IN THE HIGH COURT OF JUDICATURE AT BOMBAY, AURANGABAD BENCH, AT AURANGABAD.

Criminal Application No. 02052 of 2018

District : Aurangabad

1. Rajeev Raj Kumar
   (Company Secretary),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

2. Madhu Vij
   (Independent Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

3. Arvind Dham
   (Non-Executive Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

4. Bahushurat Lugani
   (Independent),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

5. Gautam Malhotra
   (Non-Executive Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at

Plot No.16, Industrial Area,
Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

6. Vinod Kumar Uppal (CFO),
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area,
Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

7. Rajeev Kumar Thakur
(Independent Director),
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area,
Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

8. Sanjiv Bhasin
(Independent Director),
Resigned on 23.06.2017
from the Board of
M/s. Amtek Auto Ltd.,
Having registered office at
Plot No.16, Industrial Area,
Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

9. Sanjay Chhabra
(Independent Director),
M/s. Amtek Auto Ltd.,
Having registered office at .. Applicants.
Plot No.16, Industrial Area,
Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

versus

1. The State of Maharashtra.

2. R.L. Steel & Energy Ltd.,
Through its Authorised
Signatory,
Mr. Amit Chaturvedi,
Age 53 years,
Occupation Service,

Having Corporate Office at
Gut No. 78-81,
Pangra Shivar,
Paithan Road,
Aurangabad - 431 107. .. Respondents (No.02 - Original complainant)

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Mr. R.N. Dhorde, Senior Advocate, instructed by Mr. S.V. Natu, Advocate, for the applicants.

Mr. K.D. Munde, Additional Public Prosecutor, for respondent no.01.

Mr. R.R. Totla, Advocate, for respondent no.02.

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With

Criminal Application No. 02055 of 2018

District : Aurangabad

1. Rajeev Raj Kumar
   (Company Secretary),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

2. Madhu Vij
   (Independent Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

3. Arvind Dham
   (Non-Executive Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

4. Bahushurat Lugani
   (Independent),
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   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

5. Gautam Malhotra
   (Non-Executive Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

6. Vinod Kumar Uppal (CFO),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

7. Rajeev Kumar Thakur
   (Independent Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

8. Sanjiv Bhasin
   (Independent Director),
   Resigned on 23.06.2017
   from the Board of
   M/s. Amtek Auto Ltd.,
   Having registered office at
   Plot No.16, Industrial Area,
   Roska Meo, P.O. Sohna,
   Gurgaon, Haryana 122 003.

9. Sanjay Chhabra
   (Independent Director),
   M/s. Amtek Auto Ltd.,
   Having registered office at .. Applicants.
   Plot No.16, Industrial Area,

Roska Meo, P.O. Sohna,
Gurgaon, Haryana 122 003.

versus

1. The State of Maharashtra.

2. R.L. Steel & Energy Ltd.,
Through its Authorised
Signatory,
Mr. Amit Chaturvedi,
Age 53 years,
Occupation Service,
Having Corporate Office at
Gut No. 78-81,
Pangra Shivar,
Paithan Road,
Aurangabad - 431 107. .. Respondents (No.02 - Original complainant)

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Mr. R.N. Dhorde, Senior Advocate, instructed by Mr. S.V. Natu, Advocate, for the applicants.

Mr. A.A. Jagatkar, Additional Public Prosecutor, for respondent no.01.

Mr. R.R. Totla, Advocate, for respondent no.02.

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CORAM : SMT. VIBHA KANKANWADI, J.

Date of reserving the judgment : 07th August 2018

Date of pronouncing the judgment : 31st August 2018

JUDGMENT :

01. Since both the parties are same in both the proceedings and on similar grounds, the proceedings are challenged, both these matters are disposed of by

this common judgment.

02. Both these applications have been filed invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973, in order to quash and set aside the order of issuance of process and the proceedings filed against the applicants by respondent no.02, before learned Judicial Magistrate (First Class), Court No.07, Aurangabad. Criminal Application No. 2052 of 2018 challenges the order of issuance of process passed on 16.11.2017 and proceedings in Summary Criminal Case No. 7882 of 2017. Criminal Application No. 2055 of 2018 challenges the order of issuance of process passed on 02.11.2017 and proceedings in Summary Criminal Case No. 7504 of 2017. Both the proceedings are filed under Section 138 of the Negotiable Instruments Act, 1881 **[For short, hereinafter referred to as "N.I. Act"].**

03. Respondent no.02 - original complainant had come with a case, that it is a company registered under the Companies Act, 1956, and it is a leading company in alloy steel plant in western India, specialized in manufacturing of carbon, alloy and special steel products in round, square, flats and special profiles. Accused no.01 is also a company registered under the Companies Act, 1956 and is engaged in business of producing wide range forging,

iron and aluminum casting, machining and sub-assemblies products. It has been contended that accused nos.02 to 12 i.e. present applicants are directors of accused no.01 - company and they are in-charge and responsible for the conduct of the business of accused no.01 - company. Accused no.01, through the directors - accused nos.02 to 12 had approached the complainant with a request for supply of rolled steel products on credit and as per the invoices, the product was supplied. The complainant has maintained account in its regular course of business. Huge amount is outstanding from accused no.01. In order to discharge the legally enforceable debt or liability, accused nos.01 to 12 issued cheques drawn on Andhra Bank, Sachapir Street, Pune. In S.C.C. No. 7882 of 2017, the cheque was bearing no. 000694, dated 06.08.2017, for an amount of Rs. 25,64,677/-, and in S.C.C. No. 7504 of 2017, the cheque 2was bearing no. 000693, dated 04.08.2017, for Rs. 14,93,915/-. Both the cheques were presented by the complainant in its bank i.e. Punjab National Bank, Aurangapura Branch, Aurangabad, for encashment. However, both of them were returned with remark '*funds insufficient*'. Statutory notice was issued on 20th September, 2017 and 24th August, 2017, respectively, in both the matters. Though the notice was duly served on accused nos.01 to 12, it was not complied with and, therefore, the complaint was filed stating that all the accused persons have committed

offence punishable under Section 138 read with Section 141 of the N.I. Act.

04. After taking into consideration the contents of the complaint, documents placed on record and examination of the complainant under Section 200 of the Cr.P.C., as well as after hearing the complainant, the learned Magistrate has issued process against all the accused persons on 16.11.2017 and 02.11.2017, respectively. These orders as well as entire proceedings have been challenged by these applications.

05. Heard learned Senior Advocate Shri R.N. Dhorde, instructed by learned Advocate Shri S.V. Natu, for the applicants. Heard learned Additional Public Prosecutors, Shri K.D. Munde and Shri A.A. Jagatkar, for respondent no.01. So also, heard learned Advocate Shri R.R. Totla for respondent no.02 - original complainant.

06. It has been submitted on behalf of the applicants, that the complainant had not placed on record, all the relevant information before the learned Magistrate. In fact, a petition under the Insolvency and Bankruptcy Code, 2016 was initiated by the Corporation Bank against accused no.01 before the National Company Law Tribunal, Chandigarh Bench at Chandigarh. An order came to be passed on

27.07.2017, whereby by way of interim order, Mr. Dinkar Tiruvannadapuram Venkatsubramanian was appointed as Interim Resolution Professional **[For short, "I.R.P."].** He was appointed for a period of 30 days and further directions were given, that I.R.P. shall cause a public announcement within three days as contemplated under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 of the initiation of the Corporate Insolvency Resolution Process in terms of Section 13(1)(b) of the 'Code' read with Section 15 calling for the submission of claims against 'Corporate Debtor'. On the same day, by a different order, the petition was admitted, declaring moratorium prohibiting (a) the institution of suits or continuation or pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002). Thereafter, the publication was made by I.R.P. A

letter was also issued by accused no.01 on 17th August, 2017 to the National Company Law Tribunal, giving list of claims for accused no.01. Name of the complainant was at serial no.189. A letter was issued by I.R.P. to Andhra Bank, Camp Branch, Pune, on 29.07.2017, whereby he informed about his appointment by the National Company Law Tribunal and the intention to propose change in authorized signatories due to the orders and a specific statement was made that the presentation of any cheques should not be allowed by the bank in respect of the accounts until further directions from I.R.P. Further, the complainant - company had given its claim to I.R.P. as per form 'B' which was for the proof of claim by operational creditors on 08.08.2017. Under such circumstance, the complainant - company was not justified in presenting the cheque for encashment. Accused nos.02 to 12 cannot be said to be the persons who can be responsible for the dishonour of the cheque. He also submitted that the learned Magistrate failed to consider that in the complaint, the complainant has not given the details as to which director was responsible for the day-to-day affairs. Only omnibus statement has been made that all the accused were in-charge and responsible for the conduct of the affairs of accused no.01. It is not a sufficient compliance of Section 141 of the N.I. Act.

07. Learned Senior Advocate appearing for the applicants relied on the decision of the Hon'ble Supreme Court in the case of *N.K. Wahi vs. Shekhar Singh & others [AIR 2007 SC 1454]*, wherein it has been held, that *"Complaint must contain specific allegations against directors as to how Directors are in-charge and responsible for conduct of business of company. The description should be clear. Mere allegations in complaint that accused persons are directors and responsible officers of the company, is not sufficient to take cognizance of the offence."* He further relied on the decision of the Hon'ble Supreme Court in the case of *Mrs. Aparna A. Shah vs. M/s. Sheth Developers Pvt. Ltd. and another [AIR 2013 SC 3210]*, wherein it has been observed, that *"Drawer of the cheque alone can be prosecuted. The accused, who is not the drawer of the cheque, as he or she has not signed the same, the criminal proceedings are required to be quashed."* He also relied on the decision of Delhi High Court in the case of *M.L. Gupta & another Vs. Ceat Financial Services Ltd. [(2008) 145 CompCas 837]*. The single bench of Delhi High Court has held, that *"The complaint under Section 138 of the N.I. Act cannot be filed as on the date of presentation of the cheque, the company was in liquidation and cannot be stated to have committed any offence. Even second and third accused were not the in-charge of the day-to-day affairs and conduct of the business of the company on that date."* He, therefore, prayed for quashing of the proceedings by submitting that the learned Magistrate failed to consider all these facts.

08. Per contra, learned Advocate appearing for respondent no.02 has submitted that there is no bar for prosecuting the company and the responsible persons for the offence punishable under Sections 138 and 141 of the N.I. Act, though the proceedings under the Insolvency and Bankruptcy Code, 2016 were initiated or the company was under liquidation. He relied on the decision of this Court at principal seat, given in Criminal Writ Petition No. 1280 of 2010, *M/s. Indorama Synthetics (I) Ltd. vs. The State of Maharashtra & others*, on 14th March 2018. Reliance was placed in that matter, on the decision of Division Bench in the case of *Firth (India) Steel Company Ltd. (In liquidation) vs. Respondent [1995(5) Bom.C.R. 907]*, wherein it was declared that, *"The embargo created on the right of a party who initiated criminal proceedings particularly for an offence punishable under Sections 138 and 141 of the N.I. Act will not operate, as said proceedings are not within the meaning of expression 'suit or other proceedings'."* He also submitted that the National Company Law Appellate Tribunal, New Delhi, in the matter of *Shah Brothers Ispat Pvt. Ltd. vs. P. Mohanraj & others [Company Appeal (AT) (Insolvency) No. 306 of 2018]* has passed an order on 31.07.2018, that *"Section 138 of the N.I. Act is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim."* Therefore, he submitted that there was no embargo for filing the complaint.

He also relied on the decision of Hon'ble Supreme Court in the case of *M/s. BSI Ltd. & another Vs. Gift Holdings Pvt. Ltd. & another [2000 Vol. 102(3) Bom.L.R. 202 (SC)]* wherein completion of offence was before commencement of proceedings under Sick Industrial Companies (Special Provisions) Act. It was observed that *"A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the Negotiable Instruments Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability."* He submitted that the said provision under Sick Industrial Companies (Special Provisions) Act, 1985 i.e. Section 22(1) is *pari materia* to Section 7 of the Insolvency and Bankruptcy Code, 2016. He further submitted that the contents of the complaint were perused by the learned Magistrate and when he found that statements are made in respect of the responsibility and liability of the other other accused persons, the process has been issued.

09. It will not be out of place to mention here, that upon query by the Bench, that who has signed the disputed cheques, learned Advocate appearing for respondent no.02 has filed the true photo-copy of the cheques in both the matters which are marked as "X".

It was also submitted by respondent no.02, that the said cheque had been signed by Financial Manager. Thereupon, again a query was made, as to whether he is an accused in the case. It is submitted that he is not made accused at this stage, but relying on the decision of the Hon'ble Supreme Court, in the case of *Bholu Ram Vs. State of Punjab & another [(2008) 9 SCC 140]*, he submitted that when it appears during trial / recording of evidence, that a person has committed an offence who is not an accused, can be tried together with the accused by invoking the powers under Section 319 of the Cr.P.C.

10. Taking into consideration the arguments advanced on behalf of the applicants, it can be seen that they want to challenge the proceedings on two counts, first in respect of the proceedings which were taken up against them by Corporation Bank before the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 and the other ground is that they were not responsible for the day-to-day affairs of the company and the basic ingredients have not been followed in view of the decision in *N.K. Wahi's case (supra)*. As regards first point is concerned, no doubt, all those things which had happened before the National Company Law Tribunal were not put before the learned Magistrate when the complaint was filed and the order of issuance of process was passed. Each and every complainant is

expected to be fair in prosecution and, therefore, the circumstances in which the cheque came to be issued in favour of the complainant ought to have been disclosed by the complainant. The prohibitory orders and appointment of I.R.P. were made by the National Company Law Tribunal on 24.07.2017. As aforesaid, all the affairs of the company i.e. accused no.01 were taken over by I.R.P. Even said I.R.P. had given instructions to the bank in which accused no.01 was having account, that henceforth the transactions would be governed under the powers of I.R.P. and the said letter was given on 29.07.2017. Prior to that, accused no.01 had given list of claims including the name of the complainant to the National Company Law Tribunal on 17.08.2017. In view of the order passed by the National Company Law Tribunal, proof of claim in Form "B" was submitted by the complainant on 08.08.2017.

11. In both the cases, the complainant has come with a case that the respective cheques were issued on 06th August 2017 and 04th August 2017, respectively, that means, prior to Form "B" submitted by it to I.R.P. on 08.08.2017. Thus, it can be said that if the complainant had knowledge about the proceedings and the prohibitory orders, whether cheque would have been issued by the Finance Officer or Advisor or Manager of accused no.01, is a question. Further, though the cheques were given on

the aforesaid dates, the cheque in S.C.C. No. 7882 of 2017 was presented by the complainant for encashment on 11.09.2017. That means, with full knowledge that I.R.P. has taken over the affairs of accused no.01, the said cheque was presented. In Form "B", the complainant has not whispered that such cheques were given by the responsible officer of accused no.01. Therefore, definitely, some cloud has been created on the issuance of cheque. No doubt, all these facts would be required to be addressed by the trial court at the time of final hearing. As regards the legal position about maintainability of the complaint is concerned, it can still be kept open for the simple reason that the proceedings is also instituted against accused no.01. Accused no.01 is not a party in this proceedings.

12. Now, turning towards the second point, it is to be noted that as regards accused nos.02 to 12, only at two places, same statement has been made by the complainant, that they are the directors of accused no.01, who are in-charge and responsible for the conduct of the affairs of the company. The complainant has not given what is the nomenclature and how each one of accused nos.02 to 12 is in-charge. Admittedly, accused nos.02 to 12 are not the signatories to the disputed cheques. In fact, in para no.05 of the complaint, the complainant has stated that accused nos.01 to 12 issued a

cheque ..... None of them i.e. accused nos.02 to 12 had issued that cheque but somebody else is the signatory to the cheque. This fact is also suppressed by the complainant. The learned Magistrate ought to have considered as to who is the signatory to the cheque and whether he is made an accused or not before proceeding to issue process against accused nos.02 to 12. In *N.K. Wahi's case (supra)*, the Hon'ble Supreme Court has relied on the decision in the case of *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another [2005(8) SCC 89]*, wherein it was held thus:-

> *" To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section*

141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial. "

Further, taking into consideration the legal fiction that has been created in Section 141 of the N.I. Act, in para 19 of the judgment, it has been held thus :-

"19. In view of the above discussion, our answers to the questions posed in the reference are as under :

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint

> *managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."*

13. Therefore, taking into consideration the above said legal position, it was necessary for the complainant to specifically aver and demonstrate as to how each one of accused nos.02 to 12 were in-charge and responsible for the conduct of the business of accused no.01. Therefore, the order of issuance of process passed by the learned Magistrate cannot be allowed to be sustained.

14. Another point that is also required to be considered is that the address of accused nos.02 to 12 is given at the address of accused no.01. No doubt, company's address can be the address of the directors and even statutory notice was also issued to accused nos.02 to 12 on the address of accused no.01. The point that is also required to be considered is, as to whether after I.R.P. has taken over the affairs of the business of accused no.01 -

company, it can be said that the address of accused no.01 would be the address of accused nos.02 to 12. Knowledge of issuance of cheque, presentation of the same and dishonour of the same, could have been only on the basis of the statutory notice to the accused nos.02 to 12. Acceptance of the notices to them by some of the employees, whether can be attributed as knowledge of accused nos.02 to 12, was also a question which ought to have been considered even at the *prima facie* stage by the learned Magistrate. However, mainly for the second point, regarding absence of specific averments, the order of process passed against the present applicants, deserves to be set aside.

15. Hence, the following order :-

(a) The applications are hereby allowed.

(b) The orders of issuance of process passed on 16.11.2017 in Summary Criminal Case No. 7882 of 2017 and on 02.11.2017 in Summary Criminal Case No. 7504 of 2017, by the learned Judicial Magistrate (F.C.), Court No.07, Aurangabad, as well as both the proceedings are hereby quashed and set aside as against the present applicants i.e. original accused nos.02 to 12.

(c) Consequently, the orders of issuance of non-bailable warrants against accused nos.02 to 12 stand quashed and set aside.

(d) It is clarified, that the matter before the trial court shall proceed as against accused no.01.

(Smt. Vibha Kankanwadi)
JUDGE

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Bhagwan Govindrao Puranik
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