

(1998) 01 GUJ CK 0014

In the Gujarat High Court

Case No : Spl. Civil Application No. 9089 of 1995

STOCK EXCHANGE

APPELLANT

Vs

ASSISTANT COMMISSIONER OF INCOME TAX.

RESPONDENT

Date of Decision : 17-01-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60(1)
Constitution of India, 1950 — Article 19(1)(g)
Income Tax Act, 1961 — Section 159(3), 222, 223, 224
Presidency Towns Insolvency Act, 1909 — Section 2(e)

Citation : (1998) 147 CTR 171 : (1998) 100 TAXMAN 626

Hon'ble Judges : R.K. Abichandani, J;R. K. Abichandani, J

Bench : Division Bench

Judgement

R. K. ABICHANDANI, J. :

The petitioner stock exchange challenges the order of provisional attachment of its deceased members card, his security deposit and margin money, issued on 14th February, 1994, under s. 281B of the IT Act, 1961, as extended from time to time, and garnishee notice dt. 14th June, 1995, issued on the Stock Exchange under s. 226(3) of the said Act and further action taken thereunder.

2. The impugned order under s. 281B of the said Act dt. 15th February, 1994, a copy of which is at Annexure "A" to the petition, was an order passed against the assessee, Smt. Dipti R. Shah, as a legal heir of Rajesh Anubhai Shah, on the ground that the assessment proceedings for the asst. yrs. 1989-90 to 1993-94 were pending in the case of the assessee and it was reasonably believed that on completion of the proceedings substantial demand of tax, interest and penalty would arise and since the assessee had not made any provision for the payment of such amounts, it was considered necessary to provisionally attach the property of the assessee described in Sch. I to the said order. This property which was provisionally attached consisted of (1) Ahmedabad stock exchange Card bearing No. 02-0419-6 in the name of Shri Rajesh Anubhai Shah, (2)

Margin money kept with the stock exchange and (3) Security deposits kept with the stock exchange. The name of Smt. Dipti R. Shah, widow of Shri Rajesh A. Shah was shown as an assessee, presumably because of the provision of s. 159(3), which provides that the legal representative of the deceased shall, for the purposes of the said Act, be deemed to be an assessee.

3. The notice under s. 226(3), dt. 14th June, 1995, a copy of which is also at Annexure "A" to the petition, was addressed to the petitioner stock exchange, requiring it to pay to the authority i.e., Asstt. CIT, any amount due from the petitioner to or held by the petitioner for or an account of the deceased Rajesh A. Shah-legal heir Dipti R. Shah. It was stated in the notice that a sum of Rs. 12,24,887 was due from "Rajesh A. Shah - legal heir Dipti R. Shah". A copy of the notice was served to Smt. Dipti R. Shah as a legal heir of the assessee. It appears that since the petitioner did not pay the amount as demanded in the notice issued under s. 226(3), the Asstt. CIT wrote to the petitioner on 5th October, 1995, which letter is referred to in para. 7 of the petition, requiring the petitioner to explain as to why it should not be treated to be an assessee-in-default in respect of the amounts specified in the said notice and why further proceedings should not be taken against the petitioner for the realisation of the amount. It was stated in this letter that despite the provisional attachment of the property in question, the governing board of the stock exchange had unauthorisedly disposed of the membership rights of the deceased, which had vested in the Stock Exchange, on 23rd January, 1995, against the consideration of Rs. 27 lakhs to M/s. UTI Securities Exchange Ltd.

4. One Rajesh A. Shah, who was a member of the petitioner stock exchange, passed away on 7th February, 1994. According to the petitioner, since he had failed to discharge during his lifetime, his obligations and liabilities in respect of certain transactions effected by him at the stock exchange, the governing board of the stock exchange had declared him as a "deemed defaulter" on 12th February, 1994. That resolution was not annexed with the petition, but during the course of the arguments it was referred to in support of the petitioners case that the legal representatives of the deceased member had expressed in writing their inability to satisfy in full or in part the liabilities/obligations and claims arising out of the contracts made by the late member, subject to the rules and regulations, and therefore, he was treated as a deemed defaulter and that it was resolved that the membership right of Rajesh A. Shah which vested in the stock exchange was to be disposed of by inviting offers by fixing a minimum floor price of Rs. 25 lakhs. The "Disposable membership rights" of deceased Rajesh A. Shah were by an auction notice published in Economic Times dt. 16th February, 1994, offered for sale.

It appears from the minutes of the meeting said to have been held on 12th February, 1994, and the contents of para. 4 of the petition that the petitioners case was that the said member Rajesh A. Shah, after his death, was declared as a "deemed defaulter" and because he was a defaulter, his right of membership

vested in the exchange and that is how the exchange offered to the eligible persons his "disposable membership right" by an auction as per the Public Notice dt. 16th February, 1994, which was placed on record during the arguments. There was a slight improvement over the petitioners case reflected in the petition, during the arguments when it was developed by also contending that the heirs of the deceased had shown their inability to discharge the obligation as per the rules and regulations, before the governing board passed resolution dt. 12th February, 1994. It appears that, even while the provisional attachment was operative by virtue of the impugned order issued under s. 281B on 15th February, 1994, the governing board proceeded to dispose of the membership right of the said deceased member by making a resolution on 5th December, 1994, after holding the open bid on 6th October, 1994, in favour of the UTI Securities Exchange Limited, which was informed about its being admitted as a corporate member of the stock exchange on 23rd February, 1995, as stated in the communication dt. 23rd January, 1996, addressed by the UTI Securities Exchange Ltd. to the office of the Asstt. CIT in response to letter dt. 20th September, 1995, in which the UTI Securities Exchange Ltd. was informed that the rights of Rajesh A. Shah were provisionally attached on 15th February, 1994, under s. 281B and that the Ahmedabad stock exchange had no right to transfer those membership rights since it had not obtained any prior approval for such transfer nor did it make any claim against the attachment order under s. 281B of the said Rules. This is reflected from the copies of the correspondence placed on record during the arguments and referred to by both the sides. The provisional attachment was extended by order dt. 11th August, 1994, upto 14th February, 1995, and by order dt. 10th February, 1995, upto 14th August, 1995. The notice under s. 226(3) was issued by the Department to the petitioner on 14th June, 1995, and the petitioner sent a reply dt. 20th June, 1995, to this garnishee notice.

It appears that on 20th June, 1995, the stock exchange also filed a statement on oath under cl. (vi) of s. 226(3) stating that there were no dues by the exchange payable to Rajesh A. Shah or his legal heir Dipti R. Shah and that the stock exchange did not hold any money for or on account of the said party or his heirs. On 5th October, 1995, the Asstt. CIT, taking strong exception to the stock exchanges act of disposing of the membership right of the deceased member which was attached, called upon the petitioner to show cause as to why it should not be treated as an assessee-in-default in respect of the amount mentioned in the garnishee notice.

5. The learned counsel appearing for the petitioner contended that the membership right of a member of a stock exchange was not "property" but a mere personal permission to carry out business as a share broker with other members for and on behalf of his constituents, subject to the rules and regulations of the stock exchange. It was submitted that such personal right or permission cannot be a subject-matter of attachment either during the lifetime of a member or after his death or on his being declared as a defaulter. The learned

counsel referred to the provisions of rr. 5, 6, 7, 8, 9, 10, 11, 12, 14 to 16, 50, 51, 53, 54 and Regulation 8.38 of the Rules and Regulations of the petitioner, in support of his contention. It was submitted that both in case of death and default of a member, his right of nomination ceases and vests in the stock exchange, as provided by r. 9. It was argued that under rr. 5 and 6, there was a prohibition on a member from assigning his right of membership or any rights or privileges attached to membership since membership was only a personal permission from the exchange to exercise the rights and privileges attached thereto. It was further argued that even the right of nomination given to a member having seven years standing under r. 11(a) was hedged with three important conditions namely - (a) approval of such person i.e., the nominee by the governing board for admission to the stock exchange, (b) qualifications and eligibility of the nominee, and (c) clearance of the dues of the outgoing member under rr. 15 and 50 of the said rules. It was submitted that until all this was done, such inchoate right of nomination could not be exercised. It was submitted that even in case of a deceased member, his representatives right to nominate given by r. 11(b) read with Appendix "C", was hedged by similar considerations. It was, therefore, submitted that there was no property element in such right which could be attached under the law. It was submitted that even during the lifetime of the member, right of membership was not a property which could be said to be transferable or saleable in any sense of the term. It was contended that on the date of the refusal of the heirs to pay the dues, the right to nomination absolutely vested in the governing board under cl. (vi) of Appendix "C" to the Rules and, therefore, the board was justified in disposing of the right in favour of the UTI Securities Exchange Limited. Reliance was placed by the learned counsel for the petitioner on the decision of the Privy Council in AIR 1932 186 (Privy Council) , the decision of the Bombay High Court in *Mrs. Sejal Rikeen Dalal and others Vs. The Stock Exchange, Bombay* and another, , and on an unreported judgment of the Bombay High Court in the case of *Jugal Kishore Seksaria vs. Jashwantlal Shah*, decided on 20th December, 1991, in support of his contention that the membership right of a member of a stock exchange was a personal right, which was non-transferable and no property could be claimed in the membership of the exchange and not being saleable such right to membership or nomination could not be attached.

It was also argued that since the deceased was declared as a deemed defaulter, there was no question of his heirs getting any right of nomination and the governing board alone could exercise, in its absolute discretion, the right of nomination. It was submitted that since the deceased member was declared as a deemed defaulter and as his heirs failed to discharge their liabilities, the procedure applicable to defaulter was required to be followed and all the provisions in the rule regarding a defaulter member would be attracted.

It was further contended that the impugned garnishee notice was issued without jurisdiction because no amount was payable by the stock exchange either to the defaulter or to his heirs or to the estate of the deceased member, and the

Exchange was obliged to distribute the amount realised by the sale of membership rights as per the priorities laid down in r. 16. It was finally contended that the margin money and the security deposit could be retained by the stock exchange as provided by r. 43 and bye-law 67 and the stock exchange had a lien over these amounts and, therefore, the Department could not require the petitioner to pay such amounts and could not have attached them even provisionally.

6. The learned counsel appearing for the Revenue, on the other hand, contended that the right to membership of the stock exchange was not a mere status, but it had value in terms of money and the membership card could be sold. It was contended that the fact that even if the nomination made by a member is rejected the member had a right to make a fresh nomination under r. 12, clearly showed that right to nominate granted by r. 11 was a property right. It was further contended that when the member dies or is in default, the right of nomination goes to the governing board as a trustee in order to satisfy the outstanding dues of the creditors and the tax dues vis-a-vis the dues of the unsecured creditors will have priority and will have to be satisfied before the dues of ordinary creditors are satisfied. It was submitted that the property which was attached, namely, membership right, could not have been disposed of by the exchange during attachment and any transfer purported to have been made by such auction of the membership right of the deceased was wholly ineffective and cannot defeat the power of the Revenue to collect the taxes from the dues realised by the petitioner from the estate of the deceased. It was submitted that the impugned notice under s. 226(3) and the letter dt. 5th October, 1995, by which the petitioner stock exchange was called upon to explain its conduct of disposing of an attached property and to pay the dues and to show cause as to why the petitioner should not be treated as an assessee-in-default, cannot be said to be without jurisdiction. It was submitted that the communication dt. 5th October, 1995, was not a final order and in para 11 of that communication, the petitioner was required to explain as to why it should not be treated as an assessee-in-default in respect of the amounts specified in the notice for the reasons mentioned therein. The petitioner has remedies available to it under the Act even in the event of any adverse order being passed and has approached this Court at a premature stage. It was also contended that the contentions that the petitioner may raise in these proceedings under s. 226(3) will have to be finally adjudicated upon by the concerned authority. As regards the provisional attachment order issued under s. 281B of the said Act, it was submitted that the Department could have proceeded to recover the amount from the attached property and if any amount is realised by a wrongful sale by the stock exchange of the property while it was under attachment, the amount so realised would continue to be under provisional attachment so long the order under s. 281B remained operative. It is submitted that if, during the currency of the order of provisional attachment the petitioner has disposed of the attached property, the statutory consequence would follow. It was submitted that the impugned

provisional attachment, order was issued in lawful exercise of the powers of the Asstt. CIT in respect of the property which was attachable.

7. A stock exchange is a BOI constituted for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities. Membership of a stock exchange depends upon the provisions of the rules of the stock exchange relating to admission and continuance of its members. The business of dealing in securities is regulated by the Securities Contracts (Regulation) Act, 1957, which, inter alia, provides for grant of recognition to stock exchanges by the Central Government in accordance with the requirement of s. 4 thereof. Under this provision the Central Government may, inter alia, prescribe conditions relating to the qualifications for membership of stock exchanges recognised by it. Sec. 30 of the said Act empowers the Central Government to make rules even as regards the conditions as to the admission of members of the stock exchange concerned. Accordingly, r. 8 of the Securities Contracts (Regulation) Act, 1957, provides for qualification of membership of a recognised stock exchange. The petitioner stock exchange is a recognised stock exchange having a set of its rules, bye-laws and regulations duly approved by the Government of India under the said Act. Both the sides have referred to these rules, bye-laws and regulations, copies of which are placed on the record of this petition.

8. The rules of the petitioner stock exchange, inter alia, provide for membership and nomination in rr. 5 to 16; election of new members in rr. 17 to 35; membership security in rr. 36 to 46, termination of membership in rr. 47 to 52, and, default and readmission to membership in rr. 53 to 66.

9. The source of power of association to demarcate the nature of the rights and privileges of its members, is the contract on the basis of which they become members. An individual possessing the prescribed qualifications and desiring to be a member of the petitioner stock exchange has to make an application in Form Appendix "A" prescribed by r. 22 of the said rules, in which he has to state that he was seeking admission "upon the terms of and under and subject to in all respects to the rules, bye-laws and regulations of the exchange ...". Admission of a member is by election by ballot under r. 28, which provides that the election of all new members (whether they shall have been nominated or not) shall be by ballot and a candidate shall be deemed duly elected if approved by majority of not less than 2/3rd of the votes cast at a meeting of the governing board at which not less than one-half of the total number of the members of the governing board are present in addition to the Government nominees, if any. Under r. 29 the governing board may in its absolute discretion, reject any application for admission (whether the candidate shall have been nominated or not), without assigning any reason. The person nominated as a candidate for admission under the rules, however, is not required to pay entrance fee payable by a member, in view of the proviso to r. 32. On admission to membership, a certificate of membership is issued under r. 35.

10. When an individual becomes member of the stock exchange by accepting all

the terms and conditions of the membership, a contract comes into existence between such individual and the stock exchange whereby the individual agrees to abide by these rules and regulations of the stock exchange and the stock exchange impliedly agrees not to deal with him otherwise than in accordance with its rules and the regulations. The rights, privileges and obligations of a member of the stock exchange thus, have a contractual origin. The nature and extent of the right of a member must, therefore, simply depend upon the material terms of the contract as may be found in the rules and regulations of the stock exchange.

11. The provisions regarding membership and nomination contained in rr. 5 and 6 indicate that the membership is a personal privilege and the right of membership is inalienable. A member cannot assign or transfer any of his rights and privileges attached to membership. This obviously is a restriction on the member, who is prohibited from effecting any transfer inter vivos. One of the important rights of a member is right of nomination which, subject to the provisions of the rules, is granted by r. 7 and is described therein as a "personal and non-transferable" right. This right of nomination cannot be exercised by an expelled member or a member who has ceased to be such member under the Rules, as provided by r. 8. Under r. 9, on death or default of a member, his right of nomination ceases and vests in the Stock Exchange. A member with less than seven years standing will have no right to nominate a person for admission in his place except his own son who is eligible, that too with the sanction of the board. However, once a member completes seven years standing as a member, he is under r. 11(a) given an important right to nominate any eligible person in his place when he desires to resign. This right to nominate a person in his place is reinforced by r. 12, which empowers him to make a fresh nomination when his nominee is rejected by the governing board. The nomination form is prescribed in Appendix "B" under r. 13, by which the member nominates the eligible person to be named therein as his successor and under which he tenders the resignation of his membership in his favour. This right to nominate the successor on resignation by the member is, however, not an absolute right and a notice of the proposed nomination is to be posted under r. 14 on the notice board of the exchange for fifteen days during which the claims against the member or in respect of whom nomination is made, are to be filed. The governing board would approve a nomination only if the dues of the stock exchange and liabilities relating to contracts have been paid and satisfied in full as per r. 15. Thus, when there are no liabilities outstanding, the member who has a standing of seven years, has a valuable right of nominating his successor, who on acceptance of the nomination by the governing board as per the Rules, will become a member in place of the nominator.

12. On the death of the member, though this right of nomination of the deceased member vests in the exchange under r. 9, that vesting is to be read subject to r. 11(b) under which the legal representatives mentioned in Appendix "C" of the rules are empowered with the sanction of the governing board to nominate an

eligible person as a candidate for admission in the place of the deceased person. Thus, while a living member who has seven years standing does not require a sanction of the board for nominating a person eligible for admission in his place, the heirs of a deceased member can make the nomination "with the sanction of the board", which words appear in r. 11(b) as also in proviso to r. 11(a) which deals with nomination by a member of his son, but are conspicuously absent from r. 11(a) giving right to nominate to a member having seven years standing subject, of course, to the provisions of rr. 15 and 50, requiring the outstandings to be paid up before the nomination could be approved by the board. the governing board has however, power in both the cases to admit a member by the prescribed procedure or to reject the nomination, in which event a fresh nomination can be submitted under r. 12. This, therefore, is the nature and extent of the right of a member and the heirs of a deceased member to nominate a person eligible under the rules in place of the retiring or deceased member, as the case may be.

13. Appendix "C" under r. 11(b) lays down guidelines for the governing board to follow when dealing with the matter under r. 11(b). In the first five clauses are mentioned combinations of the heirs of the deceased and preference is to be given to a person recommended by them in the order indicated. In cl. (vi), which is relevant, it is provided that "in any other event the governing board shall, subject to the rules of the exchange relating to the qualifications of candidates, have an absolute discretion to make the nomination in favour of any person it may think fit". Thus, though the right to nomination of a deceased member vests in the stock exchange under r. 9, it can be exercised by his heirs mentioned in Appendix "C" under r. 11(b) with the sanction of the board and if there be no recommendation by such heirs, the right to nominate which has vested in the stock exchange can be exercised by the governing board in its absolute discretion subject to the rules of the exchange relating to qualifications. Thus, the right of nomination of a deceased member vesting in the stock exchange is by r. 11(b), allowed to be exercised by the heirs of such member with the boards sanction and in absence of the heirs availing of it, by the board itself in its absolute discretion. When this event empowering the board to exercise the right to nomination of a deceased member occurs as per cl. (vi) of Appendix "C", there would remain no right of the heirs to nominate with boards consent a person for the candidature in place of the deceased member. In other words, the heirs lose their right to nominate if they do not make the nomination as per r. 11(b), r/w cls. (i) to (v) of Appendix "C" and they cannot after the board comes into picture under cl. (vi) of Appendix "C", nominate any person. Thus, even the limited and hedged right of nomination by the heirs would, in other words, be extinguished at that stage.

14. The crucial question now falls for our determination is as to whether the right to nominate of the nature and extent noted above as is available under the rules of the stock exchange, is a right to property and if so, whether it can be attached for the purpose of the recovery of Income Tax payable by the assessee.

According to the learned counsel for the petitioner, even the aforesaid hedged and limited right of the member or his heirs would only be a personal right and not a property right.

A valuable contract would be a part of the mans estate, just as much as a valuable chattel. The rules of a stock exchange do spell out the right to nominate an eligible person in place of the member. As a part of the terms of contract between the member and the stock exchange, a member or his heirs as the case may be, can enforce this right against the exchange within the four corners of the rules reflecting those terms. The stock exchange would equally be bound by its mandatory rules and would be required to consider a valid nomination as per the rules and cannot act with malice and contrary to the rules. It, for example, cannot arbitrarily refuse to consider nomination by a member who has put in the requisite standing of seven years. When the nomination is accepted, the successor-member acquires valuable rights and privileges of doing the business in securities as per the rules and regulations of the stock exchange.

The distinction between property and personal rights would be that the property rights are susceptible to valuation while the personal rights are not. The right would be proprietary if it has economic value. The right to nomination even if hedged and limited has, for whatever it is as per the rules of exchange, an economic value. The nomination in favour of an eligible person is made for consideration and the nominee acquires a nomination from the retiring member for a price. In other words, the right is in respect of an economic thing. Economic advantage to the person entitled to this "thing" i.e., the right to nominate a successor to membership for a price is the object of the right. This would be a "thing" in economic conception just as there are physical things. This is because there is an element of wealth in the right. The economic view has prevailed in the legal science for recognising intangible rights as proprietary rights. The test would be, is there a legally guaranteeable value ? The right to nomination to whatever extent granted under the rules of the petitioner stock exchange, clearly answers this test and would in our view be a property right since it has economic value.

15. Membership of stock exchange also called "seats", are bought and sold on the basis of the right to nomination which brings in the successor member in place of the member who sells his seat. In the New York Stock Exchange "memberships are transferable with the approval of the exchange, and a member wishing to retire, may sell his privilege of membership to a purchaser who must, however, be approved for membership by the board of governors before the transfer may become effective. The character and previous conduct of a candidate are carefully investigated, and unless he can meet the rigorous standards maintained by the exchange, he is denied admission and the sale is cancelled. The purchase price of "seats" is determined entirely by supply and demand and is paid to the retiring member, and not to the exchange itself" (see the Encyclopaedia Americana -1958 Edn. Vol. 20 p. 243-244

under the caption "New York Stock Exchange").

16. Similar observations are found in International Encyclopaedia of the Social Sciences (1968 Vol. 14 at p. 137 under the caption "Securities Market" which read as under :

"The number of members of the New York Stock Exchange has been fixed in recent years. Memberships, called "seats", are bought and sold. The price of a seat in 1966 was approximately 250,000 dollars. In 1875 seats sold for as little as 4,250 dollars, and in 1929 they reached an all time high of 625,000 dollars ..."

17. In Encyclopaedia Britannica 16th Edn. Vol. 16 at p. 450, acquisition of nomination for a price to membership of London Stock Exchange is mentioned in the following excerpt under the heading "Securities trading".

"To become a member, an individual must acquire, with the approval of the board of governors, a "seat" from a present member or from the estate of a deceased one. Before granting approval, the exchange will investigate such matters as the applicants past record and financial standing; To become a member of the London Stock Exchange, an individual must acquire a "nomination" from a retiring member at a price that varies with demand and supply".

It may be noted that in the membership right auction notice which was issued by the petitioner stock exchange in the Economic Times on 16th February, 1994, the opening words clearly refer to "Disposable membership right". In that notice, bids were invited from the interested bidders of Rs. 25 lakhs and above for the membership right of the deceased, which was available by auction. This would also show that there was a property element in the rights of membership of the petitioner stock exchange.

It will thus be seen that the membership of stock exchange has not only personal attributes but it carries a valuable property right to nominate which "nomination" can be sold for a price to the nominee by the member having a requisite standing of seven years, or, on his death, by his heirs, of course, with the sanction of the board. This proprietary right of the heirs would extinguish when cl. (vi) of Appendix "C" under r. 11(b) starts operating on the default of the heirs in making nomination, as per that provision r/w cls. (i) to (v) of Appendix "C" to the rules. The attachment of membership card, therefore, in substance was attachment of the aforesaid property right to nominate as recognised by the rules of the stock exchange. The words "any property" under s. 281B of the Act are in our opinion, words of widest amplitude and would include such property also.

18. The contention that the right of membership being inalienable under r. 6 and the right of nomination being non-transferable under r. 7, even if any property element is traced in the right it cannot be attached, is based on the ground that a property which cannot be sold, cannot be attached. It was submitted that under r. 10 of Sch. II to the IT Act relating to procedure for recovery of tax, all

such property, as is by the CPC exempt from attachment and sale in execution of a decree of a Civil Court, shall be exempt from attachment and sale under Sch. II. From the proviso to s. 60(1) of the CPC which enumerates the items which will not be liable to attachment or sale, no exception was shown to us in which the property of the nature involved in this case can fall. The contention that the property in the present case is not a saleable property, is based on a misapprehension of the word "saleable" used in s. 60(1) of the CPC. The words "saleable" in the present context evidently would mean saleable by auction at a compulsory sale under the Second Schedule and cannot be confined to transfers inter vivos. The rules do forbid transfer by the member of his membership and the right to nomination, but these are clearly transfers inter vivos which are prohibited, and not compulsory sales under the statutory provisions. It cannot, therefore, be said that the property right in a members card cannot be attached. Albeit, that what will be under attachment in such a case would be only the right of a member having seven years standing to nominate his successor or in case of a deceased member, right of his heirs to make such nomination with the sanction of the board. If however, that right is extinguished when no nomination as per r. 11(b) r/w cls. (i) to (iv) of Appendix "C" is made and the absolute discretion to nominate goes to the board under cl. (vi) of Appendix "C", there would remain no property right of nomination, which can be attached and sold.

19. The property right of nomination when attached as a result of the attachment of the membership card by the tax authorities, will nonetheless remain a right of the same nature and substance as it was with the member or his heirs and when such membership card is auctioned for sale, the auction purchaser of the "nomination" could be treated only as a nominee of the member or his heirs as the case may be and his nomination as a candidate for admission to membership will be processed as per the rules and regulations of the board. The property right of the member or his heirs of making nomination as is available subject to the rules and regulations of the stock exchange cannot get expanded in the hands of the Revenue on being attached.

20. The case of the petitioner stock exchange is that the said member Rajesh A. Shah died on 7th April, 1994, and "since he failed to discharge his obligations" (see paragraph 4 of the petition), the governing board of the stock exchange declared him a deemed defaulter on 12th February, 1994, as during his lifetime he had defaulted in carrying out his obligations. A copy of the minutes of the board meeting held on 12th February, 1994, was referred to by the petitioners counsel during his arguments and it was pointed out that the deceased was treated as a "deemed defaulter" and his membership rights were resolved to be disposed of by inviting offers for which the minimum floor price of Rs. 25 lakhs was fixed. Pursuant to this resolution, the petitioner issued a public notice on 16th February, 1994, in "Sandesh" inviting the claimants to put up their claims before the defaulter committee. It was submitted that since the member was declared as a "deemed defaulter" on 12th February, 1994, under rr. 9 and 53, his right of nomination and membership vested in the exchange. Rules 53 to

63A deal with default and readmission to membership. Under bye-law 316 of the stock exchange, a member is to be declared a defaulter by the board or the president, if he fails to fulfil his obligations as mentioned in that bye-law. Under bye-law 325, the defaulters committee is required to make a strict enquiry into the dealings of the defaulter and report to the board. A defaulter can apply for re-admission under r. 58 and can be readmitted under r. 62 on conditions mentioned therein. A defaulter shall not be required to obtain a nomination before readmission unless the Governing Board has already exercised the right of nomination, as provided by r. 55. Thus, the scheme of the rules and regulations of the stock exchange indicates that only a living member can be declared as a defaulter and there is no provision for declaring a dead member as a deemed defaulter. When a person dies before being declared a defaulter, his heirs of Appendix "C" step in for the limited right of nomination provided by r. 11(b). As per Regulation 8.38, if a member dies on or before the pay-in day and after the clearing house has received the clearing forms, the procedure to be followed in clearing and settling the account of such member shall be the procedure prescribed for clearing and settling the account of a defaulter, provided that with the permission of the governing board the heirs or legal representatives of such deceased member may receive and deliver securities and make and receive payments on account of such deceased member or any member of whom the Governing Board approves, may deliver securities and make payment on account of such deceased member. It will be noted from this provision that only the procedure for clearing and settling the account of a defaulter is required to be followed when a death occurs of a member during clearing and there is no scope of declaring him as a deemed defaulter after his death under the said provision. In the present case, when the death occurred on 7th February, 1994, the provisions of r. 11(b) r/w cls. (i) to (v) of Appendix "C" became operative, enabling the heirs of the deceased member to make nomination, subject to rules particularly rr. 15 and 50 and there was no total extinction of that limited right as may happen when the defaulters right of membership lapses and vests in the exchange immediately when he is declared as a defaulter under r. 54. Thus, when the impugned provisional attachment order was issued under s. 281B on 15th February, 1994, on the widow of the deceased member presumably treating her as a deemed assessee under s. 159(3), she as a widow specified in Appendix "C" along with other heirs, if any, mentioned therein, was entitled to the limited and hedged right of selling the "nomination" with the sanction of the Board subject to the rules and regulations including rr. 15 and 50 of the Rules, which required the claims admitted by the Board against the deceased to be paid up before the nomination could be approved. This and this alone was the right of the heirs of the deceased member, which could be attached under the impugned provisional attachment order while attaching the membership card of the deceased member. The impugned attachment order cannot, therefore, be said to have been made without jurisdiction.

21. In the above view of the matter, the decisions on which reliance is placed on

behalf of the petitioner cannot assist the petitioner. It will be noted that the decision of the Privy Council in *Official Assignee vs. Shroff* (supra) was rendered in the context of a defaulting member. The defaulting member lost all interest both in the property of the Association and in his card and in that context, the Privy Council held that there was no interest reserved in the defaulters card except to members of the Association who had suffered by his lapse or to the Association itself. In the present case, as noted above, there was no scope for declaring the deceased member as a defaulter and the heirs of the deceased member came into picture by virtue of the provisions of r. 11(b) r/w Appendix "C", as regards the right to nominate which interest had a pecuniary worth as held above. In fact, the Privy Council took note of the fact that in relation to the members card, which is a thing separate altogether from the property of the Association, certain rights were reserved to a member or his representative on death or retirement. In the case before the Privy Council, on the basis of the rules of the Bombay Natives Share and Stock Brokers Association, it was found that the rights in the representatives of the deceased were enforceable rights as after 25 years membership are the rights of the member himself under the resolution dt. 17th December, 1924. The Privy Council decision clearly proceeds on the footing that a defaulter member loses his right and does not lay down a proposition that there is no property right involved in the membership of a stock exchange. It will be noted that the question had arisen in the context of the provisions of the Presidency Towns Insolvency Act. This decision cannot therefore, assist the petitioner.

22. Even the other decision, dt. 20th December, 1991, by learned Single Judge of the Bombay High Court in Notice of Motion No. 57/1991 in petition No. 24/1952 on which reliance was placed, was passed in the context of the Presidency Towns Insolvency Act, relying upon the ratio of the decision in *Official Assignee vs. Shroff* (supra). Considering the definition of the word "property" in s. 2(e) of the Presidency Towns Insolvency Act, it was noted by the Court that the right of nomination, in the case before it, being a joint one with the widow and other son of the deceased, it could not be said that the insolvent had an exclusive right for his own benefit and, therefore, the right of nomination which was indivisible, could not be exercised by him alone. In this context it was held that it could not be treated as a property within the meaning of definition of the word "property" in s. 2(e) of the Presidency Towns Insolvency Act. This decision, therefore, cannot assist the petitioner.

23. The third decision of the Bombay High Court on which reliance was placed of *Sejal Dalal vs. Stock Exchange*, (supra) also cannot assist the petitioner because in that case a right to membership was being asserted as a fundamental right under Art. 19(1)(g) of the Constitution and the petitioner, who was nominated for membership of the stock exchange, but did not get elected by securing requisite majority of votes of the governing board in the election by ballot, failed on the ground that the decision of the governing board arrived at bona fide for not granting membership to the petitioner did not violate fundamental right

guaranteed by Art. 19(1)(g) of the Constitution. Much reliance was placed on the observations made by the Court in para 10 of the judgment in which, while referring to the rules similar to those of the petitioner stock exchange relating to its membership, it was observed that the membership under those rules was not a transferable right and that there was no property in membership. It is obvious that while referring to the provisions relating to membership in para 10, the Hon'ble Court only indicated that transfer inter vivos was not permissible and, therefore, there was no property which could be transferred inter vivos in that membership. In fact, in para 14 of the judgment in the context of the governing boards power, it was observed that if a decision is not bona fide or is based on ill-informed prejudice, it can be challenged as a mala fide exercise of discretion. There was no question involved in that case about the power of the Revenue to attach the property and the decision revolves entirely around a different issue namely, whether a nominee can claim a fundamental right to become a member of a stock exchange.

24. As regards the security deposits and margin money which were attached under the impugned order, this being property, could be provisionally attached under s. 281B of the Act and it cannot be said that when the order of attachment was issued, it was without jurisdiction. The petitioner, if it had any lien over these amounts under the rules, could have put up those objections but that would not make the order of provisional attachment as an order without jurisdiction, even if it were to be questioned by the petitioner on merits.

25. The impugned notice issued under s. 226(3) on 14th June, 1995, required the petitioner to pay the amount of Rs. 12,24,887. This is because the rights of membership of the deceased were sold by the Exchange to the UTI Securities Exchange Ltd. for Rs. 27 lakhs. The Department took up the stand that the Stock Exchange did not challenge the provisional attachment order under s. 281B of the IT Act and that the stock exchange also did not obtain any prior approval before transferring membership rights of late Shri Rajesh A. Shah to the UTI Securities Exchange Ltd., in the letter dt. 20th September, 1995, addressed by the Asstt. CIT to the UTI Securities Exchange Ltd.. The question whether the petitioner Stock Exchange held the amount on behalf of the estate as alleged in the garnishee notice is yet to be decided. It may also entail a factual enquiry into the question whether the heirs and representatives of the deceased member really expressed their inability and the governing board acted by virtue of cl. (vi) after all the heirs mentioned in cls. (i) to (v) of Appendix "C" expressed their inability to comply with rr. 15 and 50 and did not, therefore, want to exercise the right to nominate with the sanction of the board. It may further need examination as to what were the outstanding liabilities of the deceased member and what was the worth of the right to nominate in terms of money when evaluated, subject to the provisions of rr. 15 and 50. All these and other relevant questions would arise and will have to be determined in the quasi-judicial enquiry, which the TRO is bound to make in view of the fact that the petitioner stock exchange had filed a statement on oath on 28th June, 1995, a copy of

which is on record. In that statement made under s. 226(3)(vi) of the said Act, it is stated that the sum demanded or any part thereof was not due by the exchange to Rajesh A. Shah or his legal heir Smt. Dipti R. Shah and that the stock exchange, Ahmedabad, does not hold any monies for or on account of the said party or his heirs. It will be noted that in the letter dt. 5th October, 1995, while justifiably getting upset over the stock exchange overreaching the Department by disposing of the property which was under provisional attachment, the Asstt. CIT overlooked the significance of the filing of a statement on oath under s. 226(3)(vi) of the Act. It will be noted from the provisions of cl. (vi) of sub-s. (3) of s. 226 of the said Act that where such statement on oath is filed objecting against the notice issued under s. 226(3) on the ground that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then nothing contained in sub-s. (3) of s. 226 shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the AO or TRO to the extent of his own liability to the assessee on the date of the notice or to the extent of the assessee's liability for any sum due under the Act, whichever is less. Thus, if a person to whom notice under sub-s. (3) of s. 226 is sent and who does not deny his liability to the assessee, fails to pay money as demanded, he would be deemed to be an assessee-in-default and recovery proceedings may be taken against him for realisation of the amount as if it were in arrears of tax due from him. However, where a statement on oath is made objecting to the notice as aforesaid, he cannot be forced to make payment. It is clear that the burden of showing that the statement on oath is false, would be on the Department. The concerned authority before coming to the conclusion that the statement was false in any material particular would be bound to conduct a quasi-judicial enquiry disclosing to the person concerned the relevant material on which he proposes to rely, and reach a quasi-judicial decision. The ITO cannot subjectively reach the conclusion that in his opinion the statement on oath made on behalf of the garnishee is false on any material particular. He will have to give notice and hold enquiry for the purpose of determining whether the statement on oath made on behalf of the garnishee is false and in which material particular and what amount is in fact due from the garnishee to the assessee. We say this on the authority of the decision of the Supreme Court in Beharilal Ramcharan Vs. Income Tax Officer, Special Circle "B" Ward, Kanpur and Another, . The learned counsel appearing for the petitioner wanted us to read the letter dt. 5th October, 1995, sent by the Asstt. CIT, as a final order, but the counsel appearing for the respondent pointing out para 11 of that letter, stated that the petitioner was only called upon to show cause as to why it should not be treated as an assessee-in-default and no final order has been made and that the said authority will, after hearing the petitioner, take an appropriate decision in the matter. It will be noted that non-compliance with a garnishee notice issued under s. 226(3) entails serious consequences under cl. (x) of sub-s. (3) of s. 226. It is provided that if a person to whom such notice is issued fails to make payment, he shall be deemed

to be an assessee-in-default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in s. 222 to 225, and the notice shall have the same effect as an attachment of a debt by the TRO in exercise of his powers under s. 222. Therefore, since the statement on oath has been filed by the petitioner objecting against the notice, no such drastic action can be taken against the petitioner unless an adequate enquiry is made by the concerned authority and an appropriate decision reached in accordance with law. The notice under s. 226(3) has, in our view, been issued in lawful exercise of the powers of the concerned authority and cannot be said to have been issued without jurisdiction as sought to be contended on behalf of the petitioner. It will be open for the petitioner to take its objections against the said notice and the concerned authority will make the necessary enquiry following the principles of natural justice and take its own decision. The challenge against the notice at this stage would, therefore, be premature so far as the merits are concerned. Moreover, the petitioner will have a remedy under the Act itself, if any adverse order is passed.

26. Under the above circumstances, the challenge of the petitioner against the validity of the impugned provisional attachment order and the impugned garnishee notice on the ground that they are issued without jurisdiction or authority, fails and the petition is rejected. Rule is discharged with no order as to costs.