

**BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI**

**Appeal No.183 of 2010**

**Date of decision: 15.2.2011**

G.M. Bosu & Co. Private Limited  
7, Lyons Range, 3<sup>rd</sup> Floor,  
Room No.2B, Kolkata.

..... Appellant

Versus

1. Securities and Exchange Board of India  
SEBI Bhavan, Plot No.C-4A,  
G Block, Bandra Kurla Complex,  
Mumbai.

2. Central Depository Services (India) Limited  
Phiroze Jeejeebhoy Towers,  
17<sup>th</sup> Floor, Dalal Street, Fort,  
Mumbai.

3. Mrs. Atreyee Chakraborty  
23K, Fern Road, Kolkata.

.....Respondents

Mr. Deepak Dhane, Advocate for the Appellant.

Dr. Poornima Advani, Advocate with Mr. Ajay Khaire and Ms. Amrita Joshi, Advocates for Respondent no.1.

Mr. Zal Andhyarujina, Advocate with Ms. Bhavini Menon and Mr. Devang Kanakia, Advocates for Respondent no.2.

None for Respondent no.3

CORAM : Justice N.K. Sodhi, Presiding Officer  
P.K. Malhotra, Member  
S.S.N. Moorthy, Member

Per : Justice N.K. Sodhi, Presiding Officer

G.M. Bosu & Co. Private Limited, the appellant before us is a participant of the Central Depository Services (India) Limited, a depository under the Depositories Act, 1996 and it is respondent no.2 in this appeal. It shall be referred to hereinafter as the depository. The appellant is also a stock broker registered with the Securities and Exchange Board of India (for short the Board) and a trading member of the Calcutta Stock Exchange. Mrs. Atreyee Chakraborty is the third respondent and she has not appeared despite service. Her husband late Manoj Ranjan Chakraborty was a registered holder of 1100 equity shares of ITC Limited (for short the company) which were held by

him in physical form. After the death of Manoj Ranjan Chakraborty, respondent 3 got in touch with one Jayanta Kumar Pyne (since deceased and hereinafter referred to as Pyne) who helped her in getting the shares transferred in her name. On the advise of Pyne that a demat account was required for the said purpose, respondent 3 entrusted the task of opening such an account to him. She handed over to him the share certificates pertaining to the aforesaid shares and another share certificate representing 100 shares of the company which stood in her name and in the name of her daughter. Pyne opened the demat account with the appellant which issued printed receipts acknowledging the receipt of share certificates representing 1200 shares of the company. It is pertinent to mention here that Pyne was an ex-employee of the appellant and had been working for the husband of respondent 3 and was, thus, known to both of them. It is the case of the third respondent that on the representation of Pyne that her signatures were required on some forms for opening a demat account, she had signed a number of blank printed forms and other documents including delivery instruction slips (DIS) in good faith and was under the impression that those documents were necessary for opening a demat account. It is also the case of respondent 3 that Pyne was responsible for fraudulently transferring some of the shares to third parties and some in his own name. The dispute in this appeal is only in regard to 100 shares of the company which have over the years become 1500 due to stock split of the shares from ₹ 10 to ₹ 1 per share and also because of corporate benefits. Since respondent 3 felt that Pyne had defrauded her, she made a complaint to the police and it appears that the police had summoned both the parties. We are not concerned with what transpired before the police but the fact of the matter is that Pyne, by his hand written note dated October 21, 2003 duly signed by him, confessed that he had cheated respondent 3 and had obtained her signatures on some forms including DIS without her consent and transferred the shares illegally. The relevant part of his hand written note reads as under:

“I have taken the signatures of A. Chakraborty without her consent in order to deceive her and to transfer it illegally. (200) shares sold to Soumitra Roy Chowdhry, (100) deposited with B.K. Guha, (100) Surapati Mukherjee, (100) shares to Sanjay Chakraborty. I have taken all the sale proceeds and I misappropriated the money. I have cheated Mrs. Atreyee Chakraborty.

I have also forged the signature of Chaity Chakraborty on the transfer deed daughter of Atreyee Chakraborty.

Schedule of Payment

1. I will make the delivery of (120) ITC Limited shares within 8/11/2003.
2. I will make delivery of (580) shares within 8/02/04 of ITC Ltd.

If I do not pay the dues within the stipulated time or in my absence my legal heirs Madhavi Pyne and Delejani Mullick will be liable to pay the dues with interest to Mrs. Atreyee Chakraborty.”

Sd/-

JayantaKumar Pyne

21.10.2003”

The hand written note by Pyne has been witnessed by respondent 3 and one Sanjay Chakraborty.

2. It appears that soon after executing the aforesaid hand written note, Pyne expired and the commitment made by him regarding the delivery of shares to respondent 3 remained unfulfilled. Respondent 3 then made some complaints to the Board making a grievance that she had been defrauded of the shares by Pyne and that she had suffered a financial loss amounting to ₹ 3 lacs. As already stated above, the dispute before us is only in regard to 100 shares which are stated to have been fraudulently transferred by Pyne. Alongwith the complaint, respondent 3 had sent to the Board a copy of the hand written note executed by Pyne accepting his liability to deliver the shares to her. She also made a complaint to the appellant with which she had her demat account alleging that she had been defrauded of the shares of the company by Pyne and she further alleged that Pyne was acting as a sub-broker of the appellant and, therefore, she claimed damages to the tune of ₹ 3 lacs for harassment and loss suffered by her. Since she did not get any response from the Board in regard to her complaint, she filed Writ Petition no.1368 of 2006 in the High Court of Calcutta for a mandamus to direct the Board to initiate proceedings against the depository and its participant, the appellant. The Writ Petition was disposed of on November 28, 2006 and the operative part of the order passed by the High Court reads as under:

“For these reasons, I dispose of the writ petition ordering that after giving reasonable opportunity of hearing to the petitioner and the second and third respondents, the first respondent shall give a decision regarding the question whether complaints made by the petitioner called for initiation of proceedings under any provisions of law. Such decision shall be given within four weeks from the date of communication of this order. If the first respondent holds that proceedings are to be initiated, then requisite proceeding shall be initiated at once and after making necessary enquiries in which the parties concerned shall be involved, the first respondent shall

give final decision in the proceedings within twelve weeks from the date of initiation of the proceedings. The decision taken by the first respondent shall be communicated to all concerned immediately. It is made clear that nothing in this order shall influence the consumer forum in course of adjudication of proceedings pending before that forum. There shall be no order for costs in the case.”

In compliance with the directions issued by the High Court, the Board summoned the depository, the appellant and also respondent 3 and after hearing them and perusing the relevant documents submitted by them came to the conclusion that the complaint of respondent 3 did not call for initiation of proceedings by the Board. This decision was communicated by the Board to respondent 3 as per letter dated January 11, 2007 the relevant portion of which reads thus:

“After hearing you and other concerned parties (i.e. CDSL and M/s. G.M. Bosu & Co. Pvt. Ltd.) and perusing the relevant documents submitted in this regard, it is observed that M/s. G.M. Bosu & Co. Pvt. Ltd., the Depository Participant opened your Depository Account on the basis of application form signed by you on June 23, 2003. You had handed over the shares of ITC to Late Jayanta Kumar Pyne. You had also signed the Delivery Instruction Slips (DIS) and Transfer Deeds (TD) and handed over the same to Late Jayanta Kumar Pyne. The said shares of ITC were transferred on the basis of your signed DIS and TD.

It is also observed that you had submitted a copy of the written confession of Late Jayanta Kumar Pyne admitting that he had transferred the shares and misappropriated the sale proceeds. Late Jayanta Kumar Pyne also confessed in writing that he had cheated you. Therefore, it is a case of private arrangement between you and Late Jayanta Kumar Pyne, where Late Jayanta Kumar Pyne acted contrary to your instructions.

Since this is a case of private arrangement between you and Late Jayanta Kumar Pyne, an unregistered entity, SEBI has no role to play in this regard and your complaint does not call for initiation of proceedings by SEBI.”

Respondent no.3 was not satisfied with the decision of the Board and again approached the High Court by filing Writ Petition no.733 of 2007 in the High Court of Calcutta. She made a grievance that the depository and the appellant, its participant were negligent in not ensuring that payment had been received by her before they transferred her shares in the name of third parties and, therefore, they violated Regulation 32 as it then stood of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 (for short the regulations). A learned single judge of the High Court took note of the earlier Writ Petition filed by respondent 3 and the order passed therein and also

noticing the provisions of regulation 32 of the regulations, disposed of the writ petition on March 12, 2010 and the operative part of the order reads as under:

“In the circumstances, I dispose of the writ application by directing the SEBI to make an enquiry as to how this depository participant has ensured in terms of Regulation 32 that the depositor was paid before effecting transfer, upon notice to the participant and upon hearing the necessary parties including the Writ Petitioner and by a reasoned order. If it is found that proper “mechanism” under Regulation 32 was not in place of the Regulation steps may be taken accordingly. I make it clear that enquiry should be confined to this issue only and should be concluded within 8 weeks from the date of communication of this order.”

In compliance with the aforesaid directions of the High Court, the whole time member of the Board summoned the appellant, the depository and respondent 3 and after affording a personal hearing to them on May 31, 2010 passed a detailed order on June 4, 2010 running into 12 pages holding that the appellant and the depository had violated regulation 32 of the regulations as it then stood and treating this order as a show cause notice called upon the appellant and the depository to show cause why they should not be directed jointly and severally to compensate respondent 3 in respect of 1500 shares of the company that would have accrued to her in respect of the original 100 shares which are the subject matter of the present dispute. The appellant filed its detailed reply denying that it had violated regulation 32. The entire history as to how the demat account had been opened and the manner in which Pyne had duped respondent 3 by transferring the shares had been stated in the reply. The case of the appellant is that the DIS is required to be filled by the client and the appellant as a participant, is only to ensure the transfer of securities as per the instructions contained therein. The appellant claims to have enquired from both respondent 3 and Pyne about the validity of the DIS and the relevant payment and only on being informed that everything was in order, the appellant recommended the transfer of the securities. It was pleaded that the appellant had complied with regulation 32 of the regulations. On a consideration of the material on the record and after hearing the appellant and the depository, the whole time member reiterated his earlier findings recorded in the order dated June 4, 2010 which was treated as a show cause notice and held that both the appellant and the depository were negligent in not ensuring that respondent 3 had received the payment before transferring her shares and were, thus, guilty of violating regulation 32 of the regulations. Curiously enough, by his

order of August 20, 2010 he directed only the appellant to credit 100 shares of the company along with further benefits that would have accrued to respondent 3 (which come to 1500 shares now) in her demat account within a period of 30 days from the receipt of the order. The appellant was further directed to file a compliance report with the Board to that effect. The appellant was informed that in case of failure to comply with the direction, the Board would initiate appropriate proceedings against it in accordance with law. This direction has been issued by the whole time member exercising powers under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act). It is against this order that the present appeal has been filed.

3. We have heard the learned counsel for the parties who have taken us through the record and are of the view that the impugned order cannot be sustained. Regulation 64 of the regulations provides that a depository or a participant who contravenes any of the provisions of the Act, the Depositories Act, the bye-laws, agreements and the regulations shall be dealt with in the manner provided under Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008 (hereinafter referred to as the intermediaries regulations). The learned counsel appearing for the appellant and the depository strenuously contended before us that their clients had not violated the provisions of regulation 32 of the regulations. They further contended that assuming, without admitting, that there was a violation, the only course open to the Board was to proceed against them under Chapter V of the intermediaries regulations and that it was not proper for the Board to exercise powers under section 11B of the Act and issue directions. There is force in this argument. Regulations 32 as it then stood and the relevant part of regulation 64 of the regulations are reproduced hereunder for facility of reference:

**“Regulation 32**

**32. Transfer to be effected only after payment** – The depository shall satisfy the Board that it has a mechanism in place to ensure that the interest of the persons buying and selling securities held in the depository are adequately protected and shall register the transfer of a security in the name of the transferee only after the depository is satisfied that payment for such transfer has been made.

## Regulation 64

### Liability for action in case of default

**64.** A depository or a participant who-

- (a) contravenes any of the provisions of the Act, the Depositories Act, the bye-laws, agreements and these regulations;
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....

shall be dealt with in the manner provided under Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008”

Regulation 32 requires a depository to satisfy the Board that it has a mechanism in place to ensure that the interest of persons buying and selling securities is adequately protected. It is no one's case before us that the depository did not have such a mechanism in place. This regulation also required a depository at the relevant time to transfer a security only after satisfying itself that payment for the transfer had been made. The whole time member has found that this part of the regulation had been violated by the depository and also by the appellant since they did not satisfy themselves that payment for the transfer of shares had been received by respondent 3 before they were transferred from her account. The plain language of regulation 32 makes it clear that the obligation to satisfy itself is only on the depository and no such duty is cast on the participant. A participant is only an agent of the depository. It is relevant to point out that this obligation of the depository has also been done away with when this regulation was amended with effect from August 8, 2008. The words “and shall register the transfer of a security in the name of the transferee only after the depository is satisfied that payment for such transfer has been made” were deleted. We cannot, therefore, agree with the Board that the appellant violated this regulation. Assuming (though not holding) that there was such a violation, regulation 64 of the regulations requires that the depository or a participant who contravenes any provision of the regulations “**shall be dealt with in the manner provided under Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008.**” The word ‘manner’ means that the procedure laid down in Chapter V of the intermediaries regulations shall have to be followed. Regulations 24 to 30 in that chapter provide the detailed manner/procedure according to

which the delinquents are to be dealt with. These provisions envisage a two stage inquiry before taking any action against the delinquent. A designated authority is required to be appointed which shall issue a show cause notice to the delinquent and after holding an inquiry, a report shall be submitted. The report will then be considered by the designated member after issuing a notice to the delinquent who will also be furnished with a copy of the report. It is only then that the designated member can take any one or more of the actions referred to in regulation 27 of the intermediaries regulations keeping in view the facts and circumstances of the case. Admittedly, this procedure has not been followed and neither the appellant nor the depository were dealt with in the manner prescribed in Chapter V of the intermediaries regulations. Instead, directions have been issued under section 11B of the Act to compensate respondent 3. It is true that the powers of the Board under section 11B are wide enough to issue directions to any intermediary or person associated with the securities market but such powers are to be exercised only to protect the interests of investors in securities or for orderly development of securities market and to preserve its integrity. These directions cannot be punitive in nature and cannot be issued to punish a delinquent. Punitive action against any delinquent intermediary could be taken only in accordance with the intermediaries regulations. In this view of the matter, the direction issued by the whole time member directing the appellant to compensate respondent 3 on the ground that it (appellant) had violated regulation 32 of the regulations cannot be sustained.

4. We are also of the considered view that, in the facts and circumstances of this case, a direction of the kind issued by the whole time member was not called for. It is the third respondent's own case that she had been cheated and duped by Pyne who got her signatures on blank forms including DIS on the basis of which he transferred the shares without her consent. If Pyne had duped her, is it fair to direct the appellant to compensate her. We do not think so. Her remedy, if any, would lie against the heirs of Pyne. We think the Board was right when it rejected her complaint by its letter of January 11, 2007 and it was rightly observed that it had no role to play as the matter was between the third respondent and Pyne. Moreover, why did she sign the blank DIS form(s) which are like cheques and since she did that, she has herself to blame.



5. We are conscious of the fact that the second writ petition filed by respondent 3 had been disposed of by the Calcutta High Court with a direction to find out whether there was any violation of regulation 32 of the regulations. If the Board was of the view that there was any such violation, it could only proceed against the delinquent(s) in accordance with law. A direction of the kind impugned in this appeal is not the answer.

In the result, the appeal is allowed and the impugned order set aside with no order as to costs.

Sd/-  
Justice N.K.Sodhi  
Presiding Officer

Sd/-  
P.K. Malhotra  
Member

Sd/-  
S.S.N. Moorthy  
Member

15.2.2011

Prepared and compared by  
RHN

