

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Decision: 31th January, 2017

1. CRL.M.C. 3462/2014 and Crl.M.A.No.11961/2014

KIRTI PREMRAAJ JAIN

..... Petitioner

Through: Ms.Geeta Luthra, Sr. Advocate with
Mr.Jivesh Tiwari and Mr.Prateek
Yadav, Mrs.Hurainn S. Dholkawalla
and Mr.Virender Singh Hooda,
Advocates.

versus

MOSER BAER CLEAN ENERGY LTD. & ANR.

..... Respondents

Through: Mr.Vikas Pahwa, Sr. Advocate with
Mr.Vineet Arora and Mr.Aditya
Dogra, Mr.Kinnori Ghosh Advocates
for R1.

2. CRL.M.C. 3465/2014 and Crl.M.A.No.11971/2014

KIRTI PREMRAAJ JAIN

..... Petitioner

Through: Ms.Geeta Luthra, Sr. Advocate with
Mr.Jivesh Tiwari and Mr.Prateek
Yadav, Mrs.Hurainn S. Dholkawalla
and Mr.Virender Singh Hooda,
Advocates.

versus

MOSER BAER CLEAN ENERGY LTD. & ANR.

..... Respondents

Through: Ms. Sima Gulati and
Mr.S.P.Mukherjee, Advocates for R1.

3. CRL.M.C. 3569/2014 and Crl.M.A.No.12286/2014

KIRTI PREMRAAJ JAIN & ANR.

..... Petitioners

Through: Ms.Geeta Luthra, Sr. Advocate with
Mr.Jivesh Tiwari and Mr.Prateek
Yadav, Mrs.Hurainn S. Dholkawalla
and Mr.Virender Singh Hooda,
Advocates.

versus

MOSER BAER CLEAN ENERGY LTD. & ANR.

..... Respondents

Through: Ms. Sima Gulati and
Mr.S.P.Mukherjee, Advocates for R1.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

I.S. MEHTA, J.

1. Instant petitions are arising out of the summoning orders dated 10.04.2013 and its subsequent notices dated 05.04.2014 passed in:

- i. C.C. No. 550/1
- ii. C.C. No. 561/1
- iii. C.C. No. 486/13

and the petitioners aggrieved from the aforesaid summoning orders and notices preferred the present petitions under Section 482 Cr.P.C. read with Article 227 of the Constitution of India for quashing and setting aside the aforesaid issuance of summons and notices.

2. The brief facts stated are that the respondent/complainant company, i.e., Moser Baer Clean Energy Ltd., filed three complaints, i.e., (i) C.C. No. 550/1, (ii) C.C. No. 561/1 and (iii) C.C. No. 486/13, qua against the petitioners under Section 200 Cr.P.C. before the Court of learned ACMM, Saket District Courts, New Delhi for the offence committed under Sections 138/141/142 of the Negotiable Instruments Act, 1881 on dishonouring of the three cheques, i.e., (i) cheque no.069316 of Rs. 2,00,00,000/-, (ii) cheque no. 069318 of Rs. 1,00,00,000 and (iii) cheque no. 091922 of Rs. 2,00,00,000, drawn on Corporation Bank, Alkapuri Branch, Vadodara.
3. The petitioner(s) entered into two Memorandum of Understandings (MoUs) dated 02.05.2011 and 28.06.2011 with the respondent/complainant company as Land Arranger and subsequently a Minutes of Meeting (MoM) dated 17.12.2011 was signed between the parties.
4. The first MoU was executed on 02.05.2011 for the purchase of 550 acres of land and the second MoU was

executed on 28.06.2011 for the purchase of 300 acres of land between the parties. In consequence of the representation made by the petitioners the respondent/complainant company paid to the petitioners a total amount of Rs. 7,30,00,000/- as advances which were repayable if not adjusted from the deed amount proportionally.

5. The petitioner Mr. Kriti Premraaj Jain in his individual capacity being the guarantor for securing the advances paid to them by the respondent/complainant company, issued two undated cheques in favour of the respondent/complainant company, i.e., cheque no.069316 of Rs. 2,00,00,000/- and cheque no. 069318 of Rs. 1,00,00,000/- drawn on Corporation Bank, Alkapuri Branch, Vadodara in terms of MoU dated 02.05.2011 and further issued one cheque bearing cheque no. 091922 of Rs. 2,00,00,000/- drawn on Corporation Bank, Alkapuri Branch, Vadodara in favour of the respondent/complainant company in terms of the second MoU dated 28.06.2011.

6. Thereafter, when the petitioners failed to discharge their obligations for obtaining bonafide industrial use permission/Non Agricultural (NA) use permission as per the applicable provisions under law in terms of the MoUs dated 02.05.2011 and 28.06.2011, the respondent/complainant company started taking action against the petitioners, resultantly, a Minutes of Meeting (MoM) dated 17.12.2011 was signed between the parties and the said three cheques which

were issued by the petitioner(s) were presented for its encashment on 15th February, 2013 but the cheques were returned dishonoured vide dishonour memo dated 16.02.2013 with the remarks "Insufficient Funds" in cheque no. 069316 of Rs. 2,00,00,000/- and "Payment stopped by the drawer" in cheque no. 069318 of Rs. 1,00,00,000/- and cheque no. 091922 of Rs. 2,00,00,000/-.

7. Consequently, the respondent/complainant company issued legal demand notices dated 26.02.2013 which was duly served upon the petitioner(s). The petitioner(s) replied to the said legal demand notice on 12.03.2013. However, when the petitioner(s) failed to make the payment despite expiry of 15 days notice period, the respondent/complainant company was constrained to file three separate complaints under Section 138 read with Section 141 and Section 142 of the NI Act in the Court of Additional Chief Metropolitan Magistrate, Saket District Court, New Delhi.

8. It is pertinent to mention here that vide orders dated 10.04.2013 the learned MM took cognizance of the offence punishable under Section 138 of NI Act against Mr. Kriti Premraaj Jain (petitioner in Crl.M.C. No.3462/2014, Crl.M.C. No.3465/2014 and petitioner No.1 in Crl.M.C. No.3569/2014) but dismissed the complaints against M/s Pyramid Spaces Pvt. Ltd. (petitioner No.2 in Crl.M.C. No.3569/2014) on the ground that the cheques does not bear company stamp and it seems that

the cheques were issued from individual account of the petitioner, i.e., Mr. Kriti Premraaj Jain.

9. Thereafter, vide orders dated 05.04.2014, the learned Metropolitan Magistrates framed notice under Section 251 Cr.P.C. for the offence punishable under Section 138 of the NI Act in CC No. 561/1, CC No. 550/1 and CC No. 486/13 qua against the petitioner, i.e., Mr. Kriti Premraaj Jain.

Hence, the present petitions.

10. The learned senior counsel for the petitioner(s) has submitted that cheques in dispute are admitted to be issued as security against the advance, which is admitted in the complaints itself.
11. The learned senior counsel for the petitioner has further submitted that in the instant case the land has already been purchased and has already been used so the application of Section 138 N.I. Act will not attract as the purpose for which the money was advanced, the same has been utilized. The learned senior counsel has further submitted that liability will only reckon on the date the cheques were issued. If there is no liability on the date of issuance of the cheques, Section 138 of N.I. Act will not attract.
12. The learned senior counsel for the petitioner has further submitted that in the instant case there is no admitted amount or there is not admitted outstanding amount due and the legal notice too does not say so therefore, *ipso facto* it is crystal clear that the cheques issued were for the purpose of security as

admitted by the respondent/complainant and on the date of the issuance of the cheques there was no legally enforceable debt qua against the petitioner(s), as the petitioner(s) as per the MoUs have already invested the amount to purchase the land and if at all there is anything, it will be the violation of the MoUs and not the provision of the Section 138 of N.I. Act.

13. The learned senior counsel for the petitioners has further submitted that the 76 sale deeds which were executed pertaining to 500 acres of land worth more than Rs. 42 Crores about which the complaints are completely silent and shows that the respondent/complainant has not come to the Court with clean hands as it did not disclose about the execution of the sale deeds in the complaints. The same is admitted in the written arguments/reply dated 06.01.2015 filed before this Court. It is in the said reply that there is an admission about the notice dated 24.04.2012. It is also not denied in the reply that the cheques were presented subsequent to the receipt of summons in the civil case filed by the petitioner company.

14. The learned senior counsel has further pointed out that the two MoUs were later on superseded, altered by a MoM dated 17.12.2011, wherein it was agreed between the parties that the amount lying with petitioner no.2 would be adjusted subject to account reconciliation and in view of that it was mutually agreed with the petitioner that advance will be subject to remittance as per clause 4 of the aforesaid MoM.

15. The learned senior counsel has further submitted that in the nutshell what was agreed between the parties was that there has to be reconciliation of the account which is the *sine qua non* before prosecuting under Section 138 read with 141 of NI Act and the cheques issued were for the purposes of security and which were already in the possession of the respondent/complainant and they without making any efforts for reconciliation of accounts, filed the complaints by which the summoning orders were issued, which are liable to be set aside and further submitted that the reconciliation between the parties is still pending.
16. The learned senior counsel has further submitted that the present petitioner had filed a civil suit on 30th January, 2013 as case No. 51/2013 which is pending in the Civil Court of Vadodara, Gujrat and the Court at Vadodara has also issued summons in the said civil suit against the respondent/complainant.
17. The learned senior counsel for the petitioners has further submitted that before filing of the civil suit the petitioner (Mr. Kirti Premraaj Jain) had also issued Notice to his banker for making “Stop payment” of the three undated cheques, which was duly been received. The said bank communication was informed to the respondent/complainant and the same is admitted in their reply.
18. The learned senior counsel has further submitted that without reconciliation of accounts, just as a counter blast to the

Civil Suit, the respondent/complainant filed the complaints which are not maintainable for want of criminal law into motion which are liable to be rejected *in toto* and requires interference by this Court by quashing/setting aside the said impugned orders as the dispute is of civil nature.

19. The learned senior counsel further submitted that neither Demand Notice based on MoM dated 17.12.2011 nor reconciliation was issued to the petitioner by the respondent/complainant. It is further pointed out that it is evident on record that no Demand Notice after reconciliation as required by MoM dated 17.12.2011 was served upon the petitioner.
20. The learned senior counsel for the petitioner has pointed out that once the petitioner had made “Stop payment” pertaining to said three cheques, and had informed the respondent/complainant who suppressed this fact in the complaints but the same is borne out in the reply of the petitioner dated 12.03.2013. As the complaints and the reply filed on 05.01.2015 in this Court is beyond the provision of Section 20 of N.I. Act.
21. The learned senior counsel for the petitioners has further submitted that to this extent the petitioner has already issued notice to the respondent/complainant which is on record dated 24.04.2012 addressed to Moser Bear Clean Energy Ltd. & Anr.
22. The learned senior counsel for the petitioners has further submitted that no response of the said notice dated 24.04.2012

was received by the present petitioner. She also submits that instead of returning the said cheques as mentioned in the notice dated 24.04.2012, the respondent/complainant company inserted date on the said cheques and presented the same before the drawee Bank on 15.02.2013, i.e., after 10-11 months of issuance of notice dated 24.04.2012. The said notice dated 24.04.2012 has been admitted by the respondent/complainant company in the reply.

23. The learned senior counsel for the petitioners has further submitted that at the time of stopping the payment, there were sufficient amount lying in the bank to non-attract the criminal liability and the learned senior counsel for the petitioners has further submitted that the complaints are nothing but the abuse of process of law.
24. The learned senior counsel on behalf of the petitioner(s) has submitted that reply to the demand notice issued is not in dispute wherein reference of notice dated 24.04.2012 is also mentioned which means it was in the knowledge of the respondent/complainant company and has deliberately filed the false complaints.
25. The learned senior counsel for the petitioners has further submitted that according to the complaints at para-T the respondent/complainant has stated that they had deposited the cheques because the cheques were non-CTS 2010 complaint cheques/instruments and as per RBI circular, which had come subsequently, the validity of non- CTS 2010 compliant cheque

was to expire initially on 31.12.2012 which was extended till 31.03.2013 as the cheques of the petitioner were old and non-CTS compliant cheques/instruments, the case of the respondent/complainant is that because they were not replaced by the petitioner, hence the respondent/complainant presented those cheques.

26. The learned senior counsel for the petitioners has further submitted that all the three cheques were presented for encashment and the respondent/complainant has filed three complaints under Section 138 of the NI Act in different courts and all the Courts have acted differently. Two complaints were filed in the Court of Shri Dheeraj Mittal, Metropolitan Magistrate and one complaint was filed in the Court of Ms. Nyan Bindu, Metropolitan Magistrate having same cause of action and arising from the same facts which would suggest that the summoning orders suffers from non- application of mind by the Court. Further, the Court of learned Metropolitan Magistrate Mr. Dheeraj Mittal did not issue any notice to petitioner No.2, i.e., the company by holding that the cheque does not bear the stamp of the company M/s Pyramid Spaces Pvt. Ltd. and seems to have been issued by the petitioner No.1, i.e., Mr. Kirti Premraaj Jain, in his individual capacity. This aspect has not been challenged by the respondent/complainant company.

27. The learned senior counsel has further submitted that the respondent/complainant tampered the cheques by putting the

dates on it and made material alteration without the consent of the petitioner/drawer.

28. The learned senior counsel for the petitioner has further submitted that the plea of quashing is only on the basis of admitted facts between the parties and hence trial is not required for quashing the present complaints.

29. The learned senior counsel for the petitioner has relied upon the judgment of *M/s. Indus Airways Pvt. Ltd. & Others v. Magnum Aviation Pvt. Ltd. and Another*, (2014) 12 SCC 539 and has submitted that in view of the abovementioned judgment, the complaints under Section 138 of the N.I. Act does not lie and its subsequent summoning orders are liable to be set aside.

30. The learned senior counsel for the petitioner has further relied upon the cases of *R. Sreenivasan v. State of Kerala and Another*, (2002) 3 Company Cas 740 and *Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited*, AIR 2016 SC 4363.

31. On the contrary, the learned senior counsel on behalf of the respondent/complainant has submitted that the petitioner has admitted the issuance of these three cheques and the same belongs to them and they have been issued in favour of the respondent/complainant company. The issuance of cheques to the respondent/complainant company has never been challenged till date so having stamp of the petitioner company makes no difference as the same has been admitted by the petitioner

which was issued in terms of the MoUs dated 02.05.2011 and 28.6.2011. Since the cheques in question were issued in favour of the respondent/complainant company there is presumption under Section 118 (a) and Section 139 of the N.I. Act which provides that once the cheque is admitted to be issued it will be presumed that it is issued for consideration and the same has been received for the discharge in whole or in part of any debt or any other liability. This presumption has to be rebutted by the petitioner(s) in the trial and all the grounds which are raised by the petitioner(s) in the present petitions are disputed question of facts which cannot be decided by this Court in the inherent jurisdiction under Section 482 Cr.P.C.

32. The learned senior counsel on behalf of the respondent has further submitted that the present petitions are filed under Section 482 Cr.P.C. and under this Section only those documents could be relied upon which are the basis of the claim/counter claim but so far the adjudication part is concerned, the same is to be dealt with by the trial Court where admission, non-admission and admissibility and its value is to be determined and these determination cannot be gone into under Section 482 Cr.P.C. before this Court.

33. The learned senior counsel on behalf of the respondent has submitted that the evidence of complainant has already been concluded in the trial court, however, the plea taken by the petitioner is false but certainly the plea which is being taken is nothing just to improve its case which is hit by act and conduct

of the petitioner company. He further submits that the issue of existing legal enforceability is to be dealt by the trial Court and not by this Court under Section 482 Cr.P.C. He further submits that the petitioner while filing a petition under Section 482 Cr.P.C. has to admit the facts narrated in the complaint and demonstrate that even after admitting the fact no offence under Section 138 N.I. Act is made out. Only in those circumstances a petition under Section 482 Cr.P.C. can be entertained and dispose of and the power under Section 482 Cr.P.C. should be used sparingly and only in the rarest of rare cases.

34. The learned senior counsel on behalf of the respondent further submitted that the issue pertaining to security cheque, guarantor cheque and the cheques which are dishonoured due to 'stop payment' have already been dealt by the Hon'ble Supreme Court in plethora of cases wherein the Hon'ble Supreme Court has held that the cheques which are issued as security cheques or as guarantor cheque or the issue of stop payment are all covered under the N.I. Act and these all are question of fact, which need to be decided before the Trial Court.

35. The learned senior counsel on behalf of the respondent has placed reliance on the following judgments:-

On security and guarantor cheques: ***ICDS Ltd. v. Beema Shabeer & Another, AIR 2002 SC 3014; Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Ltd., AIR 2016 SC 4363; HMT Watches Ltd. v. MA Abida & Others, 2015 (2) ACR 1682; Credential Leasing &***

Credits Ltd. v. Shruti Investments & Others, 2015 (151) DRJ 147; Suresh Chand Goyal v. Amit Singhal 2015 ALLMR (CRI) 470 and KS Bakshi & Others v. State & Another, 146 (2008) DLT 125.

On Stop payment: *Pulsive Technologies Pvt. Ltd. v. State of Gujrat, AIR 2015 SC 910; MMTC v. Medchem Chemicals & Pharma Ltd., AIR 2002 SC 182 and Modi Cements Ltd. v. Kuchil Kumar Nandi, AIR 1998 SC 1657.*

36. The learned senior counsel on behalf of the respondent further submits that it is settled proposition of law that both civil and criminal proceedings can go simultaneously as they are mutually exclusive and will have no bearing on the outcome of the proceedings and has placed reliance on the following decisions:- *Sh. Vishnu Dutt Sharma v. Smt. Daya Sapra, (2009) 13 SCC 729, P. Swaroopa Rani v. M. Hari Narayana @ Hari Babu, AIR 2008 SC 1884, The Bhajanpura Cooperative Urban Thrift and Credit Society Ltd. v. Sushil Kumar, Criminal Appeal No. 972/2012* decided by the this Court 03.09.2014 and *Sanjay Aggarwal v. G.S. Tayal & Others, Criminal Miscellaneous No. 4144/2009* decided by this Court on 11.04.2012.

37. The learned senior counsel for the respondent further submits that the issue pertaining to dishonour of cheque punishable under Section 138 N.I. Act has to be dealt with separately in view of the facts and circumstances of a particular case in the trial. As far as the issue pertaining to undated

cheques is concerned, he submits that the claim of the petitioner(s) that the cheques were undated and filling of the date subsequently amounts to tampering is totally untenable and is beyond the provisions of the N.I. Act. Section 20 of N.I. Act squarely deals with this proposition and it says that once a person signs and delivers to another person any negotiable instrument, either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete as the case may be upon the said instrument for any amount specified therein and not exceeding the amount covered by the stamp.

38. The learned senior counsel on behalf of the respondent has further submitted that in view of Section 20 of the N.I. Act, the persons so signing shall be liable upon such instrument being deposited in bank for encashment. In the instant case, the petitioner has admitted the issuance of the cheques during the execution of the MoUs and has given solemn assurance that the same shall be encashed upon presentation.

In this regard, the learned senior counsel for the respondent has placed reliance on the following judgments:- ***Ravi Chopra v. State & Anr. 2008 (2) JCC NI 169; Jaspal Singh v. State Ors. 2016 XAD (Delhi) 274; and MOJJ Engineering System v. A.V. Sugars 154 (2008) DLT 579.***

39. The learned senior counsel on behalf of the respondent has submitted that so far as returning of the cheques to the respondent/complainant and CTS are concerned, it was to be

done by the petitioner company and it was supposed to be replaced by the petitioner company. Para T of the criminal complaints filed before the lower Court deals with this averment. However, the standard cheques which were issued in circulation were not declared to be invalid by the bank in view of the notification issued by the RBI and it was directed by the RBI that standard cheques were to be accepted.

40. The learned senior counsel on behalf of the respondent submitted that as far as issuance of letter dated 24.04.2012 is concerned, the same is not part of the record and if at all they relied upon the same, it has been replied by letter dated 02.05.2012 by the respondent. Here in the instant petition under Section 482 Cr.P.C. it cannot be determined whether the said letter was issued or not replied, it is to be determined only by the Trial Court.

41. The learned senior counsel has further pointed out that this letter has not been put during cross examination to the respondent/complainant company that such letter has been issued. Once it is not done, the petitioner ceases to have plea in their hand.

42. The learned senior counsel for the respondent has submitted that as far as the issue pertaining to reconciliation is concerned, the same is subject matter of proving and disproving in the civil suit but once the demand notice dated 26.02.2013 is issued under Section 138 of N.I. Act, *ipso facto* attracts the provisions of N.I. Act and the petitioner(s) cannot escape the

liability of making payment within 15 days from the date of receipt of notice. It is further submitted that the issuance of the demand notice *ipso facto* brings home the attraction of Section 138 of the N.I. Act.

43. The learned senior counsel for the respondent has submitted that the judgements relied upon by the learned senior counsel for the petitioner(s) are not applicable to the present facts of the case.

44. The learned senior counsel for the respondent/complainant company has submitted that instant is a case where the respondent company has made advance payment to the petitioners to purchase land and the said amount has been encashed by the petitioner company and the liability does arise as the money is already passed on and there is nothing on the part of the respondent company to execute and further action to shift the onus. Consequently, once the money is given through cheque and the same is withdrawn by the petitioner, the liability always lies with the with the petitioner company to return the same. It is for this reason, the security cheques were with the respondent company and therefore it is crystal clear that the liability does exist on the said date and Section 138 of the N.I. Act does apply and the present petitions goes with disposal and nothing remains to be further adjudicated in the present petitions.

45. The learned senior counsel for the respondent has submitted that *M/s. Indus Airways* (supra) case is not

applicable as in the abovementioned case on the date of deposit of the cheque there was no liability however, in the present case, liability has arisen because the respondent company has issued cheques as advances that has already been encashed by the petitioner(s) and the same is not deposited by the petitioner. The learned senior counsel for the respondent has relied on the judgement of ***HMT Watches Ltd. Versus M.A. Abida & Anr.***

46. Finally, he submits that all mandatory requirements have already been complied with and the Court below has rightly passed the order of summoning and there is no infirmity in the summoning order.

47. The instant petitions are arising out of the summoning orders passed in the following three complaint cases:-

- i. C.C. No. 550/1
- ii. C.C. No. 561/1
- iii. C.C. No. 486/13

wherein the petitioners are claiming the impugned summoning orders are bad on account that the dispute between the parties is civil in nature and the complaints are nothing but abuse of process of law as the petitioner(s) have already filed a civil suit qua against the respondent at Vadodara and the complaints are result of a counter blast by the respondent against the petitioner(s).

48. The whole question hinges around whether civil and criminal proceedings can run simultaneously?

The answer obviously is YES.

49. The *Black's Law Dictionary* defines *Criminal Wrong* as an act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding and a *Civil Wrong* is defined as a violation of noncriminal law, such as a tort, a breach of contract or trust, a breach of statutory duty, or a defect in performing a public duty; the breach of a legal duty treated as the subject matter of a civil proceeding.

50. The proceedings under Section 138 read with Section 142 and section 142 of the NI Act are undoubtedly criminal proceeding which the respondent/creditor is initiating qua against the present petitioners for the wrongful act on the part of the petitioners. The standard of proof in the criminal proceeding is higher than that of a civil proceeding which thus gives the platform to the creditor to run criminal as well as civil proceedings parallelly. This Court has already said so in the case *Sanjay Aggarwal vs. G.S. Tayal & Ors.*; Crl. M.C. No. 4144/2009 decided on 11.04.2012 and reliance is also placed on the judgment of the Apex court in the case *Sh. Vishnu Dutt Sharma vs. Smt. Daya Sapra, (2009) 13 SCC 729*.

51. Section 138 of the Negotiable Instruments, Act 1881 is reproduce as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a

person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.— For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability."

52. The Hon'ble Supreme Court in the case of ***Kusum Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. And Others;*** (2000) 2 SCC 745 has laid down the following ingredients for taking cognizance under Section 138 of the NI Act:-

" (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;"

53. In the instant case the respondent/complainant has filed complaints under Section 200 Cr.P.C. for the offence committed under Sections 138/141/142 of the NI Act on 08.04.2013. The learned Metropolitan Magistrate relying upon the complaints

which were supported with affidavits, documents and ocular evidence given by the AR of the respondent/complainant took cognizance under Section 138 of the NI Act and passed the summoning orders dated 10.04.2013 and subsequently, the learned Metropolitan Magistrates framed notices vide orders dated 05.04.2014 under Section 251 Cr.P.C. in C.C. No. 550/1, C.C. No. 561/1 and C.C. No. 486/13.

54. The contention of the learned senior counsel for the petitioner that the cheques in question were more than three months old and by putting the date on the said cheques amounts to tampering does not seem to be correct as in the instant case factum of the two undated cheques of equivalent amount, i.e., Rs. 2 Crores and Rs. 1 Crores, along with corporate guarantee against advances were issued as by the petitioner in favour of the respondent/complainant in terms of the MoU dated 02.05.2011 and subsequently, in terms of the MoU dated 28.06.2011 one more undated cheque of equivalent amount, i.e., Rs. 2 Crores, along with corporate guarantee against advances was issued by the petitioner in favour of the respondent/complainant.

55. In the instant case issuance of the cheques is not disputed by the petitioner(s). There is no dispute that the cheques in question belong to the petitioner(s).

56. In para 7 of the MoUs dated 02.05.2011 and 28.06.2011 the petitioner(s) has given solemn assurance that the cheques on

presentation shall be encashed and the same is reproduced as under:

As per MoU dated 02.05.2011:-

- “7. The Land Arranger hereby agrees that the Consideration shall be paid in the following manner and in accordance with the area per acre mentioned in the Sale Deed:*
- (i) Rs.20,000,000/- (Rupees Two Crore Only) as advance (the “Advance 1”) on submission of undated cheque of equivalent amount and a corporate guarantee of the Land Arranger (the “Security 1”) in the format to the satisfaction of the Buyer;*
 - (ii) after 15 days from the date of this MOU, in case the Buyer is satisfied with the progress for the procurement of the Scheduled Land and the metal road as per Clause 6(i), Rs.10,000,000/- (Rupees One Crore Only) as advance (the “Advance 2”) on submission of undated cheque of equivalent amount and a corporate guarantee of the Land Arranger (the “Security 2”) in the format to the satisfaction of the Buyer;*

Advance 1 and Advance 2 shall collectively hereinafter to as the “Advance”. The Advance shall be adjusted from the Deed Amount (as defined below) in proportion to the area per acre while making such payment as per this MOU. However, the Buyer shall be obligated to pay the Advance to the Land Arranger only after the Land Arranger deposits with the Buyer the Security 1 and Security 2 respectively, as per Clause 7(i) and Clause 7(ii) above, in order to recover the Advance paid to the Land Arranger by the Buyer, in case the Land Arranger fails to perform its obligation as per this MOU. The Land Arranger assures the Buyer of the realization of the Security 1 and Security 2 respectively, so deposited by it with the Buyer towards the repayment of the Advance. The Land Arranger further assures the realization of the Security 1 and Security 2 given to the Buyer as security in case of his default in repayment of the Advance as per the terms of this MOU and no action shall be taken by the Land Arranger in restraining in exercise of the right conferred to the Buyer under this

MOU. Any action of the Land Arranger restraining the Buyer from exercising the aforesaid right shall amount to a criminal breach of trust. The Security 1 and Security 2 shall be released only after the full adjustment of the Advance from the Deed Amount;

- (iii) Rs.6,00,000/- (Rupees Six Lac Only) per acre (the “Deed Amount”) simultaneously with the registration of the Sale Deed;*
- (iv) Rs.65,000/- (Rupees Sixty Five Thousand Only) per acre at the time the Scheduled Land gets mutated, consolidated and amalgamated in the name of Buyer in the records of the respective authority is provided in the favour of the Buyer for the Scheduled Land and the Buyer getting the possession of the Scheduled Land after the measurement by the respective authority in accordance with and after the consolidation and amalgamation. The Land Arranger shall confirm all the above in writing; and*
- (v) Rs.1,00,001/- (Rupees One Lac One Only) after getting the 63 AA and NA permission for the Scheduled Land in the favour of the Buyer;*

XXX XXX XXX XXX

As per MoU dated 28.06.2011:-

7. The Land Arranger hereby agrees that the Consideration shall be paid in the following manner and in accordance with the area per acre mentioned in the Sale Deed:

- (i) Rs.200,00,000/- (Rupees Two Crores Only) as advance (the “Advance”) on submission of undated cheque of equivalent amount and a corporate guarantee of the Land Arranger (the “Security 1”) in the format to the satisfaction of the Buyer; Advance shall be adjusted from the Deed Amount (as defined below) in proportion to the area per acre while making such payment as per this MOU. However, the Buyer shall be obligated to pay the Advance to the Land Arranger only after the Land Arranger deposits with the Buyer the Security 1, as per*

- Clause 7(i) above, in order to recover the Advance paid to the Land Arranger ;by the Buyer, in case the Land Arranger fails to perform its obligation as per this MOU. The Land Arranger assures the Buyer of the realization of the Security, so deposited by it with the Buyer towards the repayment of the Advance. The Land Arranger further assures the realization of the Security given to the Buyer as security in case of his default in repayment of the Advance as per the terms of this MOU and no action shall be taken by the Land Arranger in restraining in exercise of the right conferred to the Buyer under this MOU. Any action of the Land Arranger restraining the Buyer from exercising the aforesaid right shall amount to a criminal breach of trust. The Security shall be released only after the full adjustment of the Advance from the Deed Amount;*
- (ii) Rs.6,45,000/- (Rupees Six Lacs Forty Five Thousand Only) per acre (the “Deed Amount”) simultaneously with the registration of the Sale Deed;*
- (iii) Rs.65,000/- (Rupees Sixty Five Thousand Only) per acre at the time the Scheduled Land gets mutated, consolidated and amalgamated in the name of Buyer in the records of the respective authority, is provided in the favour of the Buyer for the Scheduled Land and the Buyer getting the possession of the Scheduled Land after the measurement by the respective authority in accordance with and after the consolidation and amalgamation. The Land Arranger shall confirm all the above in writing; and*
- (iv) Rs.1,00,001/- (Rupees One Lac One Only) per acre shall be paid after the Buyer getting the 63 AA and NA permission for the Scheduled Land in the favour of the Buyer;”*

57. Section 20 of the Negotiable Instruments Act, 1881 is reproduced as under:

"Section 20 in The Negotiable Instruments Act, 1881 20. Inchoate stamped instruments.—Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in 1[India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

58. Bare perusal of Section 20 of the NI Act shows there is a presumption that a person signing on the cheque(inchoate stamped instrument) shall be responsible for its encashment on presentation and such person thereby gives *prima facie* authority to the holder thereof to make or complete as the case may be upon it, a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp. The reliance is placed on the judgment of the this Court in the case ***Ravi Chopra vs. State and Anr.; 2008 (102) DRJ 147.***

59. As far as the contention of the learned senior counsel for the petitioner that the petitioner had sent a letter dated 23.04.2012 to its bank for stop payment of the cheques, the

same is ineffective as there was an existing liability qua against the petitioner(s) on the date of directing stop payment to the bank and it cannot obviate the offence under Section 138 of NI Act. The object of Chapter XVII of the NI Act is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. Reliance is placed on the judgment of the Apex Court in the case ***Modi Cements Ltd. vs. Kuchil Kumar Nandi; (1998) 3 SCC 249.***

60. The contention of the learned counsel for the petitioner that in pursuance of the advances made to the petitioner(s), the petitioner(s) executed 76 sale deeds and subsequently the parties executed a Minutes of Meeting dated 17.12.2013 wherein it has been agreed to adjust the balance amount by reconciliation and there is no demand notice issued to the petitioner to this effect therefore, the summoning orders are bad is not convincing as the present petitions are qua against a very limited question whether the summoning orders passed by the learned Metropolitan Magistrate and its consequential notices are bad?

61. So far the sufficiency of the evidences and determination of validity of the demand notice dated 26.02.2013 is concerned it is a mixed question of facts and law and is not the material point at this stage as it is to be determined during the due course as the same is the subject matter of trial Court.

62. Further the argument of the learned senior counsel for the petitioner that the cheques issued were for the purpose of collateral security and her reliance on the judgments ***Sampelly***

Satyanarayana Rao (supra) and **Indus Airways Private Limited** (supra) is not convincing as in the instant case the cheques issued by the petitioner were in consequence of the advances made by the respondent/complainant to the petitioner(s) and the petitioner(s) in consequence of the MoUs dated 02.05.2011 and 28.06.2011 has drawn the advance amount which makes a legally enforceable liability qua against the petitioner(s). Whereas the **Indus Airways Private Limited** (supra) case relied upon by the learned senior counsel for the petitioner is based on non existence of the legally enforceable liability in the form of security. The distinction drawn by the Apex Court in the case **Sampelly Satyanarayana Rao** (supra) is reproduced as under:

"12. Judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held herein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonor of cheque issued was not by itself at par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued to discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such deposit of cheques towards repayment of installments was also

*described as “security” in the loan agreement. In applying the judgment in **Indus Airways (supra)**, one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.”*

63. In the instant case:-

- (i) the petitioner had issued three undated cheques, i.e., cheque no. 069316 of Rs. 2,00,00,000/-, cheque no. 069318 of Rs. 1,00,00,000/- and cheque no. 091922 of Rs. 2,00,00,000/-, in favour of the respondent/complainant against the advances;
- (ii) the aforesaid post dated cheques were made/completed dated 18.01.2013 and were presented for encashment on 15.02.2013 which is within a period of six months from the date on which they were drawn or within the period of their validity whichever is earlier;
- (iii) the cheques were returned dishonoured vide dishonour memo dated 16.02.2013 with the remarks “Insufficient Funds” in cheque no. 069316 of Rs. 2,00,00,000/- and "Payment stopped by the drawer" in cheque no. 069318 of Rs. 1,00,00,000/- and cheque no. 091922 of Rs. 2,00,00,000/-;
- (iv) the respondent/complainant had sent legal notice dated 26.02.2013 to the petitioner(s) upon

dishonouring of the aforesaid three cheques which is within 15 days of the receipt of information by respondent/complainant from the bank regarding the return of the cheques as unpaid;

(v) the petitioner(s) failed to make payment of the said amount to the respondent/complainant (the holder in due course of the cheque) within 15 days of the receipt of the said notice dated 26.02.2013.

64. On bare perusal of the abovementioned facts it is crystal clear that there was an existing liability qua against the petitioner(s) under Section 138 of NI Act and the Apex Court in the case ***Kusum Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. And Others; (2000) 2 SCC 745*** has specifically stated that if the ingredients are satisfied by the complainant then the summoning order is not bad and the relevant para is reproduced as under:-

"11. If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase "debt or other liability" means a legally enforceable debt or other liability."
(underlining supplied)

65. The cheques, i.e., cheque no. 069316 of Rs. 2,00,00,000/- , cheque no. 069318 of Rs. 1,00,00,000/-, were issued by the petitioner on the basis of the advances made to the petitioner(s) by the respondent in terms of the MoU dated 02.05.2011 and

further one more cheque, i.e., cheque no. 091922 of Rs. 2,00,00,000/-, was issued by the petitioner on the basis of the advances made to the petitioner(s) by the respondent in terms of the MoU dated 28.06.2011 which is also arising from the continuous liability qua against the petitioner(s). On the basis of the advances made by the respondent/complainant to the petitioner(s) and the petitioner(s) failing to do the needful in accordance with the terms of the abovementioned MoUs the respondent/complainant demanded back the advance amount vide demand notice dated 26.02.2013.

66. Therefore, I find no merit in the contentions of the learned senior counsel for the petitioner(s) and the judgments relied by her are not helpful in view of the facts and circumstances of the case and the judgments; *Sampelly Satyanarayana Rao* (supra), *Kusum Ingots & Alloys Ltd.*(supra) and *Modi Cements Ltd.* (supra).

67. Consequently, the present petitions are dismissed having no merit. One copy of this judgment be sent to the concerned Court(s).

68. Let one copy of this judgment be placed on the files of Crl. M.C. No.3465/2014 and Crl. M.C. No.3569/2014. No order as to costs.

I.S.MEHTA, J

JANUARY 31, 2017/km