

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.55 OF 2009

IN

EXECUTION APPLICATION NO.329 OF 1997

IN

ARBITRATION PETITION NO.112 OF 1997

IN

AWARD NO.79 OF 1997

Rajendra Y. Shah and Ors.Petitioners/Applicants

Vs.

Amu Shares and Securities Ltd. and Ors.Respondents

Shri Rohaan Cama I/b. Shri Mehul S. Shah for claimants/applicants.

Shri Kishore Jain a/w. Ms. Priyal Chheda and Shri Dileep Satale I/b.

Shri Priyadarshan V. Shah for respondent nos.1 to 6.

Shri Simil Purohit a/w. Ms. Kirtida Chandarana and Ms. Dipanwita Ghosh
I/b. M. Humranwala for respondent no.7.

CORAM : K.R.SHRIRAM, J.

RESERVED ON : 20th DECEMBER 2018

PRONOUNCED ON : 9th JANUARY 2019

P.C.:

1 Applicants are the children and legal heirs of the award holder of the original BSE Arbitration Award and Decree in terms of the said Award, Mr. Yashwant N. Shah (reference to Applicants includes reference to Mr. Yashwant N. Shah as applicable). Applicants are pressing prayer clauses - (a), (b) and (f)(i) of the Chamber Summons which read as under :

(a) That respondent nos.1 and 7, or such of them as this Hon'ble Court holds liable be ordered and directed to :

(i) deposit with Mr. Amol V. Doijode, Receiver, within a period of four weeks, in his Demat Account, DPID No.IN300685 Client ID 10536714, all the shares transferred out of the Demat Account of respondent no.9, DPID 12016200, Client ID 00000785, after the passing of the Injunction Order on May 6, 2005 in Ch/s. 534/2005, particulars whereof are at Schedule "V" hereto together with all the benefits thereon, inter alia, bonus shares, split shares, rights shares, dividends etc., issued by the Companies after the date of transfer;

(ii) in the alternate to (a) (i) above, handover to Mr. Amol V. Doijode, Receiver, within a period of four weeks, the monetary value of the said shares, which were transferred after the passing of the Injunction Order on May 6, 2005 in Ch/s. 534/2015, Rs.4,70,25,060.12, along with interest thereon @ 18% p.a. from September 20, 2007, till payment or realization as per the particulars of the claim shown in Schedule "VI" hereto;

(b) Respondent no.1 be directed to handover to Mr. Amol V. Doijode, Receiver, within a period of four weeks, all the monies and all the properties and assets whatsoever received by respondent no.1 from (Late) Ashok Bimal Ghosh/Estate of Ashok Bimal Ghosh and respondent no.9, after May 6, 2005, including all monies from all bank accounts of (Late) Ashok Bimal Ghosh/Estate of Ashok Bimal Ghosh and respondent no.9 (which as per records available to the Receiver and the Petitioners, include Rs.6,06,643/-, Rs.2,08,000/- and Rs.10,00,000/-) and which monies/assets/properties were credited in any account whatsoever in the books of respondent no.1;

(f) Respondent no.7 be directed to :

(i) transfer and deposit with Mr. Amol V. Doijode, Receiver, in his Demat Account, DPID No.IN300685, Client ID 10536714, within a period of two weeks, all the shares lying in the demat account of (Late) Ashok Bimal Ghosh being DPID 12016200 Client ID 00000504, as of May 6, 2005, together with all the benefits thereon, inter alia, bonus shares and split shares, issued by the Companies thereon.

2 The present chamber summons and the reliefs sought for in prayer clauses - (a) and (b) arise, *inter alia*, in respect of breach of an order dated 6th May 2005 passed by this Court in chamber summons no.534 of 2005 (the "**said order**"). Prayer clause – f (i) was not opposed by any of the respondents, but CDSL would require a formal order to transfer Ashok Bimal Ghosh's shares to the Private Receiver's demat account. These shares are currently valued at about Rs.6 lakhs. Respondent Nos.1 to 6 in the present chamber summons were respondent nos.7 to 12 in the aforesaid chamber summons no.534 of 2005 and were parties to the said order. Respondent no.1 herein, who was respondent no.9 in the earlier chamber summons, is

one Amu Shares and Securities Limited (hereinafter “**Amu**”). Respondent nos.1 and 2 in the earlier chamber summons were Ashok Bimal Ghosh (hereinafter “**Ghosh**”) and his wife Lily Ashok Ghosh (hereinafter “**Lily**”). Respondent nos.2 and 3 in the present chamber summons are Directors of Amu. They are also Directors of respondent nos.4 to 6 herein and according to applicants are intrinsically linked to Ghosh prior to his death in April 2006. Respondent no.3 to the earlier chamber summons no.534 of 2005, is respondent no.9 in the present chamber summons, viz., one ABG Securities Private Limited (hereinafter alternatively referred to as “**ABG**”). ABG appears to stand for Ashok Bimal Ghosh. Respondent no.7 in the present chamber summons is the Central Depository Services Limited (hereinafter “**CDSL**”).

3 The present chamber summons seeks, *inter alia*, directions to Amu and CDSL to restore the status quo ante as it stood on 6th May 2005 by transferring back to the account of ABG, the shares transferred out therefrom in breach of the order passed by this Court on 6th May 2005 in chamber summons no.534 of 2005, i.e., the said order, along with accrued benefits, or the money value of the shares transferred out after the said order, either on the date of the respective transfers, i.e., Rs.1,79,62,131.56 or the value as on the date of 20th September 2007 being the date on which the demand for shares to be brought back was made by the Private Receiver

to CDSL under cover of his letter dated 20th September 2007 with interest thereon. According to applicants, the value in the chart dated 10th December 2018 and tendered by Amu at the hearing of 13th December 2018 is misleading as it shows the value of shares sold/transferred is Rs.1,15,69,390.00 on the date of the said order, i.e., 6th May 2005. According to applicants, the relevant value is Rs.1,79,62,131.56 computed as on the dates of the respective sale/transfer of shares, as that is the value yielded by sale/transfer of shares after the said order and from the CDSL demat account of ABG. Shri Cama submitted that the value of the shares sold/transferred in breach of the said order is to be brought back in full, including those purchased after the injunction. To argue otherwise means that though ABG and Ghosh were enjoined from alienating any/all their assets (including monies), shares purchased by them in breach of the said order could be sold regardless of the injunction. This is unstateable as the injunction barred any transfer of assets whatsoever regardless of whether shares were existing on 6th May 2005 or were purchased subsequently. Shri Cama further submitted that as per the chart dated 10th December 2018 submitted on 13th December 2018 by the Advocates for Amu, the value of shares sold/transferred after the said order is Rs.2,42,25,715.78 and therefore, these shares with accrued benefits or the sum of Rs.2,42,25,715.78 together with interest thereon ought to be restored by Amu/CDSL.

Brief Facts:

4 Applicants are the decree holder in respect of two Awards passed in BSE arbitrations under the Arbitration Act, 1940, which were since confirmed as decrees of this Court. Applicants have filed Execution Application No.329 of 1997 in which applicants had, *inter alia*, filed a chamber summons bearing no.534 of 2005. Amu was respondent no.9 to that chamber summons and Ghosh and ABG were respondent nos.1 and 3, respectively. Prayer clauses - (h) and (j) as also Schedule VIII which are relevant for the present chamber summons read as under :

“(h) that respondent nos.1, 3 to 6 and their servants/agents/aliases be directed by an order and injunction of this Hon’ble Court restraining them from transferring, selling, alienating, encumbering any property of respondent nos.1, 3 to 6 or from creating any third party rights in any of the properties and assets of respondent nos.1 to 6 including those shown in Schedule IV to VIII hereto;

(j) that respondent nos.1 be directed by an order and injunction of this Hon’ble Court restraining him from transferring, selling, alienating, encumbering or creating any third party rights in respondent no.1’s flat no.105 “C” Wing, Jhaveri Complex Co-op. Housing Society Ltd., 123/124 Bhabhola Chulna Road, Vasai (W), Dist. Thane, Maharashtra;”

“SCHEDULE – VIII

*National Securities Depository Ltd.
Trade World, “A” Wing, 4th & 5th Floors,
Kamala Mills Compound,
Lower Parel, Mumbai 400 013.*

And

*Central Depository Services (India) Ltd.,
28th Floor, P. J. Towers,
Dalal Street, Mumbai 400 023.*

All shares in physical form and all shares in Demat accounts with

aforesaid entities standing in the names (singly or jointly) of:

<i>Respondent No. 1</i>	-	<i>Ashok B. Ghosh</i>
<i>Respondent No. 2</i>	-	<i>Lily A. Ghosh</i>
<i>Respondent No. 3</i>	-	<i>ABG Securities Pvt. Ltd.</i>
<i>Respondent No. 4</i>	-	<i>Lans Communication</i>
<i>Respondent No. 5</i>	-	<i>Ashok Film and Finance</i>
<i>Respondent No. 6</i>	-	<i>Lily Agro Products”</i>

5 On 6th May 2005, the said order was passed by His Lordship Hon’ble Mr. Justice D. K. Deshmukh, whereby prayer clause - (h) was granted with a clarification that it did not cover the demat account of Lily, which is to say that it covered the demat accounts of only Ghosh and ABG held, *inter alia*, with CDSL. Prayer clause - (j) was also granted.

6 Pursuant to the said order, the Advocate for applicants, Mr. Amol Doijode, addressed a letter to CDSL on 1st June 2005, *inter alia*, informing CDSL of the order dated 6th May 2005 and also forwarded a copy of the chamber summons and the order with a request to make note of the said order and act upon the same. In the said letter the names and addresses of the parties whose shares had been injuncted were specifically set out. ABG was written as “ABG Securities Pvt. Ltd.” (emphasis supplied), and its address at Sr. No.5, i.e., Shreyas Building was specifically mentioned. This has some relevance as could be seen later. Another letter of the same date was also addressed by the advocate for applicants in respect of Lily having been declared insolvent.

7 CDSL replied by its letter dated 10th June 2005 giving reference to the title of both orders/matters and both letters. Though a reference was made to chamber summons no.534 of 2005, mistakenly the order in Lily's matter was ascribed. However, CDSL assured that having seen the letters they were in the process of giving effect to the said order which had been passed in the chamber summons. CDSL further noted that a request was made by applicants in respect of various respective demat accounts of respondents to the chamber summons, but declined to furnish any information citing confidentiality Byelaws of CDSL. In the light of CDSL's letter dated 10th June 2005, applicants rested assured that the orders would be acted upon and no such transactions would be permitted by CDSL. It is a matter of record that CDSL admittedly froze the account of Ghosh on the basis of the said order.

8 By a letter dated 16th August 2005 addressed to CDSL, the advocate for applicants clarified the mismatch in the order dates. In the meantime, on 6th July 2005, the advocate for applicants had forwarded a compilation in the earlier chamber summons to the then advocate for respondent nos.1 to 6 herein, including Amu, in which the said order was annexed.

9 Thereafter, in Appeal No.63 of 1998 filed by Ghosh before he passed away in April 2006, Ghosh's wife and his sole heir, Lily, entered into

Consent Terms dated 7th March 2007 with applicants. In the consent terms, *inter alia*, Mr. Amol Doijode was appointed as a Private Receiver (hereinafter “**the Receiver**”) and applicants were entitled to proceed, *inter alia*, against the said shares which were subject matter of the said order in execution of the decrees against Ghosh/Lily. The appeal was disposed of in terms of the consent terms on 15th March 2007.

10 Pursuant to his appointment, the Receiver addressed a letter dated 26th April 2007 to the advocates for respondent nos.1 to 6 herein, *inter alia*, seeking information from Amu in respect of the status of the shares of ABG for the period between 1st April 2002 and 30th April 2007. As no response was received, a reminder letter was sent on 21st June 2007 reiterating the request for information.

11 Mr. Doijode, now in his capacity as the Receiver, sent a letter dated 7th May 2007 to CDSL, *inter alia*, seeking transaction particulars of the demat accounts of Ghosh and “ABG Securities Pvt. Ltd.” (emphasis supplied) from 1st April 2002 till 30th April 2007. The said letter once again, as in the letter sent on 1st June 2005, set out the addresses of the parties including that of Shreyas Building which was the address of ABG. Pertinently, the said letter referred to ABG again as “ABG Securities Pvt. Ltd.” and not “ABG Securities Private Limited”. A reminder letter to this effect was sent on 21st June 2007.

12 In response to the above letter, CDSL addressed a letter dated 6th July 2007 stating, *inter alia*, that after having performed a search in their data base, on the basis of “the building name/flat number/room number” (which for ABG was the Shreyas Building address), they had found the demat accounts of Ghosh and ABG. The same addresses had been given even in the earlier letter dated 1st June 2005 and in both cases, the name of ABG had been written as “ABG Securities Pvt. Ltd.”, hence the words “Pvt. Ltd.” had been emphasised. Enclosed to the said letter were, *inter alia*, the demat account statements of ABG which showed various share transfer transactions done after the said order dated 6th May 2005. The various debit entries show several sales/transfers made after the said injunction order dated 6th May 2005 and after CDSL was put to notice of the said order and had assured applicants that the same would be acted upon.

13 Upon perusing the demat statements, applicants/Receiver learnt of the transfers and sought further details from CDSL vide subsequent correspondence. The Receiver also highlighted the defaults committed by CDSL and the breach of statutory provisions and Byelaws. Pertinently in one of the letters exchanged, on 9th August 2007, CDSL itself refers to ABG as “ABG Securities Pvt. Ltd.”. By its Advocate’s letter dated 1st October 2007, CDSL responded to Receiver’s letter dated 20th September 2007, *inter alia*, stating that there was no order directing CDSL and their agents

(Amu herein) to freeze the demat account and disputing the Receiver's interpretation of the Byelaws and Agreement between CDSL and Amu.

14 Further correspondence ensued between the parties including with the advocate for respondent nos.1 to 6. The advocate for respondent nos.1 to 6 addressed to the Receiver, a letter dated 21st November 2007, stating that the advocate at the time, Mr. R. K. Bharuka, who had appeared for them when the said order was passed, had not informed them of the order dated 6th May 2005 and had only told them that the order was passed against Ghosh and Lily. It was sought to be contended that ABG owed amounts to Amu on account of having a debit balance.

15 Further correspondence ensued between the Receiver and the advocates where repeated requests were made by the Receiver for transaction records. According to applicants, little factual detail was provided by respondent nos.1 to 6 herein. Amu then offered to give inspection for a 30 minute period, but Amu did not give the requested particulars of the entries/transactions including copies of bills mentioned in Amu's accounts of Ghosh and ABG. Amu in its affidavit in sur-rejoinder has contended that applicants are not entitled to get the full particulars of entries and copies of documents pertaining to the entries (including copies of bills and journal vouchers) of Amu's records, qua the transactions, despite applicants having requested for them.

16 In the above factual matrix, applicants herein have filed the present chamber summons.

Submissions on applicants' case by Shri Cama :

17 It is the case of applicants that CDSL and Amu were both aware of the said order, were specifically put to notice of the same and were mandated by law to give effect to the said order and to forthwith restrain any debit share transfer transaction being done in the demat accounts of ABG and Ghosh after the said order.

18 It is the case of applicants that the order of injunction was binding on CDSL and Amu. Despite the said order, Amu and CDSL have permitted the transfers to take place in clear breach of the injunction. Having permitted the breach to take place despite knowledge of the injunction and despite CDSL expressly assuring applicants that the orders would be acted upon and given effect to, CDSL and Amu have caused/permitted the said transactions to take place. Shri Cama stated that by prayer clause - (a) of the present chamber summons applicants are not seeking, at present, for disbursal or payment of any sums to applicants. Applicants are merely seeking that actions taken in breach of an injunction order be undone by the parties who have clearly knowingly permitted the same. Applicants are merely seeking that the persons responsible for the transfer in breach of the injunction be not permitted to perpetuate the

illegality, and status quo ante be restored by them by either bringing back the shares with accrued benefits thereon, or the monetary value thereof with interest, which may be retained subject to further orders that may be passed by this Court.

19 It is settled law that third parties like, CDSL and Amu were bound to give effect to the orders passed in the matter, even though CDSL may not have been a party to the order. Further, even the relevant statutory provisions pertaining to demat shares under The Depositories Act, Rules and Regulations, CDSL Byelaws and Agreements thereunder.

Shri Cama submitted (i) under Section 26 of the Depositories Act, 1996, the depository, being CDSL, is authorized to make byelaws which are approved by SEBI and which are consistent with the Depositories Act and Regulations thereunder. These Byelaws, *inter alia*, have statutory force and cover issues including as to the conditions subject to which securities may be dealt with, (ii) under CDSL's Byelaws 5.3.22 and 20.1.1 the Depository Participant, Amu, is required to indemnify CDSL against any claims or losses suffered by CDSL on account of any actions of the Participant which are in breach of the provisions of the Act, Regulations or Byelaws, (iii) byelaw 5.3.25 is crucial and statutorily mandates as under:

“5.3.25. CDSL shall not effect any transaction or take any other action upon the instructions of a participant if it would violate any applicable law, decree or Order of a competent court or

tribunal or an Order of the Central or State Government or SEBI or that of any other competent authority.”

(emphasis supplied)

It is clear from the above that CDSL is mandated by its Byelaws, which admittedly have statutory force, not to give effect to any transaction or take any action which would violate any order of a Court. Nowhere does the provision contemplate that the said order or injunction must be directed against CDSL. CDSL cannot contend that even if CDSL was informed of a High Court order barring a transaction, CDSL would not be required to ensure compliance of the order as the injunction was not specifically directed against CDSL, (iv) under Regulation 26 of the SEBI (Depositories and Participants) Regulations, 1996 the Depository and the Depository Participant, i.e., CDSL and Amu respectively, shall in addition to the rights and obligations in the Depositories Act and in the Byelaws framed by CDSL have all the rights and obligations arising from Agreements entered into by them. Thus, the Agreements and the Byelaws have been recognized as having statutory and binding force and (v) the Agreement between CDSL and Amu provides in clause 8.1.14 as under :

“8.1.14. The Participant shall not effect any entries or transactions and CDSL shall not permit any entries or transactions to be effected which would violate any law or decree or Order of any court or tribunal or any Order or direction of the Central or State Government or SEBI or that of any other statutory or revenue authority that may have been served upon or intimated to the Participant or CDSL or which, to their knowledge, would constitute a breach of any covenant or undertaking given to any court, tribunal or statutory or revenue authority or which CDSL otherwise deems not to be in its interest or that of its participants or beneficial owners.”

(emphasis supplied)

Thus, CDSL and/or Amu need not be a party to the Order, but it is sufficient if they are aware of the same. They were mandatorily required not to give effect to a transaction which would violate an Order of the Court. Despite this, CDSL and Amu carried out / permitted to be carried out the subject transactions. This wrong has to be corrected and status quo ante be restored.

20 Admittedly, in the case of Ghosh, his demat account was frozen by CDSL. Thus CDSL was well aware that it was required to comply with the said order, although it is erroneously contended by CDSL that the same was done in some manner of a benevolent gesture to aid applicants. But for the contention that the words "Pvt. Ltd." were allegedly not showing up in their system, in 2005, (though it did show up in 2007), CDSL has no explanation as to why it did not give effect to the order qua ABG.

Amu, despite being represented through its advocate, has strangely taken the position that the order was not required to be complied with by them, as the order was not directed specifically against Amu, but also that their advocate had not told them of the order against ABG and they were told that it was only against Ghosh and Lily.

21 According to applicants various Courts have laid down the salutary principles applicable to the present case. Applicants' counsel Shri Cama relied upon the following judgments :

(a) *Delhi Development Authority v/s. Skipper Construction Co. Pvt. Ltd. & Anr.*¹

(b) *Municipal Council Shirdi v/s. Sau. Soniya Devidas Patil*²

(c) *Vidya Charan Shukla v/s. Tamil Nadu Olympic Association*³

(d) *Sitaram v/s. Balbir*⁴

(e) *All Bengal Excise Licensees Association v/s. Raghavendra Singh & Ors.*⁵

(f) *Keshrimal Jivji Shah & Anr. v/s. Bank of Maharashtra & Ors.*⁶

(g) *Gopal L. Raheja & Anr. v/s. Vijay B. Raheja*⁷

(h) *Prakash Govindram Ahuja v/s. Ganesh Pandharinath Dhonde & Ors.*⁸

(i) *Damodaran Pillai & Ors. v/s. South Indian Bank Ltd.*⁹

(j) *Nilkantha Sidramappa Ningashetti v/s. Kashinath Somanna Ningashetti & Ors.*¹⁰

(k) *Somasundara Mudali & Ors. v/s. Thiruppathuran*¹¹

22 Relying upon those judgments, Shri Cama submitted :

A. INHERENT POWER UNDER SECTION 151

(i) It is the duty of the Court to set right the wrong where an act is done in violation of an order of stay or injunction. Parties must be put back in the same position as they stood prior to the interim order. No technicality

1. 1997 Vol. 89 Comp.Cas. pg 362

2. 2009 (2) All MR 847

3. AIR 1991 Mad. 323 (Full Bench)

4. 2017 (2) SCC 456

5. AIR 2007 SC 1386

6. 2004 (3) MhLJ 893

7. 2007 (1) Bom CR 244

8. 2016 Vol.6 Bom CR 262

9. 2005 (7) SCC 300

10. AIR 1962 SC 666

11. AIR (36) 1949 Mad. 362

should prevent the Court from doing justice in exercise of inherent powers. *[Delhi Development Authority (Supra)]*.

(ii) Where a party has acted in breach of an injunction then even though the party may not take out a Contempt Petition or resort to Order 39 Rule 2A of the Code of Civil Procedure, 1908, the Civil Court seized with hearing the matter can resort to section 151 of the Code to set the wrong right. The Court is bound to exercise this power in the interest of justice. *[Municipal Council Shirdi (Supra)]*.

B. THIRD PARTY IS BOUND BY THE INJUNCTION; THE TRANSFER IS VOID AND THE PARTIES ARE LIABLE TO RESTORE STATUS QUO ANTE

(i) Regardless of the remedy of contempt, the Court has an inherent power to restore things to their former condition if a party has acted in breach of an injunction. This is both under Section 151 of the CPC as also a matter of judicial policy. This is in addition to remedies of contempt, etc.

A third party or a stranger if he had aided or abetted the violation with notice or knowledge of the order of injunction would equally be liable.

The Court can order status quo ante to be restored by issuing a mandatory injunction. *[Vidya Charan Shukla (Supra)]*.

(ii) A third party will be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he willfully assists the person to whom it was directed to disobey it. [*Sitaram v/s. Balbir (Supra)*].

(iii) The parties committing breach of the injunction must restore status quo ante and the Court has power to do so under its inherent powers. [*All Bengal Excise Licensees Association (Supra)* following *Vidya Charan Shukla (Supra)*].

(iv) A transaction done in breach of an order of injunction is void and the transfer must be set aside.

An Order of injunction does not bind only the transferor. The said order will equally bind a third party and it is enough that the transferor was party to the proceedings in which the order was passed. [*Keshrimal Jivji Shah (Supra)*].

The case of *Keshrimal Jivji Shah (Supra)* is not restricted only to cases of immovable property.

(v) A third party who aids and abets the breach of a Court order is equally guilty of contempt. To hold otherwise would lead to orders being redundant and would enable the orders to be circumvented. [*Gopal L. Raheja (Supra)*].

(vi) A transfer or transaction done in breach of an interim order is illegal and such an order will have the effect of binding subsequent transferees. The order of injunction acts in rem though not technically against the third parties, in rendering such alienations illegal and void *ab initio*. [*Prakash Govindram Ahuja (Supra)*].

C. KNOWLEDGE OF THE ADVOCATE IS KNOWLEDGE OF THE PARTY.

(i) The knowledge of the advocate of the order passed is deemed to be knowledge of the client of the order. [*Damodaran Pillai (Supra)*].

Relying upon Order III Rule 5 of the CPC the Supreme Court held that notice to the pleader is notice to the party. [*Nilkantha Sidramappa Ningashetti (Supra)*].

It is manifest that when an order of injunction is passed by a Court in the presence of the respondent himself or Counsel appearing on his behalf, the respondent is aware of the injunction and there is no necessity for formal notice to be given of the Court's direction. [*Somasundara Mudali (Supra)*].

23 According to Shri Cama, it is clear from the said judgments that when an act has been done in breach of an injunction, then no technicalities or procedural issues can stand in the way of the Court undoing the actions done in breach. It is the inherent duty and indeed obligation of the Court, as a matter of judicial policy, regardless of any other remedy that may be

available in contempt, under Order XXXIX, Rule 2A of the Code of Civil Procedure, 1908, execution etc., to restore the status quo ante.

24 If a third party has aided or abetted or permitted/caused the breach of the order then the third party is equally liable and must be directed to restore the status quo ante and put the parties in the position that they were prior to the order.

Submissions by Shri Purohit for respondent no.7 – CDSL :

25 Shri Purohit, counsel for respondent no.7, at the outset, submitted that the entire case of the judgment creditor/applicant is premised on the breach of an order dated 6th May 2005 and prayer clause – (h) which was granted on 6th May 2005 in Chamber Summons No.534 of 2005 does not seek for any relief against CDSL (respondent no.7) and hence the order dated 6th May 2005 does not amount to any injunctive relief against CDSL. In view thereof, the present chamber summons against CDSL is not maintainable.

It was also submitted at the further outset, that it is not the case of judgment creditor/applicant that CDSL had carried out any transfer of shares or has sold any shares in breach of the injunctive orders. The shares have been sold by respondent nos.1 to 6 having operated the demat account of the judgment debtor, contrary to the orders passed by this Court. The breach, if any, is thus committed by respondent nos.1 to 6 and not by CDSL.

Thus, the question of CDSL being liable for same cannot and does not arise.

26 Mr. Purohit submitted that :

(A) Applicants are seeking to execute the decree against CDSL;

(B) Section 47 of the Code of Civil Procedure, 1908 (CPC) governs the application, and cannot apply to CDSL;

(C) Order XXI of CPC only provides for payment in three situations none of which is contemplated in the present chamber summons, and there is no provision in CPC for passing an order against CDSL to restore the status quo ante;

(D) CDSL could not freeze the account of ABG as there was no specific order against CDSL; the injunction was in personam against Ghosh, Lily and ABG;

(E) There is no obligation on CDSL, in law, to freeze the account; CDSL may choose to do so but it is their entitlement entirely;

(F) CDSL could not locate the account of ABG in its system as it was written as "ABG Securities Pvt. Ltd." and in their system it was recorded as "ABG Securities Private Limited";

(G) CDSL is an innocent third party and the present Application effectively seeks damages against CDSL which cannot be done by way of the present proceedings.

27 As far as (A), (B) and (C) of paragraph 26 are concerned, Shri Purohit submitted that what applicants are seeking is to execute the decree against CDSL and that is not permissible. Shri Purohit submitted that :

(I) Executing Court cannot go behind the decree :

Applicants are proceeding on an erroneous premise by incorporating the Contempt of Courts Act, 1971, into execution proceedings. The Contempt of Courts Act, 1971, is enacted pursuant to the powers granted under Article 215 of the Constitution of India and the provisions of the Contempt of Courts Act, 1971, are a separate statute by itself and the provisions of the Contempt of Courts Act, 1971, cannot be incorporated while executing a decree.

The Decree dated 29th September, 1997 can be enforced only against respondent nos.2 to 6 and not against CDSL. It is settled principle that the Executing Court only has to execute the decree as per its terms, cannot go behind the decree and cannot enforce the decree against a person who is not the judgment debtor.

By the present chamber summons, judgment creditor is effectively seeking to enforce the decree against CDSL and Amu Shares, who are not the judgment debtors. A decree is enforceable only against respondent nos.2 to 6, who are the legal heirs of Mr. Ashok Bimal Ghosh, the original Judgment Debtor.

(II) The Executing Court ought not to pass a decree against a third party :

An Executing Court cannot pass any decree against a third party. A recovery proceeding can only be initiated against a third party if the third party is a representative in interest or a garnishee. Order XXI of the

Code of Civil Procedure, 1908 does not make any provision empowering the Executing Court to pass a fresh decree against a third party who was not a party to the original proceedings.

This Hon'ble Court can only enforce a decree. Applicants, under the guise of an execution application is calling upon an Executing Court to pass a decree against Amu Shares and CDSL who are neither parties nor representatives of judgment debtor nor garnishees.

(III) CDSL is not the representative-in-interest of Judgment Debtor : Section 47 of the Code of Civil Procedure, 1908 :

CDSL is admittedly not a party to the suit/arbitration/earlier proceedings nor is it a representative in interest of judgment debtor. Section 47¹² of the Code of Civil Procedure, 1908 authorizes the Court to determine all questions between:

- (a) Parties to the suit,
- (b) Their representatives,
- (c) Relating to execution, discharge and satisfaction.

Clearly, CDSL is not a party to the Suit as per Explanation I and

¹²“Questions to be determined by the Court executing decree – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(sub-section 2 omitted)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.”

II to Section 47.

It is not the case of applicants that CDSL is a representative-in-interest of the judgment debtor. CDSL is merely a depository under Depositories Act, 1996, wherein the account of all the depository participants are maintained which, in turn, are owned by the beneficial owners. Judgment Creditor did not have a direct account/privity with CDSL. Even in terms of Explanation II (b) to Section 47, the issues raised by applicants are not questions relating to the execution of the decree and goes beyond it. The issues raised in the present application are beyond the purview and jurisdiction of the Executing Court. In support of this contention, Shri Purohit relied upon :

(a) *Hanmantagouda Nagangouda Hiregoudar and Ors. v/s. Shivappa Dundappa Manwi*¹³

*“....17.The question of lis pendens is one thing and the question as to the appellants being representatives of the judgment-debtor within the meaning of Section 47 of the Civil Procedure Code is another thing.....
..... It is quite clear from Section 47 of the Civil Procedure Code that all questions relating to execution, discharge and satisfaction of a decree arising between the parties to the suit in which the decree was made, or their representatives, must be determined in execution proceedings, and a separate suit is barred. The appellants admittedly were not parties to the suit. It is, therefore, necessary for the respondent to show that they are representatives of the original judgment-debtor, or of the decree-holder. He contends, relying upon the full bench decisions of the Calcutta and Allahabad High Courts, that a person can be said to be a representative if he is bound by the decree, even though his interest came into existence after the decree. The word "representative" is not defined in the Code. In my opinion, a representative is a person in: whom the interest of a party to the suit has vested either by an act of the party, i.e., a transferee from the party, or by operation of law. Operation of law, ordinarily, would mean, and would include, cases of testamentary and intestate succession upon the death of the party to the suit or upon his insolvency, or cases of forfeiture. Their Lordships of the Privy Council however have said in a*

13. 1940 (42) BOMLR 1123

case, to which I shall presently refer, that a purchaser at an auction held by the Court in execution of a decree, commonly referred to as a Court purchaser, is a transferee by operation of law. It is true that their Lordships have also said that he is not a representative of the judgment-debtor, but speaking with great humility and with infinite respect, it seems to me that the expression "operation of law" must mean this, that the interest of a party has automatically, without anything more, become vested in another person under the statute or common law. In the present case the appellants were not parties to the suit nor has any interest of any of the parties to the suit vested in them by an act of the parties themselves. They purchased the property at a sale held by the Collector, or by Government, in pursuance of the provisions of various Acts; and it is difficult, in my opinion, to hold that they have become transferees of the interest of the judgment-debtors, as the result of an act done voluntarily by the judgment-debtors themselves. Then the question is whether the appellants are transferees by operation of law. No authority directly bearing on the position of a revenue purchaser is forthcoming; at least none has been cited before me. All the authorities cited refer to the case of a Court purchaser or, as he is sometimes called, an auction purchaser. It is necessary, therefore, to consider the position of a Court purchaser. The learned advocate of the respondent relies upon the Calcutta and Allahabad decisions. The effect of these decisions undoubtedly is that a transferee of a party to the suit, whether by assignment, succession or otherwise, who, so far as such interest is concerned, is bound by the decree, is a representative of the party within the meaning of Section 47 of the Code. The view of the Calcutta and Allahabad High Courts, therefore, is that a stranger purchasing the judgment-debtor's property in execution of a decree against him is his representative. The learned advocate therefore contends that where, as here, the decree binds immovable property of the judgment-debtor, then, any transferee, whether he is a voluntary transferee, or the property is transferred to him at an involuntary sale, either by the Court or by the revenue authorities, would be bound by the decree and would be a representative of the judgment-debtor in the case..... It is difficult, in my opinion, to take the view that a Court purchaser is a representative of the judgment-debtor. He is not a transferee by act of parties: there is no bargain between the parties: the title which impliedly the transferor gives in a private sale is wanting in a sale by the Court. These and other considerations, therefore, to which I need not refer, support the view taken by this Court. Order XXI of the Civil Procedure Code itself seems to recognize the distinction between a transferee at an auction sale held by the Court, and a voluntary transfer. Thus, when property is sold by the Court and purchased by a person, such person, if he is obstructed in obtaining possession of the property, is not bound to proceed under Section 47, or under the provisions of Order XXI itself. It cannot be disputed that such a purchaser, who comes under Rule 95 of Order XXI, would be entitled to bring an ordinary suit for possession within twelve years from the date of the purchase. On the other hand, if such; a purchaser is a representative of the judgment-debtor, clearly a suit of this nature would be barred. If then a Court purchaser is not a

representative of the judgment-debtor, it seems to me that a revenue purchaser is still less. The provisions of the Bombay Land Revenue Code to which I have referred show that if proper steps are taken the revenue purchaser acquires the property free of charges created by the owner thereof."

(b) Thomson Press India Ltd. v/s. Nanak Builders and Investors Pvt. Ltd.¹⁴

"53. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor."

(c) Mohan Lal Mahto v/s. Shibdhari Chaube¹⁵

"4. As I have stated, the respondents have taken a preliminary objection that no appeal lies in this case. It is urged on their behalf that their application was an application under O. 21, R.90 of the CPC, and if that were so, no appeal would be to this Court from the order of the learned District Judge. It is however, clear from the terms of the application that what is complained of is not irregularity or illegality in the publication or conduct of the sale but rather that the sale took place when the Court of the Munsif was prohibited from selling. As I have stated, the application in terms purports to be made under section 47 of the CPC, but it is true that applicants should not be tied down to the heading which they give in an application under O. 21, R. 90 of the CPC, and was an application which could only have been dealt with under the provisions of Section 47 of the CPC. The learned District Judge treated the appeal to him as an appeal against an order passed under Section 47 of the CPC, and in my view it was an order passed under that section, and that being so, a second appeal lies to this Court."

Prakash Gobindram Ahuja v/s. Ganesh Pandharinath Dhonde &

Ors. (Supra), that was relied upon by applicants at paragraphs 87 and 88

14. AIR 2013 SC 2389

15. AIR 1942 Pat 146

held as follows:

“87. The effect and impact in legal terms on the alienation or transfer of an immovable property in the teeth of an order of injunction is distinct and that a prohibitory or preventive order passed by a Competent Court restrains the party to it from indulging in the above acts. If that is breached, the consequences are that the transaction may not be void but it is illegal. We are concerned in this reference with the issue of presence of Section 52 of TP Act, 1882; is it enough protection and whether an order of injunction would still be required or should be passed to take care of the apprehension of the plaintiff?”

88. Thus, from the above-said emphatic pronouncement of the Apex Court, it is crystal clear that the principle of lis pendens contained in Section 52 of the TP Act, neither restrains the party from alienating the property, nor it has the effect of rendering such transaction pendent lite ipso facto or ipso jure illegal or void. It also does not make such transaction void ab-initio, nor the transfer ineffective. It only makes the alienation subservient to the decision of the Court. As it does not contemplate the Court passing any order of restraining the party to the suit from alienating the said property, the party, thus, alienating the property during pendency of the litigation does not incur any consequences for breach of any order of the Court.”

(IV) Court ought not to exceed its jurisdiction and exercise powers under section 151 of Civil Procedure Code, 1908 :

When faced with difficulties in enforcing a decree against a third party in an execution proceeding, applicants prayed that this Court may invoke its inherent powers under Section 151 of the Civil Procedure Code, 1908. It is well settled that the Court cannot go beyond its jurisdiction and exercise its power arbitrarily under section 151 of the CPC. This proceeding is not an execution proceeding against CDSL and this Court ought not to go beyond its jurisdiction and permit applicants to effectively execute the decree against a third party, being CDSL in the present case, particularly when CDSL is not concerned with the disputes amongst the judgment creditor and judgment debtor. There is no relation between CDSL

and applicants, and CDSL certainly does not owe any moneys to applicants, nor does it owe any obligation to applicants. Thus, this Court ought not to permit applicants to execute the decree passed in applicants' favour against CDSL or to direct *status quo ante* or compensate applicants. In support of this contention, the following case law was referred to :

Trident Steel and Engineering Co. v/s. Vallourec & Anr.¹⁶ at paragraphs 44 and 58 held as follows:

“...44. These are not orders or directions which we can support with the aid of section 151 of the Code of Civil Procedure. That provision saves the inherent power of a court. By the saving provision, such of the powers which enable a civil court to render justice are saved, but that does not mean that with the aid of these powers, the court can travel beyond or defeat other provisions in the Code of Civil Procedure, 1908 enabling grant of interlocutory and interim reliefs. These are conferred by the Code itself. Section 151 cannot, therefore, be of any assistance much less when recourse to it defeats the substantive provisions of the Code. It is well settled that the Code of Civil Procedure, 1908 contains partly procedural and partly substantive provisions. The substantive powers conferred in the civil court enable it to render complete justice. Section 151, therefore, cannot override the same and by taking aid of section 151, the civil court cannot pass an order which it is not empowered to pass under the substantive provisions of the Code. Section 151 is but an aid to exercise of these powers. That is why we have upheld several orders, which have been passed under section 151 so as to render assistance to a civil court or assist the executing court or its enforcement machinery to execute decrees and orders passed by a civil court. Such aid can be in the form of police assistance also. However, beyond that, a clear takeover of the powers of a criminal court can never be upheld and has not been upheld by us.....

...58. In the judgment of the Hon'ble Supreme Court rendered in the case of Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, the ambit and scope of the powers conferred by section 151 of the Code of Civil Procedure, 1908 was in issue. The Hon'ble Supreme Court, outlining the ambit and scope of these powers, pertinently held that in the exercise of these powers, the civil courts cannot pass such orders as are totally beyond their jurisdiction. While Mr. Dhond relies upon para 18 of this judgment, it must be stated that the Hon'ble Supreme Court did not accept the extreme arguments, but cautioned that the powers

16. 2018 SCC OnLine Bom 4060

under section 151 of the Code of Civil Procedure, 1908 are not to be exercised when their exercise is in conflict with what has been expressly provided in the Code of Civil Procedure, 1908. This restriction, for practical purposes, on the exercise of these powers is not because these powers are controlled by the provisions of the Code, but because it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice (see paras 20 and 21). This judgment, therefore, cannot be read in the manner suggested by Mr. Dhond, but must be read together with this note of caution. Once it is so read, that is also of no assistance.”

Court's views on Shri Purohit's submissions – Paragraph 26 (A), (B) and (C):

28 These contentions of Shri Purohit in my view are misconceived as applicants are not seeking, by prayer clause - (a), to execute the decree against CDSL or to ask CDSL to pay money to applicants. Applicants are simply seeking an order from this Court that the transfers having been permitted to be done by CDSL in breach of the orders of the Court and in violation of the statutory provisions, Byelaws and Agreement between CDSL and Amu having statutory force, this Court, in exercise of its inherent powers, as per the law laid down in the various judgments referred to and relied upon by Shri Cama, ought to undo the wrong and restore the parties to the position that they were prior to the order of injunction.

Applicants are not seeking any orders of execution of the decree against CDSL but are simply seeking consequential orders to bring back the shares sold/transferred in breach of the said order and thereby restore the parties to the position they were in, prior to the transfers being done in breach of said order.

29 The entire contention of Shri Purohit that Section 47 of CPC governs the application and cannot apply to CSDL proceeds on the incorrect basis that the order seeking restoration of the status quo ante falls under Section 47 of CPC. As held in various judgments as referred earlier, this Court has an inherent power, regardless of any other provisions in law, to restore things to their former condition if a party has acted in breach of an injunction. This is both under Section 151 of CPC and also as a matter of judicial policy. A party may not even take out a Contempt Petition or resort to any other provision of law; the Court which passed the order ought to simply exercise its inherent power to ensure that its order is not stultified or set at naught. Judgments referred to above and particularly those of *Municipal Council Shirdi (Supra)* and *Vidhya Charan Shukla (Supra)* clarify the above position.

Paragraph 12 of the *Municipal Council Shirdi (Supra)* reads as under :

12. The pleading of the party has to be considered and understood in its proper perspective. This Court and Supreme Court has held that mofussil pleading has to be construed liberally. Para 6 (B) of the prayer clause specifically makes a prayer that if defendants no.1 to 3 succeed in carrying out the construction of the road legally, in that circumstances said work (construction of the road) and said action should be removed and plaintiff be permitted to enjoy the property peacefully. This pleading is in vernacular. I read the plaint from para (1) till last prayer in para 6(C). If the plaint as a whole is read and appreciated, in my view, adequate and sufficient pleading is made by the plaintiff seeking mandatory injunction and/or direction. In the case in hand, both the Courts are concurrent on the point that temporary injunction was issued by the Court. The Courts have referred to various dates right from the

date of filing of the suit and even couple of months before it. The Courts have referred the report of the Commissioner. The Courts have also appreciated the short span of time within which the defendant no.2 could complete the construction work of the road in defiance of the temporary injunction granted by the Civil Court. The conduct of the defendants carrying out and completing the construction work in defiance of temporary injunction granted by the Court, has been taken cognizance by the First Appellate Court referring to the pleading, i.e., para 6(B) and has quashed and set aside the judgment and decree passed by the Trial Court. It is unfortunate that the Trial Court did not read the plaint especially para nos.6(A), (B) and (C) in its proper perspective. The parties cannot be permitted to flout the orders of the Civil Court, if such instances are brought to the notice of the Court and Court has restored the possession on the date of filing of the suit, said order cannot be said to be perverse.

In my view, a party to the litigation, cannot be allowed to take an unfair advantage by committing breach of an interim order passed by the Civil Court and escape the consequences thereof. Wrong committed by the party disobeying the order of the Civil Court should not be allowed to continue or perpetuate such wrong as a precedent. Such disregard of the order of the Civil Court should not be permitted to hold good. Such disobedience, if brought to the notice of the Court, what is the duty of the Court? A party suffering breach of injunction order may or may not resort to provision laid down under Order 39, Rule 2(A) of the Code of Civil Procedure. Such party may or may not file or take out contempt petition in accordance with the provisions of law. However, the Civil Court seized with hearing of such lis always can resort to Section 151 of the Code of Civil Procedure. Imposition of punishment or consequences of order passed under Order 39, Rule 2(A) of Civil Procedure Code and/or order passed by the competent Court under the provisions of Contempt of Courts Act, 1971 would be altogether different aspect of the matter. Citizens/litigants who approaches to the Civil Court for adjudication of alleged rights is/are basically interested in seeking remedy/decreed/order from the competent Civil Court. Primarily he has concern with relief of Civil nature in his favour from the Civil Court upon adjudication of rights. The Civil Court, therefore, is duty bound, to exercise inherent powers under Section 151 of the Code for setting wrong at naught. This is because it is of high importance that orders of the Court should be obeyed. Thus, in my view, on principle those who defy a prohibition imposed ought not to be able to get away with the fruits of their defiance. If act of the disobedience were to let it go as such, it would defeat the ends of justice and prevalent public policy. When the Court intends a particular state of affair to exist while it is in seizin of lis, that state of affair is not only required to be maintained, but it is presumed to exist till the same Court orders otherwise or Superior Court orders otherwise. The Court, in these circumstances, has the duty and also right to treat such disobedient act as having not taken place at all for its purposes. In my view, these inherent powers u/s. 151 of the Code of Civil Procedure are wide and are not subject to any limitation. To put it in other words,

it can be stated that where in violation of stay order or injunction against a party, something has been done in disobedience, it shall be the duty of the Court as a policy to set the wrong, right and not allow the perpetuation of the wrong. In my view, the inherent powers will not only be available in such case, but it is bound to be exercise in that manner in the interest of justice. Even apart from the Section 151 of Civil Procedure Code, in my view, as a matter of judicial policy, the Courts should guard against itself being stultified. In the circumstances like this it cannot be held that Court is powerless to undoing a wrong done in disobedience of Court orders. However, in the case on hand the First Appellate Court has exercised such power under Section 151 of the Code. This exercise, therefore, cannot be said to be arbitrary, absurd or perverse.

Paragraph 46 of *Vidhya Charan Shukla (Supra)* reads as under :

46. We can see thus clearly that the Courts in India invariably accepted the law applied in England and found (1) a party to the suit if he had notice or knowledge of the order of the Court and (2) a third party or a stranger, if he had aided or abetted the violation with notice or knowledge of the order of injunction guilty of civil contempt and otherwise found a (third party guilty of criminal contempt if he has been found knowingly obstructing implementation of its order of direction, if it is found in the instant suit that Sri Shukla was directly or indirectly a party defendant in the suit and the order of the learned single Judge was directed to his conduct also and he violated the order after notice or knowledge, he shall be guilty of civil contempt. He can still be found guilty of civil contempt if he is found to have aided and abetted the violation of the order of the Court. Even otherwise it is found that he obstructed or attempted to obstruct the implementation of the Court's injunction/direction, he may be found guilty of criminal contempt provided he had the notice or the knowledge of the order of the Court. It will be only after a determination of the nature of the disobedience that it will be possible for the Court to say whether the procedure applied to a civil contempt shall be applied to the contempt proceeding in his case or the procedure applied to a criminal contempt will be applied to it. In the former case, the learned single Judge shall be competent to proceed. In the latter case, it shall be before a Division Bench and subject to such conditions as are envisaged under the Contempt of Courts Act, 1971. We have however no hesitation, in view of the principles of law noticed by us that this Court's power as the Court of Record will extend not only to the determination of the contempt but also the determination whether on the allegations brought before it, a civil contempt is made out or a criminal contempt is made out and instead of any action of committal for contempt, the Court should make any such order which would be in the administration of justice or not. We have already noticed that there are provisions in Order XXXIX Rule 2A of the Code of Civil Procedure as a remedy for the violation of temporary or interim injunction. Besides what is contemplated under Order XXXIX Rule 2A of the Code of Civil

Procedure, Courts have found another source of power in Section 151 of the Code of Civil Procedure and if that is also ignored for a moment, this Court's power as a Court of Record and a Court of Special jurisdiction is preserved under Articles 215 and 225 of the Constitution of India. There have been cases before several Courts in which when faced with situations that some order or direction was violated and the violation resulted in grave and serious injury, the Courts took the view that the Code of Civil Procedure is not exhaustive. There are cases which say that if remedy to do justice is not provided for in the Code or any other Act, the High Court must not fold its hands and allow injustice to be done.

30 The judgments relied upon by Shri Purohit on the aspect of Section 47 are clearly inapplicable. Firstly, neither of them deals with a situation similar to the present one where a sale/transfer was done in breach of an injunction order and was permitted to be done by a party despite knowledge of the injunction. Further, the said judgments were not dealing with the aspects covered in the various judgments cited by applicants, which squarely apply to the case at hand.

31 The contention of Shri Purohit that Order 21 of the Code of Civil Procedure only provides for payment in 3 situations etc., proceeds on the erroneous assumption that applicants are seeking a direction for payment against CDSL in execution or by way of executing the decree against CDSL. As stated above, as per prayer clause - (a) the application only seeks that the parties be restored to the status quo prevailing on the date of the order and does not in any manner seek a direction for payment against CDSL by way of execution of the decree. Once the shares or the monetary value thereof with accrued benefits/interest, is restored,

applicants may then take appropriate steps in execution, as permissible in law.

32 As far as (D), (E) and (F) in paragraph 26 are concerned, Shri Purohit submitted that the only allegation against CDSL by applicants is to somehow substantiate its entire claim that CDSL, pursuant to applicants' Advocate's letter dated 1st June, 2005 was aware of the order of injunction passed by this Court and despite having knowledge of the same, by permitting respondent no.1 (Amu) to transfer the shares, has 'aided and abetted' respondent nos.1 to 6 in transferring the shares.

33 Shri Purohit submitted that firstly, the question of aiding and abetting respondent nos.1 to 6 cannot and does not arise. Respondent nos.1 to 6 are persons who have operated the demat accounts of the judgment debtor on the platform provided by CDSL. CDSL does not take by itself 'buy or sell' decision on behalf of its clients.

Secondly, CDSL is not the recipient of sale consideration. Except for meager transaction charges, CDSL takes no amount for any transaction of sale of shares. The shares were sold by Respondent No.1, the sale proceeds are received by it and the shares were transferred to itself, and later sold in the market. Thus, the question of CDSL aiding and abetting Respondent Nos.1 to 6 to sell their shares is without any basis.

Thirdly, the issue of aiding and abetting is a concept followed by applicants from the provisions of the Contempt of Courts Act, 1971. The judgments relied upon by applicants, viz., *Vidya Charan Shukla (Supra)*, *Sitaram v/s. Balbir (Supra)*, *All Bengal Excise Licensees Association (Supra)* and, *Gopal L. Raheja & Anr. v/s. Vijay B. Raheja & Ors. (Supra)*, all of which are related to the breach or willful disobedience of an order by the parties and the persons aiding and abetting them. They are not applicable, and in any event, beyond the purview of the Executing Court. An Executing Court cannot adjudicate on the issue as to whether a contempt has been committed of an order. An Executing Court is restricted to executing a decree.

34 Even otherwise, applicants are claiming monies from CDSL. The issue of aiding and abetting is a question of fact which needs to be determined by trial and evidence. Applicants have to first establish as to how and to what extent CDSL has abetted respondent nos.1 to 6 and induced them to transfer the shares and to what extent, and that due to such alleged aiding and abetting, applicants have suffered loss. Applicants cannot seek to recover their claim against the judgment debtors from a third party.

35 Further more, CDSL could not have frozen the account. Even if it is assumed that the order dated 6th May 2005 is directed against CDSL and

CDSL has specifically been restrained from permitting the operation of the account, the Bye-Laws of CDSL (in operation as on 2005), having the force of law, prescribes the procedure for account-freezing in Bye Law 13.4¹⁷. This Bye Law imposes an obligation for such account-freezing on the Depository Participant. In the present case, respondent no.1 (Amu) is the Depository Participant. Amu was represented in this Court by its Advocate/counsel during the hearing when the order dated 6th May, 2005 was passed, and thus, there was no requirement for CDSL to inform Amu.

Thus, under the Bye Laws, Amu, as a Depository Participant, was obligated to freeze the accounts in terms of the order dated 6th May, 2005, and not CDSL. But Amu, despite being admittedly aware of the order dated 6th May, 2005, did not freeze the demat accounts. On the contrary, Amu proceeded to deal with and transacted in respect of the shares held in

¹⁷“13.4 ACCOUNT FREEZING

13.4.1 Every Beneficial Owner shall have an option to freeze his account with the participant so as to render it inoperable for a limited period of time. The participant shall freeze the account of a Beneficial Owner maintained with it on written instructions received by the participant in that regard from the Beneficial Owner concerned in the form specified by the Operating Instructions.

13.4.2 The participant shall freeze the account of a Beneficial Owner on written instructions received by it in this regard from CDSL pursuant to the orders of the Central or State Government, SEBI or any order passed by a court, tribunal, or any statutory authority in this regard.

13.4.3 An account so frozen shall be activated on instructions in writing from the Beneficial Owner, and on receipt of instructions from CDSL pursuant to the passing of any order or issuance of instructions vacating revoking or setting aside the order of freezing by the court, tribunal or authority.

Provided further that on the account being frozen in either event, the participant of such Beneficial Owner shall not effect any debit entry or any such other transaction unless the instructions or order for freezing the account has been withdrawn, revoked, vacated, set aside or modified as aforesaid. However, the participant shall credit benefits to a frozen account.

13.4.4. CDSL shall direct a participant to freeze an account opened by the participant with itself in respect of securities held by the participant in its own name :

13.4.4.1 on the orders of the Central or State Government or SEBI or any court or tribunal or any statutory authority in this regard.

13.4.4.2 if the participant becomes insolvent, bankrupt or in case of a body corporate being wound up.

Provided further that the frozen account may be released on instructions of the authority under whose directions such account was frozen.”

the demat account of ABG.

36 On inaccurate name, Shri Purohit had also submitted that CDSL is a depository for numerous Depository Participants in India which, in turn, have millions of account holders. There are several beneficial owners who have similar names. Any incorrect freezing of the account would have severe repercussions for the account holder as he would be prevented from dealing with his shares. From a perusal of prayer clause - (h) to the chamber summons no.534 of 2005 read with Schedule VIII, it is clear that the same does not provide for any details of the account holders save and except the names. Even the letter dated 1st June 2005 together with a copy of the order dated 6th May 2005 and the Schedule served on CDSL by applicants did not provide for any account number or PAN Card details, which would have facilitated identifying/locating the correct demat account. In absence thereof, it would be highly speculative for CDSL to freeze the account merely by the name.

37 CDSL, on the request of petitioners' Advocate, sought to assist applicants in compliance with order dated 6th May 2005. While CDSL found the demat account of Mr. Ashok Bimal Ghosh, which it froze, it could not locate an accurate match for the demat account by the name of 'ABG Securities Pvt. Ltd.' even after due and diligent search and was unable to trace the said account and hence, could not freeze it as applicants' Advocate

had furnished incomplete/inaccurate name of 'ABG Securities Pvt. Ltd.' instead of 'ABG Securities Private Limited'.

During the course of arguments, CDSL tried to demonstrate the difficulty in freezing an account only with the name of the party. Shri Purohit submitted that it would be very difficult that CDSL would freeze an account on the basis of an incomplete and inaccurate name as clients would have multiple accounts and it would result in a third party's account being frozen contrary to the mandate of the bye-laws of CDSL and the Depository Act.

38 Shri Purohit also submitted that Amu is not only a depository participant of CDSL but also a broker of Bombay Stock Exchange Ltd. The act of transfer of shares from the demat account of ABG through or to Amu is out of purview of depository operations as the activities of a depository participant in its capacity other than a depository participant, e.g., as a broker, are not subject to supervision by a depository, in the present case, CDSL. Thus, although Amu, in its capacity as a depository participant, is an agent of CDSL, in respect of the transfer of shares had acted in the capacity of a broker of Bombay Stock Exchange Limited.

39 Shri Purohit also submitted that CDSL has not made any gains whatsoever by the share transfers out of the demat account of ABG Securities, with no beneficial interest therein. Shri Purohit stated that a

depository is an organisation which facilitates holding of securities of a beneficial owner in electronic form in the same way as a bank holds money by way of a book entry in the passbook of an account holder. The depository facilitates holding of securities in electronic form and also records transfer of ownership of securities through beneficial owner accounts held with its depository participants. Thus, CDSL does not have any beneficial interest in the securities held by the beneficial owners through its system. In this situation, whatever transactions were allegedly effected, could never have benefited CDSL. Therefore, applicants ought to pursue its remedy against such third parties, who may have benefited from the alleged share transactions in the demat account of ABG, for recovering the concerned shares or value thereof.

Court's views on Shri Purohit's submissions – Paragraph 26 (D), (E) and (F):

40 None of these submissions of Shri Purohit are of any assistance to CDSL. Firstly, these contentions are contrary to CDSL's own conduct as CDSL had admittedly frozen the account of Ghosh upon receipt of the order dated 6th May 2005, under cover of applicants' advocate's letter dated 1st June 2005. Thus, CDSL was able to freeze transfers in a demat account and had in fact done so qua Ghosh.

41 CDSL's contention that there is a requirement for a specific order against CDSL, is contrary to the Byelaws themselves which clearly contemplate that CDSL shall give effect to an order passed by a competent Court. The Byelaws nowhere provide that the injunction order must be specifically directed against CDSL. CDSL cannot contend that despite knowledge of an order having been passed by this Court against a beneficial owner and despite being aware that any transfer would be in breach of the order, CDSL was powerless and/or was not required to prevent the transaction proceeding.

42 Pertinently, in its reply letter dated 10th July 2005 CDSL assured applicants' advocate that they were giving effect to the said order and nowhere stated that they did not have the power to give effect to the order or to freeze the account of ABG.

43 Further the argument that there is no obligation on CDSL in law to freeze the account and CDSL may do so if it so wishes, is untenable. Clause 5.3.25 of the Byelaws (quoted in paragraph 19 above), which admittedly has statutory force, clearly imposes an obligation on CDSL not to give effect to any transfer which it knows would be in breach of an order of a competent Court. This mandate on CDSL not to give effect to a transfer in breach of a Court order is also reflected in Clause 8.1.14 (quoted in paragraph 19 above) of CDSL's Agreement with Amu. None of these

provisions contemplate CDSL having a discretion to ensure compliance with an order of a competent Court, regardless of whether the said order is directed against CDSL. In my view, mere knowledge of the order is sufficient to require CDSL to mandatorily ensure compliance therewith, and to take necessary steps in this regard.

44 CDSL relies upon Byelaw 13.4 (quoted in paragraph 35 above) to contend that CDSL could only direct the Participant to freeze the account, but that CDSL could not freeze the account itself. Firstly, clause 13.4.4 merely contemplates that CDSL shall direct a Participant to freeze the account if it receives an order of a Court in this regard. This provision is in no manner exhaustive or contemplates that CDSL itself cannot freeze the account and stop the transfer as was admittedly done by CDSL in the case of Ghosh. Further, it is pertinent to note that despite this mandate under Byelaw 13.4.4, CDSL did not see fit to order Amu to freeze the account of ABG, which was, even by CDSL's own case, the very minimum that CDSL could have and should have done.

45 The incorrectness of this stand is further borne out from CDSL's affidavit wherein it is not CDSL's case that it could not freeze a demat account; the only reason given for not freezing ABG's account was that CDSL claims it could not find the words "ABG Securities Pvt. Ltd.".

46 The contention of CDSL that it could not locate the account of ABG in its system as it was written as “ABG Securities Pvt. Ltd.” and the system had it as “ABG Securities Private Limited” and there are parties with multiple accounts and freezing an account on the basis of inaccurate name would have disastrous consequences are all untenable. Firstly, CDSL claims in its letter addressed to the Receiver on 6th July 2007 that it located the account details of ABG through ABG’s address of Shreyas Building. This very same address had been given in the letter dated 1st June 2005 enclosing the said order, and therefore, there is no basis or cogent explanation as to why CDSL could not have found the same at that time.

47 Further, in its reply letter dated 10th June 2005 CDSL at no point stated that it could not locate the demat account of ABG, due to the purported mismatch of the words “Pvt. Ltd.”, or otherwise. On the contrary CDSL stated that it was in the process of giving effect to the order in respect of the respective demat accounts. It is rather unbelievable that a party would not take the minimum effort of searching for ABG’s name both as “Pvt. Ltd.” and “Private Limited”, when searching for the same more so when there is an order of the Court. “Pvt. Ltd.” is too commonly used a term for CDSL to contend that they did not think to search for ABG’s name with “Pvt. Ltd.” and “Private Limited”. As stated earlier, in its own letter addressed on 9th August 2007, CDSL has referred to ABG as “ABG Securities

Pvt. Ltd.” (emphasis supplied).

48 As far as (G) in paragraph 26 is concerned, i.e., CDSL is an incorrect third party and applicants cannot seek damages against CDSL, Shri Purohit had submitted that injunctive orders granted by courts are equitable reliefs and it is a settled principle of law that equity acts *in personam* and not *in rem*. The order dated 6th May, 2005 is an order requiring *status quo* to be maintained with respect to the judgment debtor’s assets. Such an order cannot be enforced against the world at large, against third parties who are not concerned with the dispute *inter se* the parties. Orders can only bind the persons against whom they have been passed. The ordinary rule is that it can only be disobeyed in contempt by persons named in the proceedings. Persons who were not defendants in the suit in which injunction was granted nor were named in the order cannot be proceeded against in contempt for disobeying the injunction. It is admitted position that the present proceedings are not a contempt proceeding against CDSL.

49 Shri Purohit further submitted assuming without admitting that there is a breach of the order of this Court, the action, if any, that applicants may adopt could be a separate suit for damages, independent of the execution application and any proceedings therein and hence, the above chamber summons is not maintainable against CDSL.

Court's views on Shri Purohit's submissions – Paragraph 26 (G):

50 In my view, CDSL cannot absolve itself of blame for having breached/ permitted the breach of the said order. CDSL was well aware of the said order, had assured to act in furtherance thereof and had in fact frozen Ghosh's account. There is no conceivable reason or explanation that can justify a failure to freeze the account of ABG. Having failed to do so, and having therefore knowingly permitted a breach of an order of injunction, CDSL must ensure that the status quo ante is restored.

51 Were it not for CDSL's failure to ensure compliance with the order, the shares would have been available as part of the assets of the judgment debtors and applicants could have proceeded in execution accordingly. It is due to CDSL's contributory failure that the injunction was breached and the shares were removed from the custody and control of this Court, and it is only to the extent that the shares or value thereof must be restored back to the custody and control of this Court, that reliefs are sought by applicants.

52 Applicants are not seeking damages against CDSL and it is entirely irrelevant whether CDSL has or has not benefited from the transfers. Applicants are simply seeking restoration of the status quo ante, which position was that the shares were available and within the control of this Court. Having caused/permitted the shares to be removed from the control

of this Court, in breach of the order, CDSL ought to be directed to bring back the shares, which will then be subject to further orders as may be passed by this Court.

Submissions of Shri Kishore Jain for respondent nos.1 to 6 :

53 Shri Jain submitted that :

(A) Though a party to the order dated 6th May 2005, Amu was not aware of the order passed and was not informed correctly about the order by its Advocate.

(B) There was no order against Amu and therefore, Amu is not liable to ensure compliance thereof or for a breach thereof.

(C) ABG had a debit balance and therefore Amu was entitled to sell the shares and appropriate proceeds in exercise of a stock-broker's lien under the Bombay Stock Exchange Bye-laws, notwithstanding the injunction.

(D) Amu's contentions that assuming Amu had violated the injunction, no useful purpose would be served in making it bring back the shares or the value thereof, if eventually Amu would be entitled to appropriate all the shares in exercise of the lien.

(E) The present proceedings be treated as garnishee proceedings and Amu would be treated as a garnishee who is entitled to adjust against the claim stated to be owing by it.

(F) ABG is being proceeded against pursuant to execution of the order of 6th May 2005 and lifting of the corporate veil of ABG by the order dated 7th December 2005 which order of 7th December 2005 was not continued on 27th January 2009 (page 562) - as the said order dated 7th December 2005 has not been further extended, there can be no execution against ABG in respect of the order dated 06.05.2005.

(G) Amu is an independent stock broker acting on an arm's length basis and not at the behest of Ghosh.

54 As far as (A) and (B) of paragraph 53 are concerned, i.e., though a party to the order dated 6th May 2005, Amu was not aware of the order as advocate did not inform Amu, there was no order against Amu, hence not liable to ensure compliance etc., Shri Jain elaborated as under :

 In the said chamber summons no.534 of 2005, wherein the ad-interim reliefs were granted on 6th May 2005, different prayers were sought against different respondents. Present respondent no.1 - Amu and respondent nos. 7, 8 & 10 to 12 were represented by a common Advocate named Mr. R. K. Bharuka. On 6th May 2005 ad-interim relief in terms of prayer clauses - (h) and (j) (reproduced in paragraph 4 above) were granted. The said prayers do not seek any relief against Amu, present respondent no.1 and other respondents therein, who were represented by said Advocate Bharuka.

 Respondent nos.1 to 6 herein were informed that no ad-interim relief against them was pressed for or granted on 6th May 2005. The said Respondents bonafide believed the same, and accordingly conducted themselves in ordinary course of their business, as share brokers.

Court's views on Shri Jain's submissions – Paragraph 53 (A) and (B) :

55 I am unable to accept Shri Jain's submissions. Amu was a party

to the order, being respondent no.9 in chamber summons no.534 of 2005 in which the order dated 6th May 2005 came to be passed. Amu was represented by an Advocate. The Advocate was present at the hearing. It is well settled as laid down in *Damodaran Pillai & Ors. (Supra)*, *Nilkantha Sidramappa Ningashetti (Supra)* and *Somasundara Mudali & Ors. (Supra)* cited by Shri Cama that knowledge of an Advocate is deemed to be knowledge of the party. It has specifically been held that where an order of injunction is passed in the presence of a party's Advocate, it is deemed that the party is aware of the injunction and no further intimation is required to be given. Pertinently Amu's stand in its Affidavit is that Amu's then Advocate, informed Amu that an order of injunction was passed against Ghosh/Lily. Thus, at the very minimum Amu was aware of the injunction against Ghosh/Lily and could not have accepted and appropriated monies from the bank account/s of Ghosh which would entail a breach of the said order. In defence, Amu has incorrectly contended that (i) Amu had no knowledge that Ghosh was paying any monies in violation of the said order and (ii) that the said order did not restrain Ghosh from repaying debts or meeting his liability or that of ABG or Lily. Applicants have sought reliefs by virtue of prayer clause - (b) of the chamber summons in this context.

56 Admittedly, even after the order was passed, on 6th July 2005, the Advocate for applicants served a compilation of documents in the earlier

chamber summons on Amu's then Advocate with a copy of the order enclosed in the compilation. This has been accepted by Amu in its affidavit in reply. Amu's own Advocate's letter claims in paragraph 2 that Amu was regularly appearing in the matter, and therefore, it is unbelievable that Amu was not aware of the order passed.

57 Even otherwise as per Amu's own case, from August 2005 there was a new Advocate appearing for Amu. This is admitted in paragraph 3 of Amu's present Advocate's letter dated 21st November 2007. Several of the transfers took place after the new Advocate came on record and it is presumed that at least he had perused the record. Therefore, this defence is *ex facie* untenable. For these reasons, it does not lie with a party who is aware of the injunction to permit and participate in the commission of breach of the order. The short point is that despite knowledge of the Order, Amu carried out the transfers, and Amu is therefore liable to restore the status quo ante regardless of any purported justification for the share transfers.

58 As far as (C) and (D) of paragraph 53 that ABG had a debit balance and therefore Amu was entitled to sell the shares and appropriate proceeds, stock-broker's lien etc. are concerned, Shri Jain submitted that as per the ledger account, as on the date of the ad-interim order dated 6th May 2005, an amount of Rs.49,51,535.89 ps. was due and payable by ABG

Securities Pvt. Ltd. to Amu and Rs.2,08,120.04 ps. was due and payable by Ashok Bimal Ghosh to Amu. Shri Jain separately handed over a compilation, indicating that as on the date of the order, i.e., 6th May 2005, it was holding shares of the value of Rs.1,15,69,390/- of ABG Securities Pvt. Ltd. and shares worth Rs.8,55,250/- of Mr. Ashok Ghosh. Amu has, while preparing the said statement, taken into consideration the closing rates of Stock Exchange and has produced in the said compilation the proof in connection therewith. Shri Jain added, Amu had in connection with the amounts due to it from said Mr. Ashok Bimal Ghosh and the said ABG Securities Pvt. Ltd., a lien in terms of bye-law 227 of the Stock Exchange, Mumbai, and had a right to sell the shares and appropriate all the assets and properties of said Ashok Ghosh and/or ABG Securities Pvt. Ltd. as provided in the said Bye-law. The said bye-law 227 is having statutory force and the lien provided thereunder creates in favour of respondent no.1 "Security", which can be enforced, as provided therein. Shri Jain relied upon ***Bombay Stock Exchange v/s. V. S. Kandalgaonkar & Ors.***¹⁸ where Rule 43 of the Stock Exchange, Mumbai came up for consideration before the Hon'ble Supreme Court of India.

59 The said Rule 43, Shri Jain submitted, is more or less on the same footing as Bye-law 227, except that Rule 43 is in relation to security of the Exchange and Bye-law 227 is in relation to security/lien of a stock

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broker. The said rule 43 uses the words “First and Paramount Lien” in relation to lien of Stock Exchange. The said words are missing in Bye-law 227. However, the effect of both Rule 43 and Bye-law 227 are more or less the same, i.e., the lien created thereunder amounts to security and the Stock Exchange and the Stock broker are to be treated as Secured Creditors to the extent of their lien, which is statutory in nature.

60 Shri Jain further submitted that applicants have, in the affidavit in support of the above chamber summons, made a statement that in connection with the dealings of shares and securities of the said Ashok Bimal Ghosh and ABG dealt with by Amu, filed a Complaint dated 20th August 2008 with SEBI for penal action against Amu - Respondent Nos.1 and 7, and that for the same, SEBI has exclusive jurisdiction under “The Depositories Act” and “Securities Contracts Regulation Act”. Applicants, however, avoided annexing copy of any such Complaint. Respondent no.1 in its affidavit in reply, pointed out that the SEBI had not taken any action against Respondent No.1 on the basis of so called Complaint, and that applicants having not given inspection of the so called Complaint or any records concerning the same, was not entitled to rely upon the same. Despite the same, applicants in their rejoinder, have neither annexed copy of the so called Complaint to the SEBI nor have they made any statement in regard to the outcome of the so called Complaint. In all probability the same

is rejected as being frivolous. In any case the SEBI having not taken any action, the matter has to be proceeded that there is absolutely no violation of any SEBI Regulation in connection with dealings of shares of Ashok Bimal Ghosh and ABG Securities Pvt. Ltd. by respondent no.1 – Amu.

61 Respondent no.1 – Amu has thus without being aware of the said order dated 6th May 2005, dealt with the shares of Ashok Bimal Ghosh and for that matter even of ABG. It is the case of Amu that ABG is not a judgment debtor qua applicants under the Award. The order based whereon the order dated 6th May 2005 was passed, has not been continued. Applicants withdrew their chamber summons no.534 of 2005 without liberty to take out fresh one for the same reliefs. The said chamber summons had sought lifting of veil, *inter alia*, of the said ABG. The ad-interim order therefore, as regards dealing of shares and securities and assets by ABG has come to an end. Therefore, applicants are otherwise also not entitled to restoration in connection with shares and properties of ABG. Even if the same are taken into account, Amu has merely made recovery of the dues payable to it by Ashok Ghosh and ABG, which as on the date of the order dated 6th May 2005 was of Rs.49,51,535.89 and after appropriations of the securities/lien, respondent no.1 - Amu still has to recover an amount of Rs.19,30,428.94 ps.

62 Respondent no.1 has thus all throughout acted bonafide in good faith and in ordinary course of its business. Respondent no.1 has neither gained by itself nor helped said Ashok Ghosh and ABG by dealing in the shares of Ashok Ghosh and/or the said ABG after the order dated 6th May 2005, and has also not caused any loss to applicants by virtue of its misunderstanding of the impact of the order dated 6th May 2005, which was in view of the information of its then Advocate, who has thereafter ceased to be the Advocate of respondent no.1. The Court may grant post facto leave for the lien exercised by respondent no.1.

63 Shri Jain further submitted that a somewhat similar situation had arisen before the Hon'ble Supreme Court in the matter of ***Ghanshyam Sarda v/s. J. K. Jute Mills Co. Ltd.***¹⁹. There was breach of an order passed by the Hon'ble Supreme Court, and therefore, the aggrieved party initiated in Supreme Court, proceedings for taking action under the provisions of Contempt of Courts Act and also for restoration by declaring the alienation in breach of the order as null & void. The Hon'ble Supreme Court after taking into account all the facts, and despite holding that (i) legal advice on which the alleged Contemnors acted was not appreciable (para 22), (ii) the violation was deliberate and (iii) the concerned person had even in the past acted in a manner not approvable, took a lenient view and did not pass order for restoration. The Hon'ble Supreme Court had in para 25 of the said

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judgment specifically noted the observations in decision in the matter of *D.D.A v/s Skipper Constructions (Supra)* in regard to restoration and yet did not pass order for restoration.

64 Applicants have, in the instant matter, proceeded on a premise that there has been willful and deliberate breach of the order dated 6th May 2005 and that the provisions of section 151 of Code of Civil Procedure providing for inherent powers, make it mandatory for the Courts to order restoration in every matter without any exception, if there is breach irrespective of the same being accidental, deliberate or otherwise. Shri Jain submitted that the judgment of Hon'ble Supreme Court in the matter of *Ghanshyam Sarda (Supra)* has diluted the judgment on the aspect of restoration and has provided for a lenient view being taken if the circumstances indicate that either the breach is accidental or not deliberate or that the person alleged of the breach has not gained anything by committing such breach.

65 Therefore, it is contended in short by Amu that Ghosh and ABG being its clients/constituents and ABG purportedly having a debit balance, Amu was entitled to exercise a broker's lien under Bye-Law 227 of the Bombay Stock Exchange Byelaws and to sell the shares of Ghosh and ABG.

Court's views on Shri Jain's submissions – Paragraph 53 (C) and (D):

66 In my view, these contentions are unacceptable. I say this

because at no point of time in the present pleadings or in the last 13 years has Amu ever expressly asserted any lien. It is only stated that there was a purported debit balance and that Amu was authorized by a purported letter of Ghosh and ABG, copies whereof are at Exhibit 2 and Exhibit 3 to the affidavit in reply dated 15th June 2009 of one Arvind M. Shah, to retain the sale proceeds of the shares for further adjustments. If indeed, Amu had a lien in law which it was entitled to assert, no such letters would have been required. This clearly shows that Amu has never asserted a lien. Further, even assuming for a moment that Amu had a right of lien and/or the right to sell the shares, the same could never have been permitted in breach of the said order of injunction. The very minimum that would have been required was for Amu to come before this Court and seek modification or vacation of the said order. I have to note, Shri Jain, in fairness agreed that Amu should have approached the Court for clarification or leave to sell and appropriate. Instead Amu has indulged ABG in speculation of sale and purchase of shares after the said order, as evident from the figures at page 17 of Amu's chart dated 10th December 2018. For ease of reference, the Chart is reproduced herein below :

STATEMENT OF AMU'S DUES RECOVERABLE FROM ABG SECURITIES PRIVATE LIMITED

Opening Balance as on the date of the injunction, i.e., 6.5.05	-49,51,535.89	Page 362 (Ledger Account) & Page 351 (Correspondence)
Speculation Transactions	-92,77,874.65	See Statement (INTRA DAY SQUARE OFF TRANSACTIONS)

Purchase Amount	-1,22,29,803.40	See Statement (DELIVERY PURCHASE TRANSACTIONS)
Total Sale Amount	2,42,25,715.78	See Statement (DELIVERY SALE TRANSACTIONS)
Expenses Amount	-6,96,984.78	See the Statement hereunder
Cheque received from ABG Securities	10,00,000.00	Page 367 (Ledger Account) (towards the bottom)
Closing Balance at the very end	-19,30,482.94	Page 367 (Ledger Account) & Page 351 (Correspondence)

SERVICE TAX	10,381.25
STAMP DUTY (MAHARASHTRA GOVERNMENT)	84,686.88
SECURITIES TRANSACTION TAX (STT) GOVERNMENT OF INDIA	4,32,178.84
TRANSACTION TAX (BOMBAY STOCK EXCHANGE)	1,69,737.81
TOTAL EXPENSES	6,96,984.78

67 Having failed to apply for modification or vacation and having actively permitted the share transfers in breach of the injunction, it does not lie with a defaulting party to contend before this Court that there is no major prejudice caused by the sale/transfer and that the breach ought to be excused. All the judgments cited by applicants speak of the majesty of the Court not being permitted to be diluted by a person acting in breach of the order. It is unstateable for a party who commits/permits the breach to say that no material difference would have occurred if the order had been complied with and therefore the breach, done intentionally and with full knowledge of the consequences, ought to be ignored. The reliance of Amu's Advocates on the judgment of *Ghanshyam Sarda (Supra)* is misplaced. The

Apex Court has simply exercised a discretion on the facts and circumstances of that case as opposed to the brazen manner in which the injunction has been violated by ABG/Amu.

68 In every case, where a party claiming to be a secured creditor (as Amu purports to be) seeks to raise an attachment or restraint on the property secured to it, the party must come before the Court and seek lifting/modification of the order of injunction. To not insist on the same and to permit a party to be excused from complying with the order of this Court would result in misuse as parties would at their *ipse dixit* decide whether or not to comply with orders of the Court.

69 It is to avoid this very malaise that the Hon'ble Supreme Court and the High Courts have held that as a matter of judicial policy the orders of a Court cannot be permitted to be breached or stultified. Whether any actual benefit is served from restoring the status quo ante or not is entirely irrelevant and cannot possibly be a factor relied upon by the defaulting party to justify its breach and avoid the consequence of having to restore the status quo ante.

70 Once the shares/value thereof are brought back, and if Amu seeks to withdraw the same, it will be open to applicants to resist the same by urging, *inter alia*, that Amu could never have claimed a lien on the said shares as Amu was in fact barred by law from dealing with the said shares.

71 On the facts and merits of the claim for lien in the present case, even assuming Amu had a lien which they could have exercised, to what extent Amu may be permitted to retain the benefit from the shares sold/transferred has to be ascertained. I have considered in detail the chart that Shri Jain tendered with a compilation on 10th December 2018. *Prima Facie*, it appears, shares transferred out of ABG's CDSL demat account after the injunction order dated 6th May 2005 were valued at Rs.1,79,62,131.56 as on the date of their respective transfer as per Schedule V to the chamber summons or Rs.2,42,25,715.78 as per page 17 of Amu's chart dated 10th December 2018. Amu's purported balance upon which they could arguably contend that they had a lien was Rs.49,51,535.89 (Amu's ledger) being the purported closing balance as on the date of the injunction. Under no circumstances, can it be suggested that even after the injunction, Amu was entitled to continue to sell and buy shares for ABG, permit ABG to indulge in speculation, rack up a huge purported loss and thereafter claim appropriation of lien of the entire purported loss from the shares sold/transferred in breach of the injunction.

72 It is crucial that the said shares be brought back with accrued benefits or their monetary value along with interest thereon from 2005. It is nowhere proved by Amu that in fact there was a debit balance of Rs.49,51,535.89/-. The accounts relied upon by Amu have no supporting

material, nor are they audited or certified accounts. They are simply Amu's internal ledger which is under their sole control. Once the shares are brought back, Amu will have to first establish and prove the existence and veracity of such purported debit balance. In para 13(f) of applicants' affidavit in rejoinder dated 31st July 2009, it has been stated that Amu refused to furnish the particulars of the entries in its accounts and refused to furnish copies of the documents pertaining to entries in the said accounts (including copies of bills and journal vouchers) and an adverse inference should be and ought to be drawn against Amu. In reply, Amu in its Affidavit in sur-rejoinder dated 6th November 2009 in para 23, has *inter alia* stated that Amu is not bound to furnish any particulars of the entries in its accounts or copies of the documents pertaining to entries in the said accounts. Applicants have specifically disputed the veracity of Amu's purported ledger account.

73 Pertinently, Amu had never asserted any right of lien in respect of the said shares at the time of passing of the said order dated 6th May 2005, though present through their Advocate. At no point in the ensuing 13 years has Amu ever asserted a claim or filed proceedings against ABG and/or Ghosh in respect of the purported debit balance it claims it still has. Amu's conduct could be viewed with suspicious collusion with Ghosh. Amu only started dealing with ABG in June 2004 after service on May 11, 2004 of

the earlier chamber summons no.754 of 2004; ABG is clearly a front for Ghosh, against whom the BSE Award was passed and execution was pending.

74 As far as (D) of paragraph 53 is concerned, Re: Amu's contentions that assuming Amu had violated the injunction, no useful purpose would be served in making it bring back the shares or the value thereof, if eventually Amu would be entitled to appropriate all the shares in exercise of the lien, Amu cannot contend that were the shares/value thereof with accrued benefits/interest be directed to be brought back, it would serve no useful purpose as they would be entitled to exercise a lien and appropriate the shares/sale proceeds. The shares were not sold by Amu in exercise of the lien but were simply sold by Ghosh/ABG as and by way of a regular sale transaction. That Amu was acting for Ghosh/ABG in ordinary course and not in exercise of a lien is evident from the fact that Amu purchased shares as well during the relevant period.

75 Even otherwise the injunction order had the effect of bringing the shares under the control and custody of this Court. The shares having been sold in breach of the injunction must be brought back into the custody, control and seisin of this Court.

76 It would be open to applicants, after status quo ante is restored, to urge that Amu cannot exercise a lien or is not entitled to the shares or the

value/full value of shares transferred after the said order and for Amu to claim those amounts or shares back. I have not expressed any views on that subject. This Court is not required at present to decide these issues.

77 The judgment of the Hon'ble Supreme Court in *Bombay Stock Exchange v/s. Kandalgaonkar and Ors. (Supra)* cannot assist Amu. Even if one assumes that Amu was to be treated as a secured creditor, this judgment nowhere states that a secured creditor is permitted to sell shares in exercise of a lien, notwithstanding an injunction order barring the sale of the shares.

78 As far as (E), (F) and (G) of paragraph 53 are concerned, Shri Jain submitted that the present chamber summons is in execution and applicants are seeking restoration of the status quo, as existed on 6th May 2005. Pertinently the orders in connection whereof restoration is sought are passed in a proceeding, where Amu had no privity and respondent no.1 (Amu) was joined in chamber summons, merely as the garnishee. Therefore, the orders in the chamber summons are orders in garnishee proceedings, as observed by the Hon'ble Supreme Court in the matter of ***Food Corporation of India v/s. Sukh Deo Prasad***²⁰.

79 Shri Jain added that the said chamber summons no.534 of 2005 was taken out on or about 19th April 2005. During pendency of the said chamber summons, applicants took out the present chamber summons

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no.55 of 2009 on or about 14th January 2009.

The said Ashok Ghosh died on or about 12th April 2006. His wife Lily Ghosh, was already adjudged an Insolvent. Therefore, in Appeal No.63 of 1998 filed by said Ashok Bimal Ghosh, challenging the Award dated 16th January 1997 and the Decree in terms thereof dated 29th September 1997, the said Lily Ghosh and Official Assignee, High Court Bombay, as the Assignee of the Estate of said Lily Ghosh, were brought on record as appellants.

Applicants and the said Lily Ghosh arrived at Consent Terms dated 7th March 2007. The same were taken on record and the report of the Official Assignee was called for as to whether the Official Assignee had any objection to sign the same. The Official Assignee submitted a Report dated 14th March 2009 and thereupon, the said appeal was disposed by an order dated 15th March 2007 in term of the consent terms. Clause - (8) read with Clause - (16) of the said consent terms, permitted the widow of said Ashok Ghosh to withdraw an amount of Rs.25,72,661/- lying with the Official Assignee. Though the said consent terms were taken on record, the Hon'ble Court has not passed any order in terms thereof, save and except disposing of the said appeal in terms of the said consent terms, as reflected from order dated 15th March 2007, whereby the consent terms already taken on record on 7th March 2007 were marked "X" for identification. Thus the consent terms remained only agreement between the parties, without the seal of

Court imposed thereon.

After taking out the present chamber summons, as set out above, the said chamber summons no.534 of 2005 was withdrawn on 27th November 2009 without seeking liberty to take out fresh chamber summons or seek for the reliefs claimed in the said chamber summons, save and except that the ad-interim order dated 6th May 2005 passed in terms of prayer clauses - (h) and (j) thereof, was continued, without prejudice to the rights and contentions of the parties, and keeping all pleas of both sides open.

Amu, made available for inspection of applicants and their Advocate the Ledger Account of Ghosh. Applicants have in the affidavit in support of the above chamber summons, made reference to the aforesaid Ledger Accounts and the correspondence relating to formalities of inspection. Applicants have only made a vague statement that they are denying the authenticity of the statement of transaction shown in the said Ledger Account and have not been able to pin-point any discrepancy. If the genuineness of the said Ledger Account are not to be accepted then as provided in provisions of Order XXI Rule 46C, 46D, 46E & 46H, as also in Rules 347, 348, 349 and 350 of High Court (O.S.) Rules, the matter ought to be relegated for recording evidence, instead of being decided on affidavits.

Court's views on Shri Jain's submissions – Paragraph 53 (E) (F) and (G) :

80 This entire submission of Amu proceeds on a misconceived basis that Amu is a garnishee owing a debt to ABG. Amu is not a garnishee in any manner whatsoever. The case of applicants' is that the shares sold were of ABG/Ghosh, and Amu despite knowledge of the order, permitted/caused the same to be sold/transferred.

81 The judgment in *Food Corporation of India v/s. Sukh Deo Prasad (Supra)*, relied upon by Amu has no bearing on the present case whatsoever. The judgment simply holds that a garnishee order is not an injunction. This judgment nowhere contemplates a situation where a party has sold shares in breach of an injunction. The issue before the Hon'ble Supreme Court was whether action could be taken under Order XXXIX Rule 2A of the CPC, which was held to be impermissible as a garnishee order is not an injunction under Order XXXIX Rule 1, and an injunction under Order XXXIX Rule 1 is the sine qua non for instituting action under Order XXXIX Rule 2A of CPC.

 This contention proceeds on a misconceived understanding of the application at hand. The simple point raised by applicants is that shares were sold/transferred in breach of an injunction. The sale/transfer being impermissible, the shares and the status quo ante have to be restored. It is sufficient that on the date of the transactions in question the injunction was in force; admittedly, this is so, and the injunction continued for more than

three years thereafter.

82 There is no attempt to 'execute' the order of 6th May 2005 or indeed to execute against the subject shares of ABG at present. Further the question of lifting the veil does not arise as the said order was specifically against ABG and it is breach of this order which is to be rectified.

83 Amu has represented as if it is an innocent arm's length stockbroker dealing for its constituent and therefore should not be liable for breach of the order. This is untenable as evident from the following :

- (i) Amu is an entity which was closely connected with and acting at the behest of Ghosh. This observation is based only on the admitted facts from Amu's own affidavits;
- (ii) Amu has admitted that Ghosh was a signatory on the bank account for respondent nos.4 to 6 herein, which are entities of Amu's directors, i.e., respondent nos.2 and 3 herein;
- (iii) Respondent nos.2 and 3, who were Amu's Directors, had appointed Ghosh as a consultant and for this purported consultancy had given Ghosh, inter alia, luxurious flats at Anand Niwas, A-Road Churchgate, and thereafter at Shreyas Building, Nariman Point to live in, for free, for which Amu was the licensee and was paying significant rent;
- (iv) Amu made payment of Rs.8,26,643/- to the Official Assignee of this Court, on 16th December 2005, on behalf of Lily who was declared insolvent; and
- (v) Amu has at Ghosh/ABG's behest carried out huge transactions after the injunction order.

84 In the above circumstances, it will be only proper and correct for this Court to undo the effect of breach of the said order by Amu/CDSL.

85 In the circumstances, chamber summons is allowed in terms of prayer clause – a (ii) and the amount will be Rs.1,79,62,131.56 and prayer clause f (i). These amounts to be paid within four weeks.

Chamber summons accordingly stands disposed.

(K.R. SHRIRAM, J.)