

**HIGH COURT OF GUJARAT****RITESH GARODIA***Versus***STATE OF GUJARAT & ANOTHER****Date of Decision:** 24 June 2016**Citation:** 2016 LawSuit(Guj) 1620**Hon'ble Judges:** [A J Shastri](#)**Eq. Citations:** 2016 4 GLR 2994, 2016 3 GLH 672, 2016 ACD 948**Case Type:** Criminal Miscellaneous Application**Case No:** 5915 of 2013**Subject:** Company, Criminal**Acts Referred:**[Code Of Criminal Procedure, 1973 Sec 482](#)[Companies Act, 1956 Sec 303\(2\)](#)[Negotiable Instruments Act, 1881 Sec 141, Sec 141\(1\), Sec 138](#)**Final Decision:** Application allowed**Advocates:** [M P Shah](#), [Kruti M Shah](#), [Jirga Jhaveri](#), [Nanavati Associates](#)**Cases Referred in (+):** 6**A J Shastri, J.**

**[1]** All these Criminal Misc. Applications are raising out of common issues and parties in all these Criminal Misc. Applications are same and the issues involved in all these applications are almost similar, these Criminal Misc. Applications are being dealt with and disposed of by this common judgment. For the sake of convenience, Criminal Misc. Application No. 5915 of 2013 is treated as a lead matter.

**[2]** The applicant - original accused has presented the application being Criminal Misc. Application No. 5915 of 2013 by invoking the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure for quashing and setting aside the issuance of summons under Section 138 of the Negotiable Instruments Act [the "Act" for short] in Criminal Complaint

No. 6545 of 2012 pending before the learned Chief Judicial Magistrate, Surat.

2.1. So far as Criminal Misc. Application No. 5916 of 2013 is concerned, complaint came to be filed by respondent No. 2 - Company for the offence punishable under Sections 138 and 141 of the Act against the present applicant and M/s. J.V.M. Steels Pvt. Ltd., and one Mr. Jayant Garodia in the court of learned Chief Judicial Magistrate, Surat which was registered as Criminal Complaint No. 11845 of 2012 and the same is pending before the Court as stated above.

2.2. So far as Criminal Misc. Application No. 5918 of 2013 is concerned, the complaint came to be filed by respondent No. 2 - Company for the offence punishable under Sections 138 and 141 of the Act against the present applicant and M/s. J.V.M. Steels Pvt. Ltd., and one Mr. Jayant Garodia in the court of learned Chief Judicial Magistrate, Surat which was registered as Criminal Complaint No. 21443 of 2012 and the same is pending before the Court as stated above.

2.3. So far as Criminal Misc. Application No. 5917 of 2013 is concerned, the complaint came to be filed by respondent No. 2 - Company for the offence punishable under Sections 138 and 141 of the Act against the present applicant and M/s. J.V.M. Steels Pvt. Ltd., and one Mr. Jayant Garodia in the court of learned Chief Judicial Magistrate, Surat which was registered as Criminal Complaint No. 27670 of 2011 and the same is pending before the Court as stated above.

**[3]** Now coming back to the lead matter i.e. Criminal Misc. Application No. 5915 of 2013, it is the case of the applicant that the complainant namely respondent No. 2 is a Company registered under the provisions of the Companies Act and is essentially engaged in the business of manufacturing Steel and accused No. 1 - Company is a Private Limited Company, which placed various orders and in response thereto, the complainant Company frequently sent goods and materials as ordered by the accused - Company. It was averred in the complaint that the orders were placed by accused - company through original accused Nos. 2 and 3 from Hajira plant, Surat. It was stated that the total outstanding amount payable comes to Rs. 31,79,469.79 and it is against this payment, the accused - Company has issued cheque bearing No. 580196 for an amount of Rs. 31,79,469.79. It is the case of the complainant that the said cheque when presented in the Bank, the same came to be returned and dishonoured and as a result of which, the complainant - Company was required to issue legal notice on 04.02.2011. It has been observed in the complaint that after the said notice, one Memorandum of Understanding (MOU for short) came to be arrived at deduced in writing and signed by original accused - Company through its Director, accused No. 2 and it was agreed in the said MOU to clear the amount by twelve monthly installments

for which accused No. 1 had issued twelve cheques each of Rs. 2,64,956/- in favour of the complainant - Company.

3.1. It is the case of the complainant that Cheque bearing No. 000922 dated 30.04.2011 was honoured, however, cheque No. 000923 was dishonoured for want of sufficient funds in the account, but later on the accused had paid the amount of said cheque by RTGS to the complainant - Company. The rest of the cheques bearing Nos. 000926, 000927 and 000928 were deposited, but the same came to be dishonoured on 26.11.2011 and 25.11.2011 again on the ground of insufficient funds in the account. For that reason, statutory notice was given on 16.12.2012 through Registered Post A.D., which came to be received by the accused on 20.12.2012, but the same having not been complied with, the complainant has lodged the criminal complaint being Criminal Complaint No. 6545 of 2012 before the learned Chief Judicial Magistrate, Surat.

3.2. In the background of these facts, the applicant who is Mr. Ritesh Garodia has brought this application under Section 482 of the Code of Criminal Procedure mainly on the premise that he has been wrongly arraigned in the prosecution. He has asserted that he has nothing to do with either the issuance of cheque or was not in-charge of the affairs of the Company at the relevant point of time and he is neither the Director nor an officer of the accused - Company and, therefore, wrongly arraigned in the prosecution. Based upon this premise, the aforesaid applications brought before this Court which came to be entertained on 01.05.2013 by this Hon'ble Court, wherein, after observing the aforesaid circumstance, the Hon'ble Court was pleased to issue notice and in the meantime, no coercive steps were directed to be taken qua the present applicant. In the background of these facts, the applications have been admitted, but later on, on 26.06.2014, the same has come up for final hearing today before this Court.

**[4]** On behalf of the applicant, Ms. Kruti Shah, learned advocate has contended that the applicant has been wrongly arraigned in the prosecution and has specifically contended that he is neither the Director nor an Officer of the accused - Company and he being merely the brother of the other Directors of the Company, has been joined and arraigned as an accused in the prosecution. The learned counsel for the applicant to substantiate this, has drawn attention to Form No. 32, which has been filed before the Registrar of the Companies in which also, the names of three Directors are specifically mentioned. The learned counsel has drawn attention that the applicant's name is not figuring in the said Form No. 32 which is reflecting the correct position of the particulars of the Directors of the Company. Based upon this, the learned counsel has requested the Court not to allow the prosecution to go on against the applicant as he has nothing to do with the offence which is alleged to have been committed. It is

further contended by the learned counsel that the applicant has not signed the cheque nor has handed over the cheques, nor is a party to even MOU and, therefore, absolutely when the applicant has no connection whatsoever, with respect to the issuance of cheque, no offence can be said to have been committed by the present applicant. The learned counsel further submitted that the issuance of cheque dishonoured is a separate and distinct offence and in that process, the applicant is not all a party and in addition thereto, she has specifically drawn attention that he is neither the Director as stated above. It has been asserted by the learned counsel that none of the Officers of the complainant - Company has not even met personally to the applicant nor even has any negotiations with the complainant - Company with respect to alleged outstanding liability of the accused - Company and since the applicant is not connected with the affairs of the accused - Company in any manner, it is not open for the complainant to drag the applicant in the prosecution simply because he being the brother of the Director of the Company. The learned counsel further submitted that even the issuance of the statutory notice in respect of offence under Section 138 of the Act is not served upon the applicant. However, he has been joined as accused in the prosecution. The learned counsel for the applicant has taken the Court to the averments contained in the complaint wherein also there is no specific attribution against the applicant, on the contrary, in paragraph 3 of the complaint, it is mentioned that the cheque is signed by the Director of the accused No. 1 - Company who is joined as original accused No. 2 and, therefore, indisputably even on the bare assertion of the complaint, the applicant is neither the signatory to the document or the cheque nor is in-charge of the affairs of the Company. There is no specific assertion in the complaint itself that at any point of time, the applicant remained as in-charge of the affairs of the Company even remotely and, therefore, in absence of such averments in the complaint, no prosecution can be allowed to proceed further against the applicant. It is in the background of this fact that the learned counsel for the applicant requested the Court to quash the complaint by granting the relief prayed for in the application. It was further pointed out by the learned counsel that in the decision of the Apex Court in the case of [National Small Industries Corporation Limited v. Harmeet Singh Paintal & Anr.](#), 2010 Supp AIR(SC) 569, even the Apex Court has laid down the proposition that if at the relevant point of time the person concerned is not in-charge of the affairs of the Company, it would be open for the Court to examine the issue for the purpose of consideration the request to delete him from the prosecution. In the background of this fact, the learned counsel has stated and requested the Court not to allow any coercive steps to be precipitated further under the guise of impugned complaint and the process be quashed.

**[5]** As against this Mr. Pranit Nanavati on behalf of Nanavati Associates appearing for respondent No. 2 - complainant Company has stated before the Court that respondent

No. 2 Company is a registered public limited company and has stated that the complaint itself discloses offence against the present applicant. It was pointed out by the learned counsel that the fact is not uncontroverted that the cheque came to be issued by the accused and the same has been returned on account of insufficient funds and the statutory notice as per the law has been given which was sufficient enough to attract the provisions of Section 138 of the Act and, therefore, on the basis of this, learned counsel for respondent No. 2 requested the Court not to entertain the present application since it is at elementary stage. Whether, the applicant is connected with the Company or he is in-charge of the affairs of the Company or he is holding a private share in the Company. All these aspects, as per the say of the learned counsel is required to be adjudicated upon and, therefore, the request came to be made not to entertain the application under Section 482 of the Code of Criminal Procedure. The learned counsel has strenuously argued that even if there is no specific averments, the High Court should not interfere with the complaint in exercise of jurisdiction under Section 482 of the Code of Criminal Procedure. After submitting this, the learned counsel for respondent No. 2 stated that simply because some averment is missing in the complaint, assuming without admitting, then also, it would not permit the High Court to go into at that stage of the proceedings to exercise jurisdiction under Section 482 of the Code of Criminal Procedure. It was pointed out by learned counsel for the respondent No. 2 - Company that in para 2.1 as well at various stages in the body of the application, it has mentioned the word "accused" and not the specific words "accused No. 1, accused No. 2 or accused No. 3" and, therefore, the learned counsel has requested the Court to raise inference with this word "accused" contained in the averment of the application by treating as it is the applicant and none else and, therefore, since this is ambiguously stated in the application, the learned counsel requested the Court to allow the proceedings to go on instead of quashing at this stage. No other submissions have been made by learned counsel for respondent No. 2 and has then requested the Court that any order or observations may not be allowed to be affected in the pending proceedings insofar as other Directors of the Company are concerned. In this background of the fact, it was requested by learned counsel not to interfere with the application in exercise of jurisdiction under Section 482 of the Code of Criminal Procedure.

**[6]** Having heard the respective counsel of both the sides, and perused the material on record and the submissions, few aspects are required to be taken note of.

(1) That the complaint in question, except the bald assertion without any substantive material, not attributing anything in specific form against the present applicant and looking to the entire complaint, no specific role is attributed insofar as the applicant is concerned.

(2) From the record, which is available in the present proceedings at page 22, Form No. 32 is produced giving particulars of the appointment of the Directors, Managers and changes amongst them if any, and thus Form No. 32 is in pursuance of Section 303(2) of the Companies Act and this form indisputably mentioning the names of three Directors ; (1) Mr. Jayant Goradia; (2) Mr. Vijay Goradia; and (3) Mr. Milan Goradia. Now this certificate appears to have been issued on 17.08.1995, but subsequent thereto, there is no other incriminating material wherein it is curled out that the present applicant is introduced either as a Director of the Company or in any form office bearer of the Company and, therefore, from the record which is available to be relied upon, it appears that the name of the applicant is nowhere figuring;

(3) The third aspect is that the cheque is indisputably not signed by the present applicant as per the specific averment contained in the complaint more particularly, in paragraph 3 of the complaint that the cheque is signed by not the applicant so much so that even MOU is also not signed by the present applicant. It is signed by the accused Company through his Director - accused No. 2 and not the applicant. Even in the affidavit-in-reply also there is no specific averment of any nature nor supported by any documentary material which would go to show that the applicant is either Director of the Company or a person in-charge of the affairs of the Company at any point of time. The affidavit is filed at page 64 of the available compilation.

6.1. On the basis of this undisputed and uncontroverted circumstance, reflecting and emerging from the record, the Court has to look to specific proviso by virtue of which the complainant Company has arraigned the present applicant. The only section which would clinch the issue is Section 141(1) of the Negotiable Instruments Act, 1881 and the same reads as under :

"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 subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence :

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-For the purposes of this section.

(a) "company" means any body corporation and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.]"

**[7]** From the aforesaid proviso also, it is clear that every person at the time of commission of offence was in-charge and was responsible to the company for the conduct of the business shall be deemed to be guilty of offence and liable to be proceeded. That sub-section (1) of Section 141 of the proviso has pointed out that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence committed was without his knowledge and that he had exercised all due diligence to prevent the commission of such offence. The second proviso to this sub-section also postulate that if a person is nominated as a Director of a company by virtue of his holding his office or employment in the Central Government or the State Government or any 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. Sub-section (2) of Section 141 of the Act prescribes that if any offence has been committed by the 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 liable to be proceeded with. Now bare reading of the wording of this entire proviso of Section 141 (1) of the Act as wholly would not in any way bring the case of the complainant Company qua the present applicant as there is no specific averment that the applicant is a director, manager, secretary or even any office bearer of the

Company and, therefore, in absence of any material to the contrary, it cannot be said that the applicant is even remotely responsible for the alleged offence being committed. This is so, more particularly, in view of the fact that a statutory Form No. 32 is specifically indicating that the applicant is not the Director at all and, therefore, from the bare reading of Section 141 of the Act it is quite clear that the applicant appears to have been wrongly dragged into prosecution. From the aforesaid circumstance, issuance of process by the learned Magistrate without examining anything in context of even remote vicarious liability is a subject which reflects clear non-application of mind. As held by the Apex Court that issuance of summons is a serious step against the person concerned and, therefore, it requires proper application of mind before issuance of it. For perusal of such proposition of law on the issue of summoning, the Apex Court in recent decision in the case of [Pooja Ravinder Devidasani v. State of Maharashtra & Anr.](#), 2015 AIR(SC) 675, stated that summoning of an accused is a serious matter, wherein, the Magistrate must reflect that he has applied his mind to the facts of the case and law applicable thereto and just in routine manner, the summons may not be issued. In context of this proposition, relevant paragraph of the said decision are worth to be taken note of and, therefore, reproduced herein after :

"22. As held by this Court in [Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors.](#), 1998 AIR(SC) 128, 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 scrutinize 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.

7.1. In the case of Pooja , the Apex Court has relied upon another decision in the case of [Gunmala Sales \(P\) Ltd., v. Anu Mehta](#), 2015 AIR(SC) 1072 and has taken into consideration the relevant para of the said decision which also deserves to be taken note of :"

23. In Gunmala Sales Private Ltd. (2014 AIR SCW 6238) 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, incontrovertible 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, incontrovertible 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".

7.2. In addition thereto, putting the criminal law into motion is not a matter of course or to settle scores between the parties which are essentially more in the nature of civil dispute and therefore, in the context of this position also, para 30 of the said decision in the case of Pooja deserves to be taken note of :

"30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."

**[8]** Under this set of circumstance, prima facie, it is deemed in no uncertain terms that the applicant has been wrongly dragged into prosecution and, therefore he not being in-charge of the Company and not in control of the affairs of the Company nor in any way connected with the Company in the capacity as the Director or office bearer or secretary etc., and, therefore, since the applicant is not party to issuance of cheque nor party to MOU, he cannot be allowed to be processed further which would tantamount to clear abuse of process of law against the applicant and, therefore, there is no hesitation to this Court in holding that allowing the prosecution to continue

against the applicant is nothing but a clear harassment to the applicant which tantamounts to be abuse of process of law. Now so far as the specific contention raised by the learned counsel for the applicant in respect of the decision of the Apex Court in the case of [National Small Industries Corporation Limited v. Harmeet Singh Paintal & Anr.](#), 2010 Supp AIR(SC) 569, certain paragraphs are very relevant which in the opinion of this Court are clearly attractive and, therefore, the same are to be taken note of :

' 12.It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, 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. Every person connected with the company shall not fall within the ambit of the provision. 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. It follows from the fact 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 for a criminal offence under the provisions. The liability arises from being in-charge of and responsible for the conduct of the 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.

20.Section 141 of the Act has been interpreted by this Court in various decisions. As to the scope of Section 141 of the Act, a three-Judge Bench of this Court considered the following questions which had been referred to it by a two-Judge Bench of this Court in [SMS Pharmaceuticals v. Neeta Bhalla and Anr.](#), 2005 AIR(SC) 3512:

"(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 fulfill 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."

21. While considering the above questions, this Court held as under:

"18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

22. Therefore, this Court has distinguished the case of persons who are in-charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in-charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the concerned Directors should be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned Directors were alleged to be in-charge of and was responsible for the conduct and affairs of the company.

39. From the above discussion, the following principles emerge :

(i) The primary responsibility is on the complainant to make specific averments as are required under the law 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 accused therein vicariously liable for offence committed by company along with averments in the petition containing that 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 accused is Managing Director or 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 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 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."

8.1. From the reading of the aforesaid decision, it is quite clear that the applicant has been wrongly dragged into prosecution and simply because he being the brother cannot be allowed to be squeezed at the behest of the complainant - Company. Insofar as the specific contention raised by Mr. Nanavati on behalf of the complainant - Company that the complaint is at interlocutory stage and, therefore, it cannot be allowed to be throttled at the investigation stage itself and more particularly, at present, summons is issued, therefore, no powers under Section 482 of the Code of Criminal Procedure be exercised.

**[9]** Now in the background of this fact whether powers under Section 482 of Code of Criminal Procedure are worth to be exercised or not is a question posed before the Court by learned counsel appearing on behalf of the complainant Company. The law on the issue of exercise of power is by now well settled and there is not straightjacket formula that if the complaint is at the elementary stage or investigation stage, no powers under Section 482 of the Code of Criminal Procedure be exercised. In fact, each

case is depending upon its own merits and in absence of any straightjacket formula, it is always open for the High Court to deal with the issue based upon the peculiar facts. It is settled position of law that if the facts are different of a particular case, it would make a world of difference in applying precedent and, therefore, few paragraphs of the recent decision of the Apex Court in the case of [Gunmala Sales Private Limited v. Anu Mehta & Ors.](#), 2015 AIR(SC) 1072 are worth to be taken note of which has clarified as to in which background powers under Section 482 of Code of Criminal Procedure deserves to be exercised by the High Court. The relevant paragraphs of the said decision are as under :

' 28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the abovementioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in-charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma (1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under Section 482 of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances, if any? Inherent power under Section 482 of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court's inherent powers? We do not think so.

29. SMS Pharma (1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in-charge of and responsible for the conduct of the company's business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment

is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma ( 1), we find that after referring to the various provisions of the Companies Act it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to Directors as per the Memorandum and Articles of Association of the company. There is nothing which suggests that simply by being a Director in a Company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of the Company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint Sub-Committees consisting of one or two Directors out of the Board of the Company who may be made responsible for the day-to-day functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule that a Director of a company is in-charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma (1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss "the doctrine of Indoor Management" on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the Companies Act that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma (1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

32. In this connection, it would be advantageous to refer to [Harshendra Kumar D. v. Rebatilata Koley and Ors.](#), 2011 AIR(SC) 1090 where process was issued by the Magistrate on a complaint filed under Section 138 read with Section 141 of the NI Act. The appellant therein challenged the proceeding by filing revision application under Section 397 read with Section 401 of the Code. The case of the appellant-Director was that he had resigned from Directorship. His resignation was accepted

and notified to the Registrar of Companies. It was averred in the complaint that the appellant was responsible for the day-to-day affairs of the company and it was on his and other Directors assurance those demand drafts were issued. Despite this averment, this Court quashed the complaint taking into account resolution passed by the company, wherein it was reflected that the appellant had resigned from the post of Director much prior to the issuance of cheque and the fact that the company had submitted Form 32. It was argued before this Court that the documents furnished by the accused could not have been taken into account. Repelling this submission this Court observed as under: (Hareshendra Kumar D. case, SCC pp.36162, para 2426)

"24. In *Awadh Kishore Gupta*, (AIR 2004 SC 517 : 2003 AIR SCW 6501) this Court while dealing with the scope of power under Section 482 of the Code observed: (SCC p. 701, para 13) : (Para 13 of AIR)

"13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the court to act as if it was a trial Judge."

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, 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 the accused, the accusations against him cannot stand, it would be travesty of justice if the 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 High Court fell into grave error in not taking into

consideration the uncontroverted documents relating to the 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.

34. We may summarize our conclusions as follows:

34.1. 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;

34.2. 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;

34.3 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, incontrovertible 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 armtwisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible 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;

34.4 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."

**[10]** In the background of these facts, it is abundantly clear that there is no proposition of Apex Court that powers under Section 482 of Code of Criminal Procedure cannot be exercised even if the complaint is at investigation stage as held by the Apex Court that each fact is required to be evaluated on its own and, therefore, considering this set of circumstance, powers Section 482 of Code of Criminal Procedure can be exercised if so needed.

**[11]** Reverting back to the present case, as stated above, it is not in dispute that the applicant is merely a brother of the Director of the accused - company. It is also not in dispute that he is not a signatory to the cheques in question, It is also not in dispute that Form No. 32 is not reflecting the name of the applicant and in addition thereto, even he is not participant of MOU nor it has been signed by the applicant. Therefore, it is absolutely clear from the record of the case that the applicant has nothing to do with the commission of offence as alleged by the complainant - Company. Except bald assertion on the aforesaid undisputed premise, this Court is left with no other alternate but to quash the complaint in so far as the present applicant is concerned and accordingly the complaint being Criminal Complaint No. 6545 of 2012 pending before the learned Chief Judicial Magistrate, Surat and issuance of process in respect of it, against the applicant is hereby quashed and set aside and the applications are allowed qua the applicant only.

**[12]** As requested by learned advocate Mr. Nanavati on behalf of the complainant - Company that a case is going on before the learned Magistrate against other Directors of the Company and, therefore, requested to restrict the aforesaid observations insofar as the present applicant is concerned. It is needless to say that the present order is passed qua the applicant only and it is open for the learned counsel to deal with the main case without being influenced by the present order. The observations made by this Court above, are related and restricted to applicant's case only namely - Mr. Ritesh Garodia.

12.1 As Criminal Misc. Application No. 5915 of 2013 is disposed of on the similar line, since the situation prevailing is almost identical, other cases are also disposed of in light of this common judgment. Hence, Criminal Complaint No. 6545 of 2012, Criminal Complaint No. 11845 of 2012, Criminal Complaint No. 27670 of 201, Criminal Complaint No. 21443 of 2012, and issuance of process thereupon are

hereby quashed and set aside insofar it relates to the present applicant. Accordingly, all the Criminal Misc. Applications Nos. 5915 of 2013, 2916 of 2013, 5917 of 2013 and 5918 of 2013 are allowed to the aforesaid extent.

**[13]** With the above clarification and in view of the aforesaid proposition, the present applications are allowed. Rule is made absolute in each of the applications.

