# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**CRIMINAL MISC.APPLICATION No. 9138 of 2005**
**WITH**
**CRIMINAL MISC.APPLICATION No. 9151 of 2005**
**CRIMINAL MISC.APPLICATION No. 9152 of 2005**
**CRIMINAL MISC.APPLICATION No. 9153 of 2005**
**CRIMINAL MISC.APPLICATION No. 9154 of 2005**
**CRIMINAL MISC.APPLICATION No. 9155 of 2005**
**CRIMINAL MISC.APPLICATION No. 9216 of 2005**
**CRIMINAL MISC.APPLICATION No. 9217 of 2005**
**CRIMINAL MISC.APPLICATION No. 9219 of 2005**
**CRIMINAL MISC.APPLICATION No. 9221 of 2005**
**CRIMINAL MISC.APPLICATION No. 9222 of 2005**
**CRIMINAL MISC.APPLICATION No. 9224 of 2005**
**CRIMINAL MISC.APPLICATION No. 9225 of 2005**
**CRIMINAL MISC.APPLICATION No. 9227 of 2005**
**CRIMINAL MISC.APPLICATION No. 9228 of 2005**
**CRIMINAL MISC.APPLICATION No. 9230 of 2005**
**CRIMINAL MISC.APPLICATION No. 9232 of 2005**
**CRIMINAL MISC.APPLICATION No. 9233 of 2005**
**CRIMINAL MISC.APPLICATION No. 9283 of 2005**
**CRIMINAL MISC.APPLICATION No. 9285 of 2005**
**CRIMINAL MISC.APPLICATION No. 9286 of 2005**
**CRIMINAL MISC.APPLICATION No. 9288 of 2005**
**CRIMINAL MISC.APPLICATION No. 9289 of 2005**
**CRIMINAL MISC.APPLICATION No. 9291 of 2005**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE K.A.PUJ**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? |
| 2 | To be referred to the Reporter or not ? |

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| 3 | Whether their Lordships wish to see the fair copy of the judgment ? |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ? |

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**MRS. INDUMATI BANSILAL SHAH & 3 - Applicant(s)**
**Versus**
**ANANT GIRDHARLAL SHAH & 1 - Respondent(s)**

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**Appearance :**
MR BN KESHWANI for Petitioners.
None for Respondent No. 1.
MR AD OZA, PUBLIC PROSECUTOR for Respondent No.2.

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**CORAM : HONOURABLE MR.JUSTICE K.A.PUJ**

**Date : 28/10/2005**

**COMMON ORAL JUDGMENT**

1.All these Cri. Misc. Applications are filed under Section 482 of the Code of Criminal Procedure invoking the inherent jurisdiction of this Court and praying for quashing and setting aside the Summons issued by the learned

Judicial Magistrate First Class, Gandevi in Criminal Cases Nos. 185 to 190 of 2000 under Section 138 of the Negotiable Instruments Act. Since common issues are involved and arguments are commonly advanced by the learned advocate appearing for the petitioners and the learned Public Prosecutor appearing for the respondent No. 2 – State in all these matters, the same are being disposed off by this common judgment.

2.Cri. Misc. Application No. 9138 of 2005 is filed by the petitioners – original Accused Nos. 4,5,9 & 10 in Criminal Case No. 185 of 2000 pending in the Court of Judicial Magistrate First Class, Gandevi. The said Criminal Case was filed by Shri Anant Girdharlal Shah under Section 138 of the Negotiable Instruments Act. Likewise, Cri. Misc. Application Nos. 9151 to 9155 of 2005 are filed by the same petitioners – original

accused Nos. 4,5,9 & 10 in Criminal Case Nos. 186, 187, 189, 188 & 190 of 2000 respectively pending in the Court of Judicial Magistrate First Class, Gandevi. All these petitions are hereinafter referred to as Group 1 petitions.

3.Cri. Misc. Application Nos. 9216 of 2005 is filed by the petitioners – original Accused Nos. 2,3,7 & 8 in Criminal Case No. 185 of 2005 pending in the Court of Judicial Magistrate First Class, Gandevi. The said Criminal Case was filed by Shri Anant Girdharlal Shah against M/s. K.M. Developers & Others.

4.Similarly, Cri. Misc. Application Nos. 9217, 9219, 9221, 9222 & 9224 of 2005 are filed by the same petitioners – original Accused Nos. 2,3,7 & 8 in Criminal Case Nos. 186, 187, 188, 189 & 190 of 2000 respectively pending in the Court of Judicial Magistrate First Class,

Gandevi. All these petitions are hereinafter referred to as Group 2 petitions.

5.Similarly, Cri. Misc. Application No. 9225 of 2005 is filed by the petitioners – original Accused Nos. 1 & 6 in Criminal Case No. 185 of 2000 pending in the Court of Judicial Magistrate First Class, Gandevi and all other petitions, namely, Cri. Misc. Application Nos. 9227, 9228, 9230, 9232 & 9233 of 2005 are filed by the same petitioners – original Accused Nos. 1 & 6 in Criminal Case Nos. 186, 187, 188, 189 & 190 of 2000 pending in the Court of Judicial Magistrate First Class, Gandevi. All these petitions are hereinafter referred to as Group 3 petitions.

6.Lastly, Cri. Misc. Application No. 9283 of 2005 is filed by the petitioner – original Accused No. 11 in Criminal Case No. 185 of 2000 pending

in the Court of Judicial Magistrate First Class, Gandevi and all other petitions, namely, Cri. Misc. Application Nos. 9285, 9286, 9288, 9289 and 9291 of 2005 are filed by the same petitioner – Accused No. 11 in Criminal Case Nos. 186 to 190 of 2000 respectively pending in the Court of Judicial Magistrate First Class, Gandevi. All these petitions are hereinafter referred to as Group 4 petitions.

7.Since all the petitioners of Group 1 to 4 petitions are accused in the Criminal Case Nos. 185 to 190 of 2000 filed by different complainants and facts are more or less similar, for the sake of convenience, the facts are taken from Cri. Misc. Application No. 9138 of 2005 of Group 1 petitions.

8.The facts in nut shell are that the accused No. 1 in all the above Criminal Cases is an

Association of persons and accused Nos. 4,5,6,9,10 and 11 are in their individual capacities and Hindu Undivided Family of Bansilal Ratilal Shah, Shailesh Bansilal Shah, Rajnikant Ratilal Shah & Harsh Rajnikant Shah in their representative capacity are its members. The said Association was formed on 09.04.1990 by Memorandum of Association. Under the said Memorandum of Association, a Managing Committee was appointed for carrying on day to day business of the Association of person of M/s. K.M. Developers with general power to do such acts and things as may be necessary for and incidental to carry on business of Association of persons with specific power to open and operate Bank accounts and to issue cheque for and on behalf of Association of person. Kartas of HUF being accused Nos. 3,7 & 8, namely, Shri Shailesh, Rajnikant and Harsh Ratilal Shah and accused No. 6 Shri Jayesh

Bansilal were the members of the said Managing Committee. All the six complainants in Criminal Case Nos. 185 to 190 of 2000 are family members and were holders of Govt. Stock of gold bonds, 1998 issued by the Reserve Bank of India. They have lent in January 1997 gold bonds to Accused No. 1 i.e. M/s. K.M. Developers with liberty to pledge the same as security for raising loans with understanding to return the gold bonds on or before stipulated date, and accused No. 1 issued post dated cheques in favour of the complainants for different amounts which represented the value of the gold covered by gold bonds and also the interest receivable under the gold bonds from the R.B.I. Agreement in this regard was executed on 07.01.1997.

9.The Accused No. 1 was engaged in the business and development of Real Estate. There was

heavy recession in the market and hence, accused No. 1 was unable to return the gold bonds on or before the agreed date and hence, time for return of gold bonds was extended from time to time and on every occasion, fresh post dated cheques were obtained by the complainants from accused No. 1. Finally on 25.06.1999, the time for return of gold bonds was extended upto 30.09.1999 and fresh post dated cheques dated 30.09.1999 for different amounts (totaling to Rs.3,67,46,878) were obtained by complainants from accused No. 1. These post dated cheques were obtained by the complainant on 25.06.1999 from accused No. 1.

10.The accused No. 1 had taken loans from different persons by pledging the gold bonds as per liberty given to the accused No. 1. Because of financial crisis, the accused No. 1 was unable to make payments of loan and hence, the

accused No. 1 expressed its inability to return the gold bonds and consequently parties arrived at a new contract Novatio whereby the original complainants were entitled to directly receive back the gold bonds from the Creditors of accused No. 1 by making payment of the loan amount for and on behalf of the accused No. 1 to the creditors of accused No. 1. The complainants also obtained from accused No. 1 requisite consent letters dated 28.06.1999. Thereafter, second agreement was executed between accused No. 1 and the complainants on 03.07.1999 under which complainants directly made payments of total amount of Rs.1,73,00,000/- on behalf of accused No. 1 and received back all the gold bonds on different dates i.e. 01.07.1999 to 12.07.1999 and from 06.08.1999 to 24.08.1999 as per copy of purshis filed before the Sessions Court, Valsad at Navsari by complainants. The complainants have

redeemed all the gold bonds and received back requisite quantity of gold and the requisite amount of interest in August 1999 from R.B.I. The complainants have filed purshis to this effect before the Sessions Court, Valsad at Navsari.

11.The dispute arose between the parties thereafter. The complainants were claiming, entire amounts of Rs. 3,67,46,878/- of post dated cheques without adjusting the value of the gold and the amount of interest received from R.B.I. The accused No. 1 expressed its readiness and willingness to pay Rs.1,73,00,000/- paid by complainants on behalf of accused No. 1 with reasonable interest. Negotiations went on and complainant did not present the post dated cheques dated 30.09.1999. The matter was to be referred to the Sole Arbitrator, Shri Vora, Common

Architect of parties, as per Arbitration clause contained in both agreements. Despite this fact, the complainants deposited the disputed cheques with the Bankers on 07.12.1999 without informing the accused No. 1 and the cheques were returned unpaid by their Bankers at Bombay. The complainants thereafter served statutory notices dated 22.12.1999 demanding total amount of Rs.3,67,46,878/- with interest. The accused No. 1 gave reply dated 11.01.2000 refuting the claim and expressing its willingness and readiness to pay the amount which was paid on its behalf by complainants to its Creditors with reasonable interest and also invoked the Arbitration clause of the Agreement. Complainants declined to refer the dispute to sole Arbitrator Shri Vora by giving counter reply dated 28.01.2000. The accused No. 1 thereafter approached the High Court of Bombay which has appointed Justice Mr.

Chandurkar as Sole Arbitrator before whom both parties appeared and filed their claims as well as replies and led oral as well as documentary evidence. They have also advanced their arguments. However, due to the death of Justice Mr. Chandurkar, the award could not be declared. In the meantime, the complainants filed six complaints being Criminal Case Nos. 185 to 190 of 2000 before the Court of Judicial Magistrate First Class, Gandevi and process was issued in each of these six complaints on 01.02.2000 for the offence under Section 138 of Negotiable Instruments Act.

12.After service of the process on all the accused except accused No. 11, discharge application was filed and the learned J.M.F.C. vide his order dated 08.11.2001 has allowed the said application and dropped all proceedings. So far as accused No. 11 is concerned, no

summons was served upon him. The complainants have, therefore, thought it fit not to proceed against the said accused No. 11 and hence, pursis was filed by the complainants declaring that they do not want to proceed with the matter against accused No. 11 and accordingly, proceedings were dropped and his name was ordered to be deleted from the complaints by the learned Magistrate.

13.Being aggrieved by the said order of the learned Magistrate, the original complainants have filed Criminal Revision Application Nos. 7 to 12 of 2002 before the Learned Sessions Judge, who vide his order dated 20.03.2004 directed to restore to file all complaints. Being aggrieved by the said order of the learned Sessions Judge, the accused persons have preferred Criminal Revision Application Nos. 260 to 265 of 2004 and 312 to 314 of 2004

to this Court which have been rejected by this Court vide its order dated 17.06.2005. This Court has also rejected the alternative prayer of the accused persons to examine the matter in exercise of inherent powers under Section 482 of the Criminal Procedure Code.

14.The original accused persons – present petitioners have, therefore, filed the present petitions before this Court making aforesaid prayers.

15.Mr. B.N. Keshwani, learned advocate appearing for the petitioners in all these matters has submitted that the learned Magistrate has passed the impugned order of issuance of process against the petitioners – accused persons mechanically and without any application of mind. He has further submitted that the impugned order passed by the learned

Magistrate is not a speaking order at all and there is nothing in the impugned order indicating or prima facie showing that the learned Magistrate passed the order after application of his mind to the facts and documentary evidence brought on record. The order regarding issuance of process in this manner has resulted into great prejudice and injustice to the petitioners and if such an order is allowed to stand, it will result into miscarriage of justice and hence, the said order is liable to be quashed and set aside. Mr. Keshwani has further submitted that the learned Magistrate has failed to take a note of an important fact that in his statement on oath recorded by the learned Magistrate under Section 200 of Cr.P.C., the complainants made absolutely false statements to the effect that the accused persons had obtained money (cash) and that the complaints were filed for recovery

of the same. It is not at all the case of the complainants all throughout that any money was ever paid by the complainants to the petitioners or to any other persons. The complainant has obtained the order of issuance of process from the learned Magistrate by suppressing material facts and by suppressing material documentary evidence. The complainants have lent Gold Bonds to the accused No. 1 Association with specific understanding that the Accused No. 1 was at liberty to pledge the same for raising funds against the security of the said Bonds and it was further agreed that accused No. 1 should return the Gold Bonds on or before the agreed date. The post dated cheques were given by accused No. 1 to the complainant by way of collateral security for the due performance of the Contract for returning the Gold Bonds in question on or before the stipulated date. There was no

existing debt on the date on which the cheques were given and thus, the question of invoking the provisions of Section 138 of the Act does not arise at all. He has further submitted that the complainants have suppressed the material facts with regard to execution of the agreement dated 25.06.1999 as well as 03.07.1999 with an ulterior motive to obtain order of issuance of process. The cheques given to the complainants were to be presented to the Bank only after the complainants did not receive the Gold Bonds from the Creditors of accused No. 1 by extended period. He has, therefore, submitted that by suppressing all those material facts, the order of issuance of process obtained by the complainants is bad in law and against the settled principles of law, equity and justice and in this view of the matter, there is no question of invoking the provisions of Section 138 of the Negotiable

Instruments Act against the petitioners and the process issued by the learned Magistrate is, therefore, liable to be quashed and set aside.

16.In support of his submissions, Mr. Keshwani has relied on the decision of the Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd., reported in [1998] 5 S.C.C. 749*** wherein it is held that summoning of accused in a criminal case is a serious matter. The 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 Court has further observed that the Magistrate has to examine the nature of the allegations made in the complaint and the evidence, both oral and documentary, in support thereof and would that be sufficient for the complainant in bringing

charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording the preliminary evidence before summoning the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. Mr. Keshwani has, therefore, submitted that the order passed by the learned Magistrate is absolutely in violation of the aforesaid legal proposition laid down by the Hon'ble Supreme Court.

17.Mr. Keshwani has further submitted that the learned Magistrate at Gandevi has no jurisdiction to entertain the complaints filed against the accused persons. The entire

transaction of lending of Gold Bonds and the execution of both the Agreements dated 07.01.1997 and 03.07.1999 and the issuance of all the cheques took place at Bombay. The cheques were issued on the Bank situated at Bombay and the cheques were presented by the original complainant through their collecting Agents, namely, the Bilimora Bank at Mumbai to the bankers of Accused No. 1 and these cheques were dishonored at Bombay. The complainants and accused persons are all permanent residents of Bombay and doing their respective business at Bombay. Thus, the alleged offence punishable under Section 138 of the Act was committed at Bombay and not within the jurisdiction of the Court of learned JMFC, Gandevi and hence, the learned Magistrate has no jurisdiction to entertain the complaint. The first part of Section 138 of the Act creates an offence by laying down that when any cheque drawn by a

person on an account maintained by him with a banker for payment of any amount of money to another person out of that account for the discharge in whole or in part of any debt or other liability, is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. The offence under Section 138 of the Act would be complete as soon as all the ingredients of the first part of Section 138 of the Act are committed. The proviso to Section

138 of the Act regarding presenting the cheque within the period of six months, and payee or holder-in-due course of the cheque making demand for the payment of amount of cheque by giving notice in writing to drawer of the cheque within fifteen days, and the drawer failing to make payment of the said cheque amount of money to the payee within fifteen days of the receipt of notice are not the ingredients of the offence, but they are only conditions precedent to filing of the complaint as held by this Court in the case of ***Satishkumar Jayantilal Shah V/s. State of Gujarat and Another, 1997 (2) G.L.H. 605*** and also held by the Hon'ble Supreme Court in the case of ***Sadanand Bhadran V/s. Madhavan Sunil Kumar, [1998] 6 S.C.C. 514*** and ***Central Bank of India V/s. Saxons Farms and Others, [1999] 8 S.C.C. 221***.

18.Mr. Keshwani has further relied on the decision of the Hon'ble Supreme Court in the case of **Sadanandan Bhadran vs. Madhavan Sunil Kumar, reported in (1998) 6 Supreme Court Cases 514**, the Hon'ble Supreme Court has held that on a careful analysis of Section 138 it is seen that its main part creates an offence when a cheque is returned by the bank unpaid for any of the reasons mentioned therein. The significant fact, however, is that the proviso lays down three conditions precedent to the applicability of the Section 138 and for that matter, creation of such offence and the conditions are; (i) the cheque should have been presented to the bank within six months of its issue or within the period of its validity, whichever is earlier; (ii) the payee should have made a demand for payment by registered notice after the cheque is returned unpaid; and (iii) that the drawer should have failed to pay

the amount within 15 days of the receipt of the notice. It is only when all the above three conditions are satisfied that a prosecution can be launched for the offence under Section 138.

19.Mr. Keshwani has further submitted that in the case of ***K. Bhaskaran, reported in [1999] 7 Judgment Today S.C. 558***, it is observed that the Provisions contained in Proviso to Section 138 are the components – ingredients of the offence under Section 138 of the Act. He has further submitted that while deciding this case, the earlier binding decision of the Hon'ble Supreme Court in Sadanand's case was not brought to the notice of the Division Bench of the Hon'ble Supreme Court. Apart from this, the later decision of the Hon'ble Supreme Court in the case of Central Bank of India (Supra) would be binding on all the Courts. The Larger Bench consisting of three Judges of the Hon'ble

Supreme Court in the case of ***Shri Ishar Alloy Steels Limited V/s. Jayaswals Neco Ltd., [2001] 3 S.C.C. 609*** has also specifically observed that Section 138 provides that where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, for 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 the Bank, such person shall be deemed to have committed an offence punishable with imprisonment as prescribed therein subject to the conditions mentioned in Clauses (a), (b), (c) and (d) of the Proviso. Mr. Keshwani has, therefore, submitted that this later decision

of the Hon'ble Supreme Court is binding and hence, it cannot be said by any stretch of imagination that the place at which the conditions mentioned in the Proviso to Section 138 are fulfilled will give jurisdiction to the Court of that place obviously because these are conditions precedent to filing of the complaint. For this purpose, he relied on the decision of the Hon'ble Supreme Court in the case of **Kapurchand Pokhraj V/s. State of Bombay, *A.I.R. 1958 S.C. 993*** wherein it is held that prior sanction before filing of a complaint is a condition precedent and that such a condition precedent is not an ingredient of an offence. He has, therefore, submitted that the learned JMFC at Gandevi had no territorial jurisdiction to entertain the complaints in question simply because the original complainants deposited the cheques in a new account opened by them at Bilimora Bank

and simply because they issued a notice through an Advocate at Gandevi calling upon the accused persons to make payment of the cheques at Bilimora.

20.Mr. Keshwani has further relied on the decision in the case of **Arunbhai Nilkanthrai Nanavati vs. Jayaben Prahladbhai through her power of attorney holder Kishorbhai, reported in 1999 (3) vo.40, 2096**, wherein this Court has held that a conjoint reading of both the Sections 138 and 72 makes it abundantly clear that the cheque is required to be presented at the Bank on which the same is drawn if the drawer is to be held liable. Of course, civil liability may remain alive, but the criminal liability would not, if the presentment is not made within six months or the period of validity at the Bank on which the cheque is drawn. The word “presentment”, therefore,

serves no purpose if the cheque is presented at any other Bank or branch as it amounts to “entrustment” or “tender” and not 'presentment'. In view of such emerging effect of the provisions of the Act, the cheque if presented at the collecting Bank is not the presentment of the cheque within meaning of Section 138.

21.Mr. Keshwani has further submitted that the petitioners were never in charge of the business of the accused No. 1 at any point of time and that they were never responsible to accused No. 1 for the conduct of the business at any point of time. The complainants have not come to the Court with clean hands. It was the definite case of the complainants that the accused No. 1 is the person who has committed an offence under Section 138 of the Act and that the accused Nos. 2 to 11 are the members

of the accused No. 1 Association and that at all times, when the offence was committed, in charge and responsible to the accused No. 1 for the conduct of the business of the accused No. 1 and they shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished under Section 138 of the Act. Thus, allegation made by the complainants against the accused persons is falsified by document produced by the complainants at mark 3/11. It is the Memorandum of Association of the Accused No. 1 wherein it has been specifically pointed out that a Managing Committee of four persons was appointed with the power to take policy decision and also with general power to carry on the business of accused No. 1 and to do such acts and things as may be necessary or incidental to carrying on business of accused No. 1. This Committee was further empowered and authorized to open a bank

account in the name of accused No. 1 and to operate the bank account by joint signatures of two members of the Managing Committee. The accused Nos. 4,5,9 & 10 were never the members of the Managing Committee at all and as such, they were not in charge or responsible for the business of accused No. 1 at any point of time. They are, therefore, not even prima facie guilty for the offence punishable under Section 138 of the Act.

22.In support of this submission, Mr. Keshwani relied on the decision of Hon'ble Supreme Court in the case of ***Sham Sundar and others V/s. State of Haryana, A.I.R. 1989 S.C. 1982*** wherein the Hon'ble Supreme Court has held that more often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who

are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub -section (1) of S.10 that the offence was committed without their knowledge. The obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be

convicted. Thus where the documents produced by the prosecution do not indicate even remotely that all the partners were doing the business of the firm and there was no other evidence on record on this aspect, it could not be said that when the offence was committed all the partners were conducting the business of the firm. Therefore, they would not be liable for conviction.

23.Mr. Keshwani further relied on the decision in the case of ***Monaben Ketanbhai Shah and Another V/s. State of Gujarat & Ors., 2004 (3) G.L.H. 769 (S.C.)*** the Hon'ble Supreme Court has held that Section 141 of the Negotiable Instrument Act does not make all partners liable for the offence. The criminal liability has been fastened on those who, at the time of the commission of the offence, was in charge of and was responsible to the firm for the conduct of

the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not incharge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. Since in that case Court has come to the conclusion that there was total absence of requisite averments in the complaint. The

complaint was accordingly quashed. Mr. Keshwani has, therefore, submitted that looking to the well settled principles of law laid down by the Apex Court, the petitioners cannot be prosecuted and the order passed by the learned Magistrate for issuance of process under Section 138 of the Act against them is liable to be quashed and set aside.

24.Mr. Keshwani has further relied on the decision of the Hon'ble Supreme Court in the case of **Zandu Pharmaceutical Works Ltd., and Ors. vs. Mohd. Sharaful Haque and Anr., reported in (2005) 1 SCC 122**, wherein the Hon'ble Supreme Court has held that the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is

based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the High Court of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrived at a conclusion that the

proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the

complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in Court which decides. The informant are of no consequence and cannot by themselves be the basis for quashing the proceedings.

25.Mr. Keshwani has further relied on the decision in the case of **M/s.Swastik Coaters Pvt. Ltd., vs., Deepak Brothers and Ors., reported in 1997 CRI.L.J. 1942(A.P.)**, wherein on the basis of the evidence the Court below

held that as on the date of the cheque there was no existing debt or liability the cheque being a post dated cheque. Such rejection does not constitute an offence under Section 138 of the Negotiable Instruments Act. The High Court found that there is no infirmity in this reasoning of the Court below. The Court has also come to the conclusion that ultimately it is a matter of Civil dispute and no offence is constituted under Section 138 of the Negotiable Instruments Act. The Court has, therefore, reiterated that the cheque was a post dated cheque and as on the date of the issuing of the cheque there was no existing enforceable debt or liability and having regard to these circumstances no offence is constituted under Section 138 of the Negotiable Instruments Act.

26.Mr. Keshwani has further relied on the decision in the case of **M/s. Pawan Enterprises**

**vs., Satish H. Verma, reported in 2003 CRI.L.J. 2146**, wherein the Court has taken the view that the cheque has been issued not for the purpose of covering the liability but it must have been issued as a security for the balance amount. It is settled law that when two views are possible then one in favour of the accused has to be accepted. The Court has also expressed the view taken by the trial Court that the cheque was issued as a security for the balance amount and, therefore, the trial Court has recorded the finding of acquittal. The Court has also held that while dealing with the order of acquittal, when two views are possible, then it would not be proper on the part of the High Court to exercise revisionary powers under Section 397 of the Code of Criminal Procedure for reversing the finding of acquittal.

27.Mr. Keshwani has further relied on the

decision in the case of **Madhavrao Jiwaji Rao Scindia and Anr. vs. Sambhajirao Chandrojirao Angre and Ors., reported in AIR 1988 SC 709**, the Hon'ble Supreme Court has held that the legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration and special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilised for any oblique purpose and where, in the opinion of the Court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while

taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

28.Mr. Keshwani has further relied on the decision in the case of **Adalat Prasad vs. Rooklal Jindal and Ors., reported in (2004)7 Supreme Court Cases 338**, wherein the Hon'ble Supreme Court has held that a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate, either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint. In none of these stages the Code of Criminal Procedure, 1973 has provided for hearing the summoned accused, because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the

latter provisions in the Code. The only stage of dismissal of the complaint arises under Section 203 CrPC at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the Court and making an application for dismissal of the complaint under Section 203 CrPC for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage. The Court has further held that it is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 CrPC

because the Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking Section 482 CrPC. The view of the Supreme Court in Mathew case, (1992) 1 SCC 217 that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.

29.Mr. Keshwani has further relied on the decision in the case of **Bhanu M. Vakil, vs. Chandra Oshiram Keswani and Anr., reported in 1991 CRI.L.J. 2819**, wherein the Bombay High Court has held that the jurisdiction of revision conferred by Sections 397 and 399 is for correcting the illegality or impropriety of a finding of a subordinate Court. It is only when the order is shown to be illegal or

improper that powers of revision under Sections 397 and 399 of the CrPC can be exercised. That power, however, cannot detract from the inherent power of the High Court under Section 482 of the CrPC Section 482 starts with the phrase “nothing in this Code shall be deemed to limit”. This phrase would bring within its compass the provisions of Section 397 as also Section 399 of the CrPC. It is true that resort to Section 482 has to be made sparingly and in exceptional cases. It is only in cases where the High Court finds that there is abuse of the process of any Court or that it is expedient in order to secure the ends of justice that resort can be had to Section 482. It is not what label is attached to the petition that matters. Whether it is label of a revision application under Section 397 or 399 of the CrPC or whether it is a label of Section 482 of the CrPC or Art.227 of the Constitution,

it is the power which the High Court exercises that has to be determined. If the order is shown to be illegal or improper, the Court should exercise its jurisdiction under Section 397 or 399 of the CrPC. If the High Court finds it necessary for the prevention of abuse of the process of any Court or for securing the ends of justice, Section 482 empowers the High Court to exercise its inherent power and in that case there can be no limitation in the exercise of that power. Similarly, if an order passed by any subordinate Court or Authority is shown to contain an error apparent on the face of the record Art.227 of the Constitution empowers the High Court to pass such orders as the case may require. While exercising such a power no provision under any law can be an impediment.

30.Mr. Keshwani has further submitted that

ordinarily, the Court would not be inclined to consider the rival contentions of the parties in a proceeding under Section 482 of Cr.P.C. but when the undisputed facts come to the surface, the matter would be different. In support of this submission, he relied on the decision in the case of ***Bharatbhai K. Patel V/s. C.L. Verma, 2002 (2) G.L.R. 1713*** wherein it is observed that normally this Court is supposed to read the averments made in the complaint and at the initial stage of the proceedings, the High Court is not justified in entertaining and accepting the plea that there is no debt or liability. Defence plea cannot be entertained in quashing proceedings. But in the cases where the petitioner is able to show to the Court that there was no existing debt or liability at the time of presentation of the cheque for encashment on the basis of the conduct of the complainant or admission made by

the complainant that may be in other legal proceedings, then in such cases, the proceedings can be terminated and the accused should not be asked to face the trial till it is concluded. The Court has further observed that the reply to statutory notice is a stage from where it can be shown that the allegations made are absurd, improbable, malafide and no prudent person can reach a just conclusion that there is sufficient ground to proceed against the accused. Mr. Keshwani has, therefore, submitted that looking to the undisputed facts, it is absolutely clear that the complaint filed by the complainant is a malafide complaint and there is no sufficient ground to proceed against the accused persons. The accused persons have satisfactorily established by the documents that the accused persons have rebutted the statutory presumption under Section 139 of the Act and hence, the complaint

filed by the complainants is liable to be quashed and set aside.

31.Mr. Keshwani has further submitted that after the issuance of the post-dated cheques dated 30.09.1999 and before the presentation of these cheques to the Bank by the original complainants, the circumstances were changed to a material extent and there was alteration in the liability of the accused No. 1 regarding the amount payable by it to the original complainants. In all 12 post-dated cheques dated 30.09.1999 were given by accused No. 1 for the total amount of Rs. 3,67,46,878/- in respect of which six different complaints, namely, Criminal Case Nos. 185 to 190 of 2000 were filed. The amount of the cheques admittedly include the amount of the price of the gold covered by the Gold Bonds and the amount of interest payable by R.B.I. on the

said Gold Bonds. The complainants have received back all the Gold Bonds and received back requisite quantity of gold and the requisite amount of interest from R.B.I. after issuance of the post-dated cheques dated 30.09.1999. The complainants had undisputedly paid in all an amount of Rs. 1,73,00,000/- on behalf of accused No. 1 to the pledges for receiving back the Gold Bonds and they received back the Gold Bonds. The complainants are bound to give credit and adjust the value of the Gold Bonds and the amount of interest received by them from R.B.I., more particularly, because the cheques given included the value of the Gold Bonds and the amount of interest payable by R.B.I. On account of the changed circumstances, after the issuance of cheques and before the presentation of the cheques to the Bank, the liability of the accused No. 1 was substantially altered and

reduced to an amount of Rs. 1,73,00,000/- which the complainants paid on behalf of accused No. 1 to the pledgees of the Gold Bonds and thus, the complainants were not entitled to present and receive from bank the amount of Rs. 3,67,46,878/- by presenting the post dated cheques dated 30.09.1999. In support of this submission, Mr. Keshwani relied on the decision of this Court in the case of ***Arvind Maneklal Tailor V/s. State of Gujarat 2000 (3) G.L.H. 442*** wherein it is held that the presumptions created by Section 118 & 139 of the Act are both rebuttable presumptions. It is further held that after the issuance of the cheque but before the due date, there was change in the obligation between the parties whereby the extent and quantum of debt was substantially altered. On the due date, the debt was for a smaller amount than the amount of the cheque which was dishonoured. The said cheque did not

represent either the entire debt or part of the debt on due date and hence, the accused cannot be said to have committed an offence under Section 138 of the Act. In this view of the matter, the accused persons have not committed any offence under Section 138 of the Act and hence, the process issued by the learned Magistrate is required to be quashed and set aside to prevent the abuse of process of law and to secure the ends of justice.

32.Mr. A.D. Oza, learned Public Prosecutor appearing for the State has submitted that all these issues which are raised in these petitions have already been raised by the petitioners in Criminal Revision Application Nos. 260 to 265 of 2004 and Criminal Revision Application Nos. 312 to 317 of 2004 which were decided by this Court on 17.06.2005 and the same have been rejected on merits. It is not

now open for the petitioners to raise these issues and contentions again before this Court in these petitions. The present petitions are clearly barred by the principles of res judicata. Mr. Oza has further submitted that the petitioners have even moved for an amendment in the said Revision Applications stating that the provisions of Sections 482 & 397/401 of Cr.P.C. are overlapping and, therefore, this Court is not precluded from examining the matter in exercise of powers under Section 482 of Cr.P.C. The Court has rejected the permission seeking draft amendment and held that the petitioners cannot be permitted to alternatively invoke the provisions of Section 482 of Cr.P.C. The Court has further observed that the same can be done only when there is serious miscarriage of justice or where there is abuse of the process of the Court or where mandatory provisions of

law are not complied with or where interference is absolutely necessary for securing the ends of justice. The Court rejected the said prayer relying on the decision of the Hon'ble Supreme Court in the case of ***Kailash Verma V/s. Punjab State Civil Supplies Corporation and another, 2005 (2) S.C.C. 571***.

33.Mr. Oza has relied on the decision in the case of **M/s.M.M.T.C.Ltd., vs. M/s. Medchi Chemicals and Pharma (P) Ltd., reported in AIR 2002 SC 182**, wherein the Hon'ble Supreme Court has held that inherent power of quashing criminal proceedings should be exercised very stringently and with circumspection. Court exercising inherent powers is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the

Court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability and quash complaint. It is not necessary to allege specifically in the complaint that there was a subsisting liability an and enforceable debt and to discharge the same, the cheques were issued. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of providing that there was no existing debt or liability was on the respondent. This they have to discharge in the trial. At this stage, merely on basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

34.Mr. Oza has further relied on the decision in

the case of **Jagdish Ram vs. State of Rajasthan and Anr., reported in (2004)4 Supreme Court Cases 432**, wherein it is held that the plea that the complaint was filed as a result of vindictiveness of the complainant is not relevant at this stage. The appellant would have adequate opportunity to raise all pleas available to him in law before the trial Court at an appropriate stage. No case has been made out to quash the criminal proceedings on the ground of delay. The Court has further held that whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.

35.Mr. Oza has further relied on the decision in the case of **Chemox Laboratories Ltd & Anr. vs.**

**Gujarat Narmada Valley Fertilisers Co. Ltd., & Anr., reported in GLR 2003 (1) vo.44, page-424**, wherein it is held that the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. If the five different acts were done in five different localities any one of the Courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those Courts having jurisdiction over

any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive, it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.

36.Mr. Oza has further relied on the decision In the case of **Priti Bhojnagarwala & Anr. vs. State of Gujarat & Ors., reported in GLR 2002(1), vol.43(1), page-293**, wherein this Court has held that it can safely be said that the offence under Section 138 of the Act has been committed by “Company” i.e., accused No.1 ( Association of Individuals), and it has been committed with the consent and connivance of the present petitioner i.e., a deemed Director within the meaning of Clause (b) of Explanation below Sec.141 of the Act. Thus, from the

complaint, notice and reply, it is crustal clear that the complainant's case falls under Section 141(2) of the Act. When this Court has found that case falls under Sub Section 141 of the Act, the requirements of 'in charge of' and 'was responsible to the company for the conduct of the business of the company' are not at all necessary to be averred in the complaint, and therefore, from the facts and circumstances of the case and by reading complaint as well as the documents produced with list by the complainant, it is crystal cleat that prima facie case is made out by the complainant for issuance of summons under Section 204 of CrPC and this Court is of the view that the learned Magistrate has exercised his jurisdiction legally and properly by taking cognizance of offence. In view of this, when legal position is clear that when Court finds that prima facie case is made out for issuance of summons, it

can be said that there is no abuse of process of law and application under Section 482 CrPC cannot be quashed on the basis of arguments advanced by the petitioner.

37.Mr. Oza has further relied on the decision In the case of **Keki Patel of Singapore Airlines Ltd., vs. Dhanesh Badarmal Jain & Ors., reported in [2003], 43 [3] G.L.R. Page 2579**, wherein this Court has held that in view of the latest pronouncement of the Hon'ble Supreme Court in Trisuns Chemical Industry v. Rajesh Agarwal, 1999 (8) SCC 686, with respect to the territorial jurisdiction of the Court taking cognizance of an offence, it would be very difficult for this Court to accept the contentions of the present petitioners that the offence has not taken place within the jurisdiction of the trial Court, and therefore the complaint should be quashed.

38.Based on the aforesaid decisions, Mr. Oza has submitted that there in no substance in all these petitions and the petitions are required to be summarily dismissed.

39.After having heard the learned advocate Mr. B.N. Keshwani at great length, after having considered the complaints, documents attached therewith, orders passed by the Courts below as well as by this Court in Revision Application and after having carefully examined the relevant statutory provisions and the case law on the subject, the Court does not see any justification to interfere in the order of the learned Magistrate of issuance of process, at this stage, by entertaining all these petitions except the petitions filed by Mr. Hem Rajnikant Shah being Cri. Misc. Application Nos. 9283, 9285, 9286, 9288, 9289 and 9291 of 2005, where

the said petitioner was discharged by the learned Magistrate on the basis of the pursis filed by the complainants to drop the proceedings against him.

40.Mr. Keshwani has raised several issues before the Court and placed reliance on many authorities. The issues raised by him are more or less in the realm of territorial jurisdiction, non-application of mind while issuing process, suppression of facts, no existing debt, cheques given by way of collateral security for due performance of contract, change in contract and creation of novatio, absence of essential ingredients of offence and condition precedents are treated as ingredients of offence so on and so forth. It is not the function of the Court while considering the quashing petitions under Section 482 of the Criminal Procedure Code, to

minutely examine all these issues on merits and express its opinion thereon. If it is done so by the Court, the trial would become redundant and the complainants would be deprived of their valuable right of establishing the guilt of the accused during trial. The Court mainly concerns as to whether complaint discloses any prima facie offence, and even if it is not so, whether exercise of power under Section 482 of the Code is in furtherance of the objects envisaged thereby. The Court keeps judicial restraints on itself and does not think it just and proper to express any opinion thereon. Reproduction or discussion of the issues in the judgment and expression of opinion thereon are two different things and the Court should not venture to do the later part especially when it is not in favour of quashing the complaint. The Court is further concerned with the fact situation that this is second round of

litigation and the petitioners have failed in their earlier attempt to get the proceedings dropped not only by the learned Sessions Judge but by this Court too. The orders passed by the learned Sessions Judge as well as by this Court speak themselves that the petitioners were not non-suited on any technical grounds. All these issues raised in these petitions were raised. They were dealt with in great details independently and even on merits. This Court finds no reason not to agree with them. The order passed by the learned Sessions Judge in Revisions filed under Section 397 of the Code do have its own persuasive value and the order and judgment passed by the learned Single Judge of this Court in writ petitions filed under Article 227 of the Constitution of India do have a binding effect from the view point of judicial propriety, unless this Court takes a different view and the matter may be referred

to the Division Bench. No such situations arise in these group of petitions. Moreover, earlier order passed by this Court has not been challenged before the Hon'ble Supreme Court or in any case, it has not been upturned. It has, thus, become final. It is also an admitted position that Mr. Keshwani has raised the contention before this Court in earlier round of litigation that the provisions of Section 482 and 397/401 of the Criminal Procedure Code are overlapping and, therefore, this Court is not precluded from examining the matter in exercise of its powers under Section 482 of the Code. While rejecting this contention, this Court observed in its order and judgment dated 17.06.2005 that the draft amendment seeking such permission has already been rejected since the petitioners cannot be permitted to alternatively invoke the provisions of Section 482 of the Code and that too at the fag end or

after full fledged hearing since this can be done only when there is serious miscarriage of justice, or where there is abuse of the process of the Court or where mandatory provisions of law are not complied with or where the interference is absolutely necessary for securing the ends of justice.

41. In view of the above discussion and considering the entire facts and circumstances of the case and keeping broad parameters and criterias laid down by this Court as well as by the Hon'ble Supreme Court in respect of nature, scope and ambit of powers under Section 482 of the Code, this Court dismisses all these petitions subject to one rider that so far as the petitions falling in the fourth group i.e. Cri. Misc. Application Nos. 9283, 9285, 9286, 9288, 9289 and 9291 of 2005 are concerned, the Court hereby directs the learned Magistrate as

to whether purshish were filed by the complainants for deleting the name of original accused No. 11 / present petitioner and whether proceedings qua him are already dropped. If it is so, the original accused No. 11 / present petitioner cannot be said to be an aggrieved party as no proceedings qua him are now pending. In that case, these six petitions falling in fourth group become infructuous and are disposed off accordingly.

42. With the aforesaid observations and directions, all these petitions stand disposed off.

**[K.A. PUJ, J.]**

43. On pronouncement of the judgment, Mr. Keshwani, learned advocate appearing for the petitioner has submitted that despite the fact that process issued against the accused No. 11

was dropped as a result of filing of purshish by the complainants, notices were issued by the learned Magistrate against him. Once accused No. 11's name is dropped from the complaints, there is no need to issue any notice on him. The learned Magistrate may accordingly examine this aspect also and see that no unnecessary harassment may be caused to the accused No. 11. Request made by Mr. Keshwani for stay against the operation of this order is rejected as there was no stay during the pendency of all these petitions.

**[K.A. PUJ, J.]**

**S**avariya