

(2020) 07 GAU CK 0008
In the Gauhati High Court
Case No : Criminal Petition No. 718 Of 2019

Neha Himatsingka And Anr

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 16-07-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 204, 397, 482
Negotiable Instruments Act, 1881 — Section 138, 141, 141(1), 142
Companies Act, 1956 — Section 303, 303(2)
Companies Act 2013 — Section 167, 168

Citation : (2020) 07 GAU CK 0008

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : R C Sanchati

Final Decision : Allowed

Judgement

1. By this criminal petition filed under Section 482 of the Code of Criminal Procedure, 1973 (the Code and/or the CrPC, for short), the

two petitioners herein have sought quashing of the criminal proceeding of Complaint Case no. C.R. 6697C/2018, presently pending in the Court of

learned Judicial Magistrate, 1st Class, Kamrup (Metro), Guwahati, and the Order dated 07.02.2019 passed by the said court, in so far as against them

are concerned.

2. The background facts which are necessary for adjudication can be exposited as follows : the respondent no. 2 as the complainant (hereinafter also

referred as the complainant, at places, for easy reference) has instituted the complaint before a Court of Chief Judicial Magistrate, Kamrup

(Metro), Guwahati on 03.12.2018. In the said complaint, the complainant has arraigned the respondent no. 3 as the accused no. 1. The respondent no.

3 (hereinafter also referred as "the accused no. 1 company", at places, for easy reference) is a company incorporated under the Companies Act.

That apart, the complainant has arraigned 4 (four) Directors of accused no. 1 company as accused no. 2, accused no. 3, accused no. 4 and accused

no. 5 respectively. The petitioner no. 1 and the petitioner no. 2 are arraigned as accused no. 3 and accused no. 4 respectively in the complaint. In this

criminal petition, while the accused no. 1 company has been impleaded as the proforma respondent no. 3, the other two accused " accused no. 2 &

accused no. 5 " are impleaded as proforma respondent no. 4 and proforma respondent no. 5 respectively. It transpires that in the complaint, the

complainant, an individual, is represented by one of her employees.

3. In order to appreciate the issue raised in this criminal petition, it is apt to advert to the averments and allegations made by the complainant in the complaint.

3.1. The complainant has stated herself as a businesswoman and that her representative is well conversant with the facts and circumstances of the

case. She has her office at Fancy Bazar, Guwahati. The accused persons are known to her as they used to avail financial assistance from the

complainant in the form of loans.

3.2. It has been averred that it was in discharge of their liability, the accused persons had issued a cheque bearing no. 157777 dated 22.10.2018 for an

amount of Rs. 5,00,000/- in favour of the complainant and it was drawn on an account maintained at Allahabad Bank, H.B. Road, Guwahati in the

name of the accused no. 1 company. The complainant presented the said cheque at her bank " HDFC Bank, Guwahati for collection but the cheque

was returned unpaid by the banker of the complainant by its cheque return memo dated 23.10.2018 with an endorsement " Exceeds

Arrangement" and the information of such dishonour of the cheque was received by the complainant on 25.10.2018. On such return, the complainant

through her Advocate sent a demand notice dated 06.11.2018 to all the accused persons by registered post with acknowledgement due intimating them

about the dishonour of the cheque and demanding the payment of the cheque amount within 15 (fifteen) days of receipt of the demand notice. It is

claimed that the demand notice was sent with the correct name and address of each of the accused persons but the same had been returned back by

the postal authorities to the advocate of the complainant with remarks dated 12.11.2018 as Add. Left RTS. It is asserted that the accused

persons are having their office at the address mentioned in the notice but they did not take delivery of the notice with mala fide intention to avoid their liability.

4. On receipt of the complaint, the same has been registered and numbered as Complaint Case no. C.R. 6697C/2018 and the learned Chief Judicial

Magistrate, Kamrup (Metro), Guwahati transferred the complaint to the Court of learned Judicial Magistrate, 1st Class, Kamrup (Metro), Guwahati

(the trial court, for short) for disposal.

5. The learned trial court had received the initial deposition of the representative of the complainant under Section 200, CrPC in the form of an

affidavit. The learned trial court took cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 (the NI Act, for

short) on the complaint and after perusal of the complaint, initial deposition in the form of affidavit and documents exhibited therewith, by its order

dated 07.02.2019, issued process against all the 5 (five) accused persons, mentioned hereinabove, to stand trial for the offence under Section 138, NI

Act.

6. I have heard Mr. S. Sancheti, learned counsel for the petitioners; Ms. S. Jahan, learned Additional Public Prosecutor for respondent no. 1, State of

Assam; and Mr. J.C. Gaur, learned counsel for respondent no. 2-complainant. I have also heard Mr. N. Sharma, learned counsel for the proforma

respondent no. 5. None has appeared for respondent no. 3 and respondent no. 4 despite service of notice.

6.1. The learned counsel for the petitioners has submitted that the petitioners have been wrongly arraigned as accused no. 3 and accused no. 4 in the

complaint as they had resigned as Directors of the accused no. 1 company at a date anterior to the cause of action for filing of the complaint for the

offence under Section 138 of the NI Act. It is submitted that such criminal prosecution has been launched by the complainant despite being fully

aware of the facts that the petitioners had submitted their resignations from the post of Director of the accused no. 1 company and their resignations

had been duly accepted by the Board of Directors of the accused no. 1 company in its meetings, prior to the filing of the complaint. It is, thus,

submitted that the liability for the dishonour of the cheque under reference cannot be extended to the petitioners by virtue of Section 141 of the NI Act

as they were not in charge of the affairs of the accused no. 1 company at the time the offence was deemed to have been committed. It is further

submitted that the averments required to be made in connection with Section 141 of the NI Act to make the petitioners vicariously liable are also

absent in the complaint. It is also submitted that none of the petitioners is a signatory to the cheque which had been dishonoured. It is submitted that

the documents submitted with the criminal petition amply demonstrate the facts of the petitioners' resignations from the post of Director of the

accused no. 1 company and the same can be acted upon to quash the criminal proceeding instituted against them by this Court in exercise of its

inherent power available under Section 482 of the Code.

6.2. The learned counsel for the respondent no. 2-complainant has submitted that the averments as regards the respective roles of the petitioners as

Directors of the accused no. 1 company have been made in the complaint and thus, there is no question of quashing the proceeding against them at

this early stage of the trial. It is contended by him that the cheque was issued on 01.10.2014 and handed over to the complainant and at the time of

issuance of the cheque in the year 2014, both the petitioners were in the helm of affairs of the accused no. 1 company. Thus, it cannot be said that the

petitioners were not in charge of the affairs of the accused no. 1 company in order to extricate themselves out of the purview of criminal liability

contemplated in Section 141 read with Section 138 of the NI Act. It is further submitted by him that the information available in the website does not

indicate that the petitioners are no longer associated as Directors with the accused no. 1 company.

6.3. It is submitted by the learned counsel for the proforma respondent no. 5 that the proforma respondent no. 5 had been inducted as a Director of

the accused no. 1 company on 22.09.2017 and she has been participating in the trial. As the issue involves questions of fact the same can be

determined and adjudicated during the stage of trial.

6.4. The learned Additional Public Prosecutor has submitted that the State is a formal party as evidently, the complaint has raised a private dispute

which has arisen out of business transactions between them.

7. I have given due consideration to the submissions made by the learned counsel for the parties. I have also perused the materials available on record and the decisions cited by the parties. This criminal petition is taken up for consideration along with Criminal Petition no. 719/2019, as the issue involved in both the petitions is same and the accused persons arraigned are the same.

8. As the provision of Section 138 of the NI Act is of utmost relevance, the same is quoted hereunder : -

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.

Explanationâ?"For the purposes of this Section, debt or other liability means a legally enforceable debt or other liability.

9. In a proceeding in respect of an offence under Section 138 of the NI Act the

Court has to consider at first whether the ingredients of the offence under Section 138 have been complied with. As per Section 138, 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 for the discharge, in whole or in part, of any debt or other liability to that other person is returned by the bank unpaid either because of the amount of money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to compliance of the other conditions, shall be deemed to have committed an offence under the Section and be punished for a term which may extend to two years or with fine which may extend to twice the amount of cheque or with both. Thus, under Section 138 of the NI Act, where a cheque issued by the drawer of the cheque in discharge of any debt or any other liability is returned by the bank unpaid, because of the amount standing to the credit of that account is insufficient or it exceeds the arrangement made with the bank to honour the cheque, the said accused person is deemed to have committed the offence.

10. As regards compliance of other conditions, the complainant is required to present the cheque 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. In the event of dishonour of the cheque on its presentation for either of the reasons afore-mentioned, the payee or the holder in due course of the cheque has to make a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 30 (thirty) days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. If the drawer of the cheque fails to make the payment of the amount within 15 (fifteen) days of the receipt of the said notice, the cause of action arises for filing of a complaint. Thus, on a reading of Section 138, the cause of action for filing of a complaint alleging commission of the offence under Section 138 of the NI Act can be said to have arisen when the following acts are completed : (a) drawal of a cheque by the accused in favour of the complainant on an account maintained by him; (b) presentation of the cheque by the complainant to the bank for collection; (c) return of the cheque unpaid for one of the reasons mentioned in the Section; (d) issuance and dispatch of a notice in writing within the stipulated

period of 30 (thirty) days to the drawer of the cheque to make payment within 15 (fifteen) days of receipt of the notice; and (e) failure on the part of

the drawer to make payment within 15 (fifteen) days of the receipt of the notice. Until the 15 (fifteen) days notice period does not expire it cannot be

said that the cause of action to file a complaint for commission of the offence has arrived. In other words, the cause of action for filing of a complaint

accusing the accused to have committed the offence arises only after expiry of 15 (fifteen) days period from the date of receipt of the notice in

writing. Section 142 provides that the court shall cognizance of the offence punishable under Section 138 of the NI Act upon receipt of a complaint in

writing made by the payee or, as the case may be, the holder in due course of the cheque. Such complaint has to be made within one month of the

date on which the cause of action arises under clause (c) of the proviso to Section 138. Discretion is also given to the court to take cognizance of the

complaint even after the prescribed period, if the court is satisfied that the complainant has sufficient cause for not making the complaint within such

period.

11. The petitioners have been arraigned as accused no. 3 and accused no. 4 by virtue of Section 141 of the NI Act, which 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 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 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.

Explanationâ?"For the purposes of this section,

(a) â??companyâ?? means anybody corporate and includes a firm or other association of individuals; and

(b) â??directorâ??, in relation to a firm, means a partner in the firm.

12. Section 141 of the NI Act has envisaged vicarious liability on the part of the Directors or other persons, mentioned therein, of the company who were in charge of and responsible for the conduct of the affairs of the company at the time the commission of the offence. A person would be vicariously liable for commission of the offence under Section 138 of the NI Act by the company only in the event the conditions laid down in Section 141 in the NI Act are satisfied.

13. The scope and purport of Section 141 of the NI Act have been considered by a three-Judge Bench of the Supreme Court of India in *S .M.S.*

Pharmaceuticals Ltd. vs. Neeta Bhalla (1), (2005) 8 SCC 89. Thereafter, the legal fiction incorporated in Section 141 of the NI Act has come up for

consideration before the Supreme Court in a number of cases like *Sabitha Ramamurthy vs. R.B.S. Channabasavaradhya*, (2006) 10 SCC 58; *1 Saroj*

Kumar Poddar vs. State (NCT of Delhi), (2007) 3 SCC 69; *3 S.M.S. Pharmaceuticals Ltd. (2) vs. Neeta Bhalla*, (2007) 4 SCC 70 ; *Everest*

Advertising (P) Ltd. vs. State (Govt. of NCT of Delhi), (2007) 5 SCC 5; *4 N. Rangachari vs. BSNL*, (2007) 5 SCC 10; *8 N.K. Wahi vs. Shekhar*

Singh, (2007) 9 SCC 481; *Paresh P. Rajda vs. State of Maharashtra*, (2008) 7 SCC 442; *DCM Financial Services Ltd. vs. J.N. Sareen*, (2008) 8 SCC

1; Ramrajsingh vs. State M.P., (2009) 6 SCC 729 and *K.K. Ahuja vs. V.K. Vora and another*, (2009) 10 SCC 48.

14. After making a survey and analysis of all the afore-mentioned decisions and in reference to the provisions of the Companies Act, 1956, the

Supreme Court of India in *National Small Industries Corporation Limited vs. Harmeet Singh Paintal and another*, reported in (2010) 3 SCC 33,0 has

once again summarised the principle of vicarious liability incorporated in Section 141 of the NI Act in the following manner : -

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.

15. In Harshendra Kumar D. vs. Rebatilata Koley and others, reported in (2011) 3 SCC 351, 18 (eighteen) complaint cases were filed under Section

138 read with Section 141 of the NI Act by the complainants against one company, M/s Rifa Healthcare (India) Pvt. Ltd. (the accused

company, for short), its Managing Director and two others Directors of the said

accused company. The appellant was arraigned as the accused no.

3 in those complaints. It was alleged in the complaints that the Managing Director and the two Directors including the appellant, were responsible for

day-to-day affairs of the accused company and it was on their assurance that the complainants had issued demand drafts in favour of the accused

company for purchase of their products and when the products were not received by the complainants, the complainants contacted the accused

persons and told them that they could not continue business with the accused persons and asked for return of the money. For and on behalf of the

accused company, in discharge of the existing liability, account payee cheques were issued but the cheques were returned on presentation for

collection with the endorsement - "insufficient fund". It was contended on behalf of the appellant that he was appointed as a Director of the

company on 27.08.2003 and he resigned from the Directorship on 02.03.2004 which was accepted by the Board of Directors on that day itself with

immediate effect. The factum of the appellant's resignation was also recorded in Form 32 filed by the company with the Registrar of Companies

on 04.03.2004. The 18 (eighteen) cheques which were issued on behalf of the accused company to the complainants were issued after his resignation.

The dishonour of those cheques were also subsequent to his resignation. The Supreme Court considered the principles summarised in *S.M.S.*

Pharmaceuticals Ltd. vs. Neeta Bhalla (1) (supra), *N. Rangachari vs. BSNL (supra)*, *K.K. Ahuja vs. V.K. Vora and another (supra)*; and *National*

Small Industries Corporation Limited vs. Harmeet Singh Paintal and another (supra) as well as the relevant provisions of the Companies Act, 1956 and

thereafter, has observed as under :-

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.

* * * * *

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 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 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.

27. As noticed above, the appellant resigned from the post of Director on 2-3-2004. The dishonoured cheques were issued by the Company on 30-4-

2004 i.e. much after the appellant had resigned from the post of Director of the Company. The acceptance of appellant's resignation is duly reflected

in the resolution dated 2-3-2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on 4-3-2004 about

the appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the appellant. These facts leave no

manner of doubt that on the date the offence was committed by the Company, the appellant was not the Director; he had nothing to do with the affairs

of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the appellant, it would result in gross injustice to

the appellant and tantamount to an abuse of process of the court.

16. The decision rendered in Anita Malhotra vs. Apparel Export Promotion Council and another, reported in (2012) 1 SCC 520 ,is also in similar lines,

following Harshendra Kumar D (supra). In Anita Malhotra (supra), the appellant was a non-executive Director on the Board of M/s Lapareil Exports

(P) Ltd. (â??the companyâ??, for short), resigned from the Directorship w.e.f. 31.08.1998. On 20.11.1998, recording the resignation of the appellant,

the company filed statutory Form 32 with the Registrar of Companies. A notice dated 10.12.2004 was issued to the appellant regarding dishonour of

alleged cheques under Section 138 of the NI Act and thereafter, a complaint case was filed arraigning the company and the Directors of the company

as accused persons with the appellant as one of the accused persons, accused no. 3 to be precise. In support of the fact of her resignation, the

appellant submitted a copy of the statutory Form 32. The appellant approached the High Court seeking quashing of the criminal proceedings. When

the High Court dismissed her petition, the appellant approached the Supreme Court. After considering the background facts, the Supreme Court while

quashing the criminal proceeding against the appellant, has observed in the following words :-

20. As rightly stated so, though it is not proper for the High Court to consider the defense of the accused or conduct a roving enquiry in respect of merit of the accusation, but if on the face of the document which is beyond suspicion or doubt placed by the accused and if it is considered the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code.

* * * * *

22. This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corp. Ltd. vs. Harmeet Singh Paintal and Another, (2010) 3 SCC 330). In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day to day affairs of the Company. We have verified the averments as regard to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed.

17. After extensive consideration of the principles enunciated in all the aforementioned decisions and few other decisions, together with the requirement of necessary averments for the purpose of making a Director of a company vicariously liable in terms of Section 141 for the offence under Section 138 of the NI Act and the situation that arises in view of resignation of a Director of such company who, thereafter, seeks quashing of the criminal proceedings, the Supreme Court in Gunmala Sales Private Limited vs. Anu Mehta and others, reported in (2015) 1 SCC 103, has observed 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 above-mentioned 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.

* * * * *

34. We may summarise 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, 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;

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.

18. Reverting back to the complaint of the case in hand, it is to be seen as to what are the averments that have been made by the complainant so as

make the other accused persons "accused no. 2, accused no. 3, accused no. 4 & accused no. 5" constructively liable apart from the accused no.

1 company. In the complaint, the averments are made to the following effect : -

5. That the complainant begs to state accuseds No. 2 to 5 apart from being the directors of the accused No. 1 have been looking after its management

and accordingly, all of them are liable and responsible for day to day affairs and conduct of business of accused No. 1 and accordingly, all of them are

liable to be prosecuted.

19. Going by the mandate of Section 141 of the NI Act and the principles enumerated in the afore-mentioned decisions, one can accept that the

complaint fulfils the basic requirement as it contains an averment to the effect that the accused nos. 2 to 5, at the time when the offence was

committed, were in charge of and were responsible for the conduct of the business of the accused no. 1 company in the capacity of Directors of the

accused no. 1 company. Such averment might have persuaded the learned trial court to take cognizance of the offence under Section 138 read with

Section 141 of the NI Act on the complaint and to issue process against all the accused persons arraigned in the complaint.

20. The ground contended in this criminal petition on behalf of the two petitioners â?" accused no. 3 and accused no. 4 â?" is on the premise that on

the date the offence was deemed to have been committed they were not Directors in the accused no. 1 company as they had resigned prior to the

date of issuance of the cheque dated 22.10.2018 and none of them was the signatory of the cheque which got dishonoured. The cheque was issued by

the accused no. 2 as a Director of the accused no. 1 company. To fortify their submissions on that ground they have annexed the following documents

to this petition on which they have placed reliance heavily â?

20.1. In relation to the petitioner no. 1 (accused no. 3) : - (i) An extract of the Minutes of the Meeting of the Board of Directors of the accused no. 1

company held on 22.09.2017 at the registered office of the company wherein it was resolved to appoint the accused no. 5 having DIN 07456718 as

Additional Director of the company as per the terms of the companyâ??s Articles of Association and to accept the resignation of the accused no. 3

having DIN 00908471, from the Directorship of the accused no. 1 company with immediate effect. It was further resolved to authorize the accused

no. 4 to digitally sign and submit Form No. 12 with the Registrar of Companies, Shillong through the portal of the Ministry of Corporate Affairs

(MCA); (ii) a letter of the accused no. 3 dated 20.09.2017 addressed to the Board of Directors of the accused no. 1 company whereby she tendered

her resignation from the Directorship of the company on the ground of pre-occupation with the request to accept her resignation with immediate

effect; and (iii) a copy of the statutory Form No. DIR-12 wherein the facts of appointment of accused no. 5 as a Director of the accused no. 1

company w.e.f. 22.09.2017 and of resignation of accused no. 3 from the Directorship of the accused no. 1 company under Section 168 of the

Companies Act, 2013 w.e.f. 22.09.2017 are duly reflected. It has further reflected about the authorization by the Board of Directors of the accused

no. 1 company on 22.09.2017.

20.2. In relation to the petitioner no. 2 (accused no. 4) : - (i) An extract of the Minutes of the Meeting of the Board of Directors of the accused no. 1

company held on 11.06.2018 at the registered office of the company wherein it was resolved to accept the resignation of the accused no. 4 having

DIN 00908482, from the Directorship of the accused no. 1 company with immediate effect. It was further resolved to authorize any Director to do all

acts, deeds and things that were deemed necessary and proper and to sign and execute all necessary documents, applications along with filing of

necessary E-forms with the Registrar of Companies, Shillong; (ii) a letter of the accused no. 4 dated 11.06.2018 addressed to the Board of Directors

of the accused no. 1 company whereby he tendered his resignation from the Directorship of the company on the ground of pre-occupation with the

request to accept his resignation with immediate effect; (iii) a letter signed by the accused no. 2 on 11.06.2018 on behalf of the accused no. 1

company whereby the accused no. 4 was informed about acceptance of his resignation w.e.f. 11.06.2018; and (iv) a copy of the statutory Form No.

DIR-12 wherein the fact of resignation of accused no. 4 from the Directorship of the accused no. 1 company w.e.f. 11.06.2018 under Section 168 of

the Companies Act, 2013 is duly reflected. It has further reflected about the authorization by the Board of Directors of the accused no. 1 company on

11.06.2018.

21. In response to the contention of the petitioners that the complainant had deliberately arraigned them as accused the complainant has sought to

traverse the same by stating that though the petitioners were known to her

personally necessary enquiry was made in the internet from the records of the Registrar of Companies, Shillong. It is contended that a Print Out obtained on 20.11.2018 reveals that the petitioners were shown as Directors of the accused no. 1 company along with the other two Directors. A look at the Print Out annexed by the complainant does not demonstrate that the same has anything to do with the Registrar of Companies, Shillong or the Ministry of Corporate Affairs, Government of India. In such situation, no credence can be given to such a document. The contention made in the additional affidavit is, thus, found not in consonance with the document relied on by the complainant.

22. At this point, a reference can be made to the provision of Section 168 of the Companies Act, 2013, which has replaced the Companies Act, 1956.

It reads as under :-

168. Resignation of director :â?

(1) A director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company :

Provided that a director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.

(2) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later :

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

(3) Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

23. Section 168 of the Companies Act, 2013 has provided that a Director may

resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed. Resignation of a Director takes effect from the date on which the notice is received by the company or the date, if any, specified by the Director in the notice, whichever is later. Earlier, it was statutory Form No. 32 under the Companies Act, 1956 by which the fact of resignation was to be intimated to the Registrar of Companies. Under the Companies Act, 2013, the fact of resignation of a Director is to be submitted in the prescribed Form No. DIR-12. The complainant has made no specific denial about the resolutions of the Board of Directors of the accused no. 1 company and consequent submission of Form No. DIR-12 in connection with resignations of the two petitioners from the Directorship of the accused no. 1 company w.e.f. 22.09.2017 and w.e.f. 11.06.2018 respectively. Moreover, the veracity of the above facts is not denied by the accused no. 1 company as well as by the other two existing Directors of the accused no. 1 company.

24. It is not the case of the complainant that the accused no. 3 and/or the accused no. 4 were/was the Managing Director and/or Joint Managing Director of the accused no. 1 company at the time of commission of the offence. It is also not the case of the complainant that either of them is the signatory of the cheque in question. Except the bald statement, as quoted above, it is not explained what role the accused no. 3 and/or the accused no. 4 had played as Directors in the affairs of the accused no. 1 company nor it is explained in what manner they were responsible for commission of the offence.

25. The contention of the complainant, which was not pleaded in the complaint but pleaded before this Court, in that the cheque was issued on 01.10.2014 and handed over to the complainant and at the time of issuance of the cheque in the year 2014, both the petitioners were in the helm of affairs of the accused no. 1 company, deserves no consideration. A cheque if issued with date, 01.10.2014 could have remained valid for a period of 6 (six) months (as it then was) w.e.f. 01.10.2014 or till its given period of validity, whichever was earlier. Such a cheque could not have been presented for collection in the year 2018. Alternatively, if it is assumed that the cheque was

an undated one in the year 2014 the complainant has failed to disclose the reason what made her to fill up the same in the year 2018 and as to why she did not present the cheque for collection for a period of about four years. Even if it is assumed that in the year 2014, the petitioners had some responsibilities as Directors for the conduct of affairs of the company that, in the wake of their resignations prior to 22.10.2018, would not be sufficient to stretch the same till 22.10.2018 by virtue of the legal fiction of constructive liability incorporated in Section 141 of the NI Act.

26. The documents submitted in support of the contentions advanced by the petitioners are found acceptable and free from any doubt, more particularly, in view of failure on the part of the complainant to put the same under any cloud and in the face on non-traversal of the same by the

accused no. 1 company and any of its existing Directors who are facing the trial pursuant to the order taking cognizance. From the documents, it is

amply demonstrated that the accused no. 3 resigned from the post of Director on 22.09.2017 whereas the accused no. 4 resigned from the post of

Director of the accused no. 1 company on 11.06.2018. The dishonoured cheque was issued on behalf of the accused no. 1 company by the accused

no. 2 on 22.10.2018, that is, much after both the petitioners i.e. the accused no. 3 and the accused no. 4 had resigned from the posts of Director of the

accused no. 1 company. The acceptance of the petitioners' resignations are duly reflected in the Resolutions of the Board of Directors of the

accused no. 1 company dated 22.09.2017 and 11.06.2018. Thereafter, the accused no. 1 company informed the matter of resignation under Section

168 of the Companies Act, 2013 to the Registrar of Companies, Shillong vide Form No. DIR-12 in due course. These facts amply go to show that on

the date the offence under Section 138 of the NI Act was deemed to have been committed due to dishonour of the cheque dated 22.10.2018, the

petitioners were not the Directors in the accused no. 1 company and they could not be held responsible for the conduct of its affairs and for that

matter, for the issuance and dishonour of the cheque under reference. They were not in the accused no. 1 company as Directors on the date the

cause of action to file the complaint arose. In the above view of the matter, if the criminal proceeding of Complaint Case no. C.R. 6697C/2018 is

allowed to proceed against the two petitioners, it would amount to abuse of the

process of the court resulting in prejudice to the petitioners.

27. For all the afore-mentioned reasons, this Court is of the considered view that this is a fit case to exercise the power under Section 482 of the Code

to stop the petitioners from undergoing the trial. The proceeding against the petitioners was stayed earlier by an interim order. This criminal petition is,

accordingly, allowed. The criminal proceeding of Complaint Case no. C.R. 6697C/2018, presently pending in the Court of learned Judicial Magistrate,

1st Class, Kamrup (Metro), Guwahati, and the order dated 07.02.2019 passed by the said court, are quashed in so far as against the two petitioners,

arraigned as the accused no. 3 and the accused no. 4 respectively, are concerned. It is, however, made clear that the criminal proceeding against the

other accused shall continue. There shall, however, be no order as to cost.