has entered into an agreement with a depository for dematerialization of specified securities already issued or proposed to be issued.

38.2. Regulations 5(1) & (2): The issuer shall appoint one or more merchant bankers, including one lead merchant banker and shall appoint other intermediaries to carry out the obligations related to the public issue. These intermediaries shall be those which are registered with the Board.

38.3. Regulation 5(5): The issuer shall enter into an agreement with the lead merchant banker and with other intermediaries in the specified format.

38.4. Regulation 5(7): The issuer shall appoint a registrar which has connectivity with all the depositories.

38.5. Regulation 6(1): No issuer shall make a public issue unless a draft offer document has been filed with SEBI through the lead merchant banker, at least thirty days prior to registering the prospectus, red herring prospectus or shelf prospectus with the RoC or filing the letter of offer with the designated stock exchange, as the case may be.

38.6. Regulation 7: The issuer to deposit, before the opening of subscription list, a certain amount with the stock exchange(s) on a continuous basis.

38.7. Regulations 26(1) & (2): The issuer may make an initial public offer if certain conditions pertaining to net tangible assets, average pre-tax operating profit, networth, etc., are satisfied. If these conditions are not satisfied, then the issuer may make an initial public offer through the book building process and the issuer undertakes to allot atleast 75% of the issue size to qualified institutional investors and if this minimum allotment is not met, then the issuer will refund the full subscription money.

38.8. Regulation 32(1): There shall be a minimum promoters' contribution in the public issue.

38.9. Regulation 36: In a public issue, the specified securities held by promoters

shall be locked-in for a certain period.

38.10. Regulation 37: In case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year.

38.11. Regulation 46(1): A public issue shall be kept open for at least three working days but not more than ten working days including the days for which the issue is kept open in case of revision in price band.

38.12. Regulation 47(1): Subject to the provisions of Section 66 of the Companies Act, 1956, the issuer shall, after registering the RHP/ prospectus with the RoC, make a pre-issue advertisement in one English/ Hindi national daily newspaper with wide circulation and one regional language newspaper with wide circulation at the place where the registered office of the issuer is situated.

38.13. Regulation 49(1): The minimum application size, in terms of number of specified securities, shall be stipulated in the offer document by the issuer.

38.14. Regulation 57(1): The offer document shall contain all true and adequate material disclosures so as to enable the applicants to take an informed investment decision.

38.15. Regulations 58(1) & (2): The abridged prospectus and abridged letter of offer shall contain the mandatory disclosures as specified in the Schedule to the ICDR Regulations, 2009.

38.16. Regulation 63: Appointment of a compliance officer by the issuer.

39. In view of the above findings, I am of the view that the erstwhile Trinity engaged in fund mobilizing activity from the public, through the offer of equity shares, and has contravened the provisions of Sections 56(1), 56(3), 60(1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956, and Section 465(2) of the Companies Act, 2013, and with the provisions of Regulations 4(2)(d), 4(2)(e), 5(1), 5(2), 5(5), 5(7), 6(1), 7, 26(1), 26(2), 32(1), 36, 37,46(1), 47(1), 49(1), 57(1), 58(1), 58(2), 63 and 115(2) of the ICDR Regulations, 2009, read with Regulation 301 of the ICDR Regulations, 2018.

**Issue No. 3:** ***If the findings on Issue No. 2 are affirmative, then does Omnitech Petroleum Limited (presently known as Trinity Tradelink Limited) along with the Directors of erstwhile Trinity bear the liability of refund under Section 73(2) of the Companies Act, 1956?***

40. As already established above, the allotment of equity shares by the erstwhile Trinity is a deemed public issue. Further, it has also been established that the erstwhile Trinity and its every director, who is an officer in default, have incurred a liability to make refund under Section 73(2) of the Companies Act, 1956. However, I note here that the erstwhile Trinity participated in a scheme of arrangement wherein it got amalgamated with a listed entity, namely, Omnitech. In view of this merger, I take note of Clauses 6.1(a) and (c) of the Scheme of Arrangement between Omnitech and the erstwhile Trinity which state as below:

***6.1. MERGER***

***a. TRANSFER OF UNDERTAKING***

*The Undertaking of the Transferor Company shall be transferred to and vested in or be deemed to be transferred to and vested in the Transferee Company in the following manner:*

*i) With effect from the Appointed Date, all the Undertaking of the Transferor Company comprising all assets and liabilities of whatsoever nature and wheresoever situated, shall, under the provisions of Section 391 read with Section 394 and all other applicable provisions, if any, of the Act, without any further act or deed (save as provided in Subclauses (II) and (III) below), be transferred to and vested in and/ or be deemed to be transferred to and vested in the Transferee Company so as to become as from the Appointed Date the assets and liabilities of the Transferee Company and to vest in the Transferee Company all the rights, title, interest or obligations of the Transferor Company therein.*

*All the movable assets including cash in hand, if any, of the Transferor Company, capable of passing by manual delivery or by endorsement and delivery, shall be*

*so delivered or endorsed and delivered, as the case may be, to the Transferee Company.*

*… …*

*iv) With effect from the Appointed Date, all debts, liabilities, duties and obligations of the Transferor Company shall also, under the provisions of Section 391 read with Section 394 of the Act, without any further act or deed, be transferred to or be deemed to be transferred to the Transferee Company so as to become as from the Appointed Date the debts, liabilities, duties and obligations of the Transferee Company and it shall not be necessary to obtain the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such debts, liabilities, duties and obligations have arisen, in order to give effect to the provisions of this sub-clause.*

41. From the above clauses, I note that all the liabilities of the Transferor Company i.e., the erstwhile Trinity stand transferred to the Transferee Company i.e., Omnitech. Section 394(4)(a) of the Companies Act, 1956, has clarified that "liabilities" includes duties of every description. The Noticees have contended that SEBI has failed to justify what duties the company, promoter or director have violated. As already established above, the erstwhile Trinity and its every director, who is an officer in default, have failed in their statutory duties under Section 73 of the Companies Act, 1956, to ensure that the funds raised through the issuance of equity shares were refunded to the investors as no application was made to list those shares on a recognized stock exchange. Hence, this liability of the erstwhile Trinity, which is a statutory duty and is covered under Section 394(4)(a), has now been transferred to Omnitech.

42. In view of the clauses of the Scheme of Arrangement, this liability of the erstwhile Trinity stands transferred to Omnitech; hence, Omnitech (presently known as Trinity Tradelink Limited) along with the every director of the erstwhile Trinity, who is an officer in default, have incurred a liability of refund under Section 73(2) of the Companies Act, 1956.

**Issue No. 4:** ***If the findings on Issue Nos. 2 & 3 are affirmative, then who are liable for appropriate directions for the violations committed?***

43. As already held above, Omnitech along with the every director of the erstwhile Trinity, who is an officer in default, bear the liability of refund under Section 73(2) of the Companies Act, 1956.

44. With respect to the directorship in erstwhile Trinity, I note the following:

    44.1. Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala have submitted that they were directors in the erstwhile Trinity during 2011-12.

    44.2. Since the repayment liability of the erstwhile Trinity has now been transferred to Omnitech after the merger and as this liability is still continuing, the repayment liability under Section 73(2), since the merger, is required to be fulfilled by Omnitech (now known as TTL).

45. Sections 56(1) and 56(3) read with Section 56(4) of the Companies Act, 1956, imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60(1) of the Companies Act, 1956, is on the company and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, the erstwhile Trinity and its directors at the time of allotment of equity shares, namely Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala, are held liable for the violations of Sections 56(1), 56(3) and 60(1) of the Companies Act, 1956. Consequently, they are also liable for the violations of the provisions of the ICDR Regulations, as mentioned in paragraph 39 above.

46. As far as the liability for non-compliance of Section 73 of Companies Act, 1956, is concerned, as stipulated in Section 73(2) of the said Act, the company and every director of the company who is an *officer in default* shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay

interest, I note that as per Section 73(2) of the Companies Act, 1956, the company and every director of the company who is an *officer in default* is jointly and severally liable, to repay all the money with interest at prescribed rate.

47. With regard to the interest rate to be charged, I note that Rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, states *"The rates of interest, for the purposes of Sub-sections (2) and (2A) of Section 73, shall be 15 per cent per annum."* Hence, the money so collected is liable to refunded with interest to be charged at 15 percent p.a.

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

49. I further note that Hon'ble Securities Appellate Tribunal (SAT) vide order dated February 14, 2019, in the mater of *Pritha Bag Vs. SEBI* stated that:

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

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

50. From the MCA records, I note the following

50.1. The erstwhile Trinity was incorporated on May 01, 2007, as a private limited company with CIN U51909WB2007PTC115424. Form 20B i.e., 'Form for filing annual return by a company having a share capital with the Registrar', has been uploaded for the year ending March 31, 2008, wherein it is mentioned that Mr. Vikrant Kayan and Mr. Sukumar Das are Directors and the document has been digitally signed by Mr. Vikrant Kayan with his designation as Director.

50.2. The company was converted to a public company, Trinity Tradelink Limited, on December 13, 2011 (CIN U51909MH2007PLC243684).

50.3. Form 20B for the erstwhile Trinity for the financial year ended March 31, 2013, mentions the following details of the Directors:

| Sr. No. | Name of Director | Date of Appointment | Designation | Whether signed Annual Return |
|---|---|---|---|---|
| 1 | Vikrant Kayan | 01/05/2007 | Managing Director | Yes |
| 2 | Sukumar Das | 01/05/2007 | Director | No |

| Sr. No. | Name of Director | Date of Appointment | Designation | Whether signed Annual Return |
|---|---|---|---|---|
| 3 | Shaleni Kayan | 22/08/2013 | Whole-Time Director | Yes |
| 4 | Sharad Jhunjhunwala | 13/12/2011 | Director | No (ceased as Director on 22/08/2013 |

50.4. This Form has also been digitally signed by Mr. Vikrant Kayan on October 26, 2013. However, an extract of the minutes of the meeting of the Board of Directors dated August 26, 2013, is also available on the MCA website wherein it has been resolved that Mr. Vikrant Kayan has been appointed as the 'Managing Director' for five years commencing from August 26, 2013. Hence, I note that Mr. Vikrant Kayan has been appointed as the Managing Director of the erstwhile Trinity from August 26, 2013, onwards i.e., after the deemed public issue has occurred. It is further noted that though Form 20B shows him as Managing director from 01/05/2007, the fact that it has been signed by him on October 26, 2013, after he become a Managing Director, indicates that as on the date of the signing of the Form 20B he was Managing Director and not on the date of 01/05/2007, as per other evidences discussed in the forthcoming paragraphs.

51. On perusal of the Board's Report (Director's Report) of the erstwhile Trinity for the financial year ending March 31, 2012 (the financial year in which the deemed public issue was carried out), I find that it has been signed by Mr. Vikrant Kayan and Mr. Sharad Jhunjhunwala, in their capacity as Directors. I also find that the Balance Sheet, as on March 31, 2012, and the Profit and Loss statement for the year ending March 31, 2012, has been signed by Mr. Vikrant Kayan and Mr. Sukumar Das, in their capacity as Directors. Further, as part of the document titled 'Significant Accounting Policies and Notes on Accounts' to the financial statements for the year 2011-12, it has been stated under the part pertaining to 'Related Party Disclosures' that Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala are Key Management Personnel with regards to their relationship with the erstwhile Trinity. Further, from the documents uploaded on the MCA website, I note that for the Board's Report for the year 2012-13 has been signed by Mr. Vikrant Kayan and Mr. Sukumar Das, in their capacity as Directors, while all three i.e., Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad

Jhunjhunwala, have been listed as Directors for the year 2012-13. Further, the Balance Sheet for year 2012-13 has been signed by Mr. Vikrant Kayan and Mr. Sharad Jhunjhunwala, in their capacity as Directors.

52. As held before, the erstwhile Trinity made allotment of equity shares between December 13, 2011 to March 28, 2012, i.e., during financial year 2011-12. Thus, from the observations made above, there is no material on record to show that during the period 2011-12, the erstwhile Trinity had appointed any Director as the Managing Director. Hence, in view of the reasoning given above, I conclude that Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala are together the 'officers in default' under Clause 5(a) of Section 5 of the Companies Act, 1956. Therefore, Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala, jointly and severally, have incurred the liability to make refund along with interest at the rate of 15% per annum, under Section 73(2) of the Companies Act, 1956, for the non-compliance of the above mentioned provisions.

53. A person cannot assume the role of a director in a company in a casual manner. The position of a 'director' in a public company/ listed company comes along with responsibilities and compliances under law associated with such position, which have to be fulfilled by such director or face the consequences for any violation or default thereof. As seen from the Form 20B mentioned above, Ms. Shaleni Kayan was appointed as the whole-time director in the erstwhile Trinity after the deemed public issue took place. Her submission that that she has acted under the instructions of her husband cannot be accepted as a person cannot assume the role of a director in a casual manner. Hence, she is also responsible for all the deeds/ acts of the erstwhile Trinity during the period of her directorship and was obligated to ensure refund of the money collected by the erstwhile Trinity to the investors as per the provisions of Section 73 of Companies Act, 1956. In view of the failure to discharge the said liability of ensuring refund, she is liable for issuance of appropriate directions against them.

54. As regards the promoters of the erstwhile Trinity viz., Dunhil Healthcare Pvt. Ltd., Devansh Kayan Beneficiary Trust and Tanvi Kayan Privilege Trust, it cannot be said that they were unaware of the issuance of the equity shares. Therefore, the

promoters were aware of the deemed public issue of equity shares in the instant case. The public interest requires that the persons who had knowledge/ consent/ connivance in the act/ omission which constitutes violation of the provisions of the deemed public issue be made accountable to the investors. Therefore, they are liable for issuance of appropriate directions.

55. It is noted that the liability to repay is a statutory liability under Section 73(2) of the Companies Act, 1956, which mandates the repayment to be made forthwith. The present order only enforces the pre-existing liability of the company and other 'officers in default' to repay along with interest. It is an additional liability of every director on behalf of the company to ensure that the company complies with the obligation under Section 73(2) of the Companies Act, 1956, forthwith. One may argue that the liability of the company is crystalized only by virtue of an order by SEBI, therefore, till then there is no liability on the company and therefore, on the directors. If such argument is accepted, all the legal obligations and compliance requirements pose the risk of being not discharged or postponed on the pretext of non-crystallization. Also, it would make the compliance of regulatory/ statutory requirement imposed on the companies bereft of clarity and incentivize delay in compliance of statutory obligation by the companies until such non-compliance is enforced through proceedings such as this. If the Board of Directors of a company cannot be considered to be liable to ensure the legal obligations cast upon a company, there would be no human instrumentality for discharge of such legal obligations on behalf of the company.

56. Considering the fact that the erstwhile Trinity, which made the allotment of equity shares, no longer exists as it has merged with Omnitech, the entity which remains post the merger i.e., Omnitech (now known as Trinity Tradelink Limited) has not complied with its obligation to repay the amounts collected in violation of deemed public issue norms. As the said liability is continuing, I find that the discharge of this liability can only be ensured by the present directors of TTL.

57. The Noticees, namely, Mr. Bhaskar Paul, Mr. Vikash Dubey, Ms. Girija Banerjee and Mr. Akhtar Khan have submitted the following details regarding their tenures as directors in TTL:

57.1. Mr. Bhaskar Paul has submitted that he was appointed on 24/08/2013 as a non-executive professional Director and was not associated with the company during 2011-12.

57.2. Mr. Vikash Dubey has submitted that he was appointed on 24/08/2013 as a non-executive professional Director and was not associated with the company during 2011-12.

57.3. Ms. Girija Banerjee has submitted that she was appointed on 06/05/2016 as a non-executive professional Director and was not associated with the company during 2011-12.

57.4. Mr. Akhtar Khan has submitted that he was appointed on 13/08/2016 as a non-executive professional Director and was not associated with the company during 2011-12.

58. From the records available on the BSE and MCA website for TTL, I note the following:

58.1. As per disclosure made on the BSE website, Mr. Vikrant Kayan has been designated as the 'Executive Director, Chairperson' of TTL.

58.2. As per disclosure made on the BSE website, Mr. Bhaskar Paul, Mr. Vikash Dubey and Ms. Girija Banerjee are presently 'Non-Executive Independent Director, Employee Director' for TTL. Their initial dates of appointments are 27/09/2014, 27/09/2014 and 06/05/2016, respectively.

58.3. As per filings made on the MCA website, Mr. Akhtar Khan was appointed as an 'Additional Non-Executive Director' with effect from August 13, 2016, in TTL.

59. I note that Mr. Bhaskar Paul and Mr. Vikash Dubey, as per their own submissions, were associated with TTL prior to the merger with the erstwhile Trinity. However, from MCA records, I note that they have been appointed as Independent Directors in TTL w.e.f. September 27, 2014. i.e., after the merger of Omnitech Petroleum Limited with the erstwhile Trinity and there is no material on record to show that

they were associated with the erstwhile Trinity during the deemed public issue. Hence, I do not find any violations on their part and as such, they are not liable for any action.

60. As regards Ms. Girija Banerjee, as per the filings made with the MCA website, she has been appointed as an Additional, Non-Executive Independent Director in TTL w.e.f. May 06, 2016, i.e., almost two years after the merger of Omnitech Petroleum Limited with the erstwhile Trinity and there is no material on record to show that she was associated with the erstwhile Trinity during the deemed public issue. Hence, I do not find any violations on her part and as such, she is not liable for any action.

61. As regards Mr. Akhtar Khan, as per the filings made with the MCA website, he has been appointed as an Additional Non-Executive Director of TTL w.e.f. August 13, 2016, i.e., almost two years after the merger of Omnitech Petroleum Limited with the erstwhile Trinity and there is no material on record to show that he was associated with the erstwhile Trinity during the deemed public issue. Hence, I do not find any violations on his part and as such, he is not liable for any action.

***<u>Issue No. 5:</u> Whether the subsequent merger of the erstwhile Trinity with Omnitech has any effect on the refund liability under Section 73(2) of the Companies Act, 1956?***

62. Pursuant to the merger of the erstwhile Trinity with Omnitech Petroleum Limited (now known as TTL), the persons who were allotted shares in the deemed public issue of erstwhile Trinity have now become shareholders in TTL.

63. I note that 2,60,10,805 equity shares of Rs. 10/- each were issued pursuant to the Scheme of Amalgamation. As per BSE Notice No. 20140206-17 dated February 06, 2014, these new securities were listed and permitted for trading on BSE from February 07, 2014. I also note that vide BSE Notice No. 20180411-53 dated April 11, 2018, trading in the securities of TTL was suspended for non-compliance with

provisions of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Further, vide BSE Notice No. 20181106-31 dated November 06, 2018, the facility of trading in the shares of TTL on Trade for Trade basis in Z Group was also discontinued w.e.f. November 20, 2018. As per details available on the BSE website, trading in the shares of TTL is still suspended.

64. From the details available from BSE website, for the period February 07, 2014, till November 20, 2018, I observe the following:

64.1. From February 10, 2014, till May 22, 2014, the highest price of the share was in the range between Rs. 1054.4 to Rs. 880.1. On February 10, 2014, the scrip has opened at Rs. 919.2.

64.2. Pursuant to a stock split from face value of Rs. 10/- to face value of Rs. 1/- from May 23, 2014, till July 13, 2015, the highest price of the share was in the range between Rs. 109.8 to Rs. 10.1.

64.3. The price of the share has fallen since July 13, 2015, and presently the price is 49 paise per share.

65. I note that the original entities were allotted equity shares in the erstwhile Trinity at Rs. 10/- for each share. After the merger with Omnitech, these shares were listed on the stock exchange from February 07, 2014, and the original allottees in the erstwhile Trinity had the opportunity to exit the shares at a profit vis-à-vis the price at which they had acquired these shares. If these shareholders had made an exit between February 10, 2014, and May 22, 2014, the profit that they would have made would be greater than the subscription money plus the applicable interest rate. From May 23, 2014 onwards, atleast for a year, these shareholders could still have exited at a profit.

66. The effect of ensuring compliance with the provisions of Section 73(2) of the Companies Act, 1956, is to ensure that the subscribers to the deemed public issue of the erstwhile Trinity are repaid the subscription money with applicable interest rate in case of issuer company is not giving exit opportunity to the shareholders

by way of compulsory listing of shares issued in deemed public issue in stock exchange. At the same time, the capital that was raised by way of the deemed public issue is now with TTL by virtue of the merger and TTL cannot be permitted to retain the same. The method adopted to provide a way for these shareholders to list i.e., listing through merger with a listed company, is not in accordance with the provisions of Section 73 of the Companies Act, 1956; however, as already mentioned above, the shareholders in the deemed public issue have been provided the opportunity to exit and may have done so at a profit more than the subscription price plus interest. I find that these shareholders have not been caused any substantial prejudice due to the non-compliance with the provisions of Section 73 of the Companies Act, 1956.

67. Hence, given the facts and circumstances of the case and considering that the shares were listed pursuant to merger and that the shareholders had atleast 18 months to exit at a profit, I am of the view that the investors in the deemed public issue of the erstwhile Trinity have not been substantially prejudiced due to the non-compliance with the provisions of Section 73 of the Companies Act, 1956. Hence, the directions relating to buy-back of securities and providing exit option to investors may not be relevant now.

68. Further, in view of the violations committed by the erstwhile Trinity, its Directors and promoters, to safeguard the interest of the investors who had subscribed to the equity shares issued by it, to safeguard their investments, and to further ensure orderly development of securities market, it becomes necessary for SEBI to issue appropriate directions against TTL and the other Noticees.

**Issue No. 6:** ***Whether appropriate directions, as mentioned in the SCN dated April 04, 2019, should be issued against the Noticees?***

69. I note here the contention of the Noticees that the scheme of amalgamation was duly approved by the Hon'ble High Court of Bombay and that BSE and SEBI, after proper verification of all papers, which includes the capital built up papers of both the transferor and transferee company, which clearly mentions the sequence of

allotments before the approval. These details, shareholders list, swap ratio and all other details were placed before the stock exchange and SEBI while seeking listing permission. The undertaking given by the Director of the Company was duly checked and verified by the stock exchange/ SEBI. BSE accorded their consent to the scheme of arrangement of merger vide letter dated July 22, 2013.

70. I find that even if these submissions were to be considered, the same cannot form the basis for not taking action by SEBI in respect of an issue of equity shares by the erstwhile Trinity, which is otherwise in violation of public issue norms. In this regard, it would be appropriate to refer and rely on the judgment of Hon'ble Supreme court of India, while summarizing the various pronouncement made by it previously on the promissory estoppel held in M/S Sharma Transport vs. Government of A.P. & dated December 3, 2001.

*"It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make. Doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the Government or public authority for having regard to the facts as they have transpired that it would be inequitable to hold the Government or public authority to the promise or representation made by it."*

71. The law laid down above would squarely applicable to the facts of this case even assuming that there was a representation by the public authority. In view of this position of law, I am not inclined to accept the submissions of the Noticees that MCA or any other Authority had never raised any question on the issuance of equity shares by the erstwhile Trinity and SEBI had knowledge of the same and, which now can't be questioned by SEBI.

72. The Noticees have also submitted that SEBI and BSE had knowledge about the details of capital built up, shareholder list, swap ratio and all other details, which were placed before the stock exchange and SEBI, while seeking permission for listing, which now can't be questioned by SEBI. Over here, it would be appropriate

to deal with the doctrine of Acquiescence. Hon'ble Supreme Court of India in the matter of *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.,* decided on 05/12/2002, described the doctrine of Acquiescence as follows:

*"… The doctrine of Acquiescence may be stated thus: "If a person having right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." (Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846). this is the proper sense of the term acquiescence, "and in that sense may be defined as acquiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." (De Bussche v. Alt. L.R. 8 Ch. D. 286 (314). Acquiescence is not a question of fact but of legal inference from facts found (Lata Beni Ram v. Kundan Lall. L.R. 261 IndAp 58 (1899).*
*…"*

73. It is noted from the records that the Noticees have not submitted any material/ documents based on which a legal inference could be drawn that the Noticees were given an impression by SEBI that SEBI has no jurisdiction on the issuance of the equity shares by the erstwhile Trinity or that the issuance of the equity shares has been approved by SEBI.

74. There is yet another reason why the submission of the Noticees is not acceptable. It is noted from *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.,* that acquiescence, is no more than an instance of the law of estoppel by words or conduct. It has been held in a catena of cases by Hon'ble Supreme Court of India viz., *Municipal Corpn. of Greater Bombay v. Hakimwadi Tenants' Assn., decided on 24 November, 1987, Tata Chemicals Ltd.* Vs. *Commissioner of Customs (Preventive)* decided on 14/05/2015, *Air India* Vs. *Nergesh Meerza*, AIR 1981 SC 1829 that there can be no estoppel against law. There can be no estoppel against a statute. Therefore, the plea of acquiescence/ estoppel would not hold good against the statutory provisions as may be applicable in this present matter.

75. It is also pertinent to mention the decisions of Hon'ble Supreme Court in the matter of Maharshi Dayanand University vs. Surjeet Kaur (2010) 11 SCC PG.159, wherein the Hon'ble Supreme Court reiterated the established legal position that *"there can be no estoppel/promissory estoppel against the legislature in exercise of the legislative function nor can the Government or a Public authority be debarred from changing its stand in a given situation. Thus, the question of estoppel has to be determined on the basis of facts in each case."*

76. Similarly, in the matter of M.I. Builders P. Ltd. vs. Radhey Shyam Sahu and Others (1999)6 SCC 464), the Hon'ble Supreme Court observed in paragraph 66 of the judgment that *"the Corporation is a continuing body and it may be estopped in a given case, but when it finds that an action was contrary to law, no estoppel would act as an impediment in the way of the Corporation to change its stand"*. Applying the ratio of M.I. Builders P. Ltd. and Maharshi Dayanand University(Supra) Hon'ble SAT in the matter of Pancard Clubs Vs. SEBI (Appeal No. 254 of 2014) observed *"SEBI may not be bound by estoppel in a given case to change its stand* due to changed circumstances or change in policy or law".

77. I note here that the Noticees have also contended that SEBI has inordinately delayed in adjudicating a matter which pertains to 2011-12. In this regard, I note that the complaint in the matter of rigging of the share price of TTL was received on August 20, 2014. The extant proceedings have emanated out of this complaint. In this context, it is noteworthy that as a generally accepted principle regarding enforcement action by any enforcement authority, investigation/ inquiry against any subject entity and the consequent action in pursuance of the same should be completed in a reasonable time frame, which would serve the objective of balancing the rights of the persons subjected to enforcement action and the investors whose rights are being protected though enforcement proceedings. However, it is equally true that the time consumed in investigation or consequent enforcement actions can be caused due to multiplicity of factors, such as, the violation coming to the notice of the enforcement authority on a later date, the requisite data/ material not being readily available, non-cooperation by the subject entities, pendency of connected matters before other courts / authorities, etc. In the present case, it is not out of relevance to mention that that delay was caused on account of the reason that the violation came to SEBI's notice at a much later

date. Thus, in order to address the contention raised by the Noticees, it would be appropriate to consider the facts and circumstances of the case in light of the legal principles in this regard.

78. I find that the factum of delay in initiation of enforcement proceedings, in itself, cannot be a ground for withdrawal of proceedings. Only in cases where the Noticees are adversely affected, can such a submission be considered. In this context, I find it relevant to refer to the order passed by Hon'ble SAT in the case of *Metex Marketing Pvt. Ltd. vs. SEBI(order dated June 4, 2019) wherein Hon'ble SAT held that: "This Tribunal has consistently held that in the absence of any specific provision in the SEBI Act or in the Takeover Regulations, the fact that there was a delay on the part of SEBI in initiating proceedings for violation of any provision of the Act cannot be a ground to quash the penalty imposed for such violation."* In the instant case, I find that the initiation of enforcement proceedings have not, in any manner, adversely affected any of the Noticees.

79. However, without prejudice to the above, it is noted that depending on the facts and circumstances of each case, time consumed in initiation and completion of proceedings can be considered as a mitigating factor for suitably modifying the directions to be issued against the Noticees, which in effect will cater to the objective of balancing the rights of the Noticee subjected to enforcement action vis-à-vis the interest of the investors.

80. Before I proceed to determine the nature of directions to be issued, a summary of the violations is as below:

80.1. The erstwhile Trinity, Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala are in violation of provisions of Sections 56(1), 56(3), 60(1) and 73, read with Section 67 of the Companies Act, 1956, and Section 465(2) of the Companies Act, 2013, and with the provisions of Regulations 4(2)(d), 4(2)(e), 5(1), 5(2), 5(5), 5(7), 6(1), 7, 26(1), 26(2), 32(1), 36, 37,46(1), 47(1), 49(1), 57(1), 58(1), 58(2), 63 and 115(2) of the ICDR Regulations, 2009, read with Regulation 301 of the ICDR Regulations,

2018.

80.2. The liability of refund incurred by the erstwhile Trinity has been passed on to TTL by virtue of amalgamation between erstwhile Trinity and Omnitech.

80.3. Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala are the 'Officers in default' under Clause 5(a) of Section 5 of the Companies Act, 1956, and as such, they have incurred the liability of refund, jointly and severally, along with TTL.

80.4. Ms. Shaleni Kayan has failed in her obligation to ensure refund of the money collected by the erstwhile Trinity to the investors as per the provisions of Section 73 of Companies Act, 1956.

80.5. Dunhil Healthcare Pvt. Ltd., Devansh Kayan Beneficiary Trust and Tanvi Kayan Privilege Trust, promoters of the erstwhile Trinity, responsible for the deemed public issue of equity shares in violation of applicable norms.

81. As already mentioned in Issue No. 5 above, directions related to buy-back and providing exit option to shareholders may not be relevant considering the facts and circumstances of this particular case. The ends of justice may be better achieved by directing SEBI to initiate Adjudication proceedings against Trinity Tradelink Limited, Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala for their violations of the provisions of the ICDR Regulations.

## ***ORDER***

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

82.1. Trinity Tradelink Limited (PAN: AAFCS8117C), Mr. Vikrant Kayan (PAN: AFJPK8437M), Mr. Sukumar Das (PAN: AEJPD0435R), Mr. Sharad Jhunjhunwala (PAN: ACVPJ0763C), Ms. Shaleni Kayan (PAN:

AFZPK1051R), Dunhil Healthcare Private Limited (PAN: AADCD3324Q), Devansh Kayan Beneficiary Trust (PAN: AABTD6118R) and Tanvi Kayan Privilege Trust (PAN: AACTT0064B) are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of three (03) years from the date of this Order.

82.2. Mr. Vikrant Kayan, Mr. Sukumar Das, Mr. Sharad Jhunjhunwala and Ms. Shaleni Kayan are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI till the expiry of three (03) years from the date of this Order.

82.3. SEBI shall initiate Adjudication proceedings against Trinity Tradelink Limited, Mr. Vikrant Kayan, Mr. Sukumar Das and Mr. Sharad Jhunjhunwala for the violations of the provisions mentioned in this Order.

82.4. The Show Cause Notice dated April 04, 2019, against Ms. Girija Banerjee, Mr. Akhtar Khan, Mr. Bhaskar Paul and Mr. Vikash Dubey is disposed of without any directions.

82.5. Needless to say, in view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of the Noticees mentioned in paragraph 82.1 above shall remain frozen.

83. It is made clear that if Trinity Tradelink Limited, Mr. Vikrant Kayan, Mr. Sukumar Das, Mr. Sharad Jhunjhunwala, Ms. Shaleni Kayan, Dunhil Healthcare Private Limited, Devansh Kayan Beneficiary Trust and Tanvi Kayan Privilege Trust have any open positions in any exchange traded derivative contracts, they can close

out/ square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. It is also clarified that the Trinity Tradelink Limited, Mr. Vikrant Kayan, Mr. Sukumar Das, Mr. Sharad Jhunjhunwala, Ms. Shaleni Kayan, Dunhil Healthcare Private Limited, Devansh Kayan Beneficiary Trust and Tanvi Kayan Privilege Trust can settle the pay-in and pay-out obligations in respect of transactions, if any, which have taken place before the close of trading on March 19, 2020.

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

85. Copy of this Order shall be sent to all the Noticees.

86. Copy of this Order shall be forwarded to the recognised Stock Exchanges, Depositories and Registrar and Share Transfer Agents for information and necessary action.

87. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs/ concerned Registrar of Companies, for their information and necessary action.

-Sd-

**DATE: March 19, 2020**
**PLACE: MUMBAI**

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