BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 148 of 2010
And
Misc. Applications No. 98 and 113 of 2010

Date of decision: 28.6.2011

M/s Emmel Financial Services
Nanabhay Mansion, 3rd Floor,
Office No.1, Sir P. M. Road,
Mumbai – 400 001. ……Appellant

Versus

1) Bombay Stock Exchange Limited
Floor 25, P J. Towers,
Dalal Street, Mumbai – 400 001.

2) Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.

3) Nikko Stock Brokers Pvt. Ltd.
R-410, Rotunda Building,
Mumbai Samachar Marg,
Mumbai – 400 001. …… Respondents

Mr. Shailesh Shah, Advocate with Mr. Simil Purohit and Mr. Nikhil Mengde, Advocates for the Appellant.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Pesi Mody,
Mr. Rahul Dwarkadas and Mr. Faraz Sagar, Advocates for Respondent No. 1.

Mr. Shiraz Rustomjee, Advocate for Respondent No. 2.

Mr. M. G. Agre, Advocate for Respondent No. 3.

CORAM : Justice N. K. Sodhi, Presiding Officer
S. S. N. Moorthy, Member

Per : Justice N. K. Sodhi, Presiding Officer

The Securities and Exchange Board of India (for short the Board) is a statutory body established under Section 3 of the Securities and Exchange Board of India Act, 1992 (for short the Act) with a view to promote the development of and to regulate the securities market and to protect the interests of investors in securities. It regulates the market intermediaries including stock exchanges and all

other market players. Section 11 of the Act enjoins a duty on the Board to protect the interests of investors in securities by such measures as it thinks fit. With a view to carry out the objects for which the Board has been set up, it has framed a plethora of regulations and, in addition, it issues circulars and guidelines from time to time as may be necessary for regulating the securities market and to protect the interests of investors. Quite often disputes arise between brokers inter se and between brokers and their clients and for settlement of such disputes, the rules, regulations and bye-laws of Bombay Stock Exchange Ltd. (for short BSE) and other stock exchanges provide for compulsory arbitration. Sometime in the year 1999, it came to the notice of the Board that arbitration awards passed in favour of the clients/investors were not being implemented by the stock brokers and the stock exchanges were unable to take prompt action to ensure the implementation of the awards. The stock exchanges felt that since the Arbitration and Conciliation Act, 1996 provided three months time to the person feeling aggrieved by the award to make an application to the Court for setting aside the same, they could not take prompt action in getting them enforced. The matter as to how prompt action could be taken by the stock exchanges was discussed by the Board and the following two decisions were taken:

- "The Stock Exchange should on receipt of the arbitration award, debit the amount of the arbitration award from the security deposit or any other monies of the member (against whom an award has been passed) and keep the amount in a separate account. Thereafter, a confirmation may be obtained from the concerned member that he has not filed any appeal within the stipulated time under section 34 of the Arbitration and Conciliation Act and only then the payment may be made to the awardee. If an appeal is filed and the same is pending in a Court of law, the amount so kept in the separate account be paid to the awardee in accordance with the court orders.

- At the time of debiting the amount, the Stock Exchange may if so desire inform him that the Exchange will not be liable for loss of interest, business etc., in case the award is modified by the Court. The Exchange may also indicate that if any amount of interest is still payable to the awardee e.g. from the date of debiting the member's account till the date of payment of the award amount to the awardee, the same be recoverable from the concerned member and the Stock exchange shall not be liable in this regard."

Accordingly, a circular dated July 9, 1999 was issued communicating to all the stock exchanges the aforesaid decisions and they were advised to comply with the

same immediately. For better implementation of the directions contained in this circular, the Board issued another circular on March 27, 2002 directing all the stock exchanges to incorporate the above decisions in their bye-laws, rules and regulations. Some of the brokers felt aggrieved by the circular of July 9, 1999 and they challenged the same in the Bombay High Court in Writ Petition No. 168 of 2002 which was dismissed by a Division Bench of the High Court on January 23, 2002. While upholding the validity of the circular, this is what the learned Judges said:

> "In our opinion the challenge to the impugned circular is without any substance. The circular has been issued by the SEBI Board in exercise of powers under section 11 and 11B of the SEBI Act in order to protect interest of the investors. It has been brought to the notice of the SEBI Board that arbitration awards passed in favor of the clients/investors are not implemented and the Stock Exchanges are unable to take appropriate action in order to ensure implementation of the awards. In our opinion the decision taken by the SEBI is in the right direction. It helps to protect the investors. The circular issued by the SEBI is confined to members/brokers of the Stock Exchanges and there is no question of the circular being contrary to the provisions of section 36 or any other provisions of the Arbitration and Conciliation Act, 1996. We do not find any illegality or arbitrariness in the circular."

2. The appellant before us is a public limited company and it had been trading in the securities market, among others, on BSE through Nikko Stock Brokers Pvt. Ltd. which is respondent no. 3 in this appeal. This respondent was a member of BSE and shall be referred to hereinafter as the broker. Pursuant to the trades executed by the broker on behalf of the appellant, the latter claimed that a sum of Rs.3,14,10,285.20 was due to it from the broker. Upon failure of the broker to pay this amount, the appellant initiated arbitration proceedings before the Arbitral Tribunal of BSE in accordance with its rules, bye-laws and regulations. The Arbitral Tribunal gave its award dated December 31, 2001 holding that the broker was liable to pay to the appellant a sum of Rs.2,60,40,342.49. The appellant communicated this award to BSE under cover of its letter dated January 8, 2002. A copy of the award and this letter are on record. It is pertinent to mention that the appellant in his letter of January 8, 2002 had requested BSE to pay to it the awarded amount from the monies, security deposits

and all types of margins and bank guarantees of the broker lying with the Exchange. This letter was received by BSE on January 8, 2002. In terms of the aforesaid circular, BSE was required to debit the account of the broker and keep that amount in a separate account and pay the same to the appellant after verifying from the broker that it had not filed any application for the setting aside of the award. It is pertinent to mention that on receipt of a copy of the award, BSE invoked the bank guarantees amounting to Rs.2.5 crores which had been furnished to it by the broker and recovered the funds thereunder. The governing board of BSE then met on January 16, 2002 and, inter alia, considered the assets and liabilities of the broker as on that date. The representatives of the appellant and the broker and one Jugal Saraf who also claimed to be a creditor of the broker were present and were heard by the governing board. The appellant made an application dated January 16, 2002 requesting BSE to make payment of Rs.2.21 crores to the income tax authorities on its behalf from the funds of the broker that were due to it. The broker also agreed before the governing board that an amount of Rs.2.21 crores be paid to the income-tax authorities on behalf of the appellant and the same be treated as payment by it to the appellant. The broker further agreed that a sum of Rs.5 lacs be released to Jugal Saraf in full and final settlement of his claim. After hearing the appellant and the broker, the governing board took the following decisions on January 16, 2002:

> "(a) Rs.2.21 crs. be paid to the Income Tax Authorities on behalf of Emmel Financial Services, who were creditors of Nikko Stock Brokers Pvt. Ltd. This amount should be treated as payment by Nikko Stock Brokers Pvt. Ltd. to Emmel Financial Services towards its claim against the member. However, Nikko Stock Brokers Pvt. Ltd. should obtain no objection letters from other claimants on record of the Exchange as of today and submit the same to the Exchange.
>
> (b) ……
>
> (c) Rs.5.00 lakhs should be paid to Shri Jugal Saraf in full and final settlement of his claim of interest against the member. Shri Jugal Saraf agreed."

It is BSE's case that since the broker did not obtain no objection letters from other claimants, it (BSE) sent a letter to the broker on January 21, 2002 calling upon it

to do the needful and that the broker did not comply with the directions. In the meantime, BSE received for the first time on February 6, 2002 two complaints – one from Shree Harivansha Securities (P) Ltd. and the other from Mahendra Kumar Saraogi, its director that amounts exceeding Rs.3.56 crores and Rs.30.71 lacs respectively were due to them from the broker. Both these complaints are dated February 5, 2002. The matter was again taken up for consideration by the governing board of BSE on February 8, 2002 when the appellant and the broker were present. The broker was directed to submit a list of its creditors to the Exchange within two days and the payment of Rs.2.21 crores to the income tax authorities on behalf of the appellant was kept in abeyance. By letter dated February 8, 2002, the broker forwarded to BSE a list of its 46 clients to whom it had pending obligations in respect of transactions on the Exchange and admitted that it had a liability of over Rs.19.68 crores including the claim of the appellant. This is what the broker said in its letter of February 8, 2002:

> "As desired by the Governing Board we are enclosing herewith a list of our clients and obligations pending against them which are to be discharged as on 8th February, 2002. The total of such liabilities are Rs.19,68,73,493.54 and the same are arising out of transactions done on the Exchange."

It is pertinent to note that the broker admitted its liability towards its clients but it did not admit its inability to pay. Be that as it may, BSE felt that since the liabilities of the broker were over Rs.24 crores and its assets with the Exchange were only about Rs.3.11 crores, the governing board in its meeting held on February 25, 2002, inter alia, rescinded its earlier decision to pay Rs.2.21 crores to the income tax authorities on behalf of the appellant and declared the broker a defaulter. This decision was taken in the absence of the appellant. However, a sum of Rs.5 lacs was paid to Jugal Saraf as decided in the meeting held on January 16, 2002 even though he did not have an award in his favour. On the same day BSE issued a public notice informing its members and the public that the broker had been declared a defaulter. By letters dated March 4, 2002 and April 17, 2002, BSE informed the appellant about the broker being declared a defaulter and advised it (appellant) to lodge its claim with the Defaulters'

Committee. It is pertinent to mention that the effect of a broker being declared a defaulter is that all its assets come to vest in the Defaulters' Committee for the benefit of and on account of the creditor members and all monies, securities and other assets due, payable or deliverable to the defaulter have to be paid or delivered to the Defaulters' Committee for pro rata distribution among the creditor members whose claims are admitted in accordance with the bye-laws and regulations of BSE. This is provided in bye-laws 326, 327 and 330 of the bye-laws framed by BSE. The order of priority in which the assets of the defaulter are to be disbursed/applied is given in bye-law 400.

3. Since the amount due to the appellant was not being released by BSE, the former served a notice dated April 30, 2002 through its counsel to pay the said amount in terms of the circular dated July 9, 1999 issued by the Board. BSE sent its reply through counsel stating that the broker had been declared a defaulter on February 25, 2002 on account of its failure to settle the claims of its creditors and, therefore, it would not be proper to utilize the funds of the broker to settle the claim of the appellant as that would be unfair and inequitable and amount to preferential payment. BSE further stated that the appellant could make an application to the Defaulter's Committee for the recovery of the amount due to it. The appellant sent another notice to BSE as per letter dated August 2, 2002 calling upon the latter to make the payment in accordance with the circular issued by the Board. A copy of this letter was endorsed to the Board as well. The appellant had also made a complaint to the Board in this regard. BSE was called upon by the Board to explain why the award in favour of the appellant was not being implemented. After exchange of some correspondence between the Board and BSE, the former by its letter of September 18, 2002 advised the latter as under:

> "Thus, the action of the Exchange in not implementing the award in the manner provided by the directive of SEBI dated July 09, 1999 amounts to it acting in violation of the said directive.
>
> In view of the above, you are advised;
> 1) to immediately implement the arbitration award dated December 31, 2001 passed in favour of M/s. Emmel Financial

> Services against M/s. Nikko Stock Broker Pvt. Ltd. for a sum of Rs.2,60,40,342.49 and confirm the compliance;
> 2) to explain, within 15 days, why the Exchange has failed to implement the award in the manner provided by the SEBI directive dated July 09, 1999."

Despite the advice given by the Board, BSE was adamant in not implementing the award and again by its letter of November 26, 2002 the Board advised BSE as under:

> "In view of the above and to protect the interests of the investors in the securities market, you are again advised to implement the arbitration award dated December 31, 2001 passed in favour of M/s. Emmel Financial Services against M/s. Nikko Stock Broker Pvt. Ltd., for a sum of Rs.2,60,40,342.49 and confirm the compliance. If you are of the view that the payment cannot be made out of the assets of M/s. Nikko Stock Brokers Pvt. Ltd., you may like to make the payment out of your own resources and recover the amount from the assets of M/s. Nikko Stock Brokers.
>
> You are also advised to immediately carry out suitable amendments to your bye-laws so as to incorporate the directions contained in our circular dated July 09, 1999 and thereafter."

The Board in the two aforesaid letters had used the word 'advised' but it was in fact a direction and BSE should have carried out the same. Since it did not implement the award, the appellant filed execution proceedings in the Bombay High Court and initiated Garnishee proceedings against BSE. An amount equal to the claim of the appellant was attached in the hands of BSE. A learned single Judge of the Bombay High Court by his order dated March 12, 2003 allowed the chamber summons of BSE and the earlier order of attachment was revoked. The learned single Judge accepted the plea of BSE that since the broker had been declared a defaulter, the appellant could only recover its monies in accordance with bye-laws 326 and 400 of the bye-laws of BSE. It was further held that the bye-laws had a statutory force. While rejecting the claim of the appellant, the learned single Judge recorded his findings in the following words:

> "In the present case, it is seen that the Award was passed on 31st December, 2001 and the statutory period for filing appeal was available to the Respondents, but before expiry of that period, the Respondents came to be declared as Defaulters on 25th February, 2002. Obviously, there was no question of making any payment to the Applicants till this date i.e. 25th February, 2002 whereas, as soon as the

> declaration that the Respondents were defaulters was issued, by virtue of Bye-Law 326, all the amounts standing in the accounts of the Respondents towards securities deposited by him stood vested in the Defaulters Committee and that amount could be disbursed only in terms of Bye-Law No.400 and not otherwise."

Feeling aggrieved by the order of the learned single Judge, the appellant filed Appeal no.530 of 2003 before the Division Bench which was partly allowed on April 26, 2010. The Division Bench while holding that the attachment order could not have been made as the amount in the hands of BSE was not a debt owed by it to the broker, set aside all other findings of the learned single Judge and made it clear that as and when the issue regarding enforceability of the circulars issued by the Board is raised before any Court, the same shall be decided on its own merit without being influenced by any observation made by the learned single Judge. After the disposal of the appeal by the Bombay High Court, the appellant by its letter dated June 8, 2010 again called upon BSE to make the payment of the awarded amount in terms of the circular dated July 9, 1999 pointing out that the Board had already advised it (BSE) to make the payment. No reply was received from BSE and, therefore, another letter dated July 10, 2010 was written making the same request. BSE then replied through its letter dated August 10, 2010 sent through its advocates stating that the appellant was not entitled to recover the amount as claimed. Feeling aggrieved by the action of BSE in not implementing the award and the directions issued by the Board, the appellant has filed this appeal challenging its inaction raising the issue of enforceability of the circulars.

4. BSE has tried to justify its stand of withholding the awarded amount that is due to the appellant from the broker. It has not disputed the aforesaid facts and it will be useful to notice its stand in its own words. This is what BSE has stated in its reply:

> "2.7 By a letter dated 8.1.2002, the Appellant inter alia informed the Exchange that an arbitration award dated 31.12.2001 had been passed in its favour against Respondent No.3 for an amount of about Rs.2.60 crores. It is pertinent to note

that the said Award expressly rejected the claims for interest and costs.

2.8 Bank Guarantees amounting to about Rs.2.5 crores which had been furnished to the Exchange by Respondent No.3 were expiring, and in view of the said unresolved claims against the Respondent no.3, the Exchange invoked the same and recovered the funds there under.

2.9 The Governing Board of the Exchange at a meeting held on 16th January 2002, inter alia considered the position of assets and liabilities of Respondent No.3 as were then known to the Exchange, and heard the representatives of the Appellant, Respondent No.3 and the said Mr. Jugal Saraf. The Governing Board, then decided that:

a) Out of the funds of Respondent No.3 lying with the Exchange, an amount of Rs.2.21 crore be paid to the Income Tax Authorities on behalf of the Appellant and the same be treated as payment by Respondent No.3 towards the claims of the Appellant and the said amount of Rs.5 lacs be released to Mr. Jugal Saraf in full and final settlement;

b) The aforesaid payment of Rs.2.21 crore to the Income Tax Authorities on behalf of Respondent no.3 would be subject, inter alia, to Respondent No.3 obtaining and submitting to the Exchange, no objection letters from other parties who had claims against Respondent No.3 as per the records of the Exchange.

2.10 By a letter dated 16.1.2002, the Appellant inter alia expressly recorded its consent / no objection to the release of the said payments of Rs.2.21 crore to the Income Tax Authorities and the said amount of Rs.5 lacs to Mr. Jugal Saraf. Consequently, the said Rs.5 lac was thereafter released to the said Mr. Jugal Saraf. Annexed hereto and marked Exhibit ”B” is a copy of the said letter dated 16.1.2002.

2.11 The Exchange addressed a letter dated 21st January 2002 to Respondent No.3, calling upon it to ensure compliance with the above directions of the Governing Board and to submit an affidavit cum indemnity; however Respondent No.3 neither complied with the said directions of the Governing Board nor submitted the required indemnity to the Exchange.

2.12 The Exchange then received fresh claims and complaints against Respondent No.3, including a claim for over Rs.3.56 crores from one Harivansha Securities Pvt. Ltd. and a claim for over Rs.30.7 lacs from one Mahendra Kumar Saraogi. The said matter was therefore once again considered by the Governing Board on 8th February 2002, and after hearing inter alia representatives of the Appellant and Respondent No.3, it was inter alia decided to direct Respondent No.3 to submit a list of its creditors to the Exchange within 2 days, and to keep the said payment of Rs.2.21 crore to the Income Tax Authorities on behalf of the Appellant in abeyance.

2.13 Respondent No.3, vide its letter dated 8th February 2002 forwarded to the Exchange, a list of its clients to whom it had pending obligations in respect of transactions on the Exchange. To the shock and surprise of the Exchange, the said letter revealed for the first time that Respondent No.3 had outstanding Exchange liabilities to 46 parties totally amounting to over Rs.19.68 crores including the claim of the Appellant. Annexed hereto and marked Exhibit "C" is a copy of the said letter dated 8.2.2002.

2.14 In view of the said shocking revelation by Respondent No.3, and since the said liabilities thus belatedly disclosed by Respondent No.3 far exceeded its assets as available with the Exchange; i.e. while the said disclosed liabilities were over Rs.24.05 crores, and the then available Exchange assets were only Rs.3.11 crores (approx); the Governing Board at a meeting held on 25.2.2002 inter alia rescinded its earlier decision to pay Rs.2.21 crore to the Income Tax Authorities on behalf of the Appellant and declared Respondent No.3 as a defaulter. Consequently, in accordance with the Rules, Bye-Laws and Regulations of the Exchange, all the assets, monies, securities, deposits etc. of Respondent No.3 lying with the Exchange, immediately stood vested in the Defaulters Committee of the Exchange for equitable distribution among the Exchange creditors of Respondent No.3 in accordance with the said Rules, Bye-laws and Regulations. The said declaration of Respondent No.3 as a defaulter was inter alia duly notified by the Exchange's public notice dated 25th February, 2002, a copy whereof is annexed hereto and marked Exhibit D."

It is clear from the reply of BSE that as on February 8, 2002, it did not have on its record the name of any creditor other than the appellant and Jugal Saraf to whom monies were due from the broker. It was only on February 6, 2002 that BSE received for the first time two complaints – one from Shree Harivansha Securities (P) Ltd. and the other from Mahendra Kumar Saraogi alleging that amounts exceeding Rs.3.56 crores and Rs.30.71 lacs respectively were due to them from the broker. Both these complaints are dated February 5, 2002. Copies of these complaints were produced by BSE on our asking. On February 8, 2002, the broker furnished to BSE a list of its clients to whom it had pending obligations and BSE claims that it was shocked and surprised to notice that the broker had as on that date outstanding liabilities of over Rs.19.68 crores.

5. We have heard the learned counsel for the appellant and Shri Janak Dwarkadas, learned senior counsel on behalf of BSE and also the learned counsel

for the other two respondents. It is contended on behalf of the appellant that the award in favour of the appellant was prior to the date on which the broker was declared a defaulter and, therefore, BSE is not justified in asking the appellant to approach the Defaulters' Committee for getting the award executed. He has referred to the two circulars issued by the Board regarding the implementation of awards obtained by investors against the member brokers and contends that BSE should have debited the awarded amount from the monies of the broker lying with it and the same should have been paid to the appellant when the broker had confirmed that no application was being filed for the setting aside of the award. In other words, the argument of the learned counsel for the appellant is that BSE should be directed to implement the circular dated July 9, 1999 issued by the Board. The learned senior counsel appearing on behalf of BSE very strenuously argued that the broker had been declared a defaulter on February 25, 2002 by which date the time prescribed for filing an application for setting aside the award had not expired and, therefore, BSE could not make payment to the appellant and with effect from February 25, 2002 all its monies lying with BSE vested in the Defaulters' Committee and the appellant could get the award executed only by approaching that committee. He contends that even if the awarded amount had been kept in a separate account as required by the circular, the same too would have vested in the Defaulters' Committee because the title to the money kept apart would still remain with the broker. It is also urged on behalf of BSE that the circular requires a stock exchange to make payment to the award-holder only on receipt of confirmation from the member that he was not filing an application for the setting aside of the award and since there was no such confirmation from the broker, BSE was justified in not making the payment. It was argued that since the period of 90 days prescribed for filing an application for setting aside the award had not expired when the broker was declared a defaulter, the circular did not apply. The learned senior counsel also contended that, in any case, the circular would not apply once a member is declared a defaulter. It was also argued that the circular is illegal and violative of Article 14 of the Constitution in as much as it

differentiates between creditors inter se. The argument is that the circular differentiates between the award-holders on the one hand and decree-holders on the other and provides a prompt remedy for the implementation of only the awards and not the decrees when both the award-holders and the decree-holders are creditors whose claims are substantiated and who are similarly situated.

6. Having given our thoughtful consideration to the rival contentions of the parties, we find merit in what is urged on behalf of the appellant. Bye-law 248 of the bye-laws framed by BSE provides that "All claims (**whether admitted or not**) difference and disputes between a member and non-member or non-members…. 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…… shall be referred to and decided by arbitration as provided in the Rules, Bye-laws and Regulations of the Exchange." When disputes arose between the appellant which is a non-member and the broker, a member, the same was referred to arbitration and the former obtained an award in its favour on December 31, 2001. Admittedly, this award was communicated to BSE on January 8, 2002 and till February 6, 2002 it did not know whether the broker had any other liability except that of Jugal Saraf and the appellant. It is BSE's own case that it was shocked and surprised when it learnt on February 8, 2002 that the broker had an outstanding liability of more than Rs.19.68 crores towards its clients. This being so, when the governing board met on January 16, 2002 and considered the award, it should have immediately debited the amount of the arbitration award from the monies of the broker lying with it particularly when it had no other creditor before it. Even if there were other creditors before BSE, none of them had an award in its favour including Jugal Saraf. It is not in dispute that BSE had more than Rs.3 crores with it in the account of the broker by way of security deposits and other monies received on revocation of bank guarantees. All that the circular of July 9, 1999 requires is that before debiting the amount, BSE should have verified from the broker whether it was moving an application in Court for the setting aside of the award. The broker

and the appellant were both present before the governing board on January 16, 2002 and, as already noticed, the broker had stated that a sum of Rs.2.21 crores be paid to the income tax authorities on behalf of the appellant and the same be treated as payment made by it to the appellant. This statement of the broker was enough confirmation of the fact that it was not challenging the award in Court. If the broker wanted to challenge the award, it would not have told BSE to make payment to the appellant. Moreover, there is no prescribed form in which the confirmation is to be obtained. It is true that by then the period for filing an application for setting aside the award had not expired but since the broker had made its intention clear that it was not challenging the same, BSE should have immediately debited the account of the broker and paid the amount to the appellant. By that time the broker had not been declared a defaulter and its monies were lying with BSE. It had no business to wait till February 25, 2002 when the broker was declared a defaulter. The whole purpose of the circular is to ensure prompt implementation of arbitration awards and the Board did not want the exchanges to wait even for the expiry of 90 days which is the period prescribed for filing an application for the setting aside of an award. By not debiting the amount on January 16, 2002, BSE frustrated the very object underlying the circular and we have no doubt that it acted in violation thereof. Moreover, on a complaint filed by the appellant the Board had made it clear to BSE that the latter had violated the circular and that it should "**immediately implement the arbitration award**……..." We wonder why BSE did not carry out the directions of the Board which it ought to have and we cannot appreciate its adamant attitude in this regard. It should have given a more thoughtful consideration to the matter particularly when it had received directions from the Board. It must be remembered that BSE is only one of the intermediaries of the securities market and its rules, regulations and bye-laws govern only it and its members. The Board, on the other hand, regulates the whole of the securities market including all the intermediaries and other market players. Therefore, in the very nature of things, the regulations, circulars and/or bye-laws issued by the

Board would override all rules, regulations and bye-laws of BSE. We do not think that this proposition could be disputed. By circular dated March 27, 2002 all the stock exchanges had been directed to amend their rules, regulations and bye-laws to bring them in conformity with the circular of July 9, 1999. BSE has been remiss in carrying out this direction as well. Its plea that there was no question of making any payment to the appellant till February 25, 2002 as the statutory period for filing an application for setting aside the award had not yet expired and thereafter all the assets of the broker vested in the Defaulters' Committee is not only without merit but also lacks bona fides. BSE is losing sight of the fact that the representative of the broker was present before it on January 16, 2002 and had made his intention clear that the award was not being challenged. Where is then the question of waiting for the statutory period for filing an application to expire? If the governing board had any doubt it should have asked the broker whether he was challenging the award. We have no reason to believe that such a question would not have been asked particularly when BSE had the circular before it though we do not find anything on our record in this regard. All awards obtained prior to the date on which a broker is declared a defaulter have to be implemented promptly in terms of the circular and it is only those awards which are obtained subsequent to the date of the declaration that have to go to the Defaulters' Committee. In this view of the matter, BSE cannot ask the appellant to go to the Defaulters' Committee and stand in queue with other creditors and recover the amount on pro rata basis.

7. Another plea that BSE has taken for not implementing the award is that any payment made to the appellant would have amounted to a fraudulent preference which was neither fair nor equitable. In our view this plea is equally baseless. The award had been obtained much prior to the date on which the broker had been declared a defaulter and there was no other creditor of the broker as on that date except Jugal Saraf who did not have an award in his favour. In these circumstances, we wonder how payment made to the appellant in terms of the circular would have amounted to fraudulent preference. As a matter of fact, the

payment made to Jugal Saraf in terms of the decision taken by the governing board on January 16, 2002 could not be justified because he did not have an award in his favour. As is clear from the bye-laws of BSE, even admitted claims are implemented only after the creditors obtain an award and it is for this reason BSE had mentioned in the public notice dated February 25, 2002 by which the public had been informed that the broker was declared a defaulter that "**Those members/investors who have any outstanding claims against the defaulter…….are required to immediately obtain arbitration awards in their favour and then put up their claims supported by arbitration awards to the Defaulters' Committee for its consideration**." In the result, we cannot but hold that BSE violated not only the circular but also the subsequent directions issued to it by the Board and its action in not debiting the account of the broker and making payment to the appellant cannot be sustained.

8. It was argued by the learned senior counsel for BSE that even if the awarded amount had been debited to the account of the broker and kept apart, the title to the same would remain with the broker and it would have vested in the Defaulters' Committee when the broker was declared a defaulter. There is no question of the amount vesting in the Defaulters' Committee because the amount should have been debited on January 16, 2002 by which time the broker had not been declared a defaulter and the same should have been paid to the appellant before February 25, 2002. The grievance of the appellant that BSE should have debited the amount and made payment to it on January 16, 2002 is justified. If this had happened and BSE had complied with the circular which it ought to have, the dispute would not have arisen. BSE should not be allowed to take advantage of the delay for which it is responsible. We cannot also agree with the learned senior counsel for BSE that the circular would not apply to the case in hand merely because the period of 90 days prescribed for filing an application for the setting aside of the award had not expired on the date when the broker was declared a defaulter.

9. This brings us to the last contention urged on behalf of BSE. It is contended that the circular differentiates between creditors inter se and treats the award-holders differently from the decree-holders both of whom are creditors of the broker. It is urged that the award-holders have been provided with a prompt remedy for the implementation of their awards whereas such a treatment has been denied to the decree-holders and, therefore, the circular violates Article 14 of the Constitution. There is no merit in this contention either. Let us be clear that every award-holder is an investor in the securities market whereas a decree-holder is not and section 11 of the Act enjoins a duty on the Board to take such measures as it thinks necessary to protect the interests of investors. The circular has been issued to protect the interests of investors and the Board is not concerned with those who have obtained decrees from a civil Court. The decree-holders are free to get their decrees executed in accordance with law. The Division Bench of the High Court while upholding the validity of the circular had pointed out that "**In our opinion the decision taken by the SEBI is in the right direction**." Since the award-holders and the decree-holders are not similarly situated, they have to be treated differently and we find no fault with the circular in this regard.

10. No other point was raised.

11. This brings us to the two applications filed by the creditors who claim that large sums of money are due to them from the broker. They want to be impleaded as respondents in the appeal and the primary prayer that they have made in the applications is for a direction to BSE not to disburse the awarded amount to the appellant till the validity and genuineness of the award in its favour is verified and scrutinized. The names of the two applicants figure in the list of creditors submitted by the broker to BSE on February 8, 2002. The name of the third applicant does not find mention therein. Be that as it may, even if the amounts due to the applicants are admitted by the broker, they cannot be paid anything till they obtain awards in their favour through the arbitral procedure prescribed by BSE. Reference in this regard may be made to bye-law 248 of the bye-laws of BSE. Only one of the applicants namely, Mahendra Kumar Saraogi claims to

have an award in his favour which was made long after the broker was declared a defaulter and that would not affect the rights of the appellant. Merely because the applicants claim to be creditors of the broker does not mean that they get a right to question the award which the appellant has obtained against the broker. Even BSE and the broker have not challenged the award. How can the applicants do that? We are satisfied that they have no locus standi to file the present applications which are misconceived. Accordingly, they are dismissed.

For the reasons recorded above, we allow the appeal and direct BSE to pay the awarded amount to the appellant from the monies of the broker lying with it. Since payment to the appellant has been sufficiently delayed for which BSE is to blame, we further direct it to pay from its own funds interest to the appellant at the rate of 10% per annum from the date of the award till the date of payment. Let the needful be done within two weeks. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
S. S. N. Moorthy
Member

After we pronounced the order in Court, the learned counsel for BSE made an oral prayer to stay the operation of our order to enable BSE to file an appeal in the Supreme Court. In case the awarded amount is paid to the appellant within a week from today, the recovery of interest as awarded by us shall remain stayed for a period of 4 weeks thereafter.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
S. S. N. Moorthy
Member

28.6.2011
Prepared and compared by-ddg