

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 972 OF 2014

Rakesh P. Gupta	... Petitioner
Versus	
The State Trading Corporation of (India) Limited and others.	... Respondents

**WITH
CRIMINAL WRIT PETITION NO. 973 OF 2014**

Rakesh P. Gupta	... Petitioner
Versus	
The State Trading Corporation of (India) Limited and others	... Respondents

**WITH
CRIMINAL WRIT PETITION NO. 834 OF 2016**

Shishir Prabhakar Dharkar	... Petitioner
Versus	
State of Maharashtra and another	... Respondents

**WITH
CRIMINAL WRIT PETITION NO. 835 OF 2016**

Shishir Prabhakar Dharkar	... Petitioner
Versus	
State of Maharashtra and another	... Respondents

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Mr. Chetan Akerkar for Petitioner in Criminal WP No.972 of 2014 and Criminal WP No.973 of 2014.

Mr. Aabad Ponda a/w Abhay Dhadiwal i/b A.S. Khan & Associates for Petitioner in Criminal WP No.834 of 2016 and Criminal WP No.835 of 2016.

Mr. Benny Joseph i/b BJ Law Offices LLP R-1 in Criminal WP No.972 of 2014 and Criminal WP No.973 of 2014 and R-2 in Criminal WP No.834 of 2016 and Criminal WP No.835 of 2016.

Mr. Y. M. Nakhwa, APP for the State.

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CORAM : PRAKASH D. NAIK, J.

RESERVED ON : 06th JULY, 2018.

PRONOUNCED ON : 10th JANUARY, 2019.

JUDGMENT :

1. The petitioners in all these petitions have invoked Article 227 of the Constitution of India and inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 challenging the order issuing process and the impugned proceedings initiated by respondent No.1 for the offence under Section 138 of the Negotiable Instruments Act.

2. The petitioners in Writ Petition Nos. 972 of 2014 and 834 of 2016 are impleaded as accused No. 4 and 2 respectively in Criminal Case No. 5836/SS/2015 pending before the Court of Metropolitan Magistrate, 23rd Court Esplanade, Mumbai, whereas

the petitioners in Writ Petition No. 973 of 2014 and Wrti Petition No. 835 of 2016 are arrayed as accused No. 4 and 2 respectively in Criminal Case No.5835/SS/2015 pending in the same Court.

3. Both the complaints were filed for the offence under Section 138 of the Negotiable Instruments Act. The complainant in Criminal Case No.5836/SS/2015 has alleged that accused No.1 is a Private Limited Company and accused Nos. 2 to 4 are the Directors of accused No.1 Company. They are In-charge of and responsible for the conduct of day to day affairs of the accused No.1 Company. In 2006, accused No.1 approached the complainant to provide its cooperation for promotion of the export of Gold jewellery, which has been ordered by certain prospective overseas companies. The accused No.1 accepted to manufacture, supply and ship gold jewellery to the said prospective overseas companies, subject to terms and conditions as per export order procured to be procured in near future. Pursuant thereto accused No.1 executed agreement dated 30th May, 2007 in favour of complainant, whereby accused No.1 Company agreed to export gold jewellery through complainant to Foreign Buyers. Both the parties agreed to abide by terms and

conditions of the agreement. In terms of conditions of agreement dated 30th May, 2007, the accused No.1 authorised the complainant to collect the payment of export proceeds from the Foreign Buyers. It was also agreed that in the event of failure or default of the foreign buyer in payment of export proceeds, the accused No.1 Company to be liable to make payment of the dues of the complainant arising out of export transactions. Accordingly, from time to time complainant exported gold jewellery on behalf of accused No.1 Company to the foreign buyers. Accused No.1 issued cheques along with letter dated 5th November, 2009. In part discharge of its liability with assurances that the same will be realised as and when deposited. The Cheque No.767678 dated 9th November, 2009 was issued for an amount of Rs.6,73,82,053/-. Cheque No.767676 dated 20th November, 2009 was issued for an amount of Rs.1,85,77,745/- and Cheque No.767677 dated 24th November, 2009 was issued for an amount of Rs.15,60,63,799/-. The said cheques when presented for realisation were dishonored on 18th November, 2009, 21st November, 2009 and 25th November, 2009 respectively with reasons insufficient funds. The complainant issued statutory notice dated 15th December, 2009

calling upon accused Nos. 1 to 4 to make the payment. Although notice was duly served, the accused Company failed to make the payment of the amount due under the dishonoured cheques. Accused No.2 (Petitioner in Criminal Writ Petition No. 834 of 2016) replied to the statutory notice contending that he has resigned from Directorship of accused No.1 Company. Accused No.2 is the signatory to the agreement dated 30th May, 2007 executed between the complainant Company and the accused Company in pursuance to Board resolution dated 24th May, 2007 and liable to be protected in the present complaint. The complaint was filed in the year 2010. Process was issued under Section 138 of the Negotiable Instruments Act, by order dated 13th August, 2010.

4. The case of the complainant in Criminal Case No.5835/SS/2015 is that accused No.1 is a Company and accused Nos. 2 to 4 are its Directors. The transaction in this complaint also arises out of agreement dated 30th May, 2007. Complainant and accused are same as in aforesaid complaint. Accused Nos. 2 to 4 are the Directors of accused No.1 who were and are In-charge of and are responsible for the conduct of day to day affairs of the

accused No.1 Company. The petitioners are impleaded as accused Nos. 2 and 4 in the said complaint. Accused No.1 issued Cheque No.767679 dated 16th December, 2009 for an amount of Rs.77,33,046/-. The said cheque was dishonored on 18th December, 2009 with reasons "*opening balance insufficient*". The complainant forwarded statutory notice dated 11th January, 2010 calling upon accused Nos. 1 to 4 to make the payment. The notice was served upon the accused. Despite notice, the accused have neglected to make the payment. Accused No.2 replied to the statutory notice and contended that he has resigned from Directorship of accused No.1 Company. Complaint was filed on 23rd February, 2010. Process was issued for the offence under Section 138 of the Negotiable Instruments Act vide order dated 7th October, 2010.

5. The petitioner in Criminal Writ Petition Nos. 834 of 2016 and 835 of 2016 challenged the order issuing process before the Sessions Court by preferring Criminal Revision Application No.1175 of 2015 and Criminal Revision Application No.1176 of 2015. The said applications were rejected by order dated 25th January, 2016.

6. Mr. Akerkar, learned Advocate for the petitioner in Criminal Writ Petition No. 972 of 2014 and Criminal Writ Petition No.973 of 2014 submitted that the learned Magistrate has mechanically issued process against the petitioner. He is not signatory to the cheque. He is not In-charge of day to day affairs of the accused No.1 Company. The complaint does not spell out requisite averments to invoke Section 141 of the Negotiable Instruments Act. The petitioner was the salaried nominal Director of the accused No.1 Company. Merely being Director of the Company the petitioner cannot be fastened with criminal liability, unless it is shown that he was involved in day to day affairs and was responsible to business of accused No.1 Company. He was appointed on 25th June, 2007 on fixed salary and duties and functions of the petitioner were explained to him. He was supposed to work under the directions of other Directors. Accused No.3 had forwarded letter dated 8th October, 2010. It was mentioned that the said petitioner and one Asif Syed were Directors of the Company prior to take over by the present Directors and he has no personal holding in the said Company and was a Director on a professional basis. It is submitted that the

complaint does not spell out the role played by the said petitioner and thus he cannot be vicariously liable for the acts of accused No.1 Company. Learned Counsel for the said petitioner relied upon the following decisions :

(i) Pooja Ravinder Devidasani Vs. State of Maharashtra and another¹

(ii) National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another²

7. Learned Counsel Mr. Ponda appearing for the petitioner in Criminal Writ Petition No. 834 of 2016 and Criminal Writ Petition No.835 of 2016 submitted that the learned Magistrate has mechanically issued process without applying mind to the facts. It is submitted that at the time of commission of offence the petitioner was not In-charge and responsible for day to day affairs of the Company. The petitioner has resigned from the Directorship of the accused No.1 Company on 30th June, 2007 and Form-32 in that regard was filed. It is submitted that statutory notice was replied by the petitioner stating that he has resigned from accused No.1 Company. The reply was received by the complainant. There

1 (2014) 16 SCC 1.

2 (2010) 3 SCC 330.

is a reference of the said reply in the complaint, however in spite of that the petitioner was impleaded as accused in the complaint. It is submitted that the address of the Company had changed after the petitioner has resigned. The annual returns of the Company which were brought on record by the complainant by filing affidavit-in-reply do not show involvement of the petitioner. The names of the other Directors are reflected in the annual returns. It is submitted that the complainant in its reply have contended that the petitioner had moved special notice pursuant to Section 284 of the Companies Act as a shareholder of the Company for removal of Director from the Board of Directors on 10th August, 2010. It is submitted that Section 284 of the Companies Act relates to removal of Directors. Sub-Section 2 of Section 284 contemplates that special notice shall be required of any resolution to remove a Director under this Section or to appoint somebody instead of Director so removed at the meeting at which he is removed. Thus, it is submitted that merely on account of issuing such notice in accordance with Section 284 of the Companies Act, it does not make the petitioner director at that point of time and it cannot be said that the petitioner has participated in the day to day affairs of

the Company. There is nothing on record to show that the petitioner was responsible for the day to day affairs of the Company. Reliance is placed on Form-32 which is annexed to the petition. The genuineness of Form-32 is not doubted. It is an uncontroverted document and hence the same ought to be considered and proceedings against the petitioner should be quashed and set aside. It is further submitted that the wife of the petitioner has also resigned which is fortified by Form-32 with regard to her resignation. It is submitted that Form 20-B relating to financial year of 2009 mentions details of Directors, Managing Director etc. which do not refer to petitioners name which shows that he had ceased to be Director of accused No.1 Company. The order of such court shows non application of mind.

8. Learned Counsel for the petitioner in the aforesaid petition relied upon the following decisions :

(i) *Anita Malhotra Vs. Apparel Export Promotion Council and another*³

(ii) *Gunmala Sales Private Limited Vs. Anu Mehta and others*⁴

³ (2012) 1 SCC 520.

⁴ (2015) 1 SCC 103.

9. Learned Counsel for the respondent Mr. Joseph submitted that there are sufficient averments in the complaint showing involvement of the accused. It is submitted that it is not necessary to mention further details with regard to the involvement of the accused in the complaint as the averments in the complaint are sufficient to invoke Section 141 of the Negotiable Instruments Act. The order issuing process is passed in the year 2010 and the petitioner in Criminal Writ Petition No. 972 of 2014 and Criminal Writ Petition No.973 of 2014 has approached this Court belatedly. The petitioner in the other petitions viz Criminal Writ Petition No. 834 of 2016 and Criminal Writ Petition No.835 of 2016 had preferred revision application before the Sessions Court which were rejected by assigning cogent reasons. It is submitted that the name of the petitioner in Criminal Writ Petition No.972 of 2014 and Criminal Writ Petition No.973 of 2014 is appearing in the list of signatories in the website of Ministry of Corporate Affairs (MCA), even today and contentions that he is not involved in transaction is absolutely incorrect and baseless. The pleadings and documents filed by him proves that he has siphoned of money by

opening account in the name of accused No.1 Company. The reliance is placed on the print out of the MCA website showing the name of the said petitioner in the list of various signatories. It is submitted that the averments made in paragraphs 2, 7, 10 and 11 of both the complaints shows that the said petitioner was In-charge and responsible for the conduct of the day to day affairs of respondent No.2 Company. He is involved in the transaction at the material time and continued to be Director of accused No.1 Company. The said petitioner stood as guarantor to the transaction by executing personal guarantee dated 24th July, 2007 thereby guaranteeing the payment of the amount as stated in the agreement for guarantee dated 24th July, 2007. The said petitioner had agreed under the agreement for guarantee to make payment in the event of any default or failure on the part of respondent No.2 Company forthwith on receiving payment raised from the complainant Company. In discharge of liability the accused No.1 Company has issued cheques which were dishonored on account of insufficient funds.

10. Learned Counsel for the respondent further submitted that the petitioner in Criminal Writ Petition Nos. 834 and 835 of 2016

is not entitled for any relief. The contentions raised by him in the petition are based on disputed question of facts. It is submitted that he was 100% shareholder. He had issued notice under Section 284 of the Companies Act for removal of the Director. He was the sole owner of the Company. Form-32 is doubtful. The accused No.1 was working from his premise. The complainant has filed reply opposing the reliefs prayed in the petition. It is submitted that the aforesaid petitioner was signatory to the agreement. He had forwarded letter dated 20th August, 2009 addressed to the complainant wherein it was stated that he has resigned from the Board of Directors from 6th August, 2007 and since transfer of the Company he is not concerned whatsoever with affairs of accused No.1 Company. Whereas in the reply to the statutory notice it is stated that he has resigned from Directorship on 30th June, 2007. The petitioner has executed agreement dated 30th May, 2007 and pursuant to the said agreement the petitioner and other Directors had agreed to abide by the terms and conditions of the agreement dated 30th May, 2007. He was fully involved in the transaction by signing and executing of the said agreement dated 30th may, 2007 under which the liability is

accrued to the accused Company and the subject cheques were issued in pursuant thereof. Thus, the petitioner was managing the day to day affairs of the accused Company. He has attended several meetings for and on behalf of accused Company with representative of respondent No.2 Company from time to time. It is submitted that the order of process has been challenged after lapse of two years. The petitioner was controlling stake in the Company whereby he was managing the affairs of the Company and had a great control over operations and business transactions of the Company. He had been manipulating the equity share holdings. The petitioners Company had filed separate Form-20B in the year 2010 with the Registrar of the Companies. The first Form-20B was signed on 30th September, 2010, in which Mr. Rahul Bhomavat has been shown as possessing 81000 shares and his wife possessing 9000 equity shares in the Company. There is direct nexus between the Company and petitioner as he has a controlling stake in the Company and controls the transactions and operations of the Company. The petitioner by issuing notice dated 10th August, 2010 has stated that he is shareholder of 45000 shares. The said notice indicates that it is issued under Section

284 of the Companies Act with intention to propose the resolution at the general meeting of the Company to be held on 2nd September, 2010. It was proposed that Rahul Bhomavat be removed from the post of Additional Director who was ultimately removed by resolution dated 11th August, 2010. It is submitted that the Petitioner has mischievously resigned from the accused Company and thereafter transferred his and his wife's shares into the name of other persons. The petitioner had filed Chamber Summons in Suit No.2600 of 2012 whereby he had pleaded that he is not shareholder of Company of which Chamber Summons was rejected. Respondent No.2 had filed reply to the said Chamber Summons annexing relevant documents showing that the petitioner was In-charge and managing day to day affairs of accused No.1 Company. It is submitted that the complainant had filed Company Petition No. 37 of 2012 against accused No.1 Company in which order dated 29th February, 2016 was passed and the Company was ordered to be wound up by appointing Official Liquidator. The Liquidator in its report dated 17th June 2016 has submitted that the registered office of the premises of the Company has been sold to the petitioner and his wife,

however the same has not been transferred by the said society and the premises stands in the name of the Company. It was also stated in the said report that there is a deed of gift dated 21st August, 2010 entered between the petitioner as donor and his wife as donee wherein the petitioner has relinquished his share in favour of wife by gifting. The petitioner was instrumentally misappropriating the funds of the accused No.1 Company. The petitioner being Director of the Company tried to liquidate the assets into his name and name of his wife by executing agreement for sale. He had executed gift-deed in the name of his wife with intent to deceive the creditors of the Company by fabricating documents to siphon. It is submitted that the complainant is not admitting the resignation of the petitioner. A document is created with *mala-fide* intention to absorb and escape from all the liabilities. It is submitted that the issues raised by the petitioner can be agitated at the time of trial and the same cannot be considered at this stage.

11. The learned Counsel for the respondent relied upon the following decisions :

- (i) *Gunmala Sales Pvt. Ltd. Vs. Anu Mehta and others*⁵
- (ii) *Standard Chartered Bank Vs. State of Maharashtra and others*⁶

12. The petitioner in Criminal Writ Petition No. 972 of 2014 and Criminal Writ Petition No.834 of 2016 are prosecuted for the offence under Section 138 of the Negotiable Instruments Act vide C.C. No.5836/SS/2015 whereas the petitioners in Criminal Writ Petition No.973 of 2014 and Criminal Writ Petition No.835 of 2016 are prosecuted for the offence under Section 138 of the Negotiable Instruments Act vide C.C. No.5835/SS/2015.

13. That the impugned complaint viz C.C. No.5836/SS/2015 was filed by the complainant on 1st February, 2010. In paragraph 2 of the said complaint it is stated that accused No.1 viz M/s. Space Mercantile Company Pvt. Ltd. is a Company incorporated under the provisions of the Companies Act and accused Nos. 2 to 4 are Directors of accused No.1 Company who were and are In-charge of and are responsible for the conduct of day to day affairs of accused No.1 Company. The present offence was committed by accused No.1 within the knowledge, consent and in connivance of

⁵ (2015) 1 SCC 103.

⁶ (2016) 6 SCC 62.

accused Nos. 2 to 4 who are fully responsible for the offence and are therefore jointly and severally liable to be prosecuted and punished. The petitioners in Criminal Writ Petition No.972 of 2014 and Criminal Writ Petition No. 834 of 2016 were impleaded as accused Nos. 2 and 4 respectively. The contention of accused No.4 is that he is not signatory to the cheque, not concerned with day to day affairs, not In-charge and responsible for business of accused No.1 Company and he was nominal Director appointed on the basis of salary. It was also contended that there are no sufficient averments in the complaint to invoke Section 141 of the Negotiable Instruments Act. The complaint viz., C.C.No.5836/SS/2015 further states that in the year 2006 the accused No.1 Company approached complainant to provide of its cooperation for permitting export of Gold jewellery which has been ordered by certain prospective overseas companies. The accused No.1 Company has accepted to manufacture, supply and ship the Gold jewellery to prospective overseas companies. The accused No.1 executed agreement dated 30th May, 2007 in favour of complainant. The accused No.1 issued cheques along with letter dated 5th November, 2009 in part discharge of liability with

assurances that the same will be realised. The cheques dated 9th November, 2009, 20th November, 2009 and 24th November, 2009 for amount of Rs.6,73,82,053/-, Rs.1,85,77,745/- and Rs.15,60,63,799/- were dishonored. It is further stated in the complaint that although the notice was served upon the accused they failed to make payment of the amount due under the dishonored cheques. In paragraph 11 of the said complaint it is stated that accused Nos. 2 to 4 are the Directors of accused No.1 Company. The accused No.2 has signed agreement dated 30th May, 2007 on behalf of accused No.1 Company, whereas accused No.3 has signed disputed cheques on behalf of accused No.1 Company. The accused Nos. 2 to 4 were and are In-charge and are responsible for conduct of day to day affairs of accused No.1 Company at the relevant time. Transaction take placed and the offence were committed by the Company, therefore accused Nos. 2 to 4 are liable for the offence committed by the respondent No.1 under Section 138 read with 141 of the Negotiable Instruments Act. The trial Court issued the process against the accused for the said offence.

14. The petitioners in Criminal Writ Petition No. 973 of 2014 and Criminal Writ Petition No. 835 of 2016 have challenged the proceedings in C.C. No.5835/SS/2015. The petitioners were impleaded as accused Nos. 4 and 2 in the said complaint. The similar contentions are raised by the petitioners in these petitions. Paragraph 2 of the complaint mentions that accused No.1 is a private limited Company and accused Nos. 2 to 4 are the Directors of accused No.1 who were and are In-charge of and are responsible for the conduct of day to day affairs of accused No.1 Company. The present offence was committed by accused No.1 within the knowledge, consent and in connivance of accused Nos. 2 to 4 who were fully responsible for the offence and are jointly and severally liable to be prosecuted and punished. The cheque dated 16th December, 2009 for Rs.77,33,046/- was issued by accused No.1 along with letter dated 5th November, 2009 in part discharge of liability. The said cheque was dishonored. The statutory notice was issued to the accused, however, the payment was not made although the notice was duly served upon all the accused. In paragraph 11 it is stated that accused Nos. 2 to 4 are the Directors of accused No.1. The accused No.2 has signed the

agreement dated 30th May, 2007 on behalf of accused No.1. Accused Nos. 2 to 4 were and are In-charge and are responsible for the conduct of day to day affairs of accused No.1 Company at the relevant time when the transaction took place and the offence was committed by the Company. Therefore, accused Nos. 2 to 4 are liable for the offence committed by accused No.1 under Section 141 of the Negotiable Instruments Act.

15. On perusal of averments in the complaint with regards to the vicarious liability of the accused I find that the complaint complies the requirement of law. The assertions in the complaint as stated above were sufficient to invoke Section 141 of the Negotiable Instruments Act. The factual aspects pointed out by respondents' Counsel shows involvement of petitioners in day to day affairs of accused No.1. The petitioner in Criminal Writ Petition No.973 of 2014 and Criminal Writ Petition No.835 of 2016 had preferred revision applications challenging the order of process before the Sessions Court which were dismissed. Learned Sessions Judge in the impugned order dated 25th January, 2016 has observed that as seen from Form-32 the accused No.2 is stated to have resigned from Directorship of accused No.1 with effect

from 30th June, 2007. The contents of Form-32 have been challenged by the complainant. *Prima-facie*, the challenge is well founded. It was further observed that in the letter dated 20th August, 2009 addressed by accused No.2 to the complainant it is mentioned that he has resigned from the Board of Director of accused No.1 on 6th August, 2007, which shows that there is inconsistent statements to the content of Form-32 about the date of retirement from the Directorship of accused No.1. Hence, the date of resignation of the accused No.2 will have to be proved by him which proof can be offered by way of defense during trial and not at this preliminary stage. Hence, merely on the basis of Form-32, accused No.2 cannot claim that he has no concern whatsoever with the conduct of business with accused No.1 after 30th June, 2007. The Court further observed that in the order dated 16th September, 2015 passed by the High Court in Summary Suit No.2600 of 2012 arising out of the transactions, subject matter of complaints, request of accused No.2 to de-link his name from the array of defendants has been rejected holding him connected with the said transactions, which fact also shows that accused No.2 is responsible for the cheque transactions which is subject matter of

complaints. There are specific allegations in the complaint that the accused No.2 signed the agreement dated 30th May, 2007 which is the foundation of the complaints. The resolution dated 24th May, 2007 of the Board of Directors of accused No.1 has been produced on record, whereby accused No.2 alone was authorised to sign the documents on behalf of accused No.1. The accused No.2 was In-charge of and responsible for the conduct of day to day affairs of accused No.1 when the cheques in question was signed by accused No.3 on behalf of accused No.1. The business of accused No.1 was conducted in the premises owned by accused No.2 which is evident from notice dated 10th August, 2010 given by accused No.2 under Section 284 of the Companies Act. The Co-accused Rahul Bhomavat (accused No.3) was removed from Directorship of accused No.1 at the instance of accused No.2. This fact shows that accused No.2 has full control over the accused No.1. Thus, necessary averments have been made in complaint to connect accused No.2 with the offence of dishonor of cheques, which is the subject matter of complaints with the aid of Section 141 of Negotiable Instruments Act. The learned Sessions Judge further observed that in view of aforesaid factual aspects the

decision in the case of **Harshendra Kumar D** would not be helpful to accused No.2 to claim discharge from the liability for the cheques in question. The defense of the accused will have to be considered at the stage of trial. The learned Sessions Judge further observed that merely replying the notice by accused No.2 stating that he is no more Director of accused No.1 by itself would not be sufficient to show that he is not concerned with accused No.1 and the cheque transactions. *Prima-facie*, there are sufficient grounds to proceed against accused No.2 for the offence punishable under Section 138 of the Negotiable Instruments Act. The trial Court has rightly issued process against the accused. There is no reason to deviate from the findings recorded by the Sessions Court while rejecting Revision Application preferred by the accused No.2.

16. The respondent No.2-complainant has filed affidavit-in-reply opposing the reliefs sought in these petitions. In the reply filed in Criminal Writ Petition No. 972 of 2014 and Criminal Writ Petition No.973 of 2014 it is stated that the name of petitioner-accused No.4 Rakesh Gupta is appearing in the list of signatories in the website of Ministry of Corporate Affairs even today and the

contention of the petitioner that he was not involved in the present transaction is absolutely incorrect and baseless.

17. The proceedings are pending since 2010 and the trial has been delayed. There are necessary and specific averments made in the complaint which are adequate to issue process against all the accused. There is specific averment that the accused No.4 is In-charge and responsible for the conduct of business of accused No.1 Company. The accused No.4 vide his letter dated 26th August, 2010 sent to the complainant thereby providing collateral security for and on behalf of the accused No.1 Company. The accused No.4 stood guarantor to the transaction by executing personal guarantee dated 24th July, 2007 thereby guaranteeing the payment of amount stated in agreement for guarantee dated 24th July, 2007. The reliance is placed on the personal guarantee dated 24th July, 2007. The petitioner has full and ample liberty to contest his defense in the trial and the proceedings need not be quashed in exercise of writ jurisdiction or inherent powers under Section 482 of Cr.P.C. The petitioner-accused No.4 was aware and involved in availing the financial accommodation and credit facility to accused No.1 in terms of agreement dated 30th May,

2007. He was involved in day to day affairs of accused No.1 Company as he has attended various meetings with the representatives of accused No.1 Company. He has personally involved in the transaction. The complainant has filed similar reply in Criminal Writ Petition No. 973 of 2014. Considering the averments made in the complaint and the evidence put-forth by the complainant, it would be necessary to give an opportunity to the complainant to adduce evidence before the trial Court and at this stage the proceedings cannot be quashed and set aside.

18. The complainant has also tendered affidavit-in-reply in Criminal Writ Petition No.834 of 2016 and Criminal Writ Petition No. 835 of 2016. The complainant's contention is that there is sufficient material evidence against accused No.2 showing his involvement in the day to day affairs of the accused No.1 Company and to escape the liability he has created the defence of resignation which is to be proved at the time of trial. It is contended that the complainant is a Government Company. The accused is trying to escape his liability. The petitioner (accused No.2) for and on behalf of accused No.1 Company (accused No.1) had approached the complainant vide letter dated 20th December,

2006 and 24th February, 2007 for their cooperation for promotion to export of Gold jewellery business to various Foreign Buyers at Dubai, U.A.E. and for facilitating and promoting volume of business of accused No.1 Company by availing the advantage of International Image of complainant. The petitioner-accused No.1 on behalf of his Company (accused No.1) entered into an agreement dated 30th May, 2007 for a period of five years writing down terms and conditions to carry out the transaction. He had signed and executed agreement and pursuant to that, agreed to abide by the terms and conditions of agreement dated 30th May, 2007. The accused No.2 was involved in transaction by signing and executing the agreement dated 30th May, 2007, under which the liability accrued to accused Company and the subject cheques were issued in pursuant thereof and it is evident that he was managing day to day affairs of accused No.1 Company. He had also attended various meetings for and on behalf of accused No.1 Company from time to time. It was also contended that accused No.2 has concealed the vital fact that he along with his wife possess 100% equity share capital of the Company. He was controlling the affairs of accused No.1 Company at all times and

the alleged resignation is meant to avoid prosecution. There is evidence on record which reflect that the petitioner (accused No.2) had been controlling the operations and business transactions of accused No.1. As per record available with the Registrar of Companies from the year 2007 to 2010, the petitioner (accused No.2) along with his wife had controlling stake in the Company whereby they jointly possess 100% equity share capital of the Company with 45% shares each. Reliance is placed on annual returns filed by the Company for the year 2008-2009. It is further stated that the accused No.2 was managing the affairs of the Company having control over operations and business transactions of accused No.1. The Company filed two separate Form-20B in 2010. The first Form-20B has been signed on 30th September, 2010 in which accused Rahul Bhomavat has been shown possessing 81000 shares and his wife possessing 9000 equity shares in the Company. Subsequently, the accused No.1 Company filed Form-20B on 22nd October, 2010 in which accused No.2 along with his wife possess 90000 equity shares in the Company. He moved a special notice pursuant to Section 282 of the Companies Act as a shareholder of the Company for removal

of Director of Board of Directors on 10th August, 2010. The resolution for removal of Director of the Company was passed on 11th August, 2010 pursuant to special notice under Section 282 of the Companies Act.

19. From all the above circumstances it is apparent that there is direct nexus between the Company and the accused No.2. The accused No.2 had resigned from the Company and transferred his and his wife's shares into some other persons, which was not objected by accused No.1 Company. The Chamber Summons in Suit No.2600 of 2012 was initiated by the petitioner-accused No.2 stating that he is no more shareholder of the Company. The said Chamber Summons was dismissed. The complainant had filed documents showing that the accused No.2 was In-charge and managing day to day affairs of accused No.1 Company. It is also contended that vide order dated 29th February, 2016 passed by this Court in Company Petition No.37 of 2012 it was ordered that the Company be wound up and Official Liquidator was appointed. In the report dated 17th June, 2016 the Official Liquidator has submitted that the registered office premises of the Company has been sold to the wife of petitioner-accused No.2 by the Company.

However, the same has not been transferred by the society in its records and still the premises stand in the name of the Company. Report also states that there is gift-deed dated 21st August, 2010 between accused No.1 and his wife relinquishing share in favour of donee. It is therefore submitted that the resignation of the petitioner is required to be proved at the time of trial and for the reasons stated herein above the documents of resignation is disputed. The same is created to escape the liability.

20. The documents relied upon by the petitioners are required to be tested in evidence. The complainant has made *prima-facie* case against the petitioners. Apart from the averment made in the complaint, there is evidence to indicate the involvement of the petitioners in the transactions of the accused No.1 Company. In the circumstances, the submissions advanced by the petitioners cannot be accepted.

21. The petitioner in Criminal Writ Petition No. 972 of 2014 and Criminal Writ Petition No. 973 of 2014 had implead original accused No.3, Rahul Bhomavat as respondent No.4 and subsequently deleted as per order dated 12th June, 2018. The said

accused had filed affidavits in the said petitions; denying the averments made in the petitions. It was stated that, accused No.4 and accused No.2 who was the majority shareholder of accused No.1, who jointly called the shots as both of them were incharge of the business and management of the affairs of accused No.1. Bare perusal of forms and resolutions filed with ROC and other correspondence unequivocally establish that, as they were signed by the said petitioner (Accused No.4), he was incharge of the day to day administration and affairs of accused No.1. The petitioner (Accused No.2) has admitted in his statement recorded by Enforcement Directorate that accused No.4 and his wife were 100% shareholders of accused No.1.

22. The petitioners had relied upon the decision in the case of ***Pooja Devidasani (supra)***, which deals with the requirement of Section 141 of the Negotiable Instruments Act, wherein it is observed that the complaint does not disclose the role of the appellant in the affairs of the Company nor in what manner he is responsible for the conduct of business of the Company was explained. The Court has also observed that the letter of guarantee gives way for a civil liability. Similar view was

expressed in the case of ***National Small Industries Corporation Limited (supra)***. In the said decision it was observed that Section 141 is a penal provision creating vicarious liability and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director is In-charge of and responsible to the Company for the conduct of the business of the Company without anything more as to the role of the Director. In recent decision of the Hon'ble Supreme Court in the case of ***Standard Chartered Bank (supra)*** the Court has referred to several decisions of the Supreme Court including the decision in the case of ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla***⁷. In the said decision the High Court had quashed the proceedings on the ground that there are no allegations against the petitioners connecting them with the affairs of the Company. In paragraph 9 of the said decision it was observed that on a studied scrutiny of Section 138 of the Negotiable Instruments Act, it is quite limpid that to constitute the criminal liability the complainant is required to show that a cheque was issued, that it was presented in the bank in question, that on due presentation, it was dishonored, that as enshrined in

⁷ (2005) 8 SCC 89.

the provision, requisite notice was served on the person who was sought to be made liable for criminal liability and that in spite of service of notice, the person who has been arraigned as an accused did not comply with the notice by making payment or fulfilling other obligations within the prescribed period. On analysing Section 141 of the said Act, it was observed in para 11 of the said decision that on perusal of the provision it is clear as crystal that if the person who commits an offence under Section 138 of the Act is a Company, the Company as well as other person In-Charge of or responsible to the Company for the conduct of the business of the Company at the time of commission of the offence is deemed to be guilty of the offence. Thus, it creates a constructive liability on the persons responsible for the conduct of the business of the Company. The Court then made reference to the observations of the Hon'ble Supreme Court in the case of ***S.M.S. Pharmaceuticals Ltd.(supra)*** wherein it was observed that a complaint must contain material to enable the Magistrate to make up his mind for issuing process and if this were not the requirement, consequences would be far-reaching. The Apex Court then referred to the observations made in ***S.M.S. Pharma (supra)***

and quoted paragraph 19 (a), wherein it was observed that it is necessary to specifically aver in a complaint under Section 141 that, at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the Company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied. The Court then considered the averment made in the complaint which was under challenge before the Court which is quoted in paragraph 31 of the said decision and in paragraph 32 it was observed that the averments clearly meet the requisite test. Accused No.1 is the Company, Accused Nos. 2 and 3 are the Chairman and Managing Director respectively and Accused Nos. 6 and 7 were signatory to the cheques. Accused Nos. 4 and 5 were whole-time Directors and the assertion is that they were In-charge of day to day business of the Company and all of them had with active connivance, mischievously and intentionally issued the cheques in question.

23. In the impugned complaints which are subject matter of these petitions. There are averments as referred to above. It is

stated that accused Nos. 2 to 4 are the Directors of accused No.1 Company who were and are In-charge and responsible for the conduct of day to day affairs of accused No.1 Company. The offence was committed by accused No.1 within the knowledge, consent and in connivance of accused Nos. 2 to 4 who are fully responsible for the aforesaid offence and are therefore jointly and severally liable to be prosecuted and punished. In paragraph 11 of the complaint it is stated that accused Nos. 2 to 4 are the Directors of accused No.1 Company. Accused No.2 has signed the agreement dated 30th May, 2007 on behalf of accused No.1 Company. The accused Nos. 2 to 4 were and are In-charge of and are responsible for the conduct of day to day affairs of accused No.1 Company at the relevant time when the transaction took place and when the offence was committed by the Company. Therefore, the said accused are liable for the offence committed by accused No.1.

24. In the light of the aforesaid averments and the material pointed out by the complainant as above, it can be seen that the complainant has made out a case for invoking vicarious liability under Section 141 of the Negotiable Instruments Act and the

contentions of the accused can be agitated only at the time of trial.

25. The petitioner-accused No.2 had vehemently urged that he has resigned from the Company and his resignation is submitted by Form-32, which cannot be doubted. However, from the analysis made herein above and material put-forth by complainant it is clear that there is sufficient material against the accused No.2, which warrants his prosecution. The evidence of the complainant is required to be tested in trial considering the factual aspects pointed out against accused No.2, he will have the accused No.2 to prove his resignation during the trial. In the light of nature of evidence against accused No.2, the decisions relied upon by the learned Counsel for the petitioner-accused No.2 will be of no assistance to him. The complaint cannot be thrown out at the threshold in the facts of the present case considering the factual aspects involved in this case. In the case of **Anita Malhotra (supra)**, the Hon'ble Supreme Court had observed that the certified copy of Form-32 should have been accepted as a proof of appellant's resignation. If the documents relied upon by the defence are beyond suspicion or doubts the same can be

considered. In the case of ***Gunmala Sales Private Limited (supra)***, it was observed that despite presence of basic averments the High Court may quash the proceedings because of the absence of more particulars about role of Director in the company and it may also having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the director could not have been concerned with the issuance of cheques and asking him to stand trial would be abuse of process of Court. This decision is also referred to in the case of ***Standard Chartered Bank (supra)***. The complainant has pointed out the involvement of the accused No.2 in the Company and contended that the accused No.2 has been controlling the Company. He was signatory to the agreement dated 30th May, 2007. He had actively participated in the accused No.1 Company. He along with his wife was 100% shareholder in the Company. Various other factors were placed on record by the learned Counsel for the complainant. The petitioner accused No.2 has filed rejoinder to the reply filed by the complainant. The contentions therein will be the matter of evidence to be tested during trial. The decisions

relied upon by the learned Counsel for the petitioners can be distinguished on the basis of factual matrix of the present case. The averments in the complaint and the circumstances put-forth by complainant would suffice to prosecute the petitioners in the impugned complaints. The proceedings cannot be quashed at this stage. The learned Sessions Judge has rejected the revision application preferred by the accused No.2 and assigned reasons for rejecting the contention with regards to his resignation confirmed by Form-32.

26. For the reasons stated herein above, the petitions are devoid of merits and the same are required to be dismissed. Hence, I pass the following order :-

ORDER

Criminal Writ Petition Nos. 972 of 2014, 973 of 2014, 834 of 2016 and 835 of 2016 stand dismissed.

(PRAKASH D. NAIK, J.)