

CYBER APPELLATE TRIBUNAL
(Ministry of Communications & Information Technology)
Jeevan Bharti (LIC) Building, Connaught Place,
New Delhi

APPEAL NO. 1/2009

Date of decision May 26,2010

SH. Harish Kumar C.Vakaria**APPELLANT**
Through Mr.Manan S.Thakker,
Advocate and
Mr.Hardik Gupta,Advo

Vs

M/s India Infoline Ltd..**RESPONDENT**
Through Mr.Y.H.Motiramani,Advo.

CORAM:

HON'BLE MR. JUSTICE RAJESH TANDON,
CHAIRPERSON

- | | | |
|-----------|--|------------|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not | YES |
| 3. | Whether the judgment should be Reported in the Digest. | YES |

CYBER APPELLATE TRIBUNAL
(Ministry of Communications & Information Technology)
Jeevan Bharti (LIC) Building, Connaught Place,
New Delhi

APPEAL NO. 1/2009

Date of decision May 26,2010

In Re:

SH. Harish Kumar C.Vakaria,
S/o Sh.Chandrakant Vakharia,
8/B,Dariyapur Patel Society,
Opp.Kirtisagar Flats,
Usmanpura,
Ahmedabad-380013, Gujarat

.....APPELLANT
Through Mr.Manan S.Thakker,
Advocate and
Mr.Hardik Gupta,Advo

Vs

M/s India Infoline Ltd..
DP Id:12044700
High Street I, Fourth Floor,
Law Garden Cross Roads,
Ahmedabad-380006, Gujarat

... RESPONDENT
Through Mr.Y.H.Motiramani,Advo.

JUSTICE RAJESH TANDON, CHAIRPERSON

Heard Mr.Manan S.Thakker, Advocate assisted by Mr.Hardik Gupta, Advocate for the appellant and Mr.Y.H.Motiramani, Advocate for the respondent.

By the present appeal, the appellant has prayed for the setting aside of the impugned order-in-original No.SEC/ CBC/1/ 2009/160 DST dated 20th May,2009 passed by Sh.Raj Kumar,

Adjudicating Officer, Gujarat State whereby dismissing the petition filed by the petitioner, appellant herein, under Section 43 of the Information Technology Act,2000.

Briefly stated the facts of the present appeal are that on 18th January,2008 Online Demat Account was opened by India Infoline Ltd. A/C No.1204470001776230 and POA ID was given as VAHARISH. It is stated that ownership of Online Trader Terminal Software was given i.e. access to Online Trader Terminal Software for the said POA ID (Client ID- VAHARISH). On 22nd February,2008, an application was made by the appellant for the Initial Public Offer of Rural Electrification Corporation Ltd. (REC Ltd.) in the name of Harishkumar Chandrakant Vakharia (HUF). Cheque Number was 163127, cheque amount was Rs.94,500/-, Bank name was ICICI Bank, S.G.Road branch and the Bank A/C number was 029501001050 of HUF saving account.

Appellant has submitted that on 7th March,2008, Karvy.com displayed allotment of 121 (amount Rs.12,705/-) shares of REC Ltd. and remaining amount of Rs.81,795/- came to be credited into the above mentioned bank account. It is further submitted that the said shares were not credited in the appellant's Online Demat Account after they were allotted. A message was alleged to have been displayed that Online Demat Account is closed. A similar letter was also sent by Karvy on 11th March,2008.

According to the appellant, the details of the account opening date and status are given as under:-

“DP ID	12044700	Client ID	01776230
A/C opening date:	18-Jan-2008	A/C Category	Regular BO
Account Status;	Active	Purchase Waiver	Y

BO Status:	Individual	BO Sub Status	Individual-Resident.
DP Int.Ref:	154843	A/C Cl./Susp.Date	
CM-ID			

First Holder Name: HARISHJKUMAR VAKHARIA

Bank Name : ICICI Bank Ltd. SG Road branch, Ahmedabad.
 Bank address: SG,Road, Ground floor, Sarthik 2 Complex,
 Opp.Rajpath Club. Bodakdev, Ahmedabad-
 380054, India, Gujarat

Tax Deduction Status: Resident Individual
 SEBI Regd.No.:
 RBI Reg.No. RBI Approval Date.
 POA ID: VAHARISH
 POA Name: INDIA INFORLINE SECURITIES PVT. LTD.

According to the appellant, the Online Demat Account came to be opened in the status of individual instead of status applied i.e. HUF and during the course of audit the issue had come to the light to the effect that the respondent had closed and cancelled the said demat account and suspended Online Trading Terminal Software for 37 days (24.2.2008 to 1.4.2008) without any permission, authorization or alternative arrangement. After the suspension of the said Online Trading Terminal Software the original Online Demat Account No.1204470001776230 and Online Trading Terminal Software remained suspended for 37 days i.e. between 24.2.2008 to 1.4.2008 till the new Online Demat account with correct status i.e. HUF was opened by the respondent on 1.4.2008.

Appellant has submitted that due to unauthorised closing/suspension of the demat account, he has suffered the losses to the extent of Rs.2,555/- (Online Demat A/c opening charges and Online Trader Terminal Software charges, Rs.3013/- (Difference amount of highest market price of 121 shares of REC Ltd. and

Purchase Price. (121 shares 130-105), Rs.1655/- (Loss on Rs.94,500/- as the amount remained blocked for a period of one month at the rate of 21%, private lending rate.

According to the appellant, due to unauthorized suspension, the amount of Rs.94,500/- could not be paid back to Mrs.Veena Baxi, Creditor as per commitment on 8.3.2008 i.e. the due date for making payment to the said creditor. Appellant has further stated that on 20.8.2008, 100 Nifty Futures (expiry date 28.8.2008) was purchased by the respondent in Online Demat A/c with the help of Online Trader Terminal Software without any permission and authorization of the applicant as will appear from the E-Contract dated 20.8.2008.

Appellant has further submitted that Online demat account was again accessed from Online Trader Terminal Software without any authorization and 121 shares of REC Ltd. were sold for recovery of loss that was fraudulently charged into the said Online Demat account after fraudulently purchasing 100 Nifty futures. According to the appellant he was deprived of investment of 121 shares of REC Ltd. which remained blocked from 22.8.2008 to 18.9.2008 (28 days), therefore, the entire conduct of the Indiainfoline Ltd. is fraudulent and the appellant has suffered a loss on account of the same.

The appeal was contested by the respondent by denying the averments contained therein. Respondent has taken objection that the appeal is beyond the period of 45 days as prescribed in Section 57 of the IT Act and submitted that the appellant has not filed any application for condonation of delay. It is further submitted that the appellant has not placed on record all the relevant documents. Respondent has submitted that the case as well as appeal is being contested for limited purpose of placing on record various agreements executed between the parties which contained an Arbitration clause for resolving the disputes between the parties. It

is further stated that the respondent has filed before the Adjudicating Officer an application under Section 8 of the Arbitration and Conciliation Act,1996.

It was submitted that the respondent has not committed any offence or that there was unauthorized access-suspension-disruption-damage to Online Demat Account or Trading Terminal Software as alleged or otherwise.

Heard the counsel for the parties.

Counsel for the appellant has submitted that due to unauthorised closing/suspension of the demat account, he has suffered the losses to the extent of Rs.2,555/- (Online Demat A/c opening charges and Online Trader Terminal Software charges, Rs.3013/- (Difference amount of highest market price of 121 shares of REC Ltd. and Purchase Price. (121 shares 130-105), Rs.1655/- (Loss on Rs.94,500/- as the amount remained blocked for a period of one month at the rate of 21%, private lending rate.

On the other hand Counsel for the respondent has submitted that the entire documents filed before the Adjudicating Officer have not been filed before this Court and that there was an arbitration clause for which there was an agreement for referring the matter to the Arbitrator.

In view of the aforesaid submissions made by the parties, **following points arise for consideration in this appeal.**

- (i) Whether the appeal was within time?**
- (ii) Whether the appellant has suffered a loss on account of the suspension of demat account.?**
- (iii) Whether necessary parties are represented in order to decide the complaint?**
- (iv) Whether there was any arbitration clause and the matter was not liable to be adjudicated under Section 43 of the Information Technology Act.**

(v) **Relief.**

My findings on the above points are as under:-

Point No.(i)

First point for consideration is, whether the appeal was within time.

Coming to the first submission regarding the appeal having been barred by time. On 21st December,2009, the matter was heard and after hearing both the parties the delay was condoned.

While condoning the delay, a reference has been made to Section 57 of the Information Technology Act which provides as under:-

57.Appeal to Cyber Appellate Tribunal.-

- (1) Save as provided in sub-section (2), any person aggrieved by an order made by Controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal having jurisdiction in the matter.
- (2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.
- (3) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Cyber Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Counsel for the appellant has submitted that he has received the copy of the judgment on 29th May,2009 and the appeal was filed on 7th July,2009 and therefore, the appeal shall be treated as well within time. The appeal, therefore, cannot be treated as beyond time.

More so this controversy has already been raised and decided vide order dated 21st December,2009 and, therefore, the point is decided in the negative.

Point No.(ii)

The second point for consideration is, Whether the appellant has suffered a loss on account of the suspension of demat account.

This appeal relates to a complaint filed under Section 43 of the Information Technology Act,2000 alleging therein that huge losses have occurred to the complainant on account of the fraudulently, illegal and dishonest conduct by the respondent, M/s IndianinfoLine Ltd. in relation to the loss of trading terminal on line and demat account.

Counsel for the appellant has placed reliance on the following losses due to cancellation and suspension of the demat account.

“Loss suffered due to unauthorized closing, canceling and suspension.

- (i) Rs.2,555/-. Online Demat A/c opening charges and Online Trader Terminal Software charges, even though services were not provided.
- (ii) Rs.3,013/-. Defference Amount of highest market price of 121 shares of REC Ltd. and Purchase Price (121 shares (130Rs.-105Rs.)

- (iii) Rs.1,655/-. Opportunity Loss on Rs.94500/- as the said amount remain blocked for a period of 1 month @ 21%-private lending rate.

- (vi) Huge Reputational Loss as full amount of Rs.94500/- could not be paid back to Mrs.Veena Baxi (Creditor) as per commitment as shares of REC Ltd. could not be sold due to unauthorized suspension & cancellation of Online Demat Account and Online Trading Terminal Software. Full payment of Rs.94500/- could not be made to Mrs.Veena Baxi on 8.3.2008 i.e. the due date for making payment to the said creditor. On 8.3.2008, Rs.81,795/- stood to the credit of Savings HUF Bank A/c No.029501001050, however, an amount of Rs.12,705/- could not be credited on account of the said amount being blocked in the issue of REC Ltd.

On the other hand, counsel for the respondent has pointed out that since he has already filed an application under Section 8 of the Arbitration and Conciliation Act and that application having not been decided, it was not possible for him to argue the case on merits either before the Adjudicating Officer or before this Appellate Tribunal unless and until the application under Section 8 of the Arbitration and Conciliation Act is decided finally.

The respondent has alleged before the Adjudicating Officer to the following effect:-

“At page 39 and 40 of the respondent’s application filed before the Adjudicating Officer, is a DP-Client Agreement between a participant and a person seeking to open a beneficial owner’s account. Since the very foundation of relationship between the petitioner and the respondent is the said agreement, all types of operations of the demat account, including the purported suspension/ closure/ cancellation, is covered by the said agreement.

Clause 1 of the said agreement provides that the provisions of Depositories Act,1996, SEBI (Depositories and Participants)Regulations, 1996, Bye Laws and

Operating Instructions issued by CDSL form part of the agreement. Clause 11 provides for arbitration clause.

Section 16 of Depositories Act,1996 provides that if any loss caused to the beneficial owner due to negligence of the depository or the participant, then the beneficial owner can be indemnified.

Even in the notice issued by the petitioner's advocate the allegation is of breach of contractual agreement by the respondent. Thus the first issue of suspension of demat account is covered by the DP-Client Agreement.

At pages 14-19 of the petition, there is a contract note printed on 22.9.2008. The contract notes themselves provide for arbitration clause in respect of any dispute arising therefrom.

Clause 3 of the contract notes provides for submitting the dispute to arbitration within six months from the date on which the claim, differences or dispute arose or shall be deemed to have arisen. Such period of six months is applicable to a person who raises the dispute by not agreeing with the contents of the contract notes.

At pages 20 to 26 of the respondent's application, is a Broker/Client Agreement for trading on NSE. The agreement provides for arbitration clause.

At pages 45-56 of the respondent's application, are the Byelaws and Regulations pertaining to arbitration."

The respondents have replied the appeal as under:

"That the appellant has not placed on record all the relevant documents that would be required for the purpose of proper adjudication of the present appeal. That the proceedings before the Adjudicating Officer was conducted on 23.3.2009, 30.3.2009, 4.4.2009 and 15.4.2009. On 15.4.2009, the appellant had filed his written submissions before the Adjudicating officer and hearing was concluded on the same date. The same is also observed by Adjudicating Officer in paragraph 2 of the impugned judgment. That the respondent is surprised to note that the appellant's Advocate has filed

written submissions dated 24.4.2009 before the Adjudicating Officer. The respondent or its advocate is never supplied a copy of the said written submissions dated 24.4.2009, filed after conclusion of hearing before the Adjudicating Officer. The Appellant has produced on record a circular dated 10.5.2005 issued by National Stock Exchange of India Limited. The said circular is placed on record for the first time in the present appeal and does not form a part of the record before the Adjudicating Officer. The respondent states that the present reply is filed for limited purpose of placing on record various agreements, executed between the Appellant and the respondent, containing the arbitration clause for resolution of the disputes between the parties. The respondent submits that the appellant had issued a notice dated 14.4.2008, through his Advocate, claiming damages in the sum of Rs.5,00,000/-. However, in the application under Section 43 of the Act, the Appellant has claimed damages in the sum of Rs.75,000/-. After issuance of the notice by the Adjudicating Officer, the respondent appeared before the Adjudicating Officer and filed an application under Section 8 of the Arbitration and Conciliation Act,1996.”

Coming to the merits of the controversy, the Adjudicating Officer has recorded the findings that the appellant has not produced any evidence to suggest that M/s India Infoline Ltd. allegedly disrupted the system and denied access to the system without the permission of owner ie. CDSL and BSE. The finding is to the following effect:-

“As per the facts of the case, the respondent M/s India Infoline has entered into appropriate legal agreements with M/s CDSL and BSE for conducting the trade and brokerage business. The petitioner has only stated but did not produce any evidence to suggest that M/s India Infoline allegedly disrupted the system and denied access to the system for the petitioner, without the permission of the owner i.e. CDSL and BSE. Likewise, there is no evidence produced by the petitioner to suggest that the alleged fraudulent charges towards brokerage and trading losses into the account of the petitioner by the respondent were without the permission of the owner i.e. CDSL and BSE. Thus, the petitioner has failed to establish the primary

requirement for applicability of section 43 of the Information Technology Act that the respondent's actions were without the permission of the owner of the computer, computer systems or computer network.”

The Adjudicating Officer shall give the respondent sufficient opportunity to represent his case on merits.

The point is decided accordingly.

Point (iii)

The third point for consideration is, whether necessary parties are represented in order to decide the complaint?

From the records it appears that necessary parties i.e. (i) CDSL (Central Depository Services (India) Ltd., (ii) BSE (Bombay Stock Exchange) and (iii) NSE (National Stock Exchange) have not been impleaded by the complainant. before deciding the merits of the controversy.

As will appear from the aforesaid facts of the case that necessary parties having not been impleaded and, therefore, the Adjudicating Officer has observed that on the lack of evidence, no relief can be granted to the complainant. Therefore, there was a lack of evidence in coming to the conclusion by the Adjudicating Officer of assessment of compensation.

Obviously the court has power to implead the parties and if the evidence was necessary in order to come to the conclusion regarding the compensation which should be allowed in accordance with the provisions contained under Section 47 of the Information Technology Act. The Adjudicating Officer should have allowed to implead the complainant as necessary parties in order to come to the conclusion regarding the compensation as claimed by the complainant. Section 47 of the IT Act provides the criteria of granting the compensation. It reads as under:-

“47.Factors to be taken into account by the adjudicating officer.- While adjudging the quantum of compensation under this Chapter, the adjudicating officer shall have due regard to the following factors, namely:-

- (a) the amount of gain of unfair advantage, wherever quantifiable, made as a result of the default;
- (b) the amount of loss caused to any person as a result of the default;
- (c) the repetitive nature of the default.”

So far as the evidence is concerned, the necessary parties may be permitted in accordance with Order 1 Rule 10 sub-clause (2) of the Code of Civil Procedure, which reads as under:-

“(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

As will appear from the sub-clause (2) of Order 1 Rule 10 CPC that whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon may be in such of the proceedings be directed to be impleaded as one of the parties.

Aforesaid provision has been interpreted in the case of Savitri Devi Vs. District Judge, Gorakhpur & others, reported in AIR 1999 SC 976 to the effect that, “The Court is empowered to join a person whose presence is necessary for the prescribed

purpose and can not under the rule direct the addition of a person whose presence is not necessary for that purpose.”

The Apex Court in the case of Savitri Devi (supra) has observed as under:-

“In Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, (1992) 2SCC 524 : (1992 AIR SCW 846), this Court discussed the matter at length and held that though the plaintiff is a ‘dominus litis’ and not bound to sue every possible adverse claimant in the same suit, the Court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the fact and circumstances of a particular case. The court said (Para 8 of AIR):

“The case really turns on the true construction of the rule in particular the meaning of the words “whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit”. The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the Court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions.”

The Court also observed that though prevention of actions cannot be said to be main object of the rule, it is a desirable consequence of the rule. The test for impleading parties prescribed in Razia Begum v. Anwar Begum, 1959 SCR 1111: (AIR 1958 SC 836), that the person concerned must be having a direct interest in the action was reiterated by the Bench.”

In view of the aforesaid findings, before proceeding in the matter, it is also necessary to implead (i) CDSL (Central Depository Services (India) Ltd., (ii) BSE (Bombay Stock Exchange) and (iii) NSE (National Stock Exchange) before deciding the merits of the controversy.

The appellant is, therefore, directed to implead CDSL, BSE and NSE as parties before the Adjudicating Officer.

The Adjudicating Officer shall give sufficient opportunity to the parties to lead evidence in respect of their claim and defence including the newly added parties.

This point is decided accordingly.

Point No.(iv)

The fourth point for consideration is, Whether there was any arbitration clause and the matter was not liable to be adjudicated under Section 43 of the Information Technology Act.

Coming to the fourth controversy as to whether the matter was liable to be referred to the arbitration, the respondents have filed the application under Section 8 of the Arbitration and Conciliation Act.

The contents of the application under Section 8 of the Arbitration and Conciliation Act,1996 are quoted below:-

“The respondent states that the petitioner has executed following agreements/documents with the respondent at the time of opening demat and trading account on/around 18.12.2007:

- (i) Account opening form for broking and depository services,
- (ii) Broker / Client Agreement – NSE,
- (iii) Broker / client Agreement – BSE,
- (iv) Combined Risk Disclosure Document for Capital Market / Cash Segment & Futures & Options Segment (BSE & NSE),
- (v) DP – Client Agreement between a participant and a person seeking to open a beneficial owner’s account
- (vi) Agreement for transaction settlement through internet,
- (vii) Power of Attorney, and
- (viii) Undertaking-cum-fax indemnity

The petitioner has already produced on record a blank copy of the aforesaid agreements / documents. The copies of

aforesaid agreements / documents duly signed by the petitioner at the time of opening the demat/trading accounts with the respondent are annexed hereto and market **Annexure – 1 to 8** respectively.

The respondent submits that all the aforesaid agreements contain the arbitration clause for resolution of disputes that may arise between the parties. The relevant arbitration clauses as incorporated in various agreements are as follows:

(i) Broker/Client Agreement – NSE:

“Clause 19: Miscellaneous

The Member and the Client are aware of the provisions of Byelaws, Rules and Regulations of the Stock Exchanges relating to resolution of disputes/differences through the mechanism of arbitration provided by the stock Exchanges and agrees to abide by the said provisions. Any and all disputes arising out of or in connection with this agreement of its performance shall be settled by arbitration by a single Arbitrator appointed by India Infoline Ltd. The arbitration shall be held, in Mumbai in accordance with the provisions of the Arbitration and Conciliation Act, 1996. As amended from time to time. In case of any disputes relating to transactions executed on any segment of any stock Exchange, the client agrees to file the grievance application only at the Investor Grievances Cell / Arbitration Department of the concerned stock Exchange situated at Mumbai, Maharashtra.”

(ii) Broker / Client Agreement - BSE

“Clause 21: Dispute Resolution

Any claim, dispute or difference arising between the Parties hereto in respect of this Agreement or any contracts, dealings or transactions pursuant hereto or any rights, obligations, terms or conditions as contained in this Agreement or the interpretation or construction of this Agreement shall be subject to the grievance redressal procedure of the Exchange and shall be subject to the arbitration procedure as prescribed by the Exchange Provisions.”

(iii) Combined Risk Disclosure Document for Capital Market / Cash segment & Futures & Options Segment (BSE & NSE):

“Investors’ Rights and Obligations – Clause 1.1.3:

Any dispute with the member with respect to deposits, margin money, etc. and producing on appropriate proof thereof, shall be subject to arbitration as per the Rules, Byelaws/Regulations of NSE/BSE or its Clearing Corporation / Clearing House.”

(iv) DP – Client Agreement between a participant and a person seeking to open a beneficial owner’s account:

“Clause 11: Arbitration

The parties hereto shall ,in respect of all disputes and differences that may arise between them, abide by the provisions relating to arbitration and conciliation specified under the Byelaws.”

The Respondent submits that the Petitioner very well knew that if any dispute arises, first of all a notice has to be served to the main office at Mumbai and then the court in Mumbai shall have the jurisdiction for the purpose of giving effect to the provisions of the Rules, Byelaws and Regulations of the Stock Exchange.

Further the same is also clearly mentioned under the Client-Broker Agreement (NSE) at Clause 19 as follows:

“MISCELLANEOUS

All trades, transactions and contracts are subject to the Rules and Regulations of the Exchange and shall be deemed to be performed in the city of Mumbai and the Parties to such trade shall be deemed to have submitted to the jurisdiction of the Courts in Mumbai for the purpose of giving effect to the provisions of the Rules, Byelaws and Regulations of the Exchange.”

Clause 20 under the Client – Broker Agreement (BSE) also provides as follows:

“LAW AND JURIDICTION

This Agreement shall be governed by and construed in all respects in accordance with the laws of the Republic of India and, subject to the provisions of Clause 21, the Courts in Mumbai, India shall have the jurisdictions over this Agreement and the Arbitration proceedings in relation to the Agreement.”

The respondent submits that the petitioner has pleaded two instances for purported violation of Section 43 of IT Act.

The petitioner had executed the aforesaid agreements on 18.12.2007 and the instances pleaded by the petitioner pertain to the period after 18.12.2007. The respondent submits that on and after the execution of agreements on 18.12.2007, the relationship between the petitioner and respondent is governed by the agreements executed by the petitioner. The petitioner is bound by the arbitration clauses contained in the aforesaid agreements. Thus the disputes raised by the petitioner are required to be referred to the arbitration.

The respondent states that one of the instances pleaded by the petitioner pertains to purchase and sale of shares. The petitioner has also relied upon following contracts produced on record:

- (i) Contract Note No.1071958 dated 20.08.2008 (page 31) for transactions executed on 20.08.2008,
- (ii) Contract Note No.4141689 dated 22.08.2008 (page 35) for transactions executed on 22.08.2008, and
- (iii) Contract Note No.1098338 dated 22.08.2008 (page 39) for transactions executed on 22.08.2008.

All the three contract notes produced on record contain extracts from the byelaws and regulations pertaining to arbitration. The relevant extract from the contract notes reads as follows:

“1. All claims, differences or disputes between the Trading Members, inter se and between Trading Members and Constituents arising out of or in relation to dealings, contracts and transactions made subject to the Bye-Laws, Rules and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their validity, construction, interpretation, fulfillment or the rights, obligations and liabilities of the parties thereto and including any question of whether such dealings, transactions and contracts have been entered into or not shall be submitted to arbitration in accordance with the provisions of these Byelaws and Regulations.

2. In all dealings, contracts and transactions, which are made or deemed to be made subject to the Byelaws, Rules and Regulations of the Exchange, the provisions relating to arbitration as provided in these Byelaws and Regulations shall form and shall be deemed to form part of the dealings, contracts and transactions and the parties shall be

deemed to have entered into an arbitration agreement in writing by which all claims, differences or disputes of the nature referred to in clause (1) above shall be submitted to arbitration as per the provisions of these Byelaws and Regulations.”

The contract notes also provide for the seat of arbitration. Thus if the petitioner is aggrieved by any of the transactions effected vide the three contract notes (produced on record), then the dispute raised by the petitioner is to be decided by arbitration as per byelaws and regulations of National Stock Exchange (NSE). A copy of the NSE Byelaws and Regulations pertaining to arbitration is annexed hereto and marked **Annexure -9.**

The respondent submits that Section 8 of Arbitration and Conciliation Act, 1996 (for short “the Act”) reads as follows:

“8 Power to refer parties to arbitration where there is an arbitration agreement. –

- (1) A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
- (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
- (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

In view of the above, the respondent prays:

- (a) that the Hon’ble Adjudicating Officer be pleased to refer the dispute raised by the Petitioner to the Arbitration Tribunal to be constituted by following the procedure prescribed in Arbitration and Conciliation Act, 1996;
- (b) that pending the hearing and final disposal of this application, the Hon’ble Adjudicating Officer be pleased to stay the further proceedings of Civil Complaint No.1/2008.”

The respondent has alleged before the Adjudicating officer to the following effect:-

“At page 39 and 40 of the respondent’s application filed before the Adjudicating Officer, is a DP-Client Agreement between a participant and a person seeking to open a beneficial owner’s account. Since the very foundation of relationship between the petitioner and the respondent is the said agreement, all types of operations of the demat account, including the purported suspension/ closure/ cancellation, is covered by the said agreement.

Clause 1 of the said agreement provides that the provisions of Depositories Act,1996, SEBI (Depositories and Participants)Regulations, 1996, Bye Laws and Operating Instructions issued by CDSL form part of the agreement. Clause 11 provides for arbitration clause.

Section 16 of Depositories Act,1996 provides that if any loss caused to the beneficial owner due to negligence of the depository or the participant, then the beneficial owner can be indemnified.

Even in the notice issued by the petitioner’s advocate the allegation is of breach of contractual agreement by the respondent.Thus the first issue of suspension of demat account is covered by the DP-Client Agreement.

At pages 14-19 of the petition, there is a contract note printed on 22.9.2008. The contract notes themselves provide for arbitration clause in respect of any dispute arising therefrom.

Clause 3 of the contract notes provides for submitting the dispute to arbitration within six months from the date on which the claim, differences or dispute arose or shall be deemed to have arisen. Such period of six months is applicable to a person who raises the dispute by not agreeing with the contents of the contract notes.

At pages 20 to 26 of the respondent's application, is a Broker/Client Agreement for trading on NSE. The agreement provides for arbitration clause.

At pages 45-56 of the respondent's application, are the Byelaws and Regulations pertaining to arbitration."

Counsel for the respondent has also filed the written arguments stating that as under:-

“ the issue of suspension of demat account is covered by the DP-Client Agreement.

“Second alleged violation is in respect of fraudulent and illegal purchases-sales of shares.

- (a) See the contract notes produced by the petitioner at pages 26-30 of the appeal memo-printed on 22.9.2008. The contract notes themselves provide for arbitration clause in respect of any dispute arising therefrom.
- (b) Clause 3 of the contract notes (at pages 27,29 and 31 of appeal memo) provides for submitting the dispute to arbitration within six months from the date on which the claim, differences or dispute arose or shall be deemed to have arisen. Such period of six months is applicable to a person who raises the dispute by not agreeing with the contents of the contract notes.
- (c) See pages 20-26 of the respondent's paper book. It is a Broker/Client Agreement for trading on NSE. The agreement provides for arbitration clause at page 26 of respondent's paper book under Clause 19-Miscellaneous clause.
- (d) See pages 45-56 of respondent's paper book-NSE-Byelaws and Regulations pertaining to arbitration.
- (e) Even in the notice issued by the petitioner's advocate the allegation is of breach of contractual agreement by the respondent.

Thus both the alleged violations of the Act are covered by the agreements containing arbitration clause. Hence the disputes/claims raised by the petitioner are required to be referred to arbitration.

In the written arguments filed by the respondent, it has been submitted that the appellant has relied upon the following citations before the Learned Adjudicating Officer:

- (i) AIR 1953 Allahabad 446
- (ii) AIR 1973 SC 2071
- (iii) AIR 1999 SC 2354
- (iv) AIR 2006 Allahabad 305
- (v) 2006 (132) Comp.Case.417 (Delhi)

It is submitted that the citations at sr.no.(i) AIR 1953 Allahabad 446 and (ii) AIR 1973 SC 2071 pertain to Section 34 of Arbitration Act, 1940. Refer to (2003) 5 SCC 531 and 2007 AIR SCW 932 relied upon by the respondent.

The citation at sr.no.(iii)-AIR 1999 SC 2354 is in respect of winding up of a company. The Hon'ble Supreme Court has held that the issue of 'winding up a company' is not a dispute between the parties and hence it would not be covered by the arbitration clause contained in any agreement.

In the citation at sr.no.(iv), AIR 2006 Allahabad 305, it is held by the Allahabad High Court that as the ingredients of Section 8(1) and 8(2) of the Arbitration and Conciliation Act,1996 were not satisfied, the application to refer the disputes to arbitration was rightly dismissed by the trial court.

In the citation at sr.no.(v) (2006) 132 Comp.Case 417 (Delhi), the Delhi High Court has held that Recovery of Debts due to Banks and Financial Institutions Act,1993 (RDDB Act) is a 'special statute' and would override all other laws for the time being in force in view of Section 34 of the said Act. As there is no provision like Section 34 of RDDB Act in Information Technology Act,2000, it could not be treated as a special statute vis-à-vis Arbitration and Conciliation Act,1996. Section 81 of Information

Technology Act is not pari material Section 34 of RDDB Act. Hence the said judgment (2006) 132 Company Case 417 (Delhi) shall not apply.

The respondent has relied upon the following judgments:

- (i) (2003) 5 SCC 531
- (ii) 2007 AIR SCW 932
- (iii) (2003) 6 SCC 503= AIR 2003 SC 2881
- (iv) (2006) 1 SCC 417
- (v) (2006) 7 SCC 275
- (vi) (2007) 3 SCC 686
- (vii) AIR 2004 NOC 99 (Calcutta)

According to the respondent, he has not filed any reply on merits either before the Adjudicating Officer or before this Tribunal.

Taking into consideration the entire pleadings of the parties, a perusal of the agreement with the National Stock Exchange of India shows that there is an arbitration clause. Same is quoted below:-

“The Member and the Client are aware of the provisions of Bylaws, Rules and Regulations of the Stock Exchanges relating to resolution of disputes/differences through the mechanism of arbitration provided by the Stock Exchanges and agrees to abide by the said provisions. Any and all disputes arising out of or in connection with this agreement of its performance shall be settled by arbitration by a single Arbitrator appointed by India Infoline Ltd. The arbitration shall be held, in Mumbai in accordance with the provisions of the Arbitration and Conciliation Act,1996. As amended from time to time. In case of any disputes relating to transactions executed on any segment of any stock Exchange, the Client agrees to file the grievance application only at the Investor Grievances Cell/Arbitration Department of the concerned stock Exchange situated at Mumbai, Maharashtra.”

The contention of the respondent is that the issue with regard to jurisdiction having not been decided by the Adjudicating Officer, the matter requires re-consideration by the Adjudicating Officer.

According to the submissions of the respondent, he has filed an application under Section 8 of the Arbitration and Conciliation Act,1996. Section 8 of the Arbitration and Conciliation Act,1996 reads as under:-

“Section 8 Power to refer parties to arbitration where there is an arbitration agreement . – (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

- (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
- (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

Sub-clause (3) of Section 8 of the Arbitration and Conciliation Act,1996 provides that notwithstanding that an application has been made and the matter is pending before the judicial authority, arbitration may be commenced or continued.

Learned counsel for the respondent has also relied upon the judgment of the Apex Court in the case of **M/s Agri Gold Exims Ltd.Vs. Sri Lakshmi Knits & Wovens** reported in 2007 (O) GLHEL-SC 38574 wherein in para-20, there is a reference of P.Ramanatha Aiyar’s Advanced Law Lexicon, 3rd edition, page 1431 and the findings have been recorded to the following effect:-

“We need not dilate on this issue as this aspect of the matter has been considered by this Court in *Rashtriya Ispat Nigam Limited & Anr. V/s. M/s. Verma Transport Company*, 2006 7 SCALE 565, wherein this Court noticed:

“ Section 34 of the repealed 1940 Act employs the expression ‘steps in the proceedings’. Only in terms of Sec. 21 of the 1940 Act, the dispute could be referred to arbitration provided parties thereto agreed. Under the 1940 Act, the suit was not barred. The Court would not automatically refer the dispute to an arbitral tribunal. In the event, it having arrived at satisfaction that there is not sufficient reason that the dispute should not be referred and not step in relation thereto was taken by the applicant, it could stay the suit.

Section 8 of the 1996 Act contemplates some departure from Sec. 34 of the 1940 Act. Whereas Sec. 34 of the 1940 Act contemplated stay of the suit; Sec. 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Sec. 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. See O.P. Malhotra’s ‘The Law and Practice of Arbitration and Conciliation, 2nd Edition, pp. ‘346-347’.

The term ‘dispute’ must be given its general meaning under the 1996 Act.

In P.Ramanatha Aiyar’s *Advanced Law Lexicon*, 3rd edition, page 1431, it is stated:

“In the context of an arbitration the words “disputes” and “differences” should be given their ordinary meanings. Because one man could be said to be indisputably right and the other indisputably wrong, that did not necessarily mean that there had never been any dispute between them”

Admittedly, the appellant’s claim is not confined to the question regarding non-payment of the amount under the two dishonored cheques. Thus, there existed a dispute between the parties. Had the dispute between

the parties been confined thereto only, the same had come to an end.

Appellant evidently has taken before us an inconsistent stand. If he was satisfied with the payment of the said demand drafts, he need not pursue the suit. It could have said so explicitly before the High Court. It cannot, therefore, be permitted to approbate and reprobate.

Section 8 of the 1996 Act is peremptory in nature. IN a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. See *Hindustan Petroleum Corpn. Ltd. V/s. Pinkcity Midway Petroleums*, 2003 6 SCC 503 and *Rashtriya Ispat Nigam Limited (supra)*. No issue, therefore, would remain to be decided in a suit. Existence or arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.

Counsel for the respondent has also relied upon the case of *Rashtriya Ispat Nigam Limited Versus Verma Transport Company* reported in 2006 (O) GLHEL-SC 37624 with regard to the interpretation of Section 8 of the Arbitration and Conciliation Act. Section 8 of the Arbitration and Conciliation Act, 1996 reads as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute refer the parties to arbitration.

(2) The application referred to in sub-sec. (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

Section 8 of the 1996 Act, however, although lifted the first part of the said Art. 8 did not contain the expression contained in the second party therein. The Indian Parliament has gone beyond the recommendations made by the UNCITRAL Model Rules in enacting Ss. 8 and 16 of the 1996 Act.

The provisions of Ss. 8 and 16 of the 1996 Act may be compared with Ss. 45 and 54 thereof. Section 45 deals with New York Convention, whereas Sec. 54 deals with Geneva Convention Awards. The difference can be immediately noticed. Whereas under Ss. 45 and 54, the Court exercises its supervisory jurisdiction in relation to arbitration proceedings, in terms of Sec. 16 of the 1996 Act, the arbitrator is entitled to determine his own jurisdiction. We, however, do not mean to suggest that Part II of the 1996 Act does not contemplate determination of his own jurisdiction by the arbitral tribunal as we are not called upon to determine the said question. We have referred to the aforementioned provisions only for the purpose of comparing the difference in the language used by the Indian Parliament while dealing with the domestic arbitration vis-à-vis the International arbitration.

Section 8 confers a power on the judicial authority. He must refer the dispute which is the subject-matter of an arbitration agreement if an action is pending before him, subject to the fulfillment of the conditions precedent. The said power, however, shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute.

what is the scope and effect of the expression, ‘substance of the dispute’ is also in question to which we shall advert to a little later.

The arbitration agreement is contained in cl. 44(a) of the contract entered into by and between the parties which reads as under:-

“If at any time any question, dispute or difference whatsoever shall arise between the company and the Consignment Agent upon or in relation to or in connection with the contract, either party may forthwith give to the other notice in writing or the existence of such question, dispute of difference and the same shall be referred to the adjudication of an arbitrator to be nominated by the Chief Executive of the Company. The award of the arbitrator shall be final and binding on both the parties and the provisions of the Indian Arbitration Act, 1940 and the rules thereunder and any statutory modification thereof shall be deemed to apply to and be incorporated in this contract”.

The scope and purport of such a clause was considered in *Heyman and Another V/s. Darwins Ltd.*, and it is stated :

“The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute, and (b) what disputes the arbitration clause covers. To take (b) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties “In respect of” the agreement or in respect of any provision in the agreement or in respect of anything arising out of it, if the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have hampered e.g. as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when “frustration” is alleged to have occurred will require closer consideration.”

In the instant case, the existence of a valid agreement stands admitted. There cannot also be any dispute that the matter relating to termination of the contract would be a dispute arising out of a contract and, thus, the arbitration agreement contained in cl. 44 of the contract would be squarely attracted. Once the conditions precedent contained in the said proceedings are satisfied, the judicial authority is statutorily mandated to refer the matter to arbitration. What is necessary to be looked into therefore, inter alia, would be as to whether the subject-matter of the dispute is covered by the arbitration agreement or not.

Section 34 of the repealed 1940 Act employs the expression 'steps in the proceedings'. Only in terms of Sec. 21 of the 1940 Act, the dispute could be referred to arbitration provided parties thereto agreed. Under the 1940 Act, the suit was not barred. The Court would not automatically refer the dispute to an arbitral tribunal. In the event, it having arrived at satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.

Section 8 of the 1996 Act contemplates some departure from Sec. 34 of the 1940 Act. Whereas Sec. 34 of the 1940 Act contemplated stay of the suit; Sec. 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Sec. 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency.

Reliance placed by the learned counsel on *sukanya Holdings (P) Ltd. V/s. Jayesh H.Pandya and Another* is misplaced. Therein, not only a suit for dissolution of the firm was filed, but a different cause of action had arisen in relation whereto apart from parties to the arbitration agreement, other parties had also been impleaded. In the aforementioned fact situation, this Court held:

“Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is

also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

It was further stated :

“The next question which requires consideration is that even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act. In our view, it would be difficult to give an interpretation to Sec. 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two difference forums”.

For the foregoing reasons, we are of the opinion that the application filed by the Appellants u/s. 8 of the 1996 Act was maintainable.”

In view of aforesaid discussion, this point is decided accordingly with a direction to the Adjudicating Officer to decide regarding the applicability of Section 8 of the Arbitration and Conciliation Act first i.e. on the point No.(iv) referred above and thereafter to proceed on other points.

The Adjudicating Officer is directed to decide the above point No.(iv) with regard to the applicability of the arbitration clause as a preliminary point. In case he finds in affirmative i.e. the matter has to go before the Arbitrator, the entire proceedings may commence before the Arbitrator accordingly. However, in the event the consideration of point No.4 did not favour the Adjudicating Officer, he may proceed on merits and may permit the parties to file reply and lead evidence in accordance with the observations made above.

Relief

Coming to the relief, In view of the aforesaid, the matter requires to be remanded to the Adjudicating Officer for deciding afresh. The Adjudicating Officer shall take the matter and permit the complainant to implead (i) CDSL (Central Depository Services (India) Ltd. (ii) BSE (Bombay Stock Exchange) and (iii) NSE (National Stock Exchange) as parties.

The Adjudicating Officer shall direct the complainant to amend the complaint in accordance with the directions made above and thereafter dispose of the complaint in accordance with law expeditiously.

In view of the above, the matter is remanded to the Adjudicating Officer, Gujarat State for deciding afresh in view of observations made above.

Parties are directed to appear before the Adjudicating Officer, Gujarat State on 5th July,2010.

This appeal is disposed of accordingly.

Parties to bear their own costs in the appeal.

Let the appeal file be consigned to record room. Records of the complaint Case No.1/2009 titled `Shri Harish Kumar

Chandrakant Vakharia Vs. India Infoline Limited` filed before the Adjudicating Officer, Government of Gujarat, Department of Science & Technology, Gandhinagar, Gujarat be sent back forthwith.

Registrar is directed to send a copy of this judgment to all the Adjudicating Officers of the States and the Union Territories with a direction to decide the cases in accordance with the observations made in this judgment.

May 26,2010

(Justice Rajesh Tandon)
Chairperso