

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 311 OF 2024.

WITH

INTERIM APPLICATION NO. 2677 OF 2024

Central Depository Services (India) Limited

.... **Petitioner/
Applicant**

: Versus :

Daksha Narendra Bhavsar and Another

.... **Respondents**

Mr. Ravi Kadam, Senior Advocate with Mr. Rohan Kadam, Mr. Vaibhav Singh, Ms. Radhika Indapurkar, Mr. Rahil Shah & Mr. Pranav Chandhoke i/b Veritas Legal, for Petitioner

Mr. Vishal Kanade with Mr. Harsh Moorjani, Ms. Priyanka Chaddha, Mr. Abhay Dhadiwal & Ms. Vidhi Karia i/b Jayakar & Partners, for Respondent

CORAM : SANDEEP V. MARNE, J.

Judg.Reserved On: 18 November 2025.

Judg.Pronounced On: 1 December 2025

JUDGMENT

THE CHALLENGE

1) The Petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996, (**Arbitration Act**) seeks invalidation of the Award dated 30 January 2024 passed by the Arbitral Tribunal. By the impugned Award, the Tribunal has allowed the claim of Respondent No.1 to the extent of Rs.86,02,768/- with direction to the Petitioner to pay the awarded sum to the First Respondent, being the value of her lost shares on the date of dispute. The Tribunal has also awarded simple interest at the rate of 9% p.a. on the awarded sum.

FACTS

2) The Petitioner-Central Depository Services Ltd. (**CDSL**) is a company established under the provisions of Companies Act, 1956 and also a Depository under section 12(1-A) of the Securities and Exchange Board of India Act, 1992 (**SEBI Act**) and a facilitator for holding securities in a dematerialized form. Respondent No.2-BRH Wealth Kreators Limited (**BRH**) is a Kolkata based public limited company and registered as a stock-broker with the Stock Exchanges. It is also a registered Depository Participant (**DP**) with the Petitioner. Respondent No.1 earlier held a Demat account of Karvy Stock Broking Limited. However, on account of compulsory closure of the said account, Respondent No.1 opened demat account with Respondent No.2-BRH on 27 June 2018. Respondent No.1 and her late husband jointly executed a Power of Attorney (**POA**) dated 29

June 2018 in favour of Respondent No.2. The husband of Respondent No.1 expired on 7 June 2019, which fact was apparently not communicated to Respondent No.2 or to the Petitioner. Acting on the Power of Attorney executed by Respondent No.1, Respondent No.2-BRH transferred equity shares from the demat account of Respondent No.1 to the Trading Member/ Clearing Member Client Account (**TM/CM Account**) of Respondent No.2 bearing BO ID: 1204630000023100, (**First TM/CM Account**). By such transfer, the title in the equity shares owned by Respondent No.1 got transferred to the TM/CM account of BRH. Petitioner claims to have issued SMS alert of such transfer on the registered mobile number of Respondent No.1. The shares of various beneficial owners (including the shares of Respondent No.1) lying in the First TM/CM account of Respondent No.2 were transferred to another dematerialized account also being second Respondent's distinct TM/CM Client Account with BO ID:1204630000021137 (**Second TM/CM Account**). It appears that in the aforesaid manner, Respondent No. 2 transferred shares of 9493 clients into the Second TM/CM Account.

3) On the strength of having acquired title in the transferred shares, BRH pledged the shares in the second TM/CM account with HDFC Bank Limited (**HDFC Bank**) for the purpose of availing loan facility against the pledged shares. It appears that the Petitioner accepted the request for creation of pledge on the ground that the title in the shares had transferred to the Second TM/CM Account of Respondent No.2.

4) On the 30 of September 2019, National Stock Exchange (**NSE**), being the Market Infrastructure Institute (**MII**) responsible for monitoring

and overseeing the activities of BRH, passed an order suspending BRH with effect from 1 October 2019 for non-compliance with regulatory provisions of the Stock Exchange. BRH defaulted on its loan obligations and accordingly HDFC invoked the pledge and sold the pledged securities. Respondent No.1 filed Appeal No.460 of 2023 before the Securities Appellate Tribunal (**SAT**) seeking direction against the Petitioner to appoint a conciliator/arbitrator to settle the claims of Respondent No.1 in respect of transfer of her shares by BRH. SEBI issued notices to HDFC Bank alleging illegal invocation of pledge of securities. By order dated 21 January 2021, Whole Time Member (**WTM**) of SEBI directed HDFC to deposit a sum of 158.68 crores along with interest at the rate of 7% per annum in addition to imposition of penalty of Rs.1 crore. HDFC Bank challenged the order passed by the WTM dated 21 January 2021 before SAT by filing Appeal No.83 of 2021. SAT passed order dated 18 February 2022 holding that the pledge created by BRH in favor of HDFC Bank was valid and the same was validly invoked by HDFC Bank. Accordingly, the order passed by the WTM was set aside. It appears that order passed by SAT is subject matter of pending Civil Appeal No.2986 of 2022 before the Supreme Court.

5) In the meantime, SEBI passed a separate order on 11 January 2023 holding that BRH had violated its duty as a broker under SEBI circulars dated 18 November 1993 and 26 September 2016 by pledging the shares of its client. BRH was accordingly debarred from the market for seven years and directed to repay the investors under the supervision of NSE. By order dated 6 June 2023, SAT permitted Respondent No.1 to initiate arbitration proceedings against the Petitioner with further direction to the Petitioner to take steps for initiation of such arbitration proceedings.

Accordingly, the Arbitral Tribunal comprising of three Arbitrators was constituted by the Petitioner for resolution of dispute raised by Respondent No. 1.

6) Respondent No.1 filed its Statement of Claim before the Arbitral Tribunal on 17 July 2023 against Petitioner and BRH. Petitioner filed its statement of Reply dated 15 September 2023 resisting Petitioner's claim. In the meantime, SEBI examined the entire transactions and issued notice to the Petitioner on 20 April 2023 to show cause as to why no inquiry should be initiated and why penalty should not be imposed under Section 19G of the Depositories Act, 1996 (**Depositories Act**) and Section 15HB of the SEBI Act 1992 for the alleged violations. After hearing the Petitioner, SEBI passed order dated 24th July 2023 holding that Petitioner had not violated the provisions as alleged in the show cause notice, which was accordingly dropped.

7) In the meantime, the arbitration proceedings before the Arbitral Tribunal in respect of claim filed by Respondent No.1 against BRH and Petitioner progressed. The Arbitral Tribunal has passed Award dated 30th January 2024 holding that Petitioner is liable to indemnify Respondent No.1 for breaches committed by BRH. The claim of Respondent No.1 is accordingly allowed in the sum of Rs.86,02,768/-, being the value of her lost shares on the date of dispute, along with post award interest of 9% p.a from the date of award till realization. Aggrieved by the Award dated 30th January 2024, the Petitioner has filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**).

SUBMISSIONS

8) Mr. Kadam, the learner Senior Advocate appearing for the Petitioner would submit that the impugned Award is patently illegal, perverse and deserves to be set aside as it holds that BRH misused the Power of Attorney as a broker, but contradictorily and perversely finds Petitioner-Depository liable to indemnify Respondent No.1 for acts committed by BRH as broker. That the Award attributes liability of BRH as DP and consequently holds Petitioner responsible for negligent supervision over BRH. That it erroneously held that BRH as DP failed to obtain pledge request from Respondent No.1 before pledging her securities as required under the DP Regulations and CDSL Bye-laws, which finding is perverse as it ignores the vital factum of the shares being not directly pledged from the account of Respondent No.1. That the Arbitral Tribunal has ignored the fact that the shares were transferred by BRH to its First CM/TM Account and thereafter to Second CM/TM Account and that the pledging occurred from Second CM/TM Account of BRH in favor of HDFC Bank. That for pledging of the shares from the Second CM/TM account, pledge request from Respondent No.1 was not necessary as the ownership in the shares no longer remained with Respondent No.1 at the time of creation of pledge. That while ignoring this vital aspect, Arbitral Tribunal has erroneously conflated the legally, separate and distinguishing roles of broker and DP and has further ignored the extant legal regime, which recognizes their distinct, legal functions and roles.

9) Mr. Kadam would further submit that the case involves transfer of shares from the account of Respondent No.1 by BRH in its capacity as

broker using the POA to the own TM/CM Accounts of BRH and the final pledge occurred from the Second CM/TM Account of BRH to HDFC. That under the SEBI Circulars applicable on the date of transaction, such transfer by brokers of client securities to CM/TM accounts for margin requirements were permissible and got prohibited only with effect from June 2020. That SEBI's Circular dated 26 September 2016 prohibited persons acting as broker from using client securities/funds for proprietary purposes with further directions for reporting transactions to the Exchanges envisaging monitoring/compliance by the Exchange alone. Thus, at the relevant time, Petitioner as a Depository had no knowledge of client securities/funds balances and no visibility over the reasons behind broker's transfer of client's security from her account to broker's CM/TM account. That the role of Petitioner as DP was limited to assessing whether the broker's account was authorized to receive shares under the POA. That shares received in CM/TM account are fungible in nature and that therefore the CM/TM account holder becomes beneficial owner for the purpose of depository. That the role of Depository *qua* a pledge was limited to ascertaining as to whether shares sought to be placed are available in the account and to obtain concurrence of the pledgee, and that the DP had no visibility over the reasons for pledge. It is only in the year 2022 that Depository was given some visibility by SEBI's Circular dated 19 September 2022 by introduction of pay invalidation mechanism. A *fortiori* only in 2022 was the Petitioner armed with means to independently validate instructions from clients for pay-in of their securities.

10) Mr. Kadam would rely upon SEBI circular dated 25 July 2023 fixing responsibility on Depositories for the trades effected without pay-in

validation whereas Exchange is made liable for misuse of POA by broker. That Circular applies even to pending cases. That therefore proper remedy for Respondent No.1 is to seek compensation from NSE from Investors Protection Fund (**IPF**) maintained by NSE. That section 16 of Depositories Act holds Petitioner liable only for negligence or acts done by BRH in its capacity DP. The operation of provisions of Section 16 cannot be extended to artificially foist the liability on the Petitioner for acts done by BRH as broker.

11) Mr. Kadam further submits that the Arbitral Tribunal failed to capture the precise duty of Depository and DP, nor has recorded a finding of violation of any such duty even otherwise. There is in fact no violation of any statutorily prescribed duty by the Depository or DP in the present case. That Petitioner had a duty to register transfer of security in the name of transferee under section 7(1) of the Depositories Act and accordingly gave effect to the transfer of shares from the account of Respondent No.1 to First TM/CM Account and thereafter to Second TM/CM Account. That since shares were in the account of BRH (Second TM/CM account), BRH became 'beneficial owner' within the meaning of section 2(1) of the Depositories Act. In its capacity as 'beneficial owner', BRH made a request for pledging of shares in his capacity as DP under Regulation 79 of DP Regulations. In his capacity as DP, BRH was only obligated under Regulation 79 to check whether the securities were available in the account and make note of the same. CDSL, as a Depository under Regulation 79, was to merely obtain concurrence of pledgee (HDFC bank) and then register the pledge. All the above acts are meticulously performed by Petitioner as a DP and that therefore there is no breach of DP Regulations or of Depositories Act by the

Petitioner. Mr. Kadam would therefore submit that the root of the transactions emanates from misuse of the POA by BRH in its capacity as broker. That though this is recognized by Arbitral Tribunal, it has erroneously held Petitioner liable in the secondary capacity under Section 16 of the Depositories Act.

12) Mr. Kadam would further submit that the Arbitral Tribunal has erroneously allowed the claim in ignorance of SEBI circular dated 24 July 2023 by holding that award of claim would 'meet the ends of justice' and would be in 'furtherance of justice'. That parties did not expressly consent to the Tribunal deciding the matters on equitable principle or *ex aequo et bono* or has *amiable compositeur* under Section 28(2) of the Arbitration Act. He would rely upon judgment of this Court in **John Peter Fernandes Versus. Saraswati Ramchandra Ghanate and others**¹ That the Tribunal's finding of Petitioner being negligent in setting up mechanism to protect investors is also patently illegal and perverse since violations are committed by BRH in its function as broker and not as DP. He would submit that since the Award is contrary to the substantive provisions of law and is perverse on account of findings being recorded in ignorance of vital evidence, the Award is liable to be set aside. Following the judgment of the Apex Court in **OPG Power Generation Private Limited Versus. Enexio Power Coolong Solutions India Private Limited and Another**², Mr. Kadam would further submit that the Arbitral Tribunal has erroneously held Petitioner liable to indemnify Respondent No.1 by misconstruing capacity of BRH as agent of the Petitioner. That even if the arrangement of agency is accepted, principal

1 (2023) 4 BOM CR 253.

2 (2025) 2 SCC 417

cannot be held liable for criminal actions of agent. That there is difference in the concepts of malfeasance and non-feasance. That negligence is only non-feasance and not malfeasance. In support, he would rely upon judgment of the Apex Court in **Malay Kumar Ganguly Versus. Dr. Sukumar Mukherjee and Others**³ That BRH has committed criminal act of theft of shares of Respondent No.1 and Petitioner in capacity as principal cannot be held liable for such criminal acts of BRH. Lastly, Mr. Kadam would urge that the Award is also perverse on account of absence of any evidence to indicate that Respondent No.1 had informed either Petitioner or BRH as DP about her husband's death and that Petitioner was justified in acting on a valid POA.

13) On above broad submissions. Mr. Kadam would pray for setting aside the impugned Award.

14) The Petition is opposed by Mr. Kanade, the learned counsel appearing for Respondent No.1. He would submit that the Arbitral Tribunal has written a categoric finding on responsibility of the Petitioner on the basis of provisions of the concerned Acts and Regulations. That these findings are primary findings followed by observations of what Tribunal describes as 'in furtherance of justice'. That Regulations in vogue at the relevant time did cast a duty on the Petitioner to prevent such fraudulent act of Depository's agent. That the findings rendered on the basis of material on record lend to an eminently correct finding and in a plausible view, which ought not to be interfered with in exercise of powers under Section 34 of the Arbitration Act.

3 (2009) 9 SCC 221.

15) Mr. Kanade would further submit that the Petitioner in its capacity as depository has acted contrary to the provisions of the Depositories Act and CDSL Regulations as well as various SEBI Circulars and has failed to monitor and supervise BRH as its DP. That Section 4 of the Depositories Act and Bye-laws 5.3.2 expressly recognizes DP as Petitioner's agent. That Section 16 of the Depositories Act read with Bye-law 5.3.24 mandates the Petitioner to indemnify the beneficial owner for loss caused by negligence of either depository or by DP. That CDSL Regulation-46 and the Code of Conduct in Part-D of the Third Schedule further required the Petitioner to maintain adequate systems to protect the investor and monitor DP compliance. In the present case, the disputed transaction itself evidences a fundamental lapse in supervision by the Petitioner. That multiple binding SEBI Circular had put a comprehensive, supervisory and preventive framework.

16) Mr. Kanade would submit that prior to the disputed transaction, SEBI had already implemented a robust, supervisory and preventive framework vide Circular dated 17 December 2018 introducing extensive early warning mechanism including freezing of broker tagged DP account, 100% concurrent audits of DP and strict restrictions on use of POA limiting its exercise only to the individual client settlement mechanism. That the said safeguards were already in effect when the disputed transactions took place and it is erroneous on the part of the Petitioner to contend that the safeguard mechanism were introduced only after the disputed transaction.

17) Next, Mr. Kanade would further submit that the case depicts and exposes a glaring and systematic supervision failure, where life savings

of 9493 passive investors are lost. That Petitioner is responsible for non-implementation of mandatory safeguards applicable at the relevant time and that therefore Arbitral Tribunal has rightly fastened the liability to indemnify Respondent No.1 by holding Petitioner responsible for negligent acts. That Respondent No.1 is not asserting any criminal liability against the Petitioner and the claim is founded on Petitioner's liability as principal for its negligence over fraud committed by its agent. That Petitioner's supervisory negligence enabled BRH to fraudulently transfer and sell securities of Respondent No.1.

18) Mr. Kanade would further submit that Respondent No.1 would be left with no other remedy if the Award is set aside as NSE has already rejected her claim vide letters dated 8 January 2021, 11 August 2021 and 7 March 2022. That the reasons recorded by NSE in those letters conclusively establish that BRH had not undertaken any trades or incurred any settlement liability that could justify exercise of authority under POA for transfer of securities of Respondent No.1 by BRH. That Arbitral Tribunal was constituted pursuant to express directives by SAT by order dated 6 June 2023 permitting Respondent No.1 to file fresh claim under the bye-laws of Petitioner and the Petitioner cannot seek to shift the blame on NSE.

19) Mr. Kanade would contest to the position that BRH acted in its role solely as a broker. That it was acting in dual capacity of stockbroker and DP. Mr. Kanade would further submit that the view taken by the Arbitral Tribunal is possible and plausible view not warranting any interference in exercise of power under section 34. That the Award is founded on admitted facts and the provisions of the Depositories Act, SEBI Regulations and

CDSL's own Bye-laws. The findings are neither perverse nor contrary to record. He would rely upon judgments of the Apex Court in **Reliance Infrastructure Limited versus, State of Goa⁴** and **Consolidated Construction Consortium Limited Versus. Software Technology Parks of India⁵**. That the arbitration proceeded under Clause 22.9.2 of Petitioner's own Bye-laws that contemplates summary proceedings. That entitlement and quantum of claim of Rs. 86,02,768/- was expressly admitted by the Petitioner in its pleadings. That this Court cannot act as an appellate Court by undertaking the exercise of re-appreciation of evidence which Petitioner is expecting this Court to do. Mr. Kanade would accordingly pray for dismissal of the Arbitration Petition.

REASONS AND ANALYSIS

20) Petitioner has challenged the Award of the Arbitral Tribunal holding it responsible for compensating the Respondent No. 1-Investor for negligent and fraudulent acts of its DP-BRH. Petitioner has filed the present Petition challenging the Award contending that none of the acts of BRH are in its capacity as DP and that all its acts were in its capacity as broker. Petitioner therefore questions fastening of responsibility by the Arbitral Tribunal on to it and contends that if anyone is to be made liable for compensation, it may be the Stock exchange-NSE. Before considering the challenge raised by the Petitioner, it would be necessary to briefly consider as to how the fraud has occurred in the present case.

4 (2024) 1 SCC 479

5 (2025) 7 SCC 757

FRAUDULENT SIPHONING OFF SHARES OF INVESTOR

21) Respondent No.1 is a passive investor, who had opened demat account with BRH. BRH was both, a stockbroker as well as Depository Participant of the Petitioner. Petitioner is the Depository providing the facility for holding of securities in the dematerialized form. In its capacity as a broker, BRH was expected to execute orders resulting in trades received from trading account holders, which are registered with and regulated by stock exchanges. In its capacity as a DP, BRH was expected to execute instructions received from clients, who are registered with and regulated by the Depository. Thus, the activity of a broker in execution of trades is regulated by stock exchanges, whereas the activity of DP in executing instructions received from clients is regulated by the Depository. There are two major depositories in India, viz. Central Depository Services Limited (CDSL) and National Security Depositors Limited (NSDL).

22) BRH was DP of the Petitioner and also a broker registered with NSE. The undisputed factual position is that BRH has misused the POA of Respondent No.1 and her husband for unauthorized transfer of shares in the demat account of Respondent No.1 to BRH's First TM/CM Account. This unauthorized transaction took place on 31 July 2019. Immediately thereafter, the second leg of transaction was effected where BRH further transferred the securities which were already held in the First TM/CM Account to its Second TM/CM Account.

23) A '*TM/CM account*' is a Trading Member (TM) and Clearing Member (CM) account. It refers to a brokerage firm that is authorized to both trade securities on behalf of clients (TM) and clear and settle trades for itself and other trading members (CM). This dual role allows the firm to execute trades and then manage the associated clearing and settlement responsibilities, such as managing margins and ensuring timely pay-in and pay-out of funds and securities.

24) It appears that in similar manner, BRH had transferred securities of as many as 9,493 clients into its TM/CM account. However, there were no underlying trades to support such transfers, and the transfers were effected by misusing the POAs secured by BRH from its clients. At that time, such transfers used to be effected based on POA mainly for margin requirements. However, in the present case, BRH fraudulently effected the transfer of shares in clients' accounts to its own TM/CM accounts without any margin requirement. On account of transfer of shares into its own TM/CM account, BRH became owner of the transferred securities. In short, BRH committed theft of shares. On the strength of fraudulent acquisition of ownership of transferred shares, BRH thereafter secured a loan facility from HDFC Bank by pledging the stolen shares which were fraudulently transferred in its Second TM/CM Account. BRH ultimately defaulted in its obligation to repay the loan availed from HDFC Bank, which led to HDFC Bank selling the pledged shares and recovering the amount of Rs.158.68 crores. This is the broad nature of fraud that has taken place in the present case, which appears to be engineered and effected by BRH. In the process, the Petitioner has lost ownership of shares of Rs.86,02,768/-.

NSE'S REFUSAL TO COMPENSATE

25) It appears that Respondent No.1 first appealed to NSE claiming the amount of lost shares of Rs.98,07,884.60/- which was declined by Defaulters' Committee Section of NSE by letter dated 8 January 2021, setting forth following reasons:-

The claimant has not executed any trades. The above transaction has been reviewed in the background of the guidelines determined by the Defaulters Committee for ascertaining nature of transaction as a loan transaction. Where the claimant has failed to withdraw the credit balance and/or securities from the defaulter for a substantial period of time for 24 months from last trade date without any trading activity or substantially meager trading disproportionate in value to the quantum of the trade balance or securities lying with the defaulter.

26) Thus, NSE refuted any liability to compensate Respondent No.1 stating that she had not executed any trades on NSE platform. Another reason assigned by NSE was about Respondent No.1 not withdrawing the credit balance/securities from BRH for substantial period of time of 24 months from the last trade date without any trading activity. Respondent No.1 again wrote to NSE and received response dated 11 August 2021 regretting the claim by recording following reasons :-

Kindly note that in the event of default by the Member, all transaction executed on the exchange platform shall be eligible for settlement from IPF (subject to maximum limit), subject to the appropriate norms laid down by the Committee. As per the norms laid down by the Member and Core Settlement Guarantee Fund Committee, since you have not traded on the exchange platform since opening of account with trading member to the date of disablement of the trading rights of the member, your claim is found to be inadmissible.

27) This time, NSE did refer to Investors Protection Fund (**IPF**) but stated that since Respondent No.1 had not traded on the exchange platform since opening of the account with BRH till the date of disablement of BRH's trading rights, her claim was found to be inadmissible. Another response dated 7 March 2022 was given by NSE to Respondent No.1 regretting the claim for reimbursement of lost shares, once again stating that she had not traded on the exchange.

APPROACH BY INVESTOR TO CDSL

28) Having driven away by NSE, Respondent No.1 filed Appeal No.460 of 2023 before SAT for appointment of Conciliator/Arbitrator. By order dated 6 June 2023, the SAT directed Respondent No.1 to file a fresh claim in the prescribed form as per Clause-22.6.1.1 of the Bye-laws. Upon filing of such claim, Petitioner was directed to initiate arbitration proceedings.

29) Accordingly, the Arbitral Tribunal comprising of a presiding officer and two co-arbitrators came to be constituted by the Petitioner. The Arbitral Tribunal took up for consideration singular issue as to whether, and to what extent, Petitioner was liable in respect of claim of Respondent No.1 for value of lost shares. Though, Respondent No.1 had raised the claim in the sum of Rs.94,56,449/-, Petitioner presented before the Arbitral Tribunal the exact valuation of various shares on the date of transactions representing cumulative sum of Rs.86,02,768/-. The Arbitral Tribunal has allowed the claim of Respondent No.1 in the sum of Rs.86,02,768/-. In that sense, there is no dispute about quantum of loss caused to Respondent No.1. The only

issue is whether Petitioner is responsible for such loss and whether Arbitral Tribunal is right in directing Petitioner to pay to Respondent No.1 the value of lost shares.

30) Before considering the challenges raised by the Petitioner to the impugned Award, it would be first necessary to consider the findings recorded by the Arbitral Tribunal.

FINDINGS OF ARBITRAL TRIBUNAL

31) The Arbitral Tribunal has examined the entire transaction and the roles of BRH and Petitioner by adopting three step approach as under:

Firstly, the Arbitral Tribunal probed into the role played by BRH as a broker and held that BRH pledged the shares of Respondent No.1 without authority to HDFC Bank as security for availing loan. It held that a standard POA only enables a broker to invoke the same for getting margin requirements, and that BRH misused the same to pledge shares for availing of loan for itself from the Bank. The Arbitral Tribunal concluded that the POA was used for purposes other than for fulfilling margin requirements.

Secondly, the Arbitral Tribunal probed into the role of BRH as DP by holding that it failed to obtain 'pledge request' from Respondent No.1 before pledging her securities as required under SEBI (DP) Regulations and CDSL Bye-laws. The Arbitral Tribunal held this act to be serious manipulation by BRH.

Thirdly, the Arbitral Tribunal has considered HDFC's action in selling shares pledged to it in open market upon non-repayment of the loan availed by BRH.

32) The Arbitral Tribunal thereafter held that it was inconceivable that unauthorised pledge could have been made without involvement of BRH as DP and in absence of client pledge request and POA not authorising DP to pledge client securities. The Tribunal concluded that the pledge created by BRH was fraudulent. The Tribunal thereafter went into the scheme of Depositories Act, Securities and Exchange Board of India (Depositories and Participants) Regulations, 2018, Bye-laws of CDSL and held that there was abject failure of governance, both structurally and hierarchically, and all attempts were made to insulate the Depository from defaults committed by BRH as DP. The Tribunal also held that the Depositories Act makes it abundantly clear that DP performed its role as an agent of the Depository. It criticised SEBI's adjudication order dated 24 July 2023 for taking empathetic view of Petitioner's incapacity to monitor BRH. The Tribunal further held that provision contained in Regulations relating to reconciliation and auditing were not complied with either in entirety or complied with in a questionable manner. The Tribunal further held that fundamental question of lack of inadequate monitoring and supervision by CDSL could be raised leading to inescapable conclusion that CDSL, as a principal, could not have been expected to function blissfully oblivious as securities of 9493 clients of BRH as DP were fraudulently pledged to HDFC without obtaining their consent to the pledge request as required under the Depositories Act and Regulations.

33) The Arbitral Tribunal thereafter referred to SEBI's letter dated 25 July 2023 and held that issuance of the said letter was SEBI's ardent attempt to bring closer to the matter of claims, already made or were in the process of being made. The Tribunal further held that since there was no trading or transaction on NSE, it would meet ends of justice if only CDSL as Depository is made sole party to the recovery process. The Tribunal held that it would be travesty of justice if only NSE is made to pay for its lapses in the form of gross misuse of client's POA for the purpose of pledging securities and CDSL is permitted to take refuge on a specious plea that it cannot be expected to monitor BRH as a broker. This is how, CDSL is made liable to indemnify Respondent No.1 for (i) its failure to monitor BRH as DP and (ii) its casual conduct in not registering the case for arbitration in question in a reasonable time.

34) The Arbitral Tribunal thereafter referred to provision of Section 16 of the Depositories Act, 1966 putting onus on the Depository to indemnify any loss caused to the beneficial owners if the loss is caused due to negligence of DP. The Arbitral Tribunal thereafter treated Petitioner as regulatory body and accused it of failing to bring BRH as DP from mis-utilising the shares of thousands of investors. It referred to part-D of third Schedule of SEBI (Regulation) 2018 and held that Petitioner cannot shy away from its paramount duty of protecting the investor's interest from malpractices.

35) On the above broad reasoning, the Arbitral Tribunal has proceeded to allow the claim of Respondent No.1 in the sum of Rs.86,02,768/-, being the value of the lost shares

BRH'S ROLE IN THE FRAUD AS 'BROKER' OR AS 'DP'

36) So far as the conclusions drawn by the Arbitral Tribunal about fraudulent acts of BRH are concerned, Petitioner is not aggrieved by those findings. There can otherwise be no doubt to the position that BRH has misused the POA executed in its favour by Respondent No.1 for fraudulently transferring the shares into BRH's own TM/CM Accounts and thereafter creating pledge of shares in favour of HDFC Bank for securing loan facility, which it defaulted. However, in the present proceedings, it is not necessary to examine correctness of findings recorded by the Arbitral Tribunal in so far as negligent and fraudulent acts of BRH are concerned. What needs to be examined is the exact capacity in which the fraudulent or negligent acts are committed by BRH and whether Petitioner as Depository can be made liable for acts of BRH.

37) In the present case, BRH was acting in dual capacity as registered broker of NSE and Depository Participant of Petitioner-CDSL. If the alleged negligent and fraudulent acts are found to have been committed by BRH purely in its capacity as a broker, Petitioner would stand absolved of responsibilities arising out of such acts. However if any of the negligent acts are attributable to the role of BRH as DP, Petitioner as a Depository would have to share responsibility for such acts towards Respondent No. 1. This is because, under Clause 5.3.2 of CDSL Bye-laws, a DP, while conducting any business with the beneficial owner, acts as an agent of CDSL. Clause 5.3.2 of CDSL Bye laws provides thus:-

5.3.2. A participant while conducting any business as a participant with a Beneficial Owner shall act as an agent of CDSL

38) Thus real key to the dispute is to find out the exact capacity in which BRH has acted in the present case. It is the contention of Petitioner - CDSL that the negligent and fraudulent acts are performed by BRH in its capacity as broker and not in his capacity as DP of the Petitioner. It is therefore contended on behalf of the Petitioner that the Stock Exchange (NSE) would be liable for fraudulent and negligent acts of BRH and not CDSL.

39) Petitioner's contention of BRH acting in capacity as broker in respect of transaction creation of pledge in favour of HDFC Bank is mainly premised on the transaction of transfer of shares into TM/CM Accounts of BRH. According to Petitioner, BRH has misused the POA of Respondent No.1 for transfer of shares from Demat Account of Respondent No.1 into a separate TM/CM Account of BRH bearing BO ID:1204630000023100. It contends that after this first leg of transaction, further transfer took place from First TM/CM Account to Second TM/CM Account with BO ID: 1204630000021137. It is from the Second TM/CM Account that the pledge of shares has taken place with HDFC Bank. Petitioner therefore strenuously contends that securing of pledge request forms from Respondent No.1 was unnecessary since the title in the shares had passed on to BRH after transfer of shares into Second TM/ CM Account. Thus according to Petitioner, use of POA has not taken place for creation of pledge and that the Arbitral Tribunal has recorded a perverse finding that BRH, in its capacity as DP, failed to obtain 'Pledge Request' from Respondent No.1 before pledging securities with HDFC Bank.

40) Though Petitioner strenuously harps on the transaction of transfer of shares into First TM/ CM Account and thereafter into Second TM/ CM Account of BRH, what it ignores is the position that this transfers are not in pursuance of any trades effected on the Stock Exchange. If BRH was to execute unauthorised trades on the Stock Exchange, its act would have been in capacity purely as a broker. However, in the present case, admittedly no underlying trades were effected for transfer of shares. What is done by BRH is mere transfer of shares *sans* any transactions from account of its client into its own account. Therefore it cannot be contended that the act of transfer of shares from client's account to its own TM/CM Account was an act purely in capacity as broker. BRH relied upon POA of Respondent No.1, possibly showed it to Petitioner-CDSL, who authorised the transaction of shares of Respondent No.1 from Demat account of Respondent No. 1 to First TM/ CM Account of BRH. Thus, act of unauthorised transfer of shares from the Demat account of Respondent No.1 is not based on any transaction on a Stock Exchange by BRH acting as a broker. While effecting of transfer of ownership of shares based on POA, BRH has also acted in its capacity as DP.

41) In fact Petitioner has contended that it was obliged and mandated to give effect to the transfer of shares from client's account to broker's TM/CM Account since transaction was based on POA. It thus appears that the Petitioner as a Depository satisfied itself that the transaction of transfer of shares was backed by an underlying document and accordingly participated in the act of transfer of title in the shares in favour of BRH by authorising the transfer transaction. Since the transaction of transfer of shares from client's account to BRH's account required nod of the Petitioner,

it cannot be contended that the said act was that of a pure broker. It involved activity of BRH as DP as well. I am therefore unable to accept submission made on behalf of the Petitioner that BRH acted as a mere broker by effecting the transaction of transfer of shares from Demat account of Respondent No.1 to its own TM/ CM Account.

42) As a matter of fact, the Arbitral Tribunal has conducted an in depth enquiry into the role of BRH as DP by recording detailed findings in paragraph 33-A to 33-N of the Award. The opening sentence of paragraph 33 reads thus:-

33. Thus, it would be in fitness of things if this Tribunal delves deep into the dispute relating to the role of the BRH as DP as also CDSL as the Depository.

(emphasis and underlining added)

43) As observed above, the Arbitral Tribunal has dissected the entire transaction into three legs. It has first described BRH as a broker in the first leg of transaction where it pledged the securities of Respondent No.1 with HDFC Bank by acting on a POA. This role can be momentarily ignored. The second and more important role of BRH as DP is observed by the Arbitral Tribunal in paragraph 33(B), which reads thus:-

The second leg wherein BRH as DP failed to obtain the "Pledge Request" from the client before pledging the Client's securities as required under SEBI (DP) Regulations and CDSL Bye-Laws. This actually amounts to serious manipulation by DP on its clients. Strangely this default of BRH as a DP has not been highlighted or indicated even once either in the entire submissions made by CDSL or found a place even in the SEBI Adjudication Order. It needs to be noted that this is not a one-off case of failure on the part of BRH as DP but involved 9493 of its clients having credit balance of securities in their demat accounts.

(emphasis and underlining added)

44) Petitioner is attempting to escape from the above findings recorded by the Arbitral Tribunal in paragraph 33(B) by contending that the pledge of shares has not happened directly from accounts of Respondent No.1 and that the pledge transaction has actually happened from Second TM/CM Account of BRH. This argument may be convenient for the purpose of escaping the liability in respect of securing the Pledge Request from Respondent No.1 before creating the pledge in favour of HDFC Bank by BRH. However, it cannot be ignored that this is a composite transaction by BRH where it has stolen shares from Demat account of Respondent No.1, transferred the shares into its own TM/CM Account and thereafter created a pledge in favour of HDFC Bank. None of these transactions are backed by any trade on the stock exchange. Therefore it cannot be conclusively held that the acts of transfer of shares from one account to another account is effected by BRH solely in its capacity as broker and there is enough room to conclude that the acts are done by BRH while acting as Depository Participant as well. The Arbitral Tribunal has recorded a plausible finding that the role played by BRH is also in its capacity as DP.

45) I therefore, do not find any patent illegality or even perversity in the findings recorded by the Arbitral Tribunal holding that the acts are performed by BRH in its capacity as DP as well.

LIABILITY OF DEPOSITORY TO COMPENSATE INVESTOR FOR NEGLIGENT ACTS OF DP

46) Once it is held that BRH acted in its capacity also as DP while performing acts of transfer of shares of Respondent No.1 from her Demat

account to his TM/CM account and thereafter creating pledge in favour of HDFC Bank, solution to the problem becomes easy. Section 16 of the Depositories Act makes Petitioner-CDSL directly liable for indemnifying the beneficial owner in respect of negligent acts of DP. Section 16 of the Depositories Act provides thus:-

16. Depositories to indemnify loss in certain cases.

(1) Without prejudice to the provisions of any other law for the time being in force, any loss caused to the beneficial owner due to the negligence of the depository or the participant, the depository shall indemnify such beneficial owner.

(2) Where the loss due to the negligence of the participant under sub-section (1) is indemnified by the depository, the depository shall have the right to recover the same from such participant.

47) In the present case, BRH is found to have indulged not just in negligent but fraudulent acts of theft of shares of Respondent No.1 by transferring the same in its own TM/CM account by misusing POA and thereafter pledging the stolen shares in favour of HDFC Bank. It therefore need not be proved that BRH has acted negligently, as the same is an admitted position. It only needs to be proved that the negligent acts were also in capacity as DP. The moment some role of BRH as DP gets attracted in the transaction, however minor it may be, CDSL's liability comes into play. To escape the liability under Section 16 of Depositories Act, Petitioner needs to prove that there is absolutely no connection with BHR's role as DP in the transaction. I have already rejected the contention of Petitioner that the entire negligent acts of BRH are in capacity only as a broker. BRH's role as DP is writ large. Therefore, Petitioner-CDSL is clearly liable under Section 16 of the Depositories Act to indemnify Respondent No.1 in respect

of negligent acts of BRH. Under sub-section (2) of Section 16 Petitioner can recover from BRH the amount indemnified by it to Respondent No.1.

48) What must be appreciated in the present case is that Petitioner-CDSL is adopting a convenient stand of segregating the fraudulent acts of BRH for the purpose of saving its own skin. What it ignores is that the series of acts performed by BRH is a composite act of fraud. The ultimate aim of BRH was to secure loan amount from HDFC Bank by pledging shares of Respondent No.1. Respondent No.1 had not given POA to BRH to create pledge of her shares. What BRH did is to misuse the POA ultimately for the purpose of creation of pledge of shares of Respondent No.1 with HDFC Bank. It engineered a method of first stealing the shares of Respondent No.1 by transferring the same into his own TM/ CM account. It then claimed status as owner of those stolen shares and represented to the Petitioner and to HDFC Bank that it is entitled to pledge those shares. Thus, though the Petitioner has sought to dissect the fraudulent act of BRH into different parts to save itself, ultimately it is one composite act of stark fraud played by BRH. Petitioner needs to share the responsibility of the said fraud as it has permitted its own DP to unauthorisedly transfer shares of as many as 9493 clients into own accounts of BRH. It never thought it necessary to enquire as to how shares of such large number of clients were getting transferred into the own accounts of BRH and how it was creating a pledge of such large number of shares for securing loan advances of hundreds crores from HDFC Bank.

49) Be that as it may. Whether Petitioner was in knowledge of fraudulent acts of BRH or whether it could have acquired such knowledge

with reasonable diligence, is immaterial. Section 16 of the Depositories Act makes Petitioner liable for negligent acts of DP irrespective of the fact whether Petitioner is responsible for such act or not. All that needs to be proved is that DP committed a negligent act. The moment the negligent act of DP is proved, liability to pay compensation is on the Depository. The Depository can recover monies from the DP. The objective behind Section 16 of the Depositories Act is to ensure quick and smooth compensation to victims of negligent acts committed by DP. Since Depository appoints the agent, if agent commits negligent act, Depository has to indemnify the beneficial owner in respect of such negligent act. The Depository can use its wherewithal for running behind its own agent/DP for recovering the amounts spent in indemnifying the beneficial owner.

50) Section 16 of the Depositories Act is aimed at instilling confidence in investors/trading members who are guaranteed reimbursement/compensation if the DP plays any fraud or negligent act resulting in losses to the trading member. A Depository is a facilitator for holding of securities in the dematerialised form and an enabler for securities transactions. Instead of dealing directly with clients, Depositories provide intermediaries in the form of Depository Participants, who act as agents of the central depository by connecting investors to electronic system for holding and managing shares. Since a Depository provides the services of DP as its agent, any negligent act of the DP becomes negligent act of the Depository in its capacity as Principal. Depositors have assured to the investors that if they suffer any loss on account of negligent conduct of DP, they would be indemnified by the Depositories. Thus instead of making the investor run behind the DP, the Depository first indemnifies the investor of

losses suffered and thereafter uses its financial wherewithal to recover the amount paid to investor from the DP. This is the broad scheme of Section 16 of the Depositories Act.

51) Petitioner has also attempted to draw distinction between the acts of misfeasance and nonfeasance. The distinction, in my view, is totally irrelevant for the present case. Section 16 of the Depositories Act makes Petitioner responsible to indemnify the Investor even for a mere negligent act of DP is established. Therefore nothing more than negligence on the part of DP is required to be proved. The element of criminality need not be established. Therefore, reliance by the Petitioner on *Malay Kumar Ganguli* (supra) is misplaced.

52) As observed above, there is no dispute in the present case to the position that BRH has acted negligently, if not fraudulently. Presence of criminal intent on the part of BRH need not be established. Mere proof of negligent act is sufficient. I have concluded that the negligent acts of BRH are also attributable to its capacity as DP. The moment negligence of DP is established, the liability of depository to indemnify beneficial owner is absolute.

RELEVANCE OF SEBI CIRCULARS PRE AND POST FRAUD

53) In addition to the specious plea of dissection of role of BRH as broker for saving its skin, Petitioner-CDSL has also raised a plea that after discovery of fraud by BRH, several measures are taken by SEBI for preventing such frauds in the future. A detailed reference is made to various

circulars issued by SEBI after detection of fraud. It is sought to be suggested that the measures subsequently implemented by SEBI were not available when the transactions in question took place. It is therefore sought to be suggested that at the relevant time, the instructions then prevalent permitted use of POA for transfer of shares by a broker for the purposes other than margin limits and on account of such permissibility, the unauthorised transactions in question have taken place. It is contended that post discovery of fraud by BRH, now use of such POA is not permissible for the purposes other than margin limits.

54) Accordingly, Petitioner has relied on few Circulars issued prior to the transaction in question. Circular dated 17 April 2008 issued by SEBI addressed to Stock Exchanges is relied upon to suggest that Stock Exchanges were required to take necessary measures to ensure that the collaterals of clients were not used for the purpose of meeting respective client's margin requirements /pay-ins. Similarly, circular dated 23 April 2010 is relied upon to suggest that use of POA by stock broker was permissible at that time for various purposes such as meeting margin money requirements, delivery obligations, pledging of securities, apply for product of like mutual fund, publication issues, etc. That use of POA was not permitted only for off market trades, transfer of funds from bank accounts, opening of broking /trading facility, execution of trades without client's consent. As a matter of fact, it would be apposite to reproduce General Guidelines of Circular dated 23 April 2010, which provided thus:-

General Guidelines

The POA shall not facilitate the stock broker to do the following:

12. Transfer of securities for off market trades.
13. Transfer of funds from the bank account(s) of the Clients for trades executed by the clients through another stock broker.
14. Open a broking / trading facility with any stock broker or for opening a Beneficial Owner account with any Depository Participant.
15. Execute trades in the name of the client(s) without the client(s) consent.
16. Prohibit issue of Delivery Instruction Slips (DIS) to beneficial owner (client).
17. Prohibit client(s) from operating the account.
18. Merging of balances (dues) under various accounts to nullify debit in any other account.
19. Open an email ID/ email account on behalf of the client(s) for receiving statement of transactions, bills, contract notes etc. from stock broker / Depository Participant
20. Renounce liability for any loss or claim that may arise due to any blocking of funds that may be erroneously instructed by the Stock Broker to the designated bank.

Stock Broker / Depository Participant should ensure that:

21. A duplicate/ certified true copy of the PoA is provided to the Client(s) after execution.
22. In case of merger/ demerger of the Stock Broker/Depository Participant with another entity/ into another entity, the scheme of merger/ demerger should be approved by High Court and one month prior intimation given to the client about the corporate restructuring to facilitate investor/ client to continue or discontinue with the broker.

55) Thus, POA was not permitted to be used by stock brokers for executing trades in the name of client without client's consent. This aspect would clearly show distinction between use of POA for effecting trades as broker and use of POA for only transferring shares from client's account to another account. Since there was prohibition on effecting of trade of shares of clients by using POA, BRH did not use its capacity as broker, but merely transferred the shares from Demat account of Respondent No.1 into his own TM/CM account by misusing POA. This aspect would again provide clarity to the fact that the act of transfer of shares is not done by BRH in his capacity only as a broker (since no trade is excluded), but it has also used its capacity as DP for effecting such transfer. The Circular shows that POA is also available with Depository, a copy of which needs to be provided to the client. Here, CDSL has examined the act of transfer of shares from demat account of Respondent No.1 to BRH's TM/CM Account and had satisfied itself that the transaction was backed by the POA. Petitioner has admitted that it had no option but to give effect to such transfer as the POA executed by Respondent No.1 gave power to BRH to transfer shares. This indicates that Petitioner has also played some role in transfer of shares. However it is not that the Petitioner is being held responsible for its own act of giving effect to transfer of ownership of shares from account of Respondent No. 1 to the TM/CM Account of BRH. Its responsibility flows out of Section 16 since it is proved that the BRH has misused the POA for effecting such transfer. Petitioner is imposed with statutory vicarious liability for negligent acts of BRH.

56) Petitioner has thereafter relied on SEBI Circular dated 26 September 2016, in support of its contention that transfer of securities from

individual client's Demat account to stock broker's pool account or stock broker's collateral account was permitted. However, the circular dated 26 September 2016 is addressed not just to Managing Directors of Stock Exchanges but the same was addressed to Depositories as well. By the very same circular, SOP for Depositories was also prescribed laying down the monitoring criteria over Depository Participants.

57) Petitioner has thereafter relied on post transaction circulars. SEBI Circular dated 25 February 2020 imposed restriction on Trading Members (TM), Clearing Members (CM) from accepting collaterals from clients for purposes other than margin pledge. Transfer of securities to the Demat account of TM/CM for margin purposes was prohibited. It is directed that if the client had given POA in favour of TM/CM, the same shall not be considered as equivalent to collection of margin by TM/CM account holder. Various other measures are suggested with a view to ensure that TM/CM accounts are not misused for the purpose of unauthorised transfer of shares. It is Petitioner's contention that this was the corrective step taken by SEBI to prevent misuse of POA after detection of fraud of BRH.

58) Thereafter by further SEBI circular dated 16 July 2021 'block mechanism' in the Demat account of clients is introduced, which does not require transfer of shares into TM/CM accounts but for merely blocking of the shares upon effecting of trade till the transaction is completed. By further circular dated 18 August 2022, block mechanism was made mandatory. By circular dated 19 September 2022, it is made mandatory for procuring OTP from clients for validation of instructions.

59) Petitioner thus contends that the safety measures now introduced by SEBI after the incident, were not available when the transaction in question occurred. This contention is raised basically to demonstrate before this Court that the transactions effected by BRH and given effect to by Petitioner were not in breach of any of the then prevalent SEBI circulars.

60) On the other hand, Mr. Kanade has relied on SEBI Circular dated 17 December 2018 implementing 'Early Warning Mechanism' for preventing unauthorised transfer of client's shares and had fixed certain responsibilities on Depositories. The said circular had taken note of unauthorised pledges by brokers and had directed stock exchanges and depositories to evolve early warning mechanism by sharing data amongst themselves to prevent unauthorised transfer and pledge of shares by brokers.

61) It thus cannot be contended that there was complete absence of regulatory framework by SEBI prior to the transactions in question. However as observed above, there is no necessity of delving deeper into such regulatory framework of SEBI as it is not necessary to enquire whether Petitioner breached any provisions of those circulars. Therefore I am not laying much stress on Circular dated 17 December 2018 as Petitioner has objected to reliance on the same by Respondent No.1 contending that the same was not produced before the Arbitral Tribunal and introduced directly during the course of arguments before me.

62) As observed above, Respondent No.1 was not required to prove before the Arbitral Tribunal that Petitioner violated any provisions of the

Acts, Regulations or Bye-laws or circulars. All that was required to be proved was negligent act of BRH in capacity as DP. The moment negligent act of BRH as DP is proved, nothing is required to be proved against Petitioner, who automatically becomes liable to indemnify Respondent No.1 in respect of negligent acts of BRH under Section 16 of the Depositories Act.

CDSL'S CLAIM OF NON-LIABILITY UNDER SEBI CIRCULAR OF 25 JULY 2023

63) The sheet anchor of Petitioner before the Arbitral Tribunal and before me is the SEBI Circular dated 25 July 2023 issued after receipt of several complaints by investors of misuse of POAs by brokers for unauthorised transfer of their securities. Under the Circular dated 25 July 2023, responsibility of Stock Exchanges and Depositories are segregated for compensating the investors from Investor Protection Fund (IPF). It would be apposite to reproduce Circular dated 25 July 2023, which reads thus:-

DEPUTY GENERAL MANAGER

Market Regulation Department
Supervision, Enforcement and Complaints-2 (SEC-2)
Phone: 022-26449520
Email: nirdoshrm@sebi.gov.in

SEBI/HO/MRD/SEC-2/OW/2023/29658/3

July 25, 2023

The Managing Director BSE Limited 25th Floor, P. J. Towers, Dalal Street, Mumbai-400 011	The Managing Director National Stock Exchange India Limited (NSE) Exchange plaza, plot no 1 C/1 G Block Bandra Kurla Complex, Bandra (E). Mumbai-400 051
The Managing Director Central Depository Services (India) Limited (CDSL) Unit No. A-2501, Marathon Futurex, Mafatial Mills Compound, N.M Joshi Marg, Lower Parel (East), Mumbai-400 013	The Managing Director National Depository Services (India) Limited (NDSL) 4th Floor, A Wing, Trade World, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai-400 013

Dear Madam/Sir,

Sub: IPF Utilization by Stock Exchanges and Depositories in cases of Unauthorised Transfer of securities by misuse of Power of Attorney ("POA") by Broker/DP

1. SEBI is in receipt of several investor complaints wherein the POA provided by clients for facilitating settlement of securities was misused by the brokers for unauthorized transfer of Investors' securities. Pursuant to the same, meetings were held with officials of stock exchanges and depositories on April 26, 2023 and May 8, 2023.

2. With regard to the same, your attention is drawn to para 2D of SEBI Circular no. SEBI/HO/DMS/CIR/P/2017/15 dated February 23 2017, which states as under.

D. Admissibility of claim for making payment out of IPF in Stock Exchanges

In the event of default by the member, all transactions executed on an exchange platform shall be eligible for settlement from IPF (subject to maximum limit), subject to the appropriate norms laid down by the Defaulters' Committee.

3. It is felt that the above provision provides scope for considering genuine cases where investor has complained before disablement/default of the broker/DP and where it is apparent that there is no collusion between the investor and the broker/DP, and the securities were bought on the exchange platform earlier.

Thus, as unauthorised transaction by broker/DP has resulted in loss for investors, such investors who have suffered losses due to unauthorised action of broker/DP having complained before default/disablement of terminal of such broker/ DP should be compensated from the IPF of stock exchange/depository, even if there is no corresponding transaction on the exchange.

5. In view of the same, the stock exchanges and depositories are advised to compensate Investors, in the following manner.

SR.	Scenario	Relevant MII
9.	Unauthorised transaction by misuse of POA by broker, and the investor has complained before default/disablement of terminal of broker (with/without trade on exchange platform)	Stock exchange
10.	Shares transferred from investor's demat account to broker's demat account by misuse of settlement ID (with/without trade on exchange platform)	
11.	Negligence/fraud committed by DP/DP employee in its DP operations	Depository
12.	Transfer of securities from client account to account of broker/any other entity without corresponding trade obligation, post implementation of pay-in validation	

6. Accordingly, stock exchanges/ depositories may suitably amend their rules/ regulations/bye laws, to the extent they are in conflict with the aforesaid SEBI circular, and compensate eligible investors, for all cases including pending matters. Stock exchanges/depositories are directed to Implement the aforesaid directions, and submit ATR within 90 days of receipt of this letter.

64) Paragraph 1 of the Circular shows that same is issued specifically for dealing with misuse of cases of POA by both brokers as well as by DPs. The cases of misuse of POA by brokers and DPs are classified into four categories. If the case involves unauthorised transaction by misuse of POA by broker, Stock Exchange is required to compensate the investor through its IPF. If shares are transferred from investor's Demat account to broker's Demat account by exercise of settlement ID (with or without trade

on exchange) still Stock Exchange is responsible to compensate the investor. In respect of the negligence/fraud committed by DP/DP employees in DP operations, the Depository is responsible to compensate the investor from its IPF. Similarly, in case of transfer of securities from client's account to the account of broker/any other entity without corresponding trade obligations, Depository is made responsible. Petitioner relies on paragraph 6 of the said circular, which seeks to apply the provisions to even pending cases. Petitioner also contends that the Circular dated 25 July 2023 holds the stock exchange responsible since the shares are transferred by misuse of POA.

65) Thus even under the Circular dated 25 July 2023, depository is responsible for compensating the investor for negligent acts of its DP.

66) Even otherwise, Circular dated 25 July 2023 cannot be used by the Petitioner for the purpose of saving its own skin and putting in the ball in the court of Stock Exchange (NSE). The Circular is issued by SEBI for segregating the cases of negligence/fraud for compensation through IPFs of stock exchanges and depositories. Such segregation for use of IPF does not mean that responsibility of a depository arising out of negligent acts of DP under Section 16 of Depositories Act gets diluted in any manner.

67) Petitioner's contention that Respondent No. 1 would receive compensation from NSE's IPF appears to be erroneous. The Circular dated 25 July 2023 envisages only 2 illustrations where the stock exchanges can be held liable to compensate the investor out of their IPF, which are:

- (i) Total unauthorised transaction (*with or without trade*) by broker by misusing POA ***and*** '*where investor has complained before default/disablement of terminal of broker*'
- (ii) Shares transferred from investor's demat account to broker's demat account '*by misuse of settlement ID*'

68) The case does not involve 'misuse of settlement ID' and if Respondent No 1 did not realise the fraud and complained 'before disablement of BRH's terminal', NSE would refuse to compensate the Respondent No. 1. The fraudulent transfers occurred in July and August 2019 and NSE suspended BRH on 30 September 2019. If Respondent No.1 did not complain to NSE during short gap of about one month, NSE would reject the claim for compensation through IPF. Thus if Petitioner's contention is accepted Respondent NO.1 will not be compensated at all. Thus if Circular dated 25 July 2023 is taken as the determinative factor for fixing the liability in the present case, neither NSE or Petitioner would compensate the Respondent No.1. Issue is if BRH in its capacity as DP has acted negligently, whether the Petitioner as Depository can be relieved of its liability arising out of Section 16 of the Depositories Act by relying in Circular dated 25 July 2023? The answer to the question appears, to my mind, to be emphatically in the negative.

69) This Court therefore does not appreciate the defence adopted by the Petitioner with reference to the Circular dated 25 July 2023 for anyhow attempting to shift the responsibility of compensating the investor in the present case to NSE. As observed above, the Circular dated 25 July 2023, issued for the purpose of dividing the responsibility for use of IPFs of stock

exchanges and depositories cannot be the determinative factor for deciding the liability of Petitioner in the present case.

70) I am therefore not inclined to accept the contention of the Petitioner that the SEBI circular dated 25 July 2023 would absolve Petitioner-CDSL of responsibility to compensate Respondent No.1. It is another matter that even under the said circular, negligent acts of DP makes depository liable to compensate the investors. In the present case, BRH in his capacity as DP is found to have acted negligently and therefore even as per the Circular dated 25 July 2023, Petitioner would be liable to compensate/indemnify for Respondent No.1 for loss suffered by Respondent No.1.

71) In my view, the Arbitral Tribunal has rightly held Petitioner-CDSL responsible for fraudulent and negligent acts of BRH. NSE cannot be held responsible in the present case as no trades are effected on NSE. The case involves theft of shares (and in any case, negligent acts) by a Depository Participant, making Petitioner responsible under Section 16 of the Depositories Act.

72) In any case, identification of role of BRH as a DP is a finding of fact recorded by the Arbitral Tribunal which need not be interfered by this Court in exercise of powers under Section 34 of the Arbitration Act. The Arbitral Tribunal has applied its mind to totality of circumstances of the case and has thereafter recorded a finding of fact that BRH has acted also as DP in the present case. This is a plausible finding. The Arbitral Tribunal is constituted by CDSL for adjudication of grievances of clients of its DP's.

CDSL's own Arbitral Tribunal has held that BRH has also acted in its capacity as DP. The finding cannot be termed as so perverse that the Award needs to be set aside by exercise of power under Section 34 of the Arbitration Act.

TRIBUNAL HAS NOT ACTED AS AMIABLE COMPOSITEUR

73) It is contended by the Petitioner that the Arbitral Tribunal has granted the claim of the Respondent No. 1 by exercising equity jurisdiction. It is contended that the parties had not agreed that the Arbitral Tribunal can decide *ex aequo et bono* or as *amiable compositeur* under Section 28(2) of the Arbitration Act and that therefore equitable considerations could not have been applied by the Arbitral Tribunal while deciding the dispute. This contention of Petitioner is essentially referable to use of the expressions '*would meet with the ends of justice*' or '*travesty of justice*' and '*furtherance of justice*' by the Arbitral Tribunal in the Award.

74) In my view however, use of the phrases '*would meet with the ends of justice*' or '*travesty of justice*' and '*furtherance of justice*' by the Arbitral Tribunal would not mean that the Award is passed by the Tribunal in exercise of jurisdiction in equity. On the contrary, the Award is made against Petitioner-CDSL after holding that its DP (BRH) has acted negligently. It is not that the Arbitral Tribunal has held that though Petitioner is not responsible in law to compensate Respondent No. 1, it was invoking equity jurisdiction for fastening the liability on the Petitioner. There is detailed discussion by the Arbitral Tribunal holding Petitioner liable for acts of BRH as its agent. Therefore, it cannot be contended that the Tribunal has exercised jurisdiction under Section 28(2) of the Arbitration Act in

absence of agreement between the parties. In that view of the matter, it is not necessary to discuss the ratio of the judgment in *John Peter Fernandes* (supra) dealing with the issue of impermissibility for Arbitrator to exercise equity jurisdiction in absence of agreement under Section 28(2) between the parties.

CONCLUSIONS

75) Considering the overall conspectus of the case, I am of the view that the Arbitral Tribunal has taken a plausible view after considering the facts and circumstances of the case by holding Petitioner responsible for indemnifying Respondent No.1 for lost shares. The findings recorded by the Arbitral Tribunal cannot be treated as perverse. The impugned Award does not suffer from perversity or any patent illegality. The Award is well supported by reasons. The conclusions reached by the Arbitral Tribunal cannot be treated as so irrational that no reasonable person would arrive at it. What Petitioner has attempted to do before me is to urge me to take another possible view for exonerating CDSL in respect of negligent and fraudulent acts committed by BRH. While BRH is held responsible also in his capacity as DP by the Arbitral Tribunal, Petitioner has made attempt to convince this Court to take another view by treating acts of BRH in capacity as broker alone. Even if it is assumed that the view of treating BRH as mere broker is also possible, that alone would not be a sufficient ground for setting aside the impugned Award. The case involves a unique and possibly unprecedented fraud where broker and DP has stolen shares of client entrusted with it and has indirectly caused sale of the same by creating pledge with HDFC Bank. The Arbitral Tribunal has considered the

composite role of BRH in the transaction as broker and DP and has held that BRH has also acted as DP is causing transfer of shares and in creating the pledge. These are plausible findings and cannot be treated as absolutely irrational. Though Petitioner has relied upon the judgments of the Apex Court in *Reliance Infrastructure* (supra) and *Consolidated Construction Consortium Limited* (supra) where all the past judgments on the issue of scope of powers under Section 34 of the Arbitration Act are surveyed and principles are restated, Petitioner has not been able to make out any of the recognised grounds for invalidating the arbitral award. In fact in *OPG Power* (supra) relied upon by the Petitioner, the Apex Court has held that the award need not be set aside if the reasons are insufficient or inadequate, if the underlying reason is discernible from reading of the entire award and documents relied upon and if such reason is not perverse. The Apex Court has held thus:-

168. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient [See paras 79 to 83 of this judgment.] . In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the Arbitral Tribunal but only explains it for a better and clearer understanding of the award.

76) In the present case, the Arbitral Tribunal has recorded the underlying reason of BRH acting in its capacity as DP during some of its negligent and fraudulent acts and has accordingly applied the provisions of

Section 16 of the Depositories Act and Clause 5.3.2 of CDSL Bye laws. The underlying reason discernible from reading of the award cannot be termed as perverse. The manner of enquiry conducted by Arbitral Tribunal or the detailed findings recorded by it may not be to the liking of the Petitioner, however so long as this Court has not found the final conclusion of Arbitral Tribunal treating role of BRH as DP to be not perverse, there is no warrant for exercising the powers under Section 34 of the Arbitration Act for invalidating the Award.

77) What Petitioner is attempting to do is mere footballoing of the genuine claim of Respondent No.1 from itself to NSE. Its whole attempt to convince this Court to treat fraudulent acts of BRH in sole capacity as broker is aimed at passing on the responsibility to NSE. There is ample material on record to indicate that BRH has not acted in its capacity solely as broker. It has not effected any trades on the Stock Exchange. As DP, it acted as agent of the Petitioner, with whom the shares were entrusted for safe keeping in dematerialised form. BRH used its capacity as DP to ensure that the ownership of shares entrusted with the Petitioner is transferred onto itself. It used the POA for transfer of such ownership. It acted in twin capacities as broker and DP to internally effect the transfer of ownership of shares. Therefore the findings of the Arbitral Tribunal that BRH acted also in capacity as DP cannot be termed as perverse. What BRH has done is a misuse of POA for the purpose of stealing the shares of Respondent No.1. It is difficult to hold that this act of stealing is done by BRH in its capacity solely as broker. The Arbitral Tribunal has rightly captured this aspect in the impugned Award.

78) I am therefore of the view that Petitioner has thoroughly failed to make out any valid ground of challenge to the impugned Award. The Arbitration Petition must fail. Since the Arbitral Tribunal has already awarded interest @ 9% p.a. on the awarded sum to Respondent No.1, it is considered appropriate not to impose any further costs on the Petitioner while dismissing the Arbitration Petition.

ORDER

79) Arbitration Petition is accordingly **dismissed** without any further order as to costs. With dismissal of Petition nothing would survive in the Interim Application and the same is also disposed of.

[SANDEEP V. MARNE, J.]

80) After the judgment is pronounced, the learned counsel appearing for the Petitioner, prays for continuation of order dated 27 February 2024 by which this Court has stayed the direction for payment of interest. The request is opposed by the learned counsel appearing for the Respondent. Considering the fact the Petitioner had not paid even principal amount to the Respondent, so also the reasonings adopted while dismissing the Arbitration Petition, I am not inclined to continue the order dated 27 February 2024. The request is accordingly rejected.

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[SANDEEP V. MARNE, J.]