



AIROnline 2019 Guj 108
GUJARAT HIGH COURT
MS . SONIA GOKANI , J.

SPECIAL CRIMINAL APPLICATION - 7193
of 2018 D/- 12 - 4 - 2019

**KAMAL RAMESHBHAI SHETH v. STATE
OF GUJARAT AND ORS.**

Criminal P.C. (2 of 1974), S.482 - Negotiable Instruments Act (26 of 1881), S.138, S.141 - Quashing of complaint - Dishonour of cheque case - Offence by company - Vicarious liability of director - Cheque issued by Company towards alleged outstanding payment for business transactions, dishonoured - Plea of accused that he being Independent Non-executive Director, had no involvement in day to day functioning of Company - Independent Non-executive Director of company who resigned prior to dishonour of cheque in question - Resignation of accused having come into effect prior to date of commission of offence, no vicarious liability can be thrust upon him - Continuing prosecution would surely tantamount to abuse of process of law - Complaint liable to be quashed.

(Paras17 18 19)

Cases Referred

(2014) 16SCC 1
2008) 8 SCC 1
(2011) 3SCC 351
(2016) 2 GLH762
(2015) 1 SCC 103
(2015) 11 SCC 776.
(2014) 16 SCC 1
(1971) 3 SCC 189
1981) 2 SCC 335
(2006) 10 SCC 581
(1998)5 SCC 343
Gunmala Sales Private Ltd.

Chronological Paras

Cases Referred

(2008) 8 SCC1
(2005) 8 10 SCC 89
(2007) 5 SCC 108
(2007) 9 SCC481
(2007) 3SCC 693
(2007) 5 SCC 54
(2007) 5 SCC103.
(2004) 7 SCC 338
(2011) 3 SCC 351
N. Rangachari v. Bharat
Sanchar NigamLtd.3, a 2
2005(8) SCC 89]
K.K. Ahuja v. V.K. Vora
andAnother.4
2005 (8) SCC 89
K.K. Ahuja4,
ationalSmall Industries
Corporation Limited v.
HarmeetSingh Paintal and
Another5
2004) 1 SCC 691
(2016) 2 GLH 762
2001 (2) GLR1023
1999[4]SCC 567

Chronological Paras

**Saurabh Soparkar For Nanavati Associates for
Petitioner; Hardik Soni, Addl. Public Prosecutor
for Respondent.**

Judgement

1.ORDER :-Rule returnable forthwith. Learned APP waives service of notice of rule for and on behalf of the respondent - State.

2. The present petition is preferred under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure seeking quashment of the complaint being Criminal Case No. 81538 of 2017 filed by the respondent no.2 under Section 138 and 141 of the Negotiable Instruments Act, 1881



('NI Act' hereinafter) against the petitioner which is pending before the learned Chief Judicial Magistrate, Ahmedabad.

3. The facts leading to the present petition are as follows:-

3.1. The petitioner is a businessman carrying on his separate business. The firm is not engaged in any direct or indirect businesses with either M/s Anil Limited or M/s Anil Nutrients Limited.

3.2. The petitioner was appointed as an Independent Non-Executive Director of a company being M/s Anil Limited on 30.09.2014 and has resigned on 31.01.2017. The board resolution evidencing his appointment on 30.09.2014 as an independent Non-Executive Director is also forming part of the record. His resignation is also evident from Form No. DIR-12 of the Registrar of Companies (ROC).

3.3. It appears that due to financial crisis M/s Anil Limited has ceased all its manufacturing activities and the petitioner was not employed with Anil Limited. It is the case of the petitioner that being an independent Non-Executive Director, he has no involvement in the day to day functioning of the company.

4. The respondent no.2 M/s. Raturaj Commodities Private Limited - the complainant, had trade relations with M/s Anil Limited. As per the complaint, respondent no.2 has undertaken the business transactions with M/s Anil Limited against which an alleged outstanding is payable as regards cheque had been issued by M/s. Anil Limited being Cheque No. 52125 dated 30.06.2017 amounting to Rs. 5,03,442/- (rupees five lakh three thousand four hundred forty tow only) respectively. They were dishonoured and return memo dated 16.08.2017 reflects endorsement "Funds Insufficient". Thereafter, legal notices had been issued by the respondent

no.2 on 15.09.2017 to all including the present petitioner.

5. Learned Chief Judicial Magistrate, Ahmedabad issued the process against the company and also against the present petitioner on 23.12.2017. According to the petitioner, since he was not in charge nor responsible for the conduct of day to day business of the accused company against whom the National Company Law Tribunal (NCLT) also has directed the initiation of the Corporate Resolution Process on 23.08.2017 under the provisions of Insolvency and Bankruptcy Code, 2016 (IBC), the petitioner cannot be held liable in respect of the alleged acts and commission of the accused company.

6. It is further the say that Section 141(1) of the Act provides for vicarious liability of the director, who is in charge of and/or responsible for the day to day business and management of the company. As the petitioner is Independent Non-Executive Director, not having undertaken any role in the day to day business activity, Section 141(1) of the Act would come to his rescue. None of the ingredients of Section 138 would be attracted in this case and accordingly the following prayers are made.

"(A) This Hon'ble Court be pleased to quash and set aside the Criminal Case No. 81538 of 2017 pending before the Ld. Chief Judicial Magistrate, Ahmedabad for the offence punishable under sections 138 and 141 of the Negotiable Instruments Act, 1881; and Order dated 23.12.2017 passed thereunder; and any further Orders passed and/or proceedings initiated in connection to the impugned Complaint, qua the Petitioner;

(B) Pending admission and/or final disposal of the present application, your Lordship be pleased to stay further proceedings in connection with Criminal Case No. 81538 of 2017 pending before the Ld. Chief Judicial Magistrate, Ahmedabad

for the offence punishable under Sections 138 and 141 of the Negotiable Instruments Act, 1881; and Order dated 23.12.2017 passed thereunder; qua the present Petitioner;

(C) Your Lordships be pleased grant an ex-parte ad-interim relief in terms of Clause (B) hereinabove;

(D) Any other and further relief as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case be granted."

7. This Court has heard learned senior advocate Mr. Saurabh Soparkar with Mr. Raheel Patel, Mr. Hard Soni and Ms. Kamy Shah for Nanavati Associates who has argued along the line of memo of the petition.

7.1. Learned senior counsel has taken this Court through the provisions of law and various decisions on the subject to urge that the petitioner, at the time of commission of offence, since was not with the company as the Director, Section 141(1) of the NI Act would not be attracted in his case. He has also further urged that chronology of events would clearly reveal that when the cheque in question was dishonoured, the petitioner had already resigned and it is also self evident from the record of the ROC.

7.2. He also further has urged that the offence can said to have been committed not on the date of presentation of the cheque or on the date of dishonour of the cheque but, the date on which there has been a noncompliance of the mandatory notices issued under Section 138 of the NI Act, as that would furnish the cause of action for the complaint to be lodged. He has emphatically argued that once the date of dishonour of the cheque is considered, it is quite obvious that the petitioner simply cannot be held liable.

7.3. To substantiate his submissions, learned counsel has relied upon the following authorities:-

(I) Pooja Ravinder Devidasani vs. State of Maharashtra; (2014) 16 SCC 1

(II) DCM Financial Services Limited vs J.N.Sareen and Another; (2008) 8 SCC 1

(III) Harshendra Kumar D. vs. Rebatilata Koley and Others; (2011) 3 SCC 351

(IV) Nikhil P. Gandhi vs. State of Gujarat and others; (2016) 2 GLH 762

(V) Gunmala Sales Private Limited and others vs. Anu Mehta and others; (2015) 1 SCC 103

8. Per contra, learned APP Mr. Hardik Soni appearing for the respondent - State has urged that there is no requirement for the Court to exercise powers under Section 482 of the Code as also under Article 226 of the Constitution, as there are mixed questions of facts and law which would necessarily need to be referred to the trial Court concerned. It is further urged that the criminal case is already pending before the Court concerned and hence, it is not for this Court to exercise its powers under Section 482 of the Code.

8.1. Reliance is placed on the decision of HMT Watches Limited vs. M.A.Abida and another; reported in (2015) 11 SCC 776.

9. Having heard both the sides and also having considered the materials on record, the Court notices that essentially and predominantly on the ground that the petitioner is an independent Non-Executive Director in the Company, on account of the resolution passed by the members in the General Meeting of M/s Anil Limited on 30.09.2014 that he was appointed as an Independent Director of the company for a term of five years w.e.f. 30.09.2014, however, he has



resigned on 31.01.2017, this petition is preferred on the ground that neither Section 138 nor Section 141 of the NI Act will cover the case of the petitioner.

10. It is apt to refer to the provisions of Section 138 and 141 of the NI Act at this initial stage:-

"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 two years], 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 six 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 thirty 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.

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 subsection (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."

11. Both these provisions when are read in harmony, they make it unequivocally clear that whenever any cheque is issued by the drawer towards any legally existing liability and if the same returns unpaid for want of availability of sufficient funds or because the amount exceeds

the arrangement made with the bank for availing the funds to the drawer, the same becomes an offence.

11.1. Mandatory requirement before any such complaint is entertained is (i) that the cheque ought to be presented by the payee or a holder in due course within the stipulated time period prescribed in the instrument of the bank. (ii) issuance of notice by the payee or the holder in the due course within thirty (30) days of intimation of such dishonour of cheque and (iii) nonpayment of such amount within fifteen (15) days of receipt of notice by the drawer.

11.2. In case of the company being the drawer, all those who are in charge and responsible in conducting the business would be held responsible and only two defences are available to such Directors that the same was committed without his knowledge and that he could not prevent this despite his best of the endeavours.

11.3. Again a nominee director of the company appointed by virtue of his being in the service of Central or State Government on the financial institute/corporation controlled by the State or the Central Government could not be held liable for any offence under Section 138 of the NI Act.

12. It would be apt to refer to the decision rendered in case of Pooja Ravinder Devidasani vs. State of Maharashtra; (2014) 16 SCC 1, the question was of dishonoured of the cheque and by the company. The Court held that requirement before a Magistrate can take cognizance under Sections 138/141 making a person vicariously liable. The Court also has held that the learned Magistrate has to ensure strict compliance with statutory requirements and the superior Courts should also maintain purity in administration of justice and should not allow the abuse of process of Court. The Director who had resigned much before the issuance of the dishonoured cheques and when his resignation was also approved

by the Board of Directors and the formalities of informing Registrar of Companies about the resignation was also fulfilled, it was held that the Director cannot be held vicariously liable in such circumstances.

12.1. The Apex Court has held and observed thus:-

"15. We have given our thoughtful consideration to the arguments advanced by the counsel on either side at length. The questions that arise for determination are

15(i) whether the appellant is liable for prosecution under Section 138 read with Section 141 of the N.I. Act for the alleged offence of dishonor of cheques committed by the default Company?;

15(ii) whether the High Court was right in dismissing the writ petitions filed by the appellant seeking quashing of the criminal proceedings initiated against her by the Respondent No. 2?

16. Before delving into the merits of the case, it would be apt to take note of relevant portions of the complaints filed by Respondent No. 2 which read thus:

"I say that the accused No. 2 to 5 on behalf of accused No. 1 have approached us with request for trade finance facility and accordingly the said facility has been granted by us to the accused as per their request and requirement. I say that accused No. 1 is private limited Company of which accused No. 2, 3 and 5 are Directors and accused No. 4 is the Director and authorized signatory of accused No. 1 M/S Elite International Pvt. Ltd.-Imprest. At all material time relevant and relating to the complaint, accused No. 2 to 5 were and are in charge of and responsible for the conduct of business of accused No. 1 and are also looking after day to day affairs of accused No. 1. It is

further submitted that accused No. 2 to 5 with accused No. 1 are liable to be prosecuted and / or connived in the commission of the present offence, in their capacity as a Director/signatory of the said private limited Company.

I say that as narrated in para 4 accused No. 2 to 5 being responsible for the affairs of accused No. 1 i.e. private limited Company are liable to be prosecuted for having committed a criminal offence in the event of failure on their part to comply with the requisitions contained in the statutory notice dated 03-11-08, which was sent to them both under R.P.A.D. and U.P.C. on 06/11/08. I say that notice was received by all the accused on or about 08/11/08 and notice sent through U.P.C. are deemed to have been served. However, accused have failed and neglected to make our payment under the above said dishonored cheques".

17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. on 1st July, 2004 and had also executed a Letter of Guarantee on 19th January, 2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonor of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not

make him liable under the N.I. Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the N.I. Act. In National Small Industries Corporation (supra) this Court observed:

" Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

18. In Girdhari Lal Gupta Vs. D.H. Mehta and Anr. (1971) 3 SCC 189, this Court observed that a person 'in charge of a business' means that the person should be in overall control of the day to day business of the Company.



19. A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned [See: State of Karnataka Vs. Pratap Chand and Ors. (1981) 2 SCC 335].

20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

21. In Sabitha Ramamurthy and Anr. Vs. R.B.S. Channbasavaradhya (2006) 10 SCC 581, it was held by this Court that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. [pic] Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. By verbatim reproducing the wording of the Section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the N.I. Act.

22. As held by this Court in Pepsi Foods Ltd. and Anr. Vs. Special Judicial Magistrate and Ors. (1998) 5 SCC 343, summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

23. In Gunmala Sales Private Ltd. (supra) on which learned counsel for the respondents has heavily relied, this Court at Para 33(c) held : "In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at

the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out".

24. xxx

25. xxx

26. xxx

27. Unfortunately, the High Court did not deal the issue in a proper perspective and committed error in dismissing the writ petitions by holding that in the Complaints filed by the Respondent No. 2, specific averments were made against the appellant. But on the contrary, taking the complaint as a whole, it can be inferred that in the entire complaint, no specific role is attributed to the appellant in the commission of offence. It is settled law that to attract a case under Section 141 of the N.I. Act a specific role must have been played by a Director of the Company for fastening vicarious liability. But in this case, the appellant was neither a Director of the accused Company nor in charge of or involved in the day to day affairs of the Company at the time of commission of the alleged offence. There is not even a whisper or shred of evidence on record to show that there is any act committed by the appellant from which a reasonable inference can be drawn that the appellant could be vicariously held liable for the offence with which she is charged. "

13. Yet another decision along the same line is in case of DCM Financial Services Limited vs J.N.Sareen and Another; (2008) 8 SCC 1, where the question was again of dishonour of the cheque issued on behalf of the company and the resignation from the post of directorship of the company by the appellant before the Apex Court. The complaint was filed under Section 138 read with Section 141 of the NI Act against the accused company on whose behalf, the bounced cheque was issued. It was a post dated cheque and the cheque was signed by the respondent in April, 1995 but the cheque was post dated and the same was presented in June, 1998 and thereafter the complaint was filed on or about 20.08.1998. The respondent had already resigned from the accused company on 25.05.1996. He had also given intimation to all concerned including the appellant and yet, he had been impleaded as a co-accused. In such circumstances, when the challenge was made by the Director who had resigned already, the Apex Court has held thus:-

"15. Section 138 of the Act reads as under :-

"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 9 without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to two year, or with fine which may extend to twice the amount of the cheque, or with both..."

16. For constituting an offence in terms of the said provision, the following ingredients are to be satisfied:-

- a) A cheque must be drawn;
- b) It must be presented and returned unpaid inter alia with the remarks "insufficient funds";
- c) A Notice for payment should be served on the accused;
- d) The accused has failed to make the payment of the said amount to the payee within 15 days from the date of receipt of notice.

17. First Respondent indisputably was a Director of the Company. The liability attached to him was not a personal liability. It was a constructive liability. The cheque was drawn on behalf of the Company. He might have been liable as a person in charge of the company within the meaning of Section 141 of the Act as has been held by this Court in *S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another* : (2005) 8 10 SCC 89 whereupon strong reliance has been placed by Mr. Patwalia. One of the questions which indisputably arose for consideration therein was as to whether a signatory of the cheque would come within the purview of Section 141 of the Act, as would appear from paragraph 1 thereof, which reads :-

"This matter arises from a reference made by a two-Judge Bench of this Court for determination of the following questions by a larger Bench:

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against." It was opined :-

"9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence." It was concluded :-

"10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words: "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, etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to

the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

18. We may also notice a decision of this Court in *N. Rangachari vs. Bharat Sanchar Nigam Ltd.* : (2007) 5 SCC 108 wherein it was held :-

"21. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board

of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position." It was further held :-

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

We are, however, concerned with a different situation hereat.

19. Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act. (See *K. Srikanth Singh vs. M/s. North East Securities Ltd. and another* : JT 2007 (9) SC 449).

20. We may also notice that this Court in *N.K. Wahi vs. Shekhar Singh and others* : (2007) 9 SCC 481 has observed :-

"8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment 15 or specific evidence the net result would be that complaint would not be entertainable." [Emphasis supplied]

21. The cheque in question was admittedly a post dated one. It was signed on 3rd April, 1995. It was presented only sometimes in June, 1998. In the meantime he had resigned from the directorship of the Company. The complaint petition was filed on or about 20th August, 1998. Intimation about his resignation was given to the complainant in writing by the 1st respondent on several occasions. Appellant was, therefore,

aware thereof. Despite having the knowledge, the 1st respondent was impleaded one of the accused in the complaint as a Director Incharge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done. Although, therefore, it may be that as an authorized signatory he will be deemed to be person incharge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person incharge of the Company in 16 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. (See also *Shiv Kumar Poddar vs. State (NCT of Delhi)* : (2007) 3 SCC 693; *Everest Adveristing Pvt. Ltd. vs. State (NCT of Delhi)* : (2007) 5 SCC 54 and *Raghu Lakshminarayanan vs. Fine Tubes* : (2007) 5 SCC 103.

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23. When post dated cheques are issued and the same are accepted, although it may be presumed that the money will be made available in the bank when the same is presented for encashment, but for that purpose, the harsh provision of constructive liability may not be available except when an appropriate case in that behalf is made out.

24. Section 140 of the Act cannot be said to have any application whatsoever. Reason to believe on the part of a drawer that the cheque would not be dishonoured cannot be a defence. But, then

one must issue the cheque with full knowledge as to when the same would be presented. It appears to be a case where the appellant has taken undue advantage of the post dated cheques given on behalf of the company. The statute does not envisage misuse of a privilege conferred upon a party to the contract. Submission of Mr. Patwalia made in view of the decision of this Court in *Adalat Prasad v. Rooplal Jindal and Others* [(2004) 7 SCC 338] is misplaced. Had such a contention been raised even in terms of *Adalat Prasad* (supra), the respondents could have filed an application for quashing in terms of Section 482 of the Code of Criminal Procedure at that stage. Again such a contention had not been raised before the High Court. No such ground appears to have been taken even in the Special Leave Petition."

13.1. Thus, in this decision, although the cheque was signed by the Director concerned who had eventually resigned, in his case also, the Court did not hold his constructive liability interpreting the provisions of NI Act extensively.

14. In the case of *Harshendra Kumar D. vs. Rebatilata Koley and Others*; (2011) 3 SCC 351, on the date when the offence was committed by the company, the appellant was neither the Director of the company nor he had anything to do with the affairs of the Company. Therefore, the Court held that if, criminal complaints are allowed to proceed against the appellant, it would result in gross injustice and tantamount to abuse of process of Court.

14.1. The relevant paragraphs profitably are reproduced as under:-

"10. The legal position concerning the vicarious liability of a director in a company which is being prosecuted for the offence under Section 138, NI Act has come up for consideration before this Court 8 on more than one occasion. In the case of *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and*

Another2, the following questions were referred to a 3-Judge Bench for determination :

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

11. The 3-Judge Bench of this Court answered the aforesaid questions thus:

"(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this 2 2005 (8) SCC 89 9 averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be

in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

12. In *N. Rangachari v. Bharat Sanchar Nigam Ltd.*³, a 2- Judge Bench of this Court discussed and considered *S.M.S. Pharmaceuticals Ltd.*² and observed as follows :

".....The scope of Section 141 has been authoritatively discussed in the decision in *S.M.S. 3 2007 (5) SCC 108 10 Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us and there is no scope for redefining it in this case. Suffice it to say, that a prosecution could be launched not only against the company on behalf of which the cheque issued has been dishonoured, but it could also be initiated against every person who at the time the offence was committed, was in charge of and was responsible for the conduct of the business of the company. In fact, Section 141 deems such persons to be guilty of such offence, liable to be proceeded against

and punished for the offence, leaving it to the person concerned, to prove that the offence was committed by the company without his knowledge or that he has exercised due diligence to prevent the commission of the offence. Sub-section (2) of Section 141 also roped in Directors, Managers, Secretaries or other officers of the company, if it was proved that the offence was committed with their consent or connivance. But as has already been noticed, the decision in *S.M.S. Pharmaceuticals Ltd.* [2005 (8) SCC 89] binding on us, has postulated that a Director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision no further discussion on this aspect appears to be warranted."

13. In the case of *K.K. Ahuja v. V.K. Vora and Another.*⁴, a 2- Judge Bench of this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of *S.M.S. Pharmaceuticals Ltd.*² It was held that mere fact that at some point of time an officer of a company had played some role in the financial 4 (2009) 10 SCC 48 11 affairs of the company, that will not be sufficient to attract the constructive liability under Section 141 of the NI Act. The Court summarized the legal position as follows:

"(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, secretary or manager as defined in Section 2(24) of the Companies Act or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

14. In *K.K. Ahuja*⁴, this Court observed that if a mere reproduction of the wording of Section 141(1) in the complaint was sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge

of and were responsible to the company for the conduct and business of the company.

15. In a recent decision in the case of *National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another*⁵, after survey of earlier decisions wherein legal position concerning Section 138 and Section 141 of the NI Act was considered, this Court culled out the following principles:

"(i) The primary responsibility is on the complainant to make specific averments as are required under the law 5 2010 (3) SCC 330 13 in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

16. Every company is required to keep at its registered office a register of its directors, managing director, manager and secretary containing the particulars with respect to each of them as set out in clauses (a) to (e) of sub-section (1) of Section 303 of the Companies Act, 1956. Sub-section (2) of Section 303 mandates every company to send to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its directors, managing directors, managers or secretaries specifying the date of change is also required to be furnished to the Registrar of Companies in the prescribed form within 30 days of such change. There is, thus, statutory requirement of informing the Registrar of Companies about change among directors of the company.

17. In this view of the matter, in our opinion, it must be held that a director - whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies - cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation. The words 'every person who, at the time the offence was committed', occurring in Section 141 (1) of the NI Act are not without significance and these words indicate that criminal liability of a director must be determined on the date the offence is alleged to have been committed.

18. On March 2, 2004, the appellant sent a letter of resignation to the Managing Director

of the Company, the relevant part of that reads as follows: "Subject : Resignation to the Post of Director With reference to the above subject I hereby resign to the post of Director in your company (sic.) immediate effect as I am pre-occupied with my other business activities and unable to concentrate, participate in the affairs of the company.

Therefore it is kind request with you to accept my resignation and intimate the R.O.C. by filing necessary applications to comply the legal formality."

19. The Board of Directors held the meeting on March 2, 2004 and accepted the appellant's resignation on that day itself. The extract of resolution to that effect reads as follows : "Mr. Harshendra Kumar D S/o Rathnavarma Hegde residing at No. -55, Vittal Mallya Road, Bangalore. Due to his personal inconveniences (sic.) he requested to accept his resignation for the Director, and the Board accepted the resignation and it will be effected immediately on the date of resignation."

20. On March 4, 2004, the Company informed the Registrar of Companies in the prescribed form (Form no. 32) about the resignation of the appellant from the post of Director of the Company and, thus, change among directors.

21. The above documents placed on record by the appellant have not been disputed nor controverted by the complainants. As a matter of fact, it was not even the case of the complainants before the High Court that the change among Directors of the Company, on resignation of the appellant with effect from March 2, 2004, has not taken place. The argument on behalf of the complainants before the High Court was that it was not permissible for the High Court to look into the papers and documents relating to the appellant's resignation since these are the matters of defence of the accused person and defence

is a matter for consideration at the trial on the basis of evidence which cannot be decided by the High Court. The complainants in this regard relied upon a decision of Single Judge of that Court in the case of Fateh Chand Bhansali1 .

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25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, 7 (2004) 1 SCC 691 18 materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater

damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the 19 High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company. "

15. In case of *Nikhil P. Gandhi vs. State of Gujarat and others*; (2016) 2 GLH 762, it was a question again of liability of director who had resigned from the company. The Court held that Non-Executive Director including the office bearers concerned cannot be fastened with any liability in absence of any cogent material of their being involved in day to day conducting of affairs and no vicarious liability in such eventuality was fixed. Let the relevant findings and observations be reproduced herein under:-

"73. The situation in the case on hand is altogether different. Much before the statutory notice was issued i.e. almost eight years before the issue of statutory notice, the drawer of the cheque had ceased himself to be the Managing Director of the company. There could be many circumstances under which a Director of a company, who drew the cheque, may have to quit the office. Sometimes the company itself would relieve the Director. Like the case in hand, the entire management would change and a new management may take over the affairs of the company. After 2005, the accused, who had drawn cheque, had absolutely no say in the matter of saying that the cheque is honoured. He could not have asked the new management to pay the amount.

74. In taking the aforesaid view of the matter, I am supported by a decision of this Court rendered by a learned Single Judge in the case of *Alka N. Shah v. State of Gujarat*

and another [2001 (2) GLR 1023. The short facts of the said case are that the complainant had placed fixed deposit with the company by the name of M/s. Piramal Finance Services Limited, wherein the accused was the Managing Director. The company had issued four cheques by way of repayment of the fixed deposit. Those four cheques were issued in the name of the complainant and were drawn on the account of the company under the signature of the accused. The accused had not drawn such cheques in her personal capacity, but in her capacity as the Managing Director of the said company. The cheques were postdated whereby the due date was 13 th July 1999. The accused resigned from the company, both as Director as well as Managing Director. In such circumstances, this Court held in paras - 9 and 10 as under after considering the decision of the Supreme Court:

"9. The short contention raised on behalf of the present applicant [accused No.1] is that even according to the complainant, the offence is committed by the company and the accused No.1 is only liable on account of her position as Managing Director of the company.

On a plain reading of section 141 of the Negotiable Instruments Act, it becomes obvious that every person "at the time the offence was committed, was in charge of and was responsible to the company" shall be deemed to be guilty of the offence..... On the facts of the case, it is an admitted position that the offence was committed [u/s 138] when the cheques were dishonoured, and when a notice of dishonour was issued u/s 138. This occurred in November and December of 1999, whereas the applicant had resigned both as Director and Managing Director of the company as early as on 27th January 1999. It could not therefore possibly be urged that the applicant was in any manner in charge of or responsible to the company, at the time the offence was committed.

10. Another aspect of the matter is as to precisely when the offence came to be committed. It is obvious that the offence could only be committed on the presentation of the cheques on due dates, on the dishonour of the cheques, and the consequential notice being issued u/s 138 of the said Act. It is not possible to contend that the offence could be said to have been committed on the dates when the cheques were issued irrespective of the due dates mentioned on the cheques. In this context, it would be relevant to refer to the observations made by the Supreme Court in the case of *Sil Imports, USA v/s Exim Aides Silk Exporters, Bangalore*, reported in 1999[4] SCC 567. The Supreme Court in this decision has mainly dealt with the period of limitation for filing a complaint u/s 142[A], in the context of the facts where notice u/s 138 proviso [b] was given more than once. In this context, the Supreme Court held that the limitation period started running from the date of receipt of the first notice by the drawer, by discussing and deciding that the cause of action arose for the purpose of filing a complaint u/s 138, when the first notice is issued to the drawer and not complied with by the latter. The necessary implication which flows from this decision is, that it is the dishonour of the cheque, the issuance of the notice u/s 138, Page 41 of 68 HC-NIC Page 43 of 70 Created On Wed Jul 13 00:57:00 IST 2016 43 of 70 R/CR.MA/968/2014 CAV JUDGMENT and the non-compliance thereof which furnishes the complainant with the cause of action. The same principle would apply in respect of the accrual of the cause of action against a company, which would be applicable to a company and its officers by virtue of section 141 of the said Act."

16. In case of *Gunmala Sales Private Limited and others vs. Anu Mehta and others*; (2015) 1 SCC 103, the Apex Court has held thus:-

"34. We may summarize our conclusions as follows:

a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the

possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

35. We will examine the facts of the present case in light of the above discussion. In this case, the High Court answered the first question raised before it in favour of the respondents. The High Court held that "in the complaint except the averments that the Directors were in charge of and responsible to the company at the relevant time, nothing has been stated as to what part was played by them and how they were responsible regarding the finances of the company, issuance of cheque and control over the funds of the company". After so observing, the High Court quashed the proceedings as against the respondents. In view of this conclusion, the High Court did not go into the second question raised before it as to whether the Director, who has resigned can be prosecuted after his resignation has been accepted by the Board of Directors of the company. Pertinently, in the application filed by the respondents, no clear case was made out that at the material time, the Directors were not in charge of and were not responsible for the conduct of the business of the company by referring to or producing any uncontrovertible or unimpeachable evidence which is beyond

suspicion or doubt or any totally acceptable circumstances. It is merely stated that Sidharth Mehta had resigned from the Directorship of the company on 30/9/2010 but no uncontrovertible or unimpeachable evidence was produced before the High Court as was done in Anita Malhotra to show that he had, in fact, resigned long before the cheques in question were issued. Similar is the case with Kanhaiya Lal Mehta and Anu Mehta. Nothing was produced to substantiate the contention that they were not in charge of and not responsible for the conduct of the business of the company at the relevant time. In the circumstances, we are of the opinion that the matter deserves to be remitted to the High Court for fresh hearing. However, we are inclined to confirm the order passed by the High Court quashing the process as against Shobha Mehta. Shobha Mehta is stated to be an old lady who is over 70 years of age. Considering this fact and on an overall reading of the complaint in the peculiar facts and circumstances of the case, we feel that making her stand the trial would be an abuse of process of the court. It is however, necessary for the High Court to consider the cases of other Directors in light of the decisions considered by us and the conclusions drawn by us in this judgment."

17. In wake of the above decisions, on adverting to the matter on hand, the prosecution of the present petitioner who is arrayed as an accused in the proceedings under Section 138 of the NI Act for he being the Director of the Company and who was admittedly a Non-Executive Director and whose resignation having come into effect prior to dishonour of the cheque cannot continue plea of the petitioner of not to drag him into this litigation under Section 138 of the NI Act by constructive or vicarious liability deserves to be acceded to. Also on consideration of material on record of the Registrar of Company in the form of Form No. DIR-12, which is of an unimpeachable character and when there is nothing to challenge that such resignation has been come into effect

on date 31.01.2017 and thus, the resignation having come into effect prior to the date of commission of offence, no vicarious liability also can be thrust upon the petitioner.

18. Following the ratio laid down in the above referred decisions, so also as laid down in case of State of Haryana and others vs. Bhajan Lal and others, reported in 1992 AIR 604, the prosecution, in exercise of powers under Section 482 of the Code need not be continued as that would surely tantamount to abuse of process of law. An attempt was made to urge by the respondent - State that the issue raised is a mixed question of facts and law and HMT Watch Judgment (supra) does not permit adjudication of such matter in exercise of powers under Section 482 of the Code. Here, being a case where the issue is no longer res- integra and when there are documents produced which are statutorily to be maintained and are of unimpeachable character, such objection cannot be countenanced.

19. Accordingly, the complaint qua the present petitioner is quashed and set aside. However, it is being clarified and directed that qua other Directors, who are liable for being either in the day to day affairs of the company or because of other statutory liabilities, the trial shall proceed on expeditious basis without even waiting for outcome of other matters.

20. It is also being further directed as a parting note that co-accused in this very complaint if has approached this Court and in whose case the Court has stayed the trial, that may not also affect adversely the case of the complainant, so far as other directors are concerned, who are not litigating before this Court and the trial Court shall ensure proceeding with their matters without being hampered by the order of stay of the trial in case of co-accused, unless of course, there is a specific explicit direction of this Court of stay of proceedings of trial Court.



21. It is being further clarified that this quashment concerns only the offence under Section 138 of the NI Act and any other offences under any other law if otherwise are found to be attracted in case of particular Director, present order of quashment shall not bar the prosecution against that Director.

22. With the above findings, directions and observations, present petition is allowed to the above extent and is disposed of accordingly.

Rule is made absolute to the aforesaid extent.

Petition Allowed .