NOTES FOR DISCHARGE APPLICATION IN CR NO 147/2002

POINT 1:

1.1"PRINCIPAL-TO-PRINCIPAL" Contract and NO BROKER CLIENT RELATIONSHIP

It is evident from **Exhibit no. 1964** i.e. Annual Report of HTL for Financial Year 2000-2001, that HTL has not reported any income from "Broking" activity during the year 2000-2001.

Whereas HTL had made a gain of Rs. 66.80 Crores on sale of investment/securities. Thus HTL, as a apart of business decision stopped its broking business and fully engaged in proprietary trading/investment of shares and securities.

As per **Exhibit No. 1717, 1718, 1719, 1720, 1721** and all other contract notes exhibited in the evidence, the transactions in questions were executed between NDCCB and HTL on **"PRINCIPAL-TO-PRINCIPAL"** basis.

In the aforesaid contract notes, Counter Party Participant (CPN) is "Home Trade" and Brokerage (BR) column is "Blank". Thus, HTL had acted as "Proprietary Trader" and not as "Agent/Broker". It is evident from the contract notes that "NO BROKERAGE" had been charged. In the given case the relationship between the parties were of "Principal Buyer" and "Principal Seller".

Hence, till complete settlement of the transactions in question a relationship of "Debtor" and "Creditor" was created between the parties. Thus, recipient (HTL) of the amount did not receive the amount from NDCCB in "Fiduciary Capacity" i.e. as Broker or agent of NDCCB, but towards settlement of payment for purchase of securities for which it was obliged to deliver the Government Securities only. The beneficial ownership in the money so paid was intended to be transferred to HTL.

ii. QUESTION OF ENTRUSTMENT DOES NOT ARISE :

In the given case as per well settled legal position the question of "entrustment" does not arise and therefore, the required ingredient to constitute an offence under S. 405, 406, 409 of IPC were completely missing. Hence, the present matter was a civil wrong ought to have been adjudicated for "Breach of Contract" under Arbitration Act and not under criminal law for "Criminal Breach of Trust". Reliance is placed on ***"State v. Tirath Das" AIR 1954 ALLAHBAD 583 (Vol 41, C N 227)***, ***AND"The State v. Jage Ram" AIR (38) 1951 PUNJAB 103".***

THERE IN NOTHING ON RECORD TO SHOW THAT HTL WAS NOT A MEMBER OF NSE :

The entire investigation and Audit by the Original Complainant (P.W.-1) had been conducted and based on the presumption that HTL had acted as "broker" in its dealing with NDCCB.

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Since, the presumption and conclusion drawn by I.O. are against the facts and the documents exhibited during the trial, the entire proceeding in the present criminal case trail is vitiated

There is nothing on record to show that HTL was not a member of The National Stock Exchange Of India (**herein after referred as "NSE")** and therefore was not authorized to issue such contract notes. There is nothing on record to suggest that the contract notes issued by HTL were legally not enforceable and hence invalid. On the contrary SEBI vide, its letter dated 9.8.2002 being **Exhibit 1831**had confirmed that HTL was SEBI registered member of NSE.

The Reserve Bank of India **(herein after referred as "RBI")** vide its letter dated 7th October, 2002 **(being <u>Exhibit no.1583/1</u>)**had confirmedthat HTL was registered in their books for its dealing in Government Securities vide registration No. 6-H/83. Thus, there was no restriction either from NSE or RBI on "Off Market Principal to Principal trades" executed by HTL with NDCCB.

There is nothing on record to show that HTL being a member of NSE was not allowed to do "Off Market Trades" on "Principal to Principal" basis or there was any limit restrictions for such transactions. **PW-51: Dr. Golak Chandra Nath in** his deposition has deposed that- the trades which are settled outside NSE are off market trade.HTL was not enabled for trading on their platform. He deposed that he does not know whether these companies were authorized to deal with government securities out of WDM platform. Therefore, he had only forwarded the information of transactions pertaining to WDM platform.

It is pertinent to mention that the platform referred in the above para means the "NSE online portal", which was merely a facility availed to its members for doing online trading with unknown buyers/sellers/members. "Off market trades" were done outside NSE online portal by and between the member of NSE and the buyer/seller already known to each other and who wanted to deal in securities on the mutually acceptable delivery/payment terms. As evident there is nothing on record to suggest that HTL being a member of NSE was restricted from undertaking "Off market trades" on "Principal to Principal" basis.

It is pertinent to note that "HTL" being a member of multiple stock exchanges and in particular being a member of NSE was entitled to do Arbitrage, jobbing, proprietary trading, Investment in shares and securities, Brokering in secondary and primary market etc. Thus, Broking activity was just a one of the business options available to HTL being a member of NSE.

The entire investigation and Audit by the Original Complainant (P.W.-1) had been conducted and based on the presumption that HTL had acted as “broker” in its dealing with NDCCB.

Since, the presumption and conclusion drawn by I.O. are against the facts and the documents exhibited during the trial, the entire proceeding in the present criminal case trail is vitiated.

As per the FIR no. 97/02 dated 25.04.2002 filed by the Ex-Chairman of NDCCB, five companies were named in the said FIR as accused. On the same cause of action, the second FIR no. 101/02 was filed on 29.04.2002 by Mr._Bhaurav VishwamanthAswar. As per the second FIR along with the Chairman & General Manager of NDCCB, the five companies named in the FIR dated 25.04.2002 were also named in the second FIR. However, for inexplicable reasons no charge sheet has been filed against these five companies by the I.O. Non-filing of charge sheet against all these Companies has made the entire criminal proceedings sensitively vulnerable and non-tenable against the other accused including A-9.

As per the charge dated 14.11.2019 the main offence alleged to had been committed is of “Criminal Breach of Trust” and for which the charge had been framed u/s 406, 409, r/w 34 & 120-B of IPC.

It is pertinent to note that as per the facts placed on record the amounts alleged to had been misappropriated by the accused were entrusted by the Depositors and Shareholders of NDCCB, to NDCCB. It is undisputed that NDCCB is a registered “Legal entity” and a “juristic person” having an independent legal identity. In other words there was no entrustment to the accused directors and office bearer of the NDCCB.

Similarly, NDCCB issued cheques/transferred amounts directly to HTL’s Bank account for purchase of Government Securities. It is undisputed that HTL is a registered “Legal entity” and a “juristic person” having an independent legal identity. In other words, there was no entrustment to the accused directors and office bearer of the HTL.

It is pertinent to note that all the Contract Notes were issued and executed on behalf of HTL to NDCCB. Thus, the privity of Contract was between HTL and NDCCB.

As per well settled law the alleged entrustment was to NDCCB and from NDCCB to HTL. As per the facts recorded in the evidence the alleged **"Principal Offenders"** in the present case were NDCCB and HTL to whom the amounts were allegedly entrusted and who allegedly misappropriated the entrusted amount. However, for the inexplicable reasons neither NDCCB nor HTL had been Charge Sheeted nor any Charge has been framed against them. Non consideration of this very vital fact made the criminal proceedings sensitively vulnerable. Hence, as per the ratio laid down by the Hon'ble Apex Court in ***"Sharad Kumar Sanghi Vs. Sangita Rane" (2015) 12 SCC 781 Para 9, 11 &13. AND "R.Kalyani Vs. Janak C. Mehta and Others" (2009) 1 SCC 516 Para 41 AND***Judgement of High Court of Jammu & Kashmir And Ladakh Pronounced on 21.5.2022 in CRM(M) No. 263/2020 in the matter of ***Sandeep Singh &Ors Vs. Nisar Ahmad Dar,*** arrangingNDCCB and HTL as main accused was mandatory to procced with the trial. Non consideration of this very vital facts has vitiated the entire proceedings.

The Hon'ble Supreme Court in the matter of ***"S.K. Alagh v State of U.P. & others, (2008) 5 SCC 662"*** in Para 13, 14, 16, 17, 18 & 19 has held that:

"As, admitted, drafts were drawn in the name of the Company, even, if the appellant was its Managing Director, he cannot be said to have committed an offence u/s 406 of IPC. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a director of a company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself."

Thus, I.O. completely misconstrued the well settled law and filed the charge sheet in gross contravention of the ratio laid down by the Hon'ble Supreme Court in the above judgement.

That in the entire evidence there is no unanimity about what exact amount was allegedly misappropriated by the accused. Different P.W.s had given completely different amounts of misappropriation. The I.O. in his deposition has admitted that he himself has not studied the transactions and bank statement details but he had completely relied on outsourced CA firm and accepted their finding as gospel truth without application of his own independent mind. The main crux of the investigation was to bring on record the exact authentic amount of alleged misappropriation which I.O. completely failed to achieve.

It is pertinent to mention that during the investigation the I.O. had sought some clarification vide his letter dated 28.05.2002 **(being Exhibit no. 1577)** from the RBI about whether the securities mentioned in his letter had been purchased for NDCCB by HTL. In response, the RBI in its letter dated 16.10.2002 being **Exhibit 1578-1 to 1587-3** in Para (a) had categorically mentioned that:

"….In view of this, a possibility that the companies mentioned by you in your letter, are holding investments as gilt account holders in the books of some CSGL account cannot be ruled out. It would therefore be appropriate to approach such of the banks/institution which may be maintaining the Gilt accounts of these companies, for further information relating to transactions mentioned by you in your letter. Incidentally, from a secondary sources of information we are aware that M/s. Home Trade Ltd. and Giltedge Management Services Ltd. are maintaining the Gilt Accounts with HDFC Bank Ltd. and Federal Bank Ltd. As already indicated more accounts being maintained by all of these companies elsewhere with the banks/institutions cannot be ruled out."

From the above para it is clear that RBI had advised the I.O. to approach HDFC Bank Ltd and Federal Bank Ltd where HTL was maintaining "Gilt Accounts" (D-mat account of Government securities) and also investigate in this direction to find HTL's other accounts maintained elsewhere with banks and institutions.

The I.O. in **Para 236** of his disposition has admitted that he has not seized Gilt Account statements from HDFC and Federal Bank. Thus, despite the specific information and advice given by RBI, the I.O. did not do any investigation to bring correct facts on records about HTL's complete holding of Government Securities. Thus, the conclusion arrived at by I.O. is based upon incomplete facts, would he conducted his thorough investigation based on the inputs given by RBI he would have come to completely different conclusion about total purchase and holding of government securities of HTL with respect to the securities sold to NDCCB from time to time.

The prosecution has utterly failed to bring on record the Gilt Transactions done by HTL through its CSGL (D-mat) account with Federal and HDFC Bank before this Hon'ble Court deliberately & benefit of the same needs to be given to the accused and A-9 deserves to be acquitted.

Thus, the conclusion arrived at by I.O. that HTL never purchased any securities for NDCCB is based upon incomplete investigation. The evidence of I.O. based on incomplete investigation, thus vitiated the entire proceedings.

It is an admitted fact that the contract notes issued by HTL had an "Arbitration Clause" in it. It is further admitted by I.O. in his deposition in Para 221 that as per contract notes, in case of any dispute including any question relating to the validity and enforceability of the contract notes the reference to NSE arbitration for adjudication of dispute was mandatory. However, for inexplicable reasons NDCCB has refrained from filing any Arbitration Application before the agreed forum at Mumbai for adjudication of the disputed transactions forming part of the Criminal Complaint filed in the police station.

It is pertinent to note that from the evidence on record this matter is not a case of criminal breach of trust but predominantly it is a matter of breach of contract which is a civil wrong and thus it ought to have been adjudicated before the arbitrator of the NSE.

The Act of signing contract notes, letters and cheques for and on behalf of HTL (Employer)while discharging official duty does not fall within the ambit of any of the section under IPC.

The act of signing documents such as contract notes, letters and cheques for and on behalf of the employer company being an employee as "Authorised Signature" does not fall within the ambit of S. 464 of IPC which defines meaning of false documents. Making of any false document, in view of the definition of "forgery" is the sine qua non thereof. What would amount to making of a false document is specified in S. 464 of IPC. What is, therefore, necessary is to execute a document with the intention of causing it to be believed that such document inter alia was made by the authority of a person by whom or by whose authority he knows that is not made. It is pertinent to note that mere preparation of document under ones own signature and writing by making false averments therein does not fall within definition of forgery.

The condition precedent for an offence under Sections 467 and 471 is forgery. The condition precedent for forgery is making a false document (or false electronic record or part thereof. This case does not relate to any false electronic record).

In short, a person is said to have made a "false document", if (i) he made or executed a document claiming to be someone else or authorised by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

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.

If there is no forgery, then neither Section 468 nor Section 471 of the Code are attracted.

To constitute an offence under section 471 of IPC, first an offence u/s 468 of IPC has to be established.

The I.O. in Para 132 of his deposition has stated about xerox copies of the forged documents being prepared by KananMevawala of HTL. The I.O. in Para 211, 212 & 213 has stated about the role of KananMevawala and he categorically stated that he did not investigate how the xerox copies of the forged documents reached to NDCCB at Nagpur. He further stated that he did not investigate to know how these copies reached at NDCCB as he felt that it was not important for him to do so.

It pertinent to note that during the trial none of the PW’s working in NDCCB have deposed of having ever seen xerox copies of the alleged forged documents referred by the I.O. Thus, how all of a sudden these copies surfaced is unsolved mystery, which speak volumes.

Thus, it shows that investigation carried out by I.O. was incomplete and hence conclusion based upon such investigation is unreliable.

It is pertinent to mention that the whole investigation done by I.O. is misleading and devoid of facts because it is suffering from the following serious flaws and infirmities :

The I.O. has investigated the matter on the belief that HTL had acted as “Broker” in its dealing with **NDCCB**. Whereas I.O. in Para 239 of his depositionhas admitted that the transactions between HTL & NDCCB were on “Principal to Principal” basis.

During the Investigation the I.O. had seized one statement furnished by NDCCB **being Exhibit no. 1475.** The Title of this statement is Details of the cheques received in the matter of Physical Securities. The I.O. had also seized copies of the cheques mentioned in this statement and all these cheques have been marked as **Exhibit nos. 1281,1282,1283,1284, 1285, 1286, 1287, 1288, 1289, 1290,1291**.These cheques were dated 24.04.2002 issued by all the accused companiesto NDCCB, the total value of all these cheques was more than Rs.124.29 Crores.

The I.O. in **Para 238** of his deposition has admitted that for what purpose these cheques were issued to NDCCB that he has not investigated. Thus, once again I.O failed to investigate on the very important evidence seized by him during the investigation. However, I.O. admitted in Para 49 of his deposition that all these cheques were deposited by NDCCB and the same were returned unpaid by the respective drawers’ banks. The I.O. further mentioned that NDCCB had filed 10 cases against the issuer companies under The Negotiable Instruments Act.

Thus, I.O. was duty bound to enquire and investigate what was the under lying consideration for which all these cheques were issued to and accepted by NDCCB. However, I.O. did not find it necessary to investigate in this direction and to bring correct facts on record as to why all these cheques were accepted and deposited by NDCCB.

The facts as appear from the statement and cheques referred above, the NDCCB had sold its entire portfolio of investment in Government Securities purchased from the respective companies (Principal to Principal transactions) at the current market price and got the cheques towards the sale consideration. Thus, after acceptance of all these cheques the NDCCB had only money claim against all the drawers of the cheques. Had the I.O. investigated in this direction his conclusion about the case would have been totally different.

The I.O. in Para 221 of his deposition has admitted that all the contract notes issued by HTL to NDCCB were subject to "MANDATORY ARBITRATION CLAUSE", which means reference to Arbitrator of NSE at Mumbai for adjudication of disputed issueswas one of the pre-requites to initiate any further proceedings against the accused person.

It is an admitted fact that the transaction between Euro Discover India Ltd and NDCCB was of loan against shares. It is also an admitted fact that the said loan was fully repaid along with agreed interest. The **PW-18 SheshravShamravGonde** stated that the Loan transactions and Government Securities transactions were totally different.

From the Adjustment letters issued by HTL to NDCCB it is clearly evident that NDCCB was having a running account with HTL. Which means settlement of amount was not done on per contract basis but after taking into consideration all the Purchase and sales transactions entered on a particular date only differential amount determined as per the adjustment letter was paid by the respective party. Thus, I.O. failed to understand and appreciate the meaning of running account and its functionality.