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

Reserved on: 22.01.2021

Pronounced on: 08.02.2021

- (1) + **CRL.M.C. 1779/2020 & CRL.M.A.12423/2020**
- (2) + **CRL.M.C. 1782/2020 & CRL.M.A.12458/2020**
- (3) + **CRL.M.C. 1783/2020 & CRL.M.A. 12460/2020**
- (4) + **CRL.M.C. 1784/2020 & CRL.M.A. 12462/2020**

MAJ. SURENDRA KUMAR HOODA (RETD.) Petitioner

Through: Mr. Madhav Khurana &
Mr. Kartikeye Dang, Advocates

Versus

KAPIL GUPTA Respondent

Through: Mr. Tanveer Ahmed Mir,
Mr. Yatharth Dohare &
Mr. Laksh Khanna, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Vide above captioned four petitions, the petitioner seeks quashing of orders dated 16.3.2017, 25.06.2018 and 25.06.2020, passed by the learned Metropolitan Magistrate in complaints under Section 138 of Negotiable Instrument Act, 1881 (*NI Act*).

2. The above captioned first petition [CRL.M.C.1779/2020] pertains to Complaint No.612304/206. The second captioned petition [Crl.M.C.

1782/2020] pertains to Complaint No. 611606/2016. The above captioned third petition [CrI.M.C. 1783/2020] pertains to Complaint No. 611608/2020. The fourth captioned petition [CrI.M.C. 1784/2020] pertains to Complaint No.612305/2016. Since the subject matter of these petitions pertain to four different complaints (*henceforth referred to as the “complaints in question”*) relating to one residential real estate project, namely, “Spire Woods”, therefore, with the consent of learned counsel for the parties, these petitions have been heard together and are being disposed of by this common judgment.

3. These petitions have been preferred by the petitioner seeking quashing of orders dated 16.3.2017 and 25.06.2018, passed by the Metropolitan Magistrate vide which petitioner has been summoned to face trial and by order dated 25.06.2020, Metropolitan Magistrate has framed Notices under Section 251 Cr.P.C and dismissed petitioner’s plea seeking discharge in the complaints in question.

4. Brief facts of the complaints are that petitioner- *Major Surendra Kumar Huda* and one other person, namely, Sunil Gandhi, are the Promoters/Directors of M/S A N Buildwell (P) Ltd. (*henceforth referred to as the “accused company”*). Respondent/complainant has alleged that petitioner

and one Mr.Ashish Gulati, induced him to invest in a residential real estate project, namely, “Spire Woods” located at Sector 103, Gurugram, Haryana and Builder Buyer Agreement and Agreement to Sell, both dated 27.03.2015 were executed between the accused company and the complainant and residential unit No. 102, in Tower 7 of the aforesaid project was allotted to the complainant. According to the complainant, in terms of aforesaid Agreement, respondent/complainant deposited Rs.45,25,331/- (Rupees Forty Five Lakhs Twenty Five Thousand Three Hundred and Thirty One only) into the account of the accused company by way of RTGS. The Agreement to Sell in question provided respondent/complainant the “Buy Back Option”, which required accused company to buy back the rights, interests and entitlements of complainant’s unit and it could be exercised by the complainant/respondent by depositing the post dated cheques amounting to Rs.1,14,74,703/- issued by the accused company. The said amount of Rs.1,14,74,703/- was given to complainant/petitioner by way of four post dated cheques, which are detailed as under:-

Cheque Number	Amount	Dated	Signed by
046777	Rs.54,90,000.00	27/3/2016	Petitioner & another AR
046776	Rs.9,59,428.00	27/3/2016	Sunil Gandhi & another AR
046775	Rs.1,79,675.00	27/3/2016	Sunil Gandhi & another AR
046774	Rs.48,45,600.00	27/3/2016	Petitioner & another AR

5. In the complaint, respondent has alleged that in January, 2016, he came to know that the accused company was on the verge of liquidation and in March, 2016, he further came to know that a provisional Official Liquidator has been appointed under the orders of this Court, and finding that the residential project was nowhere near completion, respondent/complainant exercised the Buy Back Option and presented all the four afore-noted post dated cheques issued by the accused company in bank on 25.04.2016 for payment, which were returned unpaid for the reasons as under:-

Cheque Number	Reasons for return by the bank
046777	Drawers signature to operate account not received
046776	Drawers signature to operate account not received
046775	Funds Insufficient
046774	Drawers signature to operate account not received

6. Respondent/complainant has alleged that after dishonouring of cheques, his verbal requests for cancellation of unit and repayment were not answered by the accused persons and he came to know that the accused Directors had already resigned from the Board of Directors of the accused company, he was left with no option but to send Demand Notices under Section 138 of NI Act against the accused company and its Directors and since no payment was received within the statutory period of 15 days, the complaints in question were instituted under Section 138 of NI Act.

7. The learned trial court, after hearing arguments on the point of

summoning held that *prima facie* offence under Section 138 of NI Act was made out and complaints were filed within limitation period and vide orders dated 16.3.2017 and 25.06.2018, directed issuance of summons against the petitioner and others and vide order dated 25.06.2020 framed Notices under Section 251 Cr.P.C. while rejecting the plea of discharge, and the said orders are under challenge in these petitions.

8. At the hearing, learned counsel for petitioner submitted that petitioner had never met respondent or induced him to invest money in the accused company. It was submitted that petitioner was only a nominee Director of M/s Schleicher Intec Pvt. Ltd. which itself had only 22% share holding in M/S A.N.Buildwell Pvt. Ltd and also that petitioner was not incharge of day to day management of M/S A.N.Buildwell Pvt. Ltd. Learned counsel for the petitioner submitted that out of four cheques in question, two were not signed by the petitioner and these cheques were issued by M/S A.N.Buildwell Pvt. Ltd. to the respondent and not by the petitioner in his personal capacity. It was stated that petitioner had resigned from the post of Nominee Director of M/S A.N.Buildwell Pvt. Ltd. on 11.09.2015 i.e. almost 06 months prior to the presentation of cheques in question, which is evident from Form DIR 12 filed in the Ministry of Corporate Affairs, confirming

petitioner's resignation.

9. It was further submitted that on 25.4.2016, while M/S A.N.Buildwell Pvt. Ltd. was under the control of provisional Official Liquidator appointed under the Orders of this Court and despite respondent/complainant having knowledge of the same, still he exercised the Buy Back Option and presented all the four cheques with his banker, which were returned unpaid. It was emphatically stated by learned counsel for the petitioner that the Demand Notices qua these cheques were also sent to Sh.D.P.Ojha, Official Liquidator and other Directors of M/S A.N.Buildwell Pvt. Ltd., namely, Mr. Michael Brian Collins, Mr. Pawan Bhandari, Mr. Harish Mehrotra, Mr. Vipin Kumar, Mr. Arun Kumar Kotwal, Mr. Rakesh Kumar Nagpal and Mr. Shashi Bhushan Prasad. However, learned trial court has erred in permitting prosecution of petitioner, Mr. Sunil Gandhi and M/S A.N.Buildwell Pvt. Ltd., despite the fact that the Directors of the company were also served with the Demand Notices and petitioner had already resigned from the Board of Directors.

10. It was next submitted by learned counsel for the petitioner that the learned trial court has passed the impugned summoning orders without taking into consideration that at the time of hearing, accused company M/S

A.N.Buildwell Pvt. Ltd. was neither represented by any Authorized Representative nor anyone appeared on behalf of provisional Official Liquidator appointed pursuant to order dated 08.03.2016 of this Court. Learned counsel submitted that a pedantic and mechanical approach was adopted by learned Metropolitan Magistrate in issuing the summoning order by ignoring the fact that respondent has deliberately not made Directors/signatory or the Official Liquidator of M/S A.N.Buildwell Pvt. Ltd. a party to the complaint cases, despite having served them Demand Notice qua the cheques in question. It is also averred that the Metropolitan Magistrate has failed to take notice of the fact that out of four cheques in question, only two cheques were signed by the petitioner and other two cheques were signed by the other Director and that petitioner was not Director of M/S A.N.Buildwell Pvt. Ltd. at the time of presentation of cheques or its dishonour or of issuance and acceptance of Demand Notices.

11. It was also submitted that factum of petitioner's resignation from the Directorship of M/S A.N.Buildwell Pvt. Ltd. on 11.09.2015 and constitution of new Board of Directors on the same day had resulted in replacement of petitioner as the authorized signatory of the bank accounts of M/S A.N.Buildwell Pvt. Ltd. and therefore, the cheques in question were

dishonoured with the remarks “*Due to signature to operate account not received*” and this fact has been completely ignored by the learned Metropolitan Magistrate while proceeding against the petitioner under Section 138 of NI Act.

12. To submit that the Director, who was not Incharge, is not responsible for conduct of business of the company, learned counsel for petitioner relied upon Supreme Court’s decision in ***DCM Financial Services Ltd. V/s. J.N. Sareen & Anr. (2008) 8 SCC 1; Sudeep Jain Vs. M/s. ECE Industries Ltd., 2013 SCC OnLine Del 1804; National Small Industries Corporation Limited Vs. Harmeet Singh Paintal & Anr. (2010) 3 SCC 330.*** To submit that if a Director has resigned before the cheque was presented for encashment, he cannot be held liable under Section 138 of NI Act, learned counsel for petitioner placed reliance upon decision in ***Kamal Goyal Vs. United Phosphorus Ltd., 2010 SCC OnLine Del 447.*** To submit that a complaint under Section 138 of NI Act is not maintainable against a Director when on the date of presentation of the cheque, the company is in liquidation, reliance is placed upon decision in ***M.L. Gupta & Anr. Vs. Ceat Financial Services Ltd., 2006 SCC OnLine Del 1448.***

13. Learned counsel for petitioner further submitted that the Official

Liquidator, who had taken charge of the company pursuant to order dated 08.03.2016 of this Court, has not yet been discharged and respondent/complainant without deliberately making him party to the complaints, has claimed almost double of the amount invested by him.

14. Learned counsel for petitioner submitted that the Demand Notice dated 19.05.2016 were despatched by respondent on 23.05.2016 and was delivered to the petitioner on 26.05.2016 and the complaints in question were instituted by respondent on 14.07.2016 and so, there is delay of 04 days in filing the complaints. Thus, the complaints filed by the respondent/complainant are barred by limitation as prescribed under Section 138 read with Section 142 of NI Act, which were not even accompanied by applications seeking condonation of delay. Lastly, learned counsel for petitioner submitted that not only the impugned orders dated 16.3.2017, 25.06.2018 and 25.6.2020 deserve to be set aside, but the complaints in question are also liable to be dismissed.

15. On the other hand, learned counsel for respondent/complainant supported the impugned orders and submitted that the orders are well merited and there is no error calling for any interference by this Court. Learned counsel for respondent/complainant submitted that besides

respondent/ complainant, over 1400 investors have invested their hard earned money in the real estate projects carried out by M/S A.N. Buildwell which was owned, operated and controlled by the petitioner and petitioner is a charge-sheeted accused in several FIRs registered in Delhi and NCR for looting and plundering of money to the tune of Rs.450 crores. Learned counsel submitted that with an intention to safe guard his hard earned invested money in the project run by the petitioner, respondent/complainant deposited the cheques in bank for payment, which were issued to him by the accused company under the Directorship and signatures of petitioner and after dishonouring of cheques, petitioner was left with no option but to have recourse to law.

16. Learned counsel for respondent/complainant submitted that petitioner's claim of having resigned from the accused company on 11.09.2015 while the cheques in question were dishonoured on 27.04.2016, is blatantly false as petitioner himself is signatory on the two cheques in question and these cheques were issued by the accused company under the Buy Back Option, as spelt out in the Builder Buyer Agreement and Agreement to Sell dated 27.03.2015. It was stated that petitioner first created financial crunch in the accused company by siphoning off the company

funds for personal benefits and then pushed company into the process of liquidation and thereafter, with the *mala fide* intention to escape his liabilities, he resigned from the Board of Directors.

17. Learned counsel for respondent submitted that the plea of petitioner that he was not involved in the day to day affairs of the company has to be rejected because at the time when respondent had invested his hard earned money into the residential project in question, petitioner was the Promoter, Director, person in charge and 40% share holder of the company i.e. M/S A.N. Buildwell and therefore, he was the main person to induce the respondent to invest and was the Director at the time of issuance of cheques in question and was responsible for the acts performed in the name of the company and, therefore, liable under Section 141 of the NI Act. Learned counsel for respondent submitted that it is an admitted fact that out of the four cheques in question, two cheques of the higher value, have been signed by the petitioner in the capacity of Director of the Company which clearly establish that petitioner was duly authorized to issue cheques in the course of business transactions of the company.

18. Learned counsel for respondent next submitted that the plea of petitioner that respondent presented the cheques for payment in bank after

M/S A.N. Buildwell had gone into liquidation is incorrect, as only 'Provisional Official Liquidator' was directed to be appointed by this Court on 08.03.2016 and in fact, the cheques handed over to the respondent/complainant were posted dated cheques bearing date of 27.03.2016, which could be presented in Bank only thereafter, and were dishonoured and returned by the Bank on 27.04.2016. It was further submitted that only provisional Official Liquidator was appointed by this Court and the company had not gone into liquidation.

19. Learned counsel for respondent/ complainant further submitted that petitioner has not approached this Court with clean hands, as he has not disclosed in the petition that this Court vide order dated 17.02.2020, in the case titled as *Sunil Gandhi Vs. M/S A.N. Buildwell Private Limited* has approved revival of the accused company and petitioner has been re-appointed as the Director of the company on 04.04.2020.

20. Regarding the plea of petitioner that the complaints in question are barred by limitation as set out in Section 138 of NI Act, learned counsel for respondent submitted that the said plea is to be rejected, as the Metropolitan Magistrate, after examining the issue of filing of complaints, has categorically stated in the impugned summoning orders dated 16.3.2017 and

25.06.2018 that the complaints were filed within period of limitation. It is averred on behalf of respondent that the cheques in question were returned from the bank vide Return Memo dated 27.04.2016 and legal Demand Notice was sent on 23.05.2016, which was served upon the company on 30.05.2016 and the complaints were instituted on 14.07.2016 and therefore, there is no delay in filing the complaints in question.

21. Learned counsel for respondent also submitted that the plea of petitioner that in the complaints in question only he, Sunil Gandhi and M/S A.N. Buildwell have been arrayed as accused despite the fact that Demand Notices were sent to other Directors as well, cannot be taken note of as only these persons were responsible for the day to day affairs of the company and they were the majority share holders as well as signatories on the cheques in question. Further, it was stated that petitioner himself has not disclosed the name of other signatory on the cheques in question. Besides, the Demand Notices qua the cheques in question were also served upon the Directors who had joined the accused company on the same date when petitioner had resigned from the Board of Directors i.e. 11.09.2015.

22. Learned counsel for respondent/complainant also drew attention of this Court to the fact that FIR No. 114/2016 has been registered at police

station Sarita Vihar, Delhi against the petitioner for the offences under Sections 406/400/420 read with Sections 34 & 120 B IPC and charge sheet in that case has already been filed and as per documents placed on record therein, the account from which the cheques in question were issued by the petitioner, did not even have sufficient balance to honour the legally enforceable debt of the respondent on the date when the cheques were issued or when the petitioner resigned from the company or when the cheques were presented for payment.

23. Learned counsel for respondent/complainant submitted that reliance placed by petitioner upon Hon'ble Supreme Court's decision in *M.L.Gupta (Supra)*, is misplaced as in the said case, the complainant had presented the cheque much after winding up of the company whereas in the present case, only publication/citations have been issued which is the first step for liquidation and in fact, till date liquidation has not taken place and rather, revival of the company has been approved by this Court. Learned counsel for respondent/complainant emphasized that petitioner has hatched an elaborate conspiracy with co-accused Sunil Gandhi and committed this premeditated crime by creating financial crunch and pushing the accused company into liquidation, resigning from the Board of Directors and thereafter, reviving it

and rejoining as Director.

24. To submit that provisions of Section 446(1) of the Companies Act can have apparently and in essence no application to the proceedings under Section 138 of NI Act, learned counsel for respondent/complainant relied upon decision of this Court in W.P.(Crl.) 1280/2010, ***M/s Indorama Synthetics (I) Ltd vs. State of Maharashtra and Anr.*** and decision of High Court of Calcutta in ***MBL Infrastructure Ltd. Vs. Sh. Manik Chand Somani [CRR 3455/2018]***. Reliance is also placed upon decision of this Court in ***Krishna Texport Industries Ltd. Vs. DCM Limited (C.O.Appeal No. 44/20025)*** and decision of *High Court of Bombay in Tayal Cotton Pvt. Ltd. Vs. State of Maharashtra and others (W.P.(Crl.) 1437/2017)* in support of respondent's case.

25. Lastly, it was submitted on behalf of respondent/complainant that none of the grounds raised by the petitioner merit any consideration and these petitions deserve to be dismissed.

26. Arguments advanced by learned counsel representing both the sides were heard in detail and I have also perused the impugned orders, material placed on record as well as decisions relied upon by the parties.

27. It is not in dispute that petitioner was Director of M/S A N Buildwell

(P) Ltd. when respondent/complainant invested in the residential project by the name of “Spire Woods” located in Gurugram, Haryana and Builder Buyer Agreement and Agreement to Sell was entered between the accused company and respondent/complainant on 27.03.2015. It is further not in dispute that out of the four post dated cheques issued in the name of respondent/complainant, two cheques of higher value were signed by petitioner in the capacity of Director as well as one another authorized representative of the accused company, whose name petitioner has not disclosed. It is also not in dispute that in terms of aforesaid agreement entered between the parties, respondent/complainant was given “Buy Back Option” and in terms thereof, petitioner handed over four post dated cheques bearing the date of 27.03.2016 to him, which could be presented in bank only after one year of entering into Builder Buyer Agreement and Agreement to Sell dated 27.3.2015.

28. As per the complaint, when respondent got to know in March, 2016 that the accused/company is facing financial crunch and its Directors had resigned from the Board of the Directors and new Directors were inducted and also that the accused company had primarily reached at the stage of liquidation, he, therefore, presented the cheques in bank for payment, which

were handed over to him by the accused company under the Buy Back Option. In such a situation, any prudent person would have adopted the similar approach to safeguard his interests, as adopted by the respondent/complainant herein.

29. Different question of facts and law have been raised in these petitions. The foremost question which is required to be determined by this Court is the preliminary objection raised by the petitioner that the complaints in question are barred by limitation. Though impugned orders dated 16.3.2017 and 25.06.2018 simply noted that the complaints filed are within the limitation period, petitioner claims that the Demand Notices were served upon him on 26.05.2016 and the complaints in question were filed on 14.07.2016 and so, there is a delay of 04 days in filing the complaints. On the other hand, the stand of respondent/complainant is that the Demand Notices were served upon the accused company on 30.05.2016 and the complaints were instituted on 14.07.2016, and, therefore, the complaints have been filed within the stipulated period as prescribed under Section 138 of NI Act and there was no requirement of filing application under Section 142 (b) NI Act for condoning the delay.

30. The Hon'ble Supreme Court and High Courts in a catena of judgments

have worded the liability of Directors, Managers and Officials of a company in complaints arising out of Section 138 & 141 NI Act. The pertinent observations of Hon'ble Supreme Court in *N. Rangachari Vs. BSNL, (2007)*

5 SCC 108, are as under:-

“15. By the fall in moral standards, even these negotiable instruments like cheques issued, started losing their creditability by not being honoured on presentment. It was found that an action in the civil court for collection of the proceeds of a negotiable instrument like a cheque tarried, thus defeating the very purpose of recognising a negotiable instrument as a speedy vehicle of commerce. It was in that context that Chapter VII was inserted in the Negotiable Instruments Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with effect from 1-4-1989. The said Act inserted Sections 138 and 142 in the Negotiable Instruments Act. The objects and reasons for inserting the chapter were:

“to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers.”

16. While Section 138 made a person criminally liable on dishonour of a cheque for insufficiency of funds or the circumstances referred to in the section and on the conditions mentioned therein, Section 141 laid down a special provision in respect of issuance of cheques by companies and commission of offences by companies under Section 138 of the Negotiable Instruments Act. Therein, it was provided that if the person committing an offence under

Section 138 of the Act was a company, every person who at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The scope of Section 141 has been authoritatively discussed in the decision in S.M.S. Pharmaceuticals Ltd. [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance.”

31. In view of the above, respondent/complainant was right in affecting service of Demand Notice upon the accused company and its erstwhile and current Directors as well. The accused company has been served on 30.05.2016, therefore, complaints having been filed on 14.07.2016, are well within the limitation period.

32. It is a matter of record that at the time when Builder Buyer Agreement

and Agreement to Sell, dated 27.03.2015 were entered into between the parties, petitioner was the Director of the company. In terms of Buy Back Option, as spelt out in the aforesaid Agreements, petitioner handed over four post dated cheques dated 27.03.2016, out of which two cheques of higher value were signed by him in the capacity of Director. It is not the case of petitioner that the two cheques in question did not bear his signatures or that at the time of issuance of cheque, he was not the Director of the accused company. The stand taken by petitioner is that at the time of presentation of cheques in bank, he was not on the role of Board of Directors and has placed on record copy of Form DIR 12 in support of his claim, which shows that he had resigned on 11.09.2015. However, this Court cannot lose sight of the fact that he was the Director/Promoter of the accused company at the time of issuance of cheques and was also signatory on two cheques. The Hon'ble Supreme Court in ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla AIR 2005 SC 3512***, while affixing the liability of the signatory on the cheque, has held as under:-

“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.”

33. In the present case, there are specific allegations in the complaint against the petitioner that he was the Director of the accused company, who had acted as a Promoter to induce petitioner to invest his money in the project and allured him of higher returns if money is paid in one instalment and issued the post dated cheques under his signatures, which shows that

petitioner was authorised to make financial transaction of the accused company and was therefore, responsible for business of the accused company.

34. Be that as it may. It is pertinent to mention here that the four cheques in question, which were handed over to respondent/complainant on 27.03.2015, were bearing dates of 27.03.2016 and could be presented in the bank only thereafter, and in between petitioner had resigned from the Board of Directors. But, this by itself would not dilute the responsibility of petitioner or accused company to fulfil their responsibility to honour the cheques.

35. The petitioner has approached this Court against his summoning and framing of Notices under Section 251 Cr.P.C in the complaints in question. It is settled law that a Magistrate at the stage of taking cognizance and summoning is required to only consider whether a *prima facie* case has been made out for summoning the accused persons or not and is not required to go into the merits of the case or material placed on record. However, since petitioner has also sought dismissal of the complaints on merits, this Court while exercising its extra ordinary inherent jurisdiction under Section 482 Cr.P.C. heard the parties at length on the merits of the case as well.

36. What has shocked the conscience of this Court is that for purchase of one residential unit, respondent/complainant had paid a sum of Rs.45,25,331/- to the accused company through RTGS, whereas the total sum value of four post dated cheques in question is Rs.11,4,74,703/- which were given to respondent by the petitioner's company. It appears that the accused company guaranteed significant returns to the customers/ investors who paid the entire amount in one instalment for the properties which were yet to be developed. Attention of this Court has been drawn to copy of charge sheet filed in FIR No. 114/2016, registered at police station Sarita Vihar, Delhi, in which petitioner herein is also an accused.

37. Attention of this Court was also drawn to the order of 17.02.2020 in *Sunil Gandhi Vs. M/S A.N. Buildwell Private Limited*, vide which a Coordinate Bench of this Court has approved revival of the accused company and petitioner has been re-appointed as the Director of the company on 04.04.2020.

38. Whether petitioner who had issued the post dated cheques in the capacity of Director of the accused company, had already resigned on the date of presentation of cheque or whether there was sufficient balance in the account to honour the legally enforceable debt or what shall be petitioner's

liabilities after being re-appointed as the Director of the Company, are the questions which cannot be gone into at this stage.

39. A Single Bench of this Court in ***J.N. Bhatia & Ors. Vs. State & Anr. 2006 SCC OnLine Del 1597***, dealt with bunch of complaints under Section 138 & 142 of NI Act based on dishonour of cheques. In one of the petition, (Crl.M.C.1162/2003), while taking note of the fact that the petitioner/accused was one of the signatory, dismissed the petition while holding as under:-

“53. Though at the time of arguments it was denied that the petitioner had signed the cheques, Trial Court record, which was summoned, shows that he is one of the signatories. When these are the facts appearing, the complaint cannot be quashed under Section 482 of the Code of Criminal Procedure. The disputes raised by the petitioner would form his defence for which evidence would be required and they are disputed questions of fact. This petition is accordingly dismissed.”

40. The Hon’ble Supreme Court in ***N. Rangachari (Supra)*** has also held as under:-

“21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its Promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily

routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

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27. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not in charge of the affairs of the Company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion (sic commencement) of the trial.”

41. Applying the dictum of **N. Rangachari (Supra)**, to the facts of present

cases, I find that the correctness of allegations levelled by the parties, have to be tested at trial and therefore, in my opinion Metropolitan Magistrate while framing notices under Section 251 Cr.P.C. has rightly rejected petitioner's prayer for discharge while observing that the points raised by the parties are triable issues which can be agitated during trial.

42. In view of the aforesaid, the above captioned four petitions are dismissed, while refraining to comment upon the merits of their case and with liberty to the parties to raise the pleas taken herein before the trial court during trial.

43. Pending applications also stand disposed of accordingly.

44. A copy of this order be sent to the court concerned for information and compliance.

45. The judgment be uploaded on the website of this Court forthwith.

(SURESH KUMAR KAIT)
JUDGE

FEBRUARY 08, 2021

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