

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1620 of 2001

[Amir Afzal Khanv.....Republic Securities Limited & others]

Date of Hearing : 29.04.2023

Plaintiff : Khawaja Shams ul Islam, Advocate.

Defendants : Mr. Nisar Ahmed Tarar, Advocate for defendant No.1. Mr. Muhammad Usman Ahmed, Advocate.

Mr. Mehmood Y. Mandviwala, Advocate for defendant No.4. a/w Mr. Hassan Mandviwala, Advocate

Mr. Badiuddin Akbar, CEO, of CDC/ defendant No.4.

JUDGMENT

Zulfiqar Ahmad Khan, J:-The plaintiff has filed the present suit making the following prayers:-

“a. Money decree for recovery of Rs.20 Lacs (approximately) shall be paid to the plaintiff by defendants No. 1 and 2 both are liable to refund the same to the plaintiff as the plaintiff did not permit and authorize the defendants No.1 and 2 to make trading in his account failing of settling of account of plaintiff by the defendants No.1 and 2, the defendant No.5 may be directed to compensate the plaintiff in terms of Section 8 (5) of the Central Depository Act, 1997.

b. Declare that the plaintiff is the owner of 80197 shares as per schedule mentioned in paragraph No.4 appearing against his name in fellow number mentioned in the register maintained by the defendants.

c. Grant permanent injunction restraining the defendants from affecting any transfers whatsoever of the said shares and / or making payment of the dividends to anyone other than the plaintiff and / or from issuing right shares to anyone other than the plaintiff to exercise any right, title or interest of any sort including the exercise voting rights for or in relations to the said shares or any of them.

d. Direct the defendants No.3, 4 and 5 to permit the plaintiff to exercise all and whatsoever rights are attached to and in relation to the said shares and to treat the plaintiff as the owner thereof.

e. Permanent injunction restraining the defendants from acting directly or indirectly or through any agent or associates, nominee or through or in relation to any transferees or purported transferees not to claim or exercise any right or purported right for or in relation to the said shares and prohibit the sale/transfer/pledge/alienating/hypothecation/charging of the said shares.

f. Money decree in the sum of Rs.70 lacs against the defendant No.1 and 2 jointly and or severally for causing mental torture and agony and losses in the plaintiff's business.

g. Such other relief (s) which this Honourable Court may deem fit and proper be granted.

h. Costs of the suit.”

2. The plaintiff set forth his case in the memo of plaint, however, his concise grievance is that on 26.01.2001 he opened an account bearing No.270 with the defendant No.1 and deposited his shares, however, at the time of opening of the account with the defendant No.1, per plaintiff, he had never given any permission or authority to the defendant No.1 or 2 to make any transaction in his account on his behalf. It is alleged by the plaintiff that his shares were valued approximately Rs.1500,000/- which were illegally sold out by the defendant No.1 & 2. Akin to plaintiff, defendant No.1 & 2 firstly sold out his shares worth of Rs.100,0,000/- before 31.07.2001 without written permission as well as consent and thereafter the remaining shares of worth of Rs.500,000/- were also sold out by the defendant No.1 & 2. Having observed such transactions, the plaintiff communicated a protest letter on 03.08.2001 to the defendant No. 1 & 2 stating therein that he never made any activity or trade in his

account since its inception, as well as never gave any authority to anyone to do so on his behalf. It is averred by the plaintiff that the defendants acted in violation of statutes i.e. Central Depository Act, 1997, therefore, he filed the present action at law with the prayers reproduced in the preceding paragraph.

3. Having admitted the *lis* at hand, notices were issued to the defendants and in response to the Court's notice, the defendant No.2 & 4 filed their written statement. It is considered expedient to record here that having effected the service upon the defendant No. 1, 3 & 5 for filing their written statement, they failed to do so and vide order dated 14.10.2002 they were declared *ex parte*.

4. The defendant No.2 in his written statement introduced on record that as per Customer Agreement Form and Account Opening Form in Central Depository company ("CDC"), the plaintiff had himself accorded permission to defendant No.1 for the sale and purchase of shares. The defendant No.2 declined the claim of the plaintiff as prayed in the memo of plaint.

5. Defendant No.4 also contested the matter by filing its written statement introducing on record that it is a service provider and facilitates the transfer/settlement of securities through book of entry and had not violated any provision of CDC Act as well as Companies Ordinance. It is further alleged by the defendant No.4 in the written statement that petitioner had not informed it about the alleged misappropriation of his securities. The defendant No.4 claimed that per requisites of Section 8(5) of the CDC Act, 1997 the plaintiff would only be compensated when loss is caused due to the negligent act or omission of the defendant No.4 or any of its employees but the

plaintiff's case is that the defendant No.1 & 2 have transferred the shares without his consent, therefore, the defendant No.4 cannot be held responsible.

6. Record insinuates that on 19.01.2004 following issues were framed by this court which are reproduced as under:-

- “1. Whether the suit is maintainable under the Central Depositories Act, 1997 especially under Section 4 and 8 of the Act? If so what would be its effect?
2. Whether the plaintiff gave any permission or consent in writing to the defendant No.1 and 2 for selling of his shares mentioned at para 4 of the plaint? If so what would be its effect?
3. Whether the selling of the shares of plaintiff by the defendants Nos.1 & 2 was violative of Section 62 of the Companies Ordinance, 1984 read with Section 4 of the Central Depository Act, 1997?
4. Whether the defendants Nos. 1 & 2 have any voice recording of plaintiff in respect of granting permission for selling of his shares as alleged in their letter dated 15th August 2001? If so, what would be its effect?
5. Whether the plaintiff is entitled for damages of Rs.50,00,000/- and recovery of Rs.20,00,000/- as prayed as well as entitled for compensation by the defendant No.5 in terms of Section 8(F) of Central Depository Act, 1997/ if so what would be its effect?
6. Whether the plaintiff is the owner of 80197 shares as per schedule mentioned in paragraph 4 of the plaint? If so, what would be its effect?
7. Whether the plaintiff has locus standi and any right to claim relief against the Defendant No.4? If so to what effect?
8. Whether the plaintiff is entitled to claim compensation and damages from Defendant No.4 if so what is the quantum?
9. What should the decree be?

7. The contesting parties adduced their evidence by introducing on record their respective documents, however, it is considered illustrative to mention here that only plaintiff and defendant No.4 adduced their evidence, whereas, defendant No.2 neither ventured into witness box nor produced any evidence despite availing considerable time, repeated chances as well as opportunities and having seen the conduct of the defendant No.2, his side was closed vide order dated 30.03.2006.

8. **Issue No.1** is correlated and concomitant to the maintainability of the suit. During course of arguments, Mr. Mandviwala, Advocate set forth that the present action at law is not maintainable under the CDC Act, 1997 and for this purpose he referred to Section 4 & 8. Section 4 connotes the affairs as well as running system of the defendant No.4, whereas, Section 8 connotes an immunity from being sued when the defendants acts under the instructions, however, per sub-section (5) of Section 8 when an aggrieved person proves to be so at the hands defendant No.4 or any of its officer/official then the defendant No.4 can be sued. To me if the plaintiff who, admittedly, was the owner of the shares and claims that his shares were unlawfully sold, was not an aggrieved party, then who would be, as section 8(5) of the CDC Act, in unequivocal terms recognizes the right of a sub-account holder (such as the plaintiff) to claim compensation from the central depository. The right to sue is thus vested in the sub-account holder himself and he is not dependent on the participant for seeking enforcement of his rights. In these circumstances, it is clear that the plaintiff, who claims his shares were illegally sold, is an aggrieved party and is, therefore, entitled to maintain this suit. Mr. Mandviwala

during course of arguments several times referred to Section 8 of the CDC Act while relying on the said Section argued that no claim can be brought in Court against the CDC as the CDC works under instructions. To elaborate his argument, it would be advantageous to reproduce Section 8 of the CDC Act which is delineated hereunder:-

“ 8. Central depository discharged from liability if acting on instructions.—

(1) A central depository, if acting in good faith and without negligence, shall not be liable for any loss, damages, compensation, costs and expenses in tort or under any law or contract for any breach of trust or duty and in the cases where the central depository has, in the accounts or sub-accounts maintained by it, made or allowed to be made entries or handled or allowed handling of any book-entry securities, according to the instructions of an account-holder or a participant, notwithstanding that the account-holder or the participant, as the case may be, had no right to dispose of or take any other action in respect of such book-entry securities.

(2) A central depository, if acting in good faith and without negligence, shall be fully discharged of its obligations to an account-holder and participant, upon the transfer or delivery of book-entry securities under the instructions of the account holder or participant, as the case may be.

(3) A central depository shall not be required to enquire whether or not—

(a) an account-holder or a participant, has a right to handle any book-entry securities entered in his account or in any sub-account under his account, as the case may be, or to take any action in that regard; or

(b) the document of title in respect of a security deposited with an issuer for the purpose of registration of the transfer of the security in the name of the central depository is genuine.

(4) Except as provided in this Act, a central depository shall not owe any fiduciary or any other obligations whatsoever, including, without limitation to the generality of the foregoing, any obligations in law, contract, tort, warranty or

strict liability, to the sub-account holders in whose name sub-accounts are maintained in the central depository system.

(5) Without prejudice to the provisions of any other law for the time being in force, if any loss is caused to an account-holder or a sub-account holder due to any negligent or wrongful act or omission of a central depository or any of its employees, the central depository shall compensate such account-holder or subaccount holder for such loss.

9. The above statutory prescription at the first go seems to bar any claim to be brought to the court, however, Sub-section (5) clearly provides that if any loss is caused to an account or sub-account holder owing to the negligent or wrongful act or omission of the CDC or any of its employees, the defendant/CDC shall compensate such account-holder or sub-account holder for such loss. The Plaintiff being a sub-account holder having 80197 shares in his account claiming that his shares had been malafidely sold out without his permission causing him loss at hands of CDC, therefore, under the purview of sub-Section (5) of Section 8 of CDC Act, the plaintiff is entitled to maintain his suit. **Issue No.1 is, therefore, decided in the Affirmative.**

10. **Issue No.2, 3 & 4.** The Issues Nos.2, 3 & 4 are interconnected to each other and based on the same facts as well as evidence made available on record, therefore, it would be appropriate to discuss those simultaneously.

11. In order to establish and substantiate his claim, the plaintiff entered into the Witness Box and having reiterated the contents of memo of plaint, produced the following documents:-

Statement showing Customs Stock Inventory position of plaintiff as on 02.02.2001 as Exh. 6.

Account opening form dated 26.01.2001 as Exh. 7.

New account record of the plaintiff as Exh. 8.

Customer agreement form as Exh. 9.

Fax application dated 31.07.2001 by plaintiff as Exh. 10.

Letters regarding sale confirmation issued by the defendants as Ex. 11 to Exh. 36.

Original letter of the defendant dated 31.07.2001 addressed to the plaintiff as Exh. 37.

Letter dated 31.07.2001 of the plaintiff as Exh. 38.

Letter dated 02.08.2001 of the plaintiff as Exh. 39.

Original letter of the defendant dated 07.08.2001 as Exh. 40.

Original letter of the defendant dated 15.08.2001 as Exh. 41.

Letter/application dated 16.08.2001 as Exh. 42.

Letter of the defendant dated 22.08.2001 as Exh. 43.

Letter dated 23.08.2001 of Karachi Stock Exchange as Exh. 44.

Letter dated 20.08.2001 as Exh. 45.

Envelope bearing R.K. No. 69104 as Exh. 46.

12. A glance on the record & proceedings shows that the defendant No.1 & 2 neither adduced any evidence nor tested the testimony of the plaintiff on cross-examination but only filed written statements. Even though the Written Statement by itself does not have any evidentiary value, unless, deponent of pleadings (plaint or Written Statement), enters the witness box to lead the evidence as it is well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party does not produce any evidence to support the

contents of its written statement, in absence of any admission on the part of a plaintiff, the averments contained in the written statement cannot be treated as evidence. Reliance in this regard can be placed on the cases of Federation of Pakistan through Secretary Ministry of Defence and another V. Jaffar Khan and others (PLD 2010 Supreme Court 604) and Muhammad Noor Alam v. Zair Hussain and 3 others (1988 MLD 1122).

13. Apart from above, the defendant No.1 & 2 are claiming to have voice recording of plaintiff in respect of granting permission for selling of his shares, however, neither the defendant No.1 & 2 stepped into witness box so as to substantiate this claim nor produced and introduced on record any evidence in this respect. According to the Article 117 of the Qanun-e-Shahadat Order, 1984, if any person desires a court to give judgment as to any legal right or liability, depending on the existence of facts which he asserts, he must prove that those facts exist and burden of proof lies on him to substantiate his case. On the contrary principle of “*onus probandi*” is applicable which states that if no evidence is produced by the party on whom the burden is casted, then such issue must be found against him¹.

14. Record further reveals that the testimony of the Plaintiff under the affidavit-in-evidence, have not been subjected to cross-examination by defendant No. 1 & 2, hence, the same is deemed to have been admitted. It is by now a settled principle of law that any deposition made in the examination-in-chief, if not subjected to cross-examination would be deemed to have been admitted. It is also a settled position of law that if a crucial and vital fact deposed in the

¹ *Nasir Ali v. Muhammad Asghar (2022 SCMR 1054) rel. para 6.*

examination-in-chief is not subjected to cross-examination, it shall be deemed to have been admitted². In view of the deliberations demonstrated above, the issues Nos. 2 & 4 are answered in negative, whereas issue No.3 is answered in affirmative.

15. **Issue No.6.** Onus to prove this issue rests upon the plaintiff. Plaintiff in order to establish his ownership of 80,197 shares exhibited statement showing Customer Stock Inventory Position which was issued by defendant No.1 as Exh. 6 (available at page 23 to 25 of evidence file). The Exh. 6 was issued by the defendant No.1 showing that plaintiff was acquiring following shares on 02.02.2001:-

Customer	Code	Item	Quantity
Amir Afzal Khan	0270	1ST ELITE CAPITAL MOD.	1,808
		1ST FID. LEAS. (NISHAT MOD.)	1,047
		1ST PRUDENTIAL MOD.	5
		23RD ICP MUTUAL FUND	2,000
		3RD PRUDENTIAL MOD.	130
		AHMED HASSAN TEX	500
		AL-ATA LEASING MOD.	385
		ARUJ GARMET	500
		ASKARI COMM. BANK	2,091
		ATLAS INV. BANK LTD.	26
		CRESCENT SPINNING	580
		CRESCENT STEEL	448
		DHAN FIBRES LTD.	13,000
		ENGLISH LEASING LTD.	1,000
		FAYSAL BANK LTD.	4,000
		PECTO CEMENT LTD.	1,000
		FIDELITY INV. BANK	1,1500
		GATRON INDUSTRIES	1,000
		GENERTECH PAK LTD	500
		GHANDHARA NISSAN LTD	500
		GROWTH MUTUAL FUND LTD	1,000
		GULF COMMERCIAL BANK (SCHON)	3,500
		HIGHNOON LABORATORIES	399
		IBRAHIM LEASING LTD.	1,687
		INDUS POLYESTER	1,000
		INTERNATIONAL IND.	441
		J.A. TEXTILE MILLS	3,500

² Per Mr. Justice Mian Saqib Nisar in the case of Farzand BATRON INDUSTRIES Ali v. Khuda Bukhsh (PLD 2015 S.C. 187) & M/s. Akbar Brothers v. M Khalil Dar (PLD 2007 LGENERTECH PAK LTD Lahore 385).
GHANDHARA NISSAN LTD.

	KOHAT CEMENT LTD	800
	KOHINOOR LOOMS LTD	1,000
	LEATHER-UP LTD.	500
	MAPLE LEAFE CEMENT	2,160
	MARI GAS CO. LTD.	875
	METROPOLITAN BANK LTD	1,875
	MUSLIM COMM. BANK	780
	NATOVER MOTOR LEASING	525
	P.T.C.L (A)	4,500
	PAK IND. & COMM. LEAS	448
	PAK SLAG CEMENT	500
	PAK SUZUKI MOTORS	2,000
	PLATINUM COMM. BANK	4,000
	POLYRON LTD.	1,000
	PRUD. DISC. & G. HOUSE	500
	PUNJAB OIL MILLS LTD.	31
	QUICE FOOD IND. LTD.	1,250
	SAIF TEXTILE	3,168
	SCHON MODARABA	1,170
	SECURITY STOCK FUND	1,500
	SERVICE FABRICS	78
	SUNRISE TEXTILE	1,000
	SUNSHINE CLOTH	3,000
	TRI-STAR POLYESTER	1,816
	TRI-STAR POWER	500
	TRUST SEC. & BROKERAGE	500
	UNICAP MODARABA	182
	UNION LEASING LTD	2,070
	Total Shares	80197

16. The plaintiff having produced the Exh. 6 which is a Customer Stock Inventory Position issued by defendant No.1 was not put to the test of cross-examination by the defendant No.1 & 2. Neither the defendant No. 1 & 2 ventured into the witness box to deny the stance of the plaintiff of being owner of 80,197 shares nor tested the veracity of the statement/evidence of the plaintiff as well as Exh. 6 during cross-examination but, nonetheless Exh. 6 is a computer generated document issued by defendant No.1 and appears to be an admitted document. In the case of **Muhammad Bachal v. Muhammad Arif Memon (2019 YLR 1040 rel. at page 1643-1644)** (authored by me), I have held that things admitted need not to be proved. Furthermore, it is a golden principle of Qanun-e-Shahadat Order, 1984

as mandated vide Article 113 that facts admitted need not to be proved. For the ease of reference, Article 113 of the Qanun-e-Shahadat Order, 1984 is reproduced as under:-

“113. Facts admitted need not be proved. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they redeemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

17. In sequel of the above deliberation, the **issue No.6 is answered in affirmative.**

18. **Issue Nos. 5, 7 & 8.** These issues will be discussed as well as answered together. Issue No.7 germane to the locus standi of the plaintiff to claim relief, whereas, issue No. 5 & 8 deal with the compensation as well as damages against the defendants and I considered it expedient to discuss the locus standi of the plaintiff first. In our judicial system, any party who suffers damage or injury from the act of a private individual or of the state can approach the courts. In this process, it is essential to demonstrate that the person approaching the court must have suffered some injury or his legal right has been violated. In other words, there shall be a sufficient nexus between the injury caused and the person approaching the court. This doctrine is known as “*Locus Standi*“ and it ensures that only the bonafide parties came to the court. However, in recent times, the rule of *locus standi* has been relaxed and even allowed a public-spirited citizen to approach the court on behalf of poor and downtrodden people.

19. The Latin Maxim "*Locus Standi*" consists of two words namely "locus" which means place and "standi" means the right to bring an action. So, collectively, it means the right to appear or the right to bring an action before the court. As per this maxim, one person needs to show his legal capacity before approaching the court. It means the person can only approach the court when his personal interest is suffered or an injury is inflicted upon him. This maxim is one of the fundamental principles of the adversarial litigation system.

20. The plaintiff produced through ample material showing to be the owner of 80,197 shares (discussed *supra*) and successfully demonstrated that these shares were illegally sold by the defendants including defendant No.4 owing to which he suffered financial loss as well as he was deprived from his shares which was his mainstay as well as livelihood, therefore, the plaintiff has locus standi to sue the defendants as well as bring the claim before the Court against the defendants.

21. Another limb of the issues under discussion is compensation and damages. Plaintiff in his pleadings of present action at law vide prayer clause "f" claimed to have suffered mental torture, agony and loss of business at the hands of defendants more particularly defendant No.4 for the reason that the defendant No.4 before selling out the shares failed to obtain permission from him and further claimed that the defendant No.4 through its statute i.e. Central Depositories Act, 1997 is duty bound to seek permission from the plaintiff before selling out the shares from his sub-account. During course of arguments, Mr. Shams reiterated Section 4 of the CDC Act

and it would be conducive to reproduce Section 4 of the CDC Act hereunder:-

4. Central depository system.---(1) A central depository shall establish a central depository system whereby, in accordance with the regulations,---

(a) (i) accounts may be opened and maintained with the central depository by the account-holders so as to record the title of the account-holders to book-entry securities entered in such accounts; or

(ii) where the account-holders are participants, sub-accounts may be opened and maintained, as part of the accounts of the participants, with the central depository by the participants on behalf of the sub-account-holders so as to record the title of the sub-account-holders to book-entry securities entered in such sub-accounts;

(b) transfers of such book-entry securities shall be effected electronically or by any similar means; and

(c) pledging of such book-entry securities may be effected in accordance with section 12.

(2) Where any securities are issued to or registered in the name of a central depository or transferred by endorsement to or deposited with a central depository, such securities shall, in accordance with the regulations, be entered in the relevant accounts or sub-accounts, as the case may be, as book-entry securities.

(3) Notwithstanding anything contained in subsection (1), a participant may, with the written authorisation of his clients, enter book-entry securities beneficially owned by the clients in his own account without establishing sub -accounts in the names of such clients in the central depository system:

Provided that the central depository may, at its discretion, enquire whether such authorisation has been obtained by the participant.

(4) Subject to the provisions of this Act, a central depository system shall be operated by a central depository for holding book-entry securities as a nominee for account-holders and for facilitating the transfer of such book-entry securities:

Provided that nothing containing herein shall be construed as preventing a central depository from holding book-entry securities, as a beneficial owner of such securities, in its own account opened and maintained on its own central depository system. '

(5) The title to any book-entry securities entered in an account shall vest in the account-holder and the title to book-entry securities entered in a sub account shall vest in the sub-account-holder.

(6) The central depository system of a central depository shall handle such securities as book-entry securities as are declared as such by the central depository.

(7) Different types of accounts and sub-accounts for different classes of persons may be opened with a central depository in accordance with the regulations.

22. Section 4 of the CDC Act discusses CDC's working and business system, however, per sub-Section (3) of Section 4 a proviso has been provided that the CDC/defendant No.4 will make enquiries as well as seek authorization from the beneficiary of the sub-account holder before making any entry in the book of entries as well as seek permission from the sub-account holder/beneficiary (such as plaintiff herein) before selling of the shares, but nothing has been introduced on record by the these defendants more particularly defendant No.4 that before selling shares of the plaintiff or making intrusion into the sub-account of the plaintiff, they sought any permission from the plaintiff. Mr. Kamran Ahmed Qazi ventured into witness box on behalf of the CDC/defendant No.4 but failed to introduce on record and exhibited any single document suggesting that they sought prior permission before selling out or making intrusion in the sub-account of the plaintiff. The said witness of defendant No.4 was put to the test of cross-examination where the said witness admitted that the

defendant No.1 is the account holder of CDC and that the plaintiff is the sub-account holder of the defendant No.1. He went on to further admit that per prescriptions of CDC Act, it is necessary for CDC to seek prior permission of the sub-account holder before transferring the shares. It is considered pertinent to reproduce the relevant constituent of the cross-examination of Kamran Ahmed witness of defendant No.4 hereunder:-

“ It is correct that defendant No.1 is a account holder of defendant No.4 and the plaintiff is the sub-account holder of defendant No.1.”

“It is correct as per the CDC Act before transferring the shares the permission/authority of the sub-account holder is necessary”.

“In the interest of the account holder we used to entertain complaints from the account holders and the applications are to be addressed to the company (defendant No.4)”

23. It is gleaned from appraisal of the foregoing that the defendant No.4 was statutorily bound to seek prior permission before transferring and selling of the shares of the plaintiff but at the case at hand, the defendant No.4 failed to introduce on record any single document suggesting that plaintiff accorded any permission to the defendant No.4 or any of the defendants to do business in his sub-account or transfer his shares to another account or sell out the same. Also the defendant No.1 & 2 failed to produce any evidence in support of their claim, however, filed written statement. Even though the Written Statement by itself does not have any evidentiary value, unless, deponent of pleadings (plaint or Written Statement), enters the witness box to lead the evidence. It is well-established principle of law that a written statement contains averments of a party, which are to be proved through cogent evidence. If a party

does not produce any evidence to support the contents of its written statement, in absence of any admission on the part of a plaintiff, the averments contained in the written statement cannot be treated as evidence. It is also a settled position of law that if a crucial and vital fact deposed in the examination-in-chief is not subjected to cross-examination, it shall be deemed to have been admitted.

24. In the present case, I have already noted above the fact that CDC had acted illegally and negligently in selling the shares of the plaintiff. The fact is that CDC as an entity enjoys a privileged position by virtue of the respective licence granted to it by SECP and at present is the only central depository in Pakistan and, therefore, enjoys a monopoly in its area of business which makes CDC an important instrument for the efficient functioning of capital markets in Pakistan as it also acts as a custodian of the interests of the various stake holders connected with the stock market including sub-account holders such as the plaintiff. In this capacity CDC has a fiduciary responsibility and a special duty of care, to ensure that the interests of account holders are properly and diligently safeguarded. A special onus, therefore, lies on CDC to perform its duties in a fair and transparent manner. The only way in which CDC can protect itself from legal action is by acting in good faith, within the law and without negligence. In the present case, for reasons noted earlier in this judgment, I have no doubt in my mind that CDC acted unlawfully and probably negligently.

25. I take privilege to discuss some judgments of foreign jurisdiction wherein the similar issue was also discussed and damages were granted to the aggrieved party. *Michael v. Hart & Co.* ((1901) 2

KB.867). This was a case in which the plaintiff had opened an account with the defendants who were stockbrokers. The defendants were to buy and sell stocks and shares for the plaintiff. On May 11, 1901, it was agreed between the plaintiff and the defendants that certain contracts for the purchase of stocks, which had been made by the defendants on the plaintiffs account for settlement in the middle of May, should be carried over to the following settlement which was to take place on May 28 and 29. The defendants, however, in breach of the said agreement, sold the stocks which they had bought for the plaintiff and closed his account on 16 May. The plaintiff sued the defendants and claimed the highest prices which the sold stocks could have realized at any time during the currency of his account. It was argued on behalf of the defendants that damages could only be assessed with reference to the price which prevailed either on the date of the breach of agreement i.e. on May 16 when the defendants closed the plaintiffs account or on May 29 at which date the account would have closed in accordance with the agreement with the plaintiff. It was specifically urged that it was not for the plaintiff to select any intermediate date which was most unfavourable to the defendants on the fictitious assumption that he would have given instructions for sale, to the brokers at the time when the price was highest. Wills, J. held that the plaintiff was entitled to the highest prices which were obtainable during the period during which he had the option of selling. I am in respectful agreement with the reasoning which led to the aforesaid conclusion, and can do no better than to reproduce the same. The learned Judge said:--

“The only matter that I have to deal with in this case is the measure of damages. The plaintiff had

entered into a contract with the defendants, whereby the defendants were to purchase shares on his behalf. The defendants in pursuance of that contract had purchased various shares on the plaintiffs behalf, and the plaintiff was entitled to have those shares delivered to him on the settling day on payment of certain prices. The defendants further by their contract undertook that they would at any time before the settling day, if directed to do so by the plaintiff, sell the same shares for the plaintiff. This they did not do, but repudiated their contract, and put an end to it. Under those circumstances it seems to me that the plaintiff is entitled to all the advantages that would have been his or that might have been his if the contract had been carried out. Amongst those advantages was the right to sell the shares whenever he chose during the period over which the transactions were to run, and at different times different prices might have been realized. No doubt the plaintiff would in fact never have realized the best prices that ruled, during that period. But I think I am right in saying that the Courts have never allowed the improbability of the plaintiffs obtaining the highest prices to be taken into consideration for the purpose of reducing the damages. The defendants are wrong-doers, and every presumption is to be made against them.”

26. In the case of *Louis Dreyfus & Co. v. Ghandamal & Co.* (AIR 1919 Sind 67). This was also a case of conversion where Louis Dreyfus & Co. had misappropriated a large quantity of wheat belonging to the plaintiff Ghandamal & Co. The relevant facts of the case, briefly, are that Dreyfus & Co. had earlier 'rejected the wheat but subsequently, when prices shot up with the advent of the First World War, they sold the wheat. The price thereafter kept fluctuating. It was argued on behalf of Louis Dreyfus & Co. that the plaintiff was entitled to the price of Rs.32-12-0 only which was the price on the date of conversion. While repelling this argument, the Court held as follows:-

“If the damages were for breach of contract, then no doubt his contention would be correct, for the measure of damages in such a case is the difference between the contract price and the market price at the date of the breach, and is

unaffected by a subsequent rise in prices, see *Jamal v. Moolla Dawood Sons & Co.* [AIR 1915 PC 48]. But this is an action in tort for conversion, and in such a case, according to the recognized law in England, the Court or jury, in assessing the damages, is not limited to the value of the property at the time of conversion, but may find as damages the value at a subsequent time even up to the date of trial, see *Halsbury's Laws of England*, Vol. 10, Art. 633, at p. 344, and Vol. 27, Art.1602 at p. 908; *Mayne on Damages* 9th Edn, p.410: *Addison on Torts*, 7th Edn, p. 511. There is also a further difference between the two cases. In actions of contract, as a rule, the motives or conduct of the defendant are not to be taken into account in assessing damages whereas in actions of tort which affect property, the conduct of the defendant may be so taken into account *Halsbury's Laws of England*, Vol.10, Arts. 593 and 598 at pp. 323, 325.”

27. Apart from above, plaintiff herein is statutorily protected and guaranteed compensation per Section 8(5) of the CDC Act that if any loss is caused to an account-holder or a sub-account holder due to any negligent or wrongful act or omission of a central depository or any of its employees, the central depository shall compensate such account-holder or subaccount holder for such loss.

28. Section 11(b) of the CDC Act expressly stipulates that upon the suit of an aggrieved party “the Court may award damages to the aggrieved party” This provision, in the circumstances of the present case, simplifies the calculation of damages.

29. In the circumstances where livelihood of the citizens is snatched and when they take all the pains before the courts to prove their cases and whereas throughout this tiring process they remain out of pocket owing to the negligent acts of the defendants, then a heavy duty casts upon the Courts to grant damages and compensate citizens' suffering through appropriate money decrees. In view of the

rationale and deliberations delineated above, the **issues No.5, 7 & 8** are answered in affirmative.

30. So far as issue No.9 is concerned, the forgoing discussion justifies that the decree should be apportioned in the manner as prayed.

JUDGE

Karachi
Dated:18.08.2023

Aadil Arab