

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 32 OF 2016

in

NOTICE OF MOTION NO.1388 OF 2014

in

SUIT NO. 781 OF 2014

with

NOTICE OF MOTION NO.73 OF 2016

Mr.Gopal Shrinivasan )  
erstwhile Nominee Director of Dunar Foods Ltd)  
having his residence at Old No.2, New No.3 )  
West Side House Adyar Club Gate Road, )  
**Chennai-600 028.**

**.. Appellant**  
(Orig.Defendant no.14)

versus

1. National Spot Exchange Limited )  
a public limited company incorporated )  
under the Companies Act, 1956, having )  
its registered office at FT Towers, CTS )  
No.256 & 257, 4<sup>th</sup> Floor, Suren Road )  
Chakala, Andheri (East) Mumbai-400 093. )

Respondent no.1  
(Orig.Plaintiff)

2. P.D.Agro Processors Pvt.Ltd )  
E-254, Lower Ground Floor, )  
Greater Kailash II, )  
**New Delhi-110 048.** )

3. Dulisons Cereals )  
Through its Proprietor )  
Mr.Duli Chand Narender Agarwal )  
Near CWC Village, )  
Karnal-132 001 **HARYANA** )

4. Dulisons Foods )  
Through its Proprietor )  
Mr Duli Chand Narender Agarwal )  
Near CWC Village, )

Baida Jatan Road, )  
Karnal-132 001 **HARYANA** )

5. Dunar Food Limited )  
Dunar Food Ltd, Near CWC Jattan Road, )  
Bazida, Karnal-132 001 )

6. Surender Gupta )  
Managing Director of P.D.Agro )  
Processors Pvt.Ltd )  
and Dunar Foods having his )  
residence at 2249, Sector 7,Karnal-132 001 )  
**HARYANA** )

7. Deepak Sharma )  
Additional Director of P.D.Agroprocessors )  
Pvt.Ltd having his residence at )  
1678, Sector 13, Urban Estate, Karnal-132 001 )  
**HARYANA** )

8. Raju Sharma )  
Additional Director of P.D.Agroprocessors Pvt. )  
Ltd having his residence at H.No.119, )  
Sector 14, Karnal-132 001 **HARYANA** )

9. Abhimanyu Veer Atri )  
Additional Director of P.D.Agroprocessors Pvt. )  
Ltd having his residence at D-8, Ground Floor )  
Pamposh Enclave, Greater Kailash-I, )  
**NEW DELHI – 110 048.** )

10. Sheetal Gupta )  
Director and Shareholder in P.D.Agroprocessors )  
C/O E-254, Lower Ground Floor, )  
Greater Kailash II, )  
**NEW DELHI-110 048** )

11. Ranjeev Agarwal )  
Director and Shareholder in P.D. )  
Agroprocessors Pvt.Ltd C/O E-254, )

Lower Ground Floor, Greater Kailash II, )  
**NEW DELHI – 110 048.** )

12. Sandeep Singla )  
Shareholder in P.D.Agroprocessors Pvt. )  
Ltd, E-254, Lower Ground Floor, )  
Greater Kailash II, )  
**NEW DELHI-110 048.** )

13.Kanta Gupta )  
Director of Dunar Foods having her )  
residence at L-1/275, B DDA Flats, Kalkaji )  
**NEW DELHI 110 019.** )

14. Kirti Dua )  
Whole Time Director of Dunar Foods )  
having her residence at L-1/275 B, )  
DDA Flats, Kalkaji, )  
**NEW DELHI 110 019.** )

15.Sankaran Balasubramaniam )  
Nominee Director of Dunar Foods )  
having his residence at Flat B 23/f, )  
Mayfair, 1 May Road, Mid-levels, )  
Mayfair, Na, **Hongkong.** )

16. Charul Kapoor )  
Company Secretary, Dunar Food Ltd )  
113, Sector 8, Part II, Karnal-132 001 )  
**HARYANA** )

17. Deepak Prakash Rane )  
Auditor of P.D.Agroprocessors )  
Pvt.Ltd, E-254,Lower Ground Floor, )  
Greater Kailash II, )  
**New Delhi -110 048.** )

18. Walker Chandiok and Co )  
Auditor of Dunar Foods Limited )  
having their address at L-41, Connought Circus,) )

**NEW DELHI -110 001.INDIA** )

19. M/s Sudhir Sunil and Co )  
Auditor of Dunar Foods Limited )  
having their office at No.5/S )  
South Delhi, Greater Kailash1, )  
**Delhi-110 048.** )

20. Primezone Developers Pvt.Ltd )  
having their office address at 109-110, )  
Main Market, Sector 8, Urban )  
Estate, Karnal, **HARYANA – 132 001.** )

).. Respondent nos.2 to 20  
(Orig,Deft nos.2 to 13 and 15 to 20)

with

APPEAL No.36 of 2016  
in  
NOTICE OF MOTION NO.765 OF 2014  
in  
SUIT NO. 781 OF 2014  
WITH  
NOTICE OF MOTION (LODG) NO.3698 OF 2015

Shankar Balakrishnan )  
Nominee Director of Dunar Foods, )  
having his residence at Flat B 23/f, )  
Mayfair, 1 May Road, Mid levels )  
Mayfair, Na **Hong Kong** )

.. Appellant  
(Orig.Deft no.15)

versus

1. National Spot Exchange Limited )  
a public limited company incorporated )  
under the Companies Act, 1956, having )  
its registered office at FT Towers, CTS )  
No.256 & 257, 4<sup>th</sup> Floor, Suren Road )  
Chakala, Andheri (East) Mumbai-400 093. )

).. Respondent no.1  
(Orig.Plaintiff)

2. P.D.Agro Processors Pvt.Ltd )  
E-254, Lower Ground Floor, )  
Greater Kailash II, )

**New Delhi-110 048.** )  
 )  
 3. Dulisons Cereals )  
 Through its Proprietor )  
 Mr.Duli Chand Narender Agarwal )  
 Near CWC Village, )  
 Karnal-132 001 **HARYANA** )  
 )  
 4. Dulisons Foods )  
 Through its Proprietor )  
 Mr Duli Chand Narender Agarwal )  
 Near CWC Village, )  
 Baida Jatan Road, )  
 Karnal-132 001 **HARYANA** )  
 )  
 5. Dunar Food Limited )  
 Dunar Food Ltd, Near CWC Jattan Road, )  
 Bazida, Karnal-132 001 )  
 )  
 6. Surender Gupta )  
 Managing Director of P.D.Agro )  
 Processors Pvt.Ltd )  
 and Dunar Foods having his )  
 residence at 2249, Sector 7,Karnal-132 001 )  
**HARYANA** )  
 )  
 7. Deepak Sharma )  
 Additional Director of P.D.Agroprocessors )  
 Pvt.Ltd having his residence at } )  
 1678, Sector 13, Urban Estate, Karnal-132 001 )  
**HARYANA** )  
 )  
 8. Raju Sharma )  
 Additional Director of P.D.Agroprocessors Pvt. )  
 Ltd having his residence at H.No.119, )  
 Sector 14, Karnal-132 001 **HARYANA** )  
 )  
 9. Abhimanyu Veer Atri )  
 Additional Director of P.D.Agroprocessors Pvt. )  
 Ltd having his residence at D-8, Ground Floor )

Pamposh Enclave, Greater Kailash-I, )  
**NEW DELHI – 110 048.** )

10. Sheetal Gupta )  
Director and Shareholder in P.D.Agroprocessors }  
C/O E-254, Lower Ground Floor, )  
Greater Kailash II, )  
**NEW DELHI-110 048** )

11. Ranjeev Agarwal )  
Director and Shareholder in P.D. )  
Agroprocessors Pvt.Ltd C/O E-254, )  
Lower Ground Floor, Greater Kailash II, )  
**NEW DELHI – 110 048.** )

12. Sandeep Singla )  
Shareholder in P.D.Agroprocessors Pvt. )  
Ltd, E-254, Lower Ground Floor, )  
Greater Kailash II, )  
**NEW DELHI-110 048.** )

13.Kanta Gupta )  
Director of Dunar Foods having her )  
residence at L-1/275, B DDA Flats, Kalkaji )  
**NEW DELHI 110 019.** )

14. Kirti Dua )  
Whole Time Director of Dunar Foods )  
having her residence at L-1/275 B, )  
DDA Flats, Kalkaji, )  
**NEW DELHI 110 019.** )

15.Gopal Srinivasan )  
Nominee Director of Dunar Foods )  
having his residence at Old No.2,West Side )  
House, Adyar Club Gate Road, )  
**Chennai-600 028.** )

16. Charul Kapoor )  
Company Secretary, Dunar Food Ltd )

113, Sector 8, Part II, Karnal-132 001 )  
**HARYANA** )

17. Deepak Prakash Rane )  
 Auditor of P.D.Agroprocessors )  
 Pvt.Ltd, E-254,Lower Ground Floor, )  
 Greater Kailash II, )  
**New Delhi -110 048.** )

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 Auditor of Dunar Foods Limited )  
 having their address at L-41, Connought Circus,) )  
**NEW DELHI -110 001.INDIA** )

19. M/s Sudhir Sunil and Co )  
 Auditor of Dunar Foods Limited )  
 having their office at No.5/S )  
 South Delhi, Greater Kailash1, )  
**Delhi-110 048.** )  
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20. Primezone Developers Pvt.Ltd )  
 having their office address at 109-110, )  
 Main Market, Sector 8, Urban )  
 Estate, Karnal, **HARYANA – 132 001.** )

).. Respondent nos.2 to 20  
 (Orig,Deft nos.1-14, 16-19)

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Mr.Iqbal Chagla Sr.Counsel a/w Mr.Himanshu Kane, Mr.Manvendra Kane,  
 Mr.Rahul Kadam, Ms.Niyati Jambaulikar i/b M/s W.S.Kane & Co for Appellant  
 in Appeal No.32 of 2016.

Dr.Birendra Saraf a/w Mr.Chirag Kamdar, Mr.Abhishek Kale, Mr.Asadulla  
 Thangal i/b.M/s Naik Naik and Co. for Respondent no.1.

Ms.Aditi Shukla i/b M/s Crawford Bayley & Co. for Respondent No.18.

Dr.V.V.Tulzapurkar Sr.Counsel a/w Mr.Vishal Kanade, Mr.Arun Siwach &  
 Mr.Jay Sanklecha i/b M/s Cyril A.Mangaldas for Appellant in Appeal No.36 of  
 2016.

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**CORAM: NARESH H.PATIL AND  
G.S.KULKARNI, JJ**  
**JUDGMENT RESERVED ON: 5<sup>th</sup> FEBRUARY, 2016**  
**JUDGMENT PRONOUNCED ON: 5<sup>th</sup> MAY, 2016**

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**JUDGMENT (Per G.S.Kulkarni, J)**

1. These appeals arise from a common order dated 23 September 2015 passed by the learned Single Judge rejecting the Notice of Motion's taken out by the Appellants (Defendant nos.14 and 15 in the suit), under Order 7 Rule 11 read with Order 1 Rule 10(2) of the Code of Civil Procedure, seeking rejection of the plaint, qua the appellants for want of a cause of action. Respondent no.1 is the original plaintiff.

2. To appreciate the case of the appellants it would be necessary to consider the plaintiff's/Respondent no.1's case as contained in the plaint. For the sake of convenience, in considering the plaint, we refer to the parties as arrayed in the plaint.

**Plaintiff's case in the plaint:-**

3. The Plaintiff's suit is inter alia for the recovery of the amount aggregating to Rs.680,239,7,706.55 to be jointly and/or severally ordered and decreed to be paid by defendant nos.1 to 16 alongwith interest at 18% p.a. as per particulars of claim annexed as Exhibit 'U' to the plaint and for a further relief that defendant no.20 be ordered and decreed to pay to the plaintiff a sum of Rs.29.20 crores along with interest at 18% p.a. from the due date of payment and/or realization thereof as per prime zone agreement dated 10 February 2013.

4. As seen from the averments made in the Plaint, the Plaintiff is a company incorporated under the Indian Companies Act, 1956 which carries on business as a "Spot Exchange", providing for an electronic trading platform in spot contracts in commodities on delivery basis. The Plaintiff commenced its business operations from October, 2008. The Defendant no.1 is a trading cum-clearing member of the Plaintiff and is inter alia trading in various

commodities including paddy, for itself and on behalf of its clients. Defendant nos.2 and 3 are proprietary firms and are related entities of Defendant no.1 being largely controlled by the same management and/or proprietors. Defendant no.4 is a company incorporated under the Indian Companies Act, 1956 and is a client of defendant no.1 and is also stated to be largely controlled by defendant no.1. Defendant no.5 was Director of defendant no.1 at the relevant time when transactions/defaults had taken place and was also a Managing Director of Defendant no.4. Defendant nos.6 to 8 are additional Directors of Defendant no.1. Defendant nos.9 to 11 are the shareholders of defendant no.1 who were stated to be responsible for the day-to-day affairs and conduct of defendant no.1. Defendant nos.12 and 13 are stated to be whole-time Directors of Defendant no.4. Defendant nos.14 and 15 (Appellants herein) are the nominee Directors of defendant no.4. Defendant no.16 is the Company Secretary of defendant no.4 and Defendant no.17 is the Auditor of defendant no.1 and Defendant no.18 was the Auditor of defendant no.4 at the relevant time who resigned on 21 October 2013.

Defendant no.19 was also a Auditor of Defendant no.4 appointed in place of defendant No.18 from 21 October 2013. Defendant No.20 is a company incorporated under the Companies Act and is engaged in the business of real estate/development of properties of which defendant no.10 is a Director.

5. It is the case of the Plaintiff that there were defaults committed on the plaintiff's exchange by Defendant No.1 and the same have occurred with the active participation, knowledge and connivance between the defendants. Plaintiff state that defendant nos.5 to 16 (which includes appellants) have utilized the corporate structure and identity of defendant nos.1 to 4 for their own personal gains and are the real beneficiaries of the defaults that have occurred on the exchange platform.

6. The plaintiffs states that on 10 June 2013 defendant no.1 executed an Agreement(at Mumbai) with the plaintiff's exchange setting out the terms and conditions, representations, warranties,

covenants agreed between them interalia protecting rights of the plaintiff's exchange and other members of the plaintiff exchange. Trading at the plaintiff's exchange took place on the basis of this contract. The trading members were permitted to purchase and sell the commodities on the Exchange platform in the manner and on the terms as specified in the contracts. The plaintiff permitted defendant no.1 to trade on its exchange platform in contracts of various commodities. All trades conducted on the plaintiff's exchange were through the accounts which were held by defendant no.1 in the HDFC Bank-New Delhi, HDFC-Ludhiana and State Bank of India-Karnal Branch details of which are set out by the Plaintiff in paragraph 6(d) of the plaint. These bank accounts would demonstrate that moneys were received by defendant no.1 towards trades entirely executed by it on the exchange platform.

7. The case of the Plaintiff is that the defendant no.1 was trading in paddy in Haryana and Punjab and has been executing T+2 and T+25 trades on the plaintiff's exchange. (*T+2 would mean trade*

*is concluded on “T” day and delivery and payment would be effected on second business day from “T” day by selling and buying member as the case may be and for T+25 delivery and payment would be effected on the 25<sup>th</sup> business day).* These contracts were governed by Bye-laws, Rules and Regulations of the plaintiffs. The defendant no.1 continued to execute these T+2 and T+25 contracts and ledger balance of defendant no.1 was reconciled on day-to-day basis and all obligation reports were sent to defendant No.1 which indicate debit and credit entries. This was never disputed by the defendant no.1 as was being routinely followed by the plaintiff which included reconciliation of ledger balance on daily basis from 6 February 2013.

8. The plaint further narrates that in April 2012, the plaintiff received a show cause notice from the Ministry of Consumer Affairs, Government of India alleging violation of conditions of notification dated 5 June 2007 by which the plaintiff was allowed to conduct trading in forward contracts of one day duration subject to conditions as contained in the notification. The show cause notice

was received by the plaintiff vide letters dated 23 May 2012, 11 August 2012 and 8 July 2013 and 12 July 2013. By a letter dated 12 July 2013 the Ministry directed the plaintiff to furnish undertaking to the effect that no further/fresh contracts shall be launched till further instructions from the authorities and all the existing contracts will be settled on due dates. In pursuance of this, the plaintiff issued a circular dated 22<sup>nd</sup> July 1013 by bringing changes in the settlement procedure with effect from 23 July 2013 by notifying that all contracts settled by delivery and payment beyond 11 days will be settled on T+20 basis and all contracts currently settled on “net obligation” shall be settled on trade-to-trade basis which included E-series contracts such as e-gold, e-silver, lead, e-nickel and e-platinum.

9. On 8 August 2013 the plaintiff decided to settle open trades in which its members had defaulted. It was revealed that there were many contra-entries in the account of the defendant no.1 and it was seen that a large an amount of Rs.637,48,977,06.55 Crs. was

due and outstanding by the defendant no.1 from 19 July 2013. In August 2013 the plaintiff appointed an independent agency namely “SGS India Limited”, to survey the stocks at various warehouses including warehouses which were in control of defendant no.1. However defendant no.1 did not allow the representatives of SGS India Limited to enter the warehouses though it was mandatory under the rules of the plaintiff exchange. An audit at the hands of SGS India Limited was prevented to be undertaken by the defendant no.1. The plaintiff called upon the defendant no.1 to make payment which had become due and payable for the outstanding trades undertaken by it on the plaintiff's exchange as settlement period had come to an end and trades were required to be settled vis-a-vis various buyers and sellers. It is the case of the plaintiff that from 19 July 2013 onwards the defendant no.1 failed to make payment and as such had defaulted in payment of the installment amount. The plaintiff in accordance with the bye-laws and rules of the plaintiff took further steps to declare the defendant no.1 and other similar trading members as defaulters.

10. The plaintiff has averred that the defendant no.1 on behalf of itself and on behalf of its clients had admittedly entered into outstanding trades and was liable to pay the amounts that had fallen due thereunder along with interest at 18% p.a. from due dates until payment and/or realization thereof. Defendant nos.1 to 4 had acted upon the outstanding trades received benefits thereunder and caused the plaintiff exchange as also the various counter party investors to act in furtherance of the outstanding trades and the same are therefore, binding upon the defendant nos.1 to 4 and thus are estopped from disputing the liability thereunder. It is averred that Defendant nos. 5 to 16 being directors and share holders and defendant nos.1 and 4 respectively were in-charge of and responsible for the affairs of defendant nos. 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 various counter party investors under the outstanding trades. The defendant nos.1 to 4 in collusion with 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 counter parties to the outstanding trades, by seeking to represent and assuring that the commodities held 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 counter parties. This has caused counter parties to the outstanding trades to part with their moneys and enter into outstanding trades on the basis of such fraudulent representations and assurances and have compounded the fraud so played by refusing to allow access to the designated warehouses for the purposes of inspecting the commodities that where purportedly deposited and/or take possession thereof and for the purpose of realization of the amounts from the defendant nos. 1 to 4 under the outstanding trades. All these facts clearly demonstrate lack of bonafides on the part of defendant nos.1 to 16 and if immediate steps are not taken to secure the claim of the plaintiff the defendant nos. 1 to 16 will take all available/possible steps to ensure that the

same is defeated. The defendant nos. 1 to 16 have already disposed of/siphoned/shifted the commodities located in the warehouses and have committed a grave breach of trust and have willfully defaulted on its obligation towards the plaintiff's exchange as well as to the various investors who have traded with the defendant no.1.

11. On account of the failure to maintain the goods/pay the outstanding amounts as required, the Economics Offences Wing of the Mumbai Police had arrested the then Director of defendant nos.1 to 4, Mr.Sunder Gupta and on 5 July 2014 holding him responsible for the defaults committed on plaintiff exchange by the defendant nos. 1 to 4. It is averred that defendant nos. 1 to 4 have siphoned off the amounts and utilised the same towards buying real estate and towards producing movies. It is averred that the defendant nos.1 to 4 in connivance with defendant nos.5 to 16 will deal with the assets which are in their control and possession and exchange their moneys and/or their assets in such manner to defeat the claim of the plaintiff exchange. The defendant nos.5 to 16 as Directors/shareholders are

in effective control of defendant nos.1 to 4 and are therefore in charge of the day-to-day affairs of defendant nos.1 to 4. Further inquiries by Economic Offences Wing indicates that persons in-charge of defendant nos. 1 to 4 have utilized the moneys and that with ulterior motives and are seeking to defeat the claim of the plaintiffs. It is therefore, necessary, expedient and in the public interest as well as interest of all the stake holders that the claim of the plaintiff is required to be secured by restraining the defendant nos.5 to 16 from dealing with, disposing of or transferring or creating any third party rights or encumbering the property in possession and in control of the consortium of banks in any manner whatsoever.

12. The defendant nos. 5 to 16 have equally benefited from the defaults that have occurred on the exchange platform. The plaintiff states that the defendant nos. 5 to 16 and directors of defendant nos.1 to 4 have also benefited from the moneys deposited in the bank accounts of the defendant nos. 1 to 4 and that the

defendant nos.1 to 4 are in fact simply vehicles to perpetuate the illegalities which are conceived by the defendant nos.15 to 16 and such illegalities were for the sole benefit of defendant nos.5 to 16.

13. The plaintiffs have prayed for diverse reliefs and reliefs which are prayed for against defendant nos.14 and 15 (appellants) are as under :

a. *that the Defendant Nos.1 to 16 be 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;*

c. *that pending the hearing and final disposal of the Suit, Hon'ble Court be pleased to direct the Defendant Nos.1 to 16 jointly and/or severally secure an amount 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 the date of providing security by way of a bank guarantee or in such other manner as this Hon'ble Court may deem fit and proper;*

f. *pending hearing and final disposal of the suit, this Hon'ble Court be pleased to order and direct the Defendant Nos.1 to 16 to disclose, on affidavit and within such time as this Hon'ble Court may deem fit and proper, all their movable and immovable assets, properties and assets including bank accounts with all details of funds debited and credited, for a minimum period of last 3 years;*

h. *pending hearing and final disposal of the suit, this Hon'ble*

*Court be pleased to issue an injunction/ direction/ order restraining the Defendant Nos.1 to 16 from disposing of, alienating, encumbering, parting with possession of and/or otherwise creating third party rights in respect of their movable and immovable assets as would be disclosed by the Defendant Nos.1 to 16 in terms of prayer clause (f) above;*

*l. pending hearing and final disposal of the suit, this Hon'ble Court be pleased to issue an injunction/ direction/ order restraining the Defendant Nos.1 to 16 from and in any manner dealing with the funds deposited by them in various Banks as may be disclosed to this Hon'ble Court in accordance with prayer (f) above;*

*m. An injunction restraining Defendant Nos.1 to 16, their agents, representatives from dealing with, selling, transferring, alienating creating third party rights, in respect of and/or encumbering their movable/immovable properties/assets mortgaged/charged which may be disclosed as in possession and/or control of various Banks in any manner whatsoever;*

*(p) An order appointing the Court Receiver, High Court, Bombay, with all powers under Order 40 Rule 1 of the Civil Procedure Code, of the assets of the Defendant Nos.1 to 16 and such assets as may be disclosed and found including the power to take possession of the same and also with the power to the Court Receiver to sell the same and deposit the sale proceeds in this Hon'ble Court / make payment of the sale proceeds to the Plaintiff;*

*r. an order appointing the Plaintiff as Agent of the receiver and permitting the Plaintiff to auction the various commodities as available in the said warehouse/property as mentioned in Exhibit "AA" and appropriate the amounts therefrom towards the said outstanding amount due from the Defendant Nos.1 to 16 to the Plaintiff.*

*s. pending hearing and final disposal of the suit, this Hon'ble Court be pleased to an order to direct the Defendant Nos.1 to 16 to file within such time as this Hon'ble Court may deem fit and proper, 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;"*

14. The defendant nos.14 and 15 respectively took out Notice of motions in the above suit inter alia praying for the following reliefs :

**Prayers in the Notice of Motion of Defendant No. 14**

- (a) that plaint in the above suit being Suit (Lodging) No.328 of 2014 be rejected qua Defendant No.14;
- (b) that the name of Gopal Srinivasan being Defendant No.14 in the above suit being Suit (lodging) No.328 of 2014 and its proceedings be struck out;
- (c) that pending the hearing and final disposal of the above Notice of Motion to above suit being Suit (Lodging) No.328 of 2014 be stayed qua Defendant No.14;

**Prayers in the Notice of Motion of Defendant No. 15**

- “(a) that the Plaint in Suit(L) No.328 of 2014 be rejected qua Defendant No.15/Applicant;
- (b) that the name of Defendant No.15/Applicant be struck out of Suit (L) No.328 of 2014;
- (c) that pending the hearing and final disposal of the Notice of Motion the suit be stayed qua Defendant No.15/Applicant;
- (d) for ad-interim relief in terms of prayer clause (c) above;
- (e) for such further and other relief as the nature and circumstances of the case may require; and
- (f) costs.”

**Case of Defendant nos 14 and 15 in the Notice of Motions.**

15. The case of Defendant Nos.14 and 15 for the above reliefs as prayed in their respective Notices of Motion to reject the plaint qua Defendant Nos.14 and 15 is basically on the contentions that there are vague and unsubstantiated allegations against these defendants in paragraphs 2,7, 9, 14, 15 and 27 of the plaint. As the entire case of the Appellants is based on the averments as contained in these paragraphs, it would be relevant as also convenient to extract the contents of these paragraphs which read thus:-

*“2. ... .. The acts leading to the defaults committed on the Plaintiff Exchange could not have occurred without the knowledge and active participation of these Defendants. 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. ... ..”*

*7. (zz)... .. The 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 counter-party investors under the Outstanding Trades. 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 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 and with an intent to defraud the Plaintiff and the counter-parties, and have thereby caused the counter-parties to the Outstanding Trades to part with their monies and enter into the Outstanding Trades on the basis of such fraudulent representations and assurances, and have compounded the fraud so played by refusing to allow access to the designated warehouses for the purpose of inspecting the commodities that were purportedly deposited and/or taking possession thereof for the purpose of sale and realization of the amounts due from the Defendant Nos.1 to 4 under the Outstanding Trades.*

9. *The Plaintiff submits that the aforesaid facts clearly demonstrate the lack of bona fides on the part of Defendant Nos.1 to 16. The Plaintiff states that if immediate steps are not taken to secure the claim of the Plaintiff, Defendant Nos.1 to 16 will take all available/possible steps to ensure that the same is defeated. The Plaintiff submits that Defendant Nos.1 to 16 having already disposed of/siphoned off/shifted the commodities located in the said 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. The 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, which liability is clearly admitted by the aforesaid letter dated 1<sup>st</sup> August,2013 and also after having committed to the schedule of settlement have failed and neglected to pay the same. The Plaintiff states 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. Surender Gupta on 5<sup>th</sup> March 2014 holding him responsible for the defaults created on the Plaintiff Exchange by Defendant Nos.1 to 4. It is pertinent to mention 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 aforesaid amounts and utilized the same towards buying real estate and towards producing movies. 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 the monies and/or their assets in such manner to defeat the claim of the Plaintiff's Exchange. 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. It is submitted 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, as noted above. It is submitted 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. Hereto annexed and marked Exhibit "BB" and "CC" are the copies of the said newspaper articles. The Plaintiff therefore submit that it is necessary, expedient and in the interest of the public as well as in the interest of justice that this Hon'ble Court be pleased to pass the necessary orders/directions to secure the claim of the Plaintiff by restraining Defendant No.1 from disposing of, alienating, encumbering, parting with possession and/or otherwise creating third party rights in respect of its assets, both movable and immovable, details of which are contained in Exhibit AA hereto.

14. The Plaintiff further states that the Plaintiffs have filed complaints against the various defaulting Trading Members with the Economic Offences Wing of the Mumbai Police, on account of their failure to maintain goods at the said designated warehouses as required, the Economic Offences Wing of the Mumbai Police. The Plaintiff states that, one Mr.Pankaj Saraf has also filed a complaint with the Economic Offences Wing and on the said complaint, Economic Offences Wing has filed an FIR bearing No.89 of 2013 on 30<sup>th</sup> September,2013. Pursuant thereto, Economic Offences Wing have arrested the MD of Defendant No.4 i.e. Mr.Surender Gupta on 5<sup>th</sup> March,2014 and thus reflecting that these representative of the defaulting borrowing member/ clients were responsible for the defaults created on Plaintiff exchange. As noted above

*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. It is submitted that the news article dated 7<sup>th</sup> March 2014 published in India Today clearly indicates that the enforcement directorate officials have noted to very pertinent facts, firstly it is found that Defendant No.1 and Defendant No.4 are sister concern and therefore, effectively under common management and secondly it appears that the Directors of Defendant No.1 and Defendant No.4 have made categorical admission in relation to the diversion of the monies received from the trades executed on the Plaintiff Exchange. The Plaintiff states that the Enforcement Directorate and the EOW are both statutory authorities.*

*15. 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 of the sole benefit of Defendant Nos.5 to 16.”*

16. The Defendant Nos.14 and 15's case is that the above averments lack credible details so as to seek a relief against

defendant nos.14 and 15 and defendant no.4 company. It was contended that defendant nos.14 and 15 are nominee Directors. A meaningful reading of the plaint would clearly reveal that the grievances of the plaintiff are principally against Defendant no.1, the Defendant no.4 on whose behalf Defendant No.1 executed various trades, on the Plaintiff's exchange and Defendant no.5 who is the Managing Director of Defendant No.4 and Director of Defendant No.1, and Defendant nos.12 and 13 who were the Directors and whole-time Director of defendant no.4 and defendant no.16 who is the Company Secretary of defendant no.4 company and not against defendant nos.14 and 15. Defendant no.14 contended that the plaintiff did not disclose as to how defendant no.14 had utilized corporate structure or identity of defendant no.4 for his own personal gains or how he was the beneficiary of the alleged defaults that occurred on the plaintiff's exchange and as to how he was in-charge or responsible for the affairs of defendant no.4 company. There were no material particulars of the role of defendant no.14 in siphoning of commodities or alleged breach of trust in respect of

defendant no.4's obligation towards the plaintiff. These particulars were lacking which were necessary make out a case and cause of action against defendant no.14. There was no privity of contract between Defendant no.14 and the plaintiff and thus defendant no.14 could not be held liable for any purported act committed by defendant no.1 and/or defendant no.4 company. On 13 September 2013 the defendant no.14 was constrained to resign from the Board of Directors of defendant no.4 with immediate effect and a copy of Form 32 was filed by the defendant no.4 Company with the Registrar of Companies in this regard. There was no cause of action against defendant no.14 and therefore plaint deserves to be rejected against defendant no.14.

17. The case of the defendant No.15 is similar to defendant no.14 as noted by us above. Defendant No.15 contends that he is a nominee Director of defendant no.4 and he has been improperly joined as party defendant in terms of Order 1 Rule 10(2) of C.P.C. It was contended that there was a statutory bar as to the jurisdiction of

the Court to decide the suit against defendant No.15 in view of the provisions of Section 3 of the International Finance Corporation (Status, Immunities and Privileges) Act, 1958. Defendant No.15 also pleaded that the allegations made against defendant No.15 in the plaint were vague, ambiguous and lacked specific particulars and were in complete disregard to the requirements of Order 7 Rule 11 showing no cause of action as also requirement of Order 6 Rule 4 of C.P.C. in relation to the allegation of fraud.

18. The learned single Judge by the impugned order has rejected the notices of motions filed by defendant nos.14 and 15 repelling the contentions as urged on behalf of defendant Nos.14 and 15. The learned Single Judge held that the averments made in the plaint as read in its entirety clearly reveals a cause of action against defendant Nos.14 and 15. The learned Single Judge held that the case in the plaint against Defendant Nos.14 and 15 was of fraud and collusion and siphoning of fund. It is observed that substantial reliefs are prayed against the defendants jointly and severally to pay

the Plaintiffs the amounts as claimed in the suit. As regards the contentions on the part of defendant Nos.14 and 15 that the averments in the plaint against these Defendants including allegation of fraud are vague and not specific and have also been rejected. It is observed that there submissions are not borne out from holistic reading of the plaint. As regards immunity as claimed by Defendant No.15 under the provisions of the International Finance Corporation (Status, Immunities and Privileges) Act, 1958, the learned Single Judge has observed that the case being of a fraud, the question of immunity as a bar under the provisions of the Act, cannot be a issue to be decided in an application under Order 7 Rule 11(a) of C.P.C.

19. On the above background, we have heard Mr.Iqbal Chagla learned senior counsel for defendant no.14/appellant in Appeal (Lodging) No.32 of 2015 and Dr.VD.Tulzapurkar learned senior counsel for defendant no.15 in Appeal (Lodging) No.36 of 2015 and Dr.Birendra Saraf for plaintiff/Respondent no.1.

20. On behalf of the appellants/defendant nos.14 and 15 the principal submissions are as follows :

(i) This is a clear case where the plaint was required to be rejected qua defendant nos.14 and 15 as the plaint discloses no cause of action against defendants.

(ii) As regards the allegations of fraud in the plaint the same are wholly insufficient as they lack particulars, calling for rejection of the plaint for want of a cause of action against the Defendant Nos.14 and 15. Bare allegation of fraud without particulars and details thereof is not sufficient to maintain a suit against defendant nos.14 and 15).

(iii) The Directors of the defendant no.4 could not have been held liable for action of defendant no.4.

(iv) Plain reading of the plaint shows that cause of action is on the basis of contract as entered by the plaintiff with defendant no.1. The cause of action on the basis of a contract is different from cause of action in tort. In such a plaint purely on a contract for recovery of the amount from the defendant no.1, a relief on a cause of action under torts cannot be claimed qua defendant nos.14 and 15.

(v) The defendant no.15 is entitled to immunity by virtue of the fact that the plaint is barred under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 on account of immunities available to the employees of the Corporation in respect of acts performed in official capacity.

In support of their submissions, the learned Senior Counsel for Defendant Nos.14 and 15 have placed reliance on the these decisions in the case of **Rajkot Municipal Corporation V. Manjulben Jayantilal Nakum & Ors.**<sup>1</sup>; **“Mr.Rajiv K.Mehta Vs. Mrs.Rekha H.Sheth”**<sup>2</sup>; **S.M.S.Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr.**<sup>3</sup>; **Mukesh Hans & Anr. Vs. Smt.Uma Bhasin & Ors.**<sup>4</sup>; **Church of Christ Charitable Trust Vs. Poniamman Educational Trust**<sup>5</sup>; **Om Prakash Khaitan Vs. Shree Keshariya Investment Ltd.**<sup>6</sup>; **Shri.Amba Motors Agencies Pvt.Ltd. Vs. Registrar of Companies** decided on 18.10.1978<sup>7</sup>; **Bishundeo Narain & Anr. Vs. Seogeni Rai & Ors.**<sup>8</sup>; **Liverpool & London S.P.&1 Vs. M.V.Sea Success Land & Anr.**<sup>9</sup>

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1(1997(9) SCC 552)

2 Judgment of Bombay High Court dated 24.3.2014 delivered in Notice of Motion No.368 of 2011 in Suit No.2521 of 2008

3 (2005)8 SCC 89

4 Judgement of Delhi High Court dated 16.8.2010 delivered in REA 14/2010 and CM No.495/2010

5 (2012)8 SCC 706

6 (1978 Company Cases Vol.48)

7 1978 Company Cases (Delhi) 89

8 (AIR 38 1951 Supreme Court 280)

9(2004)9 SCC 512.

21. On the other hand on behalf of Respondent no.1/plaintiff Dr.Saraf would submit:

(i) that the contentions as urged on behalf of the appellants are wholly misconceived as the plaint is required to be read as a whole which makes it clear that the defendant nos.14 and 15 are necessary parties in the light of the claim as made out in the suit.

(ii) Plaintiffs have clearly set out particulars of fraud. All assertions of the plaintiff against the defendants including the appellants can be proved in the suit.

(iii) Plaintiffs have clearly averred in the plaint as regards the breach of trust and that the appellants were responsible for the day-to-day affairs as directors of defendant no.4.

(iv) Plaintiffs have clearly averred that appellants are the beneficiaries of fraud and thus the reliefs in respect of the property are categorically prayed for in the suit.

(v) Defendant nos.14 and 15 submitting that being nominee Directors they have no liability, cannot be accepted as though nominal directors, they have indulged in a fraud. In this regard

allegations as made out in the plaint are more than sufficient to show that defendant nos.14 and 15 are necessary parties.

(vi) A suit involving cause of action on contract as also on tort as set out in the plaint is definitely maintainable and thus the defendant nos.14 and 15 cannot seek a relief for rejecting the plaint qua these defendants under the provisions of Order 7 Rule 11 of the Code of Civil Procedure 1908.

(vii) Under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958, reliefs cannot be claimed by defendant no.15 when there is an allegation of fraud.

(viii) The learned Judge has appropriately considered all these issues in rejecting the Notice of motion filed by defendant nos.14 & 15.

In support of his submissions, the learned Counsel for the Respondents has placed reliance on the decisions in the case of **Sopan Sukhdeo Sable & Ors. Vs. Asstt. Charity Commissioner & Ors.**<sup>10</sup>; **Eva Drdakova Vs. Khemka Exports Pvt.Ltd,**<sup>11</sup>; **Goa Industrial Development Corporation Vs. Sadhana Builders Pvt.Ltd**<sup>12</sup>; **Qar Mohammed Zakir Hussain & Ors Vs. Municipal Corporation of**

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10(2004)3 SCC 137

11(2012)2 Bom.C.R. 634

12(2014)6 AIR Bom R. 734

**Gr.Mumbai & Ors.<sup>13</sup>; Deepak Ansal Vs. Ansal Properties and Industries Ltd. & Anr,<sup>14</sup> ; Anjum Nath Vs. British Airways Plc. & Ors.<sup>15</sup>; Clarinda D'Souza Vs. Mccann Erickson India Ltd.<sup>16</sup>;**

22. With the assistance of the learned counsel appearing for the parties, we have gone through the plaint, the impugned order passed by the learned Single Judge and the respective notices of motions as filed by defendant nos.14 and 15 before the learned single Judge and pleadings in that regard. As the issue as raised is whether the plaint was required to be rejected against the Defendant Nos.14 and 15, what would be relevant is as to whether a complete reading of the plaint whether discloses a cause of action against Defendant Nos.14 and 15.

23. Having perused the plaint, we have noted above the relevant averments in the context of the issues as arising in the present appeal. The averments in the plaint indicate that this is a

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<sup>13</sup> (2002(2) Vol.104(1) Bom.L.R. 120

<sup>14</sup>(2007) 138 DLT 560

<sup>15</sup>(2005)125 DLT 717

<sup>16</sup>(2003(2) Mh.L.J.373

composite suit where the plaintiff has sought reliefs of recovery of the money claimed against the defendants on contract as also by way of damages being a liability under the torts. This is clear from several averments of connivance between the defendants and the joint and several liability arising for payment as claimed by the Plaintiffs in making the suit claim.

24. In the context of these issues, the provisions of Order 1 of the Code of Civil Procedure, 1908 need to be noted which pertains to parties to a suit. Order I Rule 3 is as regards who may be joined as defendant and reads thus:

*“3. Who may be joined as defendants”- All persons may be joined in one suit as defendant where*  
*a) any right to relief in respect of, or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons whether jointly, severally or in the alternative and*  
*b) if separate suits were brought against such persons any common question of law or fact would arise.*

Order I Rule 3 makes it clear that when a right to relief arises out of same act or transaction or series of acts or transactions which the plaintiff would allege to a extent against such persons whether

jointly or severally then such persons can be joined as defendants in one suit. This position is made explicit from sub-rule (b) which categorically provides that all such persons can be joined in one suit as defendants even if separate suits were brought against such persons common questions of law or facts would arise.

25. The next provisions is Order 1 Rule 4 which provides that the Court may give a Judgment for or against one or more of the joined parties. Clause (b) Rule 4 would be relevant in the present context which provides that the Court may give a judgment against one or more of the defendants as may be found to be liable against the respective liabilities. Further Order 1 Rule 5 of the Code provides that it shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him. Further Order 1 Rule 10 (2) also becomes relevant in the present context as it provides that the court may strike out or add parties “*at any stage of the proceedings*” either upon or without application of other party and whether the plaintiff or defendant be struck out and that name

of any other person sought to be joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit be added. Thus, provisions of Order 1 throw a complete a light on the issue of necessary parties to a suit. The plaint is therefore, required to be considered in the present context in the light of provisions of Order 1 Rules 3,4 and 5 and 10 as would be relevant.

26. The next provision and under which Defendant Nos.14 and 15 seek a relief is Order 7 Rule 11 of the CPC which provides for rejection of plaint and reads thus :

**“11. Rejection of Plaint-** The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action

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

(c) where the relief claimed is properly valued by the plaintiff 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.”

Relying on Order 7 Rule 11(a), defendant nos.14 and 15 /contend that plaint is liable to be rejected qua these defendants as it does not disclose cause of action and more particularly for the reason that there are no material particulars in the plaint to show any connivance, collusion, fraud as alleged to be committed by these defendants as regards the transactions of Defendant No.1 on the plaintiffs exchange. In this regard learned Senior Counsel for the appellants urge that under the provisions of Order 6 Rule 4, it is an obligation on the plaintiff to give particulars of fraud when a case of fraud and breach of trust is pleaded in the plaint. It is submitted that these can be the averments against the defendant no.1 or for that matter against the defendant no.4 but it can never be a case against these defendants who were the nominee Directors of defendant no.4.

27. In this context, learned Senior Counsel for the appellants have drawn our attention to averments in the plaint to submit that

these are sweeping averments sans particulars. The approach of the Court when confronted with the issues as raised on behalf of the appellants would be to consider as to whether any cause of action arises against defendant nos.14 and defendant no.15 so that they can be said to be the necessary parties to the suit, qua the relief being claimed by the plaintiff. The endeavour of the Court would be make a holistic and meaningful reading of the plaint and not superficial or perfunctory reading in segments or in parts. The averments in the plaint are required to be seen in their entirety to find out the real cause of action. The Court would consider whether on a meaningful reading of the plaint, the plaint is manifestly vexatious and merit less so as to not disclose a clear right to sue, only in such a situation power under Order 7 Rule 11 of the Code can be exercised by the Court to reject the plaint against the defendants. It is a settled law that there cannot be a compartmentalization, dissection, segregation and inversion and language of the various paragraphs in the plaint nor is it permissible to cull out a sentence or passage and to consider the same in isolation. It is the substance and not merely the form

which is required to be looked into. The pleadings are required to be construed as it stands without additions or subtractions or words or change of its apparent grammatical sense. The tenor and the sentence of the pleadings is required to be seen as a whole. (*See Sopan vs. Assistant Charity Commissioner, Air Supreme Court 2004 page 180*)

28. In view of the above discussion, we apply the well-settled rule that the plaint is required to be considered in its entirety to ascertain cause of action and proceed to deal with the submissions as urged on behalf of defendant nos.14 and 15. A holistic reading of the plaint would demonstrate that the plaintiff has impleaded defendant nos.14 and 15 who were directors and shareholders of defendant no.4 so as to seek a relief against these defendants. The plaintiffs have made averments in the plaint that at the relevant time defendant nos.14 and 15 were in-charge and responsible for the affairs of defendant no.4 and as such they were also liable to jointly and/or severally pay amounts due from defendant nos.1 to 4 to the

plaintiff which was in fact the moneys of the counter-parties dealing on the exchange as set out in para 7 (zz) of the plaint. It is pertinent that the plaintiff in para 7 (zz) of the plaint has made categorical averments that defendant nos.1 to 4 in collusion with 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 counter parties to the outstanding trades, by seeking to represent and assure that the commodities held thereunder have been duly deposited in 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 counter parties and have thereby caused the counter-parties to part their moneys and enter into outstanding trades on the basis of such fraudulent representations and assurances and further have compounded the fraud so played by refusing an access to the designated warehouses for parties of accepting commodities that were purportedly deposited and/or taken possession thereof for the purpose of sale and realization of the

amounts due from defendant nos.1 to 4 under outstanding trades. It is categorically averred that defendant nos.1 to 4 have acted upon these outstanding trades received benefits thereunder and that defendant nos.1 to 4 are estopped from disputing the same and/or its liability thereunder. It is further averred that defendant nos.5 to 16 are directors and shareholders of defendant nos.1 to 4 respectively and were in-charge of and responsible for the affairs of defendant nos.1 to 4 and as such they are also liable to jointly and severally pay the amounts due from defendant nos.1 to 4 to the various counter party investors of the outstanding trades.

29. Further in para 9 of the plaint, the plaintiff have averred that facts as set out in the plaint clearly demonstrate lack of bonafides on the part of defendant nos.1 to 16 which includes (appellants). It is further averred that if immediate steps are not taken to secure the claim of the plaintiff, defendant nos.1 to 16 will take all forcible/possible steps to ensure that the same is defeated. The plaintiff have also stated that defendant nos.1 to 16 have already

disposed of/siphoned off/shifted the commodities located in warehouses/property and has committed a grave breach of trust and have willfully disputed its obligations towards the plaintiff and the exchange as well as various investors who have traded with defendant no.1. The plaintiff have also stated that on account of failure to maintain and/or pay outstanding amounts as required, the Economic Offences wing of the Mumbai police had arrested the then Director of defendant nos.1 to 4 Mr.Surendra Gupta on 5<sup>th</sup> May 2014 holding him responsible for the defaults committed on plaintiff's exchange by defendant nos.1 to 4. The plaintiff have further pleaded that the investigating authorities namely Economic Offences wing and Enforcement Directorate have stated in various newspapers articles that defendant nos.1 to 4 have siphoned off the aforesaid amounts as claimed by the plaintiffs in the suit and utilized the same towards buying real estate and towards producing movies. In this context, the plaintiff have stated that defendant nos.1 to 4 in connivance with defendant nos. 5 to 16 would deal with the assets in their control and possession and therefore, exhaust monies and/or

assets in such a manner to defeat the claim of plaintiff's exchange. It is stated that defendant nos. 5 to 16 as Directors/shareholders 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 enquiry of the Economic Offences wing clearly indicates that persons in charge of defendant nos.1 to 4 have utilized their monies for ulterior motives and/or are seeking to defeat and defraud the claim of the plaintiffs. This was borne out by the fact that the Economic Offences wing had arrested Mr.Surendra Gupta Managing Director of defendant no.1.

30.           Thereafter, in para 15 of the plaint, the plaintiff have averred that defendant nos.5 to 16 have clearly benefited from the defaults that have occurred on the exchange platform and that defendant nos. 5 to 16 as shareholders and directors of defendant nos.1 to 4 have benefited from the moneys deposited in the bank accounts of defendant nos.1 to 4. and that defendant nos.1 to 4 were in fact simply vehicles to perpetuate the illegalities which were conceived by defendant no.5 which illegality was for the sole benefit

of defendant nos. 5 to 15. Accordingly on this factual background, the plaintiffs have prayed for reliefs in prayer clauses (a) (c) (f) (h) (m) (n) (p) (r) and (s) against defendant nos.14 and 15/appellants.

31. From the reading of the plaint, thus it is borne out that although a contract was between the plaintiff and defendant no.1, defendant nos.2 to 4 had also a role to play in the transactions being related companies of defendant no.1. The defendant nos.2 to 4 are largely controlled by the same management. The defendant no.1 admittedly had executed various trades in commodities for itself and on behalf of its clients including defendant nos.2 to 4 on the plaintiff's exchange. At the relevant time defendant no.5 was the Director of defendant no.1 and also Managing Director of defendant no.4 of which defendant nos.14 and 15 were Directors. Admittedly, SGS which was an independent agency which was appointed to survey stocks on various warehouses/property including warehouses in control of defendant no.1 made a report that representatives of SGS were not allowed to enter the warehouses of defendant no.1.

Further, defendant no.1 had failed to make payments which had become due and payable for outstanding trades undertaken by defendant no.1 on the plaintiff's exchange. These trades were required to be settled during a specific settlement period and which was qua various buyers/sellers. Defendant no.1 did not store the required goods in warehouses. The plaintiffs have averred that defendant no.1 had disbursed the same thereby committing a fraud on the plaintiff to the extent of Rs.680 crores. It is the specific case of the plaintiff that these fraudulent acts were not singular acts on behalf of defendant no.1 but with active aid and participation of other defendants which includes the appellants. Further, it is specifically pleaded that defendant nos.5 to 16 being Directors and shareholders of defendant nos.1 to 4 were in-charge and responsible for affairs of defendant nos.1 to 4 and thus were liable jointly and/or severally to pay the amounts due from defendant nos.1 to 4 to the various counter parties investors under outstanding trades. The specific allegation is that defendant nos.1 to 16 had already disposed/siphoned/shifted off the commodities located in the

warehouses whereby committed a grave breach of trust and thereby willfully defaulted towards its obligations on the plaintiff's exchange. The plaintiff have further stated that this large scale defaults and fraud was also a subject matter of investigation of Economic Offences wing (EOW). Articles appeared in newspapers on this investigation of the EOW which further high-lighted that defendant nos.1 to 4 and their management namely defendant nos.5 to 16 were responsible for siphoning the amount outstanding to the plaintiff. The case of the plaintiff that these acts of defendants committing fraud on the plaintiff's exchange could not have occurred without the knowledge and active participation of the defendants.

32. The case of the plaintiff is also that the amounts siphoned by defendant nos.1 to 4 again by playing fraud on the plaintiff has been deposited in the bank account of the defendant nos.1 to 4 and defendant no.5 to 16 Directors and shareholders of defendant nos.1 to 4. It is the case of the plaintiff that in fact defendant nos.1 to 4 are simply vehicles to perpetuate illegalities

conceived at the hands of defendant nos.5 to 16. It is thus, the case of the plaintiff that defendant nos.1 to 4 along with defendant nos.5 to 16 are responsible for large-scale illegalities and thus defendant nos.14 and 15 become necessary parties to the suit. It is clearly the plaintiff's case that defendant nos. 5 to 16 (includes Appellants) have utilised the corporate structure and identity of defendant nos.1 to 4 for their own personal gains and are real beneficiaries of the defaults that have been committed on the Plaintiff's exchange platform.

33. We thus see much substance in the contention as urged on behalf of the plaintiff. The case of the plaintiff is clearly of illegalities on the part of defendant nos. 1 to 4 while trading on the plaintiff's interest as also of a fraud played on the plaintiff. The defendant no.1 is a company under the Companies Act. Defendant nos.2 and 3 are proprietary concerns and defendant no.4 is also a company under the Companies Act. When allegation of such mass illegalities, siphoning of moneys, fraud etc are made against defendant nos.1 and defendant no.4 obviously, it cannot be

overlooked that these legal persons are governed by the Board of Directors who are responsible for the management of its day-to-day affairs. It is not the case that the plaint is lacking averments, that there was a collusion between defendant nos.1 to 4 with other defendants i.e defendant nos. 14 and 15 who according to the plaintiffs were in-charge of and responsible for the affairs of the company. The plaintiffs have categorically averred that Directors of defendant nos.1 and 4 are the beneficiaries of the fraud, which is also stated to be revealed in the investigation of the EOW. This is the cause of action for the plaintiff to file the present suit against defendants/appellants. On a holistic reading of the plaint, we cannot persuade ourselves to hold that there is no cause of action against defendant nos. 14 and 15. We are therefore, not impressed with the submissions made on behalf of the appellants that this is a case where the plaint is required to be rejected by the Court for want of cause of action against defendant nos. 14 and 15 in exercising powers under order 7 Rule 11 of the CPC.

34. Now coming to the contention as urged on behalf of the appellants that there is a specific requirement under the provisions of Order 6 Rule 4 that the allegation of fraud, collusion was required to be specifically pleaded with all supporting material and the plaint lacks these averments and thus the plaint deserves to be rejected against the appellants in our view, is also misconceived for two reasons: firstly, for the reason that fraud which is played on the plaintiffs is by defendant nos.1 to 4. Defendant nos.1 to 4 admittedly are Corporate entities acting through Directors namely appellants and others. It is not in dispute that at the relevant time, defendant nos.14 and 15 were Directors of defendant no.4. An averment is made that in fact they were responsible for the day-to-day affairs of the management of defendant no.4. Further, there is an averment in the plaint that these directors are the beneficiaries of the illegalities and fraud which is perpetuated by defendant no.4 as also they are beneficiaries of the amounts which in fact are amounts entitled and liable to be paid to the plaintiff. We do not see as to how these averments are not sufficient to satisfy the requirement of Order 6

Rule 4 of the C.P.C. Secondly, such submissions on behalf of Defendant Nos.14 and 15 also cannot be accepted as these submissions overlook a holistic reading of the plaint. If a holistic reading of the plaint makes out a case of fraud, siphoning of funds and such an activity is undertaken by a corporate entity like the defendant no.4, then surely, it cannot be said that defendants and defendant nos.14 and 15 had no concern whatsoever for their lack of specific role and the plaint cannot be rejected for want of cause of action.

35. If we consider the statements as made in the plaint as a whole which we have noted above, it certainly demonstrates a case of fraud of a large magnitude. The defendant nos. 14 and 15 would not be correct in contending that the plaintiffs have not pleaded a case of fraud, collusion in siphoning of the amount which may fasten the liability on the defendants.

36. In the view which we have taken and more particularly

taking into consideration the case of the Plaintiff as is made out in the plaint, we are of the clear opinion that the decision in the case of **“Bishnudeo Narain & Anr. Vs. Seogeni Rai & Ors.”** (supra) which arose out of a partition dispute, would not be of any assistance to Defendant Nos.14 and 15. In any event in paragraph 27 of the decision, it is clearly observed that as regards the allegations of coercion it was grounded on single allegation that the father was threatened with death, and in the facts and circumstances of the case, the Court of opinion that sans particulars such singular allegations would not be of any assistance to the plaintiffs. The facts in the present case can in no manner be comparable for application of this decision. So also in the decision in the case of **“Liverpool & London S.P.&1 Vs. M.V. Sea Success Land & Anr.”** (supra) would also not assist the Defendant Nos.14 and 15 in support of their contention that a Director cannot be held vicariously liable for the acts committed by Defendant No.4 unless these acts are categorically and specifically attributed to such Director. This decision would not be applicable in the facts of the present case inasmuch as the case in

hand, however, is of completely different complexion. The magnitude and the complexities of the transactions are also of peculiar nature. The interest of the Plaintiff in this case certainly includes interest of large number of traders/and several other connected persons who are directly or and/or indirectly related and concerned with these transactions. Thus, the plaintiff's interest also bears a interest of large number of investors who have entered into bonafide transactions and which transactions failed on account joint and several acts on the part of the Defendants as contented in the plaint.

37. As regards the contention as raised on behalf of the defendant nos.14 and 15 that they are nominee Directors and therefore, they cannot be held liable for any contractual defaults on the part of the company, we see no merit in this contention. The learned single Judge has rightly observed that such a contention can never be a ground for rejecting the plaint and/or striking name of the defendant nos.14 and 15 as it can never be an absolute proposition that there can never be any action whatsoever against nominee Directors or even if Directors have played a fraud. The averments in the plaint in that regard cannot be overlooked which

are of collusion/siphoning of moneys and fraud and the defendant's directors being the beneficiaries of these moneys which were liable to be paid to the plaintiffs. Reliance on behalf of the appellants on the decision of the Delhi High Court in the case of “***Omprakash Khetan vs. Shree Keshaviya Investment Ltd., (1978 Vol.48 Company Cases 85)***”, therefore, is completely misconceived as it was not a case under Order 7 Rule 11 of the C.P.C., but it was a case under section 633 of the Companies Act which requires factual inquiry in the conduct of the Directors so as to ascertain whether the Directors have acted honestly and reasonably. This requirement under the Companies Act is quite different from the scope of the inquiry under Order 7 Rule 11 or Order 1 Rule 4 of the C.P.C. The learned single Judge has rightly rejected the contention of the appellants.

38. On behalf of defendant no.15, there is an additional issue which is urged namely that defendant no.15 is entitled to immunity by virtue of the provisions of Section 3 of the International

Finance Corporation (Status, Immunities, Privileges) Act, 1958, in respect of the acts performed in official capacity. It is thus contended that the plaint is barred under the provisions of this Act. Even on this count, we find that the contention has no merit. The learned Single Judge has rightly observed that the defendant no.15 cannot seek immunity when there is an allegation of collusion and fraud and that defendant no.15 becomes beneficiary. The learned Judge has appropriately observed that the fraudulent actions can never be stated to be committed in an official capacity and thus, no question of immunity can arise on account of provisions of the said Act and such issue can be decided at the trial stage. The learned Judge is justified in observing and in the facts of the case that such a plea on the part of Defendant No.15 is too far fetched. IN this context learned Counsel on behalf of Plaintiff/Respondent No.1 is justified in placing reliance on the decision of the learned Single Judge of this Court in “*Ms.Eva Drdakova Vs. M/s.Khemka Exports Pvt.Ltd.*” that such a question cannot be gone into at this stage under Order 7 Rule 11 of C.P.C. and is required to be decided on a trial. This would be

the correct position as, in our opinion, for the reason that such an issue would be a mix question of law and fact and cannot constitute an express or implied bar on the jurisdiction of the Civil Court. A learned Single Judge of this Court in the case of “***Goa Industrial Development Corporation Vs. Sadhana Builders Pvt.Ltd, (2014)5 BCR 135***” in adverting to the principles of law laid down in “***Popat and Kotecha Property Vs. State Bank of India Staff Association, (2005)7 SCC 510***” has observed that the immunity cannot be claimed when there is a pleading of fraud and collusion, and that while deciding an application under Order 7 Rule 11 the Court cannot decide the disputed question of fact and law and, thus, even a plea of such immunity would become a mix question of law and fact would be decided at the trial of the suit.

39. In our view, this is a case where the facts speaks for themselves as seen from the averments in the plaint which indicate that it is not only the contract entered by the Plaintiff with Defendant No.1 which has given rise to the cause of action for the suit but

something which is beyond the contract and involving actions of Defendant Nos.2 to 16 which are all interconnected. The plaintiff pleads of a large scale and well thought-out design to cause losses to the Plaintiffs in the extensive manner as set out in the plaint. Further, the distinctive feature is that this money which is being claimed by the Plaintiff is the money which are the claims and entitlement of the other members on the exchange for whose benefit the transactions came to be entered at the Plaintiffs' exchange. The plaintiff owed an obligation to these members and their legitimate entitlement to have the goods traded on the plaintiff's exchange which except for the breach of the obligation and by a systematic mechanism of a fraud as practiced on behalf of the defendant and pleaded by the plaintiff could not be discharged. The Plaintiff was the trustee of the monies of the buyers and sellers at the exchange. It is in this context the plaint is required to be seen and held on its averments qua the reliefs claimed and the evidence led by the Plaintiff to seek such relief. If this be the case, then, we are of the opinion that the averments made in the plaint make out sufficient

requirements of Order 6 Rule 4 of the C.P.C. In “***Thakur Gajendra Shah and another Vs. Thakur Shankar Bux Singh and another, (AIR 1935 Oudh 16)***”, their Lordships of the Division Bench had observed that where the transactions speak for themselves and furnish internal proof of a well thought-out design, the omission to set forth particulars of conspiracy by which fraud is committed does not contravene provisions of Order 6 Rule 4 of C.P.C.

40. We may also usefully make a reference to the observations in the case of “***Bishunath Tewari and others Vs. Mst.Mirchi, (AIR 1955 Patna 66)***” wherein in a majority judgment of the learned Chief Justice it is observed as under:-

“8..... It has been pointed out on more occasions than one that pleadings in India are not to be strictly and literally construed. In “Gopi Narain Khanna Vs. Babu Bansidhar, 32 Ind App 123 at page 132(PC) (A), their Lordships of the Judicial Committee pointed out that if the plaint contains a statement of all the material circumstances constituting fraud, but the prayer is inartistically framed, the Court can give appropriate relief if the Plaintiff is otherwise entitled

to it. I am, therefore, inclined to the view that the Court of Appeal below was not right in its remarks that the Plaintiff had not alleged fraud in the plaint.”

41. Thus, the approach of the Appellants/defendants in reading of the plaint, in our view, is not correct. As the pleadings are not to be strictly interpreted in the manner in which the each and every allegations is brought out in the plaint, what is necessary is to plead all material and relevant facts on which the case of the Plaintiff would stand. Also in **Ramswaroop Gupta Vs. Bishun Narayan & Anr., AIR 1987 SC 1242**” (Read) their Lordships have observed that the pleadings should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. It is held that whenever the question about lack of pleadings is raised, the enquiry should not be so much about the form of the pleadings but the endeavour of the Court should be to ascertain the substance of the pleadings. In ascertaining whether the plaint shows cause of action, the Court is not required to elaborate the inquiry in the doubtful or complicated question of law and fact. The endeavour of the Court would be to ascertain whether on the allegations a cause of action is shown and so long as the plaint

discloses the same cause of action, and so raises a question, fit to be decided by a Judge. Order 7 Rule 11(a) of C.P.C. though would confer a power on the Court to reject a plaint on failure on the part of the Plaintiff to disclose a cause of action, but such power should not be exercised when averments made in the plaint and the documents upon which the reliance has been placed would disclose a cause of action.

42. As regards the contention as urged on behalf of defendant nos.14 and 15 that there is no cause of action against Defendant Nos.14 and 15, inasmuch as this suit is based on a contract between the plaintiff and Defendant Nos.1 and that the relief which is being sought against Defendant Nos.14 and 15 is on tort and that such a relief cannot be claimed against Defendant Nos.14 and 15 in a suit on the basis of a contract. This submission on behalf of the Appellants is not well founded. In our view, the suit is properly framed and there is no mis-joinder of causes of action. On a careful reading of the plaint what we may note that the suit

clearly falls within the provisions of Order 1 Rule 3 of C.P.C. as the reliefs arise out of a case of a breach of the contract as against Defendant No.1 and in tort against the other defendants which right to relief was available to the plaintiffs. Order 1 Rule 3 is not confined to joinder of parties above but would also encompass joinder of causes of action. A conjoint reading of Order 1 Rule 3 and Order 2 Rule 3 of C.P.C. would indicate that it is permissible to join different causes of action against the different defendants in one suit. A holistic reading of the plaint in the present case indicate that the plaintiff has sought reliefs against the defendants which arise out of the transaction which would involve not only Defendant Nos.1 to 4 but also the other defendants which includes Defendant Nos.14 and 15 and accordingly, they can be joined, jointly and/or severally in the alternative in one and the same suit. The requirement of Order 1 Rule 3, therefore, would stand satisfied read with the provisions of Order 2 Rule 3 which would permit joinder of causes of action. It was, therefore, permissible for Plaintiffs to join causes of action on the plea of breach of contract which is against Defendant No.1 In

taking this view, we are also supported by the decision of the Division Bench of Calcutta High Court in the case “**Shew Narayan Singh Vs. Brahmanand Singh & Ors., (AIR 1950 Calcutta 479)**” in which their Lordships have observed thus:-

18. *The last argument on behalf of the petitioner may be stated thus. The cause of action against the original defendant is based on contract while the cause of action against the other defendants is based on tort. Causes of action so differently based cannot be joined. I am not prepared to accept this view. There is nothing in the provisions of the Code of Civil Procedure which supports it. As pointed out above the Code permits a joinder of different causes of action against different defendants. The fact that so far as the different defendants are concerned, their liability arises out of their different legal relationships with the plaintiff would not, in my opinion, bar this suit and drive the plaintiff to institute separate suits. Order 1 R.3 and O.2 R.4 are directed towards avoiding multiplicity of litigation. What would be the result of giving effect to the view propounded / The plaintiff would first have to institute a suit, against defendant 1 alone and establish a breach of contract. If he succeeded in so doing, he would then have to institute another suit against defendant 1 and the added defendants and again establish, first, the breach of the contract because the other defendants not being parties to first suit would not be bound by any decision arrived at therein; he would also have to establish conspiracy. It may be that in the second suit the added defendants may succeed in showing that there was no breach of contract. This would lead to*

*conflicting decision on the same issue. It is to avoid such anomalies and inconsistencies that the Code has provided that one suit is permissible. It is true that the claim against defendant 1 is based on the breach of a contractual right while the claim against the other defendants is based on the breach of a common law right, but the right to relief is available in respect of both sets of defendants because the contractual right has been infringed. If it had not been infringed no question of tort would arise. In such a case one suit against all is in my opinion permissible. This view has been taken by a Special Bench of the High Court at Rangoon in the case of P.B.Boss V.M.B.N.Chettyar Fir, AIR (25) 1938 Rang 185 at p.188: (1938 Rang LJ 303 S.B.) Dankley,J. Observes :*

*“The learned Judge appears to have thought that there was a mis-joinder of defendants in the original suit, and that a decree based on a breach of contract against one defendant and a decree of damages in tort against another defendant cannot be made in the same suit. With the greatest respect, this is a misconception of the law. There was no mis-joinder of defendants in this case; the provisions of O.1 R.3, Civil P.C., cover the joinder of the three defendants in the suit in the Township Court. There is no reason why a decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant should not be passed in the same action; in R.T.Grant V. Australian Knitting Mills Ltd., (1936)AC 85 : (AIR (23)1936 PC 34) the Privy Council made a decree against the retailer of the underwear for breach of contract and against the manufacturer of the underwear in tort.”*

*The Privy Council decision is R.T.Grant V. Australian Knitting Mills Ltd., and it is also reported in AIR (23) 1936 PC 34. The*

*Privy Council upheld a decision of the Australian Court awarding damages in the same suit against a retailer for breach of contract and against the manufacturer for the negligence of tort. I would refer to p.39 of the report where the Lordship said:*

*“The liability of each respondent depends on a different cause of action though it is for the same damage. It is not claimed that the appellant should recover his damage twice over.”*

*The claim against both retailer and manufacturer was upheld. This principle would apply to the present case.*

19. I would also refer to the case of *Frankenburg V. Great Horseless Carriage Co. (1900)1 QB 504 at p.509: (69 LJ QB 147)* where the Court of Appeal refused to give effect to a similar technical objection. They said:

*“In substance the shareholder had one grievance. Call its cause of action or what you like, and in substance he has one complaint and all the persons he sues have, according to him been guilty of conduct which gives him a right to relief in respect of that one thing which they have done, namely, the issuing of a prospectus.”*

*The position here is the same. The plaintiff has one grievance viz. That the contract has been broken and he alleges that all the defendants have joined or conspired together in causing this breach. I can see no reason why one suit against all should not be allowed.”*

43. Further in this context on behalf of the Appellants the reliance on the decision in *Rajkot Municipal Corporation vs. Manjulaben Jayantilal Nakum & Ors (1997) 9 SCC 552,* would

not assist Defendant Nos.14 and 15. In this case the Respondent Manjulaben had filed a Suit, claiming damages against the Municipal Corporation on the ground that the Municipal Corporation had failed in its statutory duty to check the healthy condition of trees, as her husband had died by falling of a tree which, according to Manjulaben was not maintained in a healthy condition by the Municipal Corporation. It was her claim that the statutory duty of the corporation gave rise to a tortious liability. In this context, the Suit filed by Manjulaben was decreed by the trial Court for a sum of Rs.45,000/-. The decree was confirmed by the Division Bench in appeal. In this context, the Supreme Court in paragraph 10 of this decision made observations that tort and contract are distinguishable. It was observed that in tort, liability is primarily fixed by law while in contract further observed that if the claim depends upon proof of the contract, action does not lie in tort and if the claim arises, from the relationship between the parties, independent of the contract, an action would lie in tort at the election of the Plaintiff although he might alternatively have pleaded

in contract. In our opinion, this decision would certainly not avail to the benefit of the Appellant as these observations of the Supreme Court itself make it clear that even if a claim between the parties arises independent of a contract still an action would lie in tort at the election of the Plaintiff. In the present case, the Plaintiff's suit against Defendant no.1 may be on contract nonetheless, the Plaintiff could very well maintained his suit against the Appellant/Defendant nos. 14 and 15 diverse the contractual relations between the parties.

44. This takes us to the other issue as urged on behalf of Defendant Nos.14 and 15 that they do not become personally responsible for the acts of the Company. In this regard reliance is placed on behalf of Defendant Nos.14 and 15 on the decision of the learned Single Judge of Delhi High Court in the case “*Tristar Consultants vs Customer Services India Pvt.Ltd. & Anr., 2007 Delhi 157*”. There cannot be a dispute on the proposition as contained in paragraph 19 to 23 of the decision that individual Director would have no power to act on behalf of the company of

which he is a Director unless so authorised. In the legal position as a Company stands, the Directors of the Company would have no fiduciary or contractual duty towards a third party who deals with the company. However, as observed by us above, the present case is not a case which merely rests on the contractual terms but according to the plaintiffs, it is a collusion fraud and the defendants becoming beneficiaries of such acts. It is for these reasons, the normal role of a Director in the normal course, as canvassed on behalf of the defendant nos.14 and 15/Appellant would not become applicable in the facts of the present case. In considering such pleas, the facts and circumstances as borne out in the pleadings in each case are required to be considered so as to determine as to whether any cause of action is made out or otherwise before exercising power as conferred under Order 7 Rule 11(a) of C.P.C.

45. The Appellants reliance on the decision of the Supreme Court in the case of *S.M.S.Pharmaceuticals Ltd vs Neeta Bhalla & anr*)<sup>17</sup> is in support of their submission that merely because the

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<sup>17</sup> (2005) 8 SCC 89

Appellants were Directors of Defendant no.4 Company, there cannot be any monetary liability on the Directors and the liability would be of the company. The Supreme court observed that there is no universal rule that a Director of a company would be in-charge of its day-to-day affairs. However, the Supreme Court at the same time observed that as to what was the role of the Director of a Company is a question of fact depending on the peculiar facts in each case. This decision arose out of the proceedings initiated under sections 141, 138 of the Negotiable Instruments Act, 1881 and in that context, the Supreme Court had made these observations that to fasten a criminal liability a specific case should be spelt out in the complaint against the person who has sought to be made liable. Parameters of the pleadings in a criminal complaint case cannot be made applicable to the facts of the present case where the issue is under Order 7 Rule 11(a) and Order 1 Rule 10(2) of the Code of Civil Procedure.

46. In the case of *Mukesh Hans* (supra) the learned Single Judge of the Delhi High Court was considering a case arising out of

the decision of the trial Court decreeing a summary Suit against the Directors of a company incorporated under the Companies Act. The Company had failed to redeem the convertible debentures issued to the plaintiffs. The decision to issue these debentures was of the Board of Directors of the Company through whom the Company was acting. In these circumstances, the Court held that the directors cannot be held to be responsible when there was no assertion in the plaint that the Directors had undertaken to make payment to the plaintiffs of the loan amount on behalf of the company. There was no case made out for piercing of the corporate veil. Further if fraud was to be made the basis of the decree when the plaint did not have sufficient particulars in that regard. These being the facts this decision would not be applicable as in the present case there are allegations of fraud and connivance. The facts are peculiar as seen from the plaint. The Court cannot in applying the principles under Order 7 Rule 11(a) and Order 6 Rule 4, be unmindful of the enormity and the complexity of the cause as reflected in the plaint. This would not permit defendant nos.14 and 15 to justify their case

under Order 7 Rule 11 to rely on this decision of the learned Single Judge of the Delhi High Court.

47. In this context, the reliance on behalf of the learned Counsel for the Plaintiff on the decision of the learned Single Judge of the Delhi High Court in the case of “***Deepak Ansal Vs. Ansal Properties and Industries Ltd. & Anr.***” (supra) and also the decision of the learned Single Judge of this Court in “***Clarinda D'Souza Vs. Mccann Erickson India Ltd.***” (supra) is well founded inasmuch as the Court would be required to consider all the averments in the plaint in relation to the reliefs as prayed for in the suit. In the present case as we have noted above there are sufficient averments for us to conclude that interference under the powers of the Court under Order 7 Rule 11(a) read with Order 1 Rule 10(2) is not warranted at this stage.

48. In view of our above observations, the reliance in the decision of “***Church of Christ Charitable Trust and Educational***

***Charitable Society Vs. Ponnoamman Educational Trust, (2012)8 SCC 706***” would also not assist the Appellants. We are in complete agreement with the contentions as urged on behalf of the Plaintiff/Respondent No.1 that the plaintiff has made out a cause of action against defendants Nos.14 and 15. The reliance on the part of the Plaintiff on the decision of the Supreme Court in the case “***Sopan vs Assistant Charity Commissioner***” (supra) in support of the proposition that the intention of the party concerned is to be gathered primarily from its tenor and terms of the pleadings taken as a whole and no pedantic approach should be adopted to defeat justice on hair-splitting technicalities, is well founded.

49. We may thus observe that the plaint in the present case contains a statement of all the material circumstances constituting fraud. It is trite law that an application under Order 7 Rule 11 read with Order 1 Rule 10 (2) can be moved at any stage of the suit. We are not persuaded to form an opinion at this stage that the averments made in the plaint are thus not sufficient for the purpose

of seeking relief as claimed in the suit against Defendant nos.14 and 15. It also cannot be overlooked that some facts are within the special knowledge of these defendants. These facts cannot be expected to be pleaded by the Plaintiffs.

50. In the light of the above discussion, we are of the clear view that these appeals lack merit. The Appeals are accordingly, rejected. No order as to costs.

51. As the appeals are dismissed, Notice of motion no.73 of 2016 and Notice of motion (L) No.3695 of 2015 taken out by the appellants in these appeals do not survive and are accordingly disposed of.

**(G.S.KULKARNI, J.)**

**(NARESH H. PATIL, J.)**