

F-142-A

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ I.A. No. 11557/2009 in O.M.P. 436/2005

INDIABULLS SECURITIES LTD. Petitioner
Through: Mr. Rajeev K. Virmani, Sr.
Advocate with Ms. Rashmi
Virmani and Ms. Srilekha
Sridhar, Advocates.

versus

AMULYA RATAN DHAR Respondent
Through: Mr. Abhijeet Chatterjee,
Advocate with Mr. S.P.M.
Tripathi and Mr. Subodh K.
Pathak, Advocates.

AND

+ O.M.P. 9/2006

INDIABULLS SECURITIES LTD. Petitioner
Through: Mr. Rajeev K. Virmani, Sr.
Advocate with Ms. Rashmi
Virmani and Ms. Srilekha
Sridhar, Advocates.

versus

ARATI DHAR Respondent
Through: Mr. Abhijeet Chatterjee,
Advocate with Mr. S.P.M.
Tripathi and Mr. Subodh K.
Pathak, Advocates.

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Date of Decision : DECEMBER 02, 2009

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J: (ORAL)

1. Both OMP Nos. 436/2005 and 9/2006 have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act 1996”) challenging the Arbitral Awards dated 26th August and 30th September, 2005. Since common issues of fact and law arise in both the proceedings and respondents in the two petitions are husband and wife, the said two petitions with consent of parties are being disposed of by a common order.

2. Mr. Rajeev K. Virmani, learned senior counsel for petitioner submitted that the arbitral tribunals had failed to appreciate that the claims filed by the respondents were barred by limitation. In this connection, Mr. Virmani, relied upon Chapter XI of the Bye laws of the National Stock Exchange of India Limited. The relevant portion of the said Chapter reads as under:-

CHAPTER XI ARBITRATION

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Limitation period for reference of claims, differences or disputes for arbitration

(3) All claims, differences or disputes referred to in Bye laws (1), (1A), (1B) and (1D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively

resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months.

Explanation :-

(1) In cases where the date of claim, difference or dispute is not ascertainable, it shall be deemed to have arisen on the date of expiry of six months from the date of the transaction in respect of which the claim, difference or dispute has arisen.

(emphasis supplied)

3. In support of his submission, Mr. Virmani relied upon a judgment of the Supreme Court in ***HCG Stock & Share Brokers Ltd. v. Gaggar Suresh*** reported in (2007) 2 SCC 279 wherein it had been held as under:

3. The learned Single Judge in turn has affirmed the order of the Arbitral Tribunal whereby the Arbitral Tribunal has upheld the objection of the respondent that the claim raised by the appellant is barred by limitation as per bye-laws of the National Stock Exchange of India Limited.

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5. In regular course of business the appellant maintained an account of the respondent in its books of accounts and from time to time the appellant forwarded to the respondent the extracts of the said account, which was received, retained and accepted by the respondent and at no point of time the respondent raised any dispute regarding the extract of the accounts. At the foot of the said account of the respondent so maintained by the appellant a sum of Rs 49,79,388.17 paise remained due and payable by the respondent to the appellant as on 31-12-1999. The appellant also sent confirmation letter to the respondent along with a copy of the statement of accounts and the respondent never raised any query nor did the respondent raise any objection and on the contrary, the respondent kept on promising to pay the outstanding dues in his accounts. The respondent sought some time for making the payment because of financial difficulties. However, after some time the appellant became suspicious and lodged a complaint against the respondent with the Economic Offences Wing on 21-3-2003. The appellant submitted that the cause of action has arisen when it filed the complaint against the respondent with the Economic Offences Wing on 21-3-2003

and, therefore, the claim was within time and the same is not barred by limitation. The respondent filed his reply and raised an objection that the claim is barred by time. Apart from other objections which have been raised by the respondent, the respondent raised the plea of limitation and submitted that the time prescribed for filing any complaint arising out of a dispute, redressal of which can be sought from the panel of arbitrators by National Stock Exchange of India Limited is six months from the date of dispute. In the present dispute the time started running from the date on which the dispute has arisen. The last date on which the appellant has carried out a transaction on behalf of the respondent was 1-7-1999. The respondent submitted that the arbitration proceedings must be terminated since prima facie the dispute is not established as it is hopelessly barred by time. The bye-laws of National Stock Exchange of India Limited provide six months' period for filing of such complaint and the relevant portion of the bye-laws reads as under:

“All claims, differences or disputes referred to in Bye-laws (1), (1-A), (1-B) and (1-D) above shall be submitted to arbitration within six months from the date on which the claim, difference or dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the relevant authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months.”

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7.....Reference to this communication leaves no manner of doubt that the dispute had already arisen on 8-2-2001 and the last date for resolving the dispute was 19-3-2001. Therefore, even if we take the last cut off date to be 19-3-2001 then too the last date of filing the complaint would be September 2003. Therefore, the complaint was hopelessly barred by time.”

4. Mr. Virmani further submitted that the arbitral tribunals had not found the petitioner responsible for any breach of contract. He stated that Mr. Debjyoti Gupta who had specifically been authorized by the respondents to operate the securities trading/depository account, was an agent of the respondents. In this connection, Mr. Virmani referred to

two undated letters written by the respondents to the petitioner as well as the Memorandum of Understanding executed between the respondents and their agent Mr. Debjyoti Gupta. The two undated letters written by the respondents which according to Mr. Virmani had been written in October, 2002 are reproduced hereinbelow:

- A) Authorization letter issued by respondents in favour of their agent Mr. Debjyoti Gupta.

*“M/s. Orbis Securities Pvt. Ltd.
F-60, Malhotra Building,
Connaught Circus
New Delhi – 110001*

Subject : Authorization

I hereby authorize Mr. Debjyoti Gupta S/o Sh. Satyaki Gupta Resident of 1/1, Dover Lane Kolkata-29, to deal/ execute all transactions in my broking account with M/s. Orbis Securities Pvt. Ltd.

Mr. Debjyoti Gupta is also authorized to receive all documents and other communications from M/s. Orbis Securities Pvt. Ltd. and to do all other Acts necessary for operations in my broking account. All transactions done by him with M/s. Orbis Securities Pvt. Ltd. shall be always binding upon me and I shall remain liable for the same.

I/We further attest the photograph of Mr. Debjyoti Gupta which is affixed herewith and as also his signatures appended below...”

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- B) Authorization letter issued by respondents in favour of petitioner.

*M/s. Orbis Securities Pvt. Ltd.
F-60, Malhotra Building,
Connaught Circus,
New Delhi-110001*

**SUBJECT : AUTHORISATION OF GROUP/FAMILY
DEALINGS**

<i>Name of Family</i>	<i>Constituent Code</i>
<i>Member/Authorised person</i>	
<i>Amullya Ratan Dhar</i>	<i>12724</i>
<i>Adhiraj Dhar</i>	<i>12724</i>
<i>Arati Dhar</i>	<i>12726</i>
<i>Aparajita Dhar</i>	<i>12726</i>
<i>Dhee Rahjah Sehgupta</i>	<i>11454</i>
<i>Suprova Sengupta</i>	<i>11454</i>
<i>Debjyoti Gupta</i>	<i>11454</i>
<i>Debjyoti Gupta</i>	<i>10839</i>

I do hereby solemnly affirm and declare as under :-

- 1. That the abovementioned authorised person/members of my family are regularly trading/investing through you on National Stock Exchange of India Ltd. (NSE) and/or any stock exchange(s). For all purposes of operations of my account with you, the above account shall be termed as Group Account.*
- 2. That I hereby authorise you to sell shares standing in my account and to transfer the proceeds of the sale of such shares to the abovementioned accounts to set off outstanding debit amounts in their respective accounts.*
- 3. That I hereby authorise you to set off all outstanding debit amounts in the above mentioned accounts maintained by you in any segment of any stock exchange(s), against the amount standing to the credit of Constituent's/Family/Group account maintained by you in respect of any segment of any stock exchange(s).*
- 4. That I have given the above authority to Orbis Securities Private Limited with my free consent and without any pressure, threat or coercion from any corner whatsoever.*
- 5. That in future I shall not make any claim from Orbis Securities Private Limited in any manner whatsoever of any amount adjusted from the credit in my account to set off the outstanding debit amounts in the abovementioned accounts and I further state that if anybody on my behalf claims the above said adjusted amount, the said act shall be null and void and shall be ineffective from all corners.*

6. *That this is my true irrevocable statement and shall remain binding on me.*
7. *That I hereby undertake to intimate you from time to time of any additions of the Constituents to the said Group Account for the purpose of either allowing them to trade on my behalf or for the purpose adjustment of balance inter se.”*

(emphasis supplied)

5. The relevant portion of the undated Memorandum of Understanding between the respondents and their agent is also reproduced hereinbelow:

MEMORANDUM OF UNDERSTANDING (MOU)

This Memorandum of Understanding (MOU) is between Mrs. Arati Dhar, herein after referred to as Client and Mr. Debjyoti Gupta for the purposes of share trading process as agreed upon mutually by both the parties.

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5. *This deal is between Mrs. Arati Dhar and Mr. Debjyoti Gupta and Orbis Securities Pvt. Ltd. is in no way connected with this.*

(emphasis supplied)

6. Mr. Virmani further pointed out that Mr. Debjyoti Gupta was an agent of the respondents and if the respondents were aggrieved by any action of their agent, they should take action against him. In this connection, Mr. Virmani relied upon Sections 226 and 238 of Indian Contract Act which read as under:-

226. Enforcement and consequences of agent's contracts.-
Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as

if the contracts had been entered into and the acts done by the principal in person.

238. Effect on agreement, of misrepresentation of fraud, by agent.-*Misrepresentation made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.*

7. Mr. Virmani lastly submitted that the concept of apportionment was unknown to law. He submitted that the concept of contributory negligence could not be applied to a contractual matter.

8. On the other hand, Mr. Abhijeet Chatterjee, learned counsel for respondents submitted that petitioner had traded in the shares of the respondents without their knowledge and/or instructions. He submitted that the claims were within limitation as the time taken to administratively resolve the claims had to be excluded under Chapter XI of the National Stock Exchange of India bye laws. In this connection, he drew my attention to the correspondence exchanged between the respondents and National Stock Exchange and in particular to the letter dated 30th March, 2005 issued by the National Stock Exchange wherein it had been specifically stated that as the National Stock Exchange could not resolve the grievances administratively with the trading member, respondents may, if they so desire take recourse to arbitration. The relevant portion of the said letter dated 30th March, 2005 is reproduced hereinebelow:-

March 30, 2005

Amullya Ratan Dhar & Adhiraj Dhar,
Nayabad, 110, Jadavpur Co-op,
P.O. Kalikapur,
Kolkata 700 099

Dear Sir,

This has reference to your complaint against M/s. Indiabulls Securities Ltd. for manipulations in the trading account.

The Exchange had taken up the grievance with the trading member for resolving the same administratively. However on account of conflicting claims and counter claims made by the constituent and the trading member, you may, if you so desire, take recourse to arbitration by filing an Application for Arbitration against the trading member M/s. Indiabulls Securities Ltd. Accordingly, kindly submit the application for arbitration along with the following documents.

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Please note that the Arbitration is subject to the Bye laws, Rules and Regulations of the Exchange. The Arbitration Application form that may be submitted by the client should be complete in all respects and the Exchange reserves the right to reject the Application for Arbitration, if any of the documents/formalities are not complied with as per the provisions of the Bye Laws, Rules and Regulations of the Exchange and return the same in original along with other relevant documents submitted by you.

Further, please note to ensure that the Arbitration Application is submitted within six months from the date on which the claim, difference or dispute arose or is deemed to have arisen, otherwise the Arbitrator may dismiss the arbitration application as time barred under the Byelaws of the Exchange.

(emphasis supplied)

9. Mr. Abhijeet, also drew my attention to the findings of the arbitral tribunals wherein they had pointed out specific breaches on the part of the petitioner. Mr. Abhijeet further stated that the entire holding

of the respondents had been fraudulently transferred to the petitioner without any payment being credited to the bank accounts of the respondents. In this connection, Mr. Abhijeet referred to one of the transaction statement of one of the respondents which reads as under:

Cut off Date 01-April-2003	TRANSACTION STATEMENT
Print Date : 26-May-2005 07:01 PM	
National Securities Depository Limited	
DP : INDIABULLS SECURITIES LTD.[IN302236]	
1A, 1ST FLOOR, HAMILTON HOUSE, CONNAUGHT	
PLACE NEW DELHI, 110001	

Selection Criteria : Transactions from Date : To Date: 01/04/2003

Client ID	10035909	Category	Non House	Status	Active
Name	AMULYA RATAN DHAR, ADHIRAJ DHAR		Beneficiary		
Address	FLAT NO. E-11				
	B-2, 426				
	PRINCE ANWAR SHAH ROAD				
	CALCUTTA				
Pin Code	700045				

Bkg. Date	Trans. No.	Description	Credit	Debit	Balance
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ISIN	INE676A01019	AVAYA GLOBALCON LTD. EQ			
Beneficiary				Opening Balance	0
27/11/2002	509154	By INDIABULLS SECURITIES LTD	200		200
		/10000226			
17/03/2003	618858	To INDIABULLS SECURITIES LTD		200	0
		/10000226			
				Closing Balance	0
ISIN	INE486A01013	CESC EQUITY			0
Beneficiary				Opening Balance	0
27/11/2002	509147	By INDIABULLS SECURITIES LTD	1600		1600
		/10000226			
03/02/2003	581132	To INDIABULLS SECURITIES LTD		1600	0
		/10000226			
				Closing Balance	0
ISIN	INE964A01019	DSQ BIOTECH LTD. EQ			
Beneficiary				Opening Balance	0
27/11/2002	509153	By INDIABULLS SECURITIES LTD	200	0	200
		/10000226			
17/03/2003	618851	To INDIABULLS SECURITIES LTD		200	0

		/10000226			
				Closing Balance	0
ISIN	INE286A01017	DSQ SOFTWARE EQ			
Beneficiary				Opening Balance	0
27/11/2002	509157	By INDIABULLS SECURITIES LTD	200		200
		/10000226			
17/03/2003	618852	To INDIABULLS SECURITIES LTD		200	0
		/10000226		Closing Balance	0

10. Mr. Abhijeet further submitted that no understanding between the respondents and their agent could override the responsibilities of the petitioner under the Member Constituent Agreement. He emphasized that the arbitral tribunals had come to the conclusion that the password had been wrongly sent by the petitioner to the respondents at the incorrect address and that too by U.P.C. instead of courier.

11. Mr. Abhijeet further stated that none of the transaction statements had been placed by the petitioner before the arbitral tribunals. In this connection, Mr. Abhijeet referred to the finding of the arbitral tribunal in the award dated 26th August, 2005 which reads as under:-

“This is a case almost similar to a cyber crime in which someone caught hold of the password of an on-line trader and indulged in trading in shares on his behalf causing clandestinely a loss of about Rs. 20 lacs to him. As there was an involvement of a third party who was allegedly instrumental in effecting trading loss and as a cheating charge had also been leveled, perhaps it would have been a fit case for the law-enforcing Agency to uncover the truth. Nevertheless, Arbitration dwells purely on the role of the Applicant and the Respondent in the whole process and on their respective lapses, which led to the loss.

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The Himalayan blunder committed by the Respondent was that they used indiscriminately the Demat A/c. of the Applicant for the purpose of provision of the margin etc., on account of the alleged trading done on the Applicant's broking account by transferring shares from the former without keeping the Applicant informed or without giving him time to regularize any deficiency in this regard. True, the system at the Respondent's end generated a number of information and data relating to trading, margin account, contract notes, ledger statement etc. But in the absence of the "password" the Applicant did not have any means to access these for his use.

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.....Fourthly, the Respondent could not also produce any proof/ document of having sent the hard copies of the periodical "Transaction Statements" relating to the Applicant's Demat Account to him. This was all the more necessary in a situation where the Respondent knew that all transactions in the Applicant's trading account were being carried out by the Applicant's AA only (vide statements made by the Respondent in Para 11 and last sentence of Para 18 of their statement of reply received at N.S.E. on 04.06.2005) and hence all "screenshot" reports might not have been brought to his notice.

(emphasis supplied)

12. In rejoinder, Mr. Virmani stated that in one of the arbitral awards dated 26th August, 2005, the arbitral tribunal had not even dealt with the petitioner's submissions with regard to limitation. He further stated that as soon as the respondents had requested for change of password, the said change had been carried out by the petitioner. He further pointed out that it was only on 04th May, 2004 that the petitioner's received a letter from the respondents requesting them not to allow Mr. Debjyoti Gupta to carry out any transaction on their behalf. He stated that immediately after receipt of said instructions on 04th May, 2004, the

petitioner had not permitted Mr. Debjyoti Gupta to carry out any transaction in the petitioner's account. The respondents' letter dated 15th March, 2004 received by the petitioner on 04th May, 2004 is reproduced hereinbelow:

Date : 15.3.04

To

*The Relationship Manager,
Orbis Securities/India Bull,
Branch Office, 7A/1A,
Middle Ten Street, Calcutta-71*

*Nayabad Jadavpur
Co-Op PO Kalikapur,
Kolkata-700099
Ph: 2432:2886*

*Sub: Cancellation or Freeze of e-trading business of A/C
No. ID 127/26 by Sri Debjoti Gupta with immediate effect i.e.
from 15.03.04.*

Dear Sir,

*We the Accounts holder of user Id-12726 are
requesting you not to allow Mr. Debjyoti Gupta (authorised
person) for e-trading business/transaction on our behalf from
today i.e. from 15.03.04 because of the following reasons.*

- 1. Violation of MOU*
- 2. Failure of regular payment of monthly-
renumerated amount.*
- 3. We have been kept in the dark about the trading
till date.*

*So, the e-trading business done by Sri Debjyoti Gupta
is no longer valid till further notice. Hence, you are
requested to furnish the details of the entire port folio are
sold/unsold/purchased shares and liquid cash balance etc. at
your earliest.*

(emphasis supplied)

13. Mr. Virmani also referred to letter dated 31st March, 2004 written by Debjyoti Gupta to the petitioner wherein he had acknowledged in writing that he had received all the contract notices and transaction summary for all transactions done till 31st March, 2004.

14. Having heard the parties at length and having perused the impugned awards, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere in arbitration awards passed under the Act, 1996. The Supreme Court in *Delhi Development Authority vs. R.S. Sharma and Company, New Delhi reported in (2008) 13 SCC 80* after referring to a catena of cases has held that an arbitration award is open to interference by a court under Section 34(2) of the Act, 1996 if it is either contrary to a statutory provision or contractual provision or is opposed to public policy or justice and morality.

15. As far as the issue of limitation is concerned, I am of the view that immediately on coming to know of misuse of their shares, the respondents had taken steps to administratively resolve the matter. In fact, from the findings arrived at by the Arbitrators, it is apparent that respondents first came to know in the month of May, 2004 of alleged embezzlement of their shares. I am also of the view that the six months period of limitation can only be counted from the date when the respondents became first aware that transactions had taken place in their account and not from the date when the actual transactions as alleged are stated to have taken place.

16. In fact on 21st May, 2004, respondents lodged an FIR and also wrote a letter to the Investor Grievance Cell of the National Stock Exchange. Thereafter, a number of letters were exchanged between the

respondents and Investor Grievance Cell and it was only when the National Stock Exchange of India Limited intimated to respondents that it was not possible to administratively resolve the matter, that the respondents immediately invoked the arbitration clause and filed their claim on 05th April, 2005.

17. I also find that the arbitral tribunal in the award dated 30th September, 2005 has given reasons for rejecting petitioner's plea with regard to limitation. The reasoning of the arbitral tribunal as contained in the award dated 30th September, 2005 reads as under:

“On the point of limitation raised by the Respondent, it is noted that the Applicant has denied having received the password and undertaken any transactions on the net or having given any instructions to Mr. Debjyoti Gupta (AA) for dispose of any of the shares deposited to ISL before January/February 2004 when they claim to have asked Mr. Debjyoti Gupta (AA) to sell off their certain shares and give them the proceeds thereof amounting to Rs.20 lacs but despite repeated reminders Mr. Gupta failed to give them the said amount. Thereupon the applicant sent their letter dated 10.03.2004 to the Respondent (who claimed to have received it on 04.05.2004) for selling shares of value of Rs. 20 lacs and giving them the sale proceeds thereof. ISL's reply to this letter is dated 12.05.2004 stating there was not sufficient balance in the account and they were unable to accede to the Applicant's request. The dispute between the Applicant and Respondent really arose at this point whereupon the applicant wrote to NSE on 26.05.2004 alleging of their being cheated and when the matter was not resolved administratively, the Applicant filed the application for adjudication by arbitration on 05.04.2005. The contention of the Respondent that the matter is barred by limitation is not accepted.”

(emphasis supplied)

18. Consequently, in my view, the claim raised by the respondents were within the limitation inasmuch as the claims were filed within a period of six months of failure to resolve the disputes administratively. It is pertinent to mention that the said disputes had been administratively raised by the respondents immediately on coming to know of alleged embezzlement of their shares. There is nothing on the arbitral record to show that respondents had knowledge prior to May, 2004 of the transactions that had been taken place.

19. I am further of the view that petitioner's argument that arbitral tribunals had not found the petitioner liable for breach of contract is not correct. In both the awards, the arbitral tribunals have given categorical findings as to why and how the petitioner herein and respondent before the arbitral tribunals had breached the contract and its obligations as a Share Broking House. For instance, in the award dated 30th September, 2005, arbitrators have concluded as under:

.....The Respondent has also claimed that as a diligent broker they acted as per the instructions of the Applicant or the authorized representative of the Applicant. However, in the matter of the aforesaid Applicant Constituent, the respondent's functioning as well as the role played by its Relationship Manager, Mr. Prasenjit Mukherjee, and its DSA, Mr. Debjyoti Gupta, lacked proper diligence and concern for protection of the interest of the client as is the apparent from the several serious anomalies found in the documentation and the lack of care, caution, vigilance and prudence as called for in this type of business for protecting the interests of all concerned on their part, some instances of the which are given below:

- The Constituent Registration Account opening Form is undated. That this important detail has been overlooked at all levels including the Relationship Manager and the DSA, and other lapses discussed below do not at all corroborate the backing to the client of a human face in the form of the Relationship Manager as professed by the Respondent.
- The email sent by the Respondent to the Applicant is dated 05.10.2002 whereas the account was opened on 07.10.2002 – this anomaly remains unexplained – the explanation given by the Respondent that the welcome letter on 7th October 2002 had the previous working day i.e. 5th October 2002 due to a time stamp error in the system software is not acceptable in a real time environment.
- The pre 23rd November 1999 address of the Applicant as given in the Constituent Registration Account Opening Form was apparently on the basis of the address given in the Voter's Identity Cards issued by the Election Commission of India, copies of which were taken by the Respondent as the Applicant's photo identity for proof of address. It is intriguing that the DSA, who was stated to be known to the Applicant and used to go to their residence frequently and provoked/insisted to open Demat account with ISL and to earn some money from the idle share worth Rs. 20 – 30 lacs at that time, and the Relationship Manager, who is stated to be the primary link of the Company with the constituent, failed to take on record the current address of the Applicant and made sure that they used the same for all purposes including for correspondence and dispatch of documents, especially when the address of the Applicant as given in the Authorisation letter in favour of Mr. Debjyoti Gupta was found to be different from that given in the Constituent Registration Account Opening Form. The Applicant has also claimed to have given to ISL two Xerox copies of Statement of their Account with ICICI Bank Demat Services A/c No. 12300112 and Statement of account of HDFC Bank No. 0221330000712 as proof of their residential address. The carelessness, negligence or purposeful disregard of this important information on the part of ISL including their DSA cannot be but viewed extremely seriously.
- In spite of expressly stating in the welcome letter to the client that the password would be sent to them by courier, dispatch of the password to the Applicant by ordinary post under certificate of posting is a gross irregularity on the part of the Respondent and in any case dispatch by post under certificate

of posting does not permit obtaining acknowledgement receipt from the recipient of the password which is considered as an essential risk management measure to safeguard against the password falling into wrong hands, and the said action of the Respondent has exposed the entire arrangement to grave risks.

- The content of the letter of Mr. Debjyoti Gupta to the Respondent dated 31/3/04 referred to by the Respondent is found to differ significantly from what is stated in his letter to NSE dated 07/02/2005, copy of which was furnished by the Applicant. While the latter letter is clearly in reply to NSE's letter dated 14.01.05, the context in which the earlier letter dated 31/3/2004 was addressed by Shri Debjyoti Gupta to the Respondent could not be explained by the Respondent when this pointed was pointedly put to the Respondent in the hearing before the arbitrators. The anomaly in these two letters is noteworthy.
- The letter of authorization addressed to the Respondent in favour of Mr. Debjyoti Gupta is undated.
- Execution of a separate MOU by the DSA of the Respondent with the Applicant and stating therein that the Respondent was in no way connected with deal and the Respondent accepting the same without raising doubts in their mind about the bonafides of the said DSA is found to be rather unusual.
- The arrangement stated in the MOU for which Mr. Debjyoti Gupta, DSA of the Respondent, agreed to pay the Applicant Rs. 5000/- every month, was not clearly spelt out therein nor did the Respondent who were in possession of a copy of the MOU raised any question over the same. This does reflect well on the Respondent and their risk management policies and measures for protection of the interest of their client and all concerned.
- On the pointed requisition of the arbitrators in the hearing held on 10.08.2005, the Respondent under cover of his letter dated 22.08.2005 (received at NSE on 30.08.2005) has furnished a copy of the Investigation Report dated 31.05.2004 of one R.S.D. Uppal, Manager. The investigation was undertaken apparently in the light of the Complaint made by the Applicant by letter dated 18.05.2005 sent to SEBI. It is surprising that the investigator did not find any of the above referred short comings and declared that there was no

substance in the complaint. However, as stated by the Respondent in their submissions to the arbitrators, Mr. Debjyoti Gupta, DSA, was stopped from introducing any client from 31.03.2004 but the reason for taking this action against the DSA has not been furnished by the Respondent.

(emphasis supplied)

20. In the other Award dated 26th August, 2005, the arbitral tribunal has clearly highlighted the following breaches on the part of the petitioner herein, who was the respondent before the arbitral tribunal:

b. On account of the Respondent

- i. In the Respondent's e-mail message dated 05.10.2002, the Applicant was advised that the "Password" would be sent by "courier" whereas it was allegedly sent by post under certificate of Posting without the latter's knowledge. There was no explanation from the Respondent as to why this was done.
- ii. Although the broking account was reported to have been opened on 07.10.2002, the e-mail was dated 05.10.2002. There is also no convincing reason from the Respondent as to how this inconsistency and anomaly crept into the record.
- iii. In the Applicant's letter of authorization (which is not dated), addressed to Orbit Securities (the predecessor organization of the Respondent) in terms of which AA was given the authority to trade on his behalf and receive all connected documents, the "client address" mentioned was different from his address recorded with the Respondent, who failed to take notice of this change. Besides, the Respondent admitted that the address could be amended only after receipt of a formal letter dated 4th May 2004 from the Applicant. The Respondent seemed to be inconsistent in this

regard as some of “contract notes” issued in the year 2003 seemed to bear the new address. Had the Respondent taken necessary steps to modify the records, the confusion of the receipt of the password could have been avoided. This inertia on their part perhaps gave opportunities to another to gain access to password unauthorisedly.

- iv. No evidence was produced by the Respondent showing that the receipt of the Password sent by them was actually acknowledged by the Respondent. It does not stand to reason as to how trading could have been allowed to be started without ensuring the receipt of acknowledgement of a password from a newly introduced client. The Respondent’s system in this regard is considered to be faulty.*
- v. The transactions in the “Demat Account” of the Applicant were unilaterally done by the Respondent without the formers’ specific approval/ instruction and hence in an unauthorized manner as the Power of Attorney given by the Applicant does not provide for it. This was the Respondent’s biggest default, which facilitated the withdrawals of shares for trading without the knowledge of the Applicant thereby catalyzing the occurrence of the huge loss to the latter.*
- vi. The Respondent helped the aggressive trading being done by the Applicant’s AA by encouraging him access to the AA’s demat account.*

(emphasis supplied)

21. I am also of the opinion that in view of the contract executed between the petitioner and respondents, even if, the respondents had appointed an agent, then also, the petitioner would still be responsible under the Member Constituent Agreement for security of the shares of

the respondents, lodged with them. In fact, the petitioner by permitting its Direct Sales Agent, Mr. Debjyoti Gupta to be respondent's agent has, to my mind, breached its duty as a Share Broking House. Moreover, existence of two undated authorisation letters, one in favour of the agent and the other in favour of the petitioner is a contradiction in terms. Clauses of indemnity in petitioner's favour in the two undated authorisation letters and MOU, as pointed by the arbitral tribunal also arouse suspicion.

22. In fact, both the arbitral tribunals have arrived at the conclusion that respondents' agent was not entitled to the password of the respondents and that the said document had landed up with the respondents' agent only on account of breach of obligations by the petitioner. Also the admitted position is that without the password the agent could not have traded with the shares of the respondents or transacted any business.

23. In any event, both the arbitral tribunals have taken a view on facts and law which cannot certainly be said to be implausible and consequently, I find no ground to interfere in Section 34 proceedings.

24. In fact, in view of the findings of breaches and lapses on part of the petitioner, I am of the view that the arbitral tribunals should not have apportioned the compensation and should have awarded the entire

compensation to the respondents. But as before me the said apportionment of award has not been challenged by the respondents and in fact the learned counsel for respondents had made a categorical statement that he does not wish to challenge the apportionment of the award due to old age of the respondents, I do not deem it appropriate to interfere with the impugned awards to that extent.

25. Accordingly, the present objection petitions and pending applications being devoid of merits are dismissed but with no orders as to costs.

MANMOHAN,J

DECEMBER 02, 2009

js