

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

FINAL ORDER

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

In the matter of ESBI Infrastructure Company Limited

***In re* Deemed Public Issue Norms**

In respect of:

S. No.	Name of the Entity	PAN	CIN/DIN
1.	ESBI Infrastructure Company Limited	AAICA6147R	U45400WB2009PLC140162
2.	Biswajit Paul	AFKPP3892A	00376113
3.	Subrata Kumar Paul	AFHPP8743H	00376140
4.	Sarbaniprasad Bishwas	NA	02732001
5.	Amitava Basu	AGYPB8380Q	02640538
6.	Biswanath Roy	ALCPR0889D	06533291
7.	Jayanta Basu	ANWPB0698J	NA
8.	Tapas Basu	AEAPB7333P	NA
9.	Jeniya Basu	AUGPS7846G	NA
10.	Saikat Sen	AKKPS9440C	NA

-
1. ESBI Infrastructure Company Limited (hereinafter referred to as “ESBI”/ “the Company”) is a Public Company incorporated on December 14, 2009 and registered with Registrar of Companies–Kolkata with CIN:

U45400WB2009PLC140162. Its registered office is at Ground Floor Premises No. 4/4B, Jadu Mitra Lane, Kolkata – 700004.

2. Securities and Exchange Board of India (hereinafter referred to as “SEBI”) received a letter/complaint against ESBI in respect of issue of equity shares and undertook an enquiry to ascertain whether ESBI had made any public issue of securities without complying with the provisions of the Companies Act, 1956, Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “SEBI Act”) and the Rules and Regulations framed thereunder read with SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as “ICDR Regulations”)
3. On enquiry by SEBI, it was observed that ESBI had made an offer of equity shares in the financial year 2011-12 and (hereinafter referred to as “*Offer of equity shares*”) and raised an amount of Rs. 1,86,73,000 from 70 allottees.
4. As the above said *Offer of equity shares* was found *prima facie* in violation of respective provisions of the SEBI Act, 1992, Companies Act, 1956 and the ICDR Regulations, SEBI passed an interim order dated May 12, 2017 (hereinafter referred to as “interim order”) and issued directions mentioned therein against ESBI and its Directors and promoters, viz. Biswajit Paul, Sarbaniprasad Bishwas, Amitava Basu, Biswanath Roy, Jayanta Basu, Tapas Basu, Jeniya Basu and Saikat Sen (hereinafter collectively referred to as “Noticees” and individually by their respective names).
5. *Prima facie findings/allegations*: In the said interim order, the following *prima facie* findings were recorded.
6. ESBI had made an *Offer of equity shares* during the financial year 2011-12 and raised an amount of Rs. 1,86,73,000 as shown below:

Date of Allotment of Equity Shares	No of Equity Shares Allotted	No. of Allottees	Value of Allotment (in Rs.)
01.03.2012	10,50,000	6	1,05,00,000
24.03.2012	4,69,300	29	46,93,000
31.03.2012	3,48,000	35	34,80,000
Total in FY 2011- 12	18,67,300	70	1,86,73,000

7. The above *Offer of equity shares* and pursuant allotment was a deemed public issue of securities under the first proviso to section 67(3) of the Companies Act, 1956. Accordingly, the resultant requirement under section 60 read with section 2(36), section 56, sections 73(1), 73(2) and 73(3) read with section 27(2) of the SEBI Act were not complied with by ESBI in respect of the *Offer of equity shares*.
8. In view of the *prima facie* findings on the violations, the following directions were issued in the said interim order dated May 12, 2017 with immediate effect.
- a. *ESBI Infrastructure Company Ltd. (PAN: AAICA6147R) and its directors viz. Mr. Biswajit Paul (PAN: AFKPP3892A), Mr. Subrata Kumar Paul (PAN: AFHPP8743H), Mr. Sarbaniprasad Bishwas (DIN: 02732001), Mr. Amitava Basu (PAN: AGYPB8380Q) and Mr. Biswanath Roy (PAN: ALCPR0889D), and promoters including Mr. Jayanta Basu (PAN: ANWPB0698J), Mr. Tapas Basu (PAN: AEAPB7333P), Mr. Jeniya Basu (PAN: AUGPS7846G) and Mr. Saikat Sen (PAN: AKKPS9440C) are restrained from mobilizing funds through the issue of equity shares or through any other form of securities, to the public and/ or invite subscription, in any manner whatsoever, either directly or indirectly till further directions.*
- b. *ESBI Infrastructure Company Ltd. and its aforementioned promoters and directors are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders.*
- c. *ESBI Infrastructure Company Ltd. and its aforementioned promoters and directors are restrained from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities in any manner whatsoever, either directly or indirectly, till further directions.*
- d. *ESBI Infrastructure Company Ltd. and its aforementioned promoters and directors shall not divert any funds raised from public at large through the issuance of equity shares, kept in its bank accounts and/or in the custody of the Company without prior permission of SEBI until further orders.*

- e. *ESBI Infrastructure Company Ltd. and its abovementioned promoters and directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the Offer of equity Shares, without prior permission from SEBI;*
 - f. *ESBI Infrastructure Company Ltd. and its directors and promoters shall provide a full inventory of all its assets and properties and details of all their bank accounts, demat accounts and holdings of shares/ securities, if held in physical form.*
 - g. *ESBI Infrastructure Company Ltd. and its promoter and directors shall cooperate with SEBI and shall furnish all the documents in respect of the offer of equity shares (as sought by SEBI vide letter dated January 27, 2016).*
9. The interim order also directed ESBI and its Directors/promoters to show cause as to why suitable directions/prohibitions under sections 11(1), 11(4), 11A and 11B of the SEBI Act read with the SEBI ICDR Regulations, including the following, should not be taken/imposed against them :
- a. *directing them jointly and severally to refund the money collected from investors through the issue of equity shares that are impugned in this Order, along with interest of 15% per annum (interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment) within a period of 180 days from the date of receipt of this order, supported by a certificate of two independent Chartered Accountants to the satisfaction of SEBI;*
 - b. *directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for a period of 4 years from the date repayment to the satisfaction of SEBI as directed above;*
 - c. *restraining them from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for a period of 4 years from the date repayment to the satisfaction of SEBI as directed above.*
10. Vide the said interim order, ESBI, its abovementioned Directors/promoters were given the opportunity to file their replies, within 21 days from the date of receipt of the said interim order. The order further stated the concerned persons may

also indicate whether they desired to avail an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

11. *Service of interim order.* The copy of the said interim order was sent to the Noticees vide letters dated May 12, 2017 which were not delivered on some of the Noticees. Subsequently, vide notification dated October 28, 2017 published in newspaper *Times of India* and notification dated October 28, 2017 published in newspaper *Anand Bazar Patrika*, the Noticees were notified by SEBI that interim order dated May 12, 2017 was issued against them and they were given a final opportunity to submit their replies in the matter.

Replies to the interim order filed by the Noticees:

12. Mr. Biswajit Paul vide a letter dated May 29, 2017 submitted his reply, contents whereof are reproduced as under:

"1) You very kindly observed that Mr. Biswajit Paul by his letter September 09, 2016 In reply to SEBI'S letter dated September 01, 2016 informed that he was not a Director of ESBI Infrastructure Ltd. at the material time.

2) It is on record that ESBI Infrastructure Company Ltd. was Incorporated on 14.12.2009. The detailed statements was given In your order at page 4 as it is found from the record.

3) The citation of a Judgment delivered by the Hon'ble Supreme Court of India In Sahara India Real Estate Corporation Ltd. & Ors.-Vs- SEBI (Civil Appeal No.9813 of 2011) Judgment dated August 31, 2012 observed in reference to Sector 55A of the Companies Act, 1956.

"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".

With due respect, it is said that it does not apply to our Company coupled with its performance and activities.

4) In short, simply, it can be said that our Company was not listed nor intended to be listed in a recognized stock Exchange in India.

5) Consequently in view of the meaning and interpretation of the verdict of the Hon'ble apex Court read with at Para 2.5.1 at page 6 "In terms of the relevant provisions of the Section 55A of the Companies Act, 1956, the provisions contained in Sections 55 to 58, 59 to 81 (including Sections 68A, 77A and 80A) 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207 of the Companies Act, 1956 read with Section 24 of the Companies Act, 2013 so far as they relate to the issue and transfer of securities shall be in the case of listed public companies and in the case of those public companies which Intend to get their securities listed on any recognized stock exchange in India, be administered by SEBI. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall also be administered by SEBI in the case of companies who intend to get their securities listed. In view of the above observations by virtue of Section 55A (a) and (b), SEBI has jurisdiction and would govern the alleged public Issue of equity shares made by the Company during the period March 2010 - March 2014, as discussed above."

The SEBI has no power or Jurisdiction to administer. It is our respectful submission.

6) Further it is submitted with due honour to law In relation to factual matrix and finding of the Learned Member, our transactions of Securities are out of domain of SEBI inasmuch as our Company never Intended to have enlisted nor listed.

7) Consequent whereupon of reference to offering shares or debentures to the public, etc. Provided inter alia that nothing contained in those sub-sections as referred to above shall apply in a case where the offer or Invitation to subscribe for shares or debentures is made to fifty persons or more.

8) *Inasmuch that nothing contained in the first proviso of Section 67 (3) of the Companies Act 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 (of 1956).

9) *The above two proviso of the Section 67 has made it clear that in our case even assuming that the equity shares were issued 70 i.e. more than 50. In that case, our company shall not be arrayed by Section 67. We were not banking financial companies or public financial institution question does not and cannot arise.*

10) *In short, it is our humble submissions that the issuance of equity share or debenture beyond 49 persons might be a public Issue but not attracting all the referred provisions of SEBI Act, Regulation framed thereunder, the Companies Act pertaining to public issue since our Company did, not make any public issue. So, the SEBI Act is not applicable. No consensus can be drawn as we beg to defer that public Issue or issue on private placement basis in accordance with Section 67 of the Companies Act, 1956 the numbers of subscribers is of utmost importance. In a case of Private Placement it is not applicable, I submit.*

11) *In reply to iii(a) at page 8, it is submitted that since Section 67 of the Companies Act, 1956 so far it relates to Issue on private placement the ESBI Infrastructure assuming issued equity share to 70 investors during the period 2011 - 2012. It is refuted. Your submission and/or statements as contained In iii(a) that offer or invitation to subscribe shares or debentures is made to 50% or more than it has to be construed as a public offer. You have very kindly prima facie observed that the said issues of equity shares made. by our Company more than 50 investors (i.e. 70 investors) during the period 2011 - 2012 were deemed public issues. It is therefore submitted that your thinking is surrounded by deeming thinking and it is not absolute in regard to public issues by ESBI. So your deeming thinking does not take place on actual or law.*

12) Clause (c) of III It is your admission that during the financial year 2011-2012 the public Issue was prima facie qualified under the first proviso of Section 67 (3) of the Companies Act, 1956. The prima facie thinking or prima facie holding cannot reach the finality. It is submitted that In view of first proviso of Section 67(3) of the Companies Act, 1956 read with 55A of the Companies Act, 1956, Section 67 of the Companies Act, 1956 so far as it relates to issue and transfer of securities shall also be administered by SEBI. It is submitted most respectfully that interpretation of Sections are hanging in air in a primary domain where finality has not yet reached how the SEBI could assume its jurisdiction for ruling out the case of ESBI Infrastructure Company Ltd. where legality has a contrast with the prima facie finding and ignoring the first proviso of Section 67 (3) read with Section 55A Companies Act,1956. As such SEBI has lost Its jurisdiction to try and determine the Issue.

13) In response to para 2.7 of the order of show cause and all allegations and/or findings are denied and disputed that the issuance of equity shares by ESBI In the nature of Public issue. Elaborate submission at the hearing may be advanced.

14) Clause (a) of 2.7 has no application in the case in hand because there was no public offer for which prospectus is a necessity. Section 2(36) read with Section 60 of the Companies Act, 1956 and Section 56(1) and 60 of the Companies Act on the premises has no application. As such the contentions of those sections were redundant and/or non-applicable consequently therefore prima facie no violations of the aforesaid provisions of law, it is submitted.

15) With reference to para 2.7 '(b) It is denied that by Issuing equity shares to more than 49 persons, the Company had to compulsory list such securities In compliance with Section 73 of the Companies Act, 1956. It is not correct.

16) Para 2.7 (b) (1) since the issue of prospectus is not applicable in view of the preceding submissions coupled with law made therein in that behalf. Section 73 of the Companies Act, 1956 and It sub-sections 1, 2 and 3 are Irrelevant. In view of the submissions made hereinabove interpreting the law

involved in the factuality and not notionally nor assumptive and presumptive.

17) In reference to Para 2.7 (b)(ii) at page 11, the observation of the Hon'ble Apex Court of India on examination of Section 73 of the Companies Act made in the "Sahara" Case has no application In the instant case. Submission will be made if called upon to the hearing of proceedings.

18) It is pertinent to mention that some of the debenture holder and equity share holder made a complain before the Learned District Consumer Disputes Redressal Forum, Kolkata and before the Hon'ble State Consumer Disputes Redressal Commission at Calcutta and the proceedings in two Fora is being continued and some of which has been ended by delivering Judgment inter aiia for payment of fund to the alleged aggrieved persons or Investors and further against such orders appeals were preferred before the Appellant Authority of State Forum and some of them have been stayed. As such all the proceedings relating to realization of money arose out of debentures and equity shares of the Company are sub judice. That apart some of the Investors have taken Shelter in the Hon'ble High Court at Calcutta under Public Interest Litigation, those are also sub judice before the Hon'ble Division Bench of Calcutta High Court. On this fact a further proceedings under the SEBI cannot or should not continue. Apart from that assuming without however admitting Section 73 (1) of the Companies Act as has been Interpreted and observed by the Hon'ble Apex Court of India In a "Sahara" Case inter alia on the line of refunding of the money with interest to the investors and SEBI's whole object is to the same line of refunding money with interest to the Investors. Now the realization proceeding of money is subject as stated hereinabove. So, in this perspective, the proceeding before SEBI will be rendered to be redundant and wastage of money and time.

19) Para 2.7 (b)(iii) at page 11 bottom, it is submitted that Hon'ble Apex Court's observations does not attract ESBI as the requirement of compulsory listing before a recognized stock exchange in terms of Section 73 (1) of the Companies Act, 1956 and also compliance with the provision of Section 72(2) and 73 (3) of that Act is not at all necessary. It is misinterpretation of law vis - a -vis the observation of the Hon'ble Apex Court in "Sahara" case with that ESBI Infrastructure. It does not have any legal implication attracting ESBI Infrastructure as such denied.

20) Para 2.7 (b)(iv) it is denied that the facts of the Instant case prima facie appears that ESBI Infrastructure has violated the provision of Section 73 of the said Act in respect of offer of equity shares as alleged. We deny with due respect that SEBI cannot assume jurisdiction in the matter which has been elaborately set out with our submission above.

21) Para 28(1) and (ii) has no application in view of the legal proceedings taken by the Investors before the Consumer FOR A as stated above for realization of the invested money by way of partly equity shares and partly debentures are in force and matters are sub judice and In such view of the matter the SEBI DIP` Guidelines or any other law, Rules and Regulations as contained in the instant paragraphs have no applicability. Main motto and/or purpose are to repay or refund the money invested by the investor in ESBI Infrastructure in any form SEBI and its Rule and Regulations are similar to the proceedings pending and/or sub judice before two Fora at Calcutta AND Calcutta High Court and some of them are going to be settled and in such view of the matter there cannot be any second proceedings on the same issue so it is redundant.

22) The SEBI ICDR regulation operate as reasonable safe guards as investors which is the fact there is no scope for deniable.

23) It is not admitted that ESBI Infrastructure has not complied with the relevant regulation of SEBI ICDR regulation In respect of public issue as alleged or 'at all. It is not applicable in the case of ESBI Infrastructure as such question of compliance does not and cannot arise at all. In view of the submissions made hereinabove in reference to different Section of the Companies Act, 1956 and also the observation made by the Hon'ble Apex Court in India In the matter of "Sahara" case. Necessary submission shall be made on the Count if reasonable opportunity shall be given at the hearing.

24) Reference 2.9 where observation of the Hon'ble Supreme Court of India in "Sahara" Case was quoted. Such quotation might not be applicable in our case In view of the narration and interpretation of relevant section of Companies Act were set out hereinabove.

25) *Para 2.10 it is on record save what appears therefrom all allegations contrary thereto are denied.*

26) *It is submitted most respectfully that it is not correct that the statements made by the then directors or in-charge of the Company was not true and not acceptable. It is beyond the scope of the proceedings save what appears from the records all finding statement, allegation contrary to the record are denied. The submission on behalf of ESBI might be placed before the SEBI If necessary.*

27) *The mobilization of alleged public funds through the issue of equity share without complying with the applicable law where some of the persons alleged to have been Involved Is not correct. The inference of the learned Member and determining or fixing the duty of directors or the persons are not correct on the basis of the record.*

28) *Para 3, there is no doubt that SEBI has a statutory duty or power to protect the Interest of investors in Security market etc. SEBI cannot have the power as said to have been vested under Section 55A of the Companies Act, 1956 having administrating power on the subject relating to public Issue of security but in the instant case SEBI has no authority competence and jurisdiction in view of the realization of purported invested money by the investor in the form of equity shares and debentures are in the domain of the Consumer Redressal Fora at Kolkata and the Hon'ble High Court at Calcutta and the matter of realization proceedings are sub judice. In such view of the matter, the SEBI with due respect lost its jurisdiction or authority to determine or realization of investors' money as purported to have the authority to realize.*

29) *In view of the pendency of the realization proceedings in judicial Fora Calcutta High Court on the selfsame issue or matter the SEBI cannot intervene and issue suitable direction including restraining the Company and its Directors/Promoters from carrying on activities in contravention of law as alleged possibly without knowing steps for realization of alleged legitimate fund from ESBI Is sub judice. It Is to be seen that no investors are defrauded.*

30) *It is submitted with due respect that the interim order as has been passed*

restraining Directors/ Promoters and others from doing all such activities without hearing the aggrieved persons. It is submitted with due respect that no statutory authority or quasi-Judicial can have power to deal with any matter without given any opportunity of the other party being aggrieved party. It is deviation from the principle of natural justice as adumbrated Article 14 of the Constitution of India. Be that as it may, in the interest of justice the Interim order as has been passed ex-parte is liable to be vacated considering all the facts and circumstances aforesaid.

31) The direction as has been contained in para 4 has been vitiated as it has been made ex parte which is violative of natural justice and fair play. In this respect it is referred of the Hon'ble Apex Court's decision reported in (2007) 2 SCC P-181 where it has been held with regard to natural justice.

a) no body shall be condemned unheard. Audi alterim partem.

b) No body shall be judge of his own cause (Nemo debet esse iudex in propria sua causa)

32) Now the scenario of judicial approach has been changed in view of the lodging of Complain of the Investors in the Consumer Fora at Calcutta and Calcutta High Court which was not taken into consideration before passing the interim order. It is to be vacated.

33) Now attention is been drawn to the SEBI Mumbai that two proceedings on the self-same cause of action cannot run partially in two judicial Fora. So, interim order should be vacated forthwith in the interest of justice.

34) Para 6a, b and c cannot have any application in view of the fact that realization proceedings are sub judice before the judicial FORA and High Court as stated above.

35) Para 7(a) the reply to the show cause as asked for is filed within a period of 21 days from the date of receipt of interim order cum show cause notice through Kolkata office.

36) Para 7(b) the personal hearing through their Advocates should be given in the facts and circumstances and in view of the creation of anomalous situation due to pendency of the same Issue before two Consumer Fora at

Kolkata and Calcutta High Court. All those matters may be submitted before the SEBI at such hearing. Personal hearing of the aggrieved persons through their Advocates by such order is to be given in Kolkata in the Regional office of SEBI at L & T Chambers, 3rd Floor, 16, Camac Street, Kolkata - 700017.

37) Para 7(c) it is submitted that the prima facie finding regarding alleged violation mentioned at para 2.6 to 2.10 of that order shall become final and absolute without any further order is beyond the jurisdiction, authority, competence of the SEBI.

38) Para (d) direction contained in para 4 to 6 above contained in the Order shall continue to operate against ESBI Infrastructure Co. Ltd. and its aforementioned promoter directors till the expiry of period of 4 years from the date of re-payment to the satisfaction of SEBI in consequence thereof. This very order is out and out without jurisdiction and this order of Injunction should be vacated in view of the proceeding for realization for the purported investors' money being sub judice before two Consumer Fora and High Court it is as such redundant.”

13. Two other Noticees namely, Mr. Biswanath Roy and Mr. Amitava Basu along with separate letters dated May 31, 2017 forwarded submissions similar to those filed by Mr. Biswajit Paul. Both of them claimed that they were handed over these submissions/letter by Mr. Biswajit Paul for onward forwarding to SEBI. However, vide the respective letters dated May 31, 2017, Mr. Biswanath Roy and Mr. Amitava Basu made submissions (recorded later in this order) which were different from those recorded above.
14. Mr. Jayanta Basu vide a letter dated June 24, 2017, without prejudice to his right to assail the interim order and the present proceedings before a Court of Law, submitted *inter alia* as under:
 - a) I am one of the shareholder holding 2.5% shares of the company.
 - b) Since I was neither a director nor in anyway involved with the affairs of the company, SEBI served no notice in my favour.
 - c) I was never named or mentioned in any alleged complaint by any investors of the said company.
 - d) I was never involved in day to day affairs of the company.

- e) Therefore, I am not involved in the instant proceeding in any manner whatsoever.
- f) I pray that I may be kept out of the purview of the instant proceeding as well as the order passed by you including order dated 12.05.2017.

He prayed for 4 weeks' time for filing additional reply in the matter. However, no such additional reply was received subsequently.

- 15. A separate reply similar to that filed by Mr. Jayanta Basu was also filed by Mr. Jeniya Basu, who (according to him) held 1.5% shares of the company. He also sought 4 weeks' time for filing additional submissions in the matter but no such submissions were received from him subsequently.
- 16. Mr. Biswajit Paul vide letter dated July 19, 2018 made further submissions regarding the litigations filed in relation to the issuances made by ESBI Infrastructure, which are recorded later in the order.
- 17. The remaining Noticees (i.e. other than those whose replies have been noted above) did not file any reply to the interim order cum show cause notice dated May 12, 2017.

Hearing and submissions:

- 18. Personal hearing in respect of the Noticees was scheduled on January 10, 2019. The intimation regarding the scheduled date of hearing was sent to the Noticees vide letters dated September 24, 2018. The said letters could not be served on certain Noticees, and therefore, vide notifications dated December 21, 2018 published in newspapers *Statesman, Anand Bazar Patrika and Sanmarg*, all the Noticees were notified by SEBI that they will be given the final opportunity of being heard on January 10, 2019 at the time and the venue mentioned therein. The Noticees were advised that in case they failed to appear for the personal hearing before SEBI on the aforesaid date, the matter would be proceeded *ex-parte* on the basis of material available on record.
- 19. On the scheduled date of hearing i.e. January 10, 2019, only Mr. Biswajit Paul appeared for hearing who was represented by his authorized representative. None of the other Noticees appeared for the hearing.

20. The oral submissions on behalf of Mr. Biswajit Paul made during the hearing and written submissions made vide letter dated January 9, 2019 (which also covered the earlier submissions made vide letter dated July 19, 2018) made by Mr. Biswajit Paul are summarized as under:

- i. He was not a director of ESBI Infrastructure at the material time.
- ii. The company did not list or intended to be listed on a recognized stock exchange in India. Thus the order of the Hon'ble Supreme Court in the Sahara matter does not apply in our case.
- iii. SEBI does not have the jurisdiction to administer the provisions of companies act mentioned in the interim order. Our transactions of securities are out of the domain of SEBI inasmuch our company was never listed nor did it ever intend to get listed.
- iv. The two provisos of section 67 (3) made it clear that our company shall not be arrayed by section 67 even assuming that the equity shares were issued to 70 persons i.e. more than 50.
- v. Mr. Subrata Paul was in charge of the issuance of and subscription of securities related matters. He is however, not related in any manner to Mr. Biswajit Paul.
- vi. Several writ petitions were filed before Hon'ble HC of Calcutta against the ESBI Group of Companies by depositors seeking refund of the deposits made by them. In the writ petition filed in respect of ESBI Infrastructure Company Ltd., SEBI was also made a party and was also represented before the Hon'ble HC.
- vii. Two write petitions i.e. W.P. No. 30617 (W) of 2015 and W.P. No.1668 (W) of 2016 came up for hearing on 04.11.2016 before the Hon'ble Division Bench comprising of Their Lordships the Hon'ble Justice and after hearing the parties, the Hon'ble Court directed the Respondent Group of Companies/Firms not to dispose of any movable or immovable properties till further directions of this court. Similarly, the directors/ partners were

directed not to dispose of or create any encumbrances of any valuable movable or immovable properties till further order.

- viii. Subsequently, the aforesaid PILs were taken up for hearing by the Hon'ble Court on 14.02.2018, when the company and its sister companies appeared before the Hon'ble Court and prayed for an order so that the ESBI Group of Companies can refund the deposits/ subscriptions raised from market by running its business of Glasses. The Hon'ble Court, in order to meet the grievance of the depositors/ subscribers in ponzi scheme companies throughout West Bengal formed a One Man Committee named Justice Sailendra Prasad Talukdar Committee. The ESBI Group of Companies also prayed that the aforesaid matters may be sent to the said Committee so that the grievances of the depositors/ subscribers/ creditors may be resolved by running the business of Glass processing/ toughening . After hearing the learned Advocate appearing on behalf of the petitioners, Company, SEBI, RBI, One Man Committee, the Hon'ble Court was pleased to refer the PILs pertaining to the ESBI Group of Companies before the Hon'ble One Man Committee (i.e. Retd. Justice Sailendra Prasad Talukdar Committee).
- ix. Thus, the Hon'ble High Court has referred the matter of refund of investors' money to Talukdar Committee. Under the Supervision of the Hon'ble One Man Committee, the Directorate of Economic Offence, West Bengal issued a notification for filing claim against the ESBI Group of Companies and that proceeding is going on.
- x. The Hon'ble One Man Committee hold several meetings on several dates pertaining to the ESBI Group of Companies where all the parties were represented including SEBI and the Hon'ble One Man Committee was pleased to opined that the factory of the ESBI Group of Companies should run for the interest of all concerning party because fund can be accumulated by running the business of the Company.
- xi. Mr. Biswajit Paul was also arrested in relation to a criminal case being handled by Directorate of Economic Offences. He was released on bail on a condition to return the deposits of depositors.

- xii. Initially, during arrest, the Director of Economic Offences made an inventory of the factory premises put the factory premises under lock and key by the aforesaid authority.
- xiii. In the order dated 12th May, 2017 passed by the Whole Time Member, SEBI failed to asses any liability of ESBI Infrastructure Company Limited.
- xiv. ESBI Glass Ltd. is the only profit earning company of the ESBI Group. An application was made before the Additional Sessions Judge seeking smooth running of the business of the company. The learned judge was pleased to allow business of the Company only to the extent of finished goods and the raw materials lying at the factory premises, and accordingly production was started and the finished goods were delivered to the client on three occasions.
- xv. Due to scarcity of raw materials, Mr. Paul preferred another application praying *inter alia* for purchasing new raw materials on 22.06.2018. The said application was heard on 07.07.2018 and the Learned Court was pleased to allow the prayer for purchasing new raw materials by an order dated 12.07.2018 and now the company is carrying on its business of glass in a full-fledged manner.
- xvi. Mr. Paul has voluntarily requested Directorate of Economic Offences to provide bank details where he can deposit the margin amount for carrying on business in order to accumulate funds which are to be refunded to the depositions but no details have been received till date.
- xvii. Since 21.07.2018 to 18.08.2018 the production unit remained closed for want of new AC drive and same was installed on 18.08.2018 and the production was resumed on and from 19.08.2018 and the same started running. The aforesaid facts were also brought to the notice of the Directorate of Economic Offences, West Bengal by a letter dated 24.08.2018.
- xviii. Mr. Paul has also made an application before the Talukdar Committee for allowing him to make a deposit of Rs. 11.4 lakh in the account of Directorate of Economic Offences or in the account of one man committee

for accumulation of fund which can be disbursed among the depositors. The matter was scheduled to come up for hearing on January 21, 2019 and the authorized representative submitted that he would inform SEBI about the outcome of the said hearing.

- xix. It was prayed on behalf of Mr. Paul that the object of present case as well as the Hon'ble One Man Committee is same i.e. to refund the deposits made by the depositors and to avoid multiplicity of proceeding, and therefore, the present case needs to be kept in abeyance or it may call for the report time to time.
 - xx. Mr. Biswajit Paul has requested SEBI not to take any coercive steps against the Company, him and other directors in terms of the order dated 12th May, 2017 as SEBI is representing before the Hon'ble High Court as well as before the Hon'ble One Man Committee, and moreover where the process of accumulation of fund already been started.
21. During the hearing, the authorized representative was directed to submit the response of Mr. Biswajit Paul on whether any of the shareholders of the company are related to him. He was given time till January 25, 2019 to submit his response in this regard, and was also directed to submit the recent orders passed by HC, Talukdar Committee, etc. However, no submission / response was received on behalf of Mr. Biswajit Paul.
22. Mr. Amitava Basu vide a letter dated December 24, 2018 (which also covered his earlier submissions made vide letter dated May 31, 2017) submitted the following:
- a) I am unable to appear for personal hearing due to certain unavoidable circumstances.
 - b) I was an ordinary staff of the company and received salary every month and it was the only source of my income.
 - c) Mr. Biswajit Paul and Mr. Subrata Paul resigned from their different positions from the company and to fill up director portfolio instructed me and another employee - Mr. Biswanath Roy to be the director of the company by force otherwise our services would be at stake. Because of this, I was compelled to register my name as one of the directors of the company as there was no other way of earning money.

- d) I was not known to the acts of the company as Biswajit Paul and Subrata Kumar Paul used to look after the company and manage all the things relating to the said company.
- e) During my directorship, I never attended any Board Meeting or any other acts and never held any shares in my custody nor received any remuneration as a director.
- f) I did not have any signing authority in the issuance of the shares of the company and I never issued any equity shares on the market nor collected any money.
- g) I resigned from the Company on 16.05.2015 and since then I have no information and whereabouts of Biswajit Paul and Subrata Kumar Paul.

23. Mr. Biswanath Roy vide a separate letter dated December 24, 2018, made his submissions (which also covered his earlier submissions made vide letter dated May 31, 2017) on the same lines as that of Mr. Basu. He also submitted that he had resigned from the company on 16/12/2014 since then he has no information and whereabouts of Mr. Biswajit Paul and Mr. Subrata Kumar Paul.

24. Mr. Saikat Sen vide a letter dated January 21, 2019 submitted the following:

- a) He is not a very educated person and was never involved in the activities of the company.
- b) He had no knowledge of the affairs related to the company. He submitted the same information before the Directorate of Economic Offences, West Bengal when he appeared before them upon being called.
- c) It is beyond his knowledge how he became a shareholder of the company as he never paid any money to the company nor he had the means to do so.
- d) He replied late to the notice received from SEBI since due to the nature of his work, he stayed away from his residence address which is available on SEBI's records.
- e) He does not have the means to travel to Mumbai for entering his personal appearance.

25. Thereafter, considering that Mr. Saikat Sen had expressed his inability to attend personal hearing in the matter due to lack of means to travel, and that he had not filed a detailed reply to the allegations levelled in the interim order, he was given another opportunity to file detailed submissions in the matter within a

period of 15 days. A letter in that regard was sent to Mr. Saikat Sen on the address on which the earlier notice of hearing was sent. However, the said letter returned undelivered. Subsequently, the letter was served on Mr. Saikat Sen by way of affixture.

Preliminary objection on behalf of certain Noticees

26. Before proceeding further with the consideration of issues involved in the matter, I find it pertinent to address the preliminary objection raised by certain Noticees. Mr. Biswajit Paul in his submissions and also Mr. Amitava Basu and Mr. Biswanath Roy in their submissions (claimed to have been handed over to them by Mr. Biswajit Paul) have disputed the jurisdiction of SEBI in relation to the matter on the ground that the company was not listed nor intended to be listed in a recognized stock Exchange in India. According to them, even assuming that the equity shares were issued to 70 investors (i.e. more than 49), the provisions of section 67 of the Companies Act, 1956 won't apply to SEBI since it did not make any public issue of securities. 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 thereof, so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed.

27. 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"

28. While interpreting the phrase "*intend to get listed*" in the context of deemed public issue the Hon'ble Supreme Court in Sahara Case observed-

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

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

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

29. Thus, I find that the preliminary submissions made by Mr. Paul, Mr. Basu and Mr. Roy noted above hold no merit as the present case is squarely covered within the observations of Hon'ble Supreme Court noted above.

Consideration of issues.

30. I have considered the allegations and materials available on record. On perusal of the same, the following issues arise for consideration. Each question is dealt with separately under different headings.

- (1) Whether the company came out with the Offer of equity shares as stated in the interim order.*
- (2) If so, whether the said issues are in violation of Section 56, Section 60 and Section 73 of Companies Act 1956 and the provisions of ICDR Regulations*

(3) *If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?*

ISSUE No. 1- *Whether the company came out with the Offer of equity shares as stated in the interim order.*

31. I have perused the interim order dated May 12, 2017 for the allegation of *Offer of equity shares*.

32. Mr. Biswajit Paul in his reply has mentioned the writ petitions which have been filed against the entire ESBI Group of Companies which includes ESBI Infrastructure Company Limited. He has also mentioned that the matter of refund to all the investors of the ESBI Group of Companies has been referred by the Hon'ble High Court of Calcutta to the Talukdar Committee. He has also offered explanation regarding the attempts being made by him to the amount collected from the investors. However, as regards the allegations levelled in the interim order, he has offered no explanation. Even during the hearing, the authorized representative was specifically asked to provide the submissions of Mr. Paul in respect of the allegations levelled in the interim order, but he did not submit any specific submissions in that regard during the hearing or thereafter.

33. I note that neither the company nor the directors or promoters have disputed the fact of issuance of equity shares by ESBI.

34. I have also perused the documents/ information obtained from the 'MCA 21 Portal' and other documents available on record. It is noted from the records that ESBI has issued and allotted equity shares to 70 investors during the financial year 2011-12 and raised an amount of Rs. 1,86,73,000.

35. *I therefore conclude that ESBI came out with an offer of equity shares as outlined above.*

ISSUE No. 2- *If so, whether the said issues are in violation of Section 56, Section 60 and Section 73 of Companies Act 1956 and the provisions of ICDR Regulations*

36. The provisions alleged to have been violated and mentioned in Issue No. 2 are

applicable to the *Offer of equity shares* made to the public. Therefore the primary question that arises for consideration is whether the issue of equity shares is 'public issue'. At this juncture, reference may be made to sections 67(1) and 67(3) of the Companies Act, 1956:

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

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

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

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

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

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

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

37. 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 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.”

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

fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956 exempts NBFCs and Public Financial Institutions from the applicability of the *first proviso*.

39. Mr. Biswajit Paul, Mr. Amitava Basu and Mr. Biswanath Roy have made a common submissions that “*the issuance of equity share or debenture beyond 49 persons might be a public Issue but not attracting all the referred provisions of SEBI Act, Regulation framed thereunder and the Companies Act pertaining to public issue since our Company did not make any public issue.*” Though, the submission of the Noticee is not very clear, but on a holistic reading of the their submission, it appears that the Noticees have sought to contend that since ESBI was not listed and never intended to get listed, the allotments made by it have to be treated as private placements and not public issues. In this regard, I note that in the instant matter, I find that equity shares were issued by ESBI to 70 investors in the financial year 2011-12 and it thereby raised Rs.1,86,73,000.
40. In light of the above observations of the Hon’ble Supreme Court of India and the findings recorded above, it can be reasonably concluded that the *Offer of equity shares* by ESBI was a “public issue” within the meaning of the first proviso to section 67(3) of the Companies Act, 1956.
41. I also find that ESBI has not claimed it to be a non–banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I find that there is no case that ESBI is covered under the second proviso to Section 67(3) of the Companies Act, 1956.
42. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the “*Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged.*” In respect of those issuances, the Noticees have not placed any material that the allotment was in satisfaction of section 67(3)(a) or 67(3)(b) of Companies Act, 1956 i.e., it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement. Moreover, reference may be made to the order dated April 28, 2017 of Hon’ble Securities Appellate Tribunal 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 appellants 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*”.

43. Therefore, in view of the material available on record, I find that the *Offer of equity shares* by ESBI falls within the first proviso of section 67(3) of Companies Act, 1956. Hence, the *Offers of equity shares* are deemed to be public issues and ESBI was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956 and ICDR Regulations.
44. Further, since the offer of equity shares is a public issue of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants.
45. In the initial replies filed by Mr. Paul, Mr. Basu and Mr. Roy, it was submitted that the observation of the Hon'ble Apex Court of India on examination of Section 73 of the Companies Act made in the "Sahara" Case has no application in the instant case and further submission will be made if called upon to the hearing of proceedings. However, during the hearing, the authorized representative of Mr. Paul stated that there are no specific submissions on behalf of Mr. Paul in respect of the allegations levelled in the interim order.
46. The allegations of non-compliance of the abovementioned provisions have been refuted in the submissions made by Mr. Paul, Mr. Basu and Mr. Roy. However, I find that the same has been done on the basis of an incorrect understanding of the order passed by Hon'ble Supreme Court in the *Sahara Case* because the Noticees in their submissions have placed reliance on isolated *lines* of the *Sahara Order* dissociating them from the context in which they have been written by the Hon'ble Court. With regard to the intention of a company to get

listed when it makes an issuance of securities to 50 or more persons, it is important to refer to the following observation of the Hon'ble Supreme Court in the *Sahara Case*:

“94. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons. In view of the clear statutory mandate, the contention raised, based on Rule 19 of the SCR Rules framed under the SCR Act, has no basis. Legal obligation flows the moment the company issues the prospectus expressing the intention to offer shares or debentures to the public, that is to make an application to the recognized stock exchange, so that it can deal with the securities. A company cannot be heard to contend that it has no such intention or idea to make an application to the stock exchange. Company's option, choice, election, interest or design does not matter, it is the conduct and action that matters and that is what the law demands.”

47. I also find that no records have been submitted to indicate that the Company had made an application seeking listing permission from stock exchange or refunded the amounts on account of such failure. Therefore, I find that ESBI has contravened the said provisions. ESBI has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that ESBI has also not complied with the provisions of section 73(3) which mandates that the amounts received from investors shall be kept in a separate bank account. Therefore, I find, that section 73(2) of the Companies Act, 1956 has not been complied with.

48. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. As the offer of equity shares was a deemed public issue of securities, ESBI was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that ESBI has not submitted any record to indicate that it has registered a prospectus with the

RoC, in respect of the offer of equity shares. I, therefore, find that ESBI has not complied with the provisions of section 60 of the Companies Act, 1956.

49. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Neither ESBI nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that, ESBI has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

50. In addition to the compliance with the provisions of the Companies Act, 1956, the Company was mandated to comply with the applicable provisions of SEBI Rules/Regulations. The ICDR Regulations (which came into effect from August 28, 2009) replaced the earlier existing SEBI (Disclosure and Investor Protection) Guidelines, 2000 and all public issues are required to comply with the ICDR Regulations. ICDR Regulations operate as reasonable safeguards for investors who subscribed or intend to subscribe in the public issues of securities. In this regard, The relevant provisions of SEBI ICDR Regulations are as under:

- *Regulation 4(2), (d) and (e),*
- *Regulation 5(1), (2), (5) and (7),*
- *Regulation 6(1),*
- *Regulation 7,*
- *Regulation 26(1), (2) and (6)*
- *Regulation 32 (1),*
- *Regulation 36,*
- *Regulation 37,*
- *Regulation 46 (1),*
- *Regulation 47 (1),*
- *Regulation 49 (1),*
- *Regulation 57 (1),*
- *Regulation 58(1)& (2), and*

- *Regulation 63*

51. In this context, it is important to note the following observation made by the Hon'ble Supreme Court of India in *Sahara Case*:

"90. in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue."

52. I note that in the present case, ESBI or its directors have not submitted any document / records to show that it had complied with the relevant Regulations of ICDR Regulations in respect of the public issue. I, therefore, find that ESBI failed to comply with the above mentioned provisions of ICDR Regulations in respect of the offer of equity shares made by it during 2011-2012.

53. Considering the above, I am of the view that ESBI engaged in fund mobilizing activity from the public, through the offer of equity shares and has contravened the provisions of section 56(1), 56(3), 2(36) read with 60, 73(1), 73(2), 73(3) of the Companies Act, 1956, read with the above mentioned provisions of ICDR Regulations.

ISSUE No. 3- If the findings on Issue No.2 are found in the affirmative, who are liable for the violation committed?

54. As recorded in the interim order, the details of the appointment and resignation of the directors are as following:

Name of the directors	Date of appointment	Date of cessation
Biswajit Paul	December 14, 2009	October 08, 2012
Subrata Kumar Paul	December 14, 2009	October 08, 2012
Sarbaniprasad Bishwas	December 14, 2009	Continuing
Amitava Basu	October 01, 2012	Continuing
Biswanath Roy	October 01, 2012	Continuing

55. Mr. Biswajit Paul in his submissions has stated that he was not a director of the company at the material time. In this regard, I note that he was undisputedly a

director of ESBI from December 14, 2009 to October 8, 2012, which means that his directorship continued during the entire financial year 2011-12 when the offer of equity shares was made by the company. Thus, for the purpose of present proceedings, the material / relevant time of directorship of Mr. Paul would be the period during which the issuance of equity shares was done by ESBI. The fact that he resigned afterwards and was not a director of ESBI when SEBI passed the interim order against ESBI, has no bearing on his liability under law in respect of the offer of equity shares made by ESBI. In view thereof, I find that the submission of Mr. Paul in this regard is untenable.

56. Mr. Biswanath Roy and Mr. Amitava Basu have submitted that they were forcefully made the directors of ESBI on the threat of being removed from their job. They also submitted that they were not known to the acts of the company as Biswajit Paul and Subrata Kumar Paul used to look after the company and manage all the things relating to the said company. They have also submitted that they have resigned from the company and have submitted acknowledged copies of their respective letters of resignation. In this regard, I note that Mr. Basu and Mr. Roy have not submitted any material / documents to substantiate their claim that they were forced to accept the position of director in the company. In fact, from a perusal of their respective letters of resignation, it appears that they had expressed their thanks and appreciation towards the company for the period during which they were associated with the company. Further, they tendered their resignation as directors only after acting as directors for 2-3 years. Furthermore, along with Mr. Sarbaniprasad Bishwas, they were the only directors of ESBI during their tenure of directorship. I am therefore unable to accept the submissions of Mr. Basu and Mr. Roy that they were forced to become directors and were not involved in the affairs of the company.

57. As regards their resignation from the company, I note that Mr. Biswanath Roy has submitted a letter of resignation dated December 18, 2014 and Mr. Amitava Basu has submitted a letter of resignation dated May 16, 2015. They have also enclosed email which they had sent to the company for tendering their respective resignations. The letters submitted by them have been acknowledged with company's seal. Considering the above, I am of the view that they had validly tendered their resignation with effect from the respective dates of their letters.

58. Thus, taking into consideration the letters of resignation submitted by Mr. Basu and Mr. Roy, the tenure of directorships is tabulated as under:

Name of the directors	Date of appointment	Date of cessation
Biswajit Paul	December 14, 2009	October 08, 2012
Subrata Kumar Paul	December 14, 2009	October 08, 2012
Sarbaniprasad Bishwas	December 14, 2009	Continuing
Amitava Basu	October 01, 2012	<i>May 16, 2015</i>
Biswanath Roy	October 01, 2012	<i>December 18, 2014</i>

59. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of Section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, ESBI and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

60. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, the rate of interest prescribed in this regard is 15%.

61. From the material available on record and the details of the appointment and resignation of the directors of ESBI as noted in paragraph 58 of this Order, it is noted that Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas were directors at the time of the issuance of equity shares. Since the

aforesaid persons were acting as directors during the period of issuance of equity shares, they are officers in default as per Section 5(g) of Companies Act, 1956. It is also seen from the documents available on MCA portal that ESBI had not designated any of the directors as the Managing Director or Whole Time Director during the relevant point of time i.e. during the period of issuance of equity shares. Further, in the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 of Companies Act, 1956 or any specified director of ESBI was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. Therefore, as per Section 5(g) of the Companies Act, 1956 all the past and present directors of ESBI (who were the directors of ESBI during the period of issuance of equity shares by ESBI i.e. FY 2011-12), as officers in default, are liable to make refund, jointly and severally, 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. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's) General Rules and Forms, 1956, and section 27(2) of the SEBI Act. Therefore, I find that ESBI and its Directors, viz. Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

62. I note that during the financial year 2011-12, ESBI through Offer of equity shares, had collected an amount of Rs. 1,86,73,000 from 70 allottees. I note that Mr. Biswajit Paul and Mr. Subrata Kumar Paul were directors of ESBI during financial year 2011-12. Further, Mr. Sarbaniprasad Bishwas was also a director of ESBI during financial year 2011-12 and has continued being a director since then. I note that Mr. Amitava Basu and Mr. Biswanath Roy joined as directors of ESBI on October 1, 2012 (i.e. FY 2012-13) and resigned subsequently as has been noted earlier. Therefore, in view of Hon'ble Securities Appellate Tribunal's (SAT) Order dated July 14, 2017 in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that the obligation of a director to refund the amount with interest jointly and severally with ESBI and other directors is limited to the extent of

amount collected during his/her tenure as director of ESBI.

63. In this regard, I note that Mr. Amitava Basu and Mr. Biswanath Roy were appointed as directors of ESBI only on October 01, 2012 i.e. after the period of issuance of equity shares. Therefore, following the reasoning as provided in the matter of *Manoj Agarwal vs. SEBI*, I am of the view that Mr. Amitava Basu and Mr. Biswanath Roy are not liable for refund of money as they were not directors during the relevant time of fund mobilization. However, Mr. Amitava Basu and Mr. Biswanath Roy had the responsibility of ensuring that refund of money was made to the investors as prescribed in law. With respect to the breach of law and duty by a director of a company, I refer to and rely on the following observations made by the Hon'ble High Court of Madras in *Madhavan Nambiar vs. Registrar of Companies* (2002 108 Cas 1 Mad):

" 13. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956. "

64. 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. The Noticees (who were directors of ESBI) cannot therefore wriggle out from liability. A director who is part of a company's board shall be responsible and liable for all acts carried out by the company. Accordingly, Mr. Amitava Basu and Mr. Biswanath Roy were also responsible for all the deeds/acts of the company during the period of their directorship and were obligated to ensure refund of the money collected by the company 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, Mr. Amitava Basu and Mr Biswanath Roy are liable to be debarred for an appropriate period of time.

65. As regards the promoters of the company, Mr. Jayanta Basu and Mr. Jeniya Basu have filed their replies and have admitted the fact that they were shareholders of the Company, however, they have denied having any involvement in the affairs of the Company. Mr. Saikat Sen has claimed that he was not aware how he became a shareholder of the Company. In this regard, I note that in the interim order, it has been observed in paragraph 2.10 that *“In view of this, it can reasonably be inferred that the directors ... and promoters of ESBI Infrastructure, viz. Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen were involved in the mobilization of public funds through the issue of equity shares without complying with the applicable law, as discussed in the forgoing paragraphs.”* It is pertinent to note that in respect of the said allegation of involvement in mobilization of funds, the above named promoters of ESBI have not offered any explanation. Mr. Sen who has denied even paying for any shares has not submitted any document to show that he had taken steps towards removal of his name as a promoter of ESBI. They have also not substantiated their denial of the knowledge/connivance/consent in the acts/omissions which constitute violation of the provisions applicable to public issue, and public interest requires that the persons who had such knowledge/connivance/consent be made accountable to the investors. Further, it is noted from the MoA that all of them had signed on the same and had subscribed to the shares of ESBI but none of them have submitted any document to show that they have disputed the same as forgery before an appropriate forum. I, therefore, note from the material available on record that Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen are promoters of ESBI and therefore, are liable as promoters for the *Offer of equity shares* against the norms of deemed public issue. Therefore, the said Noticees are liable to be debarred for an appropriate period of time.

66. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct ESBI and its Directors, viz. Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas to refund the monies collected, with interest to such

investors. Also, in order to safeguard the interests of investors, to prevent further harm to investors and to ensure orderly development of securities market, all the Noticees becomes liable to be debarred for an appropriate period of time.

67. I also note that, vide the interim order dated May 12, 2017, ESBI was directed to provide a full inventory of all the assets and properties belonging to the Company. Similarly, the Directors/Promoters of ESBI were also directed to provide an inventory of assets and properties belonging to them. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that no such inventory has been provided either by ESBI or the other Noticees despite the service of the interim order / notifications of information of issuance of the interim order through newspaper publications as stated in paragraph 11 of this Order.

68. In view of the discussion above, appropriate action in accordance with law needs to be initiated against ESBI and its Directors and Promoters, viz. Mr. Biswajit Paul, Mr. Subrata Kumar Paul, Mr. Sarbaniprasad Bishwas, Mr. Amitava Basu, Mr. Biswanath Roy, Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen.

69. 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 thereof, hereby issue the following directions:

- a) ESBI Infrastructure Company Ltd., Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas shall forthwith refund the money collected by the Company through the issuance of equity shares including the application money collected from investors till date, pending allotment of securities, if any, with an interest of 15% per annum, from the eighth day of collection of funds, to the investors till the date of actual payment.
- b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as "Non-Transferable".
- c) Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form.

- d) ESBI and Mr. Sarbaniprasad Bishwas (on behalf of the company) are directed to provide a full inventory of all the assets and properties and details of all the bank accounts, demat accounts and holdings of mutual funds/shares/securities, if held in physical form and demat form, of the company.
- e) ESBI and Mr. Sarbaniprasad Bishwas (on behalf of the Company) are permitted to sell the assets of the Company for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.
- f) ESBI Infrastructure Company Ltd., Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas are prevented from selling their assets, properties and holding of mutual funds/shares/securities held by them in demat and physical form except for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.
- g) ESBI, Mr. Sarbaniprasad Bishwas (on behalf of the company and in his personal capacity to make refund), Mr. Biswajit Paul and Mr. Subrata Kumar Paul in their personal capacity to make refund, shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including the details of contact persons such as names, addresses and contact details, within 15 days of this Order coming into effect.
- h) After completing the aforesaid repayments, ESBI, Mr. Sarbaniprasad Bishwas (on behalf of the company and in his personal capacity to make refund) and Mr. Biswajit Paul and Mr. Subrata Kumar Paul in their personal capacity, shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India.
- i) In case of failure of ESBI Infrastructure Company Ltd., Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas to comply with the

aforesaid applicable directions, SEBI, on the expiry of three months period from the date of this Order may recover such amounts, from the company and the directors liable to refund as specified in paragraph 69 (a) of this Order, in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.

- j) ESBI Infrastructure Company Ltd., Mr. Biswajit Paul, Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas 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 4 (four) years from the date of completion of refunds to investors as directed above. The above said directors 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 from the date of this Order till the expiry of 4 (four) years from the date of completion of refunds to investors.
- k) Mr. Amitava Basu, Mr. Biswanath Roy, Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen are restrained from accessing the securities market and are further restrained from buying, selling or dealing in securities, in any manner whatsoever, for a period of 4 (four) years from the date of this order.
- l) Needless to say, in view of prohibition on sale of securities, it is clarified that during the respective period of restraint, the existing holding, including units of mutual funds, of the Noticees shall remain frozen.
- m) The above directions shall come into force with immediate effect.

70. It is pertinent to mention here that the Hon'ble High Court at Calcutta in W.P. 30617 (W) of 2015 C.A.N.1296 of 2017 *Nirmal Chandra Banerjee Vs. The State of West Bengal & Ors.* and two other Writ Petitions has directed as under:

“This batch of writ petitions relates to different companies of ESBI Group. We are of the opinion that the Committee should make an assessment of the value of assets of this group of companies and file a report before this Court. The companies and their directors shall cooperate with the Committee and furnish the particulars whenever required to do so.”

Therefore, the effect and implementation of the aforesaid directions except those stated in paragraph 69 (c), (d), (j) and (k) shall be subject to the directions passed by the Hon'ble High Court in its Order dated December 15, 2016 or any further orders passed in respect of the present subject matter or any orders/decisions of the Hon'ble Justice (Retd) S. P. Talukdar Committee appointed in this regard.

71. Copy of this Order shall be forwarded to the recognized Stock Exchanges, Depositories and Registrar and Transfer Agents for information and necessary action.
72. 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.
73. Further, a copy of this Order shall also be forwarded to Hon'ble Justice (Retd) S. P. Talukdar Committee and the Local Police/State Government for information

Sd/-

DATE: May 14, 2019
PLACE: Mumbai

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