

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC. APPLICATION NO. 3246 of 2020

With

CRIMINAL MISC. APPLICATION (FOR VACATING INTERIM RELIEF)

NO. 1 of 2021

In

R/CRIMINAL MISC. APPLICATION NO. 3246 of 2020

With

CRIMINAL MISC. APPLICATION (FOR EXTENSION OF INTERIM
RELIEF) NO. 2 of 2021

In

R/CRIMINAL MISC. APPLICATION NO. 3246 of 2020

FOR APPROVAL AND SIGNATURE:

SD/-

HONOURABLE MS. JUSTICE GITA GOPI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

C.M. SMITH AND SONS. LTD THROUGH DEINESH MOHANLAL PANCHAL

Versus

STATE OF GUJARAT

Appearance:

MR. Y.S. LAKHANI, SR. ADVOCATE WITH MR. ADITYA J PANDYA
(6991) for the Applicant(s) No. 1,2,3,4,5MR NILESH PANDYA WITH MR. HARESH H PATEL (611) for the
Respondent(s) No. 2MR PRANAV TRIVEDI, ADDL. PUBLIC PROSECUTOR for the
Respondent(s) No. 1

CORAM: **HONOURABLE MS. JUSTICE GITA GOPI**

Date : 10/02/2022

ORAL JUDGMENT

1. By way of this application filed under Section 482 of the Code of Criminal Procedure read with Article 226 of the Constitution of India, the applicants have prayed to quash and set aside the order dated 18.11.2019 passed by the Court of learned 13th Additional Chief Judicial Magistrate, Rajkot below Exhibit-1 in Criminal Case No.16873 of 2019 whereby, the complaint filed by respondent No.2 herein, original complainant, under section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act”) was ordered to be registered and process under Section 204 of Cr.P.C. was ordered to be issued against the applicants herein and have also prayed to quash and set aside all the consequential proceedings initiated under Criminal Case No.16873 of 2019.

2. The facts in brief are as under;

The applicant No.1 herein is a Company registered under the Companies Act, 1956 and having its Registered Office at “Dashrathvadi, Court Road, Naidad”. It is engaged in the business of production of Grey Cast Iron and Nodular Iron (Ductile Iron) castings weighing from 5 Kgs to 150 Kgs and is also a supplier of fully finished parts to Original Equipment Manufacturers since the year 1956. The factory premises of applicant No.1 Company is located at Nadiad and it employs

around 1500 workers. The respondent No.2 herein is a Partnership Firm registered under the provisions of the Indian Partnership Act and is engaged in the business of manufacture of Casting Parts. It also accepts orders and manufactures casting parts as per requirements of different customers.

2.1 It appears that the parties were into business relations for several years. However, in the year 2014, problem arose in their business relation when a large number of parts that had been supplied by the respondent No.2 to applicant No.1 Company, which, in turn, had supplied it to its clients were rejected and returned to applicant No.1 Company for being defective or of inferior quality. It is the say of the applicants that on account of the defective parts manufactured by the No.2, which were, in turn, supplied by the applicants to the Original Equipment Manufacturers, who were mainly into the Automobile industry, defects were reported in the vehicles in which the parts were used and resultantly, the automobile manufactures had to call back several numbers of vehicles for carrying out necessary repair works. As a result thereof, the applicant No.1 Company had suffered huge financial loss and had sustained a big blow on its reputation and goodwill in the market.

2.2 The respondent No.2 herein filed a summary suit being Special Summary Suit No.23 of 2014 against the applicant No.1

Company before the Court of learned 4th Additional Senior Civil Judge at Rajkot under Order 37 of the Code of Civil Procedure for recovery of an amount of Rs.1,12,26,500/- being the amount payable with interest by the applicant-defendant to the respondent-plaintiff for the work executed and goods delivered as per the order placed by applicant No.1 Company. In the suit proceeding, the applicant No.1 Company preferred an application seeking Leave to Defend; however, the same was rejected. Thereafter, vide judgment and order dated 07.05.2015, the Court of learned 4th Additional Senior Civil Judge at Rajkot decreed Special Summary Suit No.23 of 2014 in favour of the respondent-plaintiff and directed the applicant No.1-Company to pay an amount of Rs.1,12,26,500/- along with 6% interest to the respondent-plaintiff.

2.3 Against the said judgment and decree dated 07.05.2015 passed by the civil Court, the applicant No.1 Company preferred appeal being First Appeal No.1730 of 2015 before this Court along with an application seeking stay of the said judgment and decree. While admitting the First Appeal vide order dated 29.01.2016, the Division Bench of this Court granted interim relief in favour of applicant No.1 Company by staying operation and implementation of the judgment and decree dated 07.05.2015 on condition that applicant No.1 Company deposits an amount of Rs.43,40,061/- before the civil Court within the stipulated period and to furnish appropriate

security to the satisfaction of the civil Court for the remaining amount. As the applicant No.1 Company failed to make such deposit, the respondent-complainant instituted execution petition being Special Execution Petition No.24 of 2015 before the civil Court at Rajkot and upon transfer of the petition to the Commercial Court, it was re-numbered as Execution Petition No.10 of 2019.

2.4 In the execution proceedings, the respondent-plaintiff moved application Exhibit-11 seeking issuance of warrant for the attachment of the movable / immovable properties of applicant No.1 Company. Before the said application was decided, the respondent-plaintiff moved another application vide Exhibit-15 seeking identical relief. It appears that the civil at Rajkot allowed application Exhibit-15 ex-parte vide order dated 22.03.2016 directing issuance of a Warrant of Attachment against the applicant No.1 Company. On the same day, the civil Court also passed an order disposing of the application Exhibit-11 by observing that in spite of the service of application on applicant No.1 Company, no reply had been filed by applicant No.1 Company and necessary orders have already been passed in application Exhibit-15. In pursuance thereof, the Court of learned Principal Senior Civil Judge at Rajkot issued Warrant of Attachment dated 31.03.2016 against the applicant No.1 Company.

2.5 It is the say of the applicants that the respondent-complainant, armed with the attachment warrant dated 31.03.2016, came at the factory premises of applicant No.1 Company situated at District : Nadiad with few men and began to load the goods, equipments and other movable properties, etc. kept at the factory premises into Trucks. They also threatened to remove the machineries / equipments installed at the factory premises and to disrupt the production process. The applicant No.2 herein, who was present at the factory premises at the relevant time, negotiated with the respondent-complainant to salvage the situation. In pursuance thereof, the parties executed a Deed of Undertaking titled “Bahedaari Karar” dated 07.04.2016 on a Rs.100/- Stamp Paper in the presence of the Court Bailiff, which is evident from the report filed by the Court Bailiff vide Annexure-H. In the said Deed of Undertaking, it has been averred that the respondent has filed Special Summary Suit No.24 of 2015 in the civil Court at Rajkot. In the said proceeding, the Court below issued Warrant of Attachment on 31.03.2016 for Rs.1,23,13,879/-. When the parties reached the factory premises of C.M. Smith at Nadiad for serving the Warrant of Attachment, the respondent is given 11 cheques. The Eleventh cheque bearing No.807621 drawn on Standard Chartered Bank, Mithakali Six Roads Branch, Ahmedabad is of Rs.69,62,879/- and the said cheque is to be kept as Security. It is further stated that the said cheque is not to be deposited by the respondent in the Bank until the final

outcome of the Summary Suit and the First Appeal filed before this High Court. It was also agreed upon that hearing of the First Appeal filed before this High Court has to be concluded in one year and that if the First Appeal is disposed of as aforesaid, then appropriate decision shall be taken as regards the aforesaid cheque given as security after carrying out due deliberations and discussions with C.M. Smith. If C.M. Smith becomes unsuccessful in getting the First Appeal disposed of within two years, then the respondent shall have the right to deposit the aforesaid cheque. It is also recorded that the said Deed of Undertaking was executed at the free will of the parties and without any coercion.

2.6 It appears that against the Warrant of Attachment, the applicant No.1 Company had preferred Special Civil Application No.7417 of 2016 before this Court. The said petition came to be disposed of by the coordinate Bench of this Court vide order dated 18.11.2016. Paragraphs – 4 to 6 of the order reads thus:

“4. In light of the statement made at bar, order dated 22.03.2016 passed by the learned 12th Additional Senior Civil Judge, Rajkot below Exh.15 in Special Execution Petition No.24 of 2015 is hereby quashed and set aside and the learned Executing Court is directed to decide application Exhs.11 and 15 afresh and pass appropriate order after hearing both sides. So far as request to return the amount of cheque is concerned, the said request is kept open to be agitated before the learned Executing

Court. The learned Executing Court is directed to consider such request while deciding application Exhs.11 and 15 afresh. Meanwhile, the respondent shall not deposit the cheques issued by the petitioner for execution of decree till final disposal of application Exhs.11 and 15.

5. It is made clear that this Court has not examined application Exhs.11 and 15 on merits and the learned Executing Court shall decide the same on merits uninfluenced by the observations recorded in the impugned order as well as concessional statement made at bar by the learned advocate appearing for the respondent. Not only that, the learned Executing Court shall pass appropriate order of refund of cheque amounts realized while executing order dated 22.03.2016 and also order to return unrealized cheques to the petitioner, if application Exhs.11 and 15 are decided in favour of the petitioner.

6. In view of the above observation and direction, present petition stands disposed of. Direct service is permitted...”

2.7 Pursuant to the order dated 18.11.2016 passed by this Court, the Court of learned Principal Senior Civil Judge, Rajkot adjudicated applications Exhibits – 11 and 15 afresh and vide order dated 20.08.2019, the trial Court confirmed its earlier order passed below applications Exhibits – 11 and 15. The said order dated 20.08.2019 was challenged before this Court in Special Civil Application No.15137 of 2019. While disposing of the said writ petition by way of judgment and order dated 16.10.2019, the Division Bench of this Court made the following observations:

“32. At least one thing is clear that the impugned order is not tenable in law and it will have to be quashed and set-aside.

33. In the result, this petition succeeds and is hereby allowed. The impugned order passed by the Principal Senior Civil Judge, Rajkot, dated 20th August 2019 below Exhibits 11 and 15 respectively in the Execution Petition No.10 of 2019 is hereby quashed and set-aside.

34. However, we reserve the liberty for the respondent (decree holder) to prefer an application in the court which passed the decree against the applicant for transfer of the decree to the court within whose territorial jurisdiction the immovable properties of the applicant are situated. In fact, clause (2) of Section 39 also provides that the court which passed a decree may of its own motion send it for execution to any subordinate court of competent jurisdiction. In other words, while sub-section (1) deals with transfer to another competent court having jurisdiction or assets being located within its jurisdiction, sub-section (2) empowers the court passing the decree on its own motion to transfer it for execution to any subordinate court of competent jurisdiction. Sub-section (2) confers a suo motu power to assign a decree for execution of its own motion to any subordinate court. The exercise of the power under sub-section (2) of Section 39 of the Code, to send the decree for execution to a subordinate court can be exercised without meeting the requirements of sub-clauses (a) to (d) under sub-section (1) of Section 39 of the Code.

35. Mr.Pandya, the learned counsel appearing for the respondent, submitted that he would advise his client to prefer an appropriate application at the earliest under Section 39 of the Code for transfer of the decree. If any such application is preferred, the court concerned shall pass appropriate order at the earliest after giving

opportunity of hearing to the other side.

36. With the above, this petition is disposed of. Rule made absolute to the aforesaid extent.”

2.8 It appears that the respondent-complainant presented the cheque of Rs.69,62,879/- bearing No.807621 drawn on Standard Chartered Bank, Mithakali Six Roads Branch, Ahmedabad with the Bank on 06.09.2019. However, the cheque got returned on 07.09.2019 with the endorsement of “Drawers signature not as per mandate”. In pursuance thereof, the respondent-complainant issued Notice dated 10.10.2019 to the applicants under section 138 of the NI Act. The applicants replied to the said notice vide reply dated 13.11.2019. On 18.11.2019 the respondent-complainant filed complaint under section 138 of the NI Act before the Court of learned 13th Additional Senior Civil Judge & A.C.J.M., Rajkot, which was numbered as Criminal Case No.16873 of 2019. On the said complaint, the Court below passed the impugned order dated 18.11.2019 below Exhibit-1 directing issuance of process under Section 204 of Cr.P.C. Being aggrieved by the same, the present application has been preferred.

3. Mr. Y.S. Lakhani, learned Senior Advocate appearing with Mr. Aditya J. Pandya for the applicants, submitted that the process issued by the Court below is contrary to the settled principles of law related to negotiable instruments. For a

complaint under Section 138 of the NI Act to be sustainable, the disputed cheque should have been issued in respect of any “enforceable debt”, which the drawer is liable to pay to the holder in due course. If the cheque is not issued in furtherance of any such “enforceable debt”, then no cognizance under Section 138 of the NI Act could be taken. It was also urged that the cheque in question was given as ‘security’, which is evident from the Deed of Undertaking dated 07.04.2016 executed before the Court Bailiff. The said Deed of Undertaking clarifies the fact that the cheque in question was given as ‘security’ and not in connection with any ‘enforceable debt’. He, therefore, contended that the Court below has committed serious error in law and on facts in issuing process to the applicants on the complaint filed by the respondent-complainant under Section 138 of the NI Act.

3.1 The learned Senior Advocate further submitted that the entire process was initiated in pursuance of the order dated 23.03.2016 passed by the Court of learned Principal Senior Civil Judge at Rajkot below applications Exhibits – 11 and 15 in Execution Petition No.10 of 2019. It was contended that the said order dated 23.03.2016 is *void ab initio* inasmuch as the civil Court at Rajkot Court had no jurisdiction to issue Warrant of Attachment in respect of properties which are situated beyond the jurisdiction of Rajkot. He pointed out that the properties of applicant No.1 Company, in respect of which the

Warrant of Attachment was issued, are situated in District Nadiad, which does not fall within the jurisdiction of the Court of learned Principal Senior Civil Judge at Rajkot as both the places fall under different jurisdictions. Only the civil Court situated at Nadiad would have the jurisdiction to pass an order of issuance of Warrant of Attachment against the applicant No.1 Company. Hence, the order directing issuance of Warrant of Attachment against the applicant No.1 Company was illegal and erroneous.

3.2 It was urged by learned Senior Advocate Mr. Lakhani that it was in pursuance of the aforesaid Warrant of Attachment that applicant No.2 had issued the cheque in question in favour of the respondent-complainant. It was pointed out that this Court has passed detailed orders on the legality of the Warrant of Attachment issued by the civil Court at Rajkot in Special Civil Application No.7417 of 2016 and Special Civil Application No.15137 of 2019. Now, when the order directing issuance of Warrant of Attachment itself is found to be illegal, all consequential proceedings would be rendered unsustainable. Hence, the entire proceedings under section 138 of the NI Act, which are initiated on the basis of the cheque given by applicant No.1 Company in pursuance of the attachment proceedings, is erroneous and unsustainable in the eyes of law.

4. Mr. Nilesh Pandya, learned advocate appearing with learned advocate Mr. Haresh Patel for respondent No.2, submitted that the cheque in question was issued in pursuance of the settlement agreement dated 07.04.2016 executed by and between the parties. He submitted that the execution proceedings and the proceedings under the NI Act are totally different and independent of each other. Therefore, even if it may be that the settlement agreement was executed in pursuance of the Warrant of Attachment issued in the execution proceedings initiated before the civil Court at Rajkot, it would not render the present proceedings under the NI Act unsustainable in the eyes of law.

4.1 Learned advocate Mr. Pandya further submitted that the order of the Division Bench of this Court in Special Civil Application No.15137 of 2019, by which the orders passed by the civil Court at Rajkot below Exhibits – 11 and 15 in Execution Petition No. 10 of 2019 were quashed and set aside, was passed on 16.10.2019. However, much before the said order came to be passed, the parties had executed the settlement agreement, i.e. Deed of Undertaking, on 07.04.2016, which was the basis for the initiation of proceedings under the NI Act. Therefore, the initiated of proceedings under Section 138 of the NI Act was legal and justified.

4.2 Learned advocate Mr. Pandya contended that the

applicant No.1 Company has committed default in making payment of the goods that were delivered by the respondent-complainant, which has not been disputed by the applicants and it was in respect of such payment that the parties had executed the settlement agreement dated 07.04.2016. Thus, the cheque in question was issued against the legally enforceable debt, which the respondent-complainant was entitled to receive from the applicants. He pointed out that though the word 'security' has been used in the settlement agreement dated 07.04.2016, the same refers to the cheque being issued towards repayment of instalment of outstanding amount. The repayment becomes due under the settlement agreement once the terms of the agreement are violated. In this case, the applicants had failed to abide the terms of settlement agreement and therefore, the dishonor of the cheque in question would fall under Section 138 of the NI Act. Therefore, the cheque would represent the outstanding liability. He submitted that the applicants will have to adduce necessary evidence in trial to show that the cheque in question was not issued against any enforceable debt and the present proceedings under Section 482 of Cr.P.C. is not the appropriate remedy. He, therefore, prayed that the present application deserves to be rejected.

4.3 In support of his submissions, learned advocate Mr. Pandya placed reliance upon the decision of Apex Court in the case of Sampelly Satyanarayana Rao v. Indian Renewable

Energy Development Agency Limited, (2016) 10 SCC 458 more particularly, on the observations made in paragraphs – 9 and 13 to 16, which reads thus:

“9. We have given due consideration to the submission advanced on behalf of the appellant as well as the observations of this Court in Indus Airways (supra) with reference to the explanation to Section 138 of the Act and the expression “for discharge of any debt or other liability” occurring in Section 138 of the Act. We are of the view that the question whether a post-dated cheque is for “discharge of debt or liability” depends on the nature of the transaction. If on the date of the cheque liability or debt exists or the amount has become legally recoverable, the Section is attracted and not otherwise.

13. In Balaji Seafoods (supra), the High Court noted that the cheque was not handed over with the intention of discharging the subsisting liability or debt. There is, thus, no similarity in the facts of that case simply because in that case also loan was advanced. It was noticed specifically therein – as was the admitted case of the parties – that the cheque was issued as “security” for the advance and was not intended to be in discharge of the liability, as in the present case.

14. In HMT Watches Ltd. versus M.A. Abida[8], relied upon on behalf of the respondent, this Court dealt with the contention that the proceedings under Section 138 were liable to be quashed as the cheques were given as “security” as per defence of the accused. Negating the contention, this Court held : (SCC pp.779-80, paras 10-12)

“10. Having heard the learned counsel for the parties, we are of the view that the accused (Respondent 1) challenged the proceedings of criminal complaint cases before the High Court, taking factual defences. Whether the cheques were given as security or not, or whether there was outstanding liability or not is a question of fact which could have been determined only by the trial court after recording evidence

of the parties. In our opinion, the High Court should not have expressed its view on the disputed questions of fact in a petition under [Section 482](#) of the Code of Criminal Procedure, to come to a conclusion that the offence is not made out. The High Court has erred in law in going into the factual aspects of the matter which were not admitted between the parties. The High Court further erred in observing that [Section 138\(b\)](#) of the NI Act stood uncomplained with, even though Respondent 1 (accused) had admitted that he replied to the notice issued by the complainant. Also, the fact, as to whether the signatory of demand notice was authorised by the complainant company or not, could not have been examined by the High Court in its jurisdiction under [Section 482](#) of the Code of Criminal Procedure when such plea was controverted by the complainant before it.

11. [In Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd.](#) [(2008) 13 SCC 678], this Court has made the following observations explaining the parameters of jurisdiction of the High Court in exercising its jurisdiction under [Section 482](#) of the Code of Criminal Procedure: (SCC pp. 685-87, paras 17 & 22)

“17. The parameters of jurisdiction of the High Court in exercising its jurisdiction under [Section 482](#) of the Code of Criminal Procedure is now well settled. Although it is of wide amplitude, a great deal of caution is also required in its exercise. What is required is application of the well-known legal principles involved in the matter.

22. Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal

proceedings would amount to an abuse of process of court or that the complaint petition is filed for causing mere harassment to the accused. While we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable.”

12. *In Rallis India Ltd. v. Poduru Vidya Bhushan* [(2011) 13 SCC 88], this Court expressed its views on this point as under: (SCC p. 93, para 12)

“12. At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless the parties are given opportunity to lead evidence, it is not possible to come to a definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the respondents ceased to be the partners of the firm.”

15. — We are in respectful agreement with the above observations. In the present case, reference to the complaint (a copy of which is Annexures P-7) shows that as per the case of the complainant, the cheques which were subject matter of the said complaint were towards the partial repayment of the dues under the loan agreement (para 5 of the complaint).

16. As is clear from the above observations of this Court, it is well settled that while dealing with a quashing petition, the Court has ordinarily to proceed on the basis of averments in the complaint. The defence of the accused cannot be considered at this stage. The court considering the prayer for quashing does not

adjudicate upon a disputed question of fact.”

4.4 Reliance was also placed on a recent decision of the Apex Court in the case of Sripati Singh (Since Deceased) Through His Son Gaurav Singh v. The State of Jhardkhand passed in Criminal Appeal Nos. 12691270 of 2021 decided on 28.10.2021 wherein similar principle has been laid down.

5. Heard learned advocates on both the sides. From the record of the case, it appears that the parties had business relations since the year 2008. There does not appear any controversy on the issue that the Registered Office of applicant No.1, which is a Company incorporated under the Companies Act, is situated in District : Nadiad. The applicant No.1 Company is also having its factory premises in District : Nadiad. The respondent-complainant filed Special Summary Suit No.23 of 2014 before the Court of learned Civil Judge, Senior Division, Rajkot against applicant No.1 Company for recovery of an amount of Rs.1,12,26,500/- with interest. The said suit came to be decreed in favour of the respondent-plaintiff vide judgment and order dated 07.05.2015. Against the said judgment and decree, the applicant No.1-defendant preferred First Appeal No.1730 of 2015 before this Court along with an application seeking interim stay of the judgment and decree. While admitting the said first appeal vide order dated 29.01.2016, the Division Bench of this Court granted interim relief in favour of applicant No.1-Company by staying

operation and implementation of the judgment and decree dated 07.05.2015 on condition that applicant No.1-Company deposits an amount of Rs.43,40,061/- before the trial Court within the stipulated period and to furnish appropriate security to the satisfaction of the trial Court for the remaining amount failing which the interim relief was ordered to get vacated automatically.

6. However, the applicants could not deposit the amount as aforesaid and therefore, the respondent-complainant initiated execution proceedings before the Court of learned Civil Judge, Senior Division, Rajkot. In the execution proceedings, the respondent-complainant moved an application Exhibit-11 seeking issuance of a Warrant of Attachment of the movable / immovable properties of applicant No.1 Company. It appears that before application Exhibit-11 could be adjudicated upon on the date fixed for hearing, the respondent-decree holder preferred another application vide Exhibit-15 seeking similar relief on an earlier date. Without affording any opportunity of hearing to applicant No.1-Company, the executing Court allowed application Exhibit-15 vide order dated 22.03.2016.

7. Against the said order dated 22.03.2016, the applicant No.1-Company preferred a writ petition before this Court in Special Civil Application No.7417 of 2016. While granting ad-interim relief in favour of applicant No.1-Company at the time

of issuing Notice in the writ petition, the learned Single Judge observed as under:

“1. Prima facie, it appears that the respondent – decree holder moved an application below Exh.11 in Special Execution Petition No.24 of 2015 with a request to issue warrant for attachment of movable/immovable properties of the petitioner. The said application was kept for hearing on 12.04.2016. On 22.03.2016, the respondent – decree holder made an application to take the matter on board and presented an application below Exh.15 for identical relief, as prayed for, in application Exh.11. It seems that copy of application Exh.15 was provided to the learned advocate appearing for the petitioner but, the learned Executing Court has not heard any submissions of the petitioner nor granted any time and, in his absence, passed order below Exh.15. Upon perusal of Rojkam submitted by learned advocate for the petitioner, which is ordered to be taken on record, it appears that learned advocate for the petitioner was not present when order below Exh.15 has been passed and thus, the impugned order has been passed without extending any opportunity to the petitioner.

2. Apart from it, it is a matter of fact that the decree under execution was passed by the competent Court at Rajkot whereas, warrant issued by the learned trial Judge as per order dated 22.03.2016 came to be executed for attachment of movable/immovable properties situated at Nadiad. Thus, considering the provisions of Section 39(4) of the Code of Civil Procedure, the learned Executing Court is not authorized to issue such warrant for executing the decree against any property outside the local limits of its jurisdiction. Admittedly, warrant issued pursuant to application Exh.15 came to be executed in respect of properties situated at Nadiad and, therefore, present petition deserves consideration. Hence, issue notice to the respondent for final disposal, making it returnable on 26.07.2016. Meanwhile, ad-interim relief in terms of para 18(B) is granted. Direct service is permitted. The learned advocate for the petitioner is permitted to file additional documents with the Registry of

this Court.

7.1 The aforesaid writ petition was disposed of by the learned Single Judge of this Court vide order dated 18.11.2016. The relevant paragraphs of the order reads as under:

“2. Learned advocate Mr.Nilesh Pandya appearing for learned advocate Mr.H.H. Patel for the respondent, upon instructions, states at bar that the order passed below Exh.15 may be quashed and set aside and the learned trial Judge may be directed to hear application Exhs.11 and 15 moved in Special Execution Petition No.24 of 2015 afresh and pass appropriate order after hearing both sides.

3. As against this, learned advocate Mr.S.M. Thakore for the petitioner makes a request that the petitioner has issued cheque for a sum of Rs.10 lacs pursuant to order passed by the learned Executing Court on 22.03.2016 and that, the amount received through the said cheque and other cheques obtained during the course of execution of decree, more particularly, placed on record at page Nos.79 to 82 to the present petition, may be ordered to be returned back to the petitioner.

4. In light of the statement made at bar, order dated 22.03.2016 passed by the learned 12th Additional Senior Civil Judge, Rajkot below Exh.15 in Special Execution Petition No.24 of 2015 is hereby quashed and set aside and the learned Executing Court is directed to decide application Exhs.11 and 15 afresh and pass appropriate order after hearing both sides. So far as request to return the amount of cheque is concerned, the said request is kept open to be agitated before the learned Executing Court. The learned Executing Court is directed to consider such request while deciding application Exhs.11 and 15 afresh. Meanwhile, the respondent shall not deposit the cheques issued by the petitioner for execution of decree till final disposal of application Exhs.11 and 15.

5. It is made clear that this Court has not examined application

Exhs.11 and 15 on merits and the learned Executing Court shall decide the same on merits uninfluenced by the observations recorded in the impugned order as well as concessional statement made at bar by the learned advocate appearing for the respondent. Not only that, the learned Executing Court shall pass appropriate order of refund of cheque amounts realized while executing order dated 22.03.2016 and also order to return unrealized cheques to the petitioner, if application Exhs.11 and 15 are decided in favour of the petitioner.

6. *In view of the above observation and direction, present petition stands disposed of. Direct service is permitted.”*

7.2 From the above order passed by the coordinate Bench of this Court in Special Civil Application No.7417 of 2016, it is clear that the executing Court at Rajkot was required to adjudicate both the applications Exhibits 11 and 15 afresh. It was specifically brought to the notice of the executing Court at Rajkot that the decree under execution was passed by the civil Court at Rajkot whereas, the warrant has been issued for attachment of movable / immovable properties situated at Nadiad, which the executing Court at Rajkot was not legally authorized to do. Issuance of warrant of attachment in respect of any property situated outside the local limits of jurisdiction is barred in view of the provisions of Section 39(4) of the Code of Civil Procedure and hence, the executing Court at Rajkot was directed to examine the matter afresh. This Court had also directed the executing Court at Rajkot to pass appropriate orders for the refund of cheque amounts realized while executing the order dated 22.03.2016 and also to return the unrealized cheques to applicant No.1-Company.

7.3 It was in the aforesaid background that the executing Court at Rajkot was required to consider applications Exhibits – 11 and 15 preferred in Execution Petition No. 10 of 2019 afresh. However, while considering the matter afresh, the executing Court at Rajkot appears to have ignored the observations made by this Court in Special Civil Application No.7417 of 2016 and passed the order dated 20.08.2019 below applications Exhibits – 11 and 15 whereby, it stood by its earlier order dated 22.03.2016.

8. It appears that pursuant to the passing of the order dated 20.08.2019 by the executing Court at Rajkot, the respondent-complainant deposited the cheque in question with the Bank on 06.09.2019, which got returned on 07.09.2019. Indisputably, the cheque in question was given as ‘security’ by the applicant No.1-Company, which has been stated in the Deed of Undertaking dated 07.04.2016 in unequivocal terms.

9. Against the order dated 20.08.2019 passed by the executing Court at Rajkot below applications Exhibits – 11 and 15 in Execution Petition No.10 of 2019, the applicant No.1-Company preferred Special Civil Application No.15137 of 2019 before this Court. By way of judgment and order dated 26.10.2019, the Division Bench of this Court allowed the writ petition by quashing and setting aside the order dated

20.08.2019 passed by the executing Court at Rajkot.

10. From the above set of facts, it is clear that the earlier order dated 22.03.2016 passed by the executing Court at Rajkot below application Exhibit-15 was quashed and set aside by the coordinate Bench of this Court vide order passed in Special Civil Application No.7417 of 2016 dated 18.11.2016 and the matter was remanded to the executing Court at Rajkot for consideration afresh. The executing Court at Rajkot considered the matter afresh; however, it stood by the conclusion arrived at in its earlier order dated 22.03.2016 by passing the order dated 20.08.2019 below applications Exhibits – 11 and 15. The said order dated 20.08.2019 was assailed before this Court in Special Civil Application No.15137 of 2019 and by judgment and order dated 16.10.2019, the subsequent order dated 20.08.2019 passed by the executing Court at Rajkot was quashed and set aside by the Division Bench of this Court. Thus, both the orders dated 22.03.2016 and 20.08.2019 passed by the executing Court at Rajkot below Exhibits – 11 & 15 were quashed and set aside by this Court after recording elaborate reasons. This would render the initiation of all proceedings, including the issuance of Warrant of Attachment dated 31.03.2016 and the subsequent execution of the Deed of Undertaking dated 07.04.2016 in the presence of the Court Bailiff, as baseless because the very source of the issuance of the Warrant of Attachment being the orders passed below

applications Exhibits – 11 & 15 have been quashed and set aside by this Court in both rounds of litigation. When the orders below applications Exhibits – 11 & 15 have been quashed and set aside by this Court, the Warrant of Attachment and all consequential proceedings, including the Deed of Undertaking dated 07.04.2016, would not have any legal basis.

11. Coming to the proceedings initiated under the NI Act, it is not in dispute that the cheque in question was given as ‘security’. The Deed of Undertaking dated 07.04.2016 executed by and between the parties in the presence of the Court Bailiff lays down the terms and conditions of payment. It specifically mentions that the cheque in question has been given as ‘security’ and also lays down the conditions as to when the said cheque shall be deposited. It is a settled proposition of law that proceedings under Section 138 of the NI Act would lie only in respect of any ‘enforceable debt’.

11.1 In the case of **Lalit Kumar Sharma v. State of Uttar Pradesh, 2008 (5) SCC 638**, the facts were that a Company, named M/s. Mediline India (P) Ltd. had taken loan of Rs.5 Lacs from the complainant. Against the said loan, two cheques for Rs.3 Lacs and Rs.2 Lacs were issued in favour of the complainant. On presentation, both the cheques were returned unpaid with the remarks - “insufficient funds”. Therefore, a

complaint under Section 138 of the N.I. Act and other sections came to be filed. It was the say of the appellants that they were not signatories to the cheques and that on the date when the two cheques were issued, they had already resigned from the post of directorship of the Company. During the pendency of the complaint, the parties appeared to have arrived at some compromise whereof, it was agreed that if a cheque of Rs.5,02,050/- is issued, then the complaint would be withdrawn. Pursuant thereto, a cheque of such amount dated 29.07.2000 was issued in favour of the complainant; however, on presentation, it was returned with the remarks “insufficient funds”. The complainant filed another complaint with regard to return of cheque dated 29.07.2000 not only against the erstwhile Directors but also against the present appellants. On the above facts, the Apex Court held that the second cheque dated 29.07.2000 was issued in terms of the compromise and it did not create a new liability and therefore, the same cannot be said to have been issued towards payment of debt, even if the compromise had not fructified.

11.2 In the present case also, evidently, the cheque in question was given as ‘security’ and not in respect of any ‘enforceable debt’, which the applicant No.1-Company was required to pay to the respondent-complainant. In paragraph-1 of the complaint filed under Section 138 of the NI Act, the respondent-complainant itself has stated that the cheque in

question has been given in view of the compromise arrived at between the parties. Thus, as per the admission of the complainant also, the cheque in question was not issued in respect of any 'enforceable debt', which the applicant No.1-Company was required to pay to the respondent-complainant. Considering the aforesaid factual aspects and in view of the principle laid down in *Lalit Kumar Sharma's* case (supra), the impugned proceedings initiated under the provisions of the NI Act deserves to be quashed and set aside.

11.3 While disposing Special Civil Application No.7417 of 2016 vide order dated 18.11.2016, this Court had observed that the executing Court shall pass appropriate orders for the refund of cheque amounts realized while executing order dated 22.03.2016 and also order to return the unrealized cheques to the applicants, if the applications Exhibits - 11 and 15 are decided in favour of the applicants. Now when the order dated 20.08.2019 passed by the Court of learned Principal Senior Civil Judge, Rajkot was quashed and set aside by the Division Bench of this Court in Special Civil Application No.15137 of 2019, the holding of the cheque in question by the respondent-complainant in connection with the proceedings under Section 138 of the NI Act would be illegal. Under the circumstances, the respondent-complainant ought to have returned the cheque in question to the applicant No.1-Company instead of depositing the same. In the considered opinion of this Court, if

the proceedings under the N.I. Act are permitted to continue, it would lead to gross miscarriage of justice and abuse of the process of Court.

12. For the foregoing reasons, the application is allowed. The impugned order dated 18.11.2019 passed by the Court of learned 13th Additional Chief Judicial Magistrate, Rajkot below Exhibit-1 in Criminal Case No.16873 of 2019 as also the complaint filed by respondent No.2 under section 138 of the NI Act being Criminal Case No.16873 of 2019 are quashed and set aside. Rule is made absolute. In view of the above order, both the civil applications stand disposed of.

(GITA GOPI, J)

FURTHER ORDER

After the judgment was pronounced, learned advocate Mr. Nilesh Pandya for the respondent-complainant requested to stay the operation of this judgment for a period of six weeks in order to approach the higher forum. The said request is accepted and hence, the operation of this judgment shall remain stayed for a period of six weeks from today. It is clarified that after the expiry of the above period, this judgment shall come into operation or shall remain subject to the orders that may be passed by the higher forum.

(GITA GOPI, J)

PRAVIN KARUNAN