महाराष्ट्र MAHARASHTRA ◐ 2023 ◐ CK 024265

प्रधान मुद्रांक कार्यालय, मुंबई
प.मु.वि.क्र. 800009 0
12 APR 2024
सक्षम अधिकारी
श्री. अतुल कि. किरडे

BEFORE THE HON'BLE ARBITRAL TRIBUNAL

AT CENTRAL DEPOSITORY SERVICES (INDIA) LTD

ARBITRATION NO. 2 OF 2023

Before the Arbitral Tribunal:

MR. KERSI LIMATHWALLA, PRESIDING ARBITRATOR

MR. ASHWIN ANKHAD & MR. ANIL NARENDRA SHAH, CO- ARBITRATORS

In the matter of:

1. NIMISH CHANDULAL SHAH)

4429

Central Depository Services (India) Limited
Marathon Futurex, A Wing, 25th Floor,
Mafatlal Mills Compound, N. M. Joshi Marg,
Lower Parel (E), Mumbai - 400 013.

परिशिष्ट - १ Annexure - I
(प्रत्यक्ष प्रतिज्ञापत्रासाठी)

मुद्रांक विकत घेणाऱ्याचे नाव ____________

मुद्रांक विकत घेणाऱ्याचे रहिवाशी पत्ता ____________

मुद्रांक विक्रिबाबतची नोंद वही अनु. क्रमांक ______ दिनांक ______

मुद्रांक विकत घेणाऱ्याची सही

परवानाधारक मुद्रांक विक्रित्याची सही

परवाना क्रमांक : ८०००९०

मुद्रांक विक्रीचे नाव/पत्ता : श्री. कल्पेश प्रेमजी गाला

शॉप नं.४, भाग्योदय बिल्डींग, ७९ नगीनदास मास्टर रोड,फोर्ट, मुंबई-४०० ००१.

16 APR 2024

शासकीय कार्यालयासमोर/न्यायालयासमोर प्रतिज्ञापत्र सादर करणेसाठी मुद्रांक कागदाची आवश्यकता नाही. (शासन आदेश क्र. [illegible]/२००४) नुसार

ज्या कारणासाठी ज्यांनी मुद्रांक खरेदी केला त्यांनी त्याच कारणासाठी मुद्रांक खरेदी केल्यापासून ६ महिन्यात वापरणे बंधनकारक आहे.

16 APR 2024

residing at)
13- A, New Woodland CHS, 67,)
Peddar Road, Mumbai- 400 026)

...CLAIMANT NO.1

2. JALPA NIMISH SHAH)
residing at)
13- A, New Woodland CHS, 67,)
Peddar Road, Mumbai- 400 026)

...CLAIMANT NO.2

3. FORTUNE FINANCIAL AND)
EQUITIES SERVICES PVT. LTD.)
A company incorporated under the)
Companies Act, 1956, having its)
registered office at 1003,)
Lodha Supremus, Off. Worli Naka,)
Dr. E. Moses Road, Mumbai – 400 018)

...CLAIMANT NO. 3

VERSUS

CENTRAL DEPOSITORY)
SERVICES (INDIA) LTD.)
A company incorporated under the)
Companies Act, 1956, recognized and)
registered as a depository under the)
Depositories Act, 1996, having its)
registered office at Unit No. A- 2501,)
Marathon Futurex, Mafatlal Mills)
Compound, N. M. Joshi Marg,)
Lower Parel (East), Mumbai- 400 013)

...RESPONDENT

AWARD

Per Mr. Anil Shah, Arbitrator

BACKGROUND:

The reference in this dispute bearing reference 02 of 2023 was entrusted to the Arbitral Tribunal by CDSL to consider and adjudicate the dispute and difference between the Claimants and the Respondent mentioned hereinabove and make the arbitration award.

The parties to the dispute have under section 29A (3) of the Arbitration and Conciliation Act, 1996 and Bye Law 22.18.1 of the CDSL Bye Laws, after reference to the Members of the Arbitration Committee at its meeting held on 01.01.2024, agreed to extend the period to make the award by 24.05.2024.

STATUS OF THE PARTIES:

The Claimants are constituents of Anugrah Stock & Broking Pvt. Ltd. (Anugrah) and are referred to as Claimant No. 1, 2 and 3. Anugrah is not a party before the Arbitral Tribunal since The National Stock Exchange of India Ltd. (NSE) had on 03.08.2020 withdrawn the trading rights of Anugrah in the F&O, Currency Derivatives and Commodity Derivatives segments. Thereafter, on 04.09.2020, NSE withdrew the trading rights of Anugrah in the Cash segment. Anugrah was a Trading Member (TM) registered with Securities and Exchange Board of India (SEBI) and a Depository Participant. Edelweiss Custodial Services Limited (Edelweiss) is the Clearing Member (CM) registered with SEBI and is the CM for

clearing the trades of Anugrah. NSE Clearing Limited **(NCL)** is a wholly owned subsidiary of NSE and is responsible for clearing and settlement of all trades executed on NSE and deposit and collateral management and risk management functions. It was formerly known as National Securities Clearing Corporation Limited.

The Respondent, Central Depository Services (India) Limited (CDSL) is a Depository, registered under the Depositories Act, 1996. In the present proceedings CDSL is also the administering institution of arbitration.

BINDING NATURE OF THE RULES, BYE LAWS, ETC OF CDSL:

Both the Claimants and the Respondent are bound by the provisions of the Rules, Byelaws and Regulations of CDSL.

PLEADINGS:

The Statement of Claim, Statement of Defense, rejoinders, sur rejoinders, and sur – sur rejoinder affidavit and documents filed from time to time, post hearing submissions, filed by the parties on record.

HEARINGS:

Physical hearings in the matter were held on 07.11.2023, 01.12.2023 and 22.12.2023.

CLAIMANTS' CASE

On facts:

1. It is Claimants' case that on account of the negligence of the Respondent and Anugrah the Claimants have lost shares and securities maintained by the Claimants in their demat accounts with Anugrah.

2. That the Claimants had transferred funds and securities to Anugrah from time to time, for meeting margin obligations and trades in F&O segments of NSE. That Edelweiss in capacity as CM was responsible for settling and clearing trades of Anugrah and was the depository and custodian of the shares of the Claimants which were transferred to Anugrah towards margin requirements.

3. Anugrah had thereafter, on 10.08.2020 informed the Claimants that all open positions of the Claimants had been squared off and provided margin statements and holding statements of the Claimants' securities (Exhibit B and C to the SOC).

4. The Claimants had, in order to secure the securities kept as collateral with Anugrah, sent respective Delivery Instruction Slips (**DIS**) calling back securities as per the holding statement. That the Claimants had respectively addressed an email dated 18.08.2020 to Anugrah canceling the Power of Attorney (**POA**) granted to Anugrah for operation of the trading accounts of the Claimants (Exhibit D and E to the SOC).

5. That on 20.08.2020, the Claimants had written to the Respondent seeking urgent intervention and ensuring that no third-party rights are created in the collaterals of the Claimants (Exhibit F to the SOC).

6. That in the interim, the Claimants had filed an Arbitration Petition (**Arbitration Petition**) under section 9 of the Arbitration and Conciliation Act, 1996 before the Hon'ble Bombay High Court to secure recovery of funds and securities lying with Anugrah and the said petition was pending final hearing.

7. That on 28.09.2020, the Claimants had addressed a notice to SEBI and NSE calling upon them to provide details pertaining to the steps taken by them for protecting and securing the interest of the Claimants on account of the negligence and inaction of the authorities (Exhibit G the SOC).

8. That on 16.10.2020, the Claimants had filed a Writ Petition (**Writ**) before the Hon'ble Bombay High Court challenging the inaction and dereliction of statutory duties by SEBI, NSE, Anugrah and the Respondent and the said petition was pending final hearing.

9. That on 20.10.2020, the NSE Clearing Limited (**NCL**) had observed that securities of the constituents of the Anugrah were illegally sold and directed Edelweiss to reinstate the same. It was also observed that securities of the constituents of the Anugrah were also illegally sold by Edelweiss (Exhibit H to the SOC).

10. That aggrieved by the said NCL Order, Edelweiss had preferred appeal before the Hon'ble Securities Appellate Tribunal (**SAT**). The Claimant no. 1 had filed Intervention Application in appeal no. 441/2020 of Edelweiss (**SAT appeal**)

supporting the NCL Order. That SAT had dismissed the appeal of Edelweiss on 15.12.2023 holding that the securities belonging to the clients/ constituents of Anugrah, including the Claimants, were wrongfully and illegally provided as 'collateral' to Edelweiss.

11. That Clause 8 of CDSL Byelaws provides that the Respondent is the custodian of securities, for and on behalf of beneficial owners, and oversees the activities of Depository Participants and is statutorily entrusted with a degree of care, precaution and vigilance to protect the interests of the beneficial owners. The said Bye Law also provides that the Respondent shall enter into an agreement with Clearing Corporations. It is the Clearing Corporations that in turn, regulate the CMs.

12. That section 10 of the Depositories Act, 1996 (**Depositories Act**) provides that the Respondent is the '**registered owner**' of the securities whereas the client/ constituent is the '**beneficial owner**'. The securities can thereafter be pledged as well as transferred only in accordance with the procedure under the Depositories Act read with the CDSL Byelaws i.e., by creation of a valid pledge. That admittedly, the Claimants had not issued any instructions to permit the sale of the same as there was no margin short-fall. That the SOD is absolutely silent as to who provided instructions to the Respondent to place the Claimants' securities as collateral to Edelweiss and/ or to initiate the sale of the Claimants' securities i.e., whether it was Edelweiss and/ or NCL. The contention in the SOD that the admitted wrongful sale of the Claimants' securities was on account of misuse of Power of Attorney (POA) by Anugrah is false and only proves the

Respondent's lack of due diligence and care to oversee and regulate Edelweiss and NCL operations.

13. The Claimants have relied on an order dated 20.12.2023 of Hon'ble SAT in the matter of Karvy Stock Broking Private Limited holding that "the role of the Depository to ensure that a proper security is being utilized by the broker for the creation of the pledge. It is the case of the Appellants therein were not acting as a Depository Participant but were participating in the capacity of an ordinary lender. The Appellants had no notice or information either from NSDL or from Karvy regarding the categorization of the account as "non house" and therefore the Appellants could not have been responsible to make any inquiry about the same.

    Further, it was held that "that the Depository should file an application before the NCLT for rectification of Register of Members. This process was not done and like a highway robber, NSDL through illegal directions from SEBI had transferred the pledged shares (which were fungible) to the clients of Karvy whose action was without any authority of law.'

14. The Arbitral Tribunal has noted that Edelweiss has preferred a Civil Appeal before the Hon'ble Supreme Court challenging the order of Hon'ble SAT and no stay has been granted to Edelweiss against the order of the Hon'ble SAT by the Hon'ble Supreme Court.

15. That the Claimants had on 18.07.2023, addressed notice to the Respondent to indemnify the Claimants on account of the negligence of the Respondent

(Exhibit K of the SOC) and the Arbitral Tribunal notes that the Respondent has not responded to the notice, but has communicated that they would do so.

16. That on 24.08.2023, the Claimants filed the present arbitration before the Arbitral Tribunal (Exhibit M of the SOC) alleging the illegal sale of shares by Edelweiss, gross negligence of the Respondent, Respondents action/ inaction to oversee the fraudulent transfer of the securities of the Claimants, the Respondent's gross violation of its duties, breach of statutory duty and claiming that the POA could never create a pledge on the securities in favour of Anugrah/ Edelweiss/ Stock Exchanges/ Respondent and the Claimants have relied on SEBI Circulars dated 23.04.2010 read with Circular dated 31.08.2010 (Exhibit N and O of the SOC). The Claimants have urged that since the Claimants had not created any pledge/ hypothecation of the securities, the Respondent could never deemed to have the authority nor could have permitted Anugrah/ Edelweiss to sell/ alienate the same.

On Indemnity and Negligence:

17. The Claimants have relied on section 16 of the Depositories Act, 1996 which is reproduced for ready reference:

"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."

18. It is the contention of the Claimants that section 16(1) can be divided into 3 parts, namely;

    (i) firstly, the provisions confer a right upon a beneficial owner, without prejudice to their rights under any other law which is not in dispute;

    (ii) secondly, the provisions call upon the depository to indemnify a beneficial owner, upon any loss caused to such beneficial owner, which fact has been adequately demonstrated;

    (iii) Thirdly, the loss caused should be due to negligence of the depository or the participant and if this is answered in the affirmative, the Claimants are entitled to seek indemnification of their loss from the Respondent.

19. That Regulation 14(1) (i) of the SEBI (Depositories and Participants) Regulations, 2018 ("**DP Regulations**"), sets out that the grant of certificate of commencement of business expands the scope under section 16(1) of the Depositories Act and provides that the Depository shall make arrangements for indemnification of beneficial owners for any loss caused due to the wrongful act,

negligence or default of the depository or its participants or of any employee of the depository or participant.

20. Further still, the DP Regulations have been enacted under section 25 of the Depositories Act, which gives SEBI the power to make Regulations and the same is therefore, binding upon the Respondent.

For ready reference, Regulation 14(1) (i) is set out hereunder:

> 'Consideration of application for grant of certificate of commencement of business:
>
> 14. (1) The Board shall take into account for considering the grant of certificate of commencement of business, all matters which are relevant to the efficient and orderly functioning of the depository and in particular, the following, namely, whether—
>
> ...
>
> (i) the depository has made adequate arrangements including insurance for indemnifying the beneficial owners for any loss that may be caused to such beneficial owners by the wrongful act, negligence or default of the depository or its participants or of any employee of the depository or participant;'

21. The Claimants have placed reliance on the judgment of the Hon'ble Bombay High Court in the matter of Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri to buttress its case on the negligence of the Respondent, more

specifically the findings pertaining to sections 124 and 125 of the Indian Contract Act, 1872._The Claimants have submitted that the Hon'ble Bombay High Court has ruled in the case that if the indemnified/ indemnity holder has incurred a liability and the liability is absolute, he is entitled to invoke the indemnity and call upon the indemnifier to pay the same. It was further ruled therein that what is only required to be shown is that, an absolute liability is incurred by the indemnity holder, which is agreed to be indemnified by the indemnifier. It is the Claimant's case that the ratio therein applies squarely to the facts of the present case. The Claimants have also placed reliance on the judgment of the Hon'ble Bombay High Court in Jet Airways (India) Limited vs. Sahara Airlines Limited.

22. The Claimants have further relied on the judgment of the Apex Court in the case of Municipal Corporation of Greater Bombay vs. Laxman Iyer which was, apparently cited by the Respondent during arguments, wherein it was observed that:

> "Negligence is the omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of the conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term but is a relative one; it is rather a comparative term."

"To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act."

23. Thus, it is the case of the Claimants, that (a) a 'loss' has been caused to them; (b) which was due to the 'negligence' of the Respondent and/ or Anugrah on account of failure to exercise due care, precaution, and vigilance to protect the interest of the Claimants; (c) entitling the Claimants for indemnification of such loss by the Respondent.

On SEBI Circular dated 17.12.2018 on Early Warning Mechanism:

24. The Claimants have relied that even in the Affidavit in Reply filed by the Respondent in the Writ, the Respondent has contended that multiple warning signals were issued by the Respondent to the NSE, on several occasions namely on 02.04.2019, 23.04.2019, 10.05.2019, 04.06.2019, 04.03.2020, 09.04.2020 and 05.12.2019 raising alerts for the period 07.08.2019 to

22.07.2020. That the Respondent had failed to monitor client funds and securities lying with TMs/ CMs / NCL/ and the Respondent and failed to detect misutilization of client funds and securities as well as the financial strength of TMs to detect the signs of the deteriorating financial health of TMs and serve as an early warning system to take preventive and remedial measures which tantamount to violation of the SEBI Circulars more specifically Circular dated 17.12.2018 (**17.12.2018 Circular**) on early warning mechanism.

25. The Claimants have submitted that the 17.12.2018 Circular mandated action by the Respondent in the early warning mechanism to prevent diversion of client securities and the relevant clauses thereof are reproduced for ready reference.

"3. Early warning signals, for prevention of the diversion of clients' securities, may include the following:

3.1. Deterioration in the financial health of the stock-broker depository participant based on any of the following parameters:

a) Significant reduction in net worth over the previous half-year / year.

b) Significant losses in the previous half years / years.

c) Delay in reporting of Annual Report, Balance Sheet, Internal Audit Reports, Risk Based Supervision (RBS) data and any other data related to its financial health to the Stock Exchanges / Depositories.

d) Failure to submit information sought by the Stock Exchange / Depositories on its dealing with related parties / promoters.

e) Significant mark-to-market loss on proprietary account/ related party accounts

f) Repeated instances of pay-in shortages.

g) Significant trading exposure or amount of loans or advances given to and investments made in related parties/ group.

h) Sudden activation of significant number of dormant client's accounts and / or significant activity in the dormant account/s.

i) A significant number of UCC modifications.

j) Resignation of Statutory Auditors or Directors.

3.2. Early warning signals in relation to securities pledge transactions by the stock Broker to be identified by the Depositories and shall be shared with Stock Exchanges which may include:

a) Alerts for stock-brokers maintaining multiple proprietary demat accounts and opening any new demat account in the name of the stock broker for client purposes.

b) Movement of shares to/from a large number of clients' demat accounts or large value shares to stock broker proprietary accounts and vice a versa.

c) Transfer of large value of shares through off-market transfers other than for settlement purposes.

d) Invocation of the pledge of securities by lenders against a stock-broker or his clients.

e) Significant depletion of client's shares in the stock broker client account maintained by the stock broker.

3.3. Increase in a number of investor complaints against the stock broker / depository participant alleging un-authorized trading / unauthorized

delivery instructions being processed and non-receipt of funds and securities and non-resolution of the same.

3.4. Alerts generated from the monthly / weekly submissions made by stock broker under Risk Based Supervision (RBS) or Enhanced Supervision to the Stock Exchanges.

a) Non-recovery of significant dues from debit balance clients over a period of time.

b) Significant dues to credit balance clients over a period of time.

c) Failure by stock broker to upload weekly data regarding monitoring of clients' funds as specified in SEBI's circular on Enhanced Supervision, for 3 consecutive weeks.

d) Pledging securities in case of clients having credit balance and using the funds so raised against them for their own purposes or for funding the debit balance of clients.

e) Mis-reporting / wrong reporting about the client funds / securities.

f) Significant increase in RBS score.

4. Stock Exchanges and Depositories shall frame an internal policy / guidelines regarding non-cooperation by stock brokers and depository participants during inspections which shall lay down the time period, the type of documents critical for closing the inspections, which if not submitted, can be treated as non-cooperation.

4.1. Failure to submit data sought for inspections especially relating to bank / demat accounts, client ledgers etc. despite repeated reminders.

4.2. Failure to provide reasonable access to the records or any office premises.

5. Stock Exchanges / Clearing Corporations / Depositories, shall devise a mechanism to detect the diversion of clients' securities and to share information among themselves in respect of:

5.1 Diversion of pay-out of securities to non-client accounts

5.2 Mis-matches between gross (client-wise) securities pay-in and pay-out files of a stock brokers generated by the Clearing Corporation which shall be compared with actual transfer of securities to/from the client's depository accounts by the Depository. The cases of any mismatch found by the Depository shall be informed to the concerned Stock Exchange / Clearing Corporation.

5.3 Stock Exchange shall seek clarification from the concerned stock broker on the mismatches reported by the Depository and identify transfer to a non-client / third party, without any trade obligation.

5.4 Such information on wrong/fraudulent / unauthorized transfer shall be shared by the Stock Exchange with other Stock Exchange/s.

8. Based on the analysis of the early warning data, if it is established that the stock-broker's financial health has deteriorated and/ or he has made an unauthorized transfer of funds / securities of the client, in such cases Stock Exchanges/ Depositories shall jointly take preventive actions on the stock broker which may include one or more of, but not limited, to the following:

8.1. Actions to be initiated by the Stock Exchanges like:

a) Blocking of a certain percentage of available collaterals towards margin.

b) Check securities register in respect of securities received and transferred against pay-in/pay-out against settlement and client's securities received as collateral.

c) Check details of funds and securities available with the clearing member, Clearing Corporation and the Depository of that stock broker.

d) Impose limits on proprietary trading by the stock broker.

e) Prescribe and monitor shorter time duration for settlement of Running Accounts of clients.

f) Conduct a meeting with the designated directors of the stock-broker to seek an appropriate explanation.

g) Uniform action of deactivation of trading terminals by all Stock Exchanges based on the communication received from other Stock Exchange.

h) Initiate inspection of the stock broker / depository participant.

i) Cross check information submitted by stock-broker with other independent sources like collateral details with the Clearing Corporation, transactions in Bank and Depositories, with statements collected directly etc.

j) Where client money and securities diversion is suspected, appoint a forensic auditor to trace trails of entire funds and securities of clients.

8.2. Actions to be taken by the Depositories:

a) Restriction on further pledge of client securities from the client's account by freezing the stock broker client account for debit.

b) Imposition of 100% concurrent audit on the depository participant.

c) Cessation/restriction on uses of Power of Attorney (POA) given to stock brokers by clients mapped to such brokers only to meet the settlement obligation of that client. Clients are to issue instructions electronically or through Delivery Instruction Slip (DIS) for delivery of shares for off-market transfers.

8.3. Any other measures that Stock Exchanges / Clearing Corporations / Depositories may deem fit.

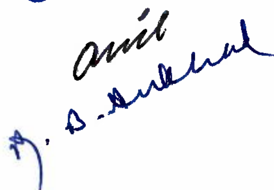
.....

That the circular is being issued in the exercise of powers conferred under section 11 (1) of the Securities and Exchange Board of India Act, 1992 and section 19 of the Depositories Act, to protect the interests of investors in

securities and to promote the development of, and to regulate the securities market."

26. It is the case of the Claimants that there is a glaring contradiction in the SOD (page 1210 of the SOD) where in it has been contended that it is difficult for the Respondent to ascertain whether Claimants No. 2 and 3 had an account with the Respondent. Surprisingly, however, in the Affidavit-in-Reply before the Hon'ble Bombay High Court in the Writ, the Respondent had annexed an email dated 05.12.2019 providing alerts generated under the 17.12.2018 Circular addressed to NSE which placed on record the fact that there was huge movement of shares to/ from a large number of clients' demat accounts to stockbroker proprietary accounts, including securities of the Claimant No. 2 [Pages 1055 and 1060 of SOD].

27. The Claimants state that during the continuance of the present proceedings, the Respondent has failed to provide information and documents which go to the root of the matter, *i.e.*, (i) complete transaction statement of the Claimants; (ii) SMS logs of Claimants No. 2 and 3 showing that the Respondent provided alerts to Claimants No. 2 and 3 upon the creation of any alleged pledge/ sale of shares; (iii) records showing how the name of the Claimants as beneficial owner was changed; (iv) when and by whom instructions were issued to the Respondent to transfer the shares when Edelweiss invoked the '**collateral**' and whether and Power of Attorney was used at such time; and (v) copies of the Power of Attorney which the Respondent alleges to have been misused by Anugrah.



28. The Claimants have further relied on clause 10 the 17.12.2018 Circular which reads as under:

> '10. This circular is being issued in the exercise of powers conferred under section 11 (1) of the Securities and Exchange Board of India Act, 1992 and section 19 of the Depositories Act, to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.'

29. The Claimants have further relied on section 19 of the Depositories Act which reads as under:

> 'Power of Board to give directions in certain cases.
>
> 19. (1) Save as provided in this Act, if after making or causing to be made an inquiry or inspection, the Board is satisfied that it is necessary—
>
> *(i)* in the interest of investors, or orderly development of securities market; or
>
> *(ii)* to prevent the affairs of any depository or participant from being conducted in the manner detrimental to the interests of investors or the securities market,
>
> it may issue such directions, —
>
> *(a)* to any depository or participant or any person associated with the securities market; or

(b) to any issuer,

as may be appropriate in the interest of investors or the securities market.

Explanation- For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.'

30. The Claimants claim that under the circumstances, appropriate direction or order was deemed to have been given by SEBI to the Respondent *vide* the 17.12.2018 Circular to take appropriate steps to freeze the stockbroker client account upon happening of the trigger events mentioned in Clause 3.1, 3.2, 3.4 and 4 of the 17.12.2018 Circular. The argument of the Respondent that the Respondent was powerless to take necessary steps to freeze the client stockbroker account is, therefore, baseless and needs to be dismissed. Moreover, the Claimants submit that no reasons have been set out by the Respondent, explaining or detailing why action under Clause 8.2(b) or (c) could not have been taken by the Respondent upon the occurrence of the trigger events. In fact, Clause 8.3 explicitly provides the Respondent with the power to take appropriate measures as they deem fit, but the Respondent had failed to exercise such inherent statutory powers mandated under the said Clause.

31. That Hon'ble SAT had in the Edelweiss judgment upholding the NCL order observed that securities belonging to the clients/ constituents of Anugrah were wrongly/ illegally sold by Edelweiss (in the present case the negligence being violation of the 17.12.2018 Circular, Byelaws and other SEBI Circulars). That in the said proceedings an argument was advanced by Edelweiss that NCL did not have the power under the applicable Bye Laws, Rules and Regulations to direct reinstatement of shares/ securities. The Hon'ble SAT had observed that wide powers were granted to Clearing Corporation under the 01.07.2020 Circular which is pari-materia to the powers granted to the Respondent under Clause 8.3 of the 17.12.2018 Circular and it had observed that:

> '61. We also find that SEBI issued a clarificatory circular dated July 1, 2020, which is also addressed to clearing corporations, clearly stating therein that with respect to clearing members, the clearing corporations are ".... free to initiate any other actions as may be necessary in compliance with their bye-laws / rules / regulations and or to protect the interest of investors ....". Therefore, a duty is cast upon NCL / Committee to ensure that the investors are protected by directing the return of the shares of the respective investors as directed in the impugned order.
>
> 62. SEBI circular dated January 10, 2019, to clearing corporations, expressly states that the Committee also has powers to impose appropriate regulatory measures on CMs. Thus, a wide power has been given to the Committee to ensure proper regulation of the markets and investor protection.

63. Once it is evident that the appellants have wrongly sold off the shares of clients, it would make a mockery of disciplinary regulation and be a travesty of justice to hold that the NCL has no power to direct the appellant to reinstate and return the shares to the clients. Such a conclusion would place a premium on dishonesty and encourage brokers to misappropriate client's securities. In fact, the very fact that the appellant has chosen to even raise such an allegation only proves its intentional defiance of the authority of the respondents to regulate the markets and the conduct of the brokers.

64. In fact, one of the guiding principles in interpreting securities laws, rules, regulations, bye-laws, circulars, etc., ought to be to enhance investor protection and to safeguard the securities markets against mischief of misappropriation of investors securities and money. Directing restitution is essential if the public is to have faith in the system.

65. The innocent clients whose securities have been, thus, misused / misappropriated, cannot be deprived of their right to get back their shares. It may be noted that in the case of Sardar Amarjit Singh Kalra (dead) by LRS. And Ors. vs. Pramod Gupta (Smt) (Dead) by LRS and Ors. [(2003) 3 SCC 272] a 5 Judge Bench of the Hon'ble Supreme Court, inter-alia, held that :-

" ...... As far as possible, courts must always aim to preserve and protect the rights of parties and extend help to enforce them rather than deny relief

and thereby render the rights themselves otiose, “ubi jus ibi remedium” (where there is a right, there is a remedy) being a basic principle of jurisprudence. Such a course would be more conducive and better conform to a fair, reasonable and proper administration of justice.....”

66. Thus, we find that the directions in the impugned orders are not barred by any law, rule, regulations, bye-law or circular. We are of the opinion that the Committee has the power for restitution, to reverse the damage wrongfully caused. The appellants having committed a wrongful act cannot be permitted to take advantage of their own wrong. Where restitution can be directed, it would be totally contrary to the cause of justice to deny the same. It would be a travesty of justice and totally undermine the regulation of the markets if any intermediary is permitted to misuse / misappropriate clients' securities by selling off the same unilaterally when the concerned investor has no outstanding obligation or liability, and then permitting the intermediary to benefit from the same at the cost of expense of the investors.'

32. It is the Claimant's case that the act of omission by the Respondent displays gross negligence and violation of Clause 8 of the 17.12.2018 Circular since upon occurrence of the trigger events, the Respondent had failed to observe the required degree of care, precaution and vigilance which was expected and demanded of the Respondent, to protect the interest of the Claimants.

33. That the argument advanced by the Respondent that it could not take the action contemplated under Clause 8.2(a) of the 17.12.2018 Circular, as the CDSL Byelaws did not permit the Respondent to take such unilateral action of freezing the stockbroker client account, without permission of SEBI and/ or an order of a Court of law, is flawed. The Claimants have submitted that the Respondent ought not to have overlooked Byelaw 13.4.2 which categorically mandates that the Respondent shall freeze the account of a beneficial owner, in the manner specified in the orders or directions of SEBI or any Court or tribunal or Government or any other authority made or given under any law for the time being in force.

34. For easy reference, Byelaw 13.4.2 is set out hereunder:

> '13.4.2. CDSL or the participant shall freeze the account of a Beneficial Owner maintained with it in the manner specified in the orders or directions of any court or tribunal or any Government or SEBI or any other authority made or given under any law for the time being in force.
>
> Provided however that any order of a Court, Tribunal, Government or other competent authority relating to the freezing of a beneficial owner account or taking any action in relation to a beneficial owner account that is within the purview of obligations cast on a depository under the Act and/or Regulations, shall be effected by CDSL or participant only on receipt from such authority the Beneficial Owner Identification Number (BOID) or Permanent Account Number (PAN) coupled with specific directions if the same are not set out in such order with sufficient accuracy.'

On SEBI Circular dated 01.07.2020 on Standard Operating Procedure:

35. That the provisions of SEBI Circular dated 01.07.2020 (01.07.2020 Circular) regarding standard operating procedure in the case of TM/CM leading to default squarely applies in the present proceedings and the Claimants state that the Respondent failed to comply with Clause 4 of the Circular.

 Clause 4 reads as follows:

 "4. On analysis of early warning signals or any of the following triggers, if the SE/CC is of the view that the TM / CM is likely to default in the repayment of funds / securities to its clients and / or fail to meet the settlement obligations to CM / CC, where:

 a) There is a shortage of funds / securities payable to the clients by Rs. 10 crore (SE may have their own criteria) and / or

 b) TM/CM has failed to meet the settlement obligations to CM / CC and / or

 c) There is a sudden increase in the number of investor's complaints against the TM / CM for non-payment of funds and / or transfer of securities, the following actions shall be taken by Initiating Stock Exchange (ISE) / SES/CCS and Depositories as per the timeline given below:

Sr. No.	Action	Timeline

4.16	Depositories to freeze the demat accounts of the TM (including TM Pool Accounts).	Within 1 trading day from the receipt of information of disablement
4.20	Depositories shall provide the details of pledges that were invoked by Banks/ NBFCs with whom TM's own securities were pledged in the previous 30 days to the SE/CC.	Within 15 trading days from the date of receipt of information of disablement.

36. That in addition to the above, it is on record that the Respondent had along with SEBI, NSE and BSE conducted a comprehensive joint inspection of Anugrah during September 2018 which revealed a short fall of funds of Rs. 111.17 crores displaying the extent of the Respondent's knowledge of the wrongful activities of Anugrah. Further still, the Forensic Audit Report dated 05.10.2020 of Ernst & Young revealed that Anugrah was engaging in illegal activities.

37. That in an identical matter, in order dated 22.11.2019 passed by SEBI against Karvy, where National Securities Depositories Limited (**NSDL**) had revoked the pledge on Karvy's account, it had been held that there was a wrongful pledge of securities belonging to the constituents of Karvy (Exhibit Q of the SOC). That

under the circumstances a similar approach was equally warranted in the present case.

38. That in the appeal by Axis Bank Ltd., the Hon'ble SAT on 20.12.2023 quashed the impugned order rejecting the representation from accessing the securities pledged with the Appellants therein and had allowed the appeals permitting the appellant banks to invoke the pledged shares. Further still, a direction was given to SEBI, NSE and NSDL to restore the pledge made in favour of the Appellants therein within 4 weeks or in the alternative SEBI, NSE, NSDL were directed to compensate the Appellants therein with the underlined securities pledged in their favour along with interest @ 10% p.a. The Arbitral Tribunal notes that, SEBI, NSE and NSDL have challenged the said SAT order in the Supreme Court.

On limitation:

39. The Claimant has relied on the Bye Laws of CDSL more particularly clause no. 22.2 which reads as under:

"22.2. CLAIMS, DIFFERENCES AND DISPUTES

22.2.1. All claims, differences and disputes between CDSL, Users and Beneficial Owners or any of them (including those inter se between Users or Beneficial Owners) arising out of or in relation to any dealings or transactions in CDSL in respect of any provisions of the Act, Regulations, Bye Laws or Operating Instructions shall be

referred in accordance with the provisions of [Limitation Act 1963 and] Arbitration and Conciliation Act, 1996.

Provided however that the limitation period shall also be applicable in the following cases.

Where the limitation period (in terms of the Limitation Act 1963) has not yet elapsed and the parties have not filed for arbitration with the depository,

or

where the arbitration application was filed but was rejected solely on the ground of delay in filing within the earlier limitation period; and the limitation period (in terms of Limitation Act 1963) has not yet elapsed.

Provided that nothing contained in this chapter shall apply to any action/ decision taken by CDSL pursuant to the provisions of Depositories Act, 1996, SEBI (Depositories & Participants) Regulations, 1996, Bye Laws and Operating Instructions issued by CDSL from time to time. Reference to arbitration shall be made as follows:

22.2.1.1. Where CDSL is a party, in accordance with Bye Law 22.2.2.

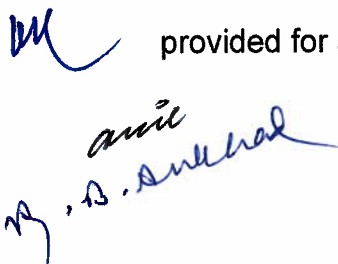
40. It is the Claimants' contention that the claim is not barred by limitation and have relied on SEBI Press Release dated 06.01. 2011, read with SEBI Circular dated 11.08.2020, 31.08.2010, 09.02, 2011, and 07.04 2011, wherein it has been categorically stated that the limitation period for arbitration has been modified to 3 years, as prescribed under the Limitation Act, 1963.

41. Further, Article 72 of the Limitation Act, 1963, has no applicability in the present case as argued by the Respondent since Article 72 deals with compensation for doing or omitting to do an act alleged to be in pursuance of any enactment. Under the circumstances, the same could never apply to proceedings under an indemnity. Assuming whilst denying that Article 72 is applicable, the Claimants state that the same would entail a period of 1 year from the date of failure to do or omission to do an act in pursuance of an enactment which in the present case, is the failure of the Respondent to indemnify the Claimants upon a request in this regard made on 18.07.2023 and consequently the claim is within limitation.

42. Further, that limitation period for an indemnity is in fact, governed by Article 113 of the Limitation Act, 1963, which provides for a period of 3 years, from the date on which the right to sue accrues for the reasons that :

(i) Article 72 falls within Part VII-Suits relating to torts whilst the cause of action in the present proceedings is under a statutory indemnity under the Depositories Act

(ii) On perusal of the repealed Limitation Act, 1908, it may be seen that 2 separate and independent provisions for computation of limitation period pertaining to suits relating to torts for compensation and suits relating to indemnity have been interpreted. Article 2 of the Limitation Act, 1908, which was *pari-materia* to Article 72 provided for a limitation period of 90 days for suits relating to torts for compensation whereas Article 83 provided for a limitation period of 3 years for indemnity;



Thus, pursuant to the repeal of the Limitation Act, 1908, the present Limitation Act, 1963, came into force, which does not contain an identical provision for Article 83. In such a scenario, Article 113 of the Limitation Act, 1963, which is the residuary Article would have to be resorted to. It was submitted that when no specific period is provided for in the Schedule to the Limitation Act, 1963, then the residuary Article 113 will stand invoked as propounded by the Hon'ble Supreme Court in Damini & Anr. vs. Managing Director, Jodhpur Vidyut Vitran Nigam Limited.

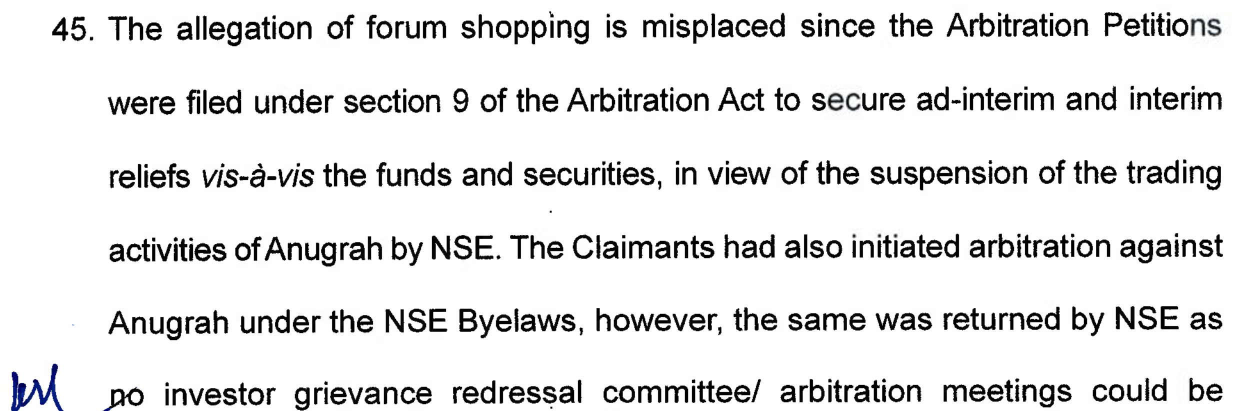
43. The Claimant has thus pleaded that the claim is maintainable and within limitation.

<u>On vicarious liability of the Respondent:</u>

44. That vicarious liability under section 238 of the Contract Act, 1872 squarely falls on the Respondent since the Respondent had notice and was otherwise too well aware of the acts of Anugrah.

<u>On forum shopping:</u>

45. The allegation of forum shopping is misplaced since the Arbitration Petitions were filed under section 9 of the Arbitration Act to secure ad-interim and interim reliefs *vis-à-vis* the funds and securities, in view of the suspension of the trading activities of Anugrah by NSE. The Claimants had also initiated arbitration against Anugrah under the NSE Byelaws, however, the same was returned by NSE as no investor grievance redressal committee/ arbitration meetings could be



conducted, in view of the bar on the same under the 01.07.2020 Circular as Anugrah's trading rights stood suspended.

46. The Writ was in challenging the inaction and dereliction of statutory duties by SEBI, the Respondent, NSE and Anugrah. That none of the final reliefs sought in the Writ were identical/ similar to the nature of reliefs sought in the present arbitration. The final reliefs sought in the Writ could not be tantamount to a relief in the nature of realization/ recovery of the securities. In any event, by an Order dated 04.12.2023, the Hon'ble Bombay High Court was pleased to grant leave to Claimant No. 1, being Petitioner No. 1 to the Writ to amend the Writ Petition and delete prayer clauses (b) to (q) from the array of prayers/ reliefs sought in the Petition. Thus, after the deletion of certain prayers, the surviving prayer clause (a) is as under:

> '(a) issue appropriate directions against Respondent No. 1 to take action against Respondents No. 2 to 9 and issue a Writ of Mandamus, or any other appropriate writ, order or direction, to direct Respondent No. 1 to exercise its powers under sections 11 and 11B of the SEBI Act and pass appropriate orders in the matter to protect the interests of the Petitioners and other clients/ constituents of the Respondent No. 5;'

As such, the objection raised by the Respondent that the present arbitration cannot be adjudicated by this Hon'ble Tribunal as the matter is purportedly sub-judice before the Hon'ble Bombay High Court could not survive.

47. That the Intervention Application filed by Claimant No. 1 in the Edelweiss SAT Appeal supports the NCL Order. The same is not an independent and separate proceeding initiated by Claimant No. 1 for recovery/ restitution of the securities and the same could never come in the way of this Hon'ble Tribunal to decide the claim.

48. Even otherwise, the Claimants have argued that if any recoveries are made by the Claimants from Edelweiss under the Edelweiss SAT Appeal, the Claimants have undertaken to return such amount to the Respondent.

49. That further still, NSE IPF Claims are in respect of compensation from IPF to clients/ constituents of Anugrah, to the maximum extent of Rs. 25 lakhs per Claimant and Claimant No. 1 has received Rs. 25 lakhs from NSE. No amounts have been received by Claimants No. 2 and 3 from NSE IPF. The relief sought in the present proceedings are in no manner identical nor can such reliefs be granted by NSE under IPF.

50. The claim is thus maintainable and this Arbitral Tribunal has the jurisdiction to adjudicate the same under the doctrine of res judicata with respect to the Writ and the Arbitration Petition pending disposal before the Hon'ble Bombay High Court.

Prayers:

51. The Claimants have prayed restoration of the securities of the Claimants per Exhibit A1 to the SOC, or in the alternative, Rs. 34, 72, 75,447/- (Rupees Thirty-

Four Crores Seventy-Two Lakh Seventy-Five Thousand Four Hundred Forty Seven Only) being a market value of the securities quantified on 28.08.2023 per Exhibit A2 to the SOC along with interest @18% p.a. till realization and has claimed legal expenses of Rs. 20 lakhs.

52. The Claimants have prayed in the alternate that assuming that the Claimants are not entitled to prayer clause (a), i.e. a direction against the Respondent to indemnify the Claimants by restoration of the securities of the Claimants the Arbitral Tribunal may be pleased to direct the Respondent to indemnify the Claimants in monetary terms i.e. the market value of the securities of the Claimants, as on August 28, 2023, along with interest at 18% p.a., till realization thereof, and costs. In the event if the Arbitral e Tribunal comes to the conclusion that the value of securities cannot be computed as on August 28, 2023, it is the Claimants' case that that the Respondent in paragraph 106 of the SOD has admitted that the value of the securities would have to be computed at the time they were sold by Anugrah and/ or Edelweiss. It is, therefore, prayed that this Arbitral Tribunal may be pleased to mold the relief in prayer clause (b) and direct the Respondent to indemnify the Claimants accordingly, along with interest at 18% for pre-reference, pendente lite and post-award period and costs.

RESPONDENT'S DEFENSE

On facts:

53. That the Respondent is regulated by SEBI and governed primarily by the Depositories Act, 1996 **(Depositories Act)** and SEBI (Depositories and

Participants) Regulations, 2018(**Depositories Regulations**) and various circulars/ notifications issued by SEBI from time to time.

54. That the claim is in relation to the alleged unauthorized and illegal retention and sale of securities by Anugrah and the alleged negligence, inaction and breach of statutory duties by NSE, NCL and the Respondent who have purportedly failed to protect the interest of the Claimants. That the Claimants are seeking indemnification of the alleged losses caused to them on account of the purported negligence of Anugrah as stock Broker and not as DP and against the Respondent under section 16 of the Depositories Act.

55. That it is an admitted position that the Claimants had executed POA in favour of Anugrah and the purported loss was on account of misuse of such POA by Anugrah as Stock Broker and the actions of Edelweiss as CM and not on account of the Respondent as a Depository.

On Jurisdiction:

56. The Respondent has strongly relied on NCL order dated 20.10.2020 and SAT order dated 15.12.2023 holding that Edelweiss has disposed of clients' securities in complete disregard of the express directions of NSE / NCL as well as SEBI Circulars and NCL Regulations. Further, that the said order has directed Edelweiss to reinstate client securities which fact demonstrates that the Respondent, being a Depository, could never have had visibility or control over Anugrah's activities as a Stock Broker and/ or Edelweiss's activities as a

CM and was thus not responsible for the alleged illegal transfers and cannot be held liable. Also, it has relied upon the Intervening Application filed by the Claimants in the Hon'ble Supreme Court in Edelweiss Appeal claiming the same relied i.e, restoration of shares and therefore another Forum like this Tribunal cannot have jurisdiction.

57. That admittedly the SOC reveals that the alleged infractions were at the instance of Anugrah as a Stock Broker and Edelweiss as a CM and not by Anugrah in the capacity as a Depository Participant.

    (a) Moreover, the Bye-Laws do not permit the Respondent to prevent a transaction and /or freeze a Beneficial Owners account unless authorized by an Order of a Court, Tribunal, Government or other Competent Authority. The Respondent has quoted Bye-Law 5.3.5.3 which recognizes the fact that a Depository Participant may also wear the hat of a stock broker and a clearing member, and the fact that the Respondent would not have visibility over the operations of such Depository Participant. Further, Bye-Law 5.3.25A *inter alia* states that any order of a Court, Tribunal or competent authority relating to the freezing of a beneficial owner account which is within the purview of obligations cast on a depository shall be effected by the Respondent only on receipt from such authority the Beneficial Owner Identification Number or PAN number. (Page 1373 of the Rejoinder). Further, Bye-Law 7.1.1 states that in respect to market trades, CDSL shall debit/credit the account of the Beneficial Owner strictly in accordance

with the advice issued by the Clearing Corporation. (*Page 1387 of the Rejoinder*). The Respondent has relied on

Bye-Law 13.4.2. which states that "CDSL or the participant shall freeze the account of a Beneficial Owner maintained with it in the manner specified in the orders or directions of any court or tribunal or any Government or SEBI or any other authority made or given under any law for the time being in force.(Page 1407 of the Rejoinder)

(b) The Respondent has complied with Bye-Law 16.4.1.1. which states that CDSL may appoint one or more persons as inspecting /investigating authority to undertake inspection of the books of accounts/other documents of the participant into the matters mentioned therein to the extent they pertain to CDSL operations for any of the purposes specified and pursuant thereto such investigations of Anugrah have taken place from time to time and the Respondent has complied with its statutory duties in this regard. (Page 1423 of the Rejoinder)

58. That the SOC is flawed in so much as it assumes that since Anugrah was a Depository Participant, the Respondent had regulated the other activities of Anugrah as a Stock Broker. That the Respondent has certain monitoring powers over the functions that a Depository Participant performs as an agent of the Respondent (Para 40, page 1176 of the SOD). That the Respondent has the power to carry out inspection and investigations of the operations of its

Depository Participants, and look into complaints filed by Beneficial Owners (BO). (Para 42 (c), page 1177 of the SOD).

59. It is the Respondent's defense that separate regulations govern separate entities, namely a Depository Participant is governed by inter alia Bye Laws of the Depository, a Stock Broker is governed by the Bye Laws of the Stock Exchange where it is a member and a CM is governed by the regulations of the Clearing Corporation of which it is a member. Under the circumstances, the Respondent's visibility over the operations of the Depository Participant is limited to the functions as a Depository Participant only and does not extend to the operations of the Depository Participant (Anugrah) as a Stock Broker or a CM.

60. That vide letter dated 08.09.2020 (Exhibit G to the SOC), the Claimants have acknowledged the fact that NSE had oversight on the activities of Anugrah. Further still, NCL vide order dated 20.10.2020 has held that Edelweiss had disposed of client securities in complete disregard of the express directions of NSE/ NCL as well as SEBI Circulars and NCL Regulations. Further still, NSE vide reply dated 16.04.2021 had recorded that the complaint of the Claimants with NSE was based on Anugrah's status as a TM/ Stock Broker with NSE.

61. That even the order dated 31.08.2020 of the Hon'ble Bombay High Court in the section 9 Application records that there is no dispute about the relationship between the Claimants and Anugrah or the fact that the Claimants were governed by the NSE arbitration mechanism.

62. That SEBI Circulars dated 23.04.2010 and 31.08.2010 (Exhibit N and O of SOC) mandate certain obligations of Stock-Brokers regarding use of POA and accordingly, the inspection of Anugrah by the Respondent did not pertain to Anugrah's operations as a Stock Broker but was limited to the actions of Anugrah as a Depository Participant only. As such, Edelweiss as CM was responsible for misuse of client's securities.

63. That considering the limited visibility that the Respondent could have had over the operations of Anugrah, the Respondent was only required to generate alerts and provide the relevant information to Stock Exchanges to assist them in supervising operations of Stock Brokers. Additionally, the Respondent had not received any instructions from Stock Exchanges or SEBI or any other regulatory entity to freeze any demat account to prevent sale of any shares. That trading operations of Anugrah were outside the purview of the Respondent and the Respondent did not have access to trade related activities of Anugrah during the joint inspections. That the joint inspection reports of Anugrah had highlighted issues pertaining only to non- compliance of KYC requirements, failure to give declaration by BO, demat and remat set up and rejections, observations of PMLA etc. (Exhibit R1 and R2 of SOD).

64. That the Respondent has denied that it is the "custodian" of the said securities that were transferred for the purpose of margin to Anugrah and that the

Respondent does not have any suo moto authority to prevent any transfer of shares by a Stock Broker/ CM.

That the prayer of the Claimants for the restoration of shares is beyond the scope of the Arbitral Tribunal and the doctrine of mitigation of loss would squarely apply. That the prayer for payment of legal expenses should be governed by Bye Law 12.16.1.2 which mandates “costs means reasonable costs” and the claim for Rupees 20 lakhs is not only exorbitant but also unsubstantiated

On forum shopping:

65. That the Claimants' have initiated several proceedings before multiple authorities, namely; the Arbitration Petition u/s 9 and the Writ Petition, both before the Hon'ble Bombay High Court, proceedings before SEBI and NSE and the Hon'ble SAT and finally intervening application before the Hon'ble Supreme Court clearly indicating that the present proceeding is not legitimate and/ or bonafide and the Claimants are indulging in forum shopping. That the multiple proceedings are otherwise sub-judice.

66. That the Claimants have relied upon the NCL order dated 20.10.2020 in support of their case that securities belonging to clients /constituents of Anugrah, including that of the Claimants, were illegally sold and that therefore NCL has directed Edelweiss to reinstate the securities of such clients / constituents. That the NCL order tantamount to a conclusion that Edelweiss has been found

guilty of violating laws and regulations, and has therefore, been directed to restore the shares / securities of the clients / constituents of Anugrah including those of the Claimants. Further, the prayer (a) at Page 22 of the SOC seeks a direction that the Respondents should restore the shares / securities of the Claimants, which relief has already been granted to the Claimants under the NCL Order. It is also on record that in an appeal to SAT by Edelweiss to the said NCL Order, the Claimants have intervened and supported the NCL Order (Paragraph 6 (vii) (e) at Page 1307 of the Rejoinder).

67. In fact, the Hon'ble SAT has on 15.12.2023 upheld the NCL Order confirming that Edelweiss must reinstate and return the clients' shares, which included the Claimants' shares. As a consequence, Edelweiss was required to reinstate the securities of the clients of Anugrah including the securities of the Claimants. Under the circumstances, the Claimants can no longer make / maintain the present arbitration proceedings in which they seek identical relief of reinstatement of shares. That on this ground alone, the present claims ought not be entertained, and the arbitration reference should be dismissed at the very threshold since the Claimants have already elected their remedy by supporting the NCL Order at SAT and the Hon'ble Supreme Court and are now forum shopping in order to obtain the very same relief from this Hon'ble Arbitral Tribunal.

On limitation:

68. That the Claimants have waived their right to approach this Arbitral Tribunal since they were aware of the rights and have failed to file the Arbitration within

limitation and the conduct of the Claimants do not deserve a remedy before the Hon'ble Arbitral Tribunal.

69. That the arbitration application is filed beyond the period of limitation and thus, is an afterthought. That the Claimants were in knowledge of the purported cause of action as early as August 2020 and have indicated for the first time the intent to invoke arbitration on 18.07.2023 (Exhibit K to the SOC).

70. That it is an admitted position that the Claimants are seeking compensation on account of breach of statutory duties/inaction on the part of the Respondent as is evident from the statements in the SOC and has relied on pages 1164 to 1166 of the SOD).

71. That Article 72 of the Schedule to the Limitation Act, 1963 expressly prescribes a period of limitation of 1(one) year for "compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends" and that the Claimants have invoked arbitration on 24.08.2023 i.e., 3 years after the accrual of the cause of action which is clearly beyond the period of limitation and ought to be dismissed at the threshold itself.

72. That section 43(1) of the Arbitration and Conciliation Act, 1996 provides that, "The Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court." Thus Article 72 of the Limitation Act, 1963 applies to the present Arbitration in the same manner that it would apply to a suit in a civil court.

73. That similarly, Clause 22.2.1 of CDSL's Bye-Laws provides that, "All claims, differences and disputes between CDSL, Users and Beneficial Owners or any of them (including those inter se between Users or Beneficial Owners) arising out of or in relation to any dealings or transactions in CDSL in respect of any provisions of the Act, Regulations, Bye Laws or Operating Instructions shall be referred in accordance with the provisions of Limitation Act 1963 and Arbitration and Conciliation Act, 1996." This confirms that the limitation period for initiating an arbitration reference before this Arbitral Tribunal would be governed as per the provisions of the Limitation Act, 1963 in the same manner that it would to a suit in a civil court.

74. That the Claimants were aware and had knowledge of the fact that the securities had been illegally sold without their instructions as far back as on 15.09.2020. That the Claimants began alleging that the Respondent had failed to act in dereliction of its statutory duties as far back as on 22.10.2020 (as per the list of dates filed by the Claimants).

75. That section 43(2) of the Arbitration Act and Conciliation Act, 1996 prescribes that for the purposes of limitation, an arbitration shall be deemed to have commenced on the date on which a request for that dispute to be referred to arbitration, is received by a Respondent which, admittedly is, 18.07.2023 (Exhibit K of the SOC).

76. That considering the fact that the limitation period to file the present claim expired /lapsed in September / October 2021 i.e., in the period that the Hon'ble Supreme Court has excluded, the Hon'ble Supreme Court has clarified that in such a scenario, all such persons shall have a limitation period of 90 days from 01.03. 2022 and that in the event the balance period of limitation remaining with effect from 01.03.2022 is greater than 90 days, the longer period shall apply (Page 1693 of the Rejoinder). That otherwise too, the arbitration application is beyond limitation.

Further, the Claimants' reliance on Article 113 of the Schedule to the Limitation Act,1963 is misplaced and untenable on the following grounds;

a. The reliance on Article 113 of the Schedule to the Limitation Act, 1963 is entirely misplaced because since Article 113 of the Schedule to the Limitation Act, 1963 prescribes a period of limitation of 3 years for "Any suit for which no period of limitation is provided elsewhere in this Schedule." It is apparent that Article 113 is the residuary clause of the Limitation Act, 1963 and can only be relied upon when there is no specific period prescribed for that particular kind of suit. In the present case however, the Claimants have premised their claim for compensation on alleged breaches of statutory duties of the Respondent which are covered specifically by Article 72 of the Schedule to the Limitation Act, 1963.

b. The Respondent has relied on the judgment v the Hon'ble Supreme Court in the case of State of A.P. vs. Challa Ramkrishna Reddy

wherein a distinction between Article 113 and Article 72 has been adequately dealt with.

"In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time. That is to say, the doing of an act or omission to do an act for which compensation is claimed must be the act or omission that is required by the statute to be done. If the act or omission complained of is not alleged to be in pursuance of the statutory authority, this article would not apply. This article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person does an act under the power conferred or deemed to be conferred by an Act of the legislature by which injury is caused to another person who invokes the jurisdiction of the court to claim compensation for that act."

77. It is the Respondent's submission that the ratio of the aforesaid judgment is squarely applicable to the facts of the present case, since the Claimants have claimed compensation, in the form of indemnification, for the alleged injury / loss caused to them on account of the Respondent purportedly failing to act in accordance with the applicable laws and/or regulations.

78. That the present case arises under section 16 of the Depositories Act, which requires the Claimants to demonstrate negligence (which is a tort) for which the specific Article 72 of the Limitation Act applies.

79. That further, the Claimants' reliance on SEBI Press Releases dated 06.01.2011 and 11.08.2010 and the SEBI Circulars dated 31.08.2010, 09.02.2011 and 07.04. 2011 (Exhibit I at Page 1672 to 1686 to the Rejoinder) to contend that vide such circulars, the period of limitation for arbitration has been modified to 3 years is also misplaced because SEBI Press Release and SEBI Circular dated 11.08.2010, SEBI Press Release dated 31.08.2010 and SEBI Circular dated 09.02.2011 are all titled "Arbitration Mechanism in Stock Exchanges". As such, none of these apply to the Respondent (a Depository). A perusal of paragraph 4 of the SEBI Circular dated 09.02.2011 indicates that directions are being issued to the Stock Exchanges only and not to Depositories.

80. Further still, SEBI Circular dated 07.04.2011 (Rejoinder page 1689) is the only circular that has been addressed to Depositories. A bare perusal of the said circular makes it apparent that the same does not direct Depositories to increase the limitation period for filing an arbitration to 3 years. In fact, the said Circular prescribes that the limitation period for filing an arbitration reference would be governed under the Limitation Act, 1963 i.e. the applicable provision in the Schedule to the Limitation Act, 1963. That Clause 22 of CDSL Bye-Laws also prescribes that all claims between CDSL and the Beneficial Owners shall be referred in accordance with the provisions of the Limitation Act, 1963 and the Arbitration and Conciliation Act, 1996.

81. That therefore, for the reasons stated above, it is submitted that the present claim is barred by the law limitation and ought to be dismissed on this ground alone.

On negligence:

82. That the Respondent has not been negligent at all or in part and the SOC has failed to demonstrate negligence and violation of statutory provisions to merit any compensation under section 16 of the Depositories Act.

83. That the Hon'ble Supreme Court in MCGM vs. Laxman Iyer has explained the elements of the tort of negligence and the relevant paragraph is extracted below for ease of reference:

> "6. ...Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of such conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness but it means want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand whereby such other persons suffer injury. The idea of negligence and duty are strictly co

relative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term, but is a relative one; It is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or a course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is the absence of care according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even failure to do anything in a manner mode or method envisaged by law would equally and per say constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act..."

84. That under Bye-Law 7.1.1., as it existed on the date when Edelweiss sold the securities, was restricted in its scope and provided as under:

"7.1. MARKET TRADES SETTLEMENT.

7.1.1. In respect of Market Trades, CDSL shall debit and/or credit the account of the Beneficial Owner and/or to 134 [such accounts as may be specified in the Operating Instructions

for the Clearing Corporation/Settlement Procedures] as the case may be, strictly in accordance with the advice issued by the Clearing Corporation on confirmation of payment."

As such, at the relevant time, the only obligation cast upon the Respondent was to debit and / or credit the account of a Beneficial Owner strictly in accordance with the instructions received from the Clearing Corporation without any requirement to first validate such instructions and therefore there is no negligence on the part of the Respondent.

85. That in order dated 02.07 2023 passed by SEBI in the matter of BRH Wealth Kreators (India), it was held that a Depository does not have visibility over the operations of a Stock-Broker and Clearing Member. Therefore, a Depository cannot be held liable for misuse of client securities by a Stock-Broker or Clearing Member. That the ratio of the BRH Wealth Kreators (India) case applies to the present proceedings despite the fact that the said case pertained to pledge.

86. That reliance on the Karvy case by the Claimants is misplaced since the facts in that case were that, there was an express direction from SEBI/ NSE to NSDL to release pledges on client securities created in favour of certain banks/ financial institutions and to return the same to the concerned clients. However, in the present proceedings. there are no such directions by any authority which are binding on the Respondent.

87. Therefore, no negligence on the part of the Respondent could be established in this case.

On the 17.12.2018 and 01.07.2020 Circulars:

88. That the Respondent had complied with both the 17.12.2018 and the 01.07.2020 Circulars by taking adequate steps towards creation of required infrastructures/ systems to detect diversion of clients securities and further vide progress reports dated 02.11.2018 and 20.11.2018 to SEBI (Exhibit P of the SOC), the Respondent had begun putting in place a system of early detection of warning signals even before the 2018 Circular. Thereafter, the Respondent along with NSDL, the Stock Exchanges and the Clearing Corporations formulated a draft SOP to determine certain thresholds for early warning signals and specify requisite action in the event of breach thereof.

89. That the Respondent had regularly conducted all monitoring activities with respect to Anugrah and raised all alerts which were required to be raised under the 17.12.2018 and the 01.07.2020 Circulars.

90. That on 02.04.2019, the Respondent had addressed email to the Stock Exchanges raising an alert indicating certain activation of significant number of dormant client accounts and significant activity in dormant accounts of Anugrah. On 23.04.2019, 10.05.2019 and 04.06.2019, the Respondent had addressed similar alerts. In addition, the Respondent issued various alerts with respect to

obligations of trades of Anugrah. The Respondent has relied on other such alters issued from time to time in para 81 on page no. 196 of the SOD.

91. That in terms of the Operating Instructions to Depository Participants, the Respondent had sent SMS alerts to Claimant no. 1 about debits in his demat account. That the Respondent has an online facility called "EASI" (Electronic Access to Securities Information) which is available to anybody who holds a demat account with the Respondent as also "EASIEST" facility (Electronic Access to Securities Information and Execution of Secured Transactions). Further, in terms of SEBI Circular dated 27.08.2020, the Respondent had in place system of obtaining client's consent through one time password for execution of physical DIS.

On Vicarious Liability and Principal Agent relationship:

92. That the Claimants have failed to demonstrate any negligence on the part of the Respondent and under the circumstances, section 16 of the Depositories Act, 1996 could never apply. That it was a settled position in law that to constitute a tort of negligence, it must be established that there existed a duty of care, that there was a breach of such duty through an action or omission and that there damages arising as a consequence of the breach. Further, in order to conclude that there did exist a duty of care, there must be foreseeability of the damage, a sufficient proximate relationship between parties and there must be just and reasonable ground to impose such a duty and the provisions of the section 238 of the Indian Contract Act, 1872, could come into play. That the

Claimants have failed to demonstrate that there was a breach of such duty through an action or omission, by the Respondent.

93. That assuming without admitting that the Respondent had visibility over the operations of Anugrah as a Stock Broker it is submitted that a principal cannot be liable for the fraud of an agent in view of section 238 of the Indian Contract Act, 1872 which states that a principal would be liable for the fraudulent acts of the agent only if the agent was acting within his authority. Reliance was placed on the judgment of the Hon'ble Patna High Court in the case of M/s Shriram Refrigeration Industries Ltd. v State Bank of India. The Hon'ble Court had inter alia held therein that there are limitations to the rule laid down in section 238. Section 238 of the Indian Contract Act, 1872 lays down that the misrepresentations made or frauds committed, by agents acting in the course of their business for their principals, have the same effect in agreement made by such agents as if such misrepresentations or frauds had been made or committed by the principals. It was contended that accordingly, the act was the independent act of the agents.

94. The Respondent has submitted that the Hon'ble Bombay High Court in the case of M. Shashikant & Co. vs. Union of India inter alia held that a principal can never be guilty for wrongful acts of the agent which were done without notice to the principal.

95. The Respondent has submitted that in the case of State Bank of India v Smt. Shyama Devi, the Hon'ble Supreme Court has held that it must be shown that the damage complained of was caused by any wrongful act of his servant or

agent done within the scope or course of the servant's or agents employment, even if the wrongful act amounted to a crime.

96. In view of the above, considering that the fraudulent actions of Anugrah were in the course of its operations as a stock broker and not a depository participant, the Respondent cannot be liable for the same because:

    (i) Anugrah (*Stock Broker*) is not an agent of the Respondent; and

    (ii) even though Anugrah (*Depository Participant*) is an agent of the Respondent, the fraudulent actions in the present case were not within the scope of its operations as a Depository Participant and were instead performed in the course of its operations as a stock broker and accordingly 238 of the Indian Contract Act, 1872would apply and the Respondent is immune from liability.

Prayers:

97. That the Claimant is not entitled to claim compensation based on current market value of shares, that is on 28.08.2023, but if at all, needs to be calculated at the time when the same was sold by Anugrah / Edelweiss.

98. That the Claimants are not entitled to any reliefs claimed in the SOC and the present proceedings deserve to be dismissed.

OUR FINDINGS AND CONCLUSIONS:

1. The Arbitral Tribunal has carefully perused the pleadings, and arguments, as well as the provisions of the Depositories Act, CDSL Bye-laws, relevant SEBI

circulars and DP Regulations. After a careful examination of all pleadings and legal provisions and after hearing the parties at length, the Arbitral Tribunal has arrived at the following findings and conclusions:

2. At the outset, the Arbitral Tribunal records that the Respondent has raised two preliminary objections in the present dispute, namely;

   i. The Claimants have already elected their remedy prior to approaching this Arbitral Tribunal and are thus forum shopping.

   ii. The present claim is barred by the law of limitation.

3. The Arbitral Tribunal proceeds to deal with the first preliminary objection alleging that the Claimants are guilty of forum shopping since the Claimants have already sought similar reliefs in an ongoing legal proceeding before the Hon'ble Supreme Court.

4. The Arbitral Tribunal observes that the NCL, vide order dated 20.10.2020 had already held that Edelweiss had failed to perform adequate and sufficient due diligence before verifying the sale of securities belonging to clients / constituents of Anugrah, including that of the Claimants, thereby resulting in misuse of clients' securities which sale was in patent violation of the circulars/directives of SEBI/NSE and Regulations of NCL. Further, vide the aforesaid order, the NCL had directed Edelweiss to reinstate the securities of such clients/constituents.

5. It is on record that, Edelweiss has challenged the said NCL Order in Appeal No. 441 of 2021 before the Hon'ble Securities Appellate Tribunal ("**SAT**") and the

Claimant No. 1 had intervened in the said Appeal, supporting the NCL order and had prayed for the dismissal of the appeal of Edelweiss.

6. It is also on record that the Hon'ble SAT, vide its judgment dated 15.12.2023 ("**SAT Judgment**"), upheld the NCL order and *inter alia* held that the NCL's direction that Edelweiss must reinstate and return the client's shares, including the Claimants' shares, does not suffer from any error in law. It is no one's case that the Claimants were not heard as interveners. A perusal of para 16 of the SAT judgment indicates that, the interveners in the Appeal, which include the Claimant No. 1 was heard and his arguments in support of the NCL order were taken into consideration while passing the judgment.

7. Being aggrieved by the SAT judgement, Edelweiss has challenged the said judgment before the Hon'ble Supreme Court in Civil Appeal No. 31/2024 and the said Appeal is presently sub-judice. In the said Civil Appeal proceeding in the Hon'ble Supreme Court, the Claimant No.1 has filed an Intervening Application in respect of his claim over subject shares.

8. The Arbitral Tribunal draws reference to the judgment in *Union of India v. Cipla Ltd., (2017) 5 SCC 262, wherein* the Hon'ble Supreme Court of India laid down a functional test to determine whether a litigant has indulged in forum shopping and held as follows: -

> *"**155**. The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity*

in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not."

9. In light of findings in the Cipla case supra, The Arbitral Tribunal has examined whether there is a functional similarity between the facts and reliefs in present Arbitral proceedings and the sub-judice appeal before the Hon'ble Supreme Court challenging the Edelweiss SAT judgment. The Arbitral Tribunal finds that the finding therein does not call for a restricted conclusion.

10. The Claimants have not denied that there is already an operating order (i.e., NCL order) passed by a competent authority which has held that Edelweiss failed to ensure that the clients' securities which were sold, including the Claimants' securities, were only of the defaulting clients, thereby resulting in misuse of clients' securities. The NCL order had held that Edelweiss verified the sale of securities without identifying and establishing that the securities belonged only to the clients who had a debit balance and hence their conduct was in gross violation of the SEBI circulars and the guidance/directions/regulations of NSE and NCL. Therefore, in the interest of justice, equity and good conscience and to protect the interests of the investors and the securities markets, NCL directed Edelweiss to reinstate the securities which had been illegally sold due to the lack of adequate due diligence by Edelweiss.

11. Having pondered over the matter, the Arbitral Tribunal could draw a parity that the relief granted by the said NCL Order confirmed by the SAT order, has a striking resemblance with prayers in the Statement of Claim, seeking a similar direction from this Arbitral Tribunal that the Respondent should restore the shares / securities of the Claimants amongst other shares / securities belonging to other clients.

12. Similarly, based on the Claimants' conduct of filing an intervention application No. Misc Appln. 512 of 2020 in appeal No. 441 of 2020 before the Hon'ble SAT challenging the said NCL Order, an inference may be drawn that the Claimants' securities fall within the purview of the remedial action stipulated in the NCL Order. The Hon'ble SAT, has upheld the said NCL order and expressly stated that they have considered the arguments advanced by the Claimants, in support of the NCL order, while dismissing Edelweiss's Appeal No. 441 of 2021.

13. Further still, a perusal of Exhibit K of the SOC, being the letter dated 18.07.2023 addressed by the Claimants to the Respondent leaves no doubt that that the Claimants, while intervening in the proceedings before the Hon'ble SAT, had sought reinstatement of the same securities which are subject matter of the present Arbitration. No prejudice ought to be caused to the Claimants since the Claimants have admittedly stated that "*If there is any recovery from Edelweiss (which is presently sub-judice before the Hon'ble SAT) for the wrongful sale of the subject securities, we undertake to return such amount of funds to you.*" An attempt is being made by the Claimants to canvass that under the doctrine of election, an alternate remedy is also available. This line of argument does not persuade us since the Hon'ble SAT has adequately addressed the issue. It is

incomprehensible that the Claimants be permitted to draw equality between the law of election and doctrine of subrogation since it would then defy propriety and rationale.

14. For the reasons stated above, The Arbitral Tribunal has no hesitation to conclude that there is an unambiguous functional similarity between the present Arbitral proceedings and the sub-judice Appeal before the Hon'ble Apex Court. The Arbitral Tribunal cannot overlook the position that in both the proceedings, the Claimants are seeking identical reliefs, which is the reinstatement of their securities illegally sold by Edelweiss. After carefully analyzing the Claimants conduct we have also identified subterfuge on their part as is evident that before the Hon'ble SAT, the Claimants have pleaded, in order to realize reinstatement of securities, that the illegal sale of their securities was caused due to the negligence of Edelweiss in not conducting adequate due diligence. Whereas before this Arbitral Tribunal, it is the Claimants' case that illegal sale of securities was on account of the Respondent's negligence as a custodian of their securities. The Arbitral Tribunal is not persuaded by the principles of credibility by concluding a "possible view" vis a vis an "impossible conclusion".

15. Therefore, on a conjoint reading, the Arbitral Tribunal holds that since the Claimants had already elected their remedy by supporting the NCL Order before the Hon' ble SAT, the present proceedings tantamount to forum shopping and the arbitration application does not deserve consideration.

16. Considering that the validity of the NCL Order as upheld by SAT is being challenged before the Hon'ble Supreme Court, any relief granted by this Arbitral Tribunal at this stage would be a travesty of proceedings.

17. Under the circumstances, the Arbitral Tribunal sees no need to deal with the issues pertaining to limitation and the merits of the case as the claim does not pass the preliminary threshold of Forum Shopping.

AWARD

i) The arbitration application in Case No. 2 of 2023 between the Claimants, Nimish Chandulal Shah, Jalpa Nimish Shah and Fortune Financial and Equities Services Pvt. Ltd. and the Respondent, Central Depositories Services (India) Ltd. is rejected.

ii) There is no order as to costs.

At Mumbai dated this ..29th... day of April 2024.

Kersi Limathwalla	Ashwin Ankhad	Anil Shah
Presiding Arbitrator	Co-Arbitrator	Co-Arbitrator