JYOTI RAJESH MANE
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 2274 OF 2025

Shri. Bipin Kantilal Kapadia
of Bombay Age 74 years, Indian Inhabitant
carrying business as Proprietor in the
style of Messrs Ishverial T. Nanavati,
Share and Stock broker and having office
at 415, Stock Exchange Tower, Dalal
Street, Fort, Mumbai - 400023 ...Appellant/Original Plaintiff

Versus

The Stock Exchange Bombay
Having office at Stock Exchange Tower,
Dalal Street, Fort, Mumbai-400023. ...Respondent/Original Defendant

Mr. Amit Shroff a/w. Mr. Vinayak Suthar, for Appellant.

Ms. Radhika Gupta and Mr. Taha Mirza i/b. Khaitan & Co. for Respondent.

CORAM: AARTI SATHE, J.

RESERVED ON: 28 AUGUST 2026

PRONOUNCED ON: 11 SEPTEMBER 2026

JUDGMENT

1. The present First Appeal is filed by the Appellant, being aggrieved by the judgement and decree dated 29th April 2017 passed by the learned Bombay City Civil Court in City Civil Court Suit No. 7708 of 2000, whereby the following order came to be passed:

> **"ORDER**
> 1. The Suit No. 7708 of 2008 (H.C. Suit No. 164 of 2000) is dismissed with costs.
> 2. Decree be drawn up accordingly.
> 3. Accordingly, suit is disposed of."

Facts:-

2. The case of the Appellant is as follows:

I) The Appellant is a share and stock broker and a member of the Respondent Stock Exchange, Bombay (hereinafter referred to as the "Respondent-Exchange"). The Appellant is a recognised member of the Respondent-Exchange, and carries on business as a proprietor of the firm in the name and style of M/s. Ishwarlal Nanavati, having Clearing No. 279. The Respondent-Exchange is a recognised Stock Exchange under the Securities Contracts (Regulation) Act, 1956 ("SCRA"). The Respondent-Exchange and its members are governed, *inter alia*, by the Rules, Bye-Laws and Regulations of the Respondent-Exchange, which have statutory force.

II) Sometime on 9th September 1996, in the course of its brokerage business, the Appellant purchased 44,600 shares of Energy Products India Limited ("EPL"), bearing Scrip Code No. 531620, in Settlement No. 14/96-97 (B2 Group Securities).

III) The aforesaid purchase was made by the Appellant on behalf of its clients. It is the Appellant's contention that, upon purchase of the said shares from the open market through the Respondent-Exchange, the requisite confirmations, memos, contract notes, bills and other relevant documents were duly issued to the respective parties.

IV) It is also the Appellant's contention that the aforesaid 44,600 shares were purchased during Settlement No./Valan No. 14/96-97, for the period commencing from 9th September 1996 and ending on 13th September 1996.

V) It is further the Appellant's contention that, in respect of the transaction involving the aforesaid 44,600 shares, the Respondent-Exchange issued a statement of payments and receipts. It was thereafter that the Appellant came to know that the transaction pertaining to the entire quantity of 44,600 shares had been executed with three other member-broker of the Respondent-Exchange, who had acted as vendors on behalf of their respective clients. The relevant broker members and the quantity of stock of shares sold by them to the Appellant's clients are as follows:

Dr. No.	Name of Broker	Quantity Script	Std. Rate	Amount(Rs.)
1,370	K.P.Vora	21,600 Energy Products (I) Ltd.	49	10,58,000/-
2,259	Hasmukh T. Shah	18,500 … do …	49	9,06,500/-
3,221	Gautam Nemani	4,500 … do ...	49	2,20,500/-

The pay-in and pay-out dates for settlement number 14/96-97 was 9th September 1996 and 13th September 1996 respectively.

3. Pursuant to the Rules, Regulations and Bye-Laws of the Respondent-Exchange and in accordance with the procedure and practice followed by the Respondent-Exchange, a statement of Payment and Receipt bearing statement No. 19-20 dated 4th October 1996 was issued. By the said statement, the Appellant's account was debited with an amount of Rs. 22,30,000/- towards the purchase of 44,600 shares through the Respondent-Exchange.

4. Further, by way of the deliver and receive order for settlement No. 17/96-97, the aforesaid 44,600 shares were to be delivered by the following members to the Appellant:

A: 4,500 shares by Mr. Gautam Nemani

B: 18,500 shares by Mr. Hasmukhlal Shah

C: 21,600 shares by Mr. K. F. Vora (the disputed shares)

5. It is the Appellant's contention that, in accordance with the Rules and Regulations of the Respondent-Exchange, the Appellant was required to deposit the requisite amount with the Clearing House of the Respondent-Exchange within one week from the date of issuance of the statement of Payment and Receipt. Upon such deposit, the Appellant would, after the expiry of a further period of one week, be entitled to receive physical delivery of the shares from the Clearing House.

6. Considering that the pay-in and pay-out dates for settlement No. 17/96-97 were 10th October 1996 and 14th October 1996, respectively, the Appellant deposited the requisite amount with the Clearing House of the Respondent-Exchange.

7. On account of various transactions undertaken by Mr. K. F. Vora, who was also a member of the Respondent-Exchange, he was required to deliver 60,000 shares of EPL in settlement No. 17/96-97. Out of the said 60,000 shares, upon giving effect to the netting and settlement procedure, the disputed shares were required to be delivered to the Appellant.

8. It is the Appellant's contention that, having deposited the requisite amount with the Clearing House of the Respondent-Exchange, the Appellant became entitled to receive physical delivery of the share certificates pertaining to the entire quantity of 44,600 shares of EPL on or about 17th October 1996.

9. However, despite the Appellant having deposited approximately

Rs.23,00,000/- with the Clearing House of the Respondent-Exchange, the Clearing House delivered only 23,000 shares, resulting in a short delivery of 21,600 shares. The said short-delivered shares were valued at Rs. 10,58,000/- and were required to be received from the broker/member, Mr. K. F. Vora.

10. It is the Appellant's contention that, on account of the short delivery, the Appellant repeatedly made inquiries with the Clearing House of the Respondent-Exchange and other departments of the Respondent-Exchange. However, the said efforts did not yield any result. The Appellant was informed that Mr. K. F. Vora had not defaulted in depositing the disputed shares with the Clearing House and that an inquiry was pending in respect of the scrip of EPL.

11. In the meanwhile, disciplinary proceedings were initiated against Mr. K. F. Vora and certain other brokers. Ultimately, in or around November 1996, the transactions in respect of EPL shares entered into in settlement Nos. 13/96-97 and 14/96-97 were cancelled/annulled. Consequently, approximately 69,400 shares were returned by the Clearing House to the concerned broker members in or about December 1996.

12. The aforesaid decision was taken pursuant to a meeting of the Governing Body of the Respondent-Exchange held on 14th October 1996, wherein it was noted that certain transactions undertaken by brokers in respect of EPL shares were not genuine commercial transactions, but were fictitious transactions. It was further noted that the concerned brokers had admitted in writing before the Respondent-Exchange that such fictitious transactions had been undertaken.

13. Pursuant to the aforesaid action, the trading rights of Mr. K. F. Vora were

also suspended by the Respondent-Exchange.

14. On 11th December 1996, the Respondent-Exchange released the disputed shares to Mr. K. F. Vora and called upon him to collect the said shares from the Clearing House.

15. As the Appellant had not received the disputed shares, by a letter dated 19th April 1997, the Appellant informed the Respondent-Exchange that it was no longer interested in receiving the disputed shares and, instead, called upon the Respondent-Exchange to refund the amount of Rs. 10,58,000/- paid towards the purchase of the disputed shares.

16. As the Appellant received no response from the Respondent-Exchange for approximately three months to its letter dated 19th April 1997, the Appellant, by a further letter dated 5th July 1997, reiterated its demand for refund of the aforesaid amount. By a letter of the same date, i.e. 5th July 1997, the Respondent-Exchange, however, called upon the Appellant to collect the disputed shares from the Clearing House. The Appellant, by its letter dated 24 July 1997, declined to accept the said shares on the ground that, by that stage, the shares were no longer of any benefit to the Appellant. However, on the very same day, the Respondent-Exchange once again called upon the Appellant to collect the disputed shares from the Clearing House.

17. On 20th August 1997, the Appellant, by a letter of even date addressed to the Respondent-Exchange, once again reiterated that, at such a belated stage, it was unjust, unfair and inequitable on the part of the Respondent-Exchange to require the Appellant to accept delivery of the disputed shares. The Appellant

accordingly called upon the Respondent-Exchange to refund, without any further delay, the sum of Rs. 10,58,000/- together with interest thereon.

18. It is the Appellant's contention that, after a lapse of approximately six months, the Respondent-Exchange, allegedly misusing its powers, addressed a letter dated 23rd February 1998 to the Appellant, once again calling upon the Appellant to collect the disputed shares from the Clearing House.

19. Thereafter, the Appellant filed L.C. Suit No. 7708 of 2000 against the Respondent seeking the following reliefs:

(a) A declaration that the transaction under Valan No. 14/96-97 was void.

(b) A direction and order against the Respondent-Exchange for refund of sum of Rs.18,39,750/- along with further interest.

(c) In the said suit, Mr. K.F. Vora was not made party as it is the Appellant's contention that the Respondent-Exchange was liable to pay the amount as sought for by the Appellant.

20. Between 2008 and 2017, the proceedings continued before the learned Trial Court and ultimately culminated in the passing of the impugned judgment and decree dated 29th April 2017.

21. In its Written Statement dated 25th November 2008, the Respondent-Exchange raised, inter alia, the following defences:

(i) The Respondent-Exchange contended that the suit was barred by limitation and was, therefore, not maintainable. It was submitted that the suit had been filed more than three years after the accrual of the cause of action and, consequently, the period of limitation had expired.

(ii) It was further contended that the Appellant had failed to offer inspection of certain documents to the Respondent-Exchange. The Respondent-Exchange also contended that the Appellant had no cause of action against the Respondent-Exchange and that the plaint did not disclose any cause of action against the Respondent-Exchange.

(iii) It was further contended that the entire suit was an attempt on the part of the Appellant, in its capacity as a member-broker, to shift and recover its losses from the Respondent-Exchange.

iv) It was further contended that the Respondent-Exchange was merely a facilitator and regulator of the business of purchase and sale of securities and did not itself participate in such transactions. The Respondent-Exchange merely provided a marketplace where its member-brokers could buy and sell securities. It was, therefore, submitted that the Respondent-Exchange could not be held liable for any losses suffered by the Appellant, even if such losses arose in the course of transactions undertaken by the Appellant on the Respondent-Exchange. It was also contended that the relevant provisions of the SCRA and the applicable Rules, Bye-Laws and Regulations protected the Respondent-Exchange, its Governing Body, Clearing House, members and office-bearers from liability for any act or omission done in good faith and/or in the due discharge of their duties and functions in furtherance of the objects of the SCRA and in accordance with the applicable Rules, Bye-laws and Regulations.

(v) It was further contended that the reliefs sought by the Appellant in the suit could not be claimed against the Respondent-Exchange and, if at all, would lie *inter se* between the concerned members with whom the Appellant claimed to have entered into the transactions. The Respondent-Exchange accordingly contended that the suit was bad for misjoinder and/or non-joinder of necessary parties and, in any event, was not maintainable and was liable to be dismissed with costs.

vi) The brief elaboration of the manner in which shares were traded in the Respondent-Exchange was also explained, the same reads as follows:

> (a) With effect from 14 March 1995, member-brokers of the Exchange have been provided with trading terminals connected to the BSE On Line Trading System ("BOLT System"). Through the BOLT system the member-brokers enter orders for the purchase and / or sale of shares from trader work stations (TWS) installed in their offices (instead of assembling in the trading ring of the Exchange, as was originally the practice).
>
> (b) At the relevant time, the 'settlement of trades' (the netting of the purchase and sales position taken by the member-broker on the BOLT, and the delivery of shares and payment of monies to the buying and selling member-brokers, as applicable) was done on an'Account Period' basis where trades done in a trading cycle of one week (each trading cycle is denoted by a Settlement Number) were consolidated, netted (share-wise) and the settlement of such netted trades took place on a particular day in the following week.
>
> (c) The Exchange then generates and issues Delivery /Receipt Orders and Money Statements for the trades done by the member-broker in each share. The Delivery and Receive Orders provide information like the share quantity and trade-names of the member-brokers (with their clearing numbers) who were to deliver / receive the shares. The Money Statement provides details of payments/ receipts of monies by the member-brokers in the settlement. The Delivery /Receipt Orders and Money Statement were made available to the member-brokers.
>
> (d) The shares are then required to be delivered as per the Delivery Orders by the member broker or a date designated for Shares Pay-in for that settlement.
>
> (e) On a date designated for Funds (money) Pay-in in that settlement, the Clearing House debits the settlement(valan) account of the member-broker.
>
> (f) On the Shares Pay-out date for that settlement, the shares are transferred / handed over to the member-brokers, who have a purchase, position in a given settlement.
>
> (g) On the Funds Pay-out date for that settlement, the funds are credited to the settlement account of the member-brokers.

(vii) It was further submitted in the Written Statement that, upon the Appellant not receiving delivery of the disputed shares on the pay-out date, i.e. 14th October 1996, the Appellant ought to have immediately approached the Respondent-Exchange. Instead, the Appellant raised a complaint regarding non-delivery of the disputed shares only after a lapse of approximately six months.

22. It was further contended that the Appellant ought to have approached the Respondent-Exchange and invoked arbitration proceedings against the member-broker, Mr. K. F. Vora, in respect of the non-delivery of the disputed shares, rather than seeking a refund from the Respondent-Exchange and refusing to accept delivery of the shares from the Respondent-Exchange.

23. The Respondent-Exchange further contended that the EPL shares were thinly traded and that, between 20th September 1996 and 17th April 1997, the price of the EPL shares had declined substantially. According to the Respondent-Exchange, it was on account of such decline in the share price that the Appellant had suffered a loss and, consequently, was no longer interested in accepting delivery of the disputed shares. It was further contended that the Appellant approached the Respondent-Exchange for a refund merely five days after expiry of the six-month period prescribed under the Rules, Bye-Laws and Regulations of the Respondent-Exchange for initiating arbitration proceedings against Mr. K. F. Vora. The Respondent-Exchange accordingly alleged that the Appellant had approached the Court after suppressing these material facts and, therefore, the suit was liable to be dismissed.

24. At the time of leading evidence in the suit, the affidavit in lieu of examination-in-chief of Mr. Bipin Kantilal Kapadia, the Appellant, was taken on record, and also the cross-examination was conducted of the Appellant, and the affidavit in lieu of examination-in-chief of the Respondent-Exchange witness was also filed.

25. Both parties also produced certain documents and evidence.

26. The trial Court framed issues and answered them as follows:-

	ISSUES	FINDINGS
1.	Whether the plaintiff proves that he, being a member of the Respondent-Exchange has complied with and acted in accordance with the Rule, Bye-Laws and Regulation of Respondent-Exchange applicable in the relevant time?	: No.
2.	Whether the plaintiff proves that the act of Respondent-Exchange requiring the plaintiff to take, the delivery of the said share is bad, illegal, unlawful, arbitrary and without any authority?	: No
3.	Whether this Court has jurisdiction to try the present suit?	: No
4.	Whether the suit is barred by limitation?	No
5.	Whether the suit is bad for misjoinder and non-joinder of parties?	Yes
6.	Whether the suit is maintainable in the present form?	No
7.	Whether the plaintiff is entitled to refund of Rs.10,58,000/- as claimed?	No
8.	Whether the plaintiff is entitled to interest @ 24% p.a. as claimed?	No
9.	What order and decree?	: As per final order.

27. By the impugned judgment and decree, the learned Trial Court answered certain issues in favour of the Appellant and certain issues against the

Appellant and ultimately dismissed the suit on the ground that the Appellant had failed to establish its claim.

28. The learned Trial Court held that the evidence on record demonstrated that the Respondent-Exchange had no role in the purchase and sale transactions undertaken through the Clearing House and that the Respondent-Exchange was merely regulating the trading in shares. The learned Trial Court further held that the suit was bad for misjoinder and non-joinder of parties and that the Appellant was not entitled to a refund of Rs. 10,58,000/- together with interest from the Respondent-Exchange.

29. In view of the aforesaid findings, the following points arise for determination in the present Appeal:

a) Whether the Respondent-Exchange was merely a facilitator and market place to buy and sell shares and was not liable to pay the refund amount of Rs. 10,58,000/- alongwith interest to the Appellant?

b) Whether there was any privity of contract between the Appellant and the member-broker Mr. K.F. Vora whose disputed shares the Appellant had not received entitling the Appellant for the delivery of shares from the said Mr. K.F. Vora or in the alternative the amount of Rs. 10,58,000/- was receivable from Mr. K.F. Vora instead of the Respondent-Exchange?

c) Whether once the trade in respect of the disputed shares by Valan No. 14/96-97 itself was annulled then the act of the Respondent-Exchange to deliver the shares to the Appellant was legal/correct ?

d) What reliefs are the plaintiffs entitled to ?

30. Mr. Amit Shroff along with Mr. Vinayak Suthar appeared on behalf of the Appellant. Ms. Radhika Gupta along with Mr. Taha Mirza instructed by Khaitan and Company appeared on behalf of the Respondent-Exchange.

31. Learned counsel on behalf of the Appellant submitted that the Trial Court failed to appreciate the facts of the present case and erred in coming to the conclusion that the Respondent-Exchange was not liable to refund the amount of Rs. 10,58,000/- to the Appellant. It was further his submission that the learned Trial Court had come to an erroneous finding that in view of Bye-Law No. 315J of Rules, Bye-Laws and Regulations of the Stock Exchange Mumbai, 1957. (hereinafter referred to as "Bye-Laws"), the Respondent-Exchange was indemnified from any action to be brought against the Respondent-Exchange, the governing board, the President and the Secretary and employee of the Exchange acting under their authority inasmuch as in the facts of the present case, it was the Respondent-Exchange itself which was bound to pay the amount of refund to the Appellant.

32. It was further his submission that considering that the trade in respect of the disputed shares with Mr. K.F. Vora had been annulled by the Respondent-Exchange itself in the year 1996, there was no question of any privity of contract between the said Mr. K.F. Vora and the Appellant. Even otherwise, it was his submission that no privity of contract could be assumed between the Appellant and Mr. K.F. Vora inasmuch as it is the Respondent-Exchange and its Clearing House which is under an obligation to deliver the physical shares by taking the same from Mr. K.F. Vora and pay the money to the Appellant, which does not make Mr. K.F. Vora liable for non-delivery of share and non-delivery of money. He therefore

submitted that the Trial Court had erroneously come to the conclusion that the suit suffered from non-joinder of parties and hence on that ground also the Suit was bad in law.

33. He further submitted that the provisions of clause 315J of the Bye-Laws were hit by Section 28 of the Indian Contract Act, 1872 (hereinafter referred to as the "Contract Act") inasmuch as Section 28 of the Contract Act specifies that an agreement by which any party thereto is restricted absolutely from enforcing his right under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time in which he may enforce the rights or extinguishes the right of any party thereto or discharges any party thereto from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights is void to that extent. The relevant Section 28 of Contract Act is reproduced below:

> **"28. Agreements in restraint of legal proceedings, void.-**
> Every agreement,—
> (a)by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
>
> (b)which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability,. under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,
> is void to that extent.
>
> Exception 1.—Saving of contract to refer to arbitration dispute that may arise. —
> This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.
>
> Exception 2.—Saving of contract to refer questions that have already arisen.— Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which

has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Exception 3.—Saving of a guarantee agreement of a bank or a financial institution.—
This section shall not render illegal a contract in writing by which any bank or financial institution stipulate a term in a guarantee or any agreement making a provision for guarantee for extinguishment of the rights or discharge of any party thereto from any liability under or in respect of such guarantee or agreement on the expiry of a specified period which is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of such party from the said liability.

(a)Explanation.—
(i)In Exception 3, the expression "bank" means—a "banking company" as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949).

(b)"a corresponding new bank" as defined in clause (da) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);

(c)"State Bank of India" constituted under section 3 of the State Bank of India Act, 1955 (23 of 1955);

(d)"a subsidiary bank" as defined in clause (k) of section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);

(e)"a Regional Rural Bank" established under section 3 of the Reg, tonal Rural Banks Act, 1976 (21 of 1976);

(f)"a Co-operative Bank" as defined in clause (cci) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);

(g)"a multi-State co-operative bank" as defined in clause (cciiia) of section 5 of the Banking Regulation Act, 1949 (10 of 1949); and

(ii)In Exception 3, the expression 'a financial institution" means any Public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956)."

34. In view of the aforesaid provision, he submitted that though this plea was not taken by him at the time of the suit proceedings the same being a legal argument could be raised for the first time in the present First Appeal proceedings. He further submitted that Arbitration proceedings under the Bye-Laws would primarily apply to disputes between members and not disputes against the Respondent-Exchange. It was his submission that in the facts of the present case

since the Appellant had no privity of contract with Mr. K.F. Vora and also that the annulment of the trade was done by the Respondent-Exchange, the question of invoking Arbitration against Mr. K.F. Vora would not be the correct position. He also submitted that even otherwise to invoke Arbitration it is incumbent upon the party claiming that the disputes are covered by the Arbitration clause to make an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act") to the Court to refer the matter to Arbitration. He submitted that in the facts of the present case that no such application under Section 8 of the Arbitration Act has been made, and hence the plea of the Respondent-Exchange that Arbitration could be invoked is not a correct position in law.

35. He further submitted that since the transaction itself of the trade of the disputed shares were annulled, the question of Mr. K.F. Vora delivering the shares physically to the Appellant was not possible and hence the question of remedy against Mr. K.F. Vora of closing out as per the Bye-Laws or seek remedy of Arbitration of delivery of shares did not arise at all. He further submitted that in fact after the disputed shares were returned to Mr. K.F. Vora, the Clearing House of the Respondent-Exchange had themselves categorically asked Mr. K.F. Vora not to deliver the shares further and placed it under no delivery caption. He further submitted that in spite of this no delivery status it was sometime in the year 1997 that the Respondent-Exchange post annulment of the trade of the disputed shares also insisted upon physical delivery of shares to be taken by the Appellant. In view of the aforesaid submissions, he submitted that the impugned order passed by the

Trial Court was liable to be set aside and the Respondent-Exchange was bound to pay the amount of Rs. 10,58,000/- to the Appellant.

36. Per contra, learned counsel on behalf of the Respondent submitted that the present First Appeal deserves to be dismissed inasmuch as the Appellant has no cause of action against the Respondent-Exchange and also the plaint did not disclose any cause of action against the Respondent-Exchange.

37. It is further her submission that the issue regarding application of the provisions of Section 28 of Contract Act was never raised before the Trial Court and hence it could not be raised for the first time in the present First Appeal. She further submitted that the Respondent-Exchange was only a facilitator of buying and selling securities and the Respondent-Exchange itself does not participate in buying or selling securities but serves as a market place to buy and sell securities. It was therefore her submission that the Respondent-Exchange was not liable for any losses incurred by the Appellant even though the losses may have been incurred in the course of trading.

38. She further submitted that the reliefs as claimed by the Appellant against the Respondent-Exchange could not be maintained and the same would have to be claimed against the member broker Mr. K.F. Vora with whom the Appellant has transacted and thus the Suit was rightly dismissed for mis-joinder/non-joinder of necessary parties. She further elaborated on the method of trading of shares at the Respondent-Exchange at the relevant point of time to contend that the accounting period in respect of the 44,600 shares of Energy Product India Limited ('EPL') which consisted of the disputed shares, which the Appellant had purchased was

from the period 9th September 1996 to 27th September 1996. The Pay-in date of settlement number 17/96-97 was 10th October 1996 and the Pay-out date was 14th October 1996 and since during that time there were investigation proceedings being conducted against Mr. K.F. Vora and other brokers, the transactions entered by these brokers were annulled and the said brokers were asked to take back their shares from the Clearing House pertaining to annulled transactions. It was in these circumstances that the delivery of shares was an obligation of Mr. K.F. Vora which was not met by the said Mr. K.F. Vora and hence the Respondent-Exchange was in no way liable to effect delivery of the same and to make payment of Rs. 10,58,000/- to the Appellant, was the contention of the learned counsel for Respondent-Exchange.

39. She further submitted that the Appellant should have approached the Respondent-Exchange immediately after the non-delivery of shares i.e. after 14th October 1996, however the same was not done by the Appellants, and he waited until December 1997 to bring the same to the attention of the Respondent-Exchange.

40. She further submitted that the appropriate remedy available to the Appellant was in fact initiating Arbitration proceedings against Mr. K.F. Vora and not claim a refund from the Respondent-Exchange and refuse to take delivery of the said shares.

41. She further submitted that the Appellant had chosen not to take delivery of the disputed shares as the value of the said shares was consistently falling and the said shares were thinly traded shares and this disincentivised the Appellant to take

physical delivery of the shares. It was further her submission that the Appellant was trying to offload the losses they had incurred on to the Respondent-Exchange and hence the refund of Rs. 10,58,000/- by the Respondent-Exchange was rightly not made.

Analysis & Findings:-

42. I have perused the papers and proceedings and the impugned order along with the relevant documents annexed to the First Appeal with the assistance of learned counsel on behalf of the parties and I proceed to decide the present First Appeal.

43. On perusal of the proceedings and the impugned order, I am of the view that the present First Appeal deserves to succeed inasmuch as the Trial Court has not considered certain vital facts and aspects in the present matter which make the Respondent-Exchange liable for the payment of Rs. 10,58,000/- to the Appellant. The subsequent discussion will aid the conclusion that I have reached at.

a. It is an admitted fact that the Appellant had placed an order of 21600 number of shares of EPL which consisted of the disputed shares of which Mr. K.F. Vora was a seller through the Respondent-Exchange. It is also an admitted fact that the Appellant had deposited an amount of Rs. 23,00,000/- in respect of the purchase of the aforesaid shares which included the disputed shares and the Pay-in and Pay-out date was between 10th October 1996 and 14th October 1996. In the written statement itself of the Respondent-Exchange dated 25th November 2008, the Respondent-Exchange has admitted that the governing board of the Respondent-Exchange had decided to annul the transactions entered into between Mr. K.F. Vora, Mr. H.V. Shah and GHFL Securities as investigation proceedings were being conducted against them in respect of suspected trades which were in the nature of fictitious dealings. As a result of the aforesaid annulment, the case of the 3 brokers were forwarded to the Disciplinary Action Committee (DAAC) and the shares pertaining to the annulled transactions were released back to the concerned member including Mr. K.F. Vora and the member brokers were asked by the Respondent-Exchange to take back their shares from the Clearing House pertaining to the annulled transactions which included the disputed shares. Once that being the case that the trades as entered into by Mr. K.F. Vora as a member broker being annulled and the shares which included the disputed shares being returned back to him by the Respondent-Exchange, the question of physical delivery of the same to the Appellant did not arise at all. The fact that once an annulment of a trade takes place it means that the trade has come to an end and thereafter the trading of that share itself is not possible. It would be beneficial to reproduce the meaning of the term "Annul" as given in the following dictionaries to demonstrate that an annulment means the end or the non-existence of a law, agreement or marriage, etc. The relevant dictionary meanings are given below: -

Oxford Dictionary 2017: -

"Annul" - "To state officially something is no longer legally valid or recognized"

K. J. Aiyar Judicial Dictionary 17th Edition Vol. 1 2017:-

"Annul" – "To reduce to nothing e.g. annul a decree; to annul or adjudicate bankruptcy. In Chambers 26th Century Dictionary, the word 'annul' has been assigned the meaning as to make null, to reduce to nothing, to abolish.

P. Ramanatha Aiyar Advanced Law Lexicon 7th Edition Vol. 1 2024:-

"Annul" – "To make void; to destroy; to cancel (as to annul a judgement); nullify; abrogate; abolish; to do away with; used especially of laws, decrees, edicts, decisions of Courts, or established rules, usages and the like.

b. Considering that the trades of the Mr. K.F. Vora were annulled, I am of the view that the argument as canvassed by the learned counsel on behalf of the Appellant has much substance that the Appellant on behalf of his client was no longer in a position to take physical delivery of the shares or was not interested in taking physical delivery of the shares. This to my mind is in view of the fact that once trading of the shares itself is annulled then by taking physical delivery of the said shares, there was no purpose which was to be served insofar as the Appellant is concerned. I am therefore of the view that the argument of learned counsel on behalf of the Respondent that the Appellant chose not to take physical delivery of shares only because the share price of the disputed shares were falling is liable to rejected at its threshold considering that the trading of the said shares was annulled.

c. I am also of the view that once the trading of the shares was annulled on 14th October 1996 the insistence of the Respondent-Exchange as admitted by them in their written statement that the Exchange had made repeated offers to the Appellants to take delivery of the shares by letters dated 22nd July 1997, 25th July 1997, 9th September 1997 & 23rd February 1998 would itself raise serious doubt that how the Respondent-Exchange could effect physical delivery of shares whose trade has been annulled. To my mind this insistence on the part of the Respondent-Exchange to force the Appellant to take the delivery of shares of which do not exist post-annulment is an action which defies all logic.

d. I am further of the view that once the shares were returned to Mr. K.F. Vora, then the same being offered by the Clearing House of the Respondent-Exchange to the Appellant for physical delivery remains a question which has not been examined by the Trial Court before passing the impugned order.

e. A Civil Court has to decide the case on preponderance of probability. The Court has to decide that the case of the Original Plaintiff or the case of the Original Defendant is more probable. In my view, the case of the Appellant (Original Plaintiff) is more probable on the examination of the documents and the evidence on record.

f. I am further of the view that as held by me, above, that once the annulment of the trade concerning the disputed shares had taken place, the obligation if any of Mr. K.F. Vora towards the Appellant would not survive. In that situation, there could be no action which the Appellant could possibly bring against the said Mr. K.F. Vora as a member broker. The contention therefore sought to be canvassed by learned counsel on behalf of the Respondent that the correct remedy to the Appellant is to invoke arbitration proceedings under the

Bye-laws, is a submission which deserves to be rejected at its very threshold, inasmuch as once there is no remedy itself available against Mr. K.F. Vora, then the question of invoking arbitration against Mr. K.F. Vora does not arise. I am also of the view that there was no privity of contract between the Appellant and Mr. K.F. Vora considering that the very process of trading as explained in the written statement filed by the Respondent-Exchange show that while effecting purchase/sale orders on the trading system, there is no one to one contract which is contemplated between a prospective buyer and prospective seller of shares. The trading process has been elaborated in paragraph 21 (vi) above.

g. It is therefore clear that once that being the situation as elaborated insofar as the trading process is concerned and coupled with the fact that the trades in respect of disputed shares have been annulled, the question of seeking a remedy against Mr. K.F. Vora either through Arbitration or by invoking any other Bye-Laws especially Bye-Law No. 282 of the Bye-Laws does not arise at all. In view thereof, the finding of the Trial Court that the suit is liable to be dismissed on account of mis-joinder/non-joinder of necessary parties is an incorrect finding rendered by the Trial Court. In the present case, there was no question of seeking any relief against the said Mr. K.F. Vora as the transaction in respect of the disputed shares had been annulled and therefore there was no privity of contract between the Appellant and Mr. K.F. Vora. The said Mr. K.F. Vora was therefore not a necessary party to the suit. This view taken by me is fortified by the decision of the Supreme Court in **Moreshar Yadaorao Mahajan v. Vyankatesh Sitaram**

Bhedi (D)[1], wherein it has been held that in order to categorize anyone as a necessary party to a dispute the twin test enumerated therein have to be satisfied. It must be established that there is a right to some relief against such party in respect of the controversy involved in the proceedings, and that no effective decree can be passed in the absence of such a party. The relevant paragraphs of the decision of the Supreme Court in the case of **Moreshar Yadaorao Mahajan** (supra) are reproduced below: -

> 18. It could thus be seen that a "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed.
>
> 19. As already discussed hereinabove, the plaintiff himself has admitted in the plaint that the suit property is jointly owned by the defendant, his wife and three sons. A specific objection was also taken by the defendant in his written statement with regard to nonjoinder of necessary parties. Since the suit property was jointly owned by the defendant along with his wife and three sons, an effective decree could not have been passed affecting the rights of the defendant's wife and three sons without impleading them. Even in spite of the defendant taking an objection in that regard, the plaintiff has chosen not to implead the defendant's wife and three sons as party defendants. Insofar as the reliance placed by Shri Chitnis on the judgment of this Court in the case of Kasturi (supra) is concerned, the question therein was as to whether a person who claims independent title and possession adversely to the title of a vendor could be a necessary party or not. In this context, this Court held thus:
>
>> **"7. …….From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are — (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."**
>
> **20. It can thus be seen that what has been held by this Court is that for being a necessary party, the twin test has to be satisfied. The first one is that there must be a right to some relief against such party in respect of the controversies involved in the proceedings. The second one is that no effective decree can be passed in the absence of such a party.**
>
> 21. In view of the plaintiff's own admission that the suit property was jointly owned by the defendant, his wife and three sons, no effective decree could have been passed in their absence.

(emphasis supplied)

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h. Further, the Supreme Court in the case of **Nak Engg. Co. (P) Ltd. Vs. Tarun Keshrichand Shah**[2] has laid down the important principles regarding necessary and proper parties. Relevant paragraphs of the aforesaid decision are reproduced below:-

> "31. The fundamental distinction between a "necessary party" and a "proper party" was succinctly explained in Ramesh Hirachand Kundanmal v. Municipal Corpn., Greater Bombay, wherein this Court held: (SCC p. 528, para 6)
>
> > "6.... A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."
>
> 32. In Kasturi v. Iyyamperumal, this Court crystallized the twin tests for a necessary party: (SCC p. 733)
>
> > "The question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. ... Two tests are to be satisfied for determining the question who is a necessary party. The tests are: (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."
>
> 33. This principle has been consistently reiterated. In Mumbai International Airport (P) Ltd. v. Regency Convention Centre & Hotels (P) Ltd., this Court reiterated: (SCC p. 423, para 15)
>
> > "15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."
>
> 34. Thereafter, in Vidur Impex & Traders (P) Ltd. v. Tosh Apartments (P) Ltd. {, the broad principles governing impleadment were summarized: (SCC p. 413, para 41)
>
> > "41.... 41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.
> >
> > 41.3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and

2 (2026) 3 SCC 631

> issues, though he may not be a person in favour of or against whom a decree is to be made.
>
> 41.4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff."
>
> 35. In the case at hand, Respondents 1 and 2 are not claiming any relief against the appellant. There is no iota of material to indicate that the relief, as claimed in the suit against Respondent 3, if granted, would be implemented against the appellant. Therefore, the appellant is not a necessary party to the suit.
>
> 36. The appellant cannot also be construed as a proper party once it has failed to establish that it is a successor to Respondent 3. In the absence of any evidence to prove that Respondent 3 has ceased to exist or cannot be represented in the suit on its own to contest it on merits, we are of the opinion that the appellant is not even a proper party to provide any assistance to the court in the suit.
>
> 37. This apart, Respondents 1 and 2 who have instituted the suit are dominus litis and it is for them to choose their adversaries. If they do not array the proper and necessary parties to the suit, they do it at their own risk. However, they cannot be compelled to add a party to defend a suit against their wishes. The decree, if any, passed in the suit would be binding only between the parties to the suit and would not infringe upon any right of a third party, much less of the appellant that is not a party to the suit."
>
> (emphasis supplied)

i. In the facts of the present case, as held by me, applying the aforesaid tests, the member broker Mr. K.F. Vora cannot be held as a necessary party, inasmuch as there was no relief that could be sought against him by the Appellant, and further, an effective decree could be passed in his absence. Therefore, the Trial Court's conclusion that the suit suffered from misjoinder of parties is an erroneous conclusion that deserves to be rejected.

j. I am also of the view that the bar to initiate proceedings against the Respondent-Exchange under Bye-Law No. 315J of the Bye-Laws would not be attracted to the facts of the present case, inasmuch as the said Bye-Law categorically provides that no party shall bring or prosecute any suit or proceeding against the Exchange, the governing body, the President, the Secretary or any employee or employees of the Exchange acting under his authority or arbitrators in respect of any matter or thing purporting to be done under this Bye-Laws or Regulations nor any suit or proceedings (save for enforcement of the award) against the other party or party to the reference. This Bye-Law comes specifically under the chapter of "**References and Appeals to Dispute Resolutions**" and it is in respect of a reference which is drawn up under the provisions and it applies only when a reference is made under the relevant Bye-laws. The mandate of Bye-law 315J of the Bye-Laws therefore cannot be read to mean that this indemnity applies in every situation to the Exchange and since in facts of the present case, there was no reference of any dispute as envisaged under the Bye-laws 315B to 315L of the Bye-laws, the submission made on behalf of the Respondent-Exchange that the Respondent-Exchange be protected on account of the aforesaid indemnity deserves to be rejected. Further, it is my view that the Trial Court also in the impugned order has only sought to place reliance upon Bye-Law No. 315J of the Bye-Laws to hold that the Respondent-Exchange was indemnified and could not be made liable for the refund as sought by the Appellant in the present case. The reliance by the Trial Court on the other Bye-laws also especially Bye-Law No. 92 which speaks of the liability of the Clearing House would not amount to exonerating the Respondent-Exchange from the refund of Rs. 10,58,000/-, it has to pay to the Appellants. Bye-Law No.92 of the Bye -Laws which speaks about the non-liability of the Clearing House is only in respect of the title, ownership, genuineness, regularity or validity of any security, transfer deed or any other document passing through the Clearing House and that by itself cannot be applied to the facts of the present case to absolve the Respondent-Exchange from refunding the amount of Rs. 10,58,000/- in respect of the annulled trade of the disputed shares. It is not the case of the Appellant that he has sought for damages or any loss suffered on account of trading but the Appellant only seeks refund of the amount which the Appellant had deposited with the Respondent-Exchange on behalf of its clients to purchase the disputed shares. It is an admitted position that the said amount was paid by the Appellant to the Respondent-Exchange and it is inconsequential whether the said amount was distributed to the respective receiving members. The ultimate liability in the facts of the present case especially in view of the fact that the trade in the disputed shares were annulled would lie squarely on the Respondent-Exchange. Considering that I have taken this view in respect of applicability of Bye-law No. 315J of the Bye-Laws, it would not be necessary to consider the applicability of the provisions of Section 28 of the Contract Act in respect of the aforesaid Bye-Law. The relevant Bye-Law is reproduced below: -

Indemnity

> 315J. No party shall bring or prosecute any suit or proceedings whatever against the Exchange, the Governing Board, the President, the Secretary or any employee or employees of the Exchange acting under his authority or against the arbitrators for or in respect of any matter or thing purporting to be done under these Bye-laws and Regulations nor any suit or proceedings (save for the enforcement of the award) against the other party or parties to the reference

k. I am further of the view that the Trial Court erred in not considering that Bye-law No. 96(a) of the Bye-Laws gives the discretion to the Clearing House to deliver securities which it has received from a member or to instruct a member of a direct delivery of the security which he has to deliver under the Bye-Laws to another member who is entitled for them. Further Bye-Law No. 96(b) of the Bye-

Laws provides that the member giving and receiving delivery as provided in sub-clause (a) shall be deemed notwithstanding that no direct contract exists between them to have made a contract between sellers and buyers. It however also provides that the rights and liabilities of such members in relation to their immediate contracting parties shall not be deemed to be affected thereby except that the selling member who is the immediate contracting party of the receiving member shall be (unless he himself is the delivering member) released from all responsibility in regard to the title, ownership, genuineness, regularity and validity of the documents received by the receiving members and in regard to the loss and damage arising therefrom which shall be dealt with in accordance of the Bye-Laws and Regulations in relation to documents and registration. The relevant Bye-Law is reproduced below:-

> **96. Clearing House to Deliver Securities at Discretion**
>
> (a) The Clearing House is entitled at its discretion to deliver securities which it has received from a member (or to instruct a member to give direct delivery of securities which he has to deliver) under these Bye-laws and Regulations to another member who is entitled under these Bye-laws and Regulations to receive delivery of securities of a like kind.
>
> **Privity of Contract**
>
> (b) Members giving and receiving delivery as provided in sub-clause (a) shall be deemed notwithstanding that no direct contract exists between them to have made a contract with each other as sellers and buyers. How-ever the rights and liabilities of such members in relation to their immedi-ate contracting parities shall not be deemed to be affected thereby except that the selling member who is the immediate contracting party of the receiving member shall be (unless he be himself the delivering member) released from all responsibility in regard to the title, ownership. genuineness, regularity and validity of the documents received by the receiving member and in regard to the loss and damages arising therefrom which shall be dealt with in accordance with the Bye-laws and Regulations relating to Documents and Registration.

l. It is therefore clear that on reading of the aforesaid Bye-Laws, the Clearing

House has the discretion to deliver securities which it has received from its member to make the delivery to another member. In the facts of the present case, the Clearing House had categorically directed the member Mr. K.F. Vora not to make further delivery in respect of the disputed shares and thereafter the trade got annulled of the disputed shares. In such a situation, it is rather flummoxing to this Court that once such instructions were issued and the trade was annulled by decision of governing body dated 14th October 1996 reflected in letter dated 26th July 1997, then the insistence of the Respondent-Exchange by letters dated 22nd July 1997, 25th July 1997, 9th September 1997 & 23rd February 1998 to the Appellant to take physical delivery of shares would be an incoherent situation at best. In such a situation clearly once the trade being annulled the remedy available against Mr. KF Vora member by the Appellant would definitely not be justifiable. Further a reading of 96(b) provides that even though there may be a deemed contract between the parties yet when the selling member is the immediate contracting party of the receiving member unless he himself is the delivering member would be released from all responsibilities with regard to the title, ownership, genuineness, regularity and validity of the documents received by the receiving member and any loss or damage arising therefrom would not be the responsibility of the selling member.

m. I am of the view therefore that in facts of the present case even if there was a deemed contract between the Appellant and Mr. K.F. Vora, the fact that the trade was annulled and that the delivery was not being effected by Mr. K.F. Vora but in fact was being done by the Clearing House would by itself show that there was no relief that the Appellant could have sought against the said Mr. K.F. Vora. Once that being the position the other provisions of other Bye-Laws particularly Regulation 8.44 regarding closing out and Bye-law No. 168 of the Bye-Laws regarding closing out of contracts would not get attracted, inasmuch as in the present case, there was no trade which was left to be closed out. Once that being the undisputed position, the question of bringing any action against Mr. K.F. Vora would not survive and the Appellant has rightly invoked the remedy against the Respondent-Exchange.

n. I am further of the view that the reliance placed by learned counsel for Respondent-Exchange on the cases of **Bombay Stock Exchange Vs. V.S. Kandalgaonkar** [3]& **Stock Exchange, Mumbai Vs. Vinay Bubna**[4] would not help her advance her contentions as they were rendered in a different fact pattern. There is no dispute that the present Bye-Laws are statutory Bye-Laws as held in the case of **Kandalgaonkar** (supra) but in the facts of the present case, the issue not being the statutory nature of Bye-Laws, but the remedy as sought by the Appellant, this decision would not apply. Further the reliance of **Vinay Bubna** (supra) would not be apposite to the facts of the present case, inasmuch as, the same was rendered in a fact pattern that is distinct from the facts of the present case. In the aforesaid case, a dispute had arisen between the two Respondents regarding a transaction effected between them, and the two parties had accordingly invoked arbitration proceedings under Bye-Law No. 248 of the Bye-Laws. The dispute was thereafter referred to an arbitral tribunal consisting of 2 arbitrators, and they had accordingly

3 (2015) 2 SCC 1
4 1999 (3) Mh.L.J. 810

passed an arbitral award in favour of Respondent No. 2 therein. Respondent No. 1 had then preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 on the ground that the constitution of the arbitral tribunal consisting of two arbitrators was in contravention to Section 10 of the Arbitration and Conciliation act, 1996, which was decided in his favour by the learned Single Judge. The Stock Exchange had therefore filed an appeal against the order of the Single Judge, wherein it was held that the Bye-Laws of the Stock exchange providing for arbitration of two arbitrators, being inconsistent with the provisions of Section 10 of the Arbitration and Conciliation Act, 1996, would prevail over Section 10 and that while interpreting Section 2(4) of the Arbitration and Conciliation Act, 1996 stress has to be laid on the words "under any other enactment". It held that once it is found that arbitration is under the Securities Contracts (Regulation) Act, 1956, Bye-Laws framed thereunder will prevail and not Section 10 of the Arbitration and Conciliation Act, 1996. The facts of the present case, however, are not in respect of the issue of whether the statutory nature of the Bye-Laws would override the provisions of another statute/enactment, as there was no reference of the dispute to any adjudicating authority under Bye-Law No. 315J of the Bye-Laws, since the remedy had been rightly sought against the Respondent-Exchange and not the member broker Mr. K.F. Vora.

o. In view thereof, the Trial Court has erred in not appreciating the facts in its entirety and coming to the conclusion that the Respondent-Exchange was not liable to make payment to the Appellant on account of non-delivery of disputed shares. The suit also did not suffer from non-joinder or mis-joinder of necessary parties as there was no remedy available to the Appellant against Mr. K.F. Vora once the trade of the disputed shares was annulled by the Respondent-Exchange and further the Appellant has only sought the refund amount which had been deposited with the Respondent-Exchange and not claimed for damages/loss.

44. The points of determination are answered accordingly. In light of the aforesaid discussion and for all the reasons stated hereinabove, the following order is passed:

ORDER

i) The present First Appeal is allowed

ii) The impugned judgment and decree dated 29th April 2017 is set aside

iii) The Respondent-Exchange to pay an amount of Rs. 10,58,000/- along with interest at the rate of 9% from the date of filing of the Suit till payment or realisation thereof.

iv) In the facts and circumstances, there will be no order as to costs.

(AARTI SATHE, J.)

After pronouncement of Judgment :

1. Learned counsel for the Appellant at this stage has prayed for stay of the aforesaid order by a period of four weeks. Considering the relief as granted, the aforesaid request is rejected.

2. Refund of court fees, if any, as per rules.

(AARTI SATHE, J.)