



## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

## COMMERCIAL ARBITRATION PETITION NO.293 OF 2024

Nimish Chandulal Shah and Ors.

.....PETITIONERS

: **VERSUS** :

Central Depository Services (India) Ltd.

....RESPONDENT

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**Mr. Karl Tamboly** with Mr. Reehan Ajmerwalla, Mr. Ravinchandra Hegde, Ms. Parinaz Bharucha, Mr. Kandarp Trivedi with Ms. Janani Sivaraman i/b M/s. RHP Partners for the Petitioners.

**Mr. Rohan Kadam** with Ms. Varuna Bhanrale, Ms. Shourya Bari, Kaazvin Kapadia and Ms. Ananya Sinha i/b M/s. Trilegal for the Respondent.

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CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON: 9 DECEMBER 2025.

JUDG. PRON. ON: 23 DECEMBER 2025.

**JUDGMENT:**

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), Petitioners have challenged the Award dated 29 April 2024 passed by the three-member Arbitral Tribunal constituted by the Central Depository Services India Ltd (CDSL). By the impugned Award, the Arbitral Tribunal has rejected

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the claim of the Petitioner for restoration of their securities or in the alternative for award of sum of Rs.34,72,75,447/-, being the market value of securities.

### FACTS

2) Petitioners are the trading members, who had opened their respective trading and Demat Accounts with Anugrah Stock and Broking Private Limited (**Anugrah**), who was both a Stock Broker on NSE India Ltd (**NSE**), as well as a Depository Participant (**DP**) of the Respondent. Respondent-CDSL is a Depository registered under the provisions of the Depositories Act, 1996 (**Depositories Act**). While opening their respective trading and Demat Account with Anugrah, Petitioners had executed various account opening documents including Power of Attorney. For undertaking trades in Future & Options Segment (**F & O**) of NSE, the trading members are required to maintain margin money. Towards their obligation of maintaining the margin monies, Petitioner had transferred funds and securities in their respective trading / Demat Accounts with Anugrah.

3) Edelweiss Custodial Services Ltd. (**Edelweiss**) was the Clearing Member of Anugrah, who was responsible for settling and clearing the trades undertaken by the Petitioners. On 3 August 2020, NSE withdrew the membership of Anugrah and its trading rights on account of non-compliance with the regulatory provisions of NSE. Accordingly, Anugrah was restrained from taking fresh positions in F&O, currency derivatives and commodities derivatives segment. On 10 August 2020, Anugrah addressed email to the Petitioners informing them that all their open positions were squared off and

Anugrah provided contract notes in that regard. On the same day, Anugrah also provided margin statement to the Petitioners, indicating that Petitioner No.1 had credit balance of Rs.3,27,16,258/- and Petitioner No.2 had trading ledger credit balance of Rs.1 crore. On 13 August 2020, Anugrah also provided holdings statement to the Petitioners which indicated holding of securities value of following amounts :-

- (i)Petitioner No.1-Rs.13,72,86,691.15/-
- (ii)Petitioner No.2-Rs.3,61,12,050/-
- (iii)Petitioner No.3-Rs.16,42,400/-.

4) After learning about suspension of activities of Anugrah, Petitioners sent instructions slips for immediate reversal of the securities kept as collaterals with Anugrah. On 18 August 2020, Petitioner No.1 sought cancellation of POA. Petitioner No.1 also lodged complaints on grievance portal of CDSL's official website. On 4 September 2020, NSE withdrew trading rights of Anugrah in cash segment as well.

5) Petitioners, along with the other aggrieved investors, filed Arbitration Petitions under Section 9 of the Arbitration Act in this Court for securing recovery of funds and securities lying with Anugrah as collaterals. This Court restrained Anugrah from disposing off its movable, immovable and financial assets and appointed Court Receiver in respect thereof. On 28 September 2020, Petitioners addressed notice to SEBI, NSE and CDSL seeking details of steps taken for protecting and securing the interests of clients of Anugrah. On 16 October 2020, Petitioner No.1 along with other clients of Anugrah, filed

Writ Petition in this Court seeking directions against SEBI, NSE, CDSL and Anugrah, which Petition is pending.

6) NSE Clearing Ltd (**NCL**) initiated proceedings, *inter alia*, against Edelweiss who was Anugrah's Clearing Member. By order dated 20 October 2020, NCL held that securities belonging to clients of Anugrah to the tune of Rs.460.32 crores were illegally sold by Edelweiss and directed Edelweiss to reinstate the same. Aggrieved by NCL's order, Edelweiss preferred Appeal No.441 of 2020 before the Securities Appellate Tribunal (**SAT**). Petitioner No.1 filed Misc. Application No. 459 of 2020 in Edelweiss' appeal before SAT seeking intervention. By order dated 2 February 2021, Intervention Application of Petitioner No.1 was allowed. In the meantime, Petitioners filed claims before NSE for refund of their funds and restoration of the subject securities. However, NSE recorded by reply dated 16 April 2021 that the securities were sold by Edelweiss and that the matter was subjudice. By order dated 15 December 2023, the Appeal preferred by Edelweiss was dismissed by SAT. Edelweiss has challenged the order passed by SAT by filing Appeal before the Supreme Court which is pending.

7) On 18 July 2023, Petitioners addressed notice to CDSL calling upon CDSL to indemnify all losses caused on account of negligence of CDSL and Anugrah. Thereafter, on 24 August 2023, Petitioners invoked arbitration. CDSL entrusted the dispute to three-member Arbitral Tribunal and the Reference was registered as Arbitration No. 02 of 2023. Petitioners filed their Statement of Claim on 5 September 2023 seeking restoration of subject shares/securities maintained by them in their respective Demat accounts with Anugrah.

In the alternative, Petitioners sought to recover the value of subject shares/securities of Rs.34,72,75,447/-. CDSL resisted the claim by filing Statement of Defence raising *inter alia* the issue of limitation and accusing Petitioners of indulging in forum shopping. On account of objection raised by CDSL about pendency of similar claim of Petitioners in Writ Petition (Lodg.) No. 4991 of 2020, Petitioners applied to this Court and deleted prayer clauses (b) to (g) from the Petition leaving only the prayer for direction against SEBI to take appropriate measures for protecting the interest of Petitioners and other clients of Anugrah.

8) After considering the arguments canvassed by both the sides, the three-member Arbitral Tribunal has delivered the Award dated 29 April 2024 rejecting the claim of the Petitioners holding that Petitioners had already elected the remedy by supporting NCL's order before SAT and that initiation of arbitration proceedings against CDSL amounts to forum shopping. Aggrieved by the Award dated 29 April 2024, Petitioners have filed the present Petition under Section 34 of the Arbitration Act.

### **SUBMISSIONS**

9) Mr. Tamboly, the learned counsel appearing for the Petitioners would submit that the Arbitral Tribunal has perversely accused the Petitioners of forum shopping and has thereby not adjudicated the claim of the Petitioners on merits. That the Arbitral Tribunal has completely misconstrued the concept of forum shopping by considering the participation by Petitioner No.1 in the regulatory proceedings initiated by NCL as an act of forum shopping. That

reliance by the Arbitral Tribunal on judgment of the Apex Court in *Union of India and Others Versus. Cipla Limited and Another*<sup>1</sup> is misplaced as there is no functional similarity between arbitral proceedings against the CDSL and NCL's regulatory proceedings against Edelweiss. The proceedings of NCL against Edelweiss were not founded on the right of the investors to be indemnified by the depositors which requires independent adjudication by the Arbitral Tribunal and which was not the subject matter of NCL proceedings. He would rely upon judgment of the Delhi High Court in *Brilltech Engineering Pvt. Ltd. Versus. Shapoorji Pallonji and Company Pvt. Ltd.*<sup>2</sup> in which judgment of the Apex Court in *Cipla Limited* (supra) is considered and it is held that mere approach to different fora for redressal of claims cannot be said to be a ground for holding that the case involves forum shopping. Once it is established that the scope of inquiry in the two proceedings is distinct, mere approach to another forum does not mean that Petitioners have indulged in forum shopping.

10) Mr. Tamboly would further submit that the Arbitral Tribunal has failed to appreciate that arbitration proceedings against CDSL are distinct from Edelweiss proceedings. That Edelweiss proceedings were for the purposes of inquiring into the acts of Edelweiss as Clearing Member. That the direction issued by NCL for restoration of securities by Edelweiss may not necessarily result in grant of relief in favour of Petitioner No.1, who had intervened in the said proceedings. If NCL's order is ultimately upheld, the exact list of securities which are to be reinstated by Edelweiss is unknown. That despite non-grant of stay by the Apex Court, Edelweiss has not

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1 (2017) 5 SCC 262

2 (2022) SCC Online Del 4422

submitted even the list of securities which it is supposed to restore. That in the event of Apex Court setting aside NCL's order, the Petitioner would be rendered remediless. That in any case, Petitioner Nos.2 and 3 did not intervene in NCL proceedings in any manner. That therefore Petitioners cannot be accused of forum shopping.

11) Mr. Tamboly would further submit that Petitioner No.1 is even otherwise entitled in law to prosecute both arbitration proceedings against CDSL and Edelweiss proceedings as the same are distinct from one another. He would rely upon judgment of this Court in *Gajanan Moreshwar Parelkar Versus. Moreshwar Madan Mantri*<sup>3</sup> in support of his contention that if the indemnified/ indemnity holder has incurred the liability and the liability is absolute, he is entitled to invoke the indemnity and call upon the indemnifier to pay the same. What steps may be taken by or against the indemnity holder is irrelevant and the Court need not speculate while deciding the issue of indemnification as to what may happen in proceedings initiated by or against the indemnity holder. What is required to be shown is that an absolute liability is incurred by the indemnity holder. By relying upon the judgment in *Raigad Concrete Industries & Another. Versus. ICICI Bank Ltd. & Others.*<sup>4</sup> Mr. Tamboly would submit that an indemnity holder is entitled in law to sue only the debtor/principal or only the indemnifier or both. In law there is nothing which prevents an arrangement whereby the indemnifier pays the amount due under the contract of indemnity subject to the condition or on an understanding between the indemnity holder and the indemnifier that the indemnity holder will continue to pursue its remedies against the debtor and in the event of it recovering the amounts from the debtor it would refund

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3 ILR 1942 Bom 670

4 (2009) 4 M.H.L.J. 923

the same to the indemnity holder. Mr. Tamboly would submit that Petitioners have accordingly expressly undertaken that if there is any recovery from Edelweiss towards wrongful sale of securities in question, Petitioner would return the amount to CDSL. However, this undertaking submitted by the Petitioners is erroneously misconstrued by the Arbitral Tribunal as forum shopping.

12) So far as the doctrine of election is concerned, Mr. Tamboly would submit that the Apex Court has explained the three elements of election in *Transcore Versus. Union of India and Another*<sup>5</sup> viz. (i) existence of two or more remedies, (ii) inconsistencies between such remedies and (iii) choice of one of them. That even if one out of the three elements is absent, the doctrine of election would not apply. He would submit that the doctrine of election is applicable only when there are two or more co-existent remedies available to a litigant which are repugnant and inconsistent. That in the present case it cannot be said that Respondent No.1 has initiated proceedings against Edelweiss. Merely by reason of his intervention in proceedings before SAT, which arose out of mere regulatory proceedings initiated by NCL, his substantive remedy of suing for recovery of securities is not lost.

13) Mr. Tamboly would submit that in identical circumstances, the Arbitral Tribunal in case of another client of Anugrah- Mrs. Karuna Gupta has held exactly to the contrary. That in arbitral proceedings initiated by Mrs. Karuna Gupta, the Arbitral Tribunal has rejected the objection of forum shopping/doctrine of election raised by CDSL and has not only agitated the dispute on merits, but has granted the relief of restoration of securities/payment of value of securities to the

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5 (2008) 1 SCC 125

investors. That two out of the three members of the Arbitral Tribunal in the case of Petitioners and Mrs. Karuna Gupta are the same. That in Mrs. Karuna Gupta arbitration proceedings, the Arbitral Tribunal has held that outcome of Edelweiss proceedings has no connection with the liability of CDSL as a depository towards the client of depository participant. Similar type of undertaking submitted by Mrs. Karuna Gupta of paying back monies to CDSL upon receipt thereof by Edelweiss has been accepted by the Arbitral Tribunal in that case. That recording of diametrically opposite findings by the Arbitral Tribunal in two identical cases would constitute patent illegality.

14) Mr. Tamboly would conclude by submitting that the impugned Award is perverse as no prudent man would come to the conclusion arrived at by the Arbitral Tribunal. That the same is contrary to the public policy of India as Petitioners have been prevented from exercising their rights arising out of statutory indemnity under Section 16 of the Depositories Act, 1966. That diametrically opposite views are expressed by majority constituents of Arbitral Tribunal in two cases. That the Award is patently illegal as it seeks to preclude Petitioners from exercising their statutory rights. Mr. Tamboly would accordingly pray for setting aside the impugned Award in order to enable the Petitioners to prosecute their claims on merits before the Tribunal.

15) The Petition is opposed by Mr. Kadam, the learned counsel appearing for the Respondent-CDSL submitting that the view adopted by the Arbitral Tribunal is a rational and plausible one and cannot be interfered with under narrow grounds available under Section 34 of the Arbitration Act. That the case involves unauthorised transfer of

securities kept as collaterals by Anugrah to Edelweiss. That Anugrah had defaulted in maintaining requisite margin monies with Edelweiss and to recover the deficit in margin monies, Anugrah let Edelweiss to sell the shares of various investors including Petitioners. That Edelweiss carried out necessary verification as to whether the shares were owned by Anugrah or whether the sold shares were kept as collaterals in receipt of margin money obligations arising out of particular clients. Thus, the case involves unauthorised sale of shares of clients of Anugrah by the Clearing Member (Edelweiss), though those clients did not owe anything to Anugrah or Edelweiss. That CDSL did not have any role to play in this transaction and Anugrah has not acted in its capacity as Depository Participant for the purpose of invoking statutory indemnity under Section 16 of the Depositories Act.

16) Mr. Kadam would further submit that Petitioners rightly conceived the unauthorised transactions by Anugrah and Edelweiss and pursued their remedies against Edelweiss. That the reliefs claimed in the Intervention Application filed before SAT and the relief claimed in Statement of Claim before the Arbitral Tribunal are similar, if not identical. That therefore Petitioners cannot be permitted to prosecute multiple remedies in respect of the same cause of act and for seeking same prayers.

17) Mr. Kadam would further submit that in the Statement of Claim filed by the Petitioners, they had suppressed filing of intervention application by Petitioner No.1 before SAT. That therefore Tribunal's finding of subterfuge is clearly justified. Notably, Petitioners disclosed filing of Intervention Application only after Respondents

raised an objection. The factor of non-filing of intervention application by Petitioner Nos.2 and 3 is immaterial as they have joined together with Petitioner No.1 in filing a common claim. Therefore, Petitioners cannot take refuge in the fact that Petitioners Nos.2 and 3 did not file any Intervention Application. That interest of Petitioner Nos.2 and 3 were being represented by Petitioner No.1 before SAT.

18) Mr. Kadam would further submit that initiation of arbitral proceedings against the CDSL amounts to abuse of legal process depicting a classic instance of forum shopping. Despite having obtained relief from one forum against Edelweiss, Petitioners have filed another proceedings before another forum against another party seeking the same relief. Once the Petitioners have elected to adopt the position that Edelweiss was responsible for the injury suffered by them due to illegal sale of their securities, they are estopped from holding any other party responsible for the same injury. He would submit that Petitioner's contention of absence of functional similarity between SAT's appeal and arbitration proceedings, is an artificial distinction. Since the relief claimed in both the proceedings is identical, functional similarity between the two proceedings is inevitable.

19) That the Arbitral Tribunal has rightly relied upon judgment of the Apex Court in UOI vs. Cipla Limited (supra). Mr. Kadam would further submit that Petitioner's reliance on arbitral award in the case of Mrs. Karuna Gupta is utterly misplaced as arbitration between the contracting parties is a confidential proceeding and an award passed in such arbitration is neither binding in other proceedings nor can be relied upon for any other purpose in relation to other proceedings. He would rely upon judgment of the Calcutta High Court in The Board of

**Trustees of the Port of Kolkata Versus. Louis Dreyfus Armatures SAS and Others**<sup>6</sup>. He relies upon provisions of Section 34(2) of the Arbitration Act in support of his contention that an application for setting aside the arbitral award must be confined to the records produced and submissions made before the Arbitral Tribunal. That an award cannot be nullified on the basis of something which was never a part of arbitral proceedings. That Award passed in the case of Mrs. Karuna Gupta is produced for the first time before this Court, that too by way of rejoinder.

20) Mr. Kadam would further submit that the factual context underlying Mrs. Karuna Gupta Award is materially different from the present dispute as Mrs. Karuna Gupta had not filed any intervention application before SAT and this aspect has been specifically considered by the Arbitral Tribunal while making the Award in the present case. In any case, Respondent-CDSL has challenged Mrs. Karuna Gupta Award under Section 34 of the Arbitration Act in Commercial Arbitration Petition No. 343 of 2024, which is pending and that therefore there cannot be any collateral use of the said Award in the present proceedings. It is also entirely immaterial that two of the arbitrators who decided the impugned Award and Mrs. Karuna Gupta Award are common as the Arbitral Tribunal draws its identity from its collective whole and presence of two common arbitrators does not imply that they cannot arrive at different conclusions in two different arbitrations. Mr. Kadam would further submit that judgment of this Court in **CDSL Versus. Daksha Narendra Bhavsar And Another**<sup>7</sup> does not apply as the fact situation in that case was entirely different where the stock broker had unauthorizedly transferred securities

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6 (2014) SCC Online Cal 17695

7 Com.ARBP 311 of 2024 decided on 1 December 2025

from her dormant Demat Account to stock brokers' own Demat Account in absence of any underlying activity. The issue of forum shopping was not involved in that case.

21) Mr. Kadam would conclude by submitting that for successful challenge to the arbitral award on the ground of patent illegality, the Petitioner needs to establish that the impugned Award is without reasons or is so perverse and irrational that no reasonable person would arrive at conclusions rendered by the Tribunal or that the view adopted by the Arbitral Tribunal is not even a plausible view. He relies upon judgment of the Apex Court in *OPG Power Generation Private Limited Versus. Enxio Power Cooling Solution India Private Limited and Another.*<sup>8</sup> and *Ssangyong Engineering and Construction Company Limited Versus. National Highways Authority of India.*<sup>9</sup> He would rely upon judgment of this Court in *Ivory Properties and Hotels Private Limited Versus. Vasantben Ramnikal Bhuta through Legal Heirs.*<sup>10</sup> in support of his contention that mere erroneous application of law cannot render the arbitral award patently illegal. He would submit that none of the tests to establish patent illegality have been satisfied or even pleaded in the Petition. He would pray for dismissal of the Petition.

### REASONS AND ANALYSIS

22) The case involves refusal of adjudication of claim of Petitioners by three-member Arbitral Tribunal by accusing Petitioners of forum shopping. Petitioners' claim before the Arbitral Tribunal was

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8 (2025) 2 SCC 417

9 (2019) 15 SCC 131

10 (2024) SCC Online BOM1900

for restoration by Respondent-CDSL of the subject securities sold by Edelweiss for satisfaction of dues owed to it by Anugrah towards margin money requirements. Alternatively, Petitioners prayed for award of claim in the sum of Rs.34,72,75,447/- being the market value of subject securities as on 28 August 2023 along with interest. The Arbitral Tribunal has held that Petitioners sought identical reliefs before the SAT by intervening in proceedings between Edelweiss and NCL and have secured the same. The Arbitral Tribunal has accordingly refused to adjudicate Petitioner's claim against CDSL which essentially arises out of statutory duty of CDSL to indemnify them in respect of acts arising out of negligent act of Depository Participant (Anugrah) under Section 16 of the Depositories Act. Thus, there is no adjudication of CDSL's liability to indemnify Petitioners on account of any acts of Anugrah (DP). The Arbitral Tribunal has refused to undertake such adjudication. Therefore, the short issue that arises for consideration in the present arbitration proceeding is whether the Award refusing to adjudicate Petitioners' indemnification claim against CDSL is liable to be invalidated on any of the grounds enumerated under Section 34 of the Arbitration Act.

**23)** As observed above while narrating the facts, the case involves sale of subject securities of Petitioners by Edelweiss for satisfaction of Edelweiss' dues payable by Anugrah, possibly arising out of margin monies requirements. It appears that Petitioners were effecting trades in F&O Segment, which requires maintenance of prescribed margin money. The margin money can be kept by a client with the broker in the form of monetary funds, securities, fixed deposit receipts, etc. In the present case, it appears that for satisfying margin money requirements, Petitioners had kept securities with Anugrah as

collateral. Edelweiss is a professional Clearing Member registered with NCL which provides clearing and settlement services to brokers/trading members. Edelweiss was not a member of Stock Exchange nor carried out any trading activities on the Exchange either for itself or on behalf of any client. The trading activities carried out by broker's (Anugrah) clients are cleared and settled by Edelweiss. For providing such clearing and settlement services, Edelweiss collected collaterals from Anugrah towards Anugrah's margin money requirements for settlement of trades on an aggregate basis. Most of such collaterals were in the form of shares. Between 15 January 2020 to 2 June 2020, Anugrah failed to pay its dues to Edelweiss on multiple occasions. To recover these dues, Edelweiss sold collateral shares furnished by Anugrah to the extent of Rs.462.32 cores and applied the proceeds to meet Anugrah's clearing obligation towards NCL.

**24)** On 19 September 2020, NCL issued show cause notice to Edelweiss alleging that it had failed to carry due diligence and to ascertain whether there was any debit balance for the clients towards liquidation of their securities. After receipt of reply from Edelweiss, the Member and Core Settlement Guarantee Funds Committee of NCL (**NCL Committee**) passed order dated 20 October 2020 holding that Edelweiss had failed to perform adequate due diligence while handling client securities and failed to ensure that client's security was utilised only for meeting particular client's obligation. By order dated 20 October 2020, the Committee of NCL directed Edelweiss to reinstate the securities by procuring the same from the market. After passing of the order, it appears that NSE sent two emails on 13 November 2020 and 30 October 2020 providing the list of securities for being reinstated by Edelweiss.

25) Edelweiss filed Appeal No. 441 of 2020 challenging the order passed by NCL. In Appeal filed by Edelweiss, only Petitioner No.1 filed Intervention Application which was allowed and he was permitted to intervene in the Appeal filed by Edelweiss before SAT. In his Intervention Application, Petitioner No.1 raised following prayers:-

25. In view of the aforesaid facts and circumstances, it is respectfully submitted that the Hon'ble Tribunal may be pleased to:

a. Allow the present Application and permit the Applicant to intervene and be impleaded in the captioned Appeal:

b. Direct the Appellant in captioned Appeal to return back the Subject Shares and Subject Monies belonging to the Applicant:

c. Direct the parties to the captioned Appeal to provide the Applicant with all the pleadings in the matter and the Applicant be allowed to make submissions and assist this Hon'ble Tribunal:

d. Dispense the filing of the copy of impugned order since the same is not yet made available to the Applicant by the National Clearing Ltd (Respondent No. 1)

e. Pass such Orders as this Hon'ble tribunal may deem fit and proper to secure the interest of the Applicant, being directly affected by the outcome of the Appeal.

26) By order dated 15 December 2023, SAT dismissed the Appeal preferred by Edelweiss and confirmed the order passed by NCL. Edelweiss has filed an Appeal before the Apex Court against SAT's order dated 15 December 2023, which is pending.

**WHETHER INTERVENTION BY PETITIONER NO. 1 IN NCL PROCEEDINGS BARS REMEDY OF ARBITRATION AGAINST CDSL?**

27) Respondent-CDSL contends that Petitioners have elected the remedy of claiming restoration of securities against Edelweiss and that therefore Petitioners cannot have another bite at the cherry by

seeking to fasten the liability in respect of the same transaction against CDSL through the arbitral proceedings.

**28)** It must be observed that the intervention application in SAT's Appeal filed by Edelweiss was filed only by Petitioner No.1 and no such application was filed by Petitioners Nos.2 and 3. I am not impressed by the submission canvassed on behalf of Respondent that Petitioner No.1 was representing interests of Petitioner Nos.2 and 3 in the said intervention application. Thus, so far as Petitioner Nos.2 and 3 are concerned, it cannot be contended that they had elected the remedy against Edelweiss and that therefore they cannot raise any claim against CDSL. This vital aspect is ignored by the Arbitral Tribunal who has proceeded ahead under a misconception that even Petitioners Nos.2 and 3 were intervenors in SAT's Appeal.

**29)** However, even if the aspect of Petitioner Nos.2 and 3 not being parties to intervention application filed before SAT is to be momentarily ignored, in my view, mere intervention of the Petitioner in SAT's Appeal would not bar his remedy to seek relief against Respondent-CDSL. This is because Petitioner No.1 did not initiate the proceedings before NCL. Those were regulatory proceedings initiated by NCL by issuance of a show cause notice. In proceedings before it, the NCL Committee of NCL has examined the role played by Edelweiss in the entire transaction as Clearing Member and has issued directions for restoration of securities sold by Edelweiss. Before NCL Committee, Petitioner No.1 was not a party. When the matter traveled to SAT by way of Appeal filed by Edelweiss, Petitioner No.1 was advised to intervene in the said appeal. Thus, intervention by Petitioner No.1 was at appellate stage of regulatory proceedings initiated by NCL. Though

Petitioner prayed for return of his securities in the intervention application, that prayer was incapable of being granted and has not been granted by SAT, which has merely dismissed the appeal preferred by Edelweiss.

**30)** In its appeal, Edelweiss was challenging the correctness of order passed by the Committee of NSE which had directed restoration of the securities sold by Edelweiss. NCL committee did not adjudicate individual claims of clients of Anugrah. NCL committee inquired into regulatory failure on the part of Edelweiss and directed reversal of transactions effected by Edelweiss. The issue for consideration is whether mere intervention in regulatory proceedings of NCL at appellate stage by Petitioner No.1 would foreclose his independent right to seek remedy against CDSL? The answer, to my mind, appears to be in the negative. Participation in the regulatory proceedings would not result in destruction of remedy of a person in respect of his own individual claim, which is capable of being agitated in independent proceedings. To illustrate, if Plaintiff agrees to purchase a flat in the proposed building, and the developer constructs the building in contravention of the sanctioned plan. The Municipal Corporation issues notice for demolition of the constructed building, and the developer challenges the notice issued by the Municipal Corporation in the Court. In such proceedings, Plaintiff intervenes and supports the action of the Municipal Corporation (possibly to ensure that the building is constructed in accordance with the sanctioned plan). Whether his intervention in adjudication of such regulatory proceedings initiated by the developer would destroy Plaintiff's right to institute independent suit for specific performance of contract to have the flat constructed and delivered as agreed under the agreement? The answer is obviously in the negative. Mere participation by the flat

purchaser in dispute between the developer and municipal corporation relating to irregularities in construction would not *ipso facto* destroy the right or remedy of the flat purchasers to file Suit for specific performance of his own agreement and to insist that he must be delivered the flat with exact specifications as agreed in the agreement of sale. It is possible that the inquiry in the two proceedings may overlap and could be similar to some extent. In action initiated by the developer against the Municipal Corporation, the Court would determine whether construction is in accordance with the sanctioned plan. Similarly, in the flat purchaser's suit for specific performance, the inquiry would also be whether the construction is in accordance with the sanctioned plans or not. Therefore, mere similarity of inquiry in the two proceedings would not mean that intervention by the flat purchaser in dispute between the developer and Municipal Corporation would result in destruction of his remedy to claim damages from the developer for constructing the flat contrary to the sanctioned plans or to have flat delivered as per specification. This is exactly what has happened in the present case. Petitioner No.1 has participated in the regulatory proceedings before SAT to support the order of NCL. SAT in those appeal proceedings was not expected to grant nor has granted restoration of the subject securities in the name of Petitioner No.1. In regulatory proceedings initiated by a regulator, the intervenor cannot claim relief as a matter of right whereas in his own substantive proceedings, he can claim relief as a matter of right. In my view, therefore mere participation by Petitioner No.1 in the regulatory proceedings initiated by NCL would not destruct his own substantive remedy to seek return of securities. As observed above, Petitioner Nos.2 and 3 had not even intervened in the proceedings before SAT.

**TRIBUNAL'S FINDING OF FORUM SHOPPING**

31) The Arbitral Tribunal has egregiously erred in accusing Petitioners of forum shopping, which findings are perverse to say the least. It is incomprehensible as to how mere support to the order passed by NCL by Petitioner No.1 before SAT would constitute forum shopping. Forum Shopping is a concept where a litigant approaches one Court for relief, but does not secure the desired relief and then approaches another court for the same relief. Forum shopping can also get attracted in a case where litigant deliberately creates cause of action in jurisdiction of Court for the purpose of invoking jurisdiction of that Court, when the real cause of action has arisen in the territorial jurisdiction of some other Court. In such case, forum shopping is indulged under a hope of securing favorable order from the desired Court. The concept of 'forum shopping' has been dealt with by the Apex Court in UOI vs. Cipla Limited (supra) in which it is held in paras-146 to 155 as under:

**Forum shopping**

146. The learned Solicitor General submitted that Cipla was guilty of forum shopping inasmuch as it had filed petitions in the Bombay High Court, the Karnataka High Court and also an affidavit in the Delhi High Court as a member of the Bulk Drug Manufacturers Association and had eventually approached the Allahabad High Court for relief resulting in the impugned judgment and order dated 3-3-2004 1. It was submitted that since Cipla had approached several constitutional courts for relief, the proceedings initiated in the Allahabad High Court clearly amount to forum shopping.

147. We are not at all in agreement with the learned Solicitor General. Forum shopping takes several hues and shades and Cipla's petitions do not fall under any category of forum shopping.

148. A classic example of forum shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. This occurred in Rajiv Bhatia v. Govt. (NCT of Delhi) 28. The respondent mother of a

young child had filed a petition for a writ of habeas corpus in the Rajasthan High Court and apparently did not get the required relief from that Court. She then filed a petition in the Delhi High Court also for a writ of habeas corpus and obtained the necessary relief. Notwithstanding this, this Court did not interfere with the order passed by the Delhi High Court for the reason that this Court ascertained the views of the child and found that she did not want to even talk to her adoptive parents and therefore the custody of the child granted by the Delhi High Court to the respondent mother was not interfered with. The decision of this Court is on its own facts, even though it is a classic case of forum shopping.

149. In *Arathi Bandi v. Bandi Jagadrakshaka Rao* 29 this Court noted that jurisdiction in a court is not attracted by the operation or creation of fortuitous circumstances. In that case, circumstances were created by one of the parties to the dispute to confer jurisdiction on a particular High Court. This was frowned upon by this Court by observing that to allow the assumption of jurisdiction in created circumstances would only result in encouraging forum shopping.

150. Another case of creating circumstances for the purposes of forum shopping was *World Tanker Carrier Corpn. v. SNP Shipping Services (P) Ltd.* 30 wherein it was observed that the respondent/plaintiff had made a deliberate attempt to bring the cause of action, namely, a collision between two vessels on the high seas within the jurisdiction of the Bombay High Court. Bringing one of the vessels to Bombay in order to confer jurisdiction on the Bombay High Court had the character of forum shopping rather than anything else.

151. Another form of forum shopping is taking advantage of a view held by a particular High Court in contrast to a different view held by another High Court. In *Ambica Industries v. CCE* 31 the assessee was from Lucknow. It challenged an order passed by the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT") located in Delhi before the Delhi High Court. Cestat had jurisdiction over the State of Uttar Pradesh, NCT of Delhi and the State of Maharashtra. The Delhi High Court did not entertain the proceedings initiated by the assessee for want of territorial jurisdiction. Dismissing the assessee's appeal this Court gave the example of an assessee affected by an assessment order in Bombay invoking the jurisdiction of the Delhi High Court to take advantage of the law laid down by the Delhi High Court or an assessee affected by an order of assessment made at Bombay invoking the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and consequently evade the law laid down by the Bombay High Court. It was said that this could not be allowed and circumstances such as this would lead to some sort of judicial anarchy.

152. Yet another form of forum shopping was noticed in *Jagmohan Bahl v. State (NCT of Delhi)* 32 wherein it was held that successive bail applications filed by a litigant ought to be heard by the same learned Judge, otherwise an unscrupulous litigant would go on filing

bail applications before different Judges until a favourable order is obtained. Unless this practice was nipped in the bud, it would encourage unscrupulous litigants and encourage them to entertain the idea that they can indulge in forum shopping, which has no sanction in law and certainly no sanctity.

153. Another category of forum shopping is approaching different courts for the same relief by making a minor change in the prayer clause of the petition. In *Udyami Evam Khadi Gramodyog Welfare Sanstha v. State of U.P.* 33 it was noticed by this Court that four writ applications were filed by a litigant and although the prayers were apparently different, the core issue in each petition centred round the recovery of the amount advanced by the bank. Similarly, substituting some petitioners for others with a view to confer jurisdiction on a particular court would also amount to forum shopping by that group of petitioners.

154. Finally and more recently, in *Supreme Court Advocates-on-Record Assn. v. Union of India (Recusal Matter)* 34 Khehar, J. noticed yet another form of forum shopping where a litigant makes allegations of a perceived conflict of interest against a Judge requiring the Judge to recuse from the proceedings so that the matter could be transferred to another Judge.

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.

32) The Arbitral Tribunal, I must say, has not even bothered to consider the ratio of the judgment in *Cipla Limited* and has blindly presumed that the same applies against the Petitioners. As a matter of fact, the judgment in *Cipla Limited*, far from damaging the case of the Petitioner, actually supports their case. The Arbitral Tribunal plucked out the two words 'functional similarity' and 'subterfuge' appearing in para-155 of the judgment without even bothering to discuss the real ratio in para-146 to 154 of the judgment. This is not how the judgment of the Court is to be read and applied to a given case. It is well settled

that a Judgment is an authority for what it decides and not what could be logically deduced therefrom.

33) Thus, even if the observations of the Apex in para-155 of the judgment in *Cipla Limited* about functional test are to be applied to the present case by ignoring the examples in paras-146 to 154, in my view, Petitioners still cannot be accused of forum shopping. Firstly, there is absolutely no functional similarity between the impugned arbitration proceedings and the appeal pending before the Supreme Court. The proceedings pending before the Apex Court stem out of regulatory proceedings initiated by NCL which would not result in grant of any direct relief to the Petitioners. While concentrating on seeking of identical reliefs in the two proceedings, the Arbitral Tribunal has conveniently ignored the fact that no relief is granted to Petitioner No.1 by SAT in the Appeal preferred by Edelweiss, which is dismissed by order dated 15 December 2023.

34) Describing Petitioner's conduct as subterfuge by the Arbitral Tribunal is clearly irrational. The finding is such that no fair-minded person would ever record. Use of such strong words for describing the efforts of Petitioners in getting back their stolen shares is something which ought to have been avoided by the Arbitral Tribunal. Merely because the word 'subterfuge' appears in para-155 of the judgment in *Cipla Limited* there was no reason or occasion for the Arbitral Tribunal to describe the conduct on the part of the Petitioners as a subterfuge. The Tribunal ought to have appreciated that Petitioners are made to run from pillar to post and have still not been granted the relief of reinstatement of their securities by any forum. An investor, whose shares are stolen from his/her demat account, is

bound to adopt all the available remedies and merely because he filed claim before the Arbitral Tribunal of CDSL, there was no warrant for the Arbitral Tribunal to brand the act of filing of claim before it as a subterfuge.

35) Thus, mere approach made by Petitioner No. 1 to different Fora for redressal of his claims cannot be a ground to hold that the case involves forum shopping. In this regard, reliance by the Petitioner on judgment of Delhi High Court in *Brilltech Engineering Pvt. Ltd.* (supra) is apposite in which it is held in paras-30 to 34 as under :

30. The respondent has further claimed that different amounts have been claimed by the petitioner in different proceedings. The claim before the MSME forum was of Rs. 20.87 lakhs while under Section 8 of IBC it was Rs. 99 lakhs. In the present case, the claim has been made for Rs. 2.50 crores. It is quite evident from the fluctuating amounts that nothing is due and it is only forum shopping which is being indulged into by the petitioner.

31. It can be seen from the various proceedings which have been initiated by the petitioner that different amounts had become due and payable at different times and also interest component which was being claimed, was a variable. The petitioner has given explanation for claiming the amounts before various forums depending upon when it had approached that particular forum. Merely because the petitioner has approached different forums for redressal of its claims, cannot be said to be a ground to hold that this is a case of forum shopping. Each of the provision invoked by the petitioner has its own individual scope and it cannot be said that resort to one has the effect of ousting the other forums or that it is a case of forum shopping.

32. The doctrine of election was discussed in *A. P. State Financial Corporation v. Gar Re-Rolling Mills*, (1994) 2 SCC 647 wherein it was explained that when two remedies are available for the same relief, the party has an option to elect either of them but that doctrine would not apply where the ambit and scope of the two remedies is essentially different. In *National Insurance Company Ltd. v. Mastan*, (2006) 2 SCC 641, the Apex Court explained that the doctrine of election is a branch of rule of estoppel in as much as a person may be precluded by his actions or conduct or silence when it has duty to speak, from asserting a right which he otherwise would have had. This test was endorsed by the Hon'ble Supreme Court in the case of *Ireo Grace Realtech Private Limited v. Abhishek Khanna*, (2021) 3 SCC 241.

33. In *Union of India v. Cipla Limited*, (2017) 5 SCC 262, the Supreme Court explained that a classic example of Forum Shopping is when a litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. Examples were given of cases pertaining to child custody, successive bail applications and of filing repeat applications with a slight change in the prayer clause of the petition. The functional test to determine Forum Shopping was explained as 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.

34. In the present case, the scope of enquiry in the proceedings before the NCLT and before the Arbitrator is absolutely distinct. Merely because the petitioner approached NCLT before seeking appointment of Arbitration, it cannot be said that he was indulging in Forum Shopping.

36) The Delhi High Court has thus considered the ratio of the judgment in *Cipla Limited* and has held that since the scope of inquiry in proceedings before NCLT and before the Tribunal was distinct, mere approach by the Petitioner therein to NCLT before seeking appointment of Arbitrator cannot be a ground for holding that he indulged in forum shopping. The judgment would apply to the present case since the fact situation appear to be similar.

#### **FINDING OF FUNCTIONAL SIMILARITY**

37) It is not possible to hold that there is functional similarity between the proceedings before NCL Committee and arbitral proceedings against CDSL. The scope of inquiry in the two proceedings is entirely different. In NCL proceedings, the scope of inquiry was about breach of Rules and Regulations by a Clearing Member whereas in the inquiry before the Arbitral Tribunal, the issue is about enforcement of statutory indemnity under Section 16 of the

Depositories Act. What Petitioners pursued before the Arbitral Tribunal is the remedy of indemnification by CDSL in respect of the acts committed by Depository Participant (Anugraha). Whether Petitioners would succeed in establishing such right of indemnity or not is another thing. However, doors on the Petitioners cannot be closed by the Arbitral Tribunal under a specious plea that in an unrelated inquiry one of the Petitioners supported the order passed by the NCL. In my view, therefore there is no functional similarity in the proceedings between the NCL proceedings against Edelweiss and arbitral proceedings against CDSL.

### DOCTRINE OF ELECTION

38) Mr. Kadam has fairly conceded that description of Petitioners' act as forum shopping may not entirely be correct and what the Arbitral Tribunal has actually invoked is the doctrine of election. He has drawn my attention to para-15 of the arbitral award, in which it has held as under :-

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.

*(emphasis and underlining added)*

39) However, the findings recorded in para-15 of the Award clearly indicate that though the Tribunal has referred to the remedy of supporting NCL order before SAT as 'election', the act of invocation of arbitration ultimately is concluded as the act of 'forum shopping'. The Arbitral Tribunal has expressly held that since Petitioner has indulged in forum shopping '*arbitration application does not deserve*

*consideration*'. Though the Arbitral Tribunal has not expressly applied the doctrine of election for refusing to adjudicate Petitioner's claim, I proceed to examine whether even doctrine of election would apply in the facts and circumstances of the present case.

40) The doctrine of election has been discussed by the Apex Court in *Transcore* (supra), in which it is held that there are three elements of election (i) existence of two or more remedies (ii) inconsistencies between such remedies, (iii) a choice of one of them. The Apex Court has further held that even if one out of the three elements is absent, the doctrine of election would not apply. The issue before the Apex Court was whether banks or financial institutions having elected to seek their remedies in terms of Recovery of Debts Due to Banks and Financial Institutions Act (**DRT Act**) can still invoke the remedy under the Secularization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**SARFAESI Act**) for attaching the secured assets without withdrawing or abandoning the original application filed before the DRT under the DRT Act. While answering the issue, the Apex Court held in para-64 as under :-

64. In the light of the above discussion, we now examine the doctrine of election. **There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply.** According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.

*(emphasis added)*

41) Thus, it is held that the remedy under the SARFAESI Act is an additional remedy to the remedy available under the DRT Act and together they constitute one remedy and that therefore doctrine of election does not apply. Existence of two or more remedies is thus sine qua non for applying the doctrine of election. To illustrate, if agreement for development of property is broken by reason of delay, the landowner can elect to terminate the contract and sue for damages for breach thereof or sue for specific performance (and in lieu of compensation). Here, what he makes is election as he has both the remedies available.

42) If the three tests prescribed by the Apex Court in *Transcore* are applied to the facts of present case, the first test of 'existence of two or more remedies' does not get satisfied. This is because Petitioners did not have a remedy of suing Edelweiss before the Committee of NCL by filing their own proceedings. Mere act of Petitioner No. 1 in filing intervention application before SAT therefore cannot be treated as a remedy available for Petitioners. Since the first test itself does not get satisfied, the question of application of doctrine of election does not arise.

43) Faced with the above situation, Mr. Kadam has contended that Petitioner No.1 believed that Edelweiss was responsible for injury caused to him and therefore pursued the remedy against Edelweiss. I am unable to agree. Even if it is assumed that Petitioners or any of them carried a belief of cause of injury by Edelweiss, that alone is insufficient for the purpose of concluding that they had the remedy of running behind Edelweiss. The issue here is whether there is any contractual or statutory obligation on Edelweiss towards Petitioner for

performance/breach of which Petitioners can directly sue Edelweiss? The answer is in the negative. Therefore, Petitioners on their own could not have sued Edelweiss and they have rightly not done so. As observed above, what Petitioner No,1 has done is to merely participate in the regulatory proceedings initiated by NCL which is not a remedy available to him in real sense. Therefore, even if he believed that his participation in NCL proceedings before SAT could get him his securities back, such belief, in itself, would not destroy his remedy of arbitration against CDSL.

44) In my view, therefore the doctrine of election is inapplicable to the facts and circumstances of the present case. It cannot be held that Petitioners had two remedies of suing Edelweiss before the Committee of NCL, as well as suing CDSL in arbitration proceedings and that they consciously elected the former remedy estopping them from exercising the latter one. As observed above, the former is not the remedy available to the Petitioners at all. Therefore, there is no question of election.

#### **IMPACT OF TRIBUNAL'S AWARD IN SIMILAR CASE**

45) This I believe is the real problem coming in the way of Respondent-CDSL and depicts complete arbitrariness in the findings of the Arbitral Tribunal. Mrs. Karuna Gupta is the similarly placed client of Anugrah, whose shares are also sold by Edelweiss. She invoked arbitration against CDSL for recovery of her sold shares by Edelweiss by holding CDSL responsible for the transactions in question. The Arbitral Tribunal has allowed the claim of Mrs. Karuna Gupta by Award dated 18 July 2024. At the moment, it is not necessary to

consider the findings recoded by the Arbitral Tribunal in that Award on merits, wherein CDSL as (depository) is held responsible for negligent acts of Anugrah (as DP) under Section 16 of the Depositories Act. Those findings may or may not have relevance to the case of the Petitioners, as and when their case is taken up for adjudication on merits by the Arbitral Tribunal. However, what would matter at this junction is the fact that the Arbitral Tribunal in the case of Mrs. Karuna Gupta entertained her claim on merits, despite being fully made aware of orders passed in NCL proceedings and despite pendency of Edelweiss Appeal before the Supreme Court. In arbitral proceedings of Mrs. Karuna Gupta also, Respondent-CDSL had raised the same defence of forum shopping, but the same is rejected by the Tribunal.

**46)** Before considering the manner in which the Arbitral Tribunal in the case of Mrs. Karuna Gupta has repelled the objection of forum shopping raised by CDSL, it must be observed that two out of the three members of Arbitral Tribunal in both proceedings were same. The Respondent's preliminary objection of forum shopping in the case of Mrs. Karuna Gupta has been dealt with by the Arbitral Tribunal by recording following reasons:-

#### **Forum Shopping**

15. The second Preliminary Objection raised by the Respondent is on Forum Shopping. The Respondent has contented as under:

i. That the Claimant has admitted that there is already an order operating that has been passed by a competent authority, namely NCL, in which Edelweiss has been found guilty of violating several laws and Regulations and has therefore been restore the shares/securities of the clients/constituents of Anugrah including the Claimant directed herself.

ii. That the prayer (a) at Page 21 of the SOC seeks a direction that the Respondents should restore the shares/securities of the Claimant and the NCL Order has granted the same relief to all the

shareholders/investors whose shares were illegally sold by Edelweiss. As per the Respondent, the Claimant in the present arbitral proceedings has sought an identical relief granted by NCL in the NCL Order dated 20th October 2020.

iii. That the attempt of the Claimant at Forum Shopping is clearly established by her admission in the letter dated 13th October 2023 addressed by the Claimant's Advocates to the Respondent, "wherein it is has been 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."

iv. That the Claimant had already elected her remedy by filing a claim before NSE to restore the subject Securities which was rejected by the NSE vide a reply dated 09.06.2021, to the tune of Rs. 4,30,25,057.89. Against the aforesaid rejection, the Claimant has admitted in her rejoinder at paragraph 7 (ix) page 24 that the Claimant preferred NSE Review which is pending adjudication as on date.

v. Therefore, the Respondent submitted that the present claim ought to be dismissed at the very threshold on the grounds that the Claimant has already elected her remedy before the NSE and is also praying for an identical relief of restoration, which is already granted to her by the NCL Order.

16. The Claimant's response to the above was as under:

i. That the NCL Order does not provide the list of securities which need to be re-instated by Edelweiss. Hence, it is uncertain and unreasonable to conclude that the Subject Securities fall within the purview of the NCL Order.

ii. That the Claimant has not filed any intervention application, either before the Hon'ble SAT or the Hon'ble Supreme Court and has fallen prey to illegal sale by Edelweiss, knowing fully well that the securities could not have been sold.

iii. The main contention alleging that the Claimant has resorted to Forum Shopping is based on the premise that the relief sought by the Claimant in the present proceedings are identical to the relief granted in the NCL Order.

17. The Arbitral Tribunal is convinced that the outcome of the challenge to the Edelweiss SAT Appeal before the Hon'ble Supreme Court could never be a defense for the Respondent for the reason that the NCL has yet not released the shares under dispute despite the fact that there is no stay given to the SAT order by the Hon'ble Supreme Court. It is also no one's case that NCL has provided the list of securities which are to be reinstated by Edelweiss. Presumably, the Respondent has failed to furnish any document on record to show that

the securities of the Claimant have been duly dealt with and is otherwise reflected in the NCL Order.

18. Under these circumstances, the Arbitral Tribunal has taken a plausible view that neither party is aware of the investigation details by NCL and are also indeterminate regarding the details of the shares covered in the NCL Order, more specifically details of the shares of the Claimant. The Arbitral Tribunal is unable to accept the arguments of the Respondent and thus, it would suffice to hold that no identical relief has been granted as yet to the Claimant in the proceedings before the NCL as contended by the Respondent as otherwise, in absence of any stay at SAT order, NCL would have given back Claimants' Securities. It is not in dispute that the Claimant has not filed any intervening petition in the Hon'ble Supreme Court unlike some other contestants.

19. Further, the Claimant has relied on the judgment dated 01.04.1942 of *Gajanan Moreshwar Parelkar vs. Moreshwar Madar Mantri*, (1942) 44 BOMLR 703, AIR 1942 BOMBAY 302) to justify that she is only required to show that an absolute liability is incurred, which is the admitted and undisputed loss of the Subject Securities. The Arbitral Tribunal is in agreement with the same and has no hesitation to conclude that the Claimant has sufficiently proved her loss for no fault on her part. The Arbitral Tribunal does not disagree with the pleading that the consequent action that may be adopted against the indemnity holder is irrelevant to the liability that has already been incurred. The Arbitral Tribunal has no hesitation to conclude that the Doctrine of Subrogation squarely applies and that the Claimant should have the option to choose to claim restoration of the subject Securities from the Respondent in the present proceedings and she could not be subjected to restrict her right to receive the same only under the NCL Order, subject to the right of subrogation, which the Respondent is entitled.

20. The arguments of the Respondent that the Claimant is treating her claim under section 16 of the Depositories Act as like a mere insurance policy does not impress the Arbitral Tribunal since the ingredients of any insurance policy namely, the insured, the insurer and the premium (consideration), the tenure, the insurable interest, etc. are grossly absent in the case. The argument is not tenable. It is evident that the present claim is in the nature of an alternate remedy and is not in the nature of an insurance. The Arbitral Tribunal holds that the Claimant has made out a convincing case.

21. **As stated in the Legal Notice addressed by the Claimant to the Respondent, it is clear that if any recovery is made by the Claimant from Edelweiss under the Edelweiss SAT Appeal or in the Appeal pending before the Hon'ble Supreme Court, the Claimant has undertaken to return such recovery of funds/ securities to the Respondent.** The Arbitral Tribunal has no hesitation to conclude that the Respondent could definitely step in the shoes of the Claimant and

claim the reliefs against Edelweiss as and when the Hon'ble Supreme Court decides the petition or even earlier in absence of any stay.

22, 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."

23. **In light of the Cipla case, the Arbitral Tribunal examined the subjudiced proceedings before the NSE. The Respondents submissions does not impress the Arbitral Tribunal as it is devoid of merits and there is no functional similarity between the facts therein with the present proceedings.** The Arbitral Tribunal is of the opinion that the Claimant has only sought for compensation under the Investor Protection Fund ("IPF") before the NSE and the said claim is subject to a maximum cap of Rs. 25 lakhs, as per the extant policies of the NSE for claims under IPF. The sub-judiced proceedings before the NSE does not determine the rights and liabilities of clients/constituents of Anugrah with regards to the alleged lapses on the part of the Respondent, as a custodian and trustee of the shares of the beneficial owner. Therefore, the Claimant's sub-judiced claim under the extant policy pertaining to IPF does not grant the Respondent immunity from indemnifying the Claimant for its alleged negligence in protecting and securing the interests of the clients/constituents of Anugrah.

24. The Respondent attempted to draw a parity that the relief granted by the NCL Order directing Edelweiss to reinstate securities worth Rs. 460.32 Crores also includes the Subject Securities of the Claimant. The sub-judiced proceedings before the Hon'ble Supreme Court is primarily a challenge to the NCL order and is to determine whether Edelweiss violated the relevant SEBI Circulars and guidelines/directions/

25. **For the reasons stated above, the Arbitral Tribunal has no hesitation to conclude that the present arbitral proceedings cannot be dismissed at the very threshold on the ground of Forum Shopping.**

47) Thus, the Arbitral Tribunal in Mrs. Karuna Gupta did not find any functional similarity between the NCL proceedings and CDSL

arbitral proceedings. In the case of Mrs. Karuna Gupta, the Arbitral Tribunal held that the judgment of *UOI vs. Cipla Limited* had no application. The objection of forum shopping is rejected in the case of Mrs. Karuna Gupta. However, in the present case, the Arbitral Tribunal has recorded diametrically opposite findings about existence of functional similarity and application of ratio of the judgment in *UOI vs. Cipla Limited*.

48) Faced with the situation of the Arbitral Tribunal in the case of Mrs. Karuna Gupta recording diametrically opposite findings than the one recorded in the impugned Award, Mr. Kadam has attempted to salvage the situation by offering three justifications (i) that Mrs. Karuna Gupta had not intervened in NCL proceedings (ii) that arbitration is a private dispute resolution mechanism and findings recorded in arbitral award bind only the parties, *inter-se*, not having any impact on other arbitral proceedings and (iii) that CDSL has challenged the award in the case of Mrs. Karuna Gupta in Commercial Arbitration Petition No. 343 of 2024, which is pending. None of the three grounds appeal to me.

49) So far as the aspect of Mrs. Karuna Gupta not intervening in NCL proceedings is concerned, even Petitioner Nos.2 and 3 did not intervene in NCL proceedings. Furthermore, non-participation by Mrs. Karuna Gupta in NCL proceedings is not a factor considered relevant by the Arbitral Tribunal for adjudicating her claim on merits by rejecting the objection of forum shopping. The Tribunal has merely recorded the response of Mrs. Karuna Gupta in para-16(ii) of the Award that she did not file interim application before SAT or before the Hon'ble Supreme Court. However, the ultimate reasoning of the

Arbitral Tribunal in para-17 of the Award is that NCL is yet to release the shares under the dispute despite non-grant of stay by the Hon'ble Supreme Court. The Arbitral Tribunal has also considered the fact that NCL is yet to provide the list of securities which are to be reinstated by Edelweiss. Most importantly, the Arbitral Tribunal has held that the proceedings before the Hon'ble Supreme Court are primarily a challenge to the NCL order for determining whether Edelweiss violated the relevant SEBI Circulars, guidelines, directions, etc. The Tribunal had laid emphasis on the aspect that Mrs. Karuna Gupta has undertaken to return the securities/amount if she receives any part of the same from Edelweiss through implementation of NCL Committee's order. It is held that the Respondent-CDSL can step into the shoes of Mrs. Gupta in such case. These are the reasons for rejecting the objection of forum shopping and not the factum of Mrs. Gupta not filing intervention application in NCL proceedings.

50) CDSL's second justification of arbitral Award of Mrs. Karuna Gupta incapable of being used in the present proceedings may not be entirely incorrect. No doubt, arbitration is essentially a private matter between the parties to it and outcome thereof is not intended to be applicable to third parties. Arbitral Tribunal is not a Court, much less a Court of record. Its Award does not constitute a binding precedent. Mr. Kadam may be right in this regard in relying on judgment of Calcutta High Court in *The Board of Trustees of the Port of Kolkata*. However, I am not, at the moment, considering the findings in the arbitral Award of Mrs. Karuna Gupta for upholding the claim of Petitioners. It is not that the impugned Award is being set aside solely on the ground of inconsistent award passed in the case of Mrs. Karuna Gupta. This Court has independently arrived at the conclusion that

the impugned Award suffers from patent illegality and that the findings recorded therein are in conflict with the public policy of India. The finding of forum shopping recorded in the impugned award is found to be egregiously arbitrary and irrational. The impugned Award can be set aside even without referring to the award made in the case of Mrs. Karuna Gupta. Taking diametrically opposite view in two similar arbitral proceedings on the issue of forum shopping is another irrational act on the part of the Arbitral Tribunal, adding further flavor of illegality to the otherwise patently illegal award. Therefore, this Court cannot altogether ignore the factum of Arbitral Tribunal entertaining the claim of Mrs. Karuna Gupta on merits and adjudicating the same while closing the doors on the Petitioners and denying them even the right of adjudication by erroneously accusing them of allegation of forum shopping.

51) Pendency of challenge to the arbitral Award in Mrs. Karuna Gupta before this Court is not a relevant factor. In that Petition, merits of the Award awarding the claim of Mrs. Gupta would be adjudicated. In the event, this Court invalidates the arbitral Award in Mrs. Karuna Gupta on merits, the findings recorded by this Court would have an impact on adjudication of claim of the Petitioners on merits. All that is being ensured at this juncture is that the claim of the Petitioners is being directed to be adjudicated on merits. May be that CDSL has also challenged the findings of the Tribunal in the case of Mrs. Karuna Gupta on the issue of forum shopping and the present judgment would impact that challenge. This is the reason why, after being informed that Commercial Arbitration Petition No. 343 of 2024 is filed challenging the award in the case of Mrs. Karuna Gupta, this Court adjourned the hearing of the present Petition to 9 December 2025,

when the Petition in the case of Mrs. Gupta was listed, so as to hold a possible analogous hearing of both the Petitions. However, CDSL chose not to opt for analogous hearing of both the Petitions and sought adjournment in Petition in the case of Mrs. Gupta, thereby clearly indicating that pendency of that Petition has no relevance with the present Petition. It has also made an informed choice of argument of forum shopping being decided in the present Petition despite pendency of Commercial Arbitration Petition No. 343 of 2024.

**PETITIONERS' UNDERTAKING OF RETURNING SECURITIES/AMOUNT TO CDSL IF RECEIVED IN NCL PROCEEDINGS**

52) Petitioners have undertaken to return securities/amounts in case of receipt thereof from Edelweiss. Petitioners have given express undertaking that in the event of they becoming the beneficiaries of upholding of NCL order by the Apex Court, they would return the securities/value thereof to CDSL. By giving such undertaking, Petitioners are ensuring that they do not unjustly enrich themselves on account of decision of parallel proceedings. Therefore,

53) Here reliance by Mr. Tamboly on judgment of this Court in **Gajanan Moreshwar Parelkar** (supra) is apposite. Justice M. C. Chagla (*as he then was*) has held as under:

It is true that under the English common law no action could be maintained until actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him, he had actually to wait till a judgment was pronounced, and it was only after he had satisfied the judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he

had done so. Therefore the Court of equity stepped in and mitigated the rigour of the Common Law. The Court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into Court sufficient money which would constitute a fund for paying off the claim whenever it was made. As a matter of fact, it has been conceded at the bar by Mr. Tendolkar that in England the plaintiff could have maintained a suit of the nature which he has filed here; but, as I have pointed out, Mr. Tendolkar contends that the law in this country is different. I have already held that ss. 124 and 125 of the Indian Contract Act are not exhaustive of the law of indemnity and that the Courts here would apply the same equitable principles that the Courts in England do. Therefore, if the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off.

54) Thus, once the indemnified has incurred the liability and that liability is absolute, he is entitled to call upon indemnifier to save him from that liability and pay it off.

55) In *Raigad Concrete Industries*, (supra), the Division Bench of this Court has held there is nothing in law which prohibits an arrangement whereby an indemnifier pays the amount due under the contract of indemnity subject to the an understanding between the indemnity holder and indemnifier that the indemnity holder will continue to pursue its remedy against the debtor and in the event it recovers the amounts from the debtor, it would return the same to the indemnity holder. The Division Bench has held in para-9 as under :-

9. In a contract of indemnity the indemnity holder is not bound to sue the indemnifier. The indemnity holder may sue only the debtor or only the indemnifier or both. In law there is nothing that prevents an agreement or arrangement between an indemnity holder and the indemnifier as to the manner or circumstances in and the conditions on which the contract of indemnity may be enforced. In particular we do not find anything that prohibits an arrangement whereby the indemnifier pays the amount due under the contract of indemnity subject to the condition or on an understanding between the indemnity holder and the indemnifier that the indemnity holder will continue to pursue its remedies against the debtor and in the event of it recovering the amounts from the debtor it would refund the same to

the indemnity holder. This is precisely what has been done in the present case by the first respondent, the indemnity holder by having accepted the amounts from the indemnifier, the DICGC, and placed the same in a suspense account. The fact that the amounts had been placed in a suspense account establishes that the first respondent had not accepted the same in discharge of the liabilities of the debtor's namely the appellants and the other respondents leaving it to the DICGC to in turn recover the same from them.

56) Following the above principles, in the event of the Petitioners succeeding in their claim in arbitration against CDSL and securing the sold securities/shares/value thereof from CDSL and thereafter if the Apex Court upholds the order of NCL and resultantly Petitioners secure some securities/amount from Edelweiss, the undertaking given by them for return of such securities/amount to CDSL can obviously be enforced. Therefore, mere likelihood of Petitioners being beneficiaries of NCL proceedings cannot be the ground for not adjudicating their claim against CDSL arising out of Section 16 of the Depositories Act. Whether Petitioners would be successful in establishing liability of CDSL under Section 16 of the Depositories Act is something which need not be speculated at this stage. It is therefore clarified that this aspect would be considered by the Arbitral Tribunal while adjudicating merits of the case and findings recorded in this regard are not conclusive.

### **CONCLUSIONS**

57) The impugned arbitral Award is thus patently illegal. The Tribunal's findings of forum shopping are so irrational that that no fair-minded person would ever record such findings. The view taken by the arbitral tribunal cannot pass the muster of possible view. It is an irrational and impossible view. Closing the doors of dispute resolution

mechanism on the Petitioners on account of one of them supporting the NCL's regulatory proceedings against Edelweiss renders the impugned Award in conflict with the public policy of India. Therefore, reliance by Mr. Kadam on judgments of the Apex Court in *OPG Power Generation Private Limited* (supra) and *Ssangyong Engineering and Construction Company Limited* (supra), far from assisting Respondent's case, actually militates against it. The impugned Award appears, to my mind, to be indefensible and it is liable to be set aside.

58) The matter would not end here. I have found that the Respondent-CDSL has levelled baseless allegation of forum shopping on the Petitioners. Raising of baseless objection by it has led to rejection of claim by the Arbitral Tribunal without adjudication on merits. These are commercial arbitration proceedings and costs must follow for allowing the Petition of this peculiar nature. Petitioners will have to undergo the rigmarole of another arbitral proceedings on account of irresponsible accusation of forum shopping raised by the Respondent. CDSL therefore must pay costs of the present proceedings to the Petitioners. In my view, considering the facts and circumstances of the case, it would be appropriate to direct Respondents-CDSL to pay costs of Rs.3,00,000/- to the Petitioners.

#### ORDER

59) Petition accordingly succeeds and I proceed to pass the following order:

- (i) The impugned Award dated 29 April 2024 passed by the Arbitral Tribunal is set aside.

- (ii) Respondent-CDSL shall pay to the Petitioners costs of Rs. 3,00,000/- within a period of four weeks.

**60)** Arbitration Petition is allowed in above terms with costs as directed above.

**[SANDEEP V. MARNE, J.]**