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BOMBAY STOCK EXCHANGE

v.

JAYA I. SHAH AND ANR.

OCTOBER 17, 2003

B

[V.N. KHARE, CJ. AND S.B. SINHA, J.]

Stock Exchange Rules, Byelaws and Regulations, 1957:

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Defaulters' Committee—Status of—Held: Is not a juristic person but merely an association of persons.

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Bye-Laws 322 and 326—Member Stock Exchange—Declared defaulter—Assets of—Vesting—Held: His assets vest in Defaulters' Committee for benefit and on account of creditor members—However, such vesting is not absolute—Vestment co-terminus with the satisfaction of the members' claim—It comes to an end as soon as the purpose of Bye-law 326 is satisfied.

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Bye-Laws 248(a) and 282—Arbitration—Between members of Stock Exchange and between member and non-member—Distinction between—Held: In the case of former, the award need not be filed in court and is an appealable one—Whereas in the case of latter, the award must be filed in court so as to make it enforceable.

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Rule 18 and Bye-Law 326—Claim of awardees—Satisfaction of—Held: Defaulters' Committee would not be a debtor in relation to awardees—The awardees entitled to get their claim on a pro rata basis and not in its entirety.

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Rule 16, Bye-Laws 326 and 343(7)—Defaulter member—Assets of—Method of distribution—To his creditors—Held: To be distributed on a pro rata basis—However, claims to be determined subject to cut-off date prescribed by the Governing Board of the Exchange—But attachment of claims in the hands of defaulters' Committee not enforceable.

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A registered broker and a member of the appellant-Exchange was declared a defaulter under byelaw No. 316 of the Stock Exchange

Rules, Byelaws and Regulations, 1957 whereupon he ceased to be a member of the appellant-Exchange under Rule 53. The Defaulters' Committee constituted in terms of the Rules, Byelaws and Regulations took charge of his assets as were within the control of the appellant. A

The respondent had certain claims against the said registered broker. An arbitration award was made in her favour, which was made a rule of court, and a decree in terms thereof was prepared. In execution of the said decree, a warrant of attachment was issued for attaching the debt owed by the appellant-Exchange to the said registered broker. A Garnishee Notice was also issued by the High Court calling upon the appellant to pay to the respondent a certain sum. B
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The appellant filed several affidavits disclosing the amount lying in its hands. In the first affidavit, it was disclosed that sufficient fund was available to meet the claim of the respondent. However, in an additional affidavit the appellant contended that the balance amount remaining out of the consideration received by exercising the right of nomination of the membership of the said registered broker i.e. card money was required to be applied *pro rata* in accordance with Rule 16(ii) and the said amount did not belong to and was not payable to the respondent whether as a debt or otherwise, and was not held by the appellant-Exchange on behalf of the respondent. The appellant, therefore, contended that the respondent was not entitled to attach any part of the said amount. D
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The Single Judge rejected the aforementioned contention of the appellant-Exchange and made the Garnishee Notice absolute pursuant whereto the appellant was directed to pay over to the respondent a certain sum. F

The appellant filed an appeal before the Division Bench contending that the Single Judge erred in rejecting and refusing to take on record the appellant's additional affidavit, which was dismissed. Hence the appeal. G

Disposing of the appeal, the Court H

A HELD : 1.1. The Defaulters' Committee constituted under Rule 170(a)(ii) of the Stock Exchange Rules, Byelaws and Regulations, 1957 is not a juristic person. It is merely an association of persons. [915-F]

B 1.2. The assets of a defaulter-member shall vest in the Defaulters' Committee under Byelaw 322 for the benefit and on account of the creditor members. However, such vesting is not absolute. The Defaulters' Committee is merely a trustee. [915-H, 916-B, 916-F]

C 1.3. The Defaulter's Committee takes in its custody the amount realised from other assets not as an owner thereof and the vestment thereof would, thus, be co-terminus with the satisfaction of the claim of the member. It, as soon as the purpose of Byelaw 326 is satisfied, comes to an end. [916-A, 917-A]

D 2.1. There lies a distinction between the two sets of arbitration – one between a member and a non-member and another between the member and member of the Exchange. A claim by a non-member against the defaulter who was the member must be considered from a different angle having regard to the fact that although the same relates to a contract, such arbitration is governed by the provisions of the law of the country, namely, the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996, as the case may be. For the said reasons, only Bye-law 259 mandates that the award shall be filed in the court so as to enable either the defaulting member or the non-member to make such objections in terms of the provisions of the Act, as may be permissible in law. Once an opportunity to file such an objection is provided for and determined, the award shall be made a rule of court and, thus, becomes enforceable in a court of law. The claim of a decree-holder, thus, cannot be *pari passu* with the claim of the award-holder in the category of non-member as it is incumbent upon a non-member to have an award made a rule of the court before it becomes enforceable. A contract between a member and a non-member is otherwise enforceable in a civil court. By reason of existence of an agreement clause, only the suit filed by a non-member against a defaulting member can be stayed and/or referred to arbitration. A decree made pursuant to

H such an award, can also be executed by taking action as against the

personal assets of the defaulting member. [917-G-H, 918-A-C]

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2.2. The scheme of arbitration between a member and a defaulting member, however, stands on a completely different footing. Not only it is an internal matter of the Exchange, an award made in such a proceeding is an appealable one. Only when determination is made in relation to a claim by and between the member and the defaulting member, the same becomes final and enforceable. [918-D-E]

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3. So long as the claim of the awardees both of members as also non-members are dealt with by the Defaulters' Committee, the Exchange or the Defaulters' Committee would not be a debtor in relation to an awardee. But once the Defaulters' Committee determines such claims and surplus is available at the hands of the Defaulters' Committee, as the surplus amount would become payable to the defaulting members, the same would become an asset of the defaulting member. In other words, other assets continue to remain assets of the defaulting members subject to the vesting thereof for the purposes mentioned in Byelaw 326 and as soon as the purpose is satisfied, the ownership, which was under animated suspension or eclipsed would again revive to the defaulting member. The awardees, however, so long as the assets remain under the control of the Defaulters' Committee would be entitled to get their claim on a *pro rata* basis and not in its entirety. [918-E-G]

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4.1. It cannot be held that despite the fact that claims having regard to the priority clause contained in Rule 16 remain in the hands of the Defaulters' Committee and an order of attachment would be enforceable, since the same would result in incongruity. No clear picture emerges from the rules and byelaws, as there does not appear to be any provision as to how the card money as also other assets belonging to the defaulting member can be handled by the Defaulters' Committee. But the rules and byelaws have to be read harmoniously. They have to be read together so as to make them effective and workable. So read, the Defaulters' Committee constituted in terms of byelaws would apply to the other assets, dues, payments of the members on a *pro rata* basis whereafter the dues of the non-member can be disbursed. While doing so, however, such claim can be determined only having regard to the cut-off date,

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A which must be prescribed by the Governing Board in terms of clause 7 of the byelaw 343. [919-A-C]

B 4.2. So far as the card money of the defaulter-member is concerned, the same must be disbursed having regard to the priority clause contained in Rule 16, in which event, upon discharge of the dues of the Exchange and clearing house, the same has to be distributed to the dues of the members and non-members. There does not exist any distinction between a member and a non-member in terms of Rule 16 and in the event the amount of the card money available at the hands of the Exchange is not sufficient to satisfy all the claims, the same has to be distributed on a *pro rata* basis. However, any amount remaining surplus even thereafter would be subject to a decision of the Governing Board. The Governing Board may in a given situation having regard to the hardship, which may be faced by the members, and non-members in realising their dues may direct that such amount would be available for disbursement towards the said dues. It, however, is free to apply the surplus for a different purpose, which, evidently cannot be de hors the purpose, and object for which the Exchange has been constituted. [919-C-F]

E *Kesoram Industries & Cotton Mills Ltd. v. CWT Wealth Tax*, [1966] 2 SCR 688; *Vinay Bubna v. Stock Exchange*, [1999] 6 SCC 215, *Stock Exchange v. Assistant Commissioner of Income Tax*, [2001] 3 SCC 559 and *Official Assignee v. K.R.P. Shroff*, AIR (1932) PC 186, referred to.

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8297 of 1997.

From the Judgment and Order dated 25th July 1997 of the High Court of Judicature at Bombay in Appeal No. 17 of 1996.

G Dushyant A. Dave, Pesy Mody, P. Venugopal, P.S. Sudheer for K. J. John for the Appellant.

Ms. Indu Malhotra for the Respondent.

H The Judgment of the Court was delivered by

S.B. SINHA, J : Interpretation of Securities Contract (Regulation) Act, 1956 (hereinafter referred to as 'the Act') *vis-à-vis* rules, bye-laws and the regulations framed thereunder as regard the right of a third party to realise his dues out of the corpus of the Defaulters' Committee is the question involved in this appeal which arises out of a judgment and order dated 25th July, 1997 passed by the High Court of Judicature at Bombay in Appeal No. 17 of 1996.

THE BACKGROUND FACT:

The appellant herein is Bombay Stock Exchange (Exchange). It is recognized by the Central Government under the Rules, Bye-laws and Regulations framed in the year 1957 pursuant to or in furtherance of the provisions of 'the Act'. The said rules, bye-laws and regulations are approved by the Central Government. Rights and obligations of the members of the Exchange as also the constituents/investors dealing with or through the members are governed by the Rules, Bye-laws and Regulations framed under the Act.

One C.S. Shah was a registered broker. He was a member of the Exchange. He carried on his business as a stock broker. He was entitled to a personal privilege under the Rules of trading as a broker member. The said privilege is inalienable. As he failed to fulfill his obligations and liabilities, on or about 4th November, 1997 he was declared a defaulter in terms of Bye-law No. 316 whereupon he ceased to be a member of the Exchange under Rule 53. His membership vested in the appellant-Exchange free of all rights, interests and claims. The Defaulters' Committee constituted in terms of the Rules, Bye-laws and Regulations took charge of his assets as were within the control of the Exchange.

The respondent herein had certain claims against the said C.S. Shah. She invoked the arbitration clause in terms of the Bye-laws of the Exchange pursuant to or in furtherance whereof an arbitration award dated 10.8.1993 was made in her favour for a sum of Rs. 2,96,000 together with interest at the rate of 15% per annum. The said award was filed in the High Court of Judicature at Bombay. The award was made a rule of court and a decree in terms thereof was prepared on 15.2.1994. In execution of the said decree

- A a Warrant of Attachment purported to be under Order 21, Rule 46 of the Code of Civil Procedure, 1908 was issued on 27.7.1994 for attaching the debt owed by the Exchange to C.S. Shah. A Garnishee Notice was also issued by the High Court on 7.12.1994 in terms whereof the Exchange was called upon to pay to the respondent/Sheriff of Bombay a sum of Rs. 4,15,157.80.

- C Several affidavits were filed by the Exchange disclosing the amount lying in its hands. In the first affidavit filed on 12.1.1995, it was disclosed that sufficient fund is available to meet the claim of the respondent. In an additional affidavit filed on 8.12.1995 it was alleged that the total amount lying with the Exchange for distribution amongst the constituent creditors of C.S. Shah was Rs. 53,56,159. It was further contended that in addition to that amount each creditor constituent was entitled to receive a maximum sum of Rs. 25,000 from the Petitioner's Customer Protection Fund towards his/ her claim and the said available sum of Rs. 53,56,159 was required to be distributed on a prorata basis in terms whereof the respondent would be entitled to receive a sum of Rs. 1,16,530 making an aggregate sum of Rs. 1,141,530.

- E A consolidated list setting out the names of the constituents who had obtained Arbitration Awards along with the relevant details was annexed to the affidavit. The respondent's claim was set out at item No. 72 of the list. The Exchange expressed its readiness and willingness to pay the said sum of Rs. 1,41,530 to the respondent simultaneously with the payments to be made to the other creditor constituents of C.S. Shah.

- F A further affidavit was filed on 14.12.1995 wherein it was contended that the Defaulters' Committee had collected and realised C.S. Shah's assets and distributed in full the proceeds thereof as provided by the appellant's Rules, Bye-laws and regulations. It was further contended that as there still remained a deficiency, the Governing Board of the Exchange had exercised the right of nomination of membership relating to C.S. Shah and recovered a sum of approximately Rs. 1,25,00,000 in that manner and as per Rule 16 of the Exchange Rules out of the realisation from the nomination of membership of approximately Rs. 1,24,00,000, a sum of approximately Rs. 70,00,000 was applied towards the payment of appellant's

Clearing House's dues and a balance sum of Rs. 53,56,159 remained available for distribution on a priority basis, under Rule 16(ii). Further contention of the Exchange was that once a member was declared a defaulter, he at once ceases to be its member whereupon the member's right of membership lapses and immediately vests in it, free of all claims and interests of such member or any person claiming through such member and the Governing Body was entitled to dispose of such membership right as it thought fit. It was stated that when such right of nomination was exercised by the Governing Board, the consideration received therefor belonged exclusively to the Exchange and was to be applied in the manner provided by Rule 16. The Exchange, therefore, set out that the balance of Rs. 53,56,159 (which was the balance remaining out of the consideration received by exercise of the right of nomination of the membership), was required to be applied prorata in accordance with the Rule 16(ii) and the said amount did not belong to and was not payable to C.S. Shah, whether as a debt or otherwise, and was not held by the Exchange on behalf of C.S. Shah. The appellant, therefore, contended that the respondent was not entitled to attach any part of the said amount.

The learned Single Judge rejected the aforementioned contention of the Exchange and made the Garnishee Notice absolute pursuant whereto it was directed to pay over to the respondent a sum of Rs. 4,14,977.80.

Aggrieved thereby the appellant preferred an appeal before the Division Bench of the Bombay High Court wherein the contentions raised before the learned Single Judge were reiterated and in particular it was contended that the learned Single Judge erred in rejecting and refusing to take on record the Exchange's additional affidavit dated 14th December, 1995.

The Division Bench while admitting the appeal passed an order taking on record the said additional affidavit and further granted leave to the respondent to file a rejoinder thereto.

By reason of the impugned judgment the said appeal was dismissed.

Before us also the following chart has been placed to show that even now the net shortfall is Rs. 70,00,000.00.

A Collection		Distribution	
1) Other assets collected by and vested in Defaulters' Committee under Bye-law 326	Rs. 68,00,000.00	1) To 'Creditor Members' under Bye-law 326	Rs. 68,00,000.00
B			
2) Sale proceeds of Membership Right vested in Stock Exchange	Rs. 1,25,00,000.00	2) To Exchange and Clearing House Dues (for members) under Rule 16(i)	Rs. 70,00,000.00
C			
Contribution by Customers Protection Fund	Rs. 38,00,000.00	3) Net Balance available for Distribution under Rule 16(ii)	Rs. 55,00,000.00
		Plus CPF	Rs. 38,00,000.00
D			-----
		PAYABLE	Rs. 93,00,000.00
		<i>Pro rata to Large Body of Creditors of Defaulter (Over 150)</i>	
E		Total Claim:	Rs. 1,63,00,000.00
		Net Short fall	Rs. 70,00,000.00

SUBMISSIONS:

F Mr. Dushyant A Dave, learned senior counsel appearing on behalf of the appellant would submit that the learned Single Judge as also the Division Bench has committed a serious error insofar as they failed to take into consideration the averments made in the additional and further affidavits wherein it has clearly been stated that there was no surplus amount available from securities deposited by the defaulter.

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The learned counsel would contend that in terms of the scheme of the Act, Rules, Bye-laws and Regulations, the dues of the Exchange, Clearing House and Members would get priority. The Defaulters' Committee has distributed the entire available amount to them from the

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assets of the defaulting member other than the card money and the only amount which was available for distribution to the members, non-members etc. is the sale proceeds from the Card Membership/right of nomination. The rights of liabilities of the members and non-members being governed by the Rules, Bye-laws, and Regulations made under the Act, the respondent does not have any priority claim and the amount available at the hands of the Defaulters' Committee must be distributed to all the claimants *pro-rata*.

The learned counsel would submit that a Garnishee proceeding is not contemplated inasmuch as no debt was lying at the hands of the Exchange or due to so far as the said C.S. Shah is concerned. Reliance in this behalf has been placed on *Kesoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central) Calcutta*, [1966] 2 SCR 688. If the judgment of the High Court is sustained, Mr. Dave would urge, the same would be contrary to the statutory rules as also the Bye-laws. Reliance in this connection has been placed on *Vinay Bubna v. Stock Exchange Mumbai & Ors.*, [1999] 6 SCC 215.

Ms. Indu Malhotra, the learned counsel appearing on behalf of the respondent would, on the other hand, submit that a Membership Card being not a personal property of the Defaulter, when sold, the proceeds thereof must be distributed amongst the creditors as 'liabilities relating to contracts' under Rule 16(ii) makes no distinction between the claims of a member and non-member as Bye-law 219 defines a 'Contract Note' to include a contract between a member and a non-member. It was argued that the other assets of the defaulting member do not vest in the Exchange. The vesting of the other assets in the Defaulters' Committee is merely to a limited extent, viz as a trustee, for the benefit and on account of the creditors members. Such vesting, Ms. Malhotra would contend, would be co-terminus with the satisfaction of the claims of the members and, thus, the surplus which remains at the hands of the Defaulters' Committee must be restored to the defaulting member in terms of Rule 44 which would be available for discharge of his other dues.

As per the first affidavit of the Exchange, Ms. Malhotra would argue, a large amount of surplus money was available at its hand, and, thus, no

A illegality can be said to have been committed by both the Single Judge and the Division Bench of the High Court in recording their concurrent finding that what had been attached was the surplus from the other assets of the defaulting member.

B The learned counsel would submit that procedures laid down for arbitration between members and non-members; and members and members are absolutely different. Whereas in the case of the former the award is to be filed before an appropriate court for being made a rule of the court; no such procedure is contemplated in the arbitration proceeding between a member and a member. An award in favour of a non-member and which had not been made a rule of court would not be enforceable, contends Ms. Malhotra.

D It was further submitted that the Defaulters' Committee could not entertain any such claim which was not preferred within the time prescribed by the Governing Board in terms of Bye-Law 343(vii). Our attention has been drawn to the fact that the Division Bench of the High Court by an order dated 17.1.1996 directed the Stock Exchange to put the entire surplus amounting to Rs. 55 lakhs in fixed deposit. In the said account a huge amount of interest has accumulated but the same has not been accounted for in the statement. The learned counsel would contend that the funds available at its hands had been dealt with by the Stock Exchange in a highly high-handed and inequitable manner and there are severe discrepancies with regard to the account submitted by it. In this connection our attention has also been drawn to the fact that the respondent had been waiting for satisfaction of decree since 15.2.1994 and thus, there is no justifiable reason that this amount be not paid to her as per the decree.

G The learned counsel would submit that the Stock Exchange had made a statement before this Court that it would deposit the entire decretal amount to the Bombay High Court within one day, since it is a money decree, as a condition for the Special Leave Petition to be entertained which was permitted on 8.9.1997 and, therefore, in interest of justice she be allowed to withdraw the said amount.

H *STATUTORY PROVISIONS:*

The Exchange is recognized as a Stock Exchange within the meaning of the said Act. The relevant provisions of the said Act are as follows: A

“2 (a) ‘Contract’ means a contract for or relating to the purchase or sale of securities;

2 (e) ‘prescribed’ means prescribed by rules made under this Act; B

2 (f) ‘recognised stock exchange’ means a stock exchange which is for the time being recognised by the Central Government under section 4;” C

Section 3 of the Act deals with Application for recognition of Stock Exchanges which reads as under:

“3. Application for recognition of stock exchanges.- (1) Any stock exchange, which is desirous of being recognised for the purposes of this Act, may make an application in the prescribed manner to the Central Government. D

(2) Every application under sub-section (1) shall contain such particulars as may be prescribed, and shall be accompanied by a copy of the bye-laws of the stock exchange for the regulation and control of contracts and also a copy of the rules relating in general to the constitution of the stock exchange, and in particular, to.. E

(a) the governing body of such stock exchange, its constitution and powers of management and the manner in which the business is to be transacted; F

(b) the powers and duties of the office bearers of the stock exchange;

(c) the admission into the stock exchange of various classes of members, the qualifications for memberships, and the exclusion, suspension, expulsion and re-admission of members there from or thereinto; G

(d) the procedure for the registration of partnerships as H

A members of the stock exchange in cases where the rules provide for such membership; and the nomination and appointment of authorised representatives and clerks.”

B Section 4 provides for Grant of recognition to stock exchanges. Sub-section 1(a) of Section 4 is as under:

“(1) If the Central Government is satisfied, after making such inquiry as may be necessary in this behalf and after obtaining such other or further information, if any, as it may require,—

C (a) that the rules and bye-laws of a stock exchange applying for registration are in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors;”

D Section 9 of the Act deals with power of recognized stock exchanges to make bye-laws. Sub-section 1 of Section 9 reads as under:

“(1) Any recognised stock exchange may, subject to the previous approval of the Central Government, make bye-laws for the regulation and control of contracts.”

E Sub-section (2) of Section 9 reads thus:

“(2) In particular , and without prejudice to the generality of the foregoing power, such bye-laws may provide for—

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G (b) a clearing house for the periodical settlement of contracts and differences thereunder, the delivery of and payment for securities, the passing on of delivery orders and the regulation and maintenance of such clearing house;

H (k) the regulation of the entering into, making, performance, rescission and termination, of contracts, including contracts between a member or between a

member and his constituent or between a member and A
a person who is not a member, and the consequences
of default or insolvency on the part of a seller or buyer
or intermediary, the consequences of a breach or
omission by a seller or buyer, and the responsibility of
members who are not parties to such contracts; B

(n) the method and procedure for the settlement of
claims or disputes, including settlement by arbitration;”

Sub-Section 3(b) of Section 9 reads as under:

“(3) The bye-laws made under this section may— C

(b) provide that the contravention of any of the bye-laws shall
render the member concerned liable to one or more of the
following punishments, namely:— D

- (i) fine;
- (ii) expulsion from membership;
- (iii) suspension from membership for a specified period; E
- (iv) any other penalty of a like nature not involving the
payment of money.”

The Rules, Bye-laws and Regulations have been framed by the
Exchange known as ‘the Stock Exchange Rules, Bye-Laws and Regulations, F
1957. The same has received the approval of the Central Government. The
Rules so framed govern the relationship of the member and Exchange.

Rule 5 provides that a membership is a personal privilege. If a
member becomes a defaulter, the said privilege is put on auction and the G
money is deposited to the Exchange. Rule 10 provides that when a right
of membership is forfeited to or vests in the Exchange, it shall belong
absolutely to the Exchange free of all rights, claims or interest of such
member or any person through such member and the Governing Board
shall be entitled to deal with or dispose of such right of membership as H

A it thinks fit.

Rule 11 deals with nomination by members. With regard to nomination in case of defaulter sub-rule (c) provides as under :

B Nomination in case of Defaulter

C “The forfeited right of membership of a defaulter shall be restored to him if he be re-admitted as a member within six months from the date of default but if an application by a defaulter for re-admission be rejected by the Governing Board or if no such application be made within six months of the declaration of default the Governing Board may at any time exercise the right of nomination in respect of such membership.”

Rule 16 reads thus:

D “16. ALLOCATION IN ORDER OF PRIORITY – When as provided in these Rules the Governing Board has exercised the right of nomination in respect of a membership vesting in the Exchange the consideration received therefor shall be applied to the following purposes and in the following order of priority namely -

E Dues of Exchange and Clearing House

F (i) first – the payment of such subscriptions, debts, fines, fees, charges and other monies as shall have been determined by the Governing Board to be due to the Exchange or to the Clearing House by the former member whose right of membership vests in the Exchange;

G Liabilities relating to Contracts

H (ii) Second – the payment of such debts, liabilities, obligations and claims arising out of any contracts made by such former member subject to the Rules, Bye-laws and Regulations of the Exchange as shall have been admitted by the Governing Board; provided

that if the amount available be insufficient to pay and satisfy all such debts, liabilities, obligations and claims in full they shall be paid and satisfied *pro rata*; and A

Surplus

(iii) third – the payment of the surplus if any to the hands of the Exchange provided that the Exchange in general meeting may at its absolute discretion direct that such surplus be disposed of or applied in such other manner as it may deem fit.” B

Rules 43 and 44 deal with the lien on security and return of security and read as under: C

LIEN ON SECURITY

“43. The security provided by a member shall be subject to a first and paramount lien for any sum due to the Exchange or to the Clearing House by him or by the partnership of which he may be a member and for the due fulfillment of his engagements, obligations and liabilities or of the partnership of which he may be a member arising out of or incidental to any bargains, dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or anything done in pursuance thereof.” D E

RETURN OF SECURITY

“44. On the termination of his membership or on his ceasing to carry on business on the Exchange or on his working as a representative member or on his death all security not applied under the Rules, Bye-laws and Regulations of the Exchange shall at the cost of the member be repaid and transferred either to him or as he shall direct or in the absence of such direction to his legal representatives.” F G

Rules 53 and 54 deal with the effect of default and read as under : H

A **DEFAULT**

“53. A member who is declared a defaulter shall at once cease to be a member of the Exchange and as such cease to enjoy any of the rights and privileges of membership but the rights of his creditor members against him shall remain unimpaired.

B **LAPSE OF MEMBERSHIP RIGHT**

54. A member’s right of membership shall lapse to and vest in the Exchange immediately he is declared a defaulter.”

C Rule 70 reads as under:

FAILURE TO PAY SUBSCRIPTION AND OTHER FEES

D “70. Save as otherwise provided in the Rules, Bye-laws and Regulations of the Exchange if a member fails to pay his annual subscription, fees, charges or other monies which may be due by him to the Exchange or to the Clearing House within two months after notice in writing has been served upon him by the Exchange he may be suspended by the Governing Board until he makes payment and if within a further period of six months he fails to make such payment he may be expelled by the Governing Body.”

E The following Bye-laws are also relevant for the purpose of disposal of this matter :

F “67. LIEN ON MARGIN DEPOSITS: The monies, Bank Deposits Receipts and other securities and assets deposited by a member by way of margin under the provisions of these Bye-laws and Regulations shall be subject to a first and paramount lien for any sum due to the Exchange or to the Clearing House by him or by

G the partnership of which he may be a member and for the due fulfillment of his engagements, obligations and liabilities or of the partnership of which he may be a member arising out of or incidental to any bargains, dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the

H Exchange or anything done in pursuance thereof.

226.(a) ALL CONTRACTS SUBJECT TO RULES, BYE-LAWS AND REGULATIONS: All contracts made by a member with a non-member for the purpose or sale of securities in which dealings are permitted on the Exchange shall in all cases be deemed made subject to the Rules, Bye-laws, Regulations and Usage of the Exchange shall be a part of the terms and conditions of all such contracts and they shall be subject to the exercise by the Governing Board and the President of the powers with respect thereto vested in it or him by the Rules, Bye-laws and Regulations of the Exchange.

251. APPOINTMENT OF UMPIRE: The arbitrators appointed by the parties or by the Governing Board or the President shall have the power to appoint a member of the Exchange as an umpire at any time and they shall do so if and when they differ as to their award.

328. FRAUDULENT PREFERENCE: A member who shall have received a difference on an account or shall have received any consideration in any transaction prior to the date fixed for settling such account or transaction shall in the event of the member from whom he received such difference or consideration being declared a defaulter refund the same to the Defaulters' Committee for the benefit and on account of the creditor members. Any member who shall have paid or given such difference or consideration to any other member prior to such settlement day shall again pay or give the same to the Defaulters' Committee for the benefit and on account of the creditor members in the event of the default of such other member.

330. DISTRIBUTION: The Defaulters' Committee shall at the risk and cost of the creditor members pay all assets received in the course of realization into such bank and/ or keep them with the Clearing House in such names as the Governing Board may from time to time direct and shall distribute the same as soon as possible *pro rata* upto sixteen annas in the Rupee but without interest among the creditor members whose claims are admitted in accordance with these Bye-laws and Regulations.

A 343. CERTAIN CLAIMS NOT TO BE ENTERTAINED: The Defaulters' Committee shall not entertain any claim against a defaulter –

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 (vii) which is not filed with the Defaulters' Committee within such time of the date of declaration of default as may be prescribed by the Governing Body.”

C The provisions for arbitration between a member and a non-member and a member and a member are different and distinct.

The following Bye-laws provide for arbitration between member and non-member:

D “248(a) REFERENCE TO ARBITRATION: All claims (whether admitted or not) differences and disputes between a member and a non-member or non-members (the terms “non-member” and “non-members” shall include a remisier, authorized clerk or employee or any other person with whom the member shares

E brokerage) arising out of or in relation to dealings, transactions and contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or in pursuance thereof or relating to their construction, fulfilment or validity or relation to the rights, obligations and liabilities of

F remisiers, authorized clerks, employees or any other persons with whom the member shares brokerage in relation to such dealings, transactions and contracts shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange.

G 249(a) APPOINTMENT OF ARBITRATORS: All claims, differences and disputes required to be referred to arbitration under these Bye-laws and Regulations shall be referred to the arbitration of two members of the Exchange one to be appointed

H by each party.

254 AWARD BY ARBITRATORS: The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party or within such extended time as the arbitrators may fix with the consent of the parties to the reference or as the Governing Body or the President may allow.

259 FILING OF AWARD: The arbitrators or umpire shall at the request of any party to the reference or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the reference and award and of the costs and charges of filing the award cause the award or a signed copy of it together with any depositions and documents which may have been taken and proved before the arbitrators or umpire to be filed in Court.”

The following Bye-laws provide for arbitration between member and member:

“282. REFERENCE TO ARBITRATION: All claims, complaints, differences and disputes between members arising out of or in relation to any bargains, dealings, transactions or contracts made subject to the Rules, Bye-laws and Regulations of the Exchange or with reference to anything incidental thereto or anything to be done in pursuance thereof and any question or dispute whether such bargains, dealings, transactions or contracts have been entered into or not shall be subject to arbitration and referred to the Arbitration Committee as provided in these Bye-laws and Regulations.

284. APPLICATION FOR ARBITRATION: Whenever a claim, complaint, difference or dispute which under these Bye-laws and Regulations must be referred to the Arbitration Committee arises between members any member who is a party to such claim, complaint, difference or dispute may apply to the Arbitration Committee to inquire into and arbitrate in the dispute.

A 290. APPEAL TO ARBITRATION COMMITTEE: A party to a reference who is dissatisfied with any award of the arbitrators may appeal to the Arbitration Committee against such award within seven days of the receipt by him of such award.

B 292. HEARING OF APPEAL: When the deposit certificate is annexed to the appeal the Arbitration Committee shall itself proceed to hear the appeal and arbitrate in the reference.

C 295. APPEAL TO THE GOVERNING BOARD: If the sum involved in dispute is "ten thousand Rupees or more" the party dissatisfied with the award of the Arbitration Committee may appeal to the Governing Board against such award within seven days of the receipt by him of such award.

D 297. DECISION OF THE GOVERNING BODY FINAL: When the deposit certificate is annexed to the appeal the Governing Board shall proceed to hear the appeal and the decision of the Governing Board shall be deemed final and binding on the parties to the appeal."

E Rules, Bye-laws and Regulations are made by the Exchange. They although are not made under a statute but having regard to the scheme as also the purport and object thereof, have a statutory flavour. Bye-laws are required to be made for regulation and control of contracts, whereas rules relate to in general to the constitution and management of a stock exchange.

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G A contract has been defined to mean a contract for or relating to purchase or sale of securities. A contract note however, in terms of Bye-law Note No. 219 includes a contract between a member and a non-member. It is not in doubt or dispute that membership conferred upon a person is a personal privilege. He holds such privilege so long as he complies with the rules, bye-laws and regulations framed by the Exchange. In the event of a default committed by a member, having regard to Rule 53 as also Bye-law 316, he would cease to enjoy any right as such. His right in terms of Rule 54 lapses and vests in the Exchange immediately
H upon a declaration that he has become a defaulter. His right of nomination

in view of Rule 9 ceases upon default and vests in the Exchange. In terms of Rule 10, the membership belongs absolutely to the Exchange free of all rights, claims or interests in such a manner as it may think fit. Rule 16 provides for the order of priority in terms whereof dues of the Exchange and clearing house would have priority, whereafter all the liabilities relating to contract are required to be discharged. Rule 16, however, does not make any distinction between the claim of a member or a non-member. In the event there being any surplus, the amount collected by the Exchange by auctioning the right of membership is to be dealt with in such a manner as the Exchange may think fit and proper. Rule 16, aforementioned, has been held to be valid in *Vinay Bubna* (supra) by this Court holding :

“10. The order of priority laid down by the aforesaid Rule 16 ensures that dues to the exchange or to the clearing house have first to be met before the balance amount can be utilised for payment of debts, liabilities, obligations etc. arising out of any contract made by the former member. If the amount available is insufficient to pay all such debts, liabilities, etc. then the payment is to be made *pro rata*. If, however, any surplus still remains the same is to be disposed of or applied in such manner as the exchange in general meeting may decide.

11. The High Court, in our opinion, was, therefore, right in coming to the conclusion that on a default being committed the sharebroker ceases to become a member of the Exchange and all his rights, privileges, etc. as a member come to an end. If he does not clear the dues within six months the governing body then has a right of nomination in respect of such membership. It will be incorrect to state that on the stock broker ceasing to be a member, he still retains any right or interest in the permission which has been granted to him by the exchange to carry on business as a member. The membership card of a share broker is not his personal property which, on default being committed by him and his ceasing to be a member, can be sold and the proceeds distributed amongst his creditors. Rules 53 and 54 leave no manner of doubt that the member's right of membership vests in the exchange after he is declared a defaulter. This view, namely, that the defaulting member can claim no interest in the membership

A card and can pass none is in consonance with the decision of the Privy Council in *Official Assignee of Bombay v. K. R. P. Shroff & Ors.*, AIR (1932) PC 186. In that case a member of the Bombay Stock Exchange had lost his membership for being a defaulter. The main question which arose for determination there was whether a card or right of membership of a share broker or the proceeds of sale thereof, when sold, would pass to the assignee in insolvency of the share broker's estate after he had lost his membership for being a defaulter. After referring to the rules of the Stock Exchange in this connection it was observed at p. 190 as follows :

“But although the rules are badly drawn and not in uniform phraseology their result in the case of a member who has lost his membership for being a defaulter clearly enough is that he loses all interest both in the property of the association and in his card. In such a case no interest is reserved in the defaulter's card except to membership of the Association who have suffered by his lapse-in the rules sometimes called his creditors-or to the association itself. This seems to their Lordships to be the result of Rules 18, 56, 57 and 62. The defaulting member himself has no interest in the result of the sale provided for under these rules nor can he require a sale to be made. The rules are there for the benefit of his “exchange creditors” and are doubtless enforceable at their instance.”

F Yet again in *Stock Exchange, Ahmedabad v. Assistant Commissioner of Income Tax, Ahmedabad*, [2001] 3 SCC 559, this Court upon following the decision of the Privy Council in *Official Assignee of Bombay v. K.R.P. Shroff*, AIR (1932) PC 186 again held :

G “10. In *Official Assignee of Bombay v. K. R. P. Shroff*, AIR (1932) PC 186 : ILR 56 Bom 374, the Privy Council considering somewhat similar Rules held that a member who has lost his membership for being a defaulter loses all interests both in the property of the association and in his card. No interest is reserved in the defaulter's card except

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to members of the association who have suffered by his lapse A
 or to the association itself. The contention urged on behalf
 of the respondent that Rajesh Shah could not be declared a
 defaulter after his death and, therefore, on his purported
 default the question of membership vesting in the Stock
 Exchange would not arise need not be gone into in the B
 present case, for that Rule 9 stipulates that both in case of
 death or default of a member his right of nomination shall
 cease and vest in the Exchange. In the case in hand, on the
 death of Rajesh Shah his right of nomination ceased and
 vested in the Exchange and his legal representatives and C
 heirs did not exercise the right of nomination by expressing
 their inability to meet the liabilities of the deceased."

How the card money is to be dealt with has been provided under the
 rules. A dichotomy, however, has been created under the rules and bye-
 laws as regard the amount received by sale of membership card and amount D
 recovered from defaulter's other assets. On a plain reading of the rules
 and bye-laws it appeared that the authority to deal with the card money and
 the liability of the members by the Defaulters' committee is different, but
 having regard to the scheme of distribution of the liabilities of the E
 Exchange, clearing house, members and non-members, all the assets shall
 be placed at the hands of the Defaulters' Committee. But as would appear
 from the discussions made hereinafter the application thereof would be
 separate and distinct.

In terms of the bye-laws, a Defaulters' Committee is to be constituted F
 which is a standing committee consisting of six members of the Exchange.
 Such a committee is constituted in terms of Rule 170(a) (ii) of the Stock
 Exchange Rules, Bye-laws and Regulations, 1957. It is not a juristic
 person. It is merely an association of persons.

Bye-laws 316 to 353A deal with default. Bye-law 316 provides for G
 declaration of default on account of specified situations where as bye-law
 317 empowers the Governing Board to declare a member as a defaulter
 if he fails to meet an obligation to a member or non-member arising out
 of a Stock Exchange transaction. Bye-law 322 empowers the Defaulters'
 Committee to take charge of all his books of accounts, documents, papers H

- A** and vouchers of such member so as to enable it to ascertain the state of his affairs and require him to file with the committee a complete list of his debtors and creditors. Bye-law 326 provides for vesting of security and margin money and securities deposited by the defaulter and recover all monies, securities and other assets due, payable or deliverable to the
- B** defaulter by any other member in respect of any transaction or dealing made subject to rules, bye-laws and regulations of the Exchange and such assets shall vest in the Defaulters' Committee for the benefit and on account of the creditor members.
- C** Bye-law 327 obliges every member to pay all monies, securities and other assets due, payable or deliverable to the defaulter, to the Defaulters' Committee within specified time.
- Bye-law 338 obliges the Defaulters' Committee to keep a separate account in respect of all monies, securities and other assets payable to a
- D** defaulter which are received by and defray costs, charges and expenses for such collection for the same.
- Bye-law 340 provides that "all accounts kept by the Defaulters' Committee in accordance with these bye-laws and Regulations shall be
- E** open to inspection 77 any creditor member."
- Bye-law 342 lays down the mode and manner as to how the net assets remaining in the hands of the Defaulters' Committee are to be applied.
- F** Vesting of such assets of the defaulter in the Defaulters' Committee is not absolute. Defaulters' committee is merely a trustee. It holds the said amount vested in it for the benefit and on account of the creditor members. Once the liabilities of the creditors from the defaulters are paid to the members, in terms of Rule 44.
- G** The assets devolve upon the Defaulters' Committee in terms of bye-law 326 for a limited purpose and as contra-distinguished from the rules, in terms whereof the card may vest in the Exchange, do not vest in it absolutely.
- H** The Defaulters' Committee takes in its custody the amount realised

from other assets not as an owner thereof and the vestment thereof would, thus, be co-terminus with the satisfaction of the claim of the member. It, as soon as the purpose of Bye-law 326 is satisfied, comes to an end. A

The assets of a defaulting member can broadly be divided into two categories, namely, card membership and other assets. B

How the assets obtained from card membership are to be applied would appear from Rules 5, 6, 7, 9 and 10, 53, 54, 54-A and 70 of the Rules. C

However, so far as other assets are concerned, the same are to be applied and dealt with in terms of Rules 36, 43, 44 and Bye-Laws 316, 322, 326 and 338. C

At this juncture, it may be necessary to look to the provisions relating to distribution proceedings under the Bye-laws so as to consider their effect on the distribution of the assets of the defaulting member. D

The bye-laws framed by the Exchange also provide the mode and manner in which the arbitration proceedings can be taken recourse to both by members and non-members against the defaulters. The rules in this behalf, however, are distinct and separate. E

Bye-laws 248(a), 249(a), 254 and 259 deal with arbitration between member and non-member. F

On the other hand, Bye-laws 282, 284, 290, 292, 295 and 296 provide for arbitration between members. F

There lies a distinction between the two sets of arbitration – one between a member and a non-member and another between the member and member of the Exchange. A claim by a non-member against the defaulter who was the member must be considered from a different angle having regard to the fact that although the same relates to a contract, such arbitration is governed by the provisions of the law of the country, namely, the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996, H

- A as the case may be. For the said reasons, only Bye-law 259 mandates that the award shall be filed in the court so as to enable either the defaulting member or the non-member to make such objections in terms of the provisions of the Act, as may be permissible in law. Once an opportunity to file such as objection is provided for and determined, the award shall
- B be made a rule of court and, thus, becomes enforceable in a court of law. The claim of a decree-holder, thus, cannot be *pari passu* with the claim of the award-holder in the category non-member as it is incumbent upon a non-member to have an award be made a rule of the court before it becomes enforceable. A contract between a member and a non-member
- C is otherwise enforceable in a civil court. By reason of existence of agreement clause only the suit filed by a non-member against a defaulting member can be stayed and/or referred to arbitration. A decree made pursuant to such an award, can also be executed by taking action as against the personal assets of the defaulting member.
- D The scheme of arbitration between a member and a defaulting member, however, stand on a completely different footing. Not only it is an internal matter of the Exchange, an award made in such a proceeding is an appealable one. Only when determination is made in relation to a claim by and between the member and the defaulting member, the same
- E becomes final and enforceable.

- There cannot, however, be any doubt that so long as the claim of the awardees both of members as also non-members are dealt with by the Defaulters' Committee, the Exchange or the Defaulters' Committee would
- F not be a debtor in relation to an awardee. But once the Defaulters' Committee determines such claims and surplus is available at the hands of the Defaulters' Committee, as the surplus amount would become payable to the defaulting members, the same would become an assets of the defaulting member. In other words, other assets continue to remain
- G assets of the defaulting members subject to the vesting thereof for the purposes mentioned in Bye-law 326 and as soon as the purpose is satisfied, the ownership which was under animated suspension or eclipsed would again revive to the defaulting member. The awardees, however, so long as the assets remain under the control of the Defaulters' Committee would
- H be entitled to get their claim on a *pro-rata* basis and not in its entirety.

If it is held that despite the fact that claims 'having regard to the A
 priority clause contained in Rule 16 remain in the hands of the Defaulters'
 Committee and an order of attachment would be enforceable, the same
 would result in incongruity. Unfortunately no clear picture emerges from
 the rules and bye-laws as there does not appear to be any provision how
 the card money as also other assets belonging to the defaulting member B
 can be handled by the Defaulters' Committee. But the rules and bye-laws
 have to be read harmoniously. They have to be read together so as to make
 them effective and workable. So read, the Defaulters' Committee constituted
 in terms of bye-laws would apply to the other assets, dues, payments of C
 the members on a *pro-rata* basis whereafter the dues of the non-member
 can be disbursed. While doing so, however, such claims can be determined
 only having regard to the cut-off date which must be prescribed by the
 Governing Board in terms of clause 7 of Bye-law 343. So far as card
 money is concerned, the same must be disbursed having regard to the
 priority clause contained in Rule 16, in which event, upon discharge of the D
 dues of the Exchange and clearing house, the same has to be distributed
 to the dues of the members and non-members. It bears repetition to state
 that there does not exist any distinction between a member and a non-
 member in terms of Rule 16 and in the event the amount of the card money
 available at the hands of the Exchange is not sufficient to satisfy all the
 claims, the same has to be distributed on a *pro-rata* basis. However, any E
 amount remaining surplus even thereafter would be subject to a decision
 of the Governing Board. The Governing Board may in a given situation
 having regard to the hardship which may be faced by the members and
 non-members in realising their dues may direct that such amount would
 be available for disbursement towards the said dues. It, however, we may F
 hasten to add, is free to apply the surplus for a different purpose which,
 evidently cannot be de' hors the purpose and object for which the Exchange
 has been constituted.

Unfortunately before the High Court, it has not been disclosed that G
 any date has been prescribed in terms of clause 7 of Bye-law 343. In its
 first affidavit, the Exchange has categorically stated that they had enough
 surplus at its hands wherefrom the claim of the respondents could be
 satisfied. It, however, as noticed hereinbefore, filed an additional affidavit
 as also a further affidavit taking a different stand. As indicated hereinbefore, H

A before us as also, a statement has been filed for the purpose of showing that there exists a shortfall of Rs.70 lakhs.

The manner in which the Exchange has dealt with the matter to say the least is unfortunate.

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The learned Single Judge noted the admission made by the Exchange to the effect that the Defaulters' Committee called in and realised the security and margin money and securities deposited by the defaulted member and recovered monies, securities and other assets due, payable or deliverable to the defaulted member. It noticed that a sum of Rs. 50 lakhs which the Defaulters' Committee would distribute ratably on *pro rata* basis amongst the creditor constituents of the defaulter member. It also noted that till 12.1.1995, the Exchange had received around 100 claims from the creditor constituents of the defaulted member aggregating to Rs.24 lakhs and in that view of the matter the Exchange agreed to make part payment of Rs. 2,96,000 to the respondents. The learned Single Judge while rejecting the contention of the Exchange that the assets belonging to the defaulted member cannot be attached in Garnishee proceedings since it is not a debt due by the Exchange to the defaulted member, held :

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"...The submission is devoid of any merit. Despite admission of the Exchange as contained in the said affidavit dated 12th January, 1995 that the Defaulters' Committee did realise the amount lying with it from the assets of the defaulted member, part of which has been utilized in defraying to the full extent the liability of the defaulted member to the Exchange, it is amusing that it is now contended that the amounts so realised belong to the Exchange and not to the defaulted member. No doubt the Defaulters' Committee of the Exchange is having custody or possession of such amount on behalf of the defaulted member but not the ownership thereof. It is not the property either of the Exchange or of the Defaulters' Committee. The surplus amount lying with the Defaulters' Committee is, in the wider sense, a debt due by the Exchange to the defaulted member and has been justifiably attached to the extent of the decretal amount payable by the defaulted member to the claimant by serving the Garnishee Notice

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upon the Exchange.”

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It was further held :

“...Such balance amount, in any event, is available to the judgment creditors including the claimant herein holding decree of competent Court of Law against the defaulted member for levy of attachment in execution of decree/s including by service of Garnishee Notice.”

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Before the Division Bench, the Exchange did not question the factual statement of fact. It may be true that the additional affidavit filed by the Exchange was taken on record by the Division Bench but in its impugned judgment it refused to look thereinto on the ground that the same was not filed within a reasonable time. Had the Exchange disclosed the cut-off date for the purpose of entertaining the claims of the members and non-members specified by the Governing Board such a contingency would not have arisen. Furthermore, in the instant case by reason of the orders of the court a sum of Rs. 55 lakhs had been directed to be deposited in a fixed deposit in January 1996. The amount of interest earned therefrom has not been disclosed. In short, the Stock Exchange has not disclosed :

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“i) The number of claims received of non-member within the period prescribed;

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ii) The Number of enforceable Decrees that have been passed with respect to the claims of non-members;

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iii) Amount of Interest available on the amount of Rs.55 lacs deposited in a fixed deposit pursuant to the Order dated 17.1.1996 of the Bombay High Court.”

For the reasons aforementioned, we are of the opinion that the matter be considered afresh by the learned Single Judge of the High Court. The High Court is requested to consider the claims of the respondents in the light of the observations made hereinbefore as also upon directing the Exchange to file a fresh statement of accounts, if it is found meet and proper. In the event, any doubt or dispute arises, the High Court would be

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- A entitled to appoint a competent person as Commissioner to go into the said accounts and submit a report to it at the cost of the Exchange. However, if it is found that the Governing Board has not specified any date in terms of clause 7 of Bye-law 343, it shall issue such direction/directions as it may deem fit and appropriate for doing complete justice not only to the respondents but also to the other creditors similarly situated.
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- In view of the fact that the respondents herein had obtained a decree in her favour as back as on 15.2.1994, we would request the High Court to consider the desirability of disposing of the matter as expeditiously as possible preferably within four months from the date of this order. This appeal is disposed of on the above terms with no order as to costs.
- C

V.S.S.

Appeal disposed of.