

psv

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS NO. 1144 OF 2011
IN
EXECUTION APPLICATION NO.342 OF 2011
IN
ARBITRATION NO. A.M. NO. F & O/M – 0252 OF 2005**

Ayushajay Constructions Pvt. Ltd.	...Applicant/ Judgment Creditor
V/s.	
Gems Equities & Securities Pvt. Ltd.	Respondent/ Judgment Debtor
And	
The National Stock Exchange of India Ltd.	Intervener/ Applicant

Dr.Birendra Saraf with Mr.Vaibhav Charalwar, Mr.Vijayendra Purohit i/b. M/s.Manilal Kher Ambalal & Co. for Applicant/Intervener.
Mr.Kunal Kumbhat with Mr.Apoorva Chindarkar i/b. Ms.Sunanda Kumbhat for Decree Holder.

**CORAM : G.S. KULKARNI, J.
DATE : 6th NOVEMBER, 2019**

ORAL ORDER:

This is a chamber summons filed by the intervener-The National Stock Exchange of India Ltd. (for short, “NSE”) in the proceedings of Execution Application No.342 of 2011 filed by the award creditor Ayushajay Constructions Pvt. Ltd. (for short, “**Ayushajay**”) against the award debtor-Gems Equities & Securities Pvt. Ltd. (for short, “**Gems Equities**”).

2. The relevant facts are that the disputes between Ayushajay and Gems Equities were referred for adjudication of an arbitral tribunal.

Gems Equities is a constituent of and registered with the NSE inter-laia engaged in the business of dealing with securities. The arbitral tribunal rendered an award dated 30 June 2010 allowing the claim of Rs.43,74,665/- in favour of Ayushajay. As the award amount was not honoured/satisfied by Gems Equities, the present execution application came to be filed.

3. This Court by an order dated 9 May 2011 issued a Warrant of Attachment of movable property belonging to Gems Equities lying with the applicant-NSE. The amount lying with the NSE was Rs.53,99,595.30 in the form of Fixed Deposit which has accordingly stands attached by virtue of the said order.

4. The present chamber summons came to be filed by the NSE on 26 June 2011 whereby the NSE has prayed for intervention in the execution application and on such prayer being granted for the order of attachment dated 9 May 2011 to be recalled and set aside.

5. The case of the applicant-NSE is principally that the award creditor-Ayushajay is not entitled to the Fixed Deposit which was submitted by Gems Equities to the NSE under the Bye-laws of NSE. This for the reason that the Fixed Deposit is required to be utilized in a manner which is provided for under the Bye-laws. It is submitted that

Ayushajay-the award creditor did not have any contractual relations with NSE and the attachment of the fixed deposit is in the nature of garnishee proceedings against the NSE. The fixed deposit as made by Gems Equities with the NSE, a registered member at the relevant time, was in accordance with the provisions of Bye-laws. This amount cannot enure to the benefit of Ayushajay which has an award against Gems Equities who in any case was expelled from its membership by the NSE with effect from 25 September 2009. To support this submission, Dr.Saraf, learned Counsel for the applicant-NSE has referred to the various provisions of the Bye-laws of the NSE and more particularly the provisions of Chapter IX which deals with Transactions and Settlements. Bye-laws 22 and 24 thereunder deal with “Margin Deposit to be held by the Exchange” and “Lien on Margins” which read thus:-

“ **Margin Deposit to be held by the Exchange**

(22) The margin deposits shall be held by the Exchange and when they are in the form of Bank Deposit Receipts and securities and such Receipts and securities may at the discretion of the relevant authority be transferred to such persons or to the name of a Bank approved by the Exchange. All margin deposits shall be held by the Exchange and/ or by the approved persons and /or by the approved Bank solely for and on account of the Exchange without any right whatsoever on the part of the depositing trading member or those in its right to call in question the exercise of such discretion.

Lien on Margins

(24) The monies, Bank Deposit Receipts and other securities and assets deposited by a trading 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. Subject to the above, the margin shall be available in preference to all other claims of the trading member for the due fulfillment of its engagements, obligations and liabilities arising out of or incidental to any bargains, dealings, transactions and contracts made subject to the Bye Laws, Rules and Regulations of the Exchange or anything done in pursuance thereof.”

6. Dr.Saraf, learned Counsel for the applicant, has also referred to the provisions of Chapter X of the Bye Laws which deals with “Rights and Liabilities of Members and Constituents”. He submits that all contracts relating to dealings permitted on the NSE made by a trading member shall in all cases be made subject to the Bye Laws, Rules and Regulations of the NSE. Bye Law (1) of **Chapter X** reads thus:-

“ All Contracts subject to Bye Laws, Rules and Regulations

(1) All contracts relating to dealings permitted on the Exchange made by a trading member shall in all cases be deemed made subject to the Bye Laws, Rules and Regulations of the Exchange. This shall be a part of the terms and conditions of all such contracts and shall be subject to the exercise by the relevant authority of the powers with respect thereto vested in it by the Bye Laws, Rules and Regulations of the Exchange.”

7. The bone of contention of Dr.Saraf, learned Counsel for the applicant is primarily on the Bye-laws falling under **Chapter XII** which is a chapter dealing with the “Default”and more particularly Bye-law 11 which provides for “vesting of assets in the Exchange”. As substantial arguments are advanced on these provisions, it would be appropriate to note this Bye-law which read thus:-

“ **Vesting of assets in the Exchange**

(11) The Defaulters' Committee shall call in and realise the security deposits in any form, margin money, other documents lying to the credit of and securities deposited by the defaulter and recover all moneys, securities and other assets due, payable or deliverable to the defaulter by any other Trading Member in respect of any transaction or dealing made subject to the Bye-laws, Rules and Regulations of the Exchange and such assets shall vest ipso facto, on declaration of any trading member as a defaulter, in the Exchange for the benefit of and on account of any dues of the Exchange, National Securities Clearing Corporation Limited, Securities and Exchange Board of India, other trading members, Constituents and registered sub-brokers of the defaulter, approved banks and any other persons as may be approved by the Defaulters' Committee and other recognised stock exchanges.”

8. It would be also relevant to note Bye-law 13 under the said Chapter which deals with “Distribution” which reads thus:-

“ **Distribution**

(13) The Defaulters' Committee shall at the risk and cost of the creditor members pay all assets received in the course of realisation into such bank and/or keep them with the Exchange in such names as the relevant authority may from time to time direct and shall distribute the same as soon as possible pro rata but without interest among creditor members whose claims are admitted in accordance with these Bye Laws, Rules and Regulations.”

9. Bye-law 23 refers to “Application of Assets” to provide that the Defaulters' Committee shall apply the net assets remaining in its hands after defraying all such costs, charges and expenses as are allowed under the Rules, Bye-laws and Regulations to be incurred by the Exchange, in satisfying the claims in the order of priority provided under clauses (a) to (e) of the said Bye-law.

10. At this stage it is required to be noted that de'hors the entitlement of Ayushajay under the award against Gems Equities, the NSE under the beneficial provisions of Chapter XIII deals with "Investor Protection Fund", by a letter dated 2 February 2018 offered an amount of Rs.11,00,000/- to Ayushajay from the Investors Protection Fund. As Ayushajay by its letter dated 14 February 2018 informed that it would conditionally accept the said amount of Rs.11,00,000/- and without prejudice to the rights to make a claim against NSE under the Warrant of Attachment, the said amount was not released by the NSE in favour of Ayushajay.

11. Chapter XIII of the Bye-laws deals with "Investor Protection Fund" and the manner of utilization. The investor protection fund can be utilized to safeguard the interest of all the stake holders as more particularly specified under Bye-law (1) which reads thus:-

"(1) In respect of such market segment of the Exchange as may be prescribed by the Exchange, an Investor Protection Fund (IPF) to be held in trust by National Stock Exchange Investor Protection Fund Trust (Trust) shall be maintained to make good claims for compensation which may be submitted by a trading member's Constituent who suffers loss arising from the said trading member being declared as a defaulter by the Exchange under Chapter XII. No claim of a claimant, who is a Trading Member of the Exchange or an associate of a Trading Member, shall be eligible for compensation from the IPF unless he has acted as a Constituent of the said trading member to the extent permitted by the Exchange."

12. It would be appropriate to note the Bye-law (6) under the Investor Protection Fund which reads thus:-

“(6) A claim for compensation in respect of a default shall be made in writing to the Exchange on or before the date specified in the said notice and any claim which is not so made shall be barred unless the Trust otherwise determines. The Exchange shall process the claims in accordance with procedures as may be laid down by Defaulters’ Committee and if the assets of the defaulter are insufficient to meet the approved claims, it shall forward the claims alongwith the recommendations of the Defaulters’ Committee to the Trust. However, the Trust need not wait for the realisation of the assets of the defaulter before the disbursement towards claims.”

13. Dr.Saraf, learned Counsel for the applicant-NSE would submit that the Bye-laws are recognized to possess a statutory character and are so recognized to have a statutory flavour by the Supreme Court in dealing with the Bye-laws of Bombay Stock Exchange as held in the decision in **Bombay Stock Exchange Versus Jaya Shah and Another**¹. Dr.Saraf would thus submit that considering the scheme of the Bye-laws, it is not permissible for Ayushajay to contend that the amount under the fixed deposit which stands vested with the NSE and on which the NSE exercises a lien and more particularly when Gems Equities was a defaulter member and claims of about Rs.5.29 Crores were received and paid by the NSE even out of investors protection funds. Dr. Saraf in support of this contention has drawn my

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attention to paragraph 8 of the additional affidavit dated 14 January 2019 filed on behalf of the NSE which reads thus:-

“8. I say that in light of what is stated hereinabove, it is clear beyond doubt that the Applicant/Intervener has acted in accordance with its Bye-laws, Rules and Regulations of the Exchange while adjudicating the claim. I say that the Defaulters Committee of the Applicant/Intervener has adjudicated all the claims against the Judgment Debtor and the status is summarized as under:

Sr. No.	Particulars	Amount
1.	Total deposits (assets lying with the Defaulters Committee as on 31 st December 2018)	Rs. 1.19 crores
2.	Total admitted claims	Rs.5.33 crores
3.	Total amount paid out of the Investor Protection Fund towards the dues of the Exchange till date	Rs.5.29 crores
4.	NSEIL dues	Rs. 37,935/-

I say that the amount of Rs.5.29 crores is paid out of the Investor Protection Fund Trust towards the claims as there are no assets available save and except the aforesaid deposits in accordance with the Bye-law 8 of Chapter XIII of the Bye-laws of the Exchange. The amount of Rs.5.29 crores paid out of the IPF is required to be replenished from the deposit lying with the Exchange and also NSEIL dues are required to be paid out of the assets.”

14. It is contended that Bye-law 11 falling under Chapter XII which provides for “vesting of assets in the Exchange” is absolutely clear to non-suit Ayushajay to raise any claim against NSE in regard to the fixed deposit. It is submitted that from the scheme of Bye-laws it is quite clear that although a person like Ayushajay who is a victim of default of a registered member namely Gems Equities, the beneficial

provisions of the Investor Protection Fund are available and it was under the said fund, an offer was made to Ayushajay to receive an amount of Rs.11,00,000/-. It is submitted that this would not mean that merely because an offer is made under the investor protection fund, Ayushajay can overlook the Bye-law 11 falling under Chapter XII which vests with the NSE. It is submitted that by virtue of Bye-law 11, not only the security deposits in the form of margin money, but also other amounts lying to the credit of the defaulter members, all moneys, securities and other assets due, payable or deliverable to the defaulter member by any other trading member in respect of any transaction or dealing made subject to the Bye-laws, Rules and Regulations of the NSE., would ipso facto vest with the NSE, on such member being declared as a defaulter member.

15. On the other hand, Mr. Kumbhat, learned Counsel for Ayushajay in opposing this chamber summons referring to the Bye-laws would contend that the award holder-Ayushajay has an absolute right to receive the amount as deposited by Gems Equities as maintained in fixed deposit by the NSE.

16. It is contended that it would be required to be held that the fixed deposit is the movable property of Gems Equities at the hands of NSE even considering Bye-law 11 falling under Chapter XII. It is

submitted that the offer of the amount under the investor protection fund not only to the Ayushajay but also to the other depositors as set out in paragraph 8 of the additional affidavit filed by the NSE would not indicate that there is any embargo on the Stock Exchange to entitle Ayushajay to make a claim in respect of the fixed deposit towards satisfaction of the award. In other words, the submission is that any disbursement under the investor protection fund is not relevant in respect of any claim which may be made by Ayushajay against NSE if it is found that there are amounts of the award debtor-Gems Equities lying with the NSE. It is submitted that the interpretation as placed on behalf of the applicant-NSE in the Bye-laws would clearly defeat the rights of Ayushajay to receive the amounts due and payable by Gems Equities under the award. It is therefore submitted that on over all consideration of the scheme of the Bye-laws, the contention as urged on behalf of the NSE ought not to be accepted and the chamber summons be rejected.

17. Having heard learned Counsel for the parties on this chamber summons and having perused the record, at the outset it needs to be observed that it is not in dispute that Ayushajay holds an award against Gems Equities for an amount of Rs.43,74,665/- and the award is now subject matter of the execution in the above execution application.

18. The question however is whether Ayushajay-award creditor can make a claim in respect of the amounts subject matter of the bank deposit which was submitted by Gems Equities in the course of its dealings as a registered member of NSE. It is not in dispute that Ayushajay did not have any direct privity against NSE, as there were transactions with the award debtor-Gems Equities, a registered member of the NSE, and there was a default on the part of Gems Equities towards Ayushajay, which eventually was taken to arbitration and the award in question being passed by the arbitral tribunal in favour of Ayushajay.

19. It is also not in dispute that once Gems Equities-award debtor was registered with the NSE, it was bound by the rules, regulations and guidelines which are governing all the activities which permitted Gems Equities, to deal in securities on the platform of the NSE. It is nobody's case that Gems Equities was not bound by such rules and regulations which are framed under the securities Act and the bye-laws which also now held to be statutory character.

20. Learned Counsel for the applicant-NSE has placed on record the bye-laws of the NSE as referred above which depict a comprehensive scheme dealing with all assets in regard to the trading on the NSE and

the manner in which the registered members of the NSE would be bound in their day to day dealings. The bye-laws are divided into 14 chapters and the relevant bye-laws necessary for the adjudication of this chamber summons are already noted above. Chapter IX deals with “Transactions and Settlements”. Bye-law 22 thereunder provides for “Margin Deposit to be held by the Exchange” which can be in the nature of bank deposit receipt and securities which under discretion of relevant authority can be transferred to such persons or to the name of the bank approved by the NSE. It is provided that the amounts shall be held by the NSE and/or by the approved persons and/or by the approved Bank solely for and on account of the Exchange without any right whatsoever on the part of the depositing trading member. Bye-law 24 provides for “Lien on Margins” formulates that the monies, Bank Deposit Receipts and other securities and assets deposited by a trading member by way of margin under the provisions of Bye Laws and Regulations shall be subject to a first and paramount lien for any sum due to the Exchange and subject to the above, the margin shall be available in preference to all other claims of the trading member for the due fulfillment of its engagements, obligations and liabilities arising out of or incidental to any bargains, dealings, transactions and contracts made subject to the Bye Laws, Rules and Regulations of the Exchange or anything done in pursuance thereof. This bye-law recognizes the lien of exchange of such deposit as deposited by a

trading member. This apart, Chapter X which provides for “rights and liabilities of members and constituents” and bye-law provides that all contracts are subject to Bye-laws, Rules and Regulations of the NSE and shall be subject to the exercise by the relevant authority of the powers with respect thereto vested in it by the Bye-laws, Rules and Regulations of the NSE. Thus, a situation is brought about that trading member in respect of all the activities which would be undertaken as a registered trading member of the NSE, would be required to undertake the trading business subject to Bye-laws, Rules and Regulations as noted in the margin deposit to be held by the Exchange and lien on such margin money and any such deposit as specified under bye-law 22 and 24 under Chapter IX.

21. When a question of default arises on the part of a trading member, the provisions of Chapter XII which contain bye-laws on default would become applicable. As noted above, the thrust of the argument of Dr.Saraf, learned Counsel for the NSE is on bye-law 11 falling under this chapter provide for “vesting of assets in the Exchange”. In the present case, it is not in dispute that Gems Equities, was the defaulter and several claims were received by the NSE in a manner recognized by the bye-laws which ultimately came to be dealt under the investor protection fund and an amount of Rs.5.29 Crores was required to be disbursed by NSE in favour of these persons due to

default as committed by Gems Equities. This position has remained undisputed on record. It is not the case of Ayushajay that Gems Equities qua his other clients was not a defaulter. It is not the case of Ayushajay that under the investor protection fund, an amount of Rs.5.29 Crores was not required to be disbursed by NSE.

22. Whether in a situation of this nature Ayushajay is in a legal position to make a claim against NSE to appropriate the deposit made by Gems Equities with the NSE, can thus be answered from the purport of the different provisions under the bye-laws and by examining whether Ayushajay would be correct in its contention that the amount of Rs.53,99,595.30 lying in the fixed deposit of Gems Equities with the NSE is in fact property of Gems Equities and that NSE does not have any lien on the said amount or the said amount is not vesting with the NSE.

23. Considering the provision of the bye-laws as noted above, it is quite clear from the provisions of bye-laws 22 and 24 falling under Chapter IX (Transactions and Settlements) that margin money is required to be deposited by the trading member with the NSE which NSE would be entitled to hold under bye-law 24 under the said Chapter which expressly provides for "Lien on Margins" under the provisions of the bye-laws as also the regulations on the first and

paramount lien of the NSE stands fully recognized by bye-law 24 and it is only subject to any sum which is due to the NSE, the margin becomes available to a trading member for any other purposes as recognized under bye-law 24. In the present case as admittedly the trading member namely Gems Equities having defaulted, it cannot be said that there was no claim of the NSE against the said trading member. The fact that the investor protection fund which is created for a beneficial purpose would come to the aid of the claimants who have suffered at the hands of Gems Equities, cannot in any manner be held to be any embargo on the NSE to be divested of such a lien. Once there were claims as received by the NSE on account of default of Gems Equities, it cannot be said that unless and until the amounts over and above such claims remain at the hands of NSE, the first and paramount claim of the NSE over a fixed deposit as submitted by a trading member, would come to an end, as seen from the scheme of the bye-laws. Thus although the fixed deposit is retained by the NSE, it would be required to be held that it is squarely hit by bye-law 24 of Chapter IX and the other bye laws. This more particularly on account of the fact that Gems Equities is not before the Court to contend that the amount in question which is lying with the NSE is a surplus amount and available after satisfying of the claims which were received by the NSE on account of the default on the part of Gems Equities. The lien of the NSE on the margin, as recognized by the bye-

law 24 is further amplified by the provision of bye-law 11 under Chapter XII which deals with “vesting of assets in the Exchange”. Bye-law 11 is a clear provision which would empower the defaulters’ committee to realise the security deposits which are at the hands of NSE in any form which includes the margin money (the bank deposit) and all other recoverables and receivables in respect of any transaction or dealing made by the trading member subject to the bye-laws, rules and regulations of the NSE and such assets shall vest with the NSE to be utilized for the benefit of and on account of any dues of the Exchange and payment to the National Securities Clearing Corporation Limited, Securities and Exchange Board of India, other trading members, Constituents and registered sub-brokers of the defaulter, approved banks and any other persons as may be approved by the defaulters’ committee and other recognized stock exchanges.

24. A plain reading of bye-law 11 under Chapter XII in my opinion, would not recognize an absolute right or sole claim and entitlement to the said amounts which are available with the NSE as deposited by the Gems Equities. This also for the reason that it would be the defaulters’ committee which would be empowered to the said amount as provided for under bye-law 13 and dealing with such assets, the priority as recognized under bye-law 23. Bye-law 13 clearly provides

that what can be made available for pro rata distribution of such amount in favour of those whose claims are admitted.

25. It is not in dispute that by a letter dated 28 October 2009 Ayushajay approached the NSE making a complaint against Gems Equities and referring to the said complaint of Ayushajay, the NSE by its letter dated 30 October 2009 had requested Ayushajay to lodge a claim against Gems Equities who was expelled from the claim of 29 September 2009. It was only when at the relevant time the deposits/securities were found to be insufficient, the claim as made by Ayushajay was referred to investor protection fund by the NSE as clearly provided for under bye-law 6 of Chapter XIII which deals with “Investor Protection Fund”. Bye-law 6 as noted above clearly provides that a claim for compensation in respect of a default is required to be made in writing to the Exchange which shall be processed by the Exchange in accordance with procedures as may be laid down by Defaulters’ Committee and only when the assets of the defaulter are insufficient to meet the approved claims, it shall forward the claims alongwith the recommendations of the Defaulters’ Committee to the investor protection fund which is an independent Trust. In that event, the Trust (investors protection fund) need not wait for the realisation of the assets of the defaulter, for the disbursement towards claims so received. It is in this scheme of things that the Exchange by

its letter dated 2 February 2018 offered an amount of Rs.11 Lakhs from the Trust to Ayushajay in the maximum amount and in so offering, it was categorically pointed out to Ayushajay that there are no assets vesting in Exchange in respect of Gems Equities and an amount of Rs.11 Lakhs out of admissible amount of Rs.37,23,950.47 shall be paid by the investor protection fund which was accepted by Ayushajay.

26. In **Bombay Stock Exchange Versus Jaya Shah and Another** (supra), the Supreme Court although in the context of the bye-laws of the Bombay Stock Exchange has clearly held that such rules, bye-laws and regulations are required to be read harmoniously, that they are required to be read together so as to make them effective and workable. The argument as advanced on behalf of Ayushajay if accepted, in my opinion, would squarely defeat the provisions of the bye-laws and more particularly the provisions of Chapter IX bye-laws 22 and 24 and also Chapter XII bye-law 11 which provide for “vesting of assets in the Exchange”. As noted above from the scheme of the bye-laws, it is clear that the investor protection fund is required to be utilized in a situation as recognized under bye-law 6 falling under “Investor Protection Fund” namely Chapter XIII and the defaulters’ committee coming to a conclusion that if the assets of the defaulter are insufficient to meet the approved claims, it shall forward the

claims along with the recommendations of the defaulters committee to the Trust, however, the trust need not wait for the realization of the assets of the defaulter before the disbursement towards claims. It is clear that the investors protection fund stands independent, and any offer made under the investors protection fund by the NSE cannot be said to have any relation to the liability of Gems Equities, being fulfilled by the NSE under the award/decreed obtained by Ayushajay. Thus, none of the bye-laws as referred above would in any manner recognize absolute entitlement of Ayushajay to make a claim against NSE in respect of the amounts under the bank deposit which clearly stand vested with the NSE. The deposit amounts as made by a trading member are required to be utilized by the NSE in a manner as recognized by the bye-laws, rules and regulations. Admittedly, the amounts with the NSE as deposited by Gems Equities were not sufficient to meet several claims as received by the NSE even taking recourse to the investor protection fund. This apart if the argument as advanced on behalf of Ayushajay is accepted, it would bring about a situation totally incongruent and contrary to the bye-laws and which would in a given case lead to grave situation. This can be appreciated from an illustration. If it is to be assumed that there are other decree holders similarly situated like Ayushajay and the amounts which are available with the NSE deposited by trading member are falling insufficient to meet the several decrees, can it be said that a right to

each of these decree holders can be recognized in respect of such amount which is available with the NSE as deposited by the trading member. The answer would be certainly in the negative. It is for this reason that the bye-laws has clearly provided that the amount shall stand vested in the NSE and whenever a surplus amount is available the same can be utilized by the trading member as clearly provided under the bye-law 24 (lien on margin) of Chapter IX read with bye-law 6 under Chapter XIII. The divesting of the deposit/margin lying with the NSE in a manner not recognized by the bye-laws surely cannot be accepted.

27. In view of the above discussion, in my opinion, Ayushajay cannot make a valid claim in law against the NSE in respect of the said amounts as held by the NSE under the bank deposits in question. The chamber summons would be required to be allowed. It is accordingly allowed in terms of prayer clause (b), which reads thus:

“b) That this Hon’ble Court be pleased to set aside the order of attachment dated 9 May 2011 passed by this Hon’ble Court.”

28. Needless to observe that it would be permissible for Ayushajay to receive the amount of Rs.11 Lakhs as offered by the NSE from the investor protection fund.

29. The chamber summons is allowed in the above terms. No costs.

[G.S. KULKARNI, J.]