

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 765 OF 2014INSUIT NO. 781 OF 2014

Mr. Sankaran Balasubramanian

... Applicant
(Original Defendant No. 15)In the matter between:

National Spot Exchange Limited

... Plaintiff

Versus

P.D. Agro Processors Pvt. Ltd. & Ors.

... Defendants

WITHNOTICE OF MOTION NO. 1388 OF 2014INSUIT NO. 781 OF 2014

Mr. Gopal Srinivasan

... Applicant
(Original Defendant No. 14)In the matter between:

National Spot Exchange Limited

... Plaintiff

Versus

P.D. Agro Processors Pvt. Ltd. & Ors.

... Defendants

Dr. B.B. Saraf, along with Mr. Chirag Kamdar, Mr. Abhishek Kale, Mr. Amit Naik and Ms. Anuja Jhunjunwala, instructed by M/s. Naik Naik & Co., for the Plaintiff.

Mr. Rohit Kapadia, Senior Advocate, along with Mr. H.W. Kane, Mr. M. H. Kane and Mr. Rahul Kadam, instructed by M/s. W.S. Kane & Co., for Defendant No.14.

Dr. V.V. Tulzapurkar, Senior Advocate, along with Mr. Arun Simach, Mr. Jay Sanklecha, instructed by M/s. Amarchand & Mangaldas & S.A. Shroff & Co., for Defendant No.15.

CORAM: S.J. KATHAWALLA, J.

**Judgment reserved on: 20th
July, 2015**

**Judgment pronounced on: 23rd September,
2015**

JUDGMENT:

1. Notice of Motion No. 765 of 2014 is filed by the Applicant -- Mr. Sankaran Balasubramanian, original Defendant No. 15 in Suit No. 781 of 2014 and Notice of Motion No. 1388 of 2014 is filed by Gopal Srinivasan, Original Defendant No. 14 in Suit No. 781 of 2014.

2. Notice of Motion No. 765 of 2014 is filed by the Applicant -- Mr. Sankaran Balasubramanian, original Defendant No. 15 in Suit No. 781 of 2014 and Notice of Motion No. 1388 of 2014 is filed by Gopal Srinivasan, Original Defendant No. 14 in Suit No. 781 of 2014. Both the above Notices of Motion are filed by the above named Applicants who are party Defendant

Nos. 14 and 15 to the captioned Suit, under Order 7 Rule 11 and Order 1 Rule 10 of the Code of Civil Procedure, 1908 (“**CPC**”) for rejection of the Plaint qua them and / or deleting their names from the cause title.

3. Both the above Notices of Motion have been heard together. Mr. R.A. Kapadia, Senior Advocate, has advanced submissions on behalf of the Applicant -- Defendant No. 14 and Dr. V.V. Tulzapurkar, Senior Advocate, has advanced submissions on behalf of the Applicant -- Defendant No. 15. The submissions advanced by both the Learned Senior Advocates in support of the respective Applicants are more or less the same save and except that Dr. Tulzapurkar, has on behalf of the Applicant -- Mr. Sankaran Balasubramanian (Defendant No. 15) made an additional submission that the plaint is barred under the provisions of the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 on account of the immunity available to employees of the Corporation in respect of acts performed in the official capacity. In view thereof, both the Notice of Motions are disposed of by this common order.

4. Following are the parties to the above suit:

5. (a) Plaintiff - National Spot Exchange Ltd., is a spot exchange which provides an electronic trading platform for spot contract in commodities.

(b) Defendant No.1 – P. D. Agro Processors Pvt. Ltd., is a Trading-cum-Clearing Member of the Plaintiff Exchange.

(c) Defendant Nos. 2, 3 and 4 are Dulisons Cereals, Dulisons Foods and Dunar Food Limited respectively. They are related entities of Defendant No. 1 and are also clients of Defendant No.1. It is the Plaintiff's case that Defendant No. 1 for itself and also on behalf of Defendant Nos. 2 to 4 has executed alleged trades on the Plaintiff Exchange. Defendant Nos. 2 to 4 are largely controlled by the same management and/or promoters. According to the Plaintiff, Defendant Nos. 1 to 4 in collusion with the erstwhile Managing Director of the Plaintiff and some of the managerial staff, have orchestrated and played a fraud on the Plaintiff and the counter parties to the outstanding trades by seeking to represent to and assure them that the commodities sold thereunder had been duly deposited in the warehouses designated by the Plaintiff, which representations were false to their own knowledge.

(d) Defendant No.5 – Mr. Surender Gupta was the Director of Defendant No.1 and Managing Director of Defendant No.4 at the relevant time.

(e) Defendant Nos. 6 to 8 are Deepak Sharma, Raju Sharma and Abhimanyu Veer Arti respectively. They are the Additional Directors of Defendant No. 1.

(f) Defendant Nos. 9 to 11 are Sheetal Gupta, Ranjeev Agarwal and Sandeep Singla respectively. They are the shareholders of Defendant No.1. Defendant No. 10 was also the Director of Defendant No. 1 at the relevant time and has signed the membership application admitting that he shall be responsible on behalf of Defendant No.1 to the Plaintiff Exchange to ensure compliance of law and procedure.

(g) Defendant Nos. 12 and 13 are Kanta Gupta and Kirti Dua respectively. They are the whole time Directors of Defendant No. 4.

(h) Defendant Nos. 14 and 15 (Applicants herein) are Gopal Srinivasan and Sankaran Balasubramanian respectively. They were the nominee Directors on the Board of Defendant No. 4. According to the Plaintiff, amongst others, Defendant Nos. 14 and 15 were in charge of and responsible for the affairs of Defendant Nos. 1 to 4.

(i) Defendant No. 16 -- Charul Kapoor is the Company Secretary of Defendant No.4.

According to the Plaintiff, Defendant Nos. 5 to 16 as Directors/shareholders/ Company Secretary are in effective control of Defendant Nos. 1 to 4 and are therefore in charge of day to day affairs of

Defendant Nos. 1 to 4 and that they are the real beneficiaries of the defaults that have occurred on the Exchange Platform. It is submitted that Defendant Nos. 1 to 4 are in fact simply vehicles to perpetuate the illegalities which were conceived by Defendant Nos. 5 to 16 and which illegalities were for the sole benefit of Defendant Nos. 5 to 16.

(j) Defendant No. 17 -- Deepak Prakash Rane is the Auditor of Defendant No. 1.

(k) Defendant Nos. 18 and 19 -- Walker Chandiook & Co. & M/s. Sudhir Sunil & Co. respectively are the Auditors of Defendant No. 4.

According to the Plaintiff, Defendant Nos 17 to 19 have colluded and contributed to the default committed by the defaulter member being Defendant No. 1 and their clients being Defendant Nos. 2 to 4. Defendant Nos. 17 to 19 being in charge of accounts of Defendant Nos. 1 and 4 respectively were aware of the transactions entered into by Defendant Nos. 1 to 4 on the Plaintiff's Exchange and were therefore aware of the wrong doings of Defendant Nos. 1 to 4 and have acted in connivance with Defendant Nos. 1 to 4 in their wrong doing.

(1) Defendant No. 20 --Primezone Developers Pvt. Ltd. is a party who has received money to the tune of Rs. 31.10 crores from Defendant No. 1 and has agreed to pay the same directly to the Plaintiff by an Agreement dated 10th December, 2013. Defendant No. 10 is the Director of Defendant No. 20.

6. The Plaintiff has in the above suit inter alia sought to recover from Defendant Nos. 1 to 6 jointly and severally an amount aggregating to Rs. 680,23,97,706.55 (Rupees Six Hundred Eighty Crores Twenty Three lacs Ninety Seven Thousand Seven Hundred Six and Paise Fifty Five only) as more particularly detailed in the Particulars of claim, which amount the Plaintiff claims to be due and payable to the Plaintiff by Defendant No. 1 on account of pay-in obligations for trades done on the Plaintiff Exchange along with interest thereon at 18 per cent per annum from the due date of payment until payment and/or realization thereof.

7. Order 1 Rule 10 and Order VII Rule 11 of the CPC are reproduced hereunder for ready reference:

Order 1 Rule 10”

“1. Who may be joined as Plaintiffs --

....

.....

.....

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provision of Rule 9.

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.”

8. Both Mr. Kapadia and Dr. Tulzapurkar have submitted that the Plaint discloses no cause of action against the Applicants. The Plaint does not disclose any specific averment or material particulars with respect to the alleged collusion and/or fraud allegedly perpetrated by Defendant Nos.14

and 15 pertaining to the alleged transactions/defaults on the Plaintiff Exchange.

9. The Learned Senior Counsel appearing for the Applicants have relied on Order IV Rule 1 and Order VI Rule 4 of the CPC which reads as follows:

Order IV Rule 1

“1. Suit to be commenced by plaintiff.- (1) Every suit shall be instituted by presenting a plaint in duplicate to the court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).”

Order VI Rule 4:

“4. Particulars to be given where necessary.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and items if necessary) shall be stated in the pleading.”

10. It is submitted that a conjoint reading of Order IV Rule 1 and Order VI Rule 4 of the Code makes it clear that unless particulars of misrepresentation or fraud or breach of trust or wilful default or undue influence, are provided with respect to each defendant against whom right to sue is claimed on the basis of misrepresentation or fraud etc., such suit is not deemed to be properly instituted under the Code. In case misrepresentation or fraud etc. is played by a company, which is an independent juristic person and right to sue is claimed not only against the said company but also against its directors, then, the role of such directors must be clearly defined and/or material facts relating thereto must be stated in the plaint.

11. It is submitted that the only averments made in the Plaint pertaining to Defendant Nos. 14 and 15 are in paragraphs 2, 7 (zz), 9, 14 ad 15 which are reproduced hereunder:

“ Paragraph 2, page 6

“Defendant Nos. 12 and 13 are the Directors and Whole time Director of Defendant No.4 hereinabove and Defendant Nos. 14 and 15 are the Nominee Directors of Defendant No.4.”

Paragraph 2, Page 6

“As will be demonstrated herein below, the Defendant Nos. 5 to 16 have utilized the corporate structure and identities of Defendant Nos. 1 to 4 for their own personal gain and are the real beneficiaries of the defaults that have occurred on the exchange platform.”

Paragraph 7(zz), Page 41

“The Defendant Nos. 5 to 16 are the Directors and shareholders of Defendant Nos. 1 to 4 respectively and are in charge of and responsible for the affairs of the Defendant Nos. 1 to 4, and as such, they are also liable to jointly and/or severally pay the amount due from the Defendant Nos. 1 to 4 to the various counterparty investors under the Outstanding Traders. In any event, Defendant Nos. 1 to 4 in collusion with the erstwhile Managing Director of the Plaintiff and some of the managerial staff who directly reported to him have orchestrated and played a fraud on the Plaintiff and the counterparties to the Outstanding Traders by seeking to represent to and assure them that the commodities sold thereunder had been duly deposited in the warehouses designated by the Plaintiff, which representations were false to their own knowledge and which were deliberately and with an intent to defraud the Plaintiff”

Paragraph 9, Page 43

“The Plaintiff submits that Defendant Nos. 1 to 16 having already disposed of/siphoned off/shifted the commodities located in the warehouse/property, has committed a grave breach of trust and has wilfully defaulted on its obligations towards the Plaintiff exchange as

well as to the various investors who have traded with Defendant No.1 through the Plaintiff exchange”

Paragraph 9, Page 44

“In view of the above, the Plaintiff apprehends that, the Defendant No.1 to 4 in connivance with Defendant Nos. 5 to 16, will deal with the assets in their control and possession and therefore exhaust their monies and/or their assets in such manner to defeat the claim of the Plaintiff’s Exchange. The Defendant Nos. 5 to 16, as Director/Shareholders/Company Secretary, are in effective control of Defendant Nos. 1 to 4 and are therefore in charge of the day to day affairs of the Defendant Nos. 1 to 4”

Paragraph 14, Page 48

“.....that the Defendant Nos. 1 to 4 and their Management (i.e. 5 to 16) are responsible for the siphoning off the Plaintiffs dues”

Paragraph 15, Page 49

“The Plaintiff states that Defendant Nos. 5 to 16 have clearly benefited from the defaults that have occurred on the exchange platform. The Plaintiff states that the Defendant Nos. 5 to 16 as shareholders and directors of Defendant Nos. 1 to 4 have benefited from the monies deposited in the Bank Accounts of Defendant Nos. 1 to 4. Without prejudice to the above, the Plaintiff states that the Defendant Nos. 1 to 4 are in fact simply vehicles to perpetuate the

illegalities which were conceived by Defendant Nos. 5 to 16 and which illegalities were for the sole benefit of Defendant Nos. 5 to 16”

12. The Learned Senior Advocates appearing for the Applicants have, referring to the above paragraphs, submitted that the Plaintiff has merely made sweeping statements with respect to the role of Defendant Nos. 14 and 15 in the alleged fraud perpetrated by Defendant Nos. 1 to 4 and no specific role whatsoever has been alleged against Defendant Nos. 14 and 15 in the Plaint. On the other hand, there are specific allegations made in the Plaint against Defendant Nos. 5 to 13 and 16 to 19, demarcating their respective roles in the alleged fraud perpetrated by Defendant Nos. 1 to 4. It is also submitted that in paragraph 2 of the Plaint, the Plaintiff has stated that ‘‘*As will be demonstrated hereinbelow, Defendant Nos. 5 to 16 have utilized the corporate structure and identities of Defendant Nos. 1 to 4 for their own personal gain and are real beneficiaries of the defaults that have occurred on the exchange platform*’’. They have thereafter failed to demonstrate as to how Defendant Nos. 5 to 16 particularly Defendant Nos. 14 and 15 have utilised the corporate structure for their personal gain or how they are the real beneficiaries of the defaults that have occurred on the Exchange platform. It is therefore submitted that on this ground alone viz. since the Plaint discloses no cause of

action and no particulars of fraud etc. are given, the Plaint deserves to be rejected or at least the names of Applicants ought to be deleted from the cause title. In support of their contention, the Learned Senior Advocates appearing for the Applicants have relied on the following judgments of the Hon'ble Supreme Court of India and this Court:

- (I) *Roop Lal Sathi v. Nachhattar Singh Gill*¹;
- (II) *Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner and Ors.*,²
- (III) *Church of Christ Charitable Trust and Educational Charitable Society vs. Ponniamman Educational Trust*³;
- (IV) *Afsar Sheikh vs. Soleman Bibi*⁴
- (V) *I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal*⁵;
- (VI) *M.V. Sea Success I vs. Liverpool and London Steamship Protection and Indemnity Association Ltd.*⁶; and
- (VII) *Rajiv K. Mehta vs. Mrs. Rekha H. Sheth and others*⁷

1 (1982) 3 SCC 487

2 AIR 2004 SC 1801

3 (2012) 8 SCC 706

4 (1976) 2 SCC 142

5 (1998) 2 SCC 70

6 AIR 2002 Bombay 151

13. The Learned Advocate appearing for the Plaintiff has in response to the submission of the Applicants that the Complaint discloses no cause of action and particulars of alleged fraud etc. are not provided, emphatically disputed the said contention. Relying on the decisions of the Hon'ble Supreme Court in *Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner and Ors. (supra)* and *Mayar (H.K.) Ltd. and Ors. Owners and Parties, vessel M.V. Fortune Express & Ors.*⁸, it is submitted that the Complaint is required to be read as a whole whilst considering an application seeking dismissal of the complaint on the ground that it discloses no cause of action.

14. The Learned Advocate appearing for the Plaintiff has, relying on the decisions of the Hon'ble Supreme Court in *Sopan Sukhdeo (supra)* and *Mayur (H.K.) Ltd. (supra)*, the decision of this Court in *Clarinda D'Souza vs. McCann Erickson India Limited*⁹ and the decisions of the Delhi High Court in *Anjum Nath vs. British Airways Plc & Ors.*¹⁰ and *Deepak Ansal vs. Ansal Properties and Industries Ltd. and another*¹¹ submitted that while deciding an

7 Decision dated 24th March, 2014 in Notice of Motion No. 368 of 2011 in Suit No. 2521 of 2008

8 (2006) 3 SCC 100

9 2003 (2) Mh. L.J. 373

10 125 (2005) DLT 717

11 138 (2007) DLT 560

application under Order 7 Rule 11 of the CPC on the ground that the Plaintiff discloses no cause of action against the Defendants, the Plaintiff must be considered on a demurrer. The Learned Advocate appearing for the Plaintiff has thereafter taken me through various paragraphs of the Plaintiff as well as the reliefs claimed in the Plaintiff and has submitted that the reading of the entire Plaintiff in the above Suit leaves no doubt whatsoever that the Plaintiff has in fact made particular allegations against the Applicants herein (Defendant Nos. 14 and 15 in the Suit). The Plaintiff has also prayed for a decree and sought various reliefs against the Applicants. It is pointed out that the Plaintiff has in detail set out various fraudulent and collusive actions of Defendant Nos. 1 to 4 including their failure to maintain adequate commodities in the exchange designated warehouses. The allegations made in the Plaintiff are supported with detail material particulars as set out inter alia in paragraphs 7 (a) to (aaa) of the Plaintiff. It is submitted that it is therefore inconceivable for the Applicants herein to contend that the Plaintiff does not disclose a cause of action against them or that the necessary particulars are not set out in the Plaintiff by the Plaintiff.

15. As regards the submission of the Applicants viz. that the Plaintiff discloses no cause of action and the required particulars are not set out in the

Plaint, I have perused the Complaint and have considered the submissions advanced on behalf of the Applicants as well as the Plaintiff and also considered the case law relied upon by them. It is trite law that a determination as regards whether or not the Complaint discloses a cause of action against the Defendant or not, must be done on a holistic, meaningful and not a formal reading of the complaint and not a perfunctory one. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the Complaint. Essentially whether the complaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the complaint in its entirety taking those averments to be correct and a complaint cannot be rejected on the basis of the allegations made by the Defendant in its written statement or in an application for rejection of the Complaint. In *Sopan Sukhdeo supra*) the Hon'ble Supreme Court has held as under:

“10. In Saleem Bhai and others v. State of Maharashtra and others, (2003 (1) SCC 557) it was held with reference to Order VII Rule 11 of the Code that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the complaint. The trial Court can exercise the power at any stage of the suit - before registering the complaint or after issuing summons to the defendant at any

time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Order VII Rule 11 of the Code, the averments in the plaint are the germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.

11. *In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal and others, (1998 (2) SCC 70) it was held that the basic question to be decided while dealing with an application filed under Order VII Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII Rule 11 of the Code.*

12. *The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order X of the Code. (See T. Arivandandam v. T. V. Satyapal and another, (1977 (4) SCC 467).*

"13. *It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in Roop Sathi v. Nachhattar Singh Gill 1982 (3) SCC 487), only a part*

of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.

14. In Raptakos Brett & Co. Ltd. v. Ganesh Property (1998) (7) SCC 184 it was observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order VII was applicable.

15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

16. Submission of learned counsel for respondent No. 2 trust was that requirement of law being reading the plaint in its totality, the appellants cannot take the plea that they would give up or relinquish some of the reliefs sought for. That would not be permissible. The plea clearly overlooks the basic distinction between statements of the facts

disclosing cause of action and the reliefs sought for. The reliefs claimed do not constitute the cause of action. On the contrary, they constitute the entitlement, if any, on the basis of pleaded facts. As indicated above, Order VI Rule 2 requires that pleadings shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim. If the plea of Mr. Savant, learned counsel for the respondent-trust is accepted the distinction between the statement of material facts and the reliance on them for the claim shall be obliterated. What is required in law is not the piecemeal reading of the plaint but in its entirety. Whether the reliefs would be granted on the pleaded facts and the evidence adduced is totally different from the relief claimed. All the reliefs claimed may not be allowed to a party on the pleadings and the evidence adduced. Whether part of the relief cannot be granted by the Civil Court is a different matter from saying that because of a combined claim of reliefs the jurisdiction is ousted or no cause of action is disclosed. Considering the reliefs claimed vis-a-vis the pleadings would not mean compartmentalization or segregation, in that sense. The plea raised by the respondent-trust is therefore clearly unacceptable."

15. In *Mayar (H.K.) Ltd.* (*supra*), the Hon'ble Supreme Court has held as follows:

"11. Under Order 7 Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not corrected within

a time as fixed by the Court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the court, and where the suit appears from the statement in the plaint to be barred by any law. Rejection of the plaint in exercise of the powers under Order 7 Rule 11 of the Code would be on consideration of the principles laid down by this Court. In T. Arivandandam vs. T.V. Satyapal, this Court has held that if on a meaningful, not formal, reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. In Roop Lal Sethi vs. Nachhattar Singh Gill, this Court has held that where the plaint discloses no cause of action, it is obligatory upon the court to reject the plaint as a whole under Order 7 Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaint. Therefore, the High Court could not act under Order 7 Rule 11(a) of the Code for striking down certain paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in absence of anything to show that the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court. In ITC Ltd. Vs. Debts Recovery Appellate Tribunal, it was held that the basic question to be decided while dealing with an application filed by the defendant under Order 7 Rule 11 of the Code is to find out whether the real cause of action has been set out in the plaint

or something illusory has been projected in the plaint with a view to get out of the said provision. In Saleem Bhai and Others vs. State of Maharashtra, this Court has held that the trial court can exercise its powers under Order 7 Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. In Popat and Kotecha Property vs. State Bank of India Staff Assn., this Court has culled out the legal ambit of Rule 11 of Order 7 of the Code in these words: (SCC p. 516, para 19)

"19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence of a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

12. *From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."*

16. It is also trite law that applications under Order 7 Rule 11 of the CPC must be considered on a demurrer. Such a plea ought to be accepted only when the Court comes to the conclusion that even if the averments in the

plaint are proved, the Plaintiff would not be entitled to the reliefs claimed. In this regard, the following decisions of the Hon'ble Supreme Court, this Court and the Delhi High Court are important and the relevant observations/findings are reproduced hereunder:

(i) *Sopan Sukhdeo Sable* (supra):

"10. ... For the purposes of deciding an application under clauses (a) and (d) of Order VII Rule 11 of the Code, the averments in the plaint are the germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage."

(ii) *Mayar (H.K.) Ltd.* (supra):

"12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the Defendant in his written statement or in an application for rejection of the plaint So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that the plaintiff may not succeed cannot be a ground for rejection of the plaint"

(iii) *Clarinda D'Souza* (supra):

"17. However, a plea that the plaint discloses no cause of action is essentially one on a demurer. Such a plea ought to be

accepted only when the court comes to the conclusion that even if the averments in the plaint are proved, the plaintiff would not be entitled to the reliefs claimed. The court must therefore presume that the facts stated in the plaint are correct. In view of the drastic consequences of upholding such a plea, it is axiomatic that it ought to be accepted only in clear cases. Moreover, while considering an application striking out the name of a defendant on the ground that the Plaint discloses no cause of action against him, the court ought to act with great circumspection and even greater restraint."

.....

"27. It would therefore be neither fair nor permissible for the court to presume that the evidence will not establish the case pleaded. It would be setting an extremely dangerous precedent to strike out the name of a defendant under Order 1, Rule 10 (2) on the ground that the plaintiff has no cause of action. I am not unmindful of the fact that while under Order 7, Rule 11 (a) the power of the Court to reject the plaint is limited to cases where it does not disclose a cause of action the language of Order 1, Rule 10 (2) does not expressly contain any such limitation. However, the effect of such an order is really to dismiss the claim against the defendant without permitting the plaintiff an opportunity of leading evidence to prove his case. It is a power which by virtue of its very nature must be carefully circumscribed. I would exclude from its scope the power of a Court to strike out the

name of a defendant on the ground that the plaintiff has no cause of action against him."

(iv) *Anjum Nath (supra):*

"6. Rejection of plaint is a serious matter as it non suits the plaintiff and kills the cause of action and consequently it cannot be ordered cursorily without satisfying the requirement of the said provision. It is no more rest integra that to decide under Order VII Rule 11, averments in the plaint have to be read without looking at the defense and thereupon it has to be seen whether on the averments made in the plaint, Order VII Rule 11 get attracted or not and thereafter it has to be seen whether a party is to be deleted on the ground that no cause of action has been alleged against him and he has been joined improperly. Legal proposition that to decide under order 7 rule 11, averments in plaint only have to be read without looking at the defense and hereupon it has to be seen whether on the averments made in the plaint, order 7 rule 11 gets attracted or not can not be disputed nor has been disputed by the applicant. Reliance for this proposition can be placed on 2005 (4) AD (Del) 541, Kanwal Kishore Manchanda v. S.D. Technical Services Pvt. Ltd.; 2005 (2) AD (Del) 430, Arvinda Kumar Singh v. Hardayal Kaur; 116(2005)DLT191, Asha Bhatia v. V.L. Bhatia; 2003 (5) AD (Del) 370, PunamLaroia v. Sanjeev Laroia: 111(2004)DLT121, Condour Power Products Pvt. Ltd. v. Sandeep Rohtagi."

(v) *Deepak Ansal (supra)*:

“45. Rejection of a plaint is a serious matter as it non suits the plaintiff and kills the cause of action. It cannot be arrived cursorily without satisfying the requirement of the settled provisions of Code of Civil Procedure. For adjudication of rejection of plaint, averments made in the plaint only have to be read without looking at the defense and thereafter it is to be seen whether on the averments made in the plaint Order 7 Rule 11 can be attracted or not. In ascertaining whether the plaint shows a cause of action the Court is not required to make an elaborate enquiry into doubtful or complicated questions of fact or law.

46. Looking at the plaint and the averments made by the plaintiff against defendant No. 2 it cannot be inferred that the plaint does not disclose cause of action against the defendant No. 2. Consequently, what is apparent is that the plaint discloses cause of action against the defendant No. 2 and the relief has also been prayed against the defendant No. 2. Merely because ultimately the relief may not be granted against defendant No. 2, will not be a ground to reject the plaint against the defendant No. 2/applicant because the Court has not to see whether the claim made by the plaintiff is likely to succeed but it is merely to satisfy itself that the allegations made in the plaint, if accepted as true would entitle the

plaintiff to the relief he claims. In ascertaining whether the plaintiff shows a cause of action the Court does not enter upon a trial of the issue effecting the merits of the claim made by the plaintiff nor it can take into consideration the defense raised by the defendants on the merits of the case. Consequently, it is apparent that the plaintiff discloses cause of action against the defendant No. 2 and the plaintiff is not liable to be rejected against defendant No. 2 on the grounds as has been raised by defendant No. 2/applicant.

47. Considering the averments made in the plaintiff in the facts and circumstances, it can not be inferred that the suit has been instituted against a wrong person or there is a bona fide mistake in instituting the suit against the defendant No. 2. In the entirety of facts and circumstances, it can not be inferred that the presence of defendant No. 2 is not necessary for determination of real matter in dispute.

48. Therefore, the application of the defendant No. 2 for rejection of the plaintiff against him under Order 7 Rule 11 of the Code of Civil Procedure or for his deletion under Order 1 Rule 10 is dismissed. Parties are, however, left to bear their own cost.”

17. There can be no dispute with regard to the following observations/findings of the Hon’ble Supreme Court in the decisions relied upon by the Applicants.

(i) Roop Lal Sathi (supra):

“26. There is distinction between ‘material facts’ and ‘particulars’. The words ‘material facts’ show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The distinction which has been made between ‘material facts’ and ‘particulars’ was brought out by Scott, L.J. in Brue v. Odhams Press Ltd. in the following passage:

The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word “material” means necessary for the purpose of formulating a complete cause of action; and if any one “material” statement is omitted, the statement of claim is bad; it is “demurrable” in the old phraseology, and in the new is liable to be “stuck out” under R.S.C. Order XXV, Rule 4 (see Philips); or “a further and better statement of claim” may be ordered under Rule 7.

The function of “particulars” under Rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim — gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff’s cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff’s cause of action with information

sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial.

The dictum of Scott, L.J. in Bruce case, has been quoted with approval by this Court in Samant N. Balkrishna v. George Fernandez and while observing that the requirements of Section 83 are mandatory, the distinction between material facts and particulars was brought out in the following terms:

The word ‘material’ shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet.

Thus, the word ‘material’ in material facts under Section 83 of the Act means facts necessary for the purpose of formulating a complete cause of action; and if any one ‘material’ fact is omitted, the statement or plaint is bad; it is liable to be struck out. The function of ‘particulars’ is quite different, the use of particulars is intended to meet a further and quite separate requirement of pleading imposed in the fairness and justice to the returned candidate. Their function is to fill in the picture of the election petitioner’s cause of action with information sufficiently detailed to put the returned candidate on his guard as to the case he has to meet and to enable him to prepare for

trial in a case where his election is challenged on the ground of any corrupt practice.”

(ii) Church of Christ Charitable Trust And Educational Charitable Society
(supra):

“It is clear that if the allegations are vexatious and meritless and not disclosing a clear right or material(s) to sue; it is the duty of the trial Judge to exercise his power under Order 7 Rule 11. If clever drafting has created the illusion of a cause of action as observed by Krishna Iyer, J. in the above referred decision, it should be nipped in the bud at the first hearing by examining the parties under Order 10 of the Code.”

(iii) Afsar Sheikh (supra):

“15. While it is true that “undue influence”, “fraud”, “misrepresentation” are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are, in view of Order 6 Rule 4, read with Order 6 Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.”

(iv) I.T.C. Ltd.(supra):

“16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (See T. Arivandandam v. T.V. Satyapal[(1977) 4 SCC 467]

27. As stated above, non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word “fraud” in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer, J. in T. Arivandandam case [(1977) 4 SCC 467], the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11(a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on “fraud”, the Bank cannot take shelter under the words “fraud” or “misrepresentation” used in the plaint.”

18. I have with the assistance of the Learned Advocate appearing for the Plaintiff gone through almost the entire Plaint including paragraphs 7 (a) to (aaa). The Plaintiff has inter alia stated/alleged as follows:

(i) That Defendant Nos. 2 to 4 are related entities of Defendant No. 1 and are largely controlled by the same management and/or promoters (Paragraph 2 of the Complaint).

(ii) That at the relevant time Defendant No. 5 was the Director of the Defendant No. 1 and also the Managing Director of Defendant No. 4 (Paragraph 4 of the Complaint).

(iii) That the Applicants (Defendant Nos. 14 and 15) are the nominee Directors on the Board of Directors of the Defendant No.4 (Paragraph 2 of the Complaint).

(iv) That Defendant No. 1 being a Trading cum Clearing Member of the Plaintiff Exchange has executed various trades for several commodities for itself and on behalf of its clients including Defendant Nos. 2 to 4 on the Plaintiff Exchange (Paragraph 2 of the Complaint).

(v) That the acts leading to the defaults committed on the Plaintiff Exchange could not have occurred without the knowledge and active participation of the Defendants (Paragraph 2 of the Complaint).

(vi) That in the paragraph subsequent to paragraph 2 of the Complaint, it will be demonstrated that Defendant Nos. 5 to 16 have utilised the corporate

structure and identities of Defendant Nos. 1 to 4 for their own personal gain and are the real beneficiaries of the defaults that have occurred on the Plaintiff Exchange platform (Paragraph 2 of the Complaint).

(vii) That the Defendant No. 1 is obliged to satisfy the Plaintiff that Defendant No. 1 is in possession of the commodities and it is obliged to deliver as per the obligations undertaken in the sale contracts executed by them. This is mandatory irrespective of any purchase contracts (Paragraph 7 (qq) of the Complaint).

(viii) That in August, 2013, post suspension of trading on the Exchange platform, the Plaintiff appointed an independent agency namely, SGS India Pvt. Ltd (“SGS”) to survey the stocks at various warehouses/property in control of Defendant No. 1, with the object of verifying the quantity of goods deposited by each member. However, despite the aforesaid obligation of Defendant No.1, when the representatives of SGS, on 14th August, 2013 and 15th August, 2013, visited the said warehouse/property in control and possession of Defendant No.1 for verification and survey, they were not permitted by Defendant No. 1 to make a survey as recorded by SGS in its report dated 6th September, 2013 (Paragraph 7 (qq) of the Complaint).

(ix) That due to this act of Defendant No.1, the Plaintiff verily believes that Defendant No. 1 has used/disbursed and will continue to use/disburse the various commodities at the said warehouse if any have been delivered to the warehouse, for its own personal gain, and to the exclusion of the legal rights of the Plaintiff (Paragraph 7 (qq) of the Plaintiff).

(x) That in light thereof and since the settlement period came to an end and the trades were required to be settled vis-à-vis the various buyers and/or sellers, the Plaintiff called upon Defendant No. 1 to make the payment as due and payable for the said Outstanding Trades undertaken by it on the Plaintiff Exchange (Paragraph 7 (rr) of the Plaintiff).

(xi) That the Plaintiff Exchange tried to amicably resolve the disputes between the various trading members and the buyers on the Exchange. A meeting was convened in the presence of a representative of the Government (through the Forward Market Commission) and an Agreement was arrived at under which Defendant No. 1 agreed to make payment by various instalments. Defendant No. 1 also issued a letter dated 1st August 2013 wherein it acknowledges its unconditional and absolute liability in the sum of Rs. 693 Crores subject to the final amount being ascertained. However,

Defendant No. 1 defaulted on the said payments (Paragraph 7 (uu) of the Plaintiff).

(xii) That therefore Defendant No. 1 on behalf of itself and on behalf of its clients has admittedly entered into the Outstanding Trades and is liable to pay to the Plaintiff the amounts that have fallen due thereunder to the Plaintiff along with interest thereon at 18% per annum from the due dates until payment and/ or realization thereof (Paragraph 7 (zz) of the Plaintiff).

(xiii) In any event, the Defendant No. 1 to 4 have acted upon the Outstanding Trades, received benefits thereunder and caused the Plaintiff Exchange as also the various counterparty investors to act in furtherance of the Outstanding Trades, and the same are therefore binding upon the Defendant No.1 to 4 who are estopped from disputing the same and/ or its liability thereunder (Paragraph 7 (zz) of the Plaintiff).

(xiv) That Defendant Nos. 5 to 16 are the Directors and shareholders of Defendant No. 1 and 4 respectively and are in charge of and responsible for the affairs of the Defendant No. 1 to 4, and as such, they are also liable to jointly and/ or severally pay the amounts due from the Defendant Nos. 1 to 4

to the various counterparty investors under the Outstanding Trades (Paragraph 7 (zz) of the Complaint).

(xv) That in any event, Defendant Nos. 1 to 4 in collusion with the erstwhile Managing Director of the Plaintiff and some of the managerial staff who directly reported to him have orchestrated and played a fraud on the Plaintiff and the counterparties to the Outstanding Trades by seeking to represent to and assure them that the commodities sold thereunder had been duly deposited in the warehouses designated by the Plaintiff, which representations were false to their own knowledge and which were deliberately and with an intent to defraud the Plaintiff and the counterparties. Defendant Nos. 1 to 4 thereby caused the counterparties to the Outstanding Trades to part with their monies and enter into the Outstanding Trades on the basis of such fraudulent representations and assurances. They have further compounded the fraud by refusing to allow access to the designated warehouses for the purpose of inspecting the commodities that were purportedly deposited and/ or taking possession of for the purpose of sale and realization of the amounts due from the Defendant Nos. 1 to 4 under the Outstanding Trades (Paragraph 7 (zz) of the Complaint).

(xvi) That since SGS/Independent Auditors appointed by the Plaintiff were not allowed to enter the warehouses by the Defendant No. 1 on 14th and 15th August 2013, the Plaintiff believes that Defendant No. 1 has either not bought in or has surreptitiously disposed of or shifted the said commodities, resulting in a breach of Defendant No. 1's obligations towards Plaintiff and also towards making the commodities available to the buyer or to compensate them by refunding the amount received by them and paid with interest. The Defendant No. 1 is therefore in default of a huge amount of money which is due to various investors (Paragraph 7 (aaa) of the Plaint.

(xvii) That since it is clear from the report of the SGS that they were not permitted by Defendant No. 1 to enter the warehouses where the goods were required to be stored by the Defendant No. 1, the Plaintiff apprehends that the Defendant No. 1 did not store the required goods in the warehouses and that it is therefore imperative that the Defendant Nos. 1 to 4 furnish before this Court, their respective financial statements and Income Tax returns and sales tax, and VAT returns for the previous 3 financial years preceding the filing of the present Suit to ascertain / identify as to how the Defendant No.1 treated these transactions for the sale / purchase of the

commodities which were traded on the Plaintiff Exchange Platform for the last three years as accounted (Paragraph 8 of the Plaintiff).

(xviii) That Defendant No. 1 has traded on the Plaintiff's Exchange on its own behalf and on behalf of Defendant Nos. 2 to 4 and have siphoned of the amounts received by them from the Plaintiff Exchange on account of the trading done.

(xix) That Defendant Nos. 1 to 16 have already disposed of/siphoned off/shifted the commodities located in the said warehouse/property and have committed a grave breach of trust and have wilfully defaulted on their obligations towards the Plaintiff Exchange as well as the various investors who have traded with Defendant No. 1 through the Plaintiff Exchange. The facts set out in the Plaintiff clearly demonstrate the lack of bona fides on the part of Defendant Nos. 1 to 16(Paragraph 9 of the Plaintiff).

(xx) That on account of the failure to maintain goods / pay the outstanding amounts as required, the Economic Offences Wing of the Mumbai Police have arrested the then Director of Defendant Nos. 1 and 4 i.e. Mr. Surender Gupta on 5th March 2014 holding him responsible for the defaults created on the Plaintiff Exchange by Defendant Nos. 1 to 4 (Paragraph 9 of the Plaintiff).

(xxi) That the investigating authorities namely Economic Offences Wing and Enforcement Directorate have stated in various newspaper articles that Defendant Nos. 1 to 4 have siphoned off the amounts and utilized the same towards buying real estate and towards producing movies and that in view thereof, the Plaintiff apprehends that, the Defendant No. 1 to 4 in connivance with Defendant Nos. 5 to 16, will deal with the assets in their control and possession and therefore exhaust the monies and / or their assets in such manner to defeat the claim of the Plaintiff's Exchange (Paragraph 9 of the Plaintiff).

(xxii) That the Defendant Nos. 5 to 16, as Directors / Shareholders / Company Secretary, are in effective control of Defendant Nos. 1 to 4 and are therefore in charge of the day to day affairs of the Defendant Nos. 1 to 4 (Paragraph 9 of the Plaintiff).

(xxiii) That the enquiry by the EOW clearly indicates that the persons in charge of Defendant Nos. 1 to 4 have utilized the monies for their own ulterior motives thereby seeking to defeat and defraud the claim of the Plaintiff. This is clearly borne out by the fact that the EOW has recently arrested Mr. Surender Gupta (Director of Defendant No. 1 and Managing Director of Defendant No.4) and that in light of this fact a clear case for

protection of the monies siphoned off by Defendant Nos. 1 to 4 is made out, particularly in light of the various news reports / statements made by the officers of the EOW investigating the matter(Paragraph 9 of the Complaint).

(xxiv) That the recent newspaper articles together with the fact that the EOW, upon investigation, has arrested Mr. Surender Gupta, clearly demonstrate that the Defendant Nos. 1 to 4 and their Management (i.e. 5 to 16) are responsible for the siphoning off the Plaintiffs dues (Paragraph 14 of the Complaint).

(xxv) That the news article dated 7th March 2014 published in India Today clearly indicates that the enforcement directorate officials have noted very pertinent facts, firstly it is found that Defendant No. 1 and Defendant No. 4 are sister concerns and therefore effectively under common management and secondly it appears that the Directors of Defendant No. 1 and Defendant No. 4 have made categorical admissions in relation to the diversion of the monies received from the trades executed on the Plaintiff Exchange (Paragraph 14 of the Complaint).

(xxvi) That Defendant Nos. 5 to 16 have clearly benefited from the defaults that have occurred on the exchange platform.

(xxvii) that the Defendant Nos. 5 to 16 as shareholders and directors of Defendant Nos. 1 to 4 have benefited from the monies deposited in the Bank Accounts of Defendant Nos. 1 to 4 and that without prejudice to the said contention, Defendant Nos. 1 to 4 are in fact simply vehicles to perpetuate the illegalities which were conceived by Defendant Nos. 5 to 16 and which illegalities were for the sole benefit of Defendant Nos. 5 to 16 (Paragraph 15 of the Complaint).

(xxviii) that the Defendant Nos. 1 to 16 be therefore jointly and/or severally ordered and decreed to pay to the Plaintiff a sum of Rs. 680,23,97,706.55 (Rupees Six Hundred And Eighty Crores Twenty Three Lacs Ninety Seven Thousand Seven Hundred Six And Paise Fifty Five Only), along with interest thereon at 18% per annum from the due date of payment until payment and/or realization thereof, as per the Plaintiff's Particulars of Claim contained in Exhibit "U" hereto (prayer clause (a) of the Complaint).

19. It therefore becomes clear from a reading of the Complaint that it is the case of the Plaintiff that Defendant Nos. 2 to 4 are related entities of Defendant No. 1 and are largely controlled by the same management and/or promoters and that Defendant No. 1 being a Trading cum Clearing Member of the Plaintiff Exchange, has executed various trades for several

commodities for itself and on behalf of its clients including Defendant Nos. 2 to 4 on the Plaintiff Exchange. In fact, Defendant No. 5 was the Director of Defendant No. 1 at the relevant time and also the Managing Director of Defendant No. 4 of which Applicant Nos. 14 and 15 are Directors. It is pointed out by the Plaintiff that Defendant No. 1 was obliged to store the required goods in the warehouses and was also required to satisfy the Plaintiff that the Defendant No. 1 was in possession of the goods/commodities for being delivered as per the obligations undertaken in the sale contracts executed by them. However, in August, 2013, when the Plaintiff appointed SGS as an independent agency to survey the stocks at various warehouses/property including the warehouses in control of Defendant No. 1, with the object of verifying the quantity of goods deposited by each member, the representatives of SGS were not allowed entry into the warehouses by Defendant No. 1. Defendant No. 1 also failed to make payments which became due and payable for the said outstanding trades undertaken by it on the Plaintiff Exchange because the settlement period came to an end and the trades were required to be settled vis-à-vis the various buyers and/or sellers. Defendant No. 1 despite promising payments by way of installments defaulted in making payments. It therefore became

clear to the Plaintiff that either the Defendant No. 1 did not store the required goods in the warehouses or that Defendant No. 1 used/disbursed the same thereby committing a fraud on the Plaintiff to the extent of more than Rs. 680 crores. The Plaintiff has pleaded that these fraudulent acts committed on the Plaintiff Exchange could not have occurred without the active participation of the other Defendants. They have further pleaded that Defendant Nos. 1 to 4 have acted upon the outstanding trades, received benefits thereunder and caused the Plaintiff's as also the various counter party investors to act in furtherance of the Outstanding Trades and the same are binding upon Defendant Nos. 1 to 4. Since Defendant Nos. 5 to 16 are the Directors and shareholders of Defendant Nos. 1 to 4 respectively and are in charge of and responsible for the affairs of Defendant Nos. 1 to 4, they are also liable to jointly and/or severally pay the amounts due from Defendant Nos. 1 to 4 to the various counter party investors under the outstanding trades. Defendant Nos. 1 to 4 in collusion with the erstwhile Managing Director of the Plaintiff and some of the managerial staff who directly reported to him have orchestrated and played a fraud on the Plaintiff and the counter parties to the outstanding trades by seeking to represent to and assure them that the commodities sold thereunder had been duly

deposited in the warehouses designated by the Plaintiff which representations were false to their own knowledge and which were deliberately made with the intent to defraud the Plaintiff and the counter parties. It is therefore, Defendant Nos. 1 to 16 who have already disposed of/siphoned off/shifted the commodities located in the said warehouse/property thereby committing a grave breach of trust and thereby wilfully defaulted on its obligations towards the Plaintiff Exchange as well as the various investors who have traded with Defendant No. 1 through the Plaintiff Exchange. It is also pointed out that the articles appearing in the recent newspaper reports and the investigation carried out by the EOW, clearly demonstrates that the Defendant Nos. 1 to 4 and their management (i.e. Defendant Nos. 5 to 16) are responsible for the siphoning of the Plaintiff's dues. The Plaintiff has also called upon Defendant Nos. 1 to 4 to furnish before this Court the respective financial statements and income tax returns and sales tax and vat returns of the previous three financial years preceding the filing of the present suit to ascertain/identify as to how the Defendant No. 1 treated these transactions for the sales/purchase of the commodities which were traded on the Plaintiff Exchange platform for the last three years as accounted. The Plaintiff has also pointed out that the

amounts earned by Defendant Nos. 1 to 4 by perpetuating the above fraud stands deposited in the Bank Accounts of Defendant Nos. 1 to 4 and the Defendant Nos. 5 to 16 as Directors and shareholders of Defendant Nos. 1 to 4 would benefit from the monies deposited in the said Bank Account. It is also submitted on behalf of the Plaintiff that Defendant Nos. 1 to 4 are in fact simply vehicles to perpetuate the illegalities which are conceived by Defendant Nos. 5 to 16 and which illegalities were for the sole benefit of Defendant Nos. 5 to 16.

20. In view thereof, from a holistic reading of the Plaint, it leaves no doubt whatsoever that the entire case of the Plaintiff in the Plaint is one of fraud played by Defendant No. 1 and its trading clients Defendant Nos. 2, 3 and 4, while trading on the Plaintiff's exchange platform. As correctly submitted on behalf of the Plaintiff, the allegations of fraud against a corporation or proprietary entity obviously relate to the persons in management and day to day control of the affairs of that corporation or proprietary entity. The plaint clearly states that a fraud has been played by Defendant Nos. 1 to 4 in collusion and connivance with the other Defendants including Defendant Nos 14 and 15 who according to the Plaintiffs are in charge of and responsible for the day to day affairs of Defendant Nos. 1 to 4.

According to the Plaintiffs, the Defendants including Defendant Nos. 14 and 15 are beneficiaries from the fraud stated to have been played on the Plaintiff. Any other interpretation would be defeating the plain and holistic reading of the plaint.

21. In view of the above averments in the Plaint, I do not agree with the Applicants that the Plaintiff has failed to set out the real cause of action in the Plaint against Applicant Nos. 14 and 15 or something illusory has been projected in the Plaint with a view to get out of the provisions of Order 7 Rule 11 of the CPC. In my view, the material facts have been stated in the plaint which facts cannot be labelled as vexatious or meritless. As held by the Hon'ble Supreme Court at this stage, the contentions in the plaint must be considered on a demurrer. The allegations and averments against the Applicants have to be considered not in isolation but in the context of the entire plaint. From the aforestated averments made in the Plaint, the Court cannot come to the conclusion that even if the averments in the plaint are proved, the Plaintiff would not be entitled to the reliefs claimed and therefore the question of dismissing the Plaint under Order 7 Rule 11 of the CPC on the ground that no cause of action is made by the Plaintiff against Defendant Nos. 14 and 15 does not arise. Considering the averments in the

plaint when read in its entirety, it cannot be said that the case pleaded by the Plaintiffs against the Applicants or that the cause of action set out in the plaint against them is purely illusory or that a right to sue has not been disclosed in the plaint.

22. As regards the contention of the Applicants that all allegations of fraud, collusion and breach of trust must be pleaded with all supporting material particulars as mandated by Order 6 Rule 4 and Order 4 Rule 1 of the CPC, and a failure to do so must result in dismissal of the Plaint under Order 7 Rule 11, as stated earlier, the fraud is alleged to have been committed by Defendant Nos. 1 to 4 who are all corporate entities. The corporate entities cannot commit a fraud on its own. Therefore what is required is a plea of the particulars of fraud committed by the Company. The Plaintiff has incorporated the plea in the plaint that Defendant Nos. 5 to 16 were in day to day control of Defendant Nos. 1 to 4 and therefore the corporate entities as set out in the Plaint and hereinabove have committed a fraud through them i.e. Defendant Nos. 5 to 16. The Plaintiff has also contended that Defendant Nos. 5 to 16 have abused the corporate structure and have benefitted from the fraud. The plant incorporates detailed particulars as regards the fraud which according to the Plaintiffs was perpetrated on them by misusing the corporate

structure of Defendant Nos 1 to 4 by all the Defendants including the Applicants who the Plaintiffs contend have benefitted from the same. The financial statements and income tax returns and sales tax and VAT returns are admittedly not in possession of the Plaintiff and they have called upon Defendant Nos. 1 to 4 to produce the same. It is only after such inspection is taken that detailed particulars of the alleged fraud would surface and brought before the Court. Before all these steps are taken, the Plaintiff needs to be given an opportunity to bring the further specific details/evidence of fraud on record and the names of the Applicants cannot be struck off for want of material particulars under Order VI Rule 4 as the same will cause grave harm injury and prejudice to the Plaintiff whereas no such harm injury or prejudice will be caused to the Applicants if they are called upon to defend the suit on merits.

23. The Applicants have also contended that Defendant Nos. 14 and 15 are nominee directors and therefore cannot be held personally liable for any breaches or defaults with respect to the Company on account of being a nominee director of such Company. They have relied on the following

observations of the Delhi High Court in the case of *Om Parkash Khaitan v.*

*Shree Keshariya Investment Ltd.*¹² :

“It is true that when a person agrees to be appointed to the board of directors of a company he is expected to exercise legitimate control over the management and the affairs of the company and be conscious of his responsibility as such director. It is also beyond doubt that when persons, who have distinguished themselves in various fields such as law, audit, management, financial management or who otherwise represent special interests on board such as the representatives of financial institutions, Government or semi-Government bodies are appointed to the boards, it certainly gives a favourable projection to the management of the company and holds out a tacit assurance to all those who would deal with the company, including the prospective shareholders of the company, that there are independent persons of eminence having specialized skill on the board of the company and that the affairs and management of the company would, therefore, be properly conducted in accordance with law. Unfortunately, however, most of such persons either do not actively participate in the management of the company and its affairs or are unable on account of the obvious limitation to the power of a director and the principle of limited accountability incorporated in the Act, to exercise an effective control over the management and affairs of the company with the result that the safeguard built into the corporate system by the institution of such directors becomes almost illusory. In the

12 (1978) 48 Co. Cases 85

circumstances, it is necessary to make a distinction between the directors who are on the board, purely by virtue of their technical skill or because they represent certain special interest and those who are in the effective control of the management and affairs of the company, whether or not they have any financial stakes in it, in deterring if relief from liability arising out of the breaches and defaults of the company should be granted or not. It cannot be denied that independent directors from the professions or from among the financial consultants or those that represent different interests, such as the financial institutions, have a salutary effect on the management of a company in spite of the various legal constraints and limitations and if such a distinction is not made it is likely to scare such persons away from any possible association with the company as directors. It is, therefore, unreasonable to fasten liability on directors for the defaults and breaches of a company where such directors are either the nominee-directors or are appointed by virtue of their special skill or expertise. It is also unfortunate that with the limited accountability an effective control of the management of the affairs of a company by the board is not possible. While there is a strong case for urgent legislative action, both in the matter of widening the frontiers of accountability of a company, both to its board of directors and to the members, as also in relieving the special category of directors from consequences of default and breaches of the company, judicial moderation is necessary in the administration of section 633 of the Act so as to ensure that such categories of directors are not subjected to the

harassment of legal proceedings for breaches and defaults of a company, which may at times be rather protracted. It would be proper in such cases to relive such directors of consequences of the defaults and the breaches unless they are directly involved in the acts or omission complained of or have otherwise not acted honestly or reasonably or have financial involvement in the company.”

In my view, the above contention can never be a ground for rejection of the Plaintiff or striking out the name of the Applicants as sought. It can never be an absolute proposition that there can never be any action whatsoever against any nominee Director even if the said Director has played a fraud. As noted above, the allegations levelled by the Plaintiff against the Applicants are of fraud and collusion. Additionally, the Plaintiff has specifically averred that the Applicants herein were in control and management of the day to day affairs of Defendant No.4. The Plaintiff has, as set out hereinabove, expressly pleaded that the Applicants have benefitted from the illegalities and the fraud and have utilised Defendant Nos. 1 to 4 as a vehicle for committing the fraud. These are all issues which would have to be tried and tested at the final hearing of the suit. The Plaintiff has sought a decree and various interim reliefs against the Applicants. The mere fact that Defendant Nos. 14 and 15 were Nominee Directors on the Board of Defendant No.4

cannot be a ground for rejection of the Plaint or striking out the name of Defendant Nos. 14 and/or 15. Further the judgment in the case of Om Prakash Khaitan (*supra*) was not a case under Order 7 Rule 11 of the Civil Procedure Code, but one under Section 633 of the Companies Act. Section 633 contemplates a factual enquiry into the conduct of a director to ascertain whether the director had acted honestly and reasonably. Such is not the scope of enquiry under Order 7 Rule 11 or Order 1 Rule 10 of the Civil Procedure Code.

24. Relying on the decision in *M.V. Sea Success I vs. Liverpool and London Steamship Protection and Indemnity Association Ltd. (supra)*, it was also sought to be contended on behalf of Defendant No. 14 that a director cannot be held vicariously liable for acts committed by the company unless such acts are specifically attributed to such director. However the said decision does not advance the cause of the Applicants since the case that the Plaintiffs have pleaded is not one of simplicitor vicarious liability or lifting of corporate veil but of actual involvement of the Applicants and that they have benefitted from the acts. In this context, the judgments relied upon by the Plaintiffs in the cases of Clarinda D'souza(*supra*), Anjum Nath (*supra*) and Deepak Ansal (*supra*) are relevant. In these cases, applications were made for deletion of

directors from the array of parties which were rejected by the Court on the ground that since allegations were made against the directors in the plaint and/or relief were also claimed against them, they could not be deleted from the array of parties. The Courts have observed that the Plaintiff was the dominus litis and since allegations were made against the directors, they could not be deleted from the array of parties and the plaint against them could not be rejected.

25. Dr. Tulzapurkar appearing for Defendant No. 15 has submitted that Respondent No. 15 is entitled to immunity by virtue of the fact that the Plaint is barred under the provisions of the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 on account of the immunity available to employees of the Corporation in respect of acts performed in the official capacity. In support of his contention he has relied on the decision of the Hon'ble Apex Court in the case of *State of Maharashtra vs. Buddhi Kota Subbarao*¹³.

26. The Plaintiff has denied and disputed the above contention of the Applicants. It is submitted that the Applicants cannot seek immunity in the case of an alleged fraud. It is submitted that the immunity contemplated

13 (1993) 3 SCC 339

under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958, is only “with respect to acts performed by them in their official capacity”. The case set out in the Complaint is of alleged fraud. Fraudulent actions can never be stated to be committed in an official capacity. Such a contention is a misnomer in itself. Consequently no question of immunity can arise on account of the provisions of the Act as regards the allegations levied and reliefs sought by the Plaintiff against the Applicants in the captioned Suit. In any event the question of entitlement of immunity can only be decided at the trial stage. It is also submitted that the contention of the Applicants is one essentially in the nature of a bar of a suit. Relying on the decision in *Qari Mohammed Zakir Hussain and Ors. vs. Municipal Corporation of Greater Mumbai and Ors.* 2002¹⁴, *Goa Industrial Development Corporation vs. Sadhana Builders Pvt. & Anr.*¹⁵ And *Eva Drdakova vs. Khemka Exports Pvt. Ltd.*¹⁶, it is submitted that no immunity can be made available to Defendant No. 15 in a case of alleged fraud. It is also submitted that the reliance by Defendant No. 15 on the judgment in the case of *State of Maharashtra vs. Buddhikota Subbara (supra)* in the context of

14 2002 (2) BomCR 98 Paragraphs 14 to 18)

15 2014 (5) Bom. C.R. 135

16 (2012) 2 BomCR 168

the contention raised by Applicant No. 15 is completely misplaced. It is therefore submitted that the contention of Defendant No. 15 that he is entitled to immunity under the provisions of the International Finance Corporation Act, 1958 be rejected.

27. In my view, the contention that the jurisdiction of a Court to go into any action of a nominee Director of IFC is barred, is too far-fetched. It can never be contended that any act of a nominee Director of IFC can be protected from the scrutiny of the Court. If such a contention were to be accepted, the same would be a certification that any Nominee Director of IFC can commit any fraud and yet be protected by an immunity. This can neither be the intent nor the purpose of the IFC Act. The IFC Act provides that the employees of the Corporation shall be immune from the legal process with respect to acts performed by them in their official capacity. This can never be a protection against fraudulent acts committed by the Applicant. In any case, whether or not such an immunity is available in the present case is a matter of trial and needs to be gone into at the stage of final hearing of the suit. This has also been observed by this Court in the case of *Era Drdakova* (supra). The decision in the case of *State of Maharashtra vs. Buddhikota Subbarao* (supra) relied upon by Defendant No. 15 is of no

assistance to Defendant No. 15. The said judgment was in the context of seeking an approval or sanction from an authority before initiating proceedings. The said judgment only held that a widest meaning should be given to the acts done in the official capacity so that without seeking sanction of the appropriate authority, no proceedings can be initiated. The said judgment is not an authority which suggests that even if an employee commits fraud the jurisdiction of a civil court is absolutely barred.

28. In view of the above, both the above Notice of Motions are dismissed. However, there shall be no order as to costs. It is also clarified that none of the observations made herein shall influence the hearing of the suit on merits.

(S.J. KATHAWALLA, J.)

CERTIFICATE

"Certified to be true and correct copy of the original signed Judgment"