

## **NOTE OF SUBMISSIONS ON BEHALF OF ACCUSED NO. 3**

**– SANJAY HARIRAM AGARWAL**

*(In the matter of Discharge under Section 239, Code of Criminal Procedure, 1973)*

### **BACKGROUND:**

1. The present submissions are filed on behalf of Accused No. 3, Mr. Sanjay Hariram Agarwal, seeking discharge under Section 239 of the Code of Criminal Procedure, 1973, in connection with R.C.C. No. 147 of 2002 pending before this Hon'ble Court.
2. The prosecution has alleged that the Accused No. 3, being one of the Directors of Home Trade Limited (HTL), participated in a larger conspiracy involving certain irregular investment transactions by Nagpur District Central Cooperative Bank Ltd. (NDCC Bank).
3. It is respectfully submitted that no prima facie material exists to sustain any of the charges alleged under Sections 120-B, 406, 409, 468, 471 read with Section 120-B or alternatively Section 34 of the Indian Penal Code, and that continuation of proceedings against Accused No. 3 would amount to a gross abuse of process of law.
4. Under Section 239 CrPC, if upon consideration of the police report and the documents submitted, the Magistrate finds that the charge against the accused is groundless, the accused shall be discharged.
5. The real test for determining whether the charge should be considered groundless under Section 239CrPC is that whether the materials are such that even if unrebutted make out no case whatsoever, the accused should be discharged under Section 239CrPC. Hence, at the current stage, This Hon'ble Court must have to consider, whether the materials relied upon by the prosecution against the applicant herein for the purpose of framing of the charge, if unrebutted, make out any case at all.

### **CRIMINAL BREACH OF TRUST**

6. In order to prove allegations under Section 406 or Section 409 of IPC, the ingredients of Criminal Breach of Trust as defined under Section 405 should be satisfied. As delineated by the Hon'ble Supreme Court in **Delhi Race Club Ltd. v. State of U.P. [(2024) 10 SCC 690] [at para 36]** the following are the ingredients of Section 406 IPC:

*“In order to constitute a criminal breach of trust (Section 406 IPC): -*

*1) There must be entrustment with person for property or dominion over the property, and*

*2) The person entrusted: -*

*a) dishonestly misappropriated or converted property to his own use, or*

*b) dishonestly used or disposed of the property or willfully suffers any other person so to do in violation of:*

*i. any direction of law prescribing the method in which the trust is discharged; or*

*ii. legal contract touching the discharge of trust”*

7. The very foundation of the offence of criminal breach of trust lies in entrustment of property or dominion over property. Unless such entrustment exists, no offence under Sections 406 or 409 IPC can arise.
8. The contract notes forming part of the charge-sheet, issued by Home Trade Ltd. to NDCC Bank, categorically show that the transactions were carried out on a Principal-to-Principal basis. These contract notes clearly show that HTL's name is written as Counter Party Participant Name (CPN) and not Counter Party Broker Name (CBN). They also show that no brokerage or commission was charged by HTL in respect of the said dealings.
9. This documentary evidence, emanating from the very record of the prosecution, conclusively establishes that:
  - a. The transaction between HTL and NDCC Bank was a commercial sale and purchase, and
  - b. The relationship was not that of principal and agent or of trustee and beneficiary, but strictly between two independent contracting parties.
10. Further, the Balance Sheet of the HTL shows that there is no income reported under the head of Income from Brokerage and there is income under the head of Investments. This shows that HTL didn't make any transactions in the capacity of a broker.
11. The legal consequence of a principal-to-principal contract is that each party acts in its own right, assumes its own commercial risk, and owes no fiduciary obligation to the other. Once the Bank made payment to HTL as the contracting counterparty, the property in that consideration passed to HTL; it cannot be said that HTL or its directors were "entrusted" with the Bank's property.

12. As held by the Hon'ble Supreme Court in **Delhi Race Club Ltd. v. State of U.P., (2024) 10 SCC 690**, the concept of entrustment does not extend to ordinary commercial transactions. The Court has lucidly held:

*“From the aforesaid, there is no manner of any doubt whatsoever that in case of sale of goods, the property passes to the purchaser from the seller when the goods are delivered. Once the property in the goods passes to the purchaser, it cannot be said that the purchaser was entrusted with the property of the seller. Without entrustment of property, there cannot be any criminal breach of trust. Thus, prosecution of cases on charge of criminal breach of trust, for failure to pay the consideration amount in case of sale of goods is flawed to the core. There can be civil remedy for the non-payment of the consideration amount, but no criminal case will be maintainable for it.”* [para 49, Annexure-\_\_]

13. The Hon'ble Supreme Court in **M/s Shikhar Chemicals v. State of U.P., 2025 SCC OnLine SC 1643**, has emphatically reiterated that a commercial or sale transaction cannot amount to entrustment so as to attract criminal breach of trust. The Court observed:

*“It was expected of the Additional CJM to know that in a case of sale transaction where is the question of any entrustment of goods so as to bring the case within the ambit of criminal breach of trust punishable under Section 406 IPC. This position of law came to be explained by this Court almost six decades back in the landmark decision titled ‘State of Gujarat v. Jaswantlal Nathalal’, 1968 (2) SCR 408, wherein this Court stated that a mere transaction of sale cannot amount to an entrustment.”*

14. In absence of such entrustment or dominion, the first and indispensable ingredient of Sections 406 and 409 IPC collapses. Without a fiduciary relationship or personal custody of another's property, no offence of criminal breach of trust can arise in law.

15. It is further submitted that once consideration for a sale transaction is paid, the payer ceases to retain any proprietary interest or control over such funds. The recipient is free to utilise the consideration in any manner it deems fit as part of its business operations. It cannot be contended that the recipient is bound to use the amount exclusively for a particular purpose or transaction, unless expressly agreed by contract

or law. The utilisation of sale proceeds is a matter of commercial discretion and internal management of the company, and any alleged non-application of such funds cannot, in law, be construed as misappropriation or breach of trust.

16. There is nothing on record to suggest that the principal-to-principal transaction between NDCC Bank and Home Trade Ltd. was impermissible under any law or regulatory direction. The prosecution has not pointed out any circular, notification, or statutory provision which prohibits such sale transactions being undertaken on a principal-to-principal basis between a cooperative bank and a registered entity. On the contrary, the communication of the Reserve Bank of India, forming part of the charge-sheet, indicates that Home Trade Ltd. was duly registered with the RBI and authorised to deal in Government Securities.
17. Further, Section 409 IPC specifically requires that the accused be a banker, merchant, factor, broker, attorney or agent and that the property be entrusted in such capacity. The existence of a principal-to-principal relationship, expressly recorded in the contract notes, negate the existence of any agency between NDCC Bank and HTL or its directors.
18. It is neither the prosecution's allegation nor borne out from the record that the said funds were ever entrusted to Accused No. 3 in his personal capacity. There is no document, or material showing that the amount was credited to him.
19. Even assuming arguendo that the company received payment from NDCC Bank, there is no material to show that Accused No. 3 misappropriated or converted any part of such amount to his own use.
20. It is, therefore, evident that:
  - a. There was no fiduciary relationship between NDCC Bank and HTL and in any case there cant be any fiduciary relationship between NDCC Bank and Accused No. 3;
  - b. The payment was made to HTL as a contracting counterparty, not to the Accused personally; and
  - c. The transaction was conducted in the nature of a sale, whereupon the ownership of funds passed to HTL, leaving no scope for the concept of "entrustment" under Section 405 IPC.
21. In light of the above, the essential precondition for invoking either Section 406 or Section 409 IPC, that is entrustment of property in a fiduciary or agency capacity is wholly absent. Consequently, the very substratum of the alleged offences collapses.

## FORGERY

22. In order to prove allegations under Sections 468 and 471 of the Indian Penal Code, the ingredients of the offence of forgery as defined under Sections 463 and 464 IPC must first be satisfied. These foundational provisions delineate when a document can be said to be “false” and when its making amounts to “forgery.”
23. Section 463 IPC defines forgery as follows:
- “Whoever makes any false document or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”
24. Section 464 IPC explains when a person is said to make a false document or electronic record. Broadly, a false document is made when a person:
- a. Dishonestly or fraudulently makes, signs, seals or executes a document, intending it to be believed that it was made or signed by another person; or
  - b. Alters or tampers with an existing document without lawful authority; or
  - c. Causes another to sign or execute a document knowing that such person does not know the contents or the nature of what he is signing.
25. From these provisions, it is clear that forgery is the act of making a document that purports to be made by someone else or under false authority. Merely writing false recitals, or including incorrect or misleading contents in a document, even if later found to be untrue, does not by itself amount to forgery unless it is shown that the accused made the document pretending it was made or signed by another person.
26. The Hon’ble Supreme Court in *Mohd. Ibrahim v. State of Bihar, (2009) 8 SCC 751*, has clarified the true import of Sections 463 and 464 IPC. It was held that forgery involves the making of a document which is intended to be believed as having been made by someone else. The Court observed that:
- “16. There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and a person executing a sale deed by impersonating the owner or falsely claiming to be authorised or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document

conveying a property describing it as his, there are two possibilities. The first is that he bona fide believes that the property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of “false documents”, it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed.

17. When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted.”

27. Thus, Section 464 fails to attract in the current case. It is submitted that if Section 464 fails, 468 and 471 automatically fail to apply.

28. Even otherwise, to constitute an offence under Section 468 IPC, the following ingredients must be established:

- a. The accused made a false document or electronic record as defined in Section 464; and
- b. The making of such document was with the intent that it be used for the purpose of cheating.

29. The offence of Cheating is defined under Section 415 of IPC. There is no allegation that Accused No. 3 induced NDCC Bank or any other person to part with property, nor any material indicating intent to deceive or cause wrongful loss or gain. The requisite mens rea of “intent to cheat” is wholly missing. In the absence of the allegation that the accused no. 3 acted with an intent to cheat, the necessary ingredients of Section 468 IPC are not satisfied even prima facie.

30. It is submitted that none of the essential elements of 471 are attracted in the present case. Even assuming arguendo that Accused No. 3 was a signatory to certain routine communications or documents in the ordinary course of the company's business, such acts do not constitute "use of a forged document."
31. To attract Section 471 IPC, it must be shown that the accused used a document which was made to appear as if it were executed by another person, thereby inducing others to believe that it originated from someone else. There is no such allegation or material in the present case. None of the documents relied upon by the prosecution purport to have been made on behalf of any other person, nor do they falsely represent any authority not possessed by the maker.

### **CRIMINAL CONSPIRACY**

32. In order to bring home an allegation of criminal conspiracy under Section 120-B of the Indian Penal Code, the prosecution must satisfy the essential elements of Section 120-A IPC, which defines the offence. Section 120-A IPC reads:

“When two or more persons agree to do, or cause to be done —

(a) an illegal act, or

(b) a legal act by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.”

33. The settled law, therefore, is that the essence of conspiracy is the agreement itself. Mere knowledge, discussion, or association with others is insufficient. Unless there is clear evidence of a meeting of minds to commit an illegal act, the offence is not constituted.
34. There is no material on record suggesting that Accused No. 3 entered into any agreement or understanding with any of the other accused persons for committing any illegal act or for achieving a lawful act through illegal means.
35. The charge-sheet and accompanying documents do not disclose:
- a. any meeting or communication where Accused No. 3 allegedly participated in planning or decision-making;
  - b. any correspondence evidencing a shared illegal objective; or

- c. any instruction or act showing that he was aware of or agreed to any purported scheme.
36. Mere participation in the company's ordinary business activities, or the existence of professional or commercial association with co-accused, cannot by itself amount to conspiracy. The prosecution must show intentional concurrence of purpose, which is absent here.
37. The entire prosecution narrative proceeds on the basis that Home Trade Ltd. entered into commercial transactions with NDCC Bank. At best, these are acts of the company in the course of business. To stretch such dealings into a criminal conspiracy would offend the principle that criminal liability must be founded on intention and participation.
38. For conspiracy, the prosecution must also establish the requisite mens rea, a conscious decision to commit an offence or to aid others in its commission. The record is silent on any such state of mind attributable to Accused No. 3.
39. Consequently, the charge of criminal conspiracy under Section 120-B IPC is wholly unfounded.

#### **THAT THERE CAN'T BE VICARIOUS LIABILITY UNDER IPC**

40. It is respectfully submitted that the entire set of allegations contained in the charge-sheet pertains to the acts and transactions of Home Trade Ltd. (HTL), the company through which the dealings with NDCC Bank were undertaken. Every document, correspondence, and transaction on record is in the name of HTL, and not in the personal name of Accused No. 3.
41. The prosecution has not alleged that the said funds were paid to or retained by Accused No. 3 in his personal capacity. On the contrary, all payments were made to HTL's official accounts, and all documents emanated from or were executed on behalf of the company. The company, being a distinct legal entity, is alone answerable for its acts done in the ordinary course of business.
42. Though the company itself has not been arrayed as an accused, the prosecution seeks to fix criminal liability solely upon Accused No. 3, merely by virtue of his position as one of its directors. Such prosecution is impermissible in law and contrary to settled principles governing corporate criminal liability.
43. The Indian Penal Code does not create or recognise the concept of vicarious criminal liability except where specifically provided by statute. In absence of a statutory

mandate, a director cannot be held criminally liable for acts allegedly committed by the company unless there is evidence of his personal role and mens rea.

44. In *Sunil Bharti Mittal v. CBI*, (2015) 4 SCC 609, the Hon'ble Supreme Court authoritatively held that a director or officer of a company cannot automatically be held liable for offences committed by the company unless there is sufficient evidence of his active role coupled with criminal intent, or the statutory provision itself specifically provides for vicarious liability.
45. In *GHCL Employees Stock Option Trust v. India Infoline Ltd.*, (2013) 4 SCC 505, it was held that a director cannot be proceeded against merely on the basis of his designation or position in the company. Specific acts and intent must be alleged and established against him individually.
46. In *Delhi Race club (Supra)*, it is observed that  
“When Appellant 1 is the Company and it is alleged that the company has committed the offence then there is no question of attributing vicarious liability to the office-bearers of the Company so far as the offence of cheating or criminal breach of trust is concerned. The office-bearers could be arrayed as accused only if direct allegations are levelled against them. In other words, the complainant has to demonstrate that he has been cheated on account of criminal breach of trust or cheating or deception practised by the office-bearers.”
47. The prosecution case, even if accepted at its highest, relates entirely to the conduct of HTL in its dealings with NDCC Bank. The alleged acts of omission or commission are all in the name and on behalf of the company. In such circumstances, the company is the primary offender, and no liability can be fastened on a director in isolation.
48. In *Sunil Bharti Mittal (supra)*, the Supreme Court further clarified that where the company is not made an accused, the directors cannot be prosecuted for the same offence.
49. Therefore, in the absence of charge against HTL, continuation of criminal proceedings against Accused No. 3 would be contrary to law and amounts to a fundamental legal infirmity vitiating the prosecution.
50. Even otherwise, the charge-sheet does not attribute any specific act, instruction, or decision to Accused No. 3 that constitutes the commission of any offence. The allegations, at best, refer to the company's transactions or its internal decisions, without any evidence of individual participation, knowledge, or intent.

51. The prosecution has also not alleged that Accused No. 3 derived any personal benefit or acted outside the scope of his official role as a director. In such circumstances, continuation of proceedings against him would amount to penalising corporate office per se, which is impermissible under the criminal law.
52. It is the finally submitted that even if the entire material relied upon by the prosecution is taken at its face value, no offence under Sections 120-B, 406, 409, 468, or 471 IPC is disclosed against Accused No. 3. The allegations, when analysed in light of the statutory ingredients and judicial principles discussed hereinabove, do not satisfy the basic elements of any of the charged offences.
53. The charge-sheet discloses at best a series of commercial transactions between NDCC Bank and Home Trade Ltd., undertaken in the ordinary course of business. There is no allegation or material showing that Accused No. 3, in his personal capacity, either conceived, directed, or participated in any unlawful act.
54. The law is settled that a criminal prosecution cannot be founded on conjecture, suspicion, or mere association, and that the Magistrate must discharge the accused if the charge is “groundless.” The cumulative effect of the above submitted grounds show that no material exists that could lead to a reasonable suspicion that Accused No. 3 has committed any offence. The charge, therefore, is “groundless” within the meaning of Section 239 CrPC. Continuing the proceedings would result in a misuse of the process of law and cause grave prejudice to the accused.