

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: S. RAMAN, WHOLE TIME MEMBER**

ORDER

Under Sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 read with Regulation 107 of the Securities and Exchange Board of India Act (Issue of Capital & Disclosure Requirements) Regulations, 2009 in respect of ESBI Infrastructure Company Ltd. (PAN: AAICA6147R) and its Directors/Promoters, viz. Mr. Biswajit Paul (PAN: AFKPP3892A), Mr. Subrata Kumar Paul PAN: AFHPP8743H), Mr. Sarbaniprasad Bishwas (DIN: 02732001), Mr. Amitava Basu (PAN: AGYPB8380Q), Mr. Biswanath Roy (PAN: ALCPR0889D), Mr. Jayanta Basu (PAN: ANWPB0698J), Mr. Tapas Basu (PAN: AEAPB7333P), Mr. Jeniya Basu (PAN: AUGPS7846G) and Mr. Saikat Sen (PAN: AKKPS9440C).

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- 1.1. Securities and Exchange Board of India (“SEBI”) received a complaint on December 28, 2015 at the Eastern Regional Office (ERO) against ESBI Infrastructure Company Limited (hereinafter referred to as “ESBI Infrastructure”/ the company), wherein it was *inter alia* alleged: “the company had collected huge amounts of money from the public by way of debentures, preference shares etc.”
- 1.2. Thereafter, SEBI obtained information regarding the company and its directors/promoters from the MCA21 Portal.
- 1.3. Based on the information obtained from the MCA21 Portal, SEBI vide separate letters dated January 27, 2016 advised ESBI and three of its directors, viz. Mr. Amitava Basu, Mr. Biswanath Roy and Mr. Sarbani Prasad Bishwas to *inter alia* furnish the following information/documents in connection with the issue of shares/debentures by the company:-
- i. Copy of Prospectus/Red Herring Prospectus / Statement in lieu of prospectus / Information memorandum filed with RoC for issuance of shares / debentures
 - ii. Date of opening and closing of the subscription list for the said shares / debentures
 - iii. Number of application forms circulated inviting subscription for shares / debentures and number of applications received.
 - iv. Details of allottees in the prescribed format ,

- v. *Copies of the minutes of Board/committee meeting in which the resolution has been passed for raising such additional capital and also for allotment of shares / debentures.*
- vi. *Copies of application forms, pamphlets, advertisements and other promotional material circulated for assurance of shares / debentures.*
- vii. *Terms and conditions of the shares / debentures.*
- viii. *Whether the company has applied for listing of its securities with any of the stock exchanges.*
- ix. *Copies of Form 2 and Form 10 filed with the RoC.*
- x. *Details of debenture trustee viz., name, address, board resolution authorizing their appointment etc.*
- xi. *Copy of Audited Annual Accounts and Annual Returns of the company for last three years*
- xii. *Name, addresses, PAN and occupation of all the promoters / directors and Key managerial Personnel of the company.*
- xiii. *Nature of Business and PAN of the company.*
- xiv. *Information in respect of issue of shares / debentures”*

1.4. The aforesaid letters sent to the company and one of the directors, Mr. Sarbani Prasad Bishwas returned undelivered with the remarks “Address Moved” and “Entity is not available”. The letters sent to the remaining directors viz. Mr. Amitava Basu and Mr. Biswanath Roy were duly delivered as signified by the acknowledgments received.

1.5. In response to SEBI’s letter dated January 27, 2016, the directors viz. Mr. Amitava Basu and Mr. Biswanath Roy vide letters dated February 02, 2016 and March 15, 2016 submitted their replies. The details of the same are as under:

- i. Mr. Amitava Basu submitted as under:
 - a. *“Mr. Biswajit Paul and Mr. Subrata Kumar Paul were principal proprietor and ex-director of ESBI Infrastructure Company Limited from commencement and holding major share of it.*
 - b. *I worked as a mere employee of the company and resigned from the company on May 16, 2015. (Xerox copy of the said resignation letter duly received by the company and mail sent are enclosed)*
 - c. *Since then I am not at all attached and connected with ESBI Infrastructure and I have no information about their present activities,*
 - d. *On receipt of your letter, I tried to contact Mr. Biswajit Paul and Subrata Kumar Paul, Original Director as well as proprietor of the said company but could not trace them and also contact their office at Shyambazar but it was locked”*

ii. Mr. Biswanath Roy submitted as under:

- a. *“Mr. Biswajit Paul and Mr. Subrata Kumar Paul were principal proprietor and ex-director of ESBI Infrastructure Company Limited from commencement and holding major share of it.*
- b. *I worked as a mere employee of the company and resigned from the company on December 18, 2014(Xerox copy of the said resignation letter duly received by the company and mail sent are enclosed)*
- c. *Since then I am not at all attached and connected with ESBI Infrastructure and I have no information about their present activities,*
- d. *On receipt of your letter, I tried to contact Mr. Biswajit Paul and Subrata Kumar Paul, Original Director as well as proprietor of the said company but could not trace them and also contact their office at Shyambazar but it was locked”*

1.6. As no reply was received from ESBI Infrastructure and Mr. Sarbani Prasad Bishwas, reminders were issued to them vide letters dated March 09, 2016. However, till date they have not responded to SEBI letters.

1.7. Thereafter, SEBI vide letter dated September 01, 2016 sought information from Mr. Biswajit Paul and Mr. Subrata Kumar Paul (two of the directors), in respect of the issue of equity shares by ESBI Infrastructure. The letter sent to Mr. Biswajit Paul was duly delivered. However, the letter sent to Mr. Subrata Kumar Paul returned undelivered with the remarks “*Address Moved*”.

Mr. Biswajit Paul, vide letter dated September 09, 2016 stated: “*I inform you that during the period under your consideration that I was not the director of the said company ESBI Infrastructure Co. Ltd. which will appear from the records of the registrar of companies West Bengal, Kolkata*”.

2.1 I have carefully perused the complaint received by SEBI along with the documents contained therein, correspondence exchanged between SEBI and ESBI Infrastructure and its directors, information/documents obtained from the MCA21 Portal, etc. and other material available on record. On an examination of the aforementioned material/information available on record, i.e. and other information/materials available on record, it is *prima facie* observed as under:

- i. ESBI Infrastructure (**ESBI Infrastructure Company Ltd.**) was incorporated on December 14, 2009 (CIN: U45400WB2009PLC140162). Its Registered Office is at Ground Floor Premises No. 4/4B, Jadu Mitra Lane, Kolkata – 700004.
- ii. The details of the present & past directors /Key Managerial Personnels’ of ESBI Infrastructure are as under:

Name of the director*	Designation	DIN/DP IN	PAN	Residential Address	Date of appointment	Date of cessation
Biswajit Paul	Director	00376113	AFKPP3892A	35/1 Bangur Avenue, Block - C, Kolkata, West Bengal - 700055	14/12/2009	08/10/2012
Subrata Kumar Paul	Director	00376140	AFHPP8743H	51/1B Ram Kanto Bose Street, Kolkata, West Bengal - 700003	14/12/2009	08/10/2012
Sarbaniprasad Bishwas	Director	02732001	N.A.	Surpara, Itachuna G.P.Itachuna Khanyan, P.S. Panpandua Dist Hooghly 712204	14/12/2009	N.A
Amitava Basu	Director	02640538	AGYPB8380Q	146 Ishan Ghosh Road, PO Barisha, PS Thakurpukur, Kolkata, West Bengal - 700008	01/10/2012	N.A
Biswanath Roy	Director	06533291	ALCPR0889D	120,Nandan Nagar, Kolkata, West Bengal - 700083	01/10/2012	N.A
Jayanta Basu	Promoter	N.A	ANWPB0698J	49, Bangur Avenue, Block – C, Kolkata 700055	N.A	N.A
Tapas Basu	Promoter	N.A	AEAPB7333P	54, Bangur Avenue, Flat – 301 Block – C Kolkata 700055	N.A	N.A
Jeniya Basu	Promoter	N.A	AUGPS7846G	49, Bangur Avenue, Block – C, Kolkata 700055	N.A	N.A
Saikat Sen	Promoter	N.A	AKKPS9440C	Kalibari Goli, Kharua Bazar, P.O. Chinsurah, DIST. Hooghly Hooghly 712101	N.A	N.A

2.2 On perusal of the Balance Sheet (Form 23AC obtained from MCA Portal) (as on March 31, 2011, March 31, 2012 and March 31, 2013) of ESBI Infrastructure, following are observed:

a. The share capital of the company is shown as under

Period	Share Capital (₹)
As on March 31 2011*	5,00,000
As on March 31 2012	4,21,03,000
As on March 31 2013**	4,21,03,000

* An amount of ₹5,46,46,900/- was shown as "Share application money pending allotment"

**The company has not filed its Annual Report since March 2013

b. Further, the balance sheet as on March 31, 2013 indicates that as on March 31, 2012 (under the head "Issued and Subscribed Capital"), an amount of ₹ 1,91,73,000/- was shown towards the issue of 1,91,73,000 equity shares of ₹ 10/- each and an amount of ₹ 2,29,30,000/- was shown towards the issue of 22,930 preference shares of ₹ 1000/- each. This indicates that the total share capital of ₹ 4,21,03,000/- (₹ 1,91,73,000 + ₹ 2,29,30,000) was collected through the issue of equity shares and preference shares by ESBI Infrastructure during the period (2011-2012) . The Form 2 obtained from the *MCA21Portal* indicates that the preference shares issue was made to 42 investors.

2.3 On perusal of Form 2 obtained from *MCA21 Portal*, it is observed as under:

a. ESBI Infrastructure issued 22,930 preference shares to 42 investors on March 31, 2012.

b. Similarly, ESBI Infrastructure issued equity shares to 70 investors during the period 2011-2012. The details are as under:

Date of Allotment of Equity Shares	No of Equity Shares Allotted	No. of Allotees	Value of Allotment (₹)
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	18,67,300	70	1,86,73,000

2.4 In the context of the abovementioned details of the *Offer of equity Shares* by ESBI Infrastructure to 70 investors (mentioned at Paragraph No. 2.3(b)), the issue for determination in the instant matter is whether the mobilization of funds by ESBI Infrastructure through the aforesaid issue, is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"), the Companies Act, 1956 (since repealed) read with the Companies Act, 2013 and the SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 (hereinafter referred to as "**SEBI ICDR Regulations**").

2.5 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 India Real Estate Corporation Limited & Ors. vs. SEBI (Civil Appeal no. 9813 of 2011) (Judgment dated August 31, 2012)*** (hereinafter referred to as the "**Sahara Case**"), had observed:

"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."

2.5.1 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 recognised 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 2001-March 2014, as discussed above.

2.6 As the *equity shares* have been issued to the public during the year 2012, the provisions of sub-Sections (1), (2) and (3) of the Section 67 of the Companies Act, 1956, are applicable to the allotments made by ESBI Infrastructure. In this regard,

i. Sections 67(1) and 67(3) of the Companies Act, 1956, are reproduced as under :

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

- (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)."*

ii. While examining the scope of Section 67 of the Companies Act, 1956, the Hon'ble Supreme Court of India in the *Sabara Case* observed :

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections

(1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ...

Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. ...

I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. ..."

- iii. In the instant matter, for ascertaining whether the *Offer of equity Shares* by ESBI Infrastructure is a public issue or issue on private placement basis in accordance with Section 67 of the Companies Act, 1956, the number of subscribers is of utmost importance.
 - a. The material obtained from the MCA Portal indicate (details mentioned in the table at Paragraph No. 2.1(iii) above) that ESBI Infrastructure has issued *equity shares* to 70 investors during the period 2011-2012. As per the first proviso to Section 67(3) of the Companies Act, 1956, where the “offer” or “invitation to subscribe for shares or debentures” is made to fifty persons or more, then it has to be construed as a public offer. In view of the foregoing, it is *prima facie* observed that the aforesaid issues of equity shares made by ESBI Infrastructure to more than 50 investors (*i.e.* 70 investors) were deemed public issues.
 - b. It is observed that ESBI Infrastructure is not stated to be a Non-banking financial company or public financial institution within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that ESBI Infrastructure is not covered under the *second proviso* to Section 67(3) of the Companies Act, 1956.

- c. In view of the above, the *Offer of equity Shares* by ESBI Infrastructure during the Financial Year 2011-2012, will *prima facie* qualify as a public issue under the *first proviso* to Section 67(3) of the Companies Act, 1956. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall also be administered by SEBI.

2.7 Having observed that the *equity shares* issued by ESBI Infrastructure are *prima facie* in the nature of public issue, the Company was required to comply with provisions of the Companies Act, 1956 and other relevant statutory provisions as applicable. I note that-

- a. Under Section 2(36) read with Section 60 of the Companies Act, 1956, a company needs to register its prospectus with the RoC, before making a public offer or 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 mentioned above, the *Offer of equity Shares* was a public issue of securities. Having made a public issue, ESBI Infrastructure was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that there is no evidence on record to indicate that ESBI Infrastructure has complied with the provisions of Section 60 of Companies Act, 1956. In view of the same, I find that ESBI Infrastructure has *prima facie* not complied with the provisions of Section 60 of Companies Act, 1956.

Under 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 or debentures of a company, unless the form is accompanied by abridged prospectus, contain disclosures as specified. Based on the material available on record, I find that ESBI Infrastructure has not complied with the provisions of Section 56(1) and 56(3) of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.

- b. By issuing equity shares to more than 49 persons, the Company had to compulsorily list such securities in compliance with Section 73 of the Companies Act, 1956. The same provides liquidity and exit opportunity to the investors. In this regard-
 - i. Sections 73 of the Companies Act, 1956, of which sub-Sections (1), (2) and (3) are relevant for the instant case is reproduced as under:

"73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more 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.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognised stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

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

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 1 [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."

- ii. In the *Sahara Case*, the Hon'ble Supreme Court of India also examined Section 73 of the Companies Act, 1956, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons.

*... Section 73(2) says that every company and every director of the company who is an officer in default, shall 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. The scope of the above mentioned provisions came up for consideration before this Court in *Raymond Synthetics Ltd. & Ors. V. Union of India* (supra), wherein the Court held that in a case where the company has not applied for listing on a stock exchange, the consequences will flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus. I am, therefore, of the view that since Saharas had violated the listing provisions and collected huge amounts from the public in disobedience of law, SEBI is justified in directing refund of the amount with interest."*

- iii. Having regard to the abovementioned observations of the Hon'ble Supreme Court of India, since the *Offer of equity Shares* is *prima facie* a public issue in accordance with the provisions of the Companies Act, 1956, the same will attract 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 provisions of Sections 73(2) and 73(3) of that Act.

- iv. In the facts of the instant case, it *prima facie* appears that ESBI Infrastructure has violated the provisions of Section 73 of the Companies Act, 1956, in respect of the *Offer of equity Shares*.

2.8 In addition to the compliance with the provisions of the Companies Act, 1956, the Company was mandated to comply with the applicable provisions of under SEBI Rules/Regulations/Guidelines. I note that:

- i. SEBI had framed the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("**SEBI DIP Guidelines**") in exercise of the powers conferred on it under the SEBI Act. The Hon'ble Supreme Court in *Sahara Case* has observed that:

"DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by ICDR 2009".

- ii. The SEBI DIP Guidelines were applicable to all public issues by listed and unlisted companies. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (**SEBI ICDR Regulations**) (which came into effect from August 28, 2009) replaced the SEBI DIP Guidelines and all public issues are now required to comply with the SEBI ICDR Regulations. As per Regulation 115 of the SEBI ICDR Regulations, anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said DIP Guidelines shall be deemed to have been done or taken under the corresponding provisions of SEBI ICDR Regulations. The said Regulation also states that any offer document, whether draft or otherwise, filed or application made to SEBI under the said DIP Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of SEBI ICDR Regulations.

The SEBI ICDR Regulations operate as reasonable safeguards for investors who subscribed or intend to subscribe in the public issues of securities. In this regard, I *prima facie* observe that ESBI Infrastructure has not complied with the relevant Regulations of SEBI ICDR Regulations in respect of the public issue. The directors, *viz.* Mr. Biswajit Paul, Mr. Subrata Kumar Paul, Mr. Sarbaniprasad Bishwas, Mr. Amitava Basu and Mr. Biswanath Roy, who were in charge and responsible for the day to day affairs and business of the company during the period of issue of shares by the company are also liable for the non-compliance of the SEBI ICDR Regulations. The relevant provisions of SEBI ICDR Regulations are:

- 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

2.9 In this regard, 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."

2.10 I note that the directors, *viz.* Mr. Biswajit Paul, Mr. Biswanath Roy and Amitava Basu replied to SEBI letters (seeking information in respect of the issue of equity shares by ESBI Infrastructure)

sent to them. Mr. Biswajit Paul vide the letter dated September 05, 2016 stated that he was not the director of the said company during the relevant period. Further, Mr. Biswanath Roy and Mr. Amitava Basu vide separate letters dated February 02, 2016 stated that they worked as mere employees of the company and thereafter resigned from the company on December 18, 2014 and May 16, 2015 respectively.

It is noted that ESBI Infrastructure had allotted *equity shares* to the public in March 2012. The documents obtained from MCA21 (as reproduced in the Table at Paragraph No. 2.1 (ii) above) *prima facie* indicate that Mr. Biswajit Paul along with Mr. Subrata Kumar Paul and Mr. Sarbaniprasad Bishwas were in charge and responsible for the day to day affairs as directors of ESBI Infrastructure during the period when the company issued equity shares during March 2012. The contention put forth by Mr. Biswajit Paul that he was not a director of the company during the period under consideration is not true and hence not acceptable. Further, as per the documents available from the *MCA21 portal*, the appointments of Mr. Biswanath Roy and Mr. Amitava Basu as the directors of ESBI Infrastructure were subsequent to the said issue of equity shares by the Company, *i.e.* on October 01, 2012. It is however noted that Mr. Biswanath Roy and Mr. Amitava Basu continued to act as the directors of the company until they resigned from the post on December 18, 2014 and May 16, 2015 respectively. It appears that they have not taken any action to remedy the violations (illegally collecting money without complying with the applicable public issue norms prescribed by the Companies Act, 1956, SEBI Act and Regulations made thereunder) committed by the Company during the tenure. Moreover, as directors of the Company, they are equally liable to refund the monies illegally collected by the company from the public. Further, Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen were the promoters of ESBI Infrastructure during the relevant period.

In view of this, it can reasonably be inferred that the directors *viz.* Mr. Biswajit Paul, Mr. Subrata Kumar Paul, Mr. Sarbaniprasad Bishwas, Mr. Amitava Basu, Mr. Biswanath Roy and promoters of ESBI Infrastructure, *viz.* Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen were involved in the mobilisation of public funds through the issue of *equity shares* without complying with the applicable law, as discussed in the forgoing paragraphs.

3. SEBI has a statutory duty to protect the interests of investors in securities market and promote the development of, and to regulate, the securities market. Section 11 of the SEBI Act has empowered it to take such measures as it deems fit for fulfilling its legislative mandate. Further, as per the provisions of Section 55A of the Companies Act, 1956, administrative authority on the subjects relating to public issue of securities is exclusively with SEBI. For this purpose, SEBI can exercise its jurisdiction under Sections 11(1), 11A, 11B and 11(4) of the SEBI Act read with Section 55A of the Companies Act, 1956.

In view of the above violations committed by ESBI Infrastructure and its directors/promoters by raising money from the public through the issue of *equity shares* without complying with the relevant provisions of the Companies Act, 1956 and SEBI Act/Regulations, etc. (as discussed in the forgoing paragraphs), it becomes necessary for SEBI, as the regulator for the securities market, to intervene and issue suitable directions including restraining the Company and its directors/promoters from carrying on activities in contravention of the law. Steps need to be taken in the instant matter to ensure only legitimate fund raising activities are carried on by ESBI Infrastructure and no investors are defrauded. In light of the facts in the instant matter, I find that there is no other alternative but to take recourse through an interim action against ESBI Infrastructure and its Directors/Promoters, for preventing the company from further carrying on with its fund mobilizing activity under the *Offer of equity Shares*.

4. In view of the forgoing, I, in exercise of the powers conferred under Sections 11(1), 11(4), 11A(1)(b) and 11B read with Section 19 of the Securities and Exchange Board of India Act, 1992 thereof and Regulation 107 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, hereby issue the following directions :

- 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 co-operate 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).*
5. The above directions shall come into force with immediate effect.
6. The *prima facie* observations contained in this interim-order- cum-show cause notice are made on the basis of the material available on record *i.e.* correspondence exchanged between SEBI and ESBI Infrastructure and information obtained from the *MCA 21 Portal*. ESBI Infrastructure and its

promoters and directors including Mr. Biswajit Paul, Mr. Sarbaniprasad Bishwas, Mr. Subrata Kumar Paul, Mr. Amitava Basu, Mr. Biswanath Roy, Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen are advised to show cause as to why suitable directions/ prohibitions, under the 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.
7. ESBI Infrastructure Company Ltd. and its aforementioned promoters and directors may file their replies/ submissions within a period of 21 days from the date of receipt of this interim order – cum- show cause notice and may also indicate whether they desire to avail an opportunity of personal hearing in the matter. In the event the aforementioned persons/entities intend to avail an opportunity of personal hearing, they may confirm the same in writing. If they fail to file their replies or request for an opportunity of personal hearing within 60 days from the date of receipt of this Order, the *prima facie* findings regarding the violations mentioned at Paragraph Nos. 2.6 to 2.10 of this Order shall become final and absolute, without any further orders. Consequently, the directions contained in Paragraph Nos. 4 and 6 above shall continue to operate against ESBI Infrastructure Company Ltd. and its aforementioned promoters and directors till the expiry of a period of 4 years from the date of repayment to the satisfaction of SEBI.

8. In case of failure on the part of ESBI Infrastructure Company Ltd. and its directors and promoters to respond to the charges mentioned above and also to comply with the aforesaid directions within a period of one hundred eighty (180) days from the date of receipt of this Order, SEBI shall initiate appropriate enforcement actions as deem fit against ESBI Infrastructure Company Ltd. and its directors, *viz.* Mr. Biswajit Paul, Mr. Subrata Kumar Paul, Mr. Sarbaniprasad Bishwas, Mr. Amitava Basu and Mr. Biswanath Roy and promoters *viz.* Mr. Jayanta Basu, Mr. Tapas Basu, Mr. Jeniya Basu and Mr. Saikat Sen including recovery proceedings under Section 28A of the SEBI Act, prosecution proceedings under Section 24 of the SEBI Act and Section 621 of the Companies Act, 1956 read with the relevant provisions of the Companies Act, 2013, adjudication proceedings under the SEBI Act, reference to State Government/Local Police, etc., in accordance with law.
9. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action.

Place: Mumbai
Date: May 12, 2017

S. RAMAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA