
(2016) 06 GUJ CK 0027
In the Gujarat High Court

Case No : Criminal Miscellaneous Application (for quashing and set aside FIR/ Order) No. 968 of 2014 with Criminal Misc. Application No. 1067 of 2014 with Criminal Misc. Application Nos. 1754 to 1756 of 2014

Nikhil P. Gandhi

APPELLANT

Vs

State of Gujarat and others

RESPONDENT

Date of Decision : 15-06-2016

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 13, 138, 139, 141, 20

Citation : (2016) ACD 793 : (2017) 1 AICLR 541 : (2016) 3 BankJ 438 : (2016) 3 BC 547 : (2016) 197 CompCas 50 : (2016) CriLJ 4338 : (2016) 4 Crimes 413 : (2016) 3 DCR 319 : (2016) 4 GLR 2838 : (2016) 2 GujLH 762 : (2017) 1 RCRCivil 205 : (2017) 1 RCRCriminal 15 : (2

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Shekhar Nephde Mahendra Anand, S.I. Nanavati and Mihir Thakore, Senior Advocates, with Sanjeev Dave, Vaibhav Shukla, Dipen C. Shah, Amit Panchal and Mrs. V.D. Nanavati, Advocates, for the Appellant; Abad Ponda, Senior Advocate with Mukul Taly, Jayesh Baro

Final Decision : Disposed Off

Judgement

J.B. Pardiwala, J.—Since the issues raised, in all the captioned applications, are more or less the same, and the relief prayed for is also to quash the selfsame criminal case, those were heard analogously are being disposed of by this common judgment and order.

2. The facts of this case may be summarised as under:

2.1 The complainant M/s. Sharda Steel Corporation is a partnership firm registered under the Partnership Act. The complainant firm is engaged in the business of supply of Steel, Cement, etc. Shri Bharat B. Shah is one of the partners of the firm. One Shri Chimanlal B. Shah is an authorised person so far as the business of the partnership firm is concerned. Both Shri Bharat B. Shah

and Shri Chimanlal B. Shah are brothers.

2.2 The Gujarat Pipavav Port Limited (original accused No.1) is a company incorporated under the Companies Act. The accused Nos.2 to 19 shown in the complaint are the Directors and other Office Bearers of the company.

2.3 Sometime in the decade of early 90's, the company started constructing a Jetty at the Pipavav Port. An agreement was entered into between the complainant firm and the accused company for supply of Steel, Cement, etc for the purpose of the construction of the Port.

2.4 At the relevant point of time i.e. the applicant of the Criminal Miscellaneous Application No.968 of 2014, in his capacity, as the Managing Director and Vice President of the company issued a blank signed cheque in favour of the complainant firm as a security.

2.5 In the course of the business transactions, a dispute arose between the accused company and the complainant firm. The complainant firm preferred three Special Civil Suits Nos.35 of 2000, 36 of 2000 and 37 of 2000 in the Court of the Civil Judge, Senior Division, Amreli, for recovery of a certain amount raised through bills. The Civil Suits are still pending as on date. In the year 2008 with the consent of the parties, the learned Civil Judge passed an order in the Special Civil Suit No.36 of 2000 appointing M/s. Chhaged & Doshi Company, Chartered Accountants, having its Head Office at Mumbai, as a mediator for the purpose of settling the accounts.

2.6 M/s. Chhaged & Doshi Company submitted its report dated 28th April 2009, according to which, the accused company owes a sum of Rs.15,82,23,865/- (Rupees Fifteen Crore Eighty Two Lac Twenty Three Thousand Eight Hundred Fifty Five only) to the complainant firm.

2.7 The complainant firm, thereafter, started demanding the amount from the accused company. There was lot of correspondence between the complainant and the accused company between 2010 and 2013 in that regard. Ultimately, the complainant thought fit to fill up the blank signed cheque, which was drawn by the then Managing Director on behalf of the company as a security. The cheque was filled up on 28th March 2013 for the amount of Rs.15,82,23,858/- drawn in favour of the Sharda Steel Corporation. The complainant negotiated the cheque in question through its banker Dena Bank which was dishonoured with an endorsement of "account closed".

2.8 The complainant, thereafter, issued a statutory notice dated 23rd April 2013, and called upon the company to make good the amount mentioned in the cheque. The drawer of the cheque, namely, Mr. Nikhil P. Gandhi (original accused No.2) gave a reply dated 6th May 2013 denying his liability. The complainant, thereafter, proceeded to file a complaint in the Court of the learned Chief Judicial Magistrate at Mahuva. The complaint came to be registered as the Criminal Inquiry Case No.20 of 2013. After recording of the verification of the

complainant, the Court thought fit to order a Magisterial inquiry under Section 202 of the Code of Criminal, 1973. On completion of the Magisterial inquiry, the Chief Judicial Magistrate, Mahuva thought fit to issue process against the company and the Directors named in the complaint for the offence under Section 138 of the Negotiable Instruments Act. On process being issued, the case came to be ultimately registered as the Criminal Case No.1710 of 2013.

2.9 Hence, these applications by the company and the Directors for quashing of the criminal proceedings initiated for the offence punishable under Section 138 of the Negotiable Instruments Act.

3. At the outset, I may state that the learned counsel appearing for the complainant very fairly made a statement that the criminal proceedings may be quashed so far as the following applicants of the Criminal Miscellaneous Application No.1067 of 2014 and Criminal Miscellaneous Application No.1756 of 2014 are concerned. A pursis in writing duly signed by the advocates on record was tendered before this Court. The details are as under:

"Criminal Miscellaneous Application No.1067 of 2014

1. Christian Moller Laursen (petitioner No.1 and original accused No.5)
2. Luis Miranda (petitioner No.3 and original accused No.8)"

"Criminal Miscellaneous Application No.1756 of 2014

1. Mr. Sunil Chawla (petitioner No.1 and original accused No.11)
2. Mr. Anup Sheth (petitioner No.2 and original accused No.10)
3. Dinesh Kumar Lal (petitioner No.3 and original accused No.7)."
4. The aforesaid concession at the end of the complainant was given on the ground that at the time when the offence is alleged to have been committed, they were no way concerned with the day-to-day affairs and management of the company.
5. However, so far as the company and the other accused are concerned, it was argued that the proceedings may not be quashed.
6. I heard Mr. Nephde, the learned senior advocate, Mr. Mahendra R. Anand, the learned senior advocate, and Mr. Mihir Thakore, the learned senior advocate and Mr. S.I. Nanavati, the learned senior advocate appearing for the company and the Directors. I also heard Mr. Abad Ponda, the learned senior advocate who appeared on behalf of the complainant.
7. It is not in dispute that a signed blank cheque leaf. was given to the complainant sometime in the year 1994-95. Except the signature of the then Managing Director Shri Gandhi, the other parts of the body were blank.
8. Let me take note of some of the admissions in the complaint itself.

"(4) For and on behalf of accused No.1 Company, the accused No.2 had given cheque as security. In the year 2000 some cheques had arisen between the complainant firm and the accused No.2 and the accused No.1 Company did not pay legitimate amount of the complainant firm, therefore, the complainant has filed SPL. Civil Suit No.35 of 2000, 36/2000 and 37/2000 in the Civil Court at Amreli for recovery of dues, wherein the Court granted ex parte interim injunction below Ex. 5 in SPL. Civil Suit No.36 of 2000."

"(9) The accused were not releasing payment of legitimate dues of complainant and were passing time. It is respectfully submitted that the cheque No.839170 of Dena Bank, Industrial Finance Branch, Mumbai was given by accused as security to the complainant. The partner of complainant firm wrote a detailed letter dated 9-2-2013 to the accused and requested the accused to make payment of legitimate dues else the complainant intend to present aforesaid cheque to the banker of accused for its clearing for Rs.15,82,23,858/- in favour of the complainant. Still, however, the accused did not make payment of dues to complainant, hence, the complainant filled up necessary details in the said cheque and deposited aforesaid cheque in the bank on 28-3-2013 for realisation of its proceeds."

9. Let me also take note of the averments made in the statutory notice issued by the complainant under Section 138 of the Act:

"3. That in consideration and on account of the just and legally enforceable debt i.e. towards the price for the sale, supply and delivery of cement and iron and other materials to you No.1 by our clients, You No.1 through You No.2 have issued to our clients cheques signed in blank including cheque No.839170 drawn on Dena Bank, Industrial Finance Branch, Bombay-400 005. The said cheques were given by way of security towards payment of the price of the said goods sold and delivered by our clients to You No.1 from the office of our clients from Mahuva. The said cheques were signed by You No.2 as Director and on behalf of You No.1."

10. In the reply to the statutory notice issued by the complainant, the following was informed by the drawer of the cheque, namely, Shri Gandhi.

"2.1 That the Management of Gujarat Pipavav Port Limited (hereinafter referred to as "GPPL Company", for short) has been changed with effect from 30.5.2005 and the said GPPL Company was taken over by A.P. Moller Group upon purchase of shares and execution of Transfer Agreement and since then, GPPL Company is run and managed by said A.P. Moller Group and our clients i.e. Mr. Nikhil P. Gandhi and Mr. Sunil Tandon have ceased to be the Director and the Managing Director respectively of the said GPPL Company. Please note that Mr. Sunil Tandon has already resigned as Managing Director of GPPL Company as back as in October, 2001 and Mr. Nikhil P. Gandhi has already resigned as Director of GPPL Company with effect from 13.4.2005 and their resignations were duly accepted and acted upon by GPPL Company.

2.2 You may also be pleased to note that a similar notice (as aforesaid) was issued by your client on 5.1.2010 to GPPL Company and GPPL Company has elaborately replied on 8.4.2010 negating all the allegations including the allegations of issuance of blank cheque in favour of your client. Therefore, your aforesaid notice dated 23.4.2013 is nothing but malicious abuse of process of law actuated with the motive of threatening our clients for the payment of illegal claim of your client for which Civil Suits have been already filed by your client in the year 2000, which are presently pending for adjudication before Civil Court at Amreli. In the said Civil Suits (especially Special Civil Suit No.36 of 2000 pending in the Civil Court at Amreli), the erstwhile Management of the GPPL Company has already filed its Written Statement wherein the company has specifically negated all the claims of your client. On the contrary, the company has filed a Counter Claim against your client. Moreover, there is serious dispute raised by the GPPL Company for the "accommodation bills" issued by your client upon GPPL Company. The said "accommodation bills" are to the extent of Rs.4.36 crores (approximately) for which your client has not made any actual supply of material to GPPL Company and the dispute is pending for adjudication in the Civil Court at Amreli..

2.3 Our clients have further instructed us to state that Mr. Sunil Tandon has ceased to be the Managing Director of GPPL Company with effect from October 2001 and Mr. Nikhil P. Gandhi has ceased to be the Director of GPPL Company with effect from 13.4.2005. It is pertinent to note here that the date mentioned in the cheque No.839170 (which is dishonoured) is 25.3.2013. Under Section 118 of the Negotiable Instruments Act, 1881, there is a lawful presumption under Clause (b) of Section 118 that "Every Negotiable Instrument bearing a date was made or drawn on such date." Undisputedly, on 25.3.2013, Mr. Nikhil P. Gandhi was not the Director of GPPL Company and he cannot sign the negotiable instrument (cheque) as the Director of GPPL Company for the simple reason that he has already resigned as Director of GPPL Company and his resignation was duly accepted and acted upon with effect from 13.4.2005 by GPPL Company. It is under these circumstances, either the signature of Mr. Nikhil Gandhi is forged by your client or the negotiable instrument (cheque) is not negotiable under the provisions of the Negotiable Instruments Act, 1881 being time barred, has been misused by your client by writing the date on which the instrument. Our clients have further instructed us to state that even the Account from which the said cheque was alleged to have been issued was also closed long back by the new Management of GPPL Company. Therefore, your client ought not to have utilised the said cheque for the simple reason that the dispute between the parties is still pending before the Civil Court, claims and counter claims are yet to be adjudicated, liabilities of any of the parties have still to be determined by the Civil Court and, therefore, there is not question of issuance of a cheque dated 25.3.2013 of the alleged amount by our client in favour of your client. Your client, with mala fide intention and ulterior motive to abuse the process of law, has filled up the cheque in question and deposited the said cheque in his bank

account knowing fully well that the signatory to such cheque has no authority under the law to sign and/or issue such cheque in favour of your client. It is under these circumstances that the action of your client is nothing but malicious, abuse of process of law actuated with the motive of threatening the present and past Directors and other officers of GPPL Company for unlawful claim of your client in the pending Civil Suits."

11. Thus, the picture that emerges from the materials on record and certain admissions on the part of the complainant is as under:

(a) For the purpose of construction of a Port by the accused company, materials like Steel, Cement, etc, were purchased from the complainant.

(b) The agreement in this regard was entered into sometime in 90?s i.e. 1994-95. It is evident from the cheque in question that the same is of a cheque-book issued in the decade of 1990?s.

(c) Indisputably, the cheque in question was a blank signed cheque.

(d) The cheque came to be deposited after filling up other details by the complainant on 25th March 2013 i.e. almost after a period of seventeen years from the date of handing over of the blank cheque. The Special Civil Suits are still pending for the adjudication. The amount which was filled up in the cheque was on the basis of the report of the M/s.Chhaged & Doshi, Chartered Accountants, having its Head Office at Mumbai. Many objections have been raised by the accused company as regards the report of M/s. Chhaged & Doshi, Chartered Accountants.

(e) The entire management of the accused company got changed with effect from 30th May 2005 and was taken over by the A.P. Moller Group upon purchase of the shares and execution of the Transfer Agreement. This fact has been admitted in paragraph 2 of the complaint itself.

(f) No sooner the management of the entire company was taken over by the A.P. Moller Group, the bank account on which the cheque was drawn was closed and a new account was opened by the new management.

(g) The drawer of the cheque, namely, Mr. Nikhil P. Gandhi, ceased to be the Managing Director of the company with effect from 13th April 2005. The other details are as under:

"(i) Blank Cheque given by Nikhil Gandhi : Prior to 2000

(ii) Date of Retirement of Nikhil Gandhi: 13-4-2005

(iii) Closure of Bank A/c: 17-7-2008

(iv) Date of Cheque drawn by Nikhil Gandhi : 25-3-2013

Criminal Miscellaneous Application No.1754 of 2014

Petitioner No.: Gujarat Pipavav Port Ltd.

Petitioner No.2: Prakash Tulsiani (Managing Director)

Date of Appointment : 28-1-2009.

Criminal Miscellaneous Application No.1755 of 2014

Petitioner No.1 - Mr. Pravain K Laheri (Non-Executive Director)

Date of Appointment : 29-8-2008 - till date.

Petitioner No.2 - Pradeep Srikrishna Mallick (Non-Executive Director)

Date of appointment : 4-9-2012.

Petitioner No.3 - Rabinda Gaitonde (Chief Operating Officer)

Date of appointment : 11-2-2008 - till date.

Petitioner No.4 - Hariharan Iyer (Chief Financial Officer)

Date of appointment : 1-5-2009 - till date.

Petitioner No.5 - C.S. Venkaterswaran (Financial Controller)

Date of appointment : 26-11-2001 to 6-3-2009.

Criminal Miscellaneous Application No.1756 of 2014

Petitioner No.1 - Mr. Sunil Chawla (Nominee Director)

Date of Appointment : 22-9-2006

Date of Retirement : 15-12-2009.

Petitioner No.2 - Anoop Kishore Sheth (None-Executive Director)

Date of Appointment : 17-3-2008

Date of Retirement : 17-12-2009

Petitioner No.3 : Dinesh Lal (Additional Director)

Date of Appointment : 1-6-2004 was Director on date of complaint - now retired.

Criminal Miscellaneous Application No.1067 of 2014

Petitioner No.1 - Christian Moller Laursen (Nominee Director)

Date of appointment : 13-5-2005

Date of retirement : 4-9-2012

Petitioner No.2 - Per Jorgensen (Non-Executive Director)

Date of Appointment : 29-8-2008

Date of Retirement: 1-6-2013."

Submissions on behalf of the applicants:

12. Mr. S.I. Nanavati, the learned senior advocate appearing for the drawer of the cheque vehemently submitted that the learned Magistrate committed a serious error in taking cognizance upon the complaint and ought not to have issued process for the offence punishable under Section 138 of the Negotiable Instruments Act.

13. Mr. Nanavati laid much stress on the fact that what was handed over to the complainant was a signed blank cheque leaf. by way of security. According to him, the complainant could not have filled up the cheque on its own after a period of almost seventeen years according to his whims and fancies. Mr. Nanavati submitted that the signed blank cheque could be termed as an incomplete document or inchoate instrument. He submitted that the complainant had no implied authority to fill up a signed blank cheque by way of security and present it for encashment.

14. Mr. Nanavati submitted that Section 20 of the Negotiable Instruments Act would not apply to a cheque, and therefore, the holder of the cheque had no authority to make or complete a negotiable instrument.

15. Mr. Nanavati submitted that the complainant was fully aware of the fact that way back in the year 2005, the drawer of the cheque had ceased to be the Managing Director of the company with the change of the management. He further submitted that the complainant was also aware of the fact that the account on which the signed blank cheque was drawn got closed on 17th July 2008 upon the instructions to the bank by the new management.

16. Mr. Nanavati submitted that since the cheque was issued by way of security, it could not be said that there was any existing debt or liability.

17. Mr. Nanavati placed reliance on Section 118(b) of the N.I. Act which provides that until the contrary is proved, it shall be presumed that every negotiable instruments bearing a date was made or drawn on such date.

18. Mr. Nanavati submitted that the presumption which is available in the law, by virtue of Section 139 of the N.I. Act, that the holder of the cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, or any debt or other liability, could be said to have stood rebutted on the face of the admission made by the complainant in the complaint itself that the instrument was handed over by way of security.

19. Mr. Nanavati submitted that filling up of a signed blank, after a period of almost seventeen years, without the consent of the company or the drawer of the cheque and without any implied authority, would amount to material alteration, as explained in Section 87 of the N.I. Act.

20. Mr. Nanavati, in support his submissions, placed reliance on two decisions of the Supreme Court D.C.M. Financial Services Limited v. J.N. Sareen and another,

2008 (8) SCC 1 and Indus Airways Pvt Ltd v. Magnum Aviation Private Limited, 2014 (2) 12 SCC 539

21. Mr. Nephde, the learned senior advocate appearing for some of the accused vehemently submitted that Section 20 of the Negotiable Instruments Act would not save the situation and in the year 2013, the complainant had no implied authority to fill up a blank signed cheque on its own according to his whims and fancies.

22. Mr. Nephde submitted that none of the Directors or other Office Bearers are liable to be prosecuted by virtue of Section 141 of the N.I. Act as there is nothing on record to indicate that on the date of commission of the alleged offence, they were in any manner connected with the day-to-day affairs and management of the company.

23. Mr. Nephde placed strong reliance on the following decisions:

(1) M.S. Narayana Menon @ Mani v. State of Karnataka and another, 2006 (6) SCC 39

(2) Sudhir Kumar Bhalla v. Jagdish Chand and others, 2008 (7) SCC 137

(3) Urban Cooperative Credit Society v. State of Gujarat through its Manager Jayrajbhai, 2003 (2) GLH 629

(4) B. Suresh Yadav v. Sharifa Bee and another, 2007 (13) SCC 107

(5) N.K. Wahi v. Shekhar Singh and others, 2007 (9) SCC 481

(6) Anita Malhotra v. Apparel Export Promotion Council and another, 2012 (1) SCC 520

24. Mr. Mihir Thakore, the learned senior advocate for some of the accused also vehemently submitted that his clients are not liable to be prosecuted for the offence punishable under Section 138 of the N.I. Act by virtue of the vicarious liability created under Section 141 of the N.I. Act. Mr. Thakore placed reliance on the following two decisions of the Supreme Court:

(1) K.K. Ahuja v. V.K. Vora, 2009(10) SCC 48

(2) National Small Industries Corporation Limited v. Harmeet Singh Paintal and another, 2010 (3) SCC 330

25. Mr. Mahendra Anand, the learned senior advocate appearing for some of the accused also submitted that his clients are not liable to be prosecuted for the offence punishable under the N.I. Act by virtue of Section 141 of the N.I. Act.

26. In such circumstances referred to above, all the learned senior advocates appearing for the applicants submitted that the prosecution should fail and the complaint deserves to be quashed.

27. On the other hand, all the applications are vehemently opposed by Mr. Abad

Ponda, the learned senior advocate appearing for the complainant.

28. Mr. Ponda submitted that by virtue of Section 20 of the Act, although what was handed over to his client was a signed blank cheque, yet his client had the implied authority to fill up the signed blank cheque and present it for the purpose of encashment. He vehemently submitted that a signed blank cheque would remain a bill of exchange till the date is filled up in the said instrument.

29. Mr. Ponda submitted that the drawer of the cheque cannot absolve himself from the liability only on the ground that he ceased to be the Managing Director of the company in the year 2005. According to Mr. Ponda, although he ceased to be the Managing Director much before the cheque was filled up and presented, yet being the drawer, his liability would continue.

30. Mr. Ponda submitted that except the few Directors for whom he gave concession to quash the complaint, all other accused could be said to be liable for the dishonour of the cheque by virtue of Section 141 of the N.I. Act.

31. Mr. Ponda submitted that there are highly disputed questions of fact which will have to be considered by the trial Court on the basis of the evidence that would be led oral as well as documentary. He submitted that having regard to the limited scope of interference in exercise of the inherent powers under Section 482 of the Cr.P.C., this Court may not quash the proceedings at this stage.

32. Mr. Ponda vehemently submitted that even if the cheque is issued by way of security, it would still attract the provisions of Section 138 of the N.I. Act. He submitted that neither the Section 138 nor explanation to it suggests that the debt or other liability should be in existence on the date of issuance of the cheque, i.e. on the date of its delivery to the drawee.

33. Mr. Ponda laid much emphasis on the fact that the instrument in question assumed the character of a cheque for the first time on 25th March 2013, as till that date, the instrument remained a bill of exchange. He submitted that when the instrument was handed over in the form of a signed blank cheque, it was just a bill of exchange and assuming for the moment that at the time of handing over of such signed blank cheque, there was no existing debt or liability, still when the cheque was filled up, the liability had been crystallised, and therefore, the argument that the cheque was issued only for the purpose of security should fail.

34. Mr. Ponda, in support of his submissions, placed reliance on the following judgments:

(1) Hiten P. Dalal v. Bratindranath Banerjee, 2001 (6) SCC 16

(2) I.C.D.S. Ltd v. Beena Shabeer and another, AIR 2002 SC 3014

(3) K. Bhaskaran v. Sankaran Vaidhyan Balan and company, 1999 (7) SCC 510

(4) Rangappa v. Sri Mohan, 2010 (11) SCC 441

(5) S.M.S. Pharmaceuticals Limited v. Neeta Bhatt and another, 2005 (8) SCC 89

(6) Subhashbhai v. State of Maharashtra and another, 2010 (1) Venkatesh Journal 181

(7) Hitenbhai Parekh Proprietor - Parekh Enterprises v. State of Gujarat, 2009 (3) GLH 742

(8) H. Maregowda and etc. v. Thippamma and others, AIR 2000 Karnataka 169

(9) Gunmala Sales Private Limited v. Anu Mehta and others, 2015 Cr.L.J. 285

(10) Amit Kapoor v. Ramesh Chander and another, 2012 (9) SCC 460

(11) Sonu Gupta v. Deepak Gupta and others, 2015 (3) SCC 424

35. Having heard the learned counsel appearing for the parties and having considered the materials on record, the following questions fall for my consideration:

(i) Whether Section 20 of the Negotiable Instruments Act applies to a cheque as well?

(ii) Whether filling up of a signed blank cheque leaf. would amount to a material alteration within the meaning of Section 87 of the N.I. Act?

(iii) Is there an implied authority to a person who receives a signed blank cheque leaf. to fill up the same showing any amount as he likes?

(iv) Whether the presumption under Section 139 of the Act could be said to have stood rebutted by the admission in the complaint itself that the blank signed cheque was issued by way of security?

(v) A person who had resigned as the Managing Director with the knowledge of the complainant in 2005 could be said to be a person in-charge of the company in 2013 when the cheque was dishonoured? Whether it could be said that the drawer of the cheque, who ceased to be the Director eight years before the dishonour, had no say in the matter of seeing that the cheque is honoured? Whether he could have asked the company to pay the amount?

(vi) Whether mere reproduction of the wordings of the Section 141(1) of the N.I. Act in the complaint is sufficient to make a person liable to face prosecution for the dishonour of the cheque?

Discussion:

The issue as regards sections 20 and 87 of the negotiable instruments act:

36. Section 20 of the N.I. Act reads as under:

"20. Inchoate stamped instruments. - Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in a India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie

authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount :

Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

37. Section 20 deals with the inchoate stamped instruments, and the scheme of that section is that when a person signs and delivers to another person an inchoate document which is properly stamped in accordance with the law relating to negotiable instruments, then by doing so he gives a prima facie authority to the holder to complete the document, the authority being restricted to filling the amount not exceeding that which would be covered by the stamp upon the document. When the document is completed and becomes a negotiable instrument, then the maker of the document is liable to any holder in due course for the amount which has been filled in the document. The proviso to Section 20 lays down that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder. It will be noticed that the right given to complete the document is given to the holder and the holder contemplated in this section is not the holder as defined in the Act itself because it is clear that definition cannot apply to this expression in Section 20, but "holder" is used in this section in the literal sense of that word, viz., the person who actually holds the document.

The section further contemplates that if the holder having completed the document negotiates it then the person who by reason of such negotiation becomes a holder in due course has a right to proceed against the maker and recover the amount mentioned in the document. Therefore, the section provides for two rights in respect of two different persons. One is the right given to the holder of the document, the person who is in possession of the document, the document being an inchoate document, and that right is the right to complete it. The other right conferred is upon the holder in due course, and that right is that even though the holder in due course might come in possession of a negotiable instrument which was not wholly completed by the maker, he has the same right against the maker as if he had himself written out the whole of the document, if the document has been completed by a person who has come into possession of it as contemplated by Section 20. Therefore, a person who permits an incomplete document to go out into the world by giving and delivering it to any person, takes the risk of having to discharge the liability, which may be provided under the document by the amount being filled in, to the person who bona fide and for consideration comes into possession of that document. That seems to be the scheme of Section 20.

[See: Tarachand Kevalram v. Sikri Brothers, AIR 1953 Bom. 290

38. Thus, to constitute an inchoate stamped instrument within the purview of Section 20 Negotiable Instruments Act it shall have the following ingredients.

- (1) The instrument shall be stamped.
- (2) It should be stamped in accordance with law relating to the negotiable instruments then in force in India.
- (3) The instrument should either be wholly blank or contains an incomplete instrument and
- (4) The instrument is signed and delivered to another making him holder of such instrument.

Before an instrument acquires the status of a full-fledged negotiable instrument, the two under mentioned conditions should be satisfied.

- (i) only the holder of the such instrument thereof in the physical sense can make or complete the same.
- (ii) provided however that the amount to be specified therein does not exceed the amount which could be covered by the stamp.

Therefore:-

- (i) a person who makes himself the payee of an inchoate document by writing up or completing the negotiable in a blank paper cannot be regarded as a holder in due course of that document. It follows therefore, that he cannot render liable the maker or the person who signed that blank document as a person who is liable under the Negotiable Instruments Act within the meaning of the second part of Section 20.
- (ii) Until the drawee's name is inserted before filing of the suit, the instrument is not a promissory note in the eye of law; the holder cannot recover the amount on the instrument; even the permission granted by the court to fill the name would not cure the defect in the instrument.
- (iii) A printed promissory with the space for rate of interest being blank is not an incomplete instrument, if enables the promisee to fill up the same so as to complete the instrument within the meaning of Section 20.
- (iv) The instrument may be wholly blank or incomplete in any particular in either case, the holder has the authority to make or complete the instrument as a negotiable one. The authority implied by a signature to a blank instrument, is so wide that the party so signing is bound to be a holder in due course even though the holder was authorised to fill for a certain amount, and be in fact inserts a greater amount, but it is necessary that sum ought not to exceed the amount covered by the stamp.

39. Section 6 of the N.I. Act defines a "cheque" as under:

"A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Explanation I.-For the purposes of this section, the expressions-

(a) "a cheque in the electronic form" means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

(b) "a truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation II.-For the purposes of this section, the expression "clearing house" means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.]"

40. Section 5 of the N.I. Act defines a "bill of exchange" as under:

"A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

Therefore, a combined reading of Sections 5 and 6 would make it clear that an instrument would be a cheque if only it contains the particulars as mentioned in the two sections referred to above. If the drawee's name is not written in the instrument, that instrument cannot even be termed to be a bill of exchange. Therefore, if it is only a signed blank cheque leaf, it cannot be said to be a cheque within the meaning of Section 6 of the Act.

41. Section 13 of the N.I. Act defines a negotiable instrument as under:

"A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer."

Explanation to Section 13 also would make it clear that it must be an instrument containing all the particulars referred to earlier.

42. If only it is a negotiable instrument within the meaning of Section 13 of N.I. Act, Section 87 would have any application. If it was only a signed blank cheque leaf, it cannot be termed as a "negotiable instrument", and if so the question of effecting material alteration of that paper (signed cheque leaf.) does not arise.

43. If it is only a signed blank cheque leaf. that was handed over it cannot be said to be a paper stamped in accordance with law relating to the negotiable

instruments. As such the contention that, whether it is wholly blank or filled up partly making it an incomplete document and that handing over of the same would give authority to the holder thereof to make or complete the instrument as the case may be for any amount specified therein and not exceeding the amount covered by the stamp, cannot be sustained. So far as a cheque is concerned, if it is a signed blank cheque leaf. it may be filled up showing any amount without any restriction what so ever and if that be so, how Section 20 of the N.I. Act can be applied to a case of cheque. But if it is a paper stamped, it can be filled up showing the amount not exceeding the amount covered by the stamp. That is the rationale behind why Section 20 is specifically made applicable to the stamped documents/instruments.

44. It has been held by a Division Bench of the Kerala High Court in *C.T. Joseph v. I.V. Philip*, AIR 2001 Kerala 300 that Section 20 of the N.I. Act would not apply to a cheque. I may quote the observations in paras 14 and 15 as under:

"14. Learned counsel for the plaintiff then argued that even the case of the fourth defendant is that he had entrusted cheque duly signed by the fourth (defendant) and the fourth defendant was authorised to issue the cheque on behalf of the Firm. He relied on Section 20 of the Negotiable Instruments Act and contended that on the basis of that the defendants are estopped from denying their liability under the cheque. So far as Section 20 of the Negotiable Instruments Act is concerned, according to us, it does not apply because Section 20 applies only with regard to inchoate negotiable instruments. So far as the cheques are concerned, they don't require any stamp under the Stamp Act in force.

15. The Lahore High Court in *Dower v. Sohan Lal*, AIR 1937 Lahore 816 have held that insofar as the cheque do not require to be stamped, Section 20 of the Negotiable Instruments Act is not applicable. Learned counsel for the plaintiff then submitted that even if the principles under Section 20 of the Negotiable Instruments Act do not apply, the general principles of law of estoppel will apply. Learned counsel also cited some decisions to show that the general principles of law of estoppel will apply. But according to us, for the application of such principles, it is highly necessary that the cheque was issued and filled up as authorised.."

45. It can be argued that when a person takes a bill in an incomplete form, he cannot be a bona fide holder for value since it can only be said that he has taken a piece of blank paper and not a bill and that he can take it as a bill only under the authority given to his transferor. Section 20 of the Act would make it clear that there can be no material alteration of a cheque leaf. only for the reasons that it was subsequently filled up. But at the same time it cannot be said that when ever a signed blank cheque leaf. is given, it gives authority to the holder to fill up the same according to his whims and fancies. Filling up of a signed blank cheque leaf. may not attract section 87 of the N.I. Act, for, there was no insertion, interlineation, erasure, alteration etc, because there was no completed

negotiable instrument within the meaning of sections 5, 6 and 13 of the N.I. Act. Therefore, neither section 20 nor section 87 applies to a blank signed cheque leaf. If so, the question must turn round to the actual execution of the instrument.

46. With regard to the instruments other than a cheque, an implied authority is given to the holder at the time of entrusting it to fill up the same. There may be instances where an implied authority is given to the person, at the time of entrusting a signed blank cheque containing the signature of the drawer of the cheque, to fill the columns therein.

47. If a principal or employer deposes his agent or employee to purchase an article and if the dealer fills up that signed blank cheque leaf, showing the exact amount covered by the bill showing the price of the article sold then it cannot be said that what was handed over by the drawer of the cheque is only a signed blank cheque leaf. In such cases an implied authority to the trader/seller of the article to fill up the cheque leaf, can certainly be inferred. Similarly, there may also be cases where at the time of settlement of the accounts, a particular amount was found payable by the drawer of the cheque to the other party and if a signed blank cheque entrusted to be filled up later is filled up in tune with the accounts, showing the actual amount payable by the drawer of the cheque to the other party, then also it can be said that there was the implied authority to fill up the signed blank cheque leaf. There may be such instances where the sum is ascertainable and the signed blank cheque leaf, is given to fill up the same after ascertaining the same. In such cases there would be no difficulty to infer an implied authority given by the drawer. Simply because the cheque is seen filled up or written in the hand writing of another person it cannot lead to a conclusion that only a signed blank cheque leaf, was given. The person signing the cheque may have difficulty due to many reasons to write the cheque and it might have been filled up by the payee or by another. In such cases it cannot be said that what was handed over was only a signed blank cheque leaf. In all such cases the ultimate conclusion may depend upon the proof of the transaction and execution of the instrument. It must also be held that when it is a case that only a signed blank leaf, was handed over by the accused, then he must offer satisfactory explanation as to the circumstances under which the signed blank cheque happened to be handed over. Considering the totality of the evidence and circumstances, it is for the court to draw the inference as to whether it was given with an implied authority to fill up the same showing the amount ascertained or ascertainable to discharge the debt or liability. Therefore, there may be such cases where implied authority can be inferred. But the contention that when a signed blank cheque leaf, is handed over, it can never be filled up and that if it is filled up it would amount to a material alteration within the meaning of using Section 87 of the N.I. Act, does not stand to rhyme or reason. Similarly, the contention that Section 20 of the N.I. Act is applicable to an unfilled or blank cheque leaf, also cannot be accepted. It would depend upon the facts of each case. Therefore, it is neither a case which attracts Section 87 of the N.I. Act nor

is it a case where the complainant can rely upon Section 20 of the N.I. Act and contend that as a signed blank cheque leaf. is given it gives an authority to fill up the same according to the whim and fancy of the payee. [See : P. Purushothaman Nair v. K. Sreekantan Nair, 2013 (4) ILR (Ker) 115.

48. In *S. Gopal v. D. Balachandran*, 2008 (1) CTC 491 the Madras High Court observed that a bare reading of Section 20 of the Negotiable Instruments Act would go to show that it would apply only to a stamped instrument viz., pronote and bill of exchange and not to the cheques. Therefore, Section 20 will have no application to the cheques issued after signing by the drawer. It has been further observed therein as follows:-

"?. there is no law which prescribes that a cheque shall be filled up by the drawer himself. If such proposition is accepted, no unlettered person, who knows only to sign his name, can ever be a drawer of a cheque. Further, a person who is physically incapacitated to fill up the cheque cannot also draw a cheque and negotiate it. Of course, as far as the other negotiable instruments viz., pronotes and bills of exchange, there is a clear mandate under Section 20 of the Negotiable Instruments Act to the effect that such an instrument can be negotiated by the maker thereof by simply signing and delivering the same to the holder in due course giving thereby ample authority to the latter to fill up the content of the instrument as intended by the maker thereof.

10. Even in case of a cheque, as there is no clear provision in the Negotiable Instruments Act, in the light of the above discussion, the court finds that if a drawer of a cheque gives authority to the payee or holder in due course or a stranger for that matter to fill up the cheque signed by him, such an instrument also is valid in the eye of law. There is no bar for the drawer of a cheque to give authority to a third person to fill up the cheque signed by him for the purpose of negotiating the same."

49. A learned Single Judge of this Court in the case of *Hitenbhai Parekh Proprietor - Parekh Enterprises v. State of Gujarat*, 2009 (3) GLH 742 has elaborately explained Section 20 of the N.I. Act.

"9.1 Any material alteration of a negotiable instrument, however, renders it void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless the alteration was made in order to carry out the common intention of the original parties. The provision to that effect contained in section 87 has to be read in harmony with section 20 which permits and authorizes the holder of a negotiable instrument to complete the instrument for any amount and renders the drawer liable to the holder in due course to the extent of the amount intended by the drawer to be paid under such instrument. It is clear from plain reading of provisions of section 20 and 87 that the injunction, under the pain of invalidating a negotiable instrument, against alteration operates only after an inchoate instrument is completed or a complete instrument falls within the definition of negotiable instrument. Therefore, the

legally permissible completion of an inchoate instrument cannot be construed as material alteration of a negotiable instrument.

10. The above analysis of the statutory provisions leads to the conclusion that, when a cheque bearing only signature of the drawer is delivered and received by a payee for the discharge, in whole or in part, of any debt or liability, there is an implied authority for the person receiving such cheque to complete it by filling the blanks and the amount having been filled up under such implied authority would be the amount intended by him to be paid thereunder. The focus in such cases would shift to the aspect of such amount being for the discharge, in whole or in part, of any legally enforceable debt or other liability. Therefore, even with the props of legal presumptions, the onus of proving legally enforceable debt or other liability for the discharge of which a cheque must have been drawn has to be discharged by the prosecution for bringing home the charge of dishonour of cheque. It may, however, be facetious to hold that a blank cheque, drawn by a person on an account maintained by him with a banker, for payment of any amount of money to another person, by merely putting his signature on it, would not be a cheque in the first place, because of not being a bill of exchange as it did not contain direction to a certain person to pay a certain sum of money to or to the order of a certain person or to the bearer of the instrument. When the Negotiable Instruments Act expressly permits and authorises by a substantive provision the completion of an inchoate instrument by section 20 with the safeguard provided in section 87, provisions of sections 5 and 6 defining bill of exchange and cheque have to be harmoniously read to mean that an instrument which was initially not a cheque falling within the definition of section 6 would become a cheque when it was completed by filling the blanks and its dishonour shall have all the legal consequences of dishonour of a cheque proper."

50. In view of the aforesaid discussion, I am of the view that Section 20 of the N.I. Act would not save the situation as such for the accused applicants. The collective reading of the various provisions of the N.I. Act shows that even under the scheme of the N.I. Act, it is possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and present the same for payment by the drawee.

51. The first three questions are answered accordingly.

Existing debt or any other legal liability:

52. Let me now proceed further to consider whether there was any existing debt or any other legal liability at the time when the blank signed cheque was handed over to the complainant. I take notice of the fact that the cheque in question was not even a postdated cheque. If it would have been a postdated cheque, it would have remained as a "bill of exchange" till the date shown on the cheque, and thereafter, it would have assumed the character of a cheque, but in the instant case, except the signature, the other columns in the cheque were blank.

Therefore, it cannot be said that it was a "bill of exchange" prior to 25th March 2013.

53. The key differences between a cheque and a bill of exchange are as under:

(1) An instrument used to make payments, that can be simply transferred by hand delivery is known as cheque. An acknowledgment prepared by the creditor to show the indebtedness of the debtor who accepts it for payment is known as a bill of exchange.

(2) A Cheque is defined in section 6 while Bill of Exchange is defined in section 5 of the Negotiable Instrument Act, 1881.

(3) The drawer and payee are always different in case of cheque. In general, drawer and payee are the same persons in case of bill of exchange.

(4) The stamp is not required in cheque. Conversely, a bill of exchange must be stamped.

(5) A cheque is payable to the bearer on demand. As opposed to bill of exchange, it cannot be made payable to the bearer on demand.

(6) Cheque can be crossed but a Bill of Exchange cannot be crossed.

(7) There is no days of grace allowed in cheque, as the amount is paid at the time of presentment of cheque. 3 days of grace are allowed in bill of Exchange.

(8) A cheque does not need acceptance whereas a bill requires to be accepted by the drawee.

54. There are clear-cut admissions on the part of the complainant in the complaint itself, as well as the statutory notice issued under Section 138 of the Act by which the presumption that the cheque was for a consideration has itself been rebutted by the complainant by making a truthful disclosure in the complaint, but unfortunately, for the complainant, this statement of truthfulness would be akin to a self goal. I repeat. The averments in paras - 4 and 9 of the complaint evidenced that the cheque was not for a valuable consideration when it was drawn. It was towards security and would have acquired consideration only on account of future contingencies.

55. The events narrated above occurred sometime in the mid 90's. Sometime in the year 2000, disputes cropped up, and the complainant had to file three civil suits in that regard. If the liability had already been determined within the meaning of Section 138 of the Act, then there was no reason for the complainant as such to wait for seventeen odd years. I am of the view that only with a view to short-cut the suit proceedings in which the Civil Court is yet to fix the liability, the complainant, on the strength of the report of the Chartered Accountants, misused the blank signed cheque. The account, on which the cheque was drawn, already stood closed on 17th July 2008 after the new management took over the company. By the time the new management took over, the drawer of the cheque

had ceased himself to be the Director in the year 2005. The account on which the cheque was drawn was not closed upon the instructions issued by the drawer, but the same was upon the instructions of the new management.

56. In such circumstances referred to above, I find it extremely difficult to fasten any liability under Section 138 of the N.I. Act.

57. Mr. Ponda vehemently submitted that even if a cheque is issued by way of security, and if such a cheque is dishonoured, the Section 138 would be attracted. This submission is sought to be fortified by the decision of the Supreme Court in the case of I.C.D.S. Limited (*supra*). In that case, the husband of the accused/respondent No. 1 had obtained a car under a hire purchase agreement from the complainant. The accused was a guarantor for payment of the amount by her husband and towards the part payment of the said transaction, she had issued a cheque in favour of the complainant. The cheque was dishonoured and the payment was not made in spite of the notice. The High Court quashed the complaint on the ground that the cheque from the guarantor could not be said to have been issued for the purpose of discharge of any debt or liability. However, the Supreme Court set aside the order of the High Court. The Supreme Court observed thus in paragraphs 10 and 11.

"10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words "Where any cheque". The above noted three words are of extreme significance, in particular, by reason of the use of the word "any" the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.

11. The issue as regards the co-extensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statute depicts the intent of the lawmakers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. "Any cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra-interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent

and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents."

58. The Supreme Court in *I.C.D.S. Limited* (supra) considered the provisions of the law and held that when the cheque is issued by the guarantor in discharge of such other liability, the provisions of section 138 are applicable. In fact, Section 138 itself specifically provides that the cheque should have been issued by a person for the discharge of any debt or other liability. The guarantor may not be himself a debtor but he guarantees the repayment of the loan taken by the principal debtor. By giving such a guarantee, the guarantor incurs a liability towards the creditor and for the discharge of that liability, if he issues a cheque, he will be covered by the provisions of Section 138. As the cheque was issued for the discharge of "other liability" case would be covered by Section 138.

59. In *Indus Airways Private Limited* (supra), the Supreme Court explained in details the expression "for discharge of any debt or other liability" occurring in Section 138 of the N.I. Act:

"9. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an existing debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability.

10. In *Swastik Coaters* (supra), the single Judge of the Andhra Pradesh High Court while considering the explanation to Section 138 held: "??..Explanation to Section 138 of the Negotiable Instruments Act clearly makes it clear that the cheque shall be relatable to an enforceable liability or debt and as on the date of the issuing of the cheque there was no existing liability in the sense that the title in the property had not passed on to the accused since the goods were not delivered???"

11. The Gujarat High Court in *Shanku Concretes* (supra) dealing with Section 138 of the N.I. Act held that to attract Section 138 of the N.I. Act, there must be subsisting liability or debt on the date when the cheque was delivered. The very

fact that the payment was agreed to some future date and there was no debt or liability on the date of delivery of the cheques would take the case out of the purview of Section 138 of the N.I. Act. While holding so, Gujarat High Court followed a decision of the Madras High Court in *Balaji Seafoods (supra)*.

12. In *Balaji Seafoods Exports (India) Ltd v. Mac Industries Ltd.*, 1999 (1) CTC 6 (Mad.) the Madras High Court held:

"Section 138 of the Negotiable Instruments Act makes it clear that where the 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 under Section 138 of the Act. The explanation reads that for the purposes of this section, 'debt or other liability' means a legally enforceable debt or liability."

13. The Kerala High Court in *Ullas Supply House v. Ullas*, 2006 Cri LJ 4330(Ker) had an occasion to consider Section 138 of the N.I. Act. In that case, the post-dated cheque was issued by the accused along with the order for supply of goods. The supply of goods was not made by the complainant. The accused first instructed the bank to stop payment against the cheque and then requested the complainant not to present the cheque as he had not supplied the goods. The cheque was dishonoured. The single Judge of the Kerala High Court held,

"Ext.P1 cheque cannot be stated to be one issued in discharge of the liability to the tune of the amount covered by it, which was really issued, as is revealed by Ext. D1, as the price amount for 28 numbers of mixies, which the complainant had not supplied?"

14. The reasoning of the Delhi High Court in the impugned order is as follows:

"8. If at the time of entering into a contract it is one of the conditions of the contract that the purchaser has to pay the amount in advance then advance payment is a liability of the purchaser. The seller of the items would not have entered into contract unless the advance payment was made to him. A condition of advance payment is normally put by the seller for the reason that the purchaser may not later on retract and refuse to take the goods either manufactured for him or procured for him. Payment of cost of the goods in advance being one of the conditions of the contract becomes liability of the purchaser. The purchaser who had issued the cheque could have been asked to make payment either by draft or in cash. Since giving cheque is a mode of payment like any other mode of payment, it is normally accepted as a payment. The issuance of a cheque at the time of signing such contract has to be considered against a liability as the amount written in the cheque is payable by the person on the date mentioned in the cheque. Where the seller or

manufacturer, on the basis of cheques issued, manufactures the goods or procures the goods from outside, and has acted upon the contract, the liability of the purchaser gets fastened, the moment the seller or manufacturer acts upon the contract and procures the goods. If for any reason, the seller fails to manufacture the goods or procure the goods it is only under those circumstances that no liability is created. However, where the goods or raw material has been procured for the purchaser by seller or goods have been manufactured by the seller, it cannot be said that the cheques were not issued against the liability. I consider that if the liability is not construed in this manner, the sole purpose of making dishonour of the cheque as an offence stands defeated. The purpose of making or enacting Section 138 of the N.I. Act was to enhance the acceptability of cheque in settlement of commercial transactions, to infuse trust into commercial transactions and to make a cheque as a reliable negotiable instrument and to see that the cheques of business transactions are not dishonoured. The purpose of Negotiable Instrument Act is to make an orderly statement of rules of law relating to negotiable instruments and to ensure that mercantile instruments should be equated with goods passing from one hand to other. The sole purpose of the Act would stand defeated if after placing orders and giving advance payments, the stop payments are issued and orders are cancelled on the ground of pricing of the goods as was done in this case."

15. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has travelled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.

16. In our opinion, the view taken by Andhra Pradesh High Court in *Swastik Coaters (P) Ltd v. Deepak Bros*, 1997 Cri. LJ 1942(AP) Madras High Court in

Balaji Seafoods Exports (India) Ltd v. Mac Industries Ltd, (1999) 1 CTC 6 (Mad) Gujarat High Court in Shanku Concretes (P) Ltd v. State of Gujarat, 2000 Cr. LJ 1988 (Guj) and Kerala High Court in Ullas Supply House v. Ullas, 2006 Cri LJ 4330(Ker) is the correct view and accords with the scheme of Section 138 of the N.I. Act."

60. Thus, a cheque may be issued under two circumstances. First, it may be issued for a debt in presenti, but payable in future. Secondly, it may be issued for a debt which may become payable in future upon the occurrence of a contingent event. The difference in the two kinds of cheques would be that the cheque issued under the first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.

61. The word 'due' means 'outstanding at the relevant date'. The debt has to be in existence as a crystallised demand akin to a liquidated damages and not a demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.

62. A learned Single Judge of the Karnataka High Court in the case of M/s. Shreyas Agro Services Pvt Ltd v. Chandrakumar, 2006 Criminal Law Journal 3140 considered almost an identical issue which I am called upon to decide. A learned Single Judge of the High Court even considered the Supreme Court decision in I.C.D.S. Limited (supra). Considering the same, the learned Single Judge held in paras 3, 4 and 5 as under:

"3. The very scheme of procedure adopted shows that the cheques are not issued in respect of any current existing ascertained liability. The words "for discharge of any debt or other liability" in Section 138 of N.I. Act should be interpreted to mean current existing or past ascertained liabilities. The cheque issued in respect of future liabilities not in existence as on the date of cheque would not attract prosecution u/S. 138 of N. I. Act.

4. The decision of the Supreme Court in I.C.D.S. Ltd. v. Beena Shabeer, (AIR 2002 SC 3014) has no application to the facts of the present case. In the said case the cheque was issued by a guarantor. The Supreme Court while interpreting the words "discharge of any debt or liability" held that the liability of the guarantor would also come within the ambit of words "the other liability". In the instant case the issue is altogether different. The accused had issued a blank cheque not in respect of any current or ascertained liability but it was issued in respect of uncertain future liability. In such situation the provisions of Section 138 of the Act would not attract and if a cheque so issued is dishonoured, no offence u/S. 138 of the Negotiable Instruments Act can be inferred.

5. The appellant has also produced the letter written by the accused marked at Ex P. 40 to contend that the accused had admitted the liability. The contents of the letter discloses that the accused admits the principal amount but however disputes the interest claimed and states that the amount reflected in the cheques is not the correct legal liability. Section 20 of N.I. Act declares that inchoate

instruments are also valid and legally enforceable. In the case of a signed blank cheque, the drawer gives authority to the drawee to fill up the agreed liability. If the drawee were to dishonestly fill up any excess liability and the extent of liability if it becomes bona fide matter of civil dispute in such case, the drawer has no obligation to facilitate the encashment of cheque. In the instant case the reply Ex. P. 40 discloses that long before presentation of cheque, the extent of liability was disputed but ignoring the objection, the company filled up the cheque for an amount not admitted by the drawer. If the accused were to prove that there is a bona fide dispute with regard to extent of liability, the dishonour of cheque under such circumstance does not attract prosecution u/S. 138 of N.I. Act. The dismissal of complaint is sound and proper. The appeal is dismissed."

63. I am not impressed by the submission of Mr. Ponda canvassed on behalf of the complainant that in the year 1994-95 when the blank signed cheque was handed over to his client as a security, there may not be any existing debt or liability, but in the year 2013 when the cheque was filled up, the liability had got determined, and therefore, on the date when the cheque was filled up and presented, there was a existing debt. In fact, as observed earlier, it could be said that the signed blank cheque as such was misused by the complainant after almost a period of seventeen years. Such misuse can be inferred from the indirect threats given in the statutory notice itself that if the amount is not paid, then the complainant would fill up the signed blank cheque and present the same for its encashment. In the year 2013, neither the accused i.e. the drawer of the cheque was the Managing Director of the company or in any way concerned with the company nor the account on which the blank signed cheque was drawn in existence. In such peculiar circumstances, it is difficult to fix the strict liability under Section 138 of the N.I. Act on the drawer of the cheque.

64. As on date, there may be a report of the Chartered Accountants fixing some liability on the accused company to be discharged towards the complainant, but the report of the Chartered Accountants cannot be termed as final. The civil suits are still pending, and are yet to be adjudicated.

65. I also take notice of the two decisions of the Supreme Court, which are helpful to the drawer of the cheque.

66. In D.C.M. Financial Services (supra), the cheque in question was a postdated one. It was drawn in 1995 and was presented in 1998. The drawer of the cheque, in the meantime, had resigned from the directorship of the company. The Supreme Court, while explaining the principle of constructive liability, held as under:

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

several occasions. Appellant was, therefore, aware thereof. Despite having the knowledge, the 1st respondent was impleaded one of the accused in the complaint as a Director In-charge of the affairs of the Company on the date of commission of the offence, which he was not. If he was proceeded against as a signatory to the cheques, it should have been disclosed before the learned Judge as also the High Court so as to enable him to apply his mind in that behalf. It was not done.

Although, therefore, it may be that as an authorised signatory he will be deemed to be person incharge, in the facts and circumstances of the case, we are of the opinion that the said contention should not be permitted to be raised for the first time before us. A person who had resigned with the knowledge of the complainant in 1996 could not be a person incharge of the Company in 1998 when the cheque was dishonoured. He had no say in the matter of seeing that the cheque is honoured. He could not ask the Company to pay the amount. He as a Director or otherwise could not have been made responsible for payment of the cheque on behalf of the Company or otherwise. (See also *Saroj Kumar Poddar v. State (NCT of Delhi)* : (2007) 3 SCC 693 *Everest Advertising Pvt. Ltd. v. State Government of (NCT of Delhi)* : (2007) 5 SCC 54 and *Raghu LakshmiNarayanan v. Fine Tubes* : (2007) 5 SCC 103.

22. Mr. Patwalia, however, submitted that a situation may arise where change in the management is effected only to avoid such constructive liability. Firstly we are not concerned with such a hypothetical case. Secondly, as noticed by this Court in *Rangachari's case* (supra) that a person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association.

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

24. Section 140 of the Act cannot be said to have any application whatsoever. Reason to believe on the part of a drawer that the cheque would not be dishonoured cannot be a defence. But, then one must issue the cheque with full knowledge as to when the same would be presented. It appears to be a case where the appellant has taken undue advantage of the post dated cheques given on behalf of the company. The statute does not envisage misuse of a privilege conferred upon a party to the contract. Submission of Mr. Patwalia made in view of the decision of this Court in *Adalat Prasad v. Rooplal Jindal and Others*, (2004) 7 SCC 338 is misplaced. Had such a contention been raised even in terms of *Adalat Prasad* (supra), the respondents could have filed an application for quashing in terms of Section 482 of the Code of Criminal Procedure at that stage.

Again such a contention had not been raised before the High Court. No such ground appears to have been taken even in the Special Leave Petition."

67. I can appreciate a situation that a Director of a company who drew the cheque on behalf of that company thinks it fit to tender resignation after having received the notice of dishonour and demand for payment of the cheque drawn by him. In such circumstances, he cannot avoid the criminal liability under Section 138 of the N.I. Act as it may result in incongruous situations. He could not escape from his liability under Section 138 of the N.I. Act. The Director appointed in his place subsequently can plead that he was not in-charge of the affairs of that company when the cheque was drawn and so he cannot be made liable. In the circumstances like this, though the offence under Section 138 of the Act becomes complete only if the payment is not made within fifteen days of the receipt of the statutory notice, yet since the Director who tendered the resignation could pay the amount covered by the dishonoured cheque and then resigned.

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

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

"9. The short contention raised on behalf of the present applicant [accused No.1] is that even according to the complainant, the offence is committed by the company and the accused No.1 is only liable on account of her position as Managing Director of the company. On a plain reading of section 141 of the

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

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

70. In the case in hand also, the accused had not drawn the cheque in question in his personal capacity, but in his capacity as a Managing Director of the company. It is not possible to contend that any cause of action had accrued against the applicant accused i.e. the drawer of the cheque, since the applicant held no position whatsoever of the company when the cause of action in fact accrued against the company.

71. The decision of the Supreme Court in *D.C.M. Financial Services Limited (supra)* has been considered by a Division Bench of the Bombay High Court in the case of *Suhas Bhand v. State of Maharashtra* reported in 2010 (1) Bank Cas 207. The Division Bench, while answering the reference made by a learned Single Judge, observed in para - 32 as under:

"In the case of *DCM Financial Service Ltd. v. J.N. Sareen & anr.*, 2008 ALL MR

(Cri) 2272, the Supreme Court has considered the effect of resignation of a Director in proceedings under Section 138 of the Act. In that case, the Director had already resigned prior to the complaint being filed and the complainant was kept informed of his resignation. The complainant had not even raised the plea that Director was in-charge and management of the Company at the relevant time in the complaint.

That was also a case of PDCs. The resignation of the Director was accepted by the Company. The agreement of purchase/lease was entered into between the Company and the complainant in April 1995. The PDCs were issued in April 1995 itself. The Director resigned in May 1996. The complainant was informed of his resignation. One of the cheques was post- dated to January 1998 which came to be presented in June 1998 and was dishonoured. The resignation of the Director was not challenged as not genuine. Hence, there was no rebuttal of the presumption of the certified copy of Form No.32. It was observed that the Directors of the Company would retire by rotation and may or may not be reappointed to the Board (which is under the provisions of Section 255 to 258 of the Companies Act). The Directors may also resign from the Company. There would be a change in the management of the Company. That change is not a private affair of the Company. Hence the Directors, who have resigned years before the cheque came to be dishonoured, could not be prosecuted. Such a Director cannot be taken to be in-charge of and responsible to the Company for the conduct of the business of the Company merely because at one point of time he played the role of a Director. It was further observed that person who had resigned to the knowledge of the complainant could not be taken to be a person in-charge of the Company when the cheque was dishonoured. It may be mentioned that was also a case where there was no dispute as to the factum of resignation of that Director."

72. In taking the aforesaid view, I am also supported by a decision of the Delhi High Court in the case of Kamal Goyal v. United Phosphorus Ltd. reported in 2013 (7) RCR (Cri) 3224. The Delhi High Court also considered D.C.M. Financial Services Limited (supra) and observed in paras 11, 12 and 13 as under:

"11. In DCM Financial Services Limited v. J.N. Sareen & Another, 2008 (3) RCR (Crl.) 152 post-dated cheques were issued by the Company known as M/s. International Agro Allied Products Limited. The first respondent before the Hon?ble Supreme Court resigned from the Directorship of the Company on 25th of May, 1996. One of the post-dated cheques, which was issued in April, 1995, i.e., before he resigned from the Directorship of the Company, was dated 28.1.1998. The cheque when presented in the Bank for encashment was dishonoured. The payment to the complainant was not made despite issue of Notice of Demand by it. The complaint against the first respondent before the Hon?ble Supreme Court was based on the allegation that he was the person in charge and responsible to the Company at the time when the offence was committed.

It was also alleged that the offence had been committed by the Company with

the consent and connivance of accused Nos.2 to 10, which included respondent No.1 before the Hon'ble Supreme Court. He filed an application seeking discharge, relying upon Form No.32 issued by Registrar of Companies in support of his contention that he had resigned as a Director of the Company much prior to dishonour of the cheque in question. The learned Additional Sessions Judge took note of Form No.32 and also noted that the complainant had not filed any affidavit to the effect that it had verified from the Registrar of Companies and Form No.32 filed by the accused was not genuine. A Criminal Revision Petition filed against the order of the learned Additional Sessions Judge was dismissed by the High Court. Relying upon its earlier decisions in the case of "K. Srikanth Singh v. M/s. North East Securities Limited & Another", JT 2007 (9) SC 449, the Hon'ble Supreme Court observed as under:

"Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act."

12. In the case before the Hon'ble Supreme Court, the respondent No.1 had resigned from the Directorship of the Company under intimation to the complainant and, in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company in the year 1999 when the cheque was dishonoured as he had no say in the matter that the cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioner under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy of Form 32 accepts his plea that he was not a director of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. He having resigned from the directorship much prior to even presentation of the cheque for encashment, he cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, he continued to control the affairs of the company and therefore continued to be person in charge of and responsible to the company for the conduct of its business.

13. It was also contended by the learned counsel for the complainant/respondent that the petitioner being the signatory of cheque in question, he was its drawer within the meaning of Section 138 of Negotiable Instruments Act. In my view, the contention is totally misconceived. The cheque was issued by the Company and not by the petitioner. He only signed the cheque on behalf of the Company. He does not become a drawer of the cheque merely by signing it on behalf of the company when the cheque is issued by the company in discharge of its debt or

liability and is not signed by him in his personal capacity. If the contention of the learned counsel for the complainant/respondent is accepted, even an employee of the Company, who on account of his being an authorised signatory signs a cheque issued by the Company towards discharge of the debt or other liability of the Company, would be liable to prosecution and conviction under Section 138 of Negotiable Instruments Act even after he resigns from the company and is no more in its employment. This certainly could not have been the intention of the legislature. Even the vicarious liability created under Section 138 of Negotiable Instruments Act would not be attracted in respect of a Director or an employee of the Company who resigns and severs his connections with the company, unless the complainant is able to bring his case within the purview of sub-Section 2 of Section 141 of Negotiable Instruments Act, by proving that the offence had been committed with his consent or connivance or was otherwise attributable to any neglect on his part."

73. Mr. Ponda placed strong reliance on the decision of the Supreme Court in the case of *Laxmi Dyechem v. State of Gujarat and others*, 2012 (13) SCC 375 to meet with the contention as regards the drawer of the cheque ceasing to be the Managing Director much before the blank signed cheque was filled up and presented in the bank. In *Laxmi Dyechem* (supra), the case of the appellant was that a running account was opened in the books of accounts of the appellant in the name of the respondent-company in which the value of the goods supplied was debited from time to time according to the standard accounting practise. A sum of Rs.4,91,91,035/- (Rupees Four Crore Ninety One Lac Ninety One Thousand Thirty Five only) was according to the appellant outstanding against the respondent-company in the former's books of accounts towards the supply made to the latter. The appellant's further case was that the respondent-company had issued under the signatures of its authorised signatories, several postdated cheques towards the payment of the amount aforementioned. Several of those cheques (1017) when presented were dishonoured by the bank on which the same were drawn, on the ground that the drawer's signatures were incomplete or that no image was found or that the signatures did not match. The appellant informed the respondents about the dishonour in terms of the statutory notice sent under Section 138 and called upon them to pay the amount covered by the cheques.

Manifold contentions were raised before the Supreme Court and one of those was on behalf of the signatories that the dishonour had taken place after they had resigned from their positions and that the failure of the company to honour the commitment implicit in the cheques could not be construed as an act of dishonesty on the part of the signatories of the cheques. In the peculiar facts of the case, the Supreme Court, while negating the contention, held as under:

"18?Just because the authorised signatories of the cheques have taken a different line of defence than the one taken by the company does not in our view justify quashing of the proceedings against them. The decisions of this Court in

National Small Industries Corporation Limited v. Harmeet Singh Paintal and Anr., (2010) 3 SCC 330 : (AIR 2010 SC (Supp) 569 : 2010 AIR SCW 1508) and S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr., (2005) 8 SCC 89 : (AIR 2005 SC 3512 : 2005 AIR SCW 4740) render the authorised signatory liable to be prosecuted along with the company. In the National Small Industries Corporation Limited's case (supra) this Court observed:

"19. xxxx

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

74. It is well settled that an authorised signatory is very much liable to be prosecuted along with the company for the offence under Section 138 of the N.I. Act. However, it would all depend on the facts of each case.

As discussed by me, the facts of the case in hand are all together different. I find it difficult to accept the argument of Mr. Ponda outright relying upon the decision of the Supreme Court in the case of Laxmi Dyechem (supra). So far as this issue is concerned, I have placed reliance on the decision of the Supreme Court in the case of D.C.M. Financial Services Limited (supra) and the Division Bench decisions of the Bombay High Court as well as the Delhi High Court. It appears that in Laxmi Dyechem (supra), there is no reference of the decision of D.C.M. Financial Services Limited (supra).

75. The observations of the Supreme Court in Laxmi Dyechem have to be read in the context in which they were made.

76. It is well settled that a judgment cannot be read like a Statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved in a given case, and the context wherein the observations were made by the Court while deciding the case. Observation made in a judgment, it is trite, should not be read in isolation and out of context. [See: Goan Real Estate and Construction Ltd. v. Union of India, (2010) 5 SCC 388 : (2010 AIR SCW 2671).

It is the ratio of the judgment, and not every observation made in the context of the facts of a particular case under consideration of the court, which constitutes a binding precedent. The Supreme Court in P.S. Sathappan v. Andhra Bank Ltd., AIR 2004 SC 5152 has held as follows:

"138. While analysing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.

139. A decision is an authority for the questions of law determined by it.

While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See *Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.*, AIR 2002 SC 834, *Union of India and Ors. v. Dhanwanti Devi and Ors.*, (1996) 6 SCC 44 : (1996 AIR SCW 4020), *Dr. Nalini Mahajan v. Director of Income-tax (Investigation) and Ors.*, (2003 Tax LR 18 (Del), *State of U.P. and Anr. v. Synthetics and Chemicals Ltd. and Anr.*, 1991 (4) SCC 139, *A- One Granites v. State of U.P. and Ors.*, 2001 AIR SCW 848 and *Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors.*, (2003) 2 SCC 111 : (AIR 2003 SC 511).

140 Although, decisions are galore on this point, we may refer to a recent one in *State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal and Ors.*, AIR 2004 SC 3894 wherein this Court held:

"? It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used."

77. The above now takes me to consider the case of other Office Bearers of the company who have been arrayed as accused by virtue of section 141 of the N.I. Act. As such it is not necessary for me to go into this issue in view of the discussion on other points, but there are few Non-Executive Directors and Office Bearers, like Chief Operating Officer, Chief Financial Officer, Financial Controller, nominated Directors who have been arrayed as accused since they all came into picture after the new management took over the company. Whether they could be held liable under Section 141 of the N.I. Act is the question?

Scope of section 141 of the Negotiable Instruments Act:

78. Before I proceed to consider the case of the other applicants, who have been arrayed as accused, by virtue of their vicarious liability, I propose to take note of the relevant portion of the complaint, which reads thus:

"(4) For and on behalf of accused No.1 Company, the accused No.2 had given cheque as security. In the year 2000 some cheques had arisen between the complainant firm and the accused No.2 and the accused No.1 Company did not pay legitimate amount of the complainant firm, therefore, the complainant has filed SPL. Civil Suit No.35 of 2000, 36/2000 and 37/2000 in the Civil Court at Amreli for recovery of dues, wherein the Court granted ex parte interim injunction below Ex. 5 in SPL. Civil Suit No.36 of 2000?"

"xxx xxx xxx(17)?The accused No.3 to 13 and 17 and 17 to 19 are the directors of accused No.1 company, and they are in charge of day-to-day management of affairs of accused No.1 company hence, they are also responsible persons for the management of accused No.1 company?"

"Moreover, the accused No.3 to 13 and 17 to 19 did not take proper care and caution to prevent occurrence of offence of dishonour of cheque nor did they make arrangement of money. The aforesaid cheque issued by accused No.1 company has returned/dishonoured, hence, the accused No.3 to 13 and 17 to 19 in their capacity as directors of accused No.1 have abated the commission of offence. The accused No.3 to 13 and 17 to 19 are in charge of day-to-day management of affairs of accused No.1 company. These accused persons had also attended various meetings on behalf of accused No.1 company. If the minutes of meeting Board of Directors dated 18-1-2010 are considered, then it is clear that there is mention therein about the dues of complainant and the cheque given for payment thereof. Therefore, it is clear that the accused No.3 to 13 and 17 to 19 were aware about the issuance of cheque by accused No.1."

79. Two classes of persons are liable to be prosecuted under Section 138. First, those persons who are in charge of and responsible to the company for the conduct of its business. They are per se responsible. In the second category comes those persons with whose consent or connivance the offence can be attributed.

When the offence under Section 138 of the Negotiable Instruments Act has been committed by 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. " (vide Section 141 of the Negotiable Instruments Act).

In *Anil Hada v. Indian Acrylic Ltd.*, (2000) Cri. LJ 373 (SC) : (2001) 1 SCC 1 it has been pointed out that three categories of persons can be discerned as brought within the purview of the penal liability, through the legal fiction envisaged in Section 141 of the Negotiable Instruments Act. They are:

- (1) The company which committed the offence.
- (2) Every person who was in-charge of and responsible to the company for the conduct of the business of the company.
- (3) Any other person who is a director or a manager or a secretary or any officer of the company with whose connivance or with whose neglect the company has committed the offence.

Followed in *M/s. B.S.I. Ltd. v. Gift Holdings Pvt Ltd.*, 2000 Cr. LJ 1424 : AIR 2000 SC 926

The Apex Court in the said case of *Anil Hada* further explaining the law as to the

liability of the company and its directors, for committing offence of dishonour of cheque, has held that normally an offence can be committed by human beings who are natural persons. Such offence can be tried according to the procedure established by law. But there are offences which could be attributed to the juristic persons also. If the drawer of a cheque happens to be a juristic person like a body corporate it can be prosecuted for the offence under Section 138 of the Act. Now there is no scope for doubt regarding that aspect in view of the clear language employed in Section 141 of the Act. In the expanded ambit of the word "company" even firms or any other associations of persons are included and as a necessary adjunct thereof a partner of the firm is treated as a director of that company.

Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even a firm, prosecution proceedings can be initiated against such drawer. In this context the phrase "as well as" used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words "shall also" in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the Legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons would become liable for the offence.

Section 141 (1) of the Negotiable Instruments Act would provide that 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. Section 141(2) provides, where any offence 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. So, the joint reading of the sub-sections (1) and (2) of Section 141 would make it clear that both the company as well as other persons who are connected and responsible for the conduct of the business of the company are liable to be proceeded.

Where offence under Section 138 of Negotiable Instruments Act is committed by a company, the complaint must prima facie disclose the act committed by the Directors from which a reasonable inference of their vicarious liability can be drawn. *Ashok Muthanna v. Exports Finance Ltd*, (2001) 2 Crimes 602 (Mad).

?Vicarious liability? in legal parlance means the liability of the master for the acts

of the servant or agent done in the course of employment. Section 141 makes a natural person vicariously liable for the contravention committed by a company provided such person has some nexus with the crime either because of his connivance with it or due to by criminal negligence which had resulted in its commission. No doubt the law makes the principal liable for the acts of his agent, but unless there is some absolute duty cast upon the principal, he cannot be held responsible for the acts of his agent. *State v. Sheo Prasad*, AIR 1956 All. 610.

80. In *K.K. Ahuja* (supra), the Supreme Court while explaining the vicarious liability of persons of the company observed as under:

"16. Having regard to section 141, when a cheque issued by a company (incorporated under the Companies Act, 1956) is dishonoured, in addition to the company, the following persons are deemed to be guilty of the offence and shall be liable to be proceeded against and punished :

- (i) 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;
- (ii) any Director, Manager, Secretary or other officer of the company with whose consent and connivance, the offence under Section 138 has been committed; and
- (iii) any Director, Manager, Secretary or other officer of the company whose negligence resulted in the offence under Section 138 of the Act, being committed by the company.

While liability of persons in the first category arises under sub-section (1) of Section 141, the liability of persons mentioned in categories (ii) and (iii) arises under sub-section (2). The scheme of the Act, therefore is, that a person who is responsible to the company for the conduct of the business of the company and who is in charge of business of the company is vicariously liable by reason only of his fulfilling the requirements of sub- section (1). But if the person responsible to the company for the conduct of business of the company, was not in charge of the conduct of the business of the company, then he can be made liable only if the offence was committed with his consent or connivance or as a result of his negligence.

17. The criminal liability for the offence by a company under Section 138, is fastened vicariously on the persons referred to in sub-section (1) of Section 141 by virtue of a legal fiction. Penal statutes are to be construed strictly. Penal statutes providing constructive vicarious liability should be construed much more strictly. When conditions are prescribed for extending such constructive criminal liability to others, courts will insist upon strict literal compliance. There is no question of inferential or implied compliance. Therefore, a specific averment complying with the requirements of Section 141 is imperative. As pointed out in *K. Srikanth Singh v. North East Securities Ltd*, 2007 (12) SCC 788 the mere fact that at some point of time, an officer of a company had played some role in the

financial affairs of the company, will not be sufficient to attract the constructive liability under Section 141 of the Act.

18. Sub-section (2) of section 141 provides that a Director, Manager, Secretary or other officer, though not in charge of the conduct of the business of the company will be liable if the offence had been committed with his consent or connivance or if the offence was a result of any 12 negligence on his part. The liability of persons mentioned in sub-section (2) is not on account of any legal fiction but on account of the specific part played-consent and connivance or negligence. If a person is to be made liable under sub-section (2) of section 141, then it is necessary to aver consent and connivance, or negligence on his part.

19. This takes us to the next question under sub-section (1) of section 141, as to (i) who are the persons who are responsible to the company for the conduct of the business of the company, and (ii) who could be said to be in charge and was responsible to the company for the conduct of the business of the company. The words "every person who, at the time of the offence was committed, was in charge of, and was responsible for the conduct of the business of the company" occurs not only in section 141(1) of the Act but in several enactments dealing with offences by companies, to mention a few - section 278 B of the Income Tax Act, 1961 Section 22C of Minimum Wages Act, 1948 Section 86A of the Employees State Insurance Act, 1948 Section 14A of Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 29 of Payment of Bonus Act, 1965 Section 40 of The Air 13 (Prevention and Control of Pollution) Act, 1981 and Section 47 of Water (Prevention and Control of Pollution) Act, 1974. But neither section 141(1) of the Act, nor the *pari materia* provisions in other enactments give any indication as to who are the persons responsible to the company, for the conduct of the business of the company. Therefore, we will have to fall back upon the provisions of Companies Act, 1956 which is the law relating to and regulating companies.

20. Section 291 of the said Act provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do. A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is *prima facie* in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business.

21. A combined reading of Section 5 and 291 of Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of section 2 of that Act would show that the following persons are considered to be the persons who are

responsible to the company for the conduct of the business of the company : --

(a) the managing director(s);

- (b) the whole-time director(s);
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and
- (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

It follows that other employees of the company, cannot be said to be persons who are responsible to the company, for the conduct of the business of the company.

22. Section 141 uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company". It is evident that a person who can be made vicariously liable under sub-section (1) of Section 141 is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in *Girdhari Lal Gupta v. D.N. Mehta*, 1971 (3) SCC 189 followed in *State of Karnataka v. Pratap Chand*, 1981 (2) SCC 335 and *Katta Sujatha v. Fertiliser & Chemicals Travancore Ltd.*, 2002 (7) SCC 655. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

23. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under sub-section (1) of section 141 does not arise. To put it differently, to be vicariously liable under sub-section (1) of Section 141, a person should fulfil the legal requirement of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfil the factual requirement of being a person in charge of the business of the company.

24. Therefore, the averment in a complaint that an accused is a director and that he is in charge of and is responsible to the company for the conduct of the business of the company, duly affirmed in the sworn statement, may be sufficient for the purpose of issuing summons to him. But if the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company?' (listed in para 14 above), then merely by stating that 'he was in charge of the business of the company?' or by stating that 'he was in charge of the day to day management of the company?' or by stating that he was in charge of, and was responsible to the company for the conduct of the business of the company?', he cannot be made vicariously liable under section 141(1) of the Act.

25. It should, however, be kept in view that even an officer who was not in charge of and was responsible to the company for the conduct of the business of the company can be made liable under sub-section (2) of Section 141. For making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.

26. Another aspect that requires to be noticed is that only a Director, Manager, Secretary or other officer can be made liable under sub-section (2) of section 141. But under sub-section (1) of section 141, it is theoretically possible to make even a person who is not a director or officer, liable, as for example, a person falling under category (e) and (f) of section 5 of Companies Act, 1956. When in SMS Pharma (I), this Court observed that 'conversely, a person not holding any office or designation in a company may be liable if he satisfies the requirement of being in charge of and responsible for conduct of the business of the company?', this Court obviously had in mind, persons described in clauses (e) and (f) of section 5 of Companies Act. Be that as it may.

27. The position under section 141 of the Act can be summarised thus :

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

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent,

connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of section 141.

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

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

28. If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

29. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled."

81. In view of the aforesaid dictum of law explained by the Supreme Court, the other accused who have been arrayed as accused by virtue of Section 141 of the N.I. Act could not be held liable. I take notice of the fact that some of the accused are Office Bearers, like the Chief Operating Officer, Chief Financial Officer, Financial Controller. Some of the Directors are nominated Directors and also Non- Executive.

82. I am also not impressed by the argument of Mr. Ponda that as the inherent powers of this Court under Section 482 of the Cr.P.C. are circumscribed, and should be exercised only in cases where the Court finds an abuse of the process of law, all the applications deserve to be outright rejected, leaving all the legal

contentions open to be canvassed before the trial Court.

83. In *Harshendra Kumar D. v. Rebatilata Koley etc*, 2011 Criminal Law Journal 1626 the Supreme Court held as under:

"21 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 cognisance, 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.

22. 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."

84. I take notice of the fact that in complaints filed for the offence under Section 138 of the N.I. Act, all the Directors of the company and even the Office Bearers are routinely being proceeded against by invoking the provisions under Section 141 of the N.I. Act by glibly repeating the words in the section that certain Director "was in-charge of and responsible to the company for the conduct of business of the company". It is necessary to emphasis that Section 141 of the N.I. Act where an offence under Section 138 of the N.I. Act has been committed by a company, the complainant is required to give a serious thought and make enquiries and ascertain the fact as to whether a particular Director was in-charge of and responsible to the affairs and conduct of the business of the company. Routinely roping in all the Directors by merely repeating the words used in Section 141 of the N.I. Act without ascertaining the facts is a serious matter which has to be deprecated.

85. Some of the applicants before me are indisputably non-executive Directors of the company. A non-executive Director is no doubt a custodian of the governance of the company, but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. (See: *Pooja Ravinder Devidasani v. State of Maharashtra*, AIR 2015 SC 675).

86. In Pooja Ravinder Devidasani (supra), the Supreme Court made the following observations in para - 30, which I deem fit to refer and rely upon :

"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 cognisance 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.

87. A Division Bench of this Court (to which I was a party) in the case of Ionic Metalliks and others [Special Civil Application No.645 of 2014 decided on 9th September 2014], while examining the challenge to the legality and validity of a master circular dated 2nd July 2012 issued by the Reserve Bank of India in respect of "wilful defaulters" had an occasion to consider the categories of Directors as classified under the Companies Act. I may quote the following from the judgment referred to above:

"The circular speaks about director and independent and nominee director. The classification of the directors under the Companies Act is as under :

A. Classification under the Companies Act

Categories of Directors

The Companies Act refers to the following two specific categories of Directors:

1. Managing Directors; and
2. Whole-time Directors.

A Managing Director is a Director who has substantial powers of management of the affairs of the company subject to the superintendence, control and direction of the Board in question. A Whole-time Director includes a Director who is in the whole-time employment of the company, devotes his whole-time of working hours to the company in question and has a significant personal interest in the company as his source of income.

Every public company and private company, which is a subsidiary of a public company, having a share capital of more than Five Crore rupees (Rs. 5,00,00,000/-) must have a Managing or Whole-time Director or a Manager.

Further classification of Directors

Based on the circumstances surrounding their appointment, the Companies Act recognises the following further types of Directors:

1. First Directors: Subject to any regulations in the Articles of a company, the subscribers to the Memorandum of Association, or the company's charter or constitution ("Memorandum"), shall be deemed to be the Directors of the company, until such time when Directors are duly appointed in the annual general meeting ("AGM").

2. Casual vacancies: Where a Director appointed at the AGM vacates office before his or her term of office expires in the normal course, the resulting vacancy may, subject to the Articles, be filled by the Board. Such person so appointed shall hold office up to the time which the Director who vacated office would have held office if he or she had not so vacated such office.

3. Additional Directors: If the Articles specifically so provide or enable, the Board has the discretion, where it feels it necessary and expedient, to appoint Additional Directors who will hold office until the next AGM. However, the number of Directors and Additional Directors together shall not exceed the maximum strength fixed in the Articles for the Board.

4. Alternate Director: If so authorised by the Articles or by a resolution passed by the company in general meeting, the Board may appoint an Alternate Director to act for a Director ("Original Director"), who is absent for whatever reason for a minimum period of three months from the State in which the meetings of the Board are ordinarily held. Such Alternate Director will hold office until such period that the Original Director would have held his or her office. However, any provision for automatic re- appointment of retiring Directors applies to the Original Director and not to the Alternate Director.

5. ?Shadow? Director: A person, who is not appointed to the Board, but on whose directions the Board is accustomed to act, is liable as a Director of the company, unless he or she is giving advice in his or her professional capacity. Thus, such a ?shadow? Director may be treated as an ?officer in default? under the Companies Act.

6. De facto Director: Where a person who is not actually appointed as a Director, but acts as a Director and is held out by the company as such, such person is considered as a de facto Director. Unlike a ?shadow? Director, a de facto Director purports to act, and is seen to the outside world as acting, as a Director of the company. Such a de facto Director is liable as a Director under the Companies Act.

7. Rotational Directors: At least two-thirds of the Directors of a public company or of a private company subsidiary of a public company have to retire by rotation and the term "rotational Director" refers to such Directors who have to retire (and may, subject to the Articles, be eligible for re-appointment) at the end of his or her tenure.

8. Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the

Central Government in case of oppression or mismanagement. The extent of a nominee Director's rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interests of their nominators, but must act in the best interests of the company and its shareholders as a whole. The fixing of liabilities on nominee Directors in India does not turn on the circumstances of their appointment or, indeed, who nominated them as Directors. Chapter 4 and Chapter 5 that follow set out certain duties and liabilities that apply to, or can be affixed on, Directors in general. Whether nominee Directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case.

B. Classification under the Listing Agreement

The Securities Contracts (Regulation) Act, 1956, read with the rules and regulations made thereunder, requires every company desirous of listing its shares on a recognised Indian stock exchange, to execute a listing agreement ("Agreement") with such Indian stock exchange. This Agreement is in a standard format (prescribed by the Securities Exchange Board of India ("SEBI")), as amended by SEBI from time to time. The Agreement provides for the following further categories of Directors:

Categories under Listing Agreement

1. Executive Director;
2. Non-executive Director; and
3. Independent Director.

Executive and non-executive Directors

An Executive Director can be either a Whole-time Director of the company (i.e., one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e., one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. Clause 49 of the Agreement prescribes that the Board shall have an optimum combination of executive and non-executive Directors, with not less than fifty percent (50%) of the Board comprising non-executive Directors. Where the Chairman of the Board is a non-executive Director, at least one-third of the Board should comprise independent Directors and in case he is an

executive Director, at least half of the Board should comprise independent Directors. Where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent Directors.

Independent Directors

The Agreement defines an "Independent Director" as a non- executive Director of the company who:

- a. apart from receiving Director's remuneration, does not have material pecuniary relationships or transactions with the company, its promoters, its Directors, its senior management, or its holding company, its subsidiaries, and associates which may affect independence of the Director;
- b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;
- c. has not been an executive of the company in the immediately preceding three (3) financial years;
- d. is not a partner or an executive or was not a partner or an executive during the preceding three (3) years, of any of the following:
 - i. the statutory audit firm or the internal audit firm that is associated with the company, and ii. the legal firms and consulting firms that have a material association with the company;
- e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect the independence of the Director; or f. he is not a substantial shareholder of the company, i.e., owning two percent (2%) or more of the block of voting shares; and g. he is not less than twenty-one (21) years of age.

Nominee directors appointed by an institution that has invested in, or lent money to, the company are also treated as independent Directors."

88. The following observations of the Supreme Court, made in the case of M/s. Pepsi Foods Ltd v. Special J.M., AIR 1998 SC 128 should be kept in mind by the Magistrates, when they decide to summon a director or partner of a company or firm to face trial under Section 138 of the Negotiable Instruments Act.

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. 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. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

"This has assumed all the more significance in view of the recent trend found that in respect of offences under Section 138 of the Negotiable Instruments Act alleged against a company, all the Directors of the company are being routinely roped in as accused with a statement that they are in-charge of and responsible to the business of the company as required under Section 141 of the Negotiable Instruments Act. In fact, it has been seen that some times, even the nominee Directors nominated by the financial agencies like IDBI have also been arrayed as accused for the offence committed by the Company on the Board of which they have been nominated. The need to carefully scrutinise the material and if necessary to question the complainant as to the basis for implicating an accused as observed by the Supreme Court in the above cited judgment cannot be ignored.

Considering this, it appears necessary that at any rate even if on the basis of formal allegations in the complaint such Directors have been summoned to face the trial, they must be afforded an opportunity at least at the earliest stage to show with reference to the material which may be placed before the Court that they are not in-charge of and are not responsible to the business of the company and on that basis seek their discharge from the array of the accused. In such cases, I think it will be a great injustice if they are asked to go through the ordeal of the trial and plead their defence only during the trial. *Om Prakash Agrawal v. State of A.P.*, 2001 Cri. L.J. 253 (para 13) A.P.

89. In *N.K. Wahi v. Shekhar Singh and others*, 2007 (9) SCC 481 the Supreme Court, after considering its earlier judgment on the point in question, held as under:

"7. This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.

8. To launch a prosecution, therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the

company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the Court can always come to a conclusion in facts of each case. But still in the absence of any averment or specific evidence the net result would be that complaint would not be entertainable."

90. In *Gunmala Sales Private Limited* (supra), the Supreme Court, after an exhaustive review of all its earlier decisions on Section 141 of the N.I. Act, summarised its conclusion as under:

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

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

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

(d) No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances

of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

91. In view of the above, there is no cogent material on record to fasten any vicarious liability so far as the other accused are concerned who are Non-Executive Directors including the Office Bearers concerned with the Accounts Department of the company.

92. The plain reading of Section 138 of the N.I. Act would clearly go to show that by reason thereof, a legal fiction had been created. A legal fiction, as is well-known, although is required to be given full effect, yet has its own limitations. It cannot be taken recourse to for any purpose other than the one mentioned in the statute itself. Section 138 of the Act moreover provides for a penal provision. A penal provision created by reason of a legal fiction must receive strict construction. Such a penal provision, enacted in terms of the legal fiction drawn, would be attracted when a cheque is returned by the bank unpaid. Before a proceeding thereunder is initiated, all the legal requirements therefor must be complied with. The Court must be satisfied that all the ingredients of commission of an offence under the said provision have been complied with. [See : Raj Kumar Khurana v. State of (NCT of Delhi) and another, (2009) 6 SCC 72

93. Before concluding, I may only say that, whenever a blank cheque or postdated cheque is issued, a trust is reposed that the cheque will be filled in or used according to the understanding or agreement between the parties. If there is a prima facie reason to believe that the said trust is not honoured, then the continuation of prosecution under Section 138 of the N.I. Act would be the abuse of the process of law. It is in the interest of justice that the parties in such cases are left to the civil remedy.

94. In my view, having regard to the peculiar facts and circumstances of the case, as narrated above, all the petitions succeed and are allowed. The order of the issuance of the process under Section 138 of the N.I. Act is hereby quashed. Rule is made absolute accordingly.

95. It is clarified that the three civil suits, which are pending as on date, in the Court of the learned Civil Judge, Senior Division, Amreli, shall proceed further in accordance with law. The learned Civil Judge is directed to take up all the three civil suits for hearing and see to it that they are disposed of with the judgment within a period of one year from the date of receipt of this order. It is further clarified that the three civil suits shall be decided strictly on the basis of the evidence that may be led oral as well as documentary by both the sides, and without being influenced, in any manner, by any of the observations made in this judgment and order. This judgment and order is only confined so far as the liability of the accused applicants under Section 138 of the N.I. Act is concerned. It has nothing to do so far as the other civil liabilities are concerned.