IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2155 OF 2016
WITH
CRIMINAL REVISION APPLICATION NO.62 OF 2022

National Spot Exchange Limited .. Petitioner
v/s.
N.K. Proteins Limited & Ors. .. Respondents

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Mr. Arvind Lakhawat, a/w. Mr. Nimeet Sharma, i/b. Muddassar Bagadia, for Petitioner-NSEL.

Mr. Girish Kulkarni, Senior Advocate, i/b. Ms. Mrunmai Kulkarni, for Respondent Nos. 1, 2, 3 and 5.

Mr. Shirish Gupte, Senior Advocate, a/w. Mr. Adnan Ansari, Mr. Adesh Jadhav, Ms. Supriya Kak and Mr. Sarvesh Dixit, i/b. Mr. Sandeep S. Ladda, for Respondent No.4.

Mr. R.M. Pethe, APP, for Respondent State.

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CORAM : R.G. AVACHAT, J.

RESERVED ON : 7 FEBRUARY 2023.

PRONOUNCED ON : 27 FEBRUARY 2023.

JUDGMENT:-

Rule returnable forthwith. Heard finally with the consent of the parties.

2. These proceedings are being decided by this common order, since common questions of fact and law arise therein. Both these proceedings have been filed by National Spot Exchange Ltd. (NSEL). For the sake of convenience, the NSEL is hereinafter referred to as complainant. The Respondents in both the proceedings are accused in two separate complaints filed by the complainant under Section 138 r/w 141 of the Negotiable Instruments Act (for short "N.I. Act"). Those complaints, C.C. No.2979/SS/2013 and C.C. No.2023/SS/2015, were on the file of the Court of Metropolitan Magistrates, Mumbai. The learned Magistrates had issued process against the Respondents herein. The Respondents, therefore, took exception to the orders of issuance of process, by filing four separate revision applications, being Revision Application Nos. 436 of 2014, 473 of 2014, 269 of 2018 and 31 of 2019. The learned Additional Sessions Judge, Greater Mumbai, by his common judgment and order, allowed Criminal Revision Application Nos.436 of 2014 and 473 of 2014 on 13 July 2015. Relying on the judgment and order in these two criminal revision applications, the learned Additional Sessions Judge, Greater Mumbai, allowed Criminal Revision Application Nos.269 of 2018 and 31 of 2019 on 5 November 2019. As such, the orders of issuance of process in both the complaints came to be set aside. The complainant has, therefore, preferred present proceedings.

3. The facts giving rise to present proceedings are as follows:-

The complainant is a company carrying on business as spot exchange providing for an electronic trading platform for spot contract in commodities on a compulsory delivery basis. Accused No.1 (Respondent No.1 in both the complaints) is N.K. Proteins Ltd., a company incorporated under the Companies Act. Other Respondents in these proceedings are the accused in the two complaints. The Respondents are hereinafter being referred to as accused. Accused No.1 was trading-cum-clearing member of the complainant, accused no.2 was the chairman, accused no.3 was the managing director, accused no.4 was the director and no.5 accused was the whole-time director of accused no.1. Accused nos. 2 to 5 are in charge and responsible for carrying out the day-to-day business of accused no.1. The affairs of accused no.1 are managed by accused nos. 2 to 5 and, as such, they are in control of affairs of accused no.1 and, therefore, liable for all the acts and deeds committed by accused no.1.

4. The Government of India, in the Ministry of Consumer Affairs, Food and Public Distribution, allowed the complainant to conduct trading in one day duration forward

contracts in commodities, subject to conditions stated in the notification dated June 5, 2007. Accused no.1 was admitted by the complainant as a trading-cum-clearing member. It was allowed to trade and clear through the clearing house of the complainant and was allowed to make deals for itself as well as on behalf of its clients. Accused nos. 2 and 3 signed all the documents pertaining to the membership of accused no.1, including the undertaking as required in accordance with Rules and Byelaws.

5. The Government of India, vide its letter dated 12 July 2013, had directed the complainant to furnish an undertaking that all existing contracts will be closed on due dates and no fresh contracts would be launched. The complainant, therefore, submitted undertaking shortening the delivery period to 10 days in all contracts. In view of the undertaking and emergency situation arising due to defaults of pay-in, the complainant issued circular dated 31 July 2013, suspending all the transactions on the exchange w.e.f. 31 July 2013 by merging the delivery and settlement of all pending contracts and deferring it for a period of 15 days.

6. There were certain defaults in pay-ins by the members trading on the platform of the complainant. On working out the

liability of accused no.1 towards the complainant in respect of the outstanding trades, it came to an amount of Rs.967.15 crores. Thus, the amount of Rs.967.15 crores was due and payable by accused no.1. Accused no.3, on behalf of accused no.1, issued post-dated cheques. They also executed and issued PDC (post-dated cheque) declaration and agreement dated 1 July 2013. It is also the case of the complainant that accused no.1 paid Rs.25,16,00,000/- (Rupees Twenty Five Crores And Sixteen Lakhs Only) towards outstanding dues. Two of the cheques were presented for encashment. The cheques returned unpaid. The details thereof are as under:-

Sr. No.	Cheque No.	Amount	Issued on/Bank	Presented for Encashment on/Bank
1	216027	Rs.48,36,00,000/- (Rupees Forty Eight Crores And Thirty Six Lakhs only)	14 August 2013/ ICICI Bank, Ashram Road Branch, Ahmedabad.	16 August 2013/Axis Bank, MIDC Branch, Andheri (E), Mumbai.
2	216028	Rs.903,25,06,159/- (Rupees Nine Hundred And Three Crores, Twenty Five Lakhs, Six Thousand And One Hundred & Fifty Nine only)	9 May 2014/ ICICI Bank, Ashram Road Branch, Ahmedabad.	12 May 2014/Axis Bank, Fort Branch, Mumbai.

7. Cheque bearing No. 216027 returned unpaid for the

reason “Payment Stopped by the Drawer”. The other cheque was bounced for the reason “Account Closed”. The complainant, therefore, issued the accused statutory demand notices dated 28 August 2013 and 29 May 2014. The accused received both the notices. They preferred to reply the notice dated 28 August 2013, denying their liability to pay. Since the amount due was not forthcoming from the accused pursuant to the statutory demand notice/s, complainant filed two separate complaints (C.C.No.2979/SS/2013 and C.C.No.2023/SS/2015), wherein process came to be issued against the accused. The accused filed four revision applications, which came to be allowed as stated above in para 2 of this order.

8. The learned Sessions Judge, vide impugned judgment and order dated 13 July 2015, allowed both Revision Application Nos.436 of 2014 and 473 of 2014, observing that it was a blank cheque issued as a security. Whenever a cheque is issued by way of security, its dishonour would not attract the penal consequences under Section 138 of the N.I. Act. There were about five signed blank cheques issued by accused no.3. The cheque in question was one of the five cheques. The blanks in the cheque were not filled-in by authorised person of accused no.1. As such, when signed blank cheque was issued, no fixed amount was due and payable by accused no.1. The learned Sessions Judge relied on the

order dated 17 June 2015, passed by this Court in Appeal (L) No.741 of 2014 with Notice of Motion (L) No.2744 of 2014. This Court observed in the said order that liability of accused no.1 certainly would have to be ascertained. The liability, shown by the complainant in the ledger account, cannot be accepted. According to learned Sessions Judge, from the said order, it is clear that no specific amount was found due and payable from accused no.1 to the complainant on 23 September 2013. The cheque for Rs.48,36,00,000/- (Rupees Forty Eight Crores And Thirty Six Lakhs only), therefore, could not be said to have been issued in the discharge of any debt or legally enforceable liability. In the reply to the statutory demand notice, a specific contention was raised. The cheque issued was security in respect of the loan proposed to be taken in future. The said contention needs to be accepted.

9. Relying on the judgment and order passed by the Sessions Judge in Revision Application Nos. 436 of 2014 and 473 of 2014, learned Additional Sessions Judge, vide his judgment and order dated 5 November 2019, allowed other two Revision Application Nos. 269 of 2018 and 31 of 2019.

10. Defence/stand of the accused

Signed blank cheques were issued as a security and/or to facilitate availment of loan. No amount was due and payable from accused no.1 to the complainant. The complainant, under the guise of trading in commodities, indulged in economic offences. The Government of India under Section 27 of the Forward Contracts (Regulation) Act 1952, exempted the complainant from the operation of the provisions of the said Act on the conditions stipulated therein. Accused no.1 is merely a member of the exchange platform of the complainant. Vide letter dated 12 July 2013, the Central Government directed the complainant that no further/fresh contract shall be launched on or through its exchange platform until further instructions from the concerned authority. The complainant, vide its circular dated 31 July 2013, suspended all the contracts until further notice. As a result of such action, there arose a severe payment crisis on the exchange platform. As a result thereof, many persons, who claim to have invested their funds with the complainant through the mode of electronic platform, did not receive back their money. Mr. Pankaj Saraf lodged the complaint. Pursuant to which, FIR No. 216 of 2013 was registered on 30 September 2013.

11. There arose some dispute between complainant and

accused no.1. The complainant preferred application under the Arbitration and Conciliation Act, 1996, before this Court for interim orders for recovery of alleged dues. Learned Single Judge refused to grant complainant ad-interim relief, observing that the complainant failed to substantiate the alleged outstanding amount. The complainant, therefore, withdrew arbitration proceedings.

12. Since the High Court has concluded that no fixed amount could be said to have been due and payable by the accused, the complainant misused signed blank cheques. The learned Sessions Judge has rightly exercised revisional powers to set aside orders of issue of process. The complainant itself admitted to have received blank cheques. The orders passed by the High Court on civil side attained finality and it binds the complainant. During investigation, the Economic Offences Wing (EOW) has seized blank cheque. The report of investigation (charge-sheet) reinforces the contention of the accused. The Sessions Judge has passed a reasoned order. Three different figures of amount are alleged to be due from accused no.1. Same itself indicate uncertainty of recovery of legally enforceable debt.

13. Certain observations in the charge-sheet filed by the Economic Offences Wing against the complainant and the

accused as well were brought to the notice of this Court. Reference thereto would be made later on. According to learned Advocate for the accused, it was in the nature of wagering contract, which is statutorily void. The transactions entered into were fraudulent. The complainant and its directors are being prosecuted therefor. A star question was raised in the parliament. The Union of India had, therefore, to swung into action and direct the complainant to stop all the dealings of one day duration forthwith.

14. Learned Senior Advocate, Mr. Girish Kulkarni, representing the accused company and its directors, except accused no.4, made the aforesaid submissions.

15. Accused No.4 in C.C. 2979/SS2013 (Respondent No.4 in Writ Petition No.2155 of 2016) filed his separate affidavit-in-reply. It is his case that he himself and his group of companies had given financial assistance of little over 6 crores of rupees to N.K. Industries and its Group Companies in the year 1997-98. It was in the nature of inter-corporate deposit. N.K. Group of companies, a sister concern of accused no.1, defaulted in repayment of financial assistance given by him. N.K. Industries Ltd. was declared as sick Industrial Company under Section 22 of Sick Industrial Companies Act, 1985 and no recovery proceedings

were maintainable in any civil court, without the express permission from the Board of Industrial and Financial Restructuring (BIFR). Therefore, purely in view of financial assistance advanced by him, the promoters of N.K. Group of Companies offered him shareholding in its other group company, namely, accused no.1. Pursuant thereto, he was given a nominal seat in its board of directors. He was appointed as a non-executive director on 16 June 2001. He never participated in the day-to-day business of accused no.1. He has not signed any document, cheque, account opening form pertaining to accused no.1. He had no authority to take any decision or sign any document with respect of any business affairs or day-to-day functioning of accused no.1. During his tenure as director, he had hardly visited the office of accused no.1, nor had he attended any business meetings. He was completely unaware and was not involved in any kind of business activity of accused no.1. He has never received any amount as consideration or any amount as director's remuneration. Since 2008, he was never called, nor did he attend any of the board meetings as a director of accused no.1. He has not signed any balance sheet or other statutory documents, including annual reports of financial submissions. He, in fact, never involved or even aware of transactions between the complainant and accused no.1. The complainant itself had admitted in the complaint that he has not signed any document of alleged transaction between the complainant and other accused. He was busy in taking care of his own business. He did not receive any communication from the complainant either before dishonour of the cheque or thereafter. He had not been served with a statutory demand notice. As per Section 282 (1)(g) of the Companies Act, 1956, as he did not attend any board meetings or took part in day-to-day business affairs and failed to attend three consecutive meetings of board of directors, without obtaining leave, by deemed fiction, he ceased to be a director of accused no.1. The Managing Director of accused no.1 has issued a letter clearly supporting his claim. As such, he was non-executive director under the Companies Act, 1956. There was no such concept of being a non-executive director under the old Companies Act. His non-participation in the day-to-day affairs itself suggest that he was a non-executive director of accused no.1.

16. It is also his case that he resigned as a director of the company on 16 August 2013, i.e. before the date of dishonour of the cheque. His resignation was accepted on the next date. It was imperative on the part of accused no.1 to immediately inform the same to Registrar of Companies (ROC) and submit necessary Form No.32 under the provisions of the Companies Act. His resignation was forwarded to ROC somewhat late. He had appointed a practising Company Secretary to take search of

accused no.1 company with regard to his directorship and resignation and day-to-day affairs as well. The Company Secretary gave a detailed report after going through the record and statutory filing of Respondent No.1 company, which clearly shows him to have resigned on 16 August 2013. The Company Secretary's report is placed on record. Notice of dishonour of cheque was delivered on the date on which he was not holding position in the accused company. In view of his resignation, there was no question of his involvement in the matter of dishonour of cheque.

17. It is further his case that the averments in the complaint are silent to assign him a specific role in the alleged offence.

Learned Senior Advocate, Mr. Shirish Gupte, made aforesaid submissions and took this Court through the documents filed in support of his submissions.

18. A host of authorities have also been relied on. Most of them pertain to consequences of not making specific averments in the complaint, attributing a role to a director with a view to invoke constructive criminal liability in terms of Section 141 of N.I. Act. The authorities relied on are as under:

1. S.P. Mani And Mohan Dairy vs. Dr. Snehalatha Elangovan.[1]

2. Pawan Kumar Goel vs. State of U.P. & Another.[2]

3. S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla & Anr.[3]

4. National Small Industries vs. Harmeet Singh Paintal & Anr.[4]

5. Pooja Ravinder Devidasani vs. State of Maharashtra & Ors.[5]

6. Sunita Palita & Ors vs. Panchami Stone Quarry.[6]

7. Mr. Satvinder Jeet Singh Sodhi & Ors. vs. State.[7]

8. Alka Khandu Avhad vs. Amar Syamprasad Mishra.[8]

9. Dashratbhai Trikambhai Patel vs. Hitesh Mahendrabhai Patel and Anr.[9]

10. Indus Airways Private Limited vs. Magnum Aviation Private Limited.[10]

19. Considered the submissions advanced. Perused the complaints, affidavits-in-reply and all the documents relied on. Also gone through the authorities placed on record. Notification dated 5 June 2007, issued by Central Government, in Ministry of

1 SCI 16 September 2022.
2 2022 SCC OnLine SC 1598.
3 (2007) 4 SCC 70.
4 (2010) 3 SCC 330.
5 (2014) 16 SCC 1.
6 (2022) SCC 945.
7 Bombay High Court 1st July 2022.
8 (2014) 4 SCC 575.
9 (2022) SCC Online SC 1376.
10 (2014) 12 SCC 539.

Consumer Affairs, Food and Public Distribution, exempted the complainant from the operation of the provisions of the Forward Contracts (Regulation) Act, 1952. Accused no.1 appears to have been one of the members trading on the platform of the complainant. Accused no.2 is admittedly a managing director of accused no.1, accused no.3 is also a managing director and authorised signatory of accused no.1, accused no.4 Kamlesh is stated to be whole-time director. The cheques in question have admittedly been signed by accused no.3 Nilesh for and on behalf of accused no.1 Company. There are specific averments in this regard in the complaint. Admittedly, the Government of India, vide letter dated 12 July 2013, had directed the complainant to furnish an undertaking that all existing contracts will be settled on due dates and no fresh contracts will be launched. Pursuant thereto, the complainant submitted an undertaking on 15 July 2013 shortening the delivery period to 10 days in all contracts.

20. Relevant provisions of N.I. Act are referred to hereinbelow:

> "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 one year, 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 three 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 fifteen 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.

139. Presumption in favour of holder.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in section 138, for the discharge, in whole or in part, of any debt or other liability.

141. **Offences by companies.** —(1) If the person committing an offence under section 138 is 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:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
Explanation.— For the purposes of this section,—
(a) "company" means any body corporate and includes a firm or other association of individuals; and
(b) "director", in relation to a firm, means a partner in the firm."

21. There are documents on record, namely:-

(i) A letter dated 1st April 2013, issued by accused no.1 to the complainant, suggesting that the accused agreed to pay the complainant a minimum amount of 5% of their dues every week on Friday commencing from the next week and settled their all outstanding dues within a period of 20 weeks. Accused no.1 Company also undertook to take all possible steps to repay all their outstandings much before the said twenty weeks' time.

(ii) Then there is a document in the nature of minutes of meeting of the directors of accused no.1. The minutes have been under signature of all accused except Jayesh Choksi.

The minutes record as under :-

- NK Proteins agreed to a payment of Rs.775 cr as a settlement amount of the total liability of Rs.964.89 Cr.

- They will give all relevant documents of the land and factory by 22 Oct.

- Settlement agreement will be entered into subject to the approval of FMC.

- The entire amount will be paid within 12 months from the date of the agreement.

- Payment schedule and issue of PDC will be finalized on 22 Oct 2013.

22. As such, accused no.1 company admitted/ acknowledged to have owed a sum of Rs.9,64,00,000/- (Rupees Nine Sixty Four Crores Only) to the complainant. Accused no.1 company also executed PDC (Post-dated Cheque) agreement. Admittedly, it issued signed blank cheques, five in number. Two of them are the subject matter of these proceedings. As has already been stated above, that the signature in the cheque is not in dispute. In case of *Bir Singh vs. Mukesh Kumar*[11], it has been observed:

> "Section 139 of N.I. Act mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. However, the presumption is rebuttable by proving to the contrary. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused to prove by cogent evidence that there was no debt or liability. Mere denial or rebuttal by the accused was not enough. (Paras 18, 20 and 24)
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> B. Debt, Financial and Monetary Laws - Negotiable Instruments Act, 1881- Ss. 139, 20 and 87 – Presumption that cheque, duly signed and voluntarily made over to payee, was in discharge of debt or liability - Arises irrespective of whether cheque was post-dated or blank cheque for filing by payer or any other person, in absence of evidence of undue influence or coercion
>
> Held:

11 (2019) 4 Supreme Court Cases 197

> A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. (Para 33)
>
> The fact that the cheque might be post dated does not absolve the drawer of a cheque of the penal consequences of Section 138 of the Negotiable Instruments Act. Further it is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence. (Paras 32 to 34 and 36)"

23. What has been submitted by learned Senior Advocate, Mr. Girish Kulkarni, relying on certain documents, is in the nature of a defence based on factual matrix. The same can only be gone into during trial of the case. It is reiterated that accused no.1 company acknowledged to have owed the appellant company a sum of Rs.9,64,00,000/- (Rupees Nine Sixty Four Crores Only). It, therefore, issued signed blank cheques. The blanks in the

cheques came to be filled-in by the complainant.

24. It is true that the complainant filed Arbitration Petition (L) No.1524 of 2013. The learned Single Judge of this Court, in para 3, 6 and 7 of its order dated 23 September 2013, observed thus:

> "3. The Petitioner's ledger account showing the transaction of Respondent No.1 is produced by Respondent No.1 to show that as on 31st July, 2013 the member delivery application of Respondent No.1 was Rs.235 Crores. Though under notification dated 6th August, 2013 no further trading was allowed, the ledger account shows the member delivery application of Respondent No.1 on 8th August, 2013 to be Rs.569 Crores and on 9th August, 2013 liability of Respondent No.1 is shown to be Rs.1093 Crores.
>
> 6. The liability of Respondent No.1 would certainly have to be ascertained. The liability shown by the Petitioner in the ledger account of Respondent No.1 cannot be accepted at present. It will have to be seen when the various application summaries of various dates are considered together.
>
> 7. The summary of the details of the transactions of Respondent No.1 annexed at Exh.K to the Petition shows that on 13th July, 2013 the delivery pay out amount is Rs.0.00 Crores. Hence it shows no shortage and no delivery outstanding. It is claimed on behalf of the Petitioner that that this was because the transaction was rolled over and consequently on and from 2nd August, 2008 shortage amount of Rs.1475341.10 lacs is shown. Consequently it is argued that this the amount not rolled over but required to

> be settled by delivery and payment came to be reflected in the ledger account because Respondent No.1 could not pay the investors in accordance with the delivery shortage. The Respondents have shown that the total delivery shortage on and from 8th and 9th August, 2013 has risen from Rs.569 Crores to 1090 Crores merely by ledger entry. Respondent No.1 showed that by this time trades were not allowed to be transacted and yet the amount is shown to be almost double from the previous date. Consequently the total liability of 1088 Crores shown at the foot of the account of Respondent No.1 in the Petitioner's ledger is not substantiated by Petitioner to obtain relief at present."

The learned Judge, therefore, refused to grant the complainant ad-interim relief.

25. Order dated 23 September 2013 was an interim order. The arbitration proceedings later on came to be withdrawn. The order dated 23 September 2013, passed in Arbitration Petition No.1524 of 2013, therefore, could not be said to have attained finality so as to bind the parties thereto. The complainant has filed a civil suit against accused no.1 company for recovery of the amount. Ad-interim order, restraining it from alienating its properties, has been passed therein.

26. True, based on the complaint filed by Pankaj Saraf, the EOW investigated the crime and has filed charge-sheet against both the complainant, accused no.1, their directors and some

other members of the complainant, who were allowed to trade on its platform. The gist of the prosecution case is, that Mr. Pankaj Saraf lodged a complaint against the complainant, their directors and many others, alleging of defrauding him and other 13,000 investors to the tune of Rs.5,600 crores. The investigating agency found substance therein. The charge-sheet has, therefore, been filed against the complainant, accused no.1 and their directors and many others.

27. It is true that it is a very big question as to how and why the complainant allowed the amount, allegedly due from accused no.1, to swell up to or even little over Rs. 1,000 crores. In view of this, there must have been something more than meets the eye. In view of presumption of innocence, nothing adverse could be commented upon at this stage. Suffice it to say that unless the cases go for trial, no truth would surface. As of today, in view of accused no.1 company to have acknowledged its liability and issued signed blank cheques and further in view of presumption under Section 139 of the N.I. Act, and the fact that what has been submitted on behalf of accused no.1 company and its other directors, being all matters of facts, this Court finds the revisional courts to have erred in setting aside orders of issue of process. The observations of the learned Sessions Judge that the cheque was issued as a security, therefore, could not have been put to

encashment is inconsistent with Apex Court judgment in case of *Sampelly Satyanarayana Rao v. India Renewable Energy Development Agency Ltd.*[12].

When the cheque is issued, the amount in the cheque is presumed to be due to the payee. Whether it was issued as a security is a matter of defence.

28. The stand of Mr. Jayesh Choksi:

With a view to avoid repetition, it is simply observed that almost all the submissions made by Senior Advocate Shri Gupte, based on the averments in the affidavit-in-reply of Respondent No.4, are matters of facts. Those have been adverted to hereinabove. In the complaint there are specific averments suggesting him to have been in day-to-day management of the affairs of accused no.1. Although there are some documents in support of his defence, those cannot be termed to be of sterling quality so as to place reliance thereon at this stage. In his case, the cheque is dated 14 August 2013. He claimed to have resigned from the post of director on 16 August 2013. His resignation is said to have been accepted on 17 August 2013. Accused no.1 informed the ROC about his resignation. The cheque was presented for payment on 16 August 2013. The cheque returned

12 AIR 2016 SC 4363

unpaid with a blank memo dated 19 August 2013. A statutory demand notice was issued on 28 August 2013. There is record to indicate the demand notice to have been served on accused no.1 and all its directors, including him (Jayesh Choksi). The notice was replied on 12 September 2013. None of the grounds raised by J.S. Choksi here were raised in the notice reply.

29. Various documents have been placed on record on his behalf. The document, Enclosure "C" to his additional affidavit-in-reply, issued by accused no.1, records that Shri J.S. Choksi had never participated in the day-to-day management of the affairs of the Company and he had never been party to any decision taken by the board of directors. In short, giving him clean chit would again be a matter of fact. Learned Advocate for the Petitioner was right in submitting that it is a case of one accused exonerating the co-accused. It is true that there are documents to indicate that he appears to have not received any remuneration, nor participated in the board meetings. He resigned as a director on 16 August 2013.

30. In case of *S.P. Mani* (supra), it has been observed in para 24 as under:-

> "24. Evidently, the gist of Section 138 is that the drawer of the cheque shall be deemed to have

committed an offence when the cheque drawn by him is returned unpaid on the prescribed grounds. The conditions precedent and the conditions subsequent to constitute the offence are drawing of a cheque on the account maintained by the drawer with a banker, presentation of the cheque within the prescribed period, making of a demand by the payee by giving a notice in writing within the prescribed period and failure of the drawer to pay within the prescribed period. Upon fulfilment of these requirements, the commission of the offence which may be called the offence of 'dishonour of cheque' is complete. If the drawer is a company, the offence is primarily committed by the company. By virtue of the provisions of sub-section (1) of Section 141, the guilt for the offence and the liability to be prosecuted and punished shall be extended to every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of its business; irrespective of whether such person is a director, manager, secretary or other officer of the company. It would be for such responsible person, in order to be exonerated in terms of the first proviso, to prove that the offence was committed without his knowledge or despite his due diligence."

In para 30 and 31 of his judgment, it has further been observed:

"30. Different persons can be in-charge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, "A" might be in charge of the company at the time of drawing the cheque, "B" might be in charge of the company at the time of dishonour of cheque and "C" might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C reply or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141. The key to this interpretation lies in the use of the phrase: "every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly" as it occurs in sub-section (1) of Section 141 and the use of the phrase "provided that nothing contained in this sub-section shall render any person liable to punishment if he proves…" that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be "proceeded against", but may not be "punished" if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during 15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The word "every" points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place. As to what this 'relevant time' is, was a question that this Court was called to answer, inter alia, in N

Rangachari v. Bharati Sanchar Nigam Limited, AIR (2007) SC 1682. In this case, Data Access, a company had issued two cheques to the BSNL, which were duly presented, but were dishonoured for insufficiency of funds. A complaint under Section 138 of the NI Act was filed. While the BSNL held the directors liable, the appellant, a chairman in the company contended that he being a nominated chairman and holding an Honorary post in the Company, was never assigned with any of the company's financial or other business activities. He was the Chairman for name sake and was never entrusted with any job or business or constituted a signing authority. Resolving the issue of when the liability could be fastened, this Court said:-

> "In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were in charge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour."
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> [Emphasis supplied]

31. As held by this Court in Anil Hada v. Indian Acrylic Ltd., (2000) 1 SCC 1, the phrase "as well as" used in sub-section (1) of Section 141 of the NI Act

> would embroil the persons mentioned therein within the tentacles of the offence on par with the offending company. Therefore, when the company or firm is the drawee of the cheque, such company or firm is the principal offender and the fiction created by the legislature. When the offence is attributed to a juristic person or a body made up of several individuals and the liability to be prosecuted and punished is extended to embroil by legal fiction certain human beings, that legal fiction has to be so interpreted and applied that the individuals intended to be embroiled may not escape the liability by mere fact of having not been in charge at the time when one of the other of the events essential to complete the offence by the company happened. Borrowing again from K. Bhaskaran (supra), the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure."

31. On the date the cheque was issued, this accused was the director of the company. Even on the date the cheque was presented, he held the said office. The facts that he was neither in charge of nor responsible to the day-to-day affairs of the Company during the relevant time, is again be a matter of factual defence.

32. In short, signatures in the cheques have been admitted. Accused no.1 Company acknowledged its liability to have owed Rs.9,64,00,000/- (Rupees Nine Sixty Four Crores Only). Accused nos. 2 to 5 were the directors of accused no.1 Company during the relevant time. Veracity of their

defence/stand can only be ascertained on trial of the case. Both the learned Sessions Judge and the learned Additional Sessions Judge erred in setting aside the orders of issuance of process. The order passed in revision applications, therefore, need to be set aside, restoring the orders of issuance of process passed by the Court of Metropolitan Magistrate/s.

33. In the result, the criminal writ petition and the revision application stand allowed. The orders impugned therein are hereby set aside, restoring the orders of issuance of process against all the accused. Since the cases are old one, the trial courts are requested to expedite the hearing thereof and conclude the same within a time-frame of one year from the date of receipt of copy of this order.

34. On request, this order is stayed for a period of three weeks from today.

(R.G. AVACHAT, J.)