

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: DR. K. M. ABRAHAM, WHOLE TIME MEMBER**

ORDER

**DIRECTIONS UNDER SECTIONS 11 AND 11B OF THE SECURITIES AND
EXCHANGE BOARD OF INDIA ACT, 1992 IN RESPECT OF THE CENTRAL
DEPOSITORY SERVICES (INDIA) LIMITED AND G.M. BOSU & CO.
PRIVATE LIMITED**

Date of hearing: June 23, 2010

Appearance:

For the Central Depository Services (India) Limited: Mr. Satish L. Budhakar, Vice President - Legal and Secretarial

For G. M. Bosu & Co. Private Limited: Mr. Somdutt Bose, Director

For the Securities and Exchange Board of India: Mr. Jayanta Jash, General Manager
Mr. Vijayakrishnan G., Deputy Legal Adviser
Mrs. Sukanya Banerjee, Assistant General Manager
Mr. T. Vinay Rajneesh, Legal Officer

1. The Hon'ble High Court at Calcutta, vide an order dated March 12, 2010 (in Writ Petition No. 733 of 2007 - Atreyee Chakraborty vs. Securities and Exchange Board of India and others) had directed the Securities and Exchange Board of India (hereinafter referred to as SEBI) to make an enquiry and pass a reasoned order, upon hearing the necessary parties including Mrs. Atreyee Chakraborty, as to how the depository participant (G. M. Bosu & Co. Private Limited) had ensured in terms of Regulation 32 of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 (hereinafter referred to as the DP Regulations) that the depositor (Mrs. Atreyee Chakraborty) was paid before effecting the transfer. The said Order further

directed SEBI to take steps, if it is found that proper “mechanism” under the aforesaid Regulation was not in place. Pursuant to the said direction of the Hon’ble High Court and after affording an opportunity of hearing to the Central Depository Services (India) Limited (hereinafter referred to as the depository), G. M. Bosu & Co. Private Limited (hereinafter referred to as the depository participant) and Mrs. Atreyee Chakraborty (hereinafter referred to as the petitioner), SEBI vide order dated June 4, 2010 *inter alia* observed that the depository participant and the depository were responsible for not complying with the requirements of Regulation 32 of the DP Regulations in respect of the petitioner’s 100 shares (which became 1500 shares on account of bonus issue by ITC Limited, as explained in the said Order) of ITC Limited, transferred under the Delivery Instruction Slip (hereinafter referred to as DIS) dated August 13, 2003. In view of the same, the said Order, which was to be treated as a show cause notice had directed the depository and the depository participant to show cause as to why they should not be directed jointly and severally to compensate the petitioner in respect of the 1,500 shares of ITC Limited that would have accrued to her in respect of the aforesaid 100 shares of ITC Limited from the date of transfer. An opportunity of hearing was also granted to the depository and the depository participant on June 23, 2010. They were further advised to file their respective reply before the said date. The depository filed its reply, vide letter dated June 21, 2010 and was represented by Mr. Satish L. Budhakar, Vice President-Legal and Secretarial, on June 23, 2010. The representative made submissions on the lines of the reply of the depository. The depository participant was represented by its director, Mr. Somdutt Bose, in the hearing, who made submissions. During the course of hearing, Mr. Somdutt Bose had submitted the reply dated June 23, 2010 of the depository participant.

2. I have considered the oral as well as written submissions of the depository and the depository participant and other material available on record.

The facts of the case were mentioned in detail in the Order dated June 4, 2010 of SEBI. As the said Order was to be treated as a show cause notice as advised therein, I do not consider it necessary to reproduce the same in detail in this order. As directed by the Hon'ble High Court of Calcutta, SEBI was mandated to conduct an enquiry in respect of the compliance of Regulation 32 of the DP Regulations. As stated in the Order dated June 4, 2010, SEBI found that the depository and the depository participant were responsible for not complying with the requirements of Regulation 32 of the DP Regulations in respect of 100 shares of ITC Limited of the petitioner, transferred under the DIS dated August 13, 2003 and accordingly, the depository and the depository participant were directed to show cause. In view of the above, the limited issue for consideration is whether the depository and the depository participant are liable to compensate the petitioner as required in the show cause notice.

3. As the issue was pertaining to the compliance of Regulation 32 of the DP Regulations as it existed at the relevant point in time, the same is reproduced herein below for reference:

“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.”(underline supplied)

4. According to the representative of the depository, under the Depositories Act 1996 (hereinafter referred to as the Act), the depository is neither required nor expected to ensure that the transferor receives his consideration before transfer takes effect in the depository's records. A similar submission was also made by the depository participant. The depository further contended that Regulation 32 as it stood then was not consistent with the Act. It was also

contended that under Section 7 of the said Act, the depository registers transfer of security in the name of the transferee, upon receipt of intimation from the depository participant. Section 7 of the Act is quoted below:

“7(1) Every depository shall, on receipt of intimation from a participant, register the transfer of security in the name of the transferee.

(2) If a beneficial owner or a transferee of any security seeks to have custody of such security the depository shall inform the issuer accordingly.”

Section 7 deals with the registration of transfer of securities. It clearly indicates that the transfer of securities by the depository should take place ***on receipt of intimation from the depository participant***. In terms of Regulation 32, registration shall be effected only after the depository is satisfied that payment for such transfer has been made. Therefore, on a combined reading of the aforesaid provisions, it becomes the duty of the depository participant who processes the DIS, to intimate the depository about the transfer of shares along with the intimation that payment for the said transfer has been made. Regulation 32 was to ensure that the shares in the dematerialized form are transferred after the receipt of consideration by the transferor. This was made in the interest of investors. The requirement of Regulation 32 is a condition precedent before complying with the duty under Section 7. Both the provisions are mutually exclusive of each other. The entities covered under Regulation 32 are expected to comply with both the provisions. In view of the above, it cannot be said that Regulation 32 was inconsistent with Section 7 and accordingly, the submission of the depository in this regard is rejected. Though, Regulation 32 was amended in the year 2008 and the requirement of registering the transfer only after ensuring the receipt of payment by the transferor was removed, the impugned transaction happened in the year 2003 and therefore, the depository and the depository participant were bound to comply with the same.

5. According to me, Regulation 32 of the DP Regulations is unambiguous and the requirement contemplated thereunder is in line with Section 7 of the Act. Such statutory requirements have to be necessarily complied with. Any submission contrary to the requirement stipulated under Regulation 32 is liable to be rejected. It is well settled that when something is to be done statutorily in a particular way, it can only be done that way or not. Admittedly, the transaction under the DIS dated August 13, 2003 was off-market. It was the contention of the depository that in an off market transaction, the execution of DIS constitutes confirmation and acknowledgement of receipt of payment (by the transferor beneficial owner) for the securities sought to be transferred under the said DIS. In this context, I note that apart from the requirement mandated under Regulation 32, the requirement of ensuring the receipt of consideration (by the transferor) before registering the transfer (in the case of off market) also finds a place in the bye-laws of the depository. The said bye-law is reproduced herein below:

“7.2. OFF MARKET TRADES SETTLEMENT

7.2.1. In respect of Off Market Trades, CDSL shall debit and/or credit the account of the Beneficial Owner entitled to such credit or debit, as the case may be, after receipt of confirmation from the delivering Beneficial Owner and the receiving Beneficial Owner through their respective participants confirming the details of securities and the receipt of payment in respect thereof.”

In terms of the aforesaid bye-law, it becomes the responsibility of the depository participant to confirm the depository, the details of the securities so transferred and the receipt of payment. The said bye-law also required the depository to debit or credit the shares only after receipt of confirmation as stated above. The very existence of the aforesaid bye-law would negate the contention that, the moment the petitioner had executed the DIS, she had not only confirmed and/or acknowledged having received the consideration for the transferred shares but

also instructed the depository participant to transfer the concerned securities. A perusal of Regulation 32 of the DP Regulations and bye-law 7.2.1 of the depository makes it very clear that the duty enshrined therein would not culminate on receipt of the DIS. The DIS cannot be processed in a mechanical manner. The said bye-law not only indicates that Regulation 32 was intended to be followed but also casts certain duties in respect of receipt of consideration. The said provisions (Regulation 32 of the DP Regulations and Bye-law 7.2.1) cast responsibility to ensure the receipt of payment by the transferor, before effecting the transfer. Therefore, the contention that there was no duty enshrined upon them to ensure the receipt of payment by the transferor before effecting the transfer would not be justified and the same was totally against the statutory specifications.

6. It was further submitted by the depository that it had devised a format of DIS which enabled a Beneficial Owner to indicate by selecting appropriate box against "cash transfer" viz. "yes", "no" and "not required", whether he received consideration or did not receive consideration for the securities sold by him or the transaction being in the nature of gift etc., no consideration was required. This would also establish that Regulation 32 was framed for the purpose of ensuring the receipt of payment by the transferor. If there was no intention to follow Regulation 32, then why was such a format in the DIS for indicating cash transfers made? In view of the facts and circumstances of the matter and the various statutory provisions as explained above in this Order, the contention of the parties that it was not necessary to ensure the receipt of payment by the transferor before effecting the transfer of securities has only to be disregarded. In the context of the present case, the acts of the depository in framing bye-laws (7.2.1) and making various provisions for indicating cash transfers in the DIS would further strengthen this finding.

7. I have perused the DIS dated August 13, 2003 that was signed by the petitioner. As submitted by the parties, the provisions for indicating 'cash transfers' were also present in the said DIS. The relevant columns in the said DIS are mentioned below:

Cash Transfer	No	Yes	Not Required
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The depository contended that none of the aforesaid boxes was selected by the petitioner on the DIS dated August 13, 2003 and therefore, it can neither be inferred that the petitioner had received the payment for the shares sold by her nor it can be inferred that she had not received the payment. The depository would have been justified to a certain extent in making such a submission, if the DIS did not contain boxes indicating cash transfers. Further, such a DIS format was necessitated in view of Regulation 32 of the DP Regulations and bye-law 7.2.1 of the depository and above all it was prescribed by the depository itself. It was the common submission that neither the depository nor the depository participant can go beyond or behind the DIS to ascertain whether the beneficial owners had in fact received payment for the transferred securities. I do not see any merit in the said submission. Why should one go beyond the DIS for ascertaining the receipt of payment, when the DIS itself contains columns for such entries? The said form speaks for itself. It was the duty of those concerned to carefully scrutinise and then process such type of requests. It was as simple as that. Further, it was the contention of the depository that the DIS was received by the depository participant and not by itself and therefore, the actual implementation of Regulation 32 lies with the depository participant with the active co-operation of the beneficial owner. It was also submitted that the DIS remains with the depository participant itself and an updation was made in this regard in the system by the depository participant. Mr. Somdutt Bose, director of the depository participant submitted that the petitioner was introduced by one Jayanta Pyne (since deceased) and accordingly, opened a Demat Account on

June 23, 2003. He further stated that, no trading account was ever opened by the petitioner with the depository participant. It was also contended that Mr. Jayanta Pyne had handed over two DISs from the petitioner, one bearing No.308806 dated August 13, 2002 and the other 308807 dated August 25, 2003. It was the claim of the depository participant that it had effected delivery, after carefully scrutinizing the forms and enquiring about the receipt of payment from Mr. Jayanta Pyne and the petitioner and therefore, it had complied with Regulation 32. The submissions of the depository participant are without any merit. The depository participant put forward a contention that it had 'enquired' with the petitioner and Mr. Jayanta Pyne about the receipt of payment before acting upon the DIS dated August 13, 2003. As discussed above in this Order, there were provisions in the DIS form to indicate cash transfers. Each and every column in the said DIS have to be filled in before handing over the same to the depository participant. However, the depository participant was not expected to process an unfilled DIS form mechanically. The depository participant had a duty to ensure that the said form was complete in all sense. If the application was not complete, it had to return the same to the petitioner to rectify the errors or fill the DIS completely. No such steps were taken by the depository participant. Instead of doing so, the depository participant processed the application negligently which has resulted in the present outcome. The depository participant claimed that it had enquired with the petitioner before acting on the DIS in question. However, it failed to substantiate the same. Even if, it had done so, it would not benefit the depository participant. If the DIS had not contained the provisions for cash transfers, the depository participant would have been justified in acting in such a manner. It is clearly wrong to process and act upon an incomplete application, especially when this follows out of exercising a statutory duty. If anyone processes such an unfilled form and that too without the vital information sought, he would definitely be failing in his duties. There is a statutory requirement to ensure the receipt of payment before

effecting the transfer of securities. Without complying with the duties cast upon it, it would be futile on the part of the depository participant to submit that it had enquired with the petitioner about the receipt of consideration. If the depository participant had exercised due diligence and prudence, he could have stopped the processing of the said DIS and reverted back to the petitioner for rectification. This was not done at all. A market intermediary, like a depository participant, is expected to exercise more diligence and care, as it is dealing with the transfer requests of the demat account holders. Had the depository participant acted diligently, the transfer of 100 shares under the aforesaid DIS could have been prevented. It was the depository participant who had initiated the process of DIS of the petitioner without verifying the entire details required therein. It had also given instructions to the depository to register the transfer of securities of the petitioner covered under the DIS dated August 13, 2003. It was the case of the depository that the DIS which was negligently processed by the depository participant in the matter was not received by it. In such a case, the primary liability would be on the depository participant in respect of the impugned transfer. However, the depository should also have exercised diligence in registering the transfer of shares. Having arrived at such a finding, I am of the view that suitable action needs to be taken against the depository participant, who without due diligence processed an incomplete DIS.

8. According to the depository, if the depository and depository participant are to be held responsible for not exercising due diligence and prudence while processing the transfer request, the petitioner should also be held equally responsible for negligence for not using safeguards provided by the depository. The fact that the petitioner had not filled a particular column/box in the DIS would not imply that the person receiving such application also should process the same in a mechanical manner. The details required in the DIS form have necessarily been prescribed with a specific purpose in mind viz. of safeguarding

the investors by ensuring the receipt of payment. Such basic requirements cannot be ignored by a regulated entity while processing the delivery instructions. As stated above, the relevant entries for indicating “cash transfers” in the DIS dated August 13, 2003 were kept blank. It is a basic requirement that a prudent person would first check the completeness of the form in all sense before acting upon the same. There was a duty cast to ensure the receipt of payment. When a requirement is statutorily prescribed in the interest of investors, the persons to whom it is directed are duty bound to comply with the same without fail. If the depository participant had exercised due diligence and prudence, he could have stopped processing the said DIS. A market intermediary, like a depository participant in the present case, is expected to exercise more diligence and care as it is dealing with the transfer request of demat account holders. It was the depository participant who had initiated the process of DIS of the petitioner without verifying the entire details required therein. Regulation 32 was not the sole provision that makes it compulsory to ensure the same. The bye-law of the depository and above all the DIS itself required that the payment had to be ensured. According to the depository, the implementation of Regulation 32 of the DP Regulations is a collective responsibility of a depository, depository participant and a beneficial owner. The contention that the petitioner did not exercise diligence and care while filling up the form would not mean that others charged with statutory duties can ignore such duties cast upon them.

9. In view of the above, I do not have any hesitation in holding that the requirements specified in Regulation 32 of the DP Regulations (ensuring the receipt of payment) were completely ignored which not only lead to a statutory failure but also a loss to the petitioner, a widow of sixty five years age. The depository participant totally failed in complying with its statutory duties while

processing and effecting the transfer of securities covered under the DIS dated August 13, 2003 submitted by the petitioner. In brief, the depository participant

- a. was totally negligent in processing an incomplete DIS;
- b. neglected the statutory requirements specified under Regulation 32 of the DP Regulations; and
- c. ignored Bye-law 7.2.1 of the Bye-laws of the depository that makes it liable to give proper instructions/advice to the depository after verifying the receipt of payment by the petitioner.

10. In this background, it is necessary on the part of SEBI to take certain corrective steps in remedying the grievance arising out of the negligence of the depository participant. In the present case, 100 shares of the petitioner had been transferred by the depository participant. I find that it is the primary duty of the depository participant to diligently process the DISs. Had the depository participant ensured to check whether payment was received or had not processed the incomplete DIS, the petitioner would not have lost her 100 shares of ITC Limited. In view of the same, in the interest of justice, I am of the considered view that the liability of compensating the petitioner for the loss of shares has to be fastened on the depository participant owing to its lack of exercise of diligence and care. As the transfer had occurred due to the lack of exercise of diligence, care and prudence of the depository participant, the lost 100 shares along with all benefits needs to be recovered from the depository participant for the purpose of compensating the petitioner. It was already mentioned in the Order dated June 4, 2010 that there was a stock split of the shares of ITC Limited and that a share with face value of Rs.10/- was split into ten shares with face value of Re.1/- on September 21, 2005. Further, on the said date, there was also a bonus issue of one share for every two shares held. In view of the same, 100 shares of ITC Limited held by Mrs. Atreyee Chakraborty would have become 1,500 shares. Therefore, the same needs to

be compensated by the depository participant to the petitioner. It is understood that ITC Limited would be issuing bonus shares in the proportion of 1 bonus share of Rs. 1/- for every existing fully paid up ordinary share of Rs. 1/- and that August 4, 2010 has been fixed as a record date for determining the members who would be entitled for the said bonus issue. Therefore, the petitioner would also be entitled to receive further benefits that would have accrued to her through the 100 shares of ITC Limited, if any, in addition to whatever has been stated above, till she is compensated by the depository participant. In view of the above, I am of the considered view that suitable direction needs to be issued under Section 11B of the Securities and Exchange Board of India Act, 1992 for the purposes of directing the depository participant to compensate the petitioner. The said provision is wide in its amplitude for directing the depository participant, which is duty bound to abide by the provisions of the aforesaid Act, Rules, Regulations and circulars and directions issued by SEBI, for meeting the objective of investor protection.

11. Before concluding, I would like to mention the contention of the depository participant that the petitioner had approached all concerned authorities like SEBI, Central Depository Services (India) Limited, Calcutta Stock Exchange Limited, National Stock Exchange of India Limited, even Consumer Forum in Kolkata, etc. but for obvious reasons, she did not receive any fruitful result from any of them. It was further stated “*lastly possibly suppressing the fact that as per the direction of the Hon’ble High Court the SEBI has already exonerated us from the allegations she lodged, she came up with a new agenda “Regulation 32” and in our absence the said matter was disposed off before the Hon’ble Court.*” The submission that the matter (Writ Petition No. 733 of 2007 - Atreyee Chakraborty vs. Securities and Exchange Board of India and others) was disposed off by the Hon’ble High Court in the absence of the depository participant is against the facts and circumstances of the case. I note that the

Hon'ble High Court, in its order dated March 12, 2010 observed "Inspite of notice during hearing of this application the respondent depository participant has not appeared. On the last day when the matter was heard and made part heard I directed the learned Counsel for the petitioner to ensure that another notice has been served on this depository participant. Such notice has been served and is kept as part of record. But none appears for the depository participants, which I take as an act of defiance."(emphasis supplied) Therefore, it is not correct and appropriate on the part of the depository participant to submit that the matter was disposed off by the Hon'ble High Court in its absence.

12. Further, the submission of the depository participant that SEBI had exonerated it is without any substance as far as the present proceedings are concerned. I note that the petitioner had filed a writ petition in W.P. No. 1368 of 2006 in the Hon'ble High Court at Calcutta [before the filing of W.P. No. 733 of 2007 (which was disposed of vide order dated March 12, 2010, as mentioned in paragraph 1 of this Order)] *inter alia* praying for a direction to SEBI to consider and enquire into the grievances of the petitioner. The said petition was disposed of by the Hon'ble High Court, vide Order dated November 28, 2006 and the said direction as observed in the Order dated March 12, 2010 is reproduced below:

"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 provision 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 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."

Pursuant to the aforesaid order, the petitioner was intimated by SEBI, vide letter dated January 11, 2007 that SEBI had no role to play in this regard and that her complaint did not call for initiation of proceedings by SEBI, as stated therein. Thereafter, the petitioner had filed the writ petition in W.P. No. 733 of 2007. In terms of the order of the Hon'ble High Court dated March 12, 2010, SEBI was bound to conduct an enquiry as stated therein. In view of the same, the submission that the depository participant was exonerated by SEBI is without any merit.

13. In view of the foregoing, I in exercise of powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Sections 11 and 11B thereof, hereby dispose of the show cause notice dated June 4, 2010 with the following directions:

a. The depository participant, G.M. Bosu & Co. Private Limited is directed to credit 100 shares of ITC Limited along with further benefits, if any, that would have accrued to her if she had held the said 100 shares from the date of the transfer till she is compensated by the said depository participant, in the dematerialised account of Mrs. Atreyee Chakraborty, within a period of thirty days from the date of receipt of this Order and thereafter, shall file a compliance report with the Securities and Exchange Board of India to that effect.

b. In case of failure to comply with the aforesaid directions, the Securities and Exchange Board of India shall initiate appropriate proceedings against the said depository participant, as it may deem fit, in accordance with law.

c. The Central Depository Services (India) Limited is directed to comply with all the statutory duties and requirements in the conduct of its activities in the securities market.

14. A copy of this Order shall also be immediately forwarded to Mrs. Atreyee Chakraborty.

**DR.K.M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**

**PLACE: MUMBAI
DATE: AUGUST 20, 2010**