IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH:NAGPUR

CRIMINAL APPLICATION NO.2760 OF 2006

Amit Mohan Inder Mohan Sharma ...Applicant
versus
M/s Mamta Agency & others ...Respondents

Mr. B.P. Bhatt, Advocate for the applicant
Mr. A. Shelat, Advocate for respondent no.1
A.P.P. for respondent no.1

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CRIMINAL APPLICATION NO.2761 OF 2006

Amit Mohan Inder Mohan Sharma ...Applicant
versus
M/s Mamta Agency & others ...Respondents

Mr. B.P. Bhatt, Advocate for the applicant
Mr. A. Shelat, Advocate for respondent no.1
A.P.P. for respondent no.1

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CRIMINAL APPLICATION NO.2762 OF 2006

Amit Mohan Inder Mohan Sharma ...Applicant
versus
M/s Mamta Agency & others ...Respondents

Mr. B.P. Bhatt, Advocate for the applicant
Mr. A. Shelat, Advocate for respondent no.1
A.P.P. for respondent no.1

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CORAM: S.R. DONGAONKAR, J.
DATE:10/1/2007

COMMON JUDGMENT

Rule.

Rule returnable forthwith. Heard finally with consent of

parties.

All these applications under section 482 of Criminal Procedure Code are directed against the common order passed by the 10th Ad-hoc Additional Sessions Judge, Nagpur in Criminal Revision Application No.408/2006, 409/2006 and 410/2006 filed by the applicant, to challenge the order of issue of process against him for the offence punishable under section 138 of Negotiable Instruments Act [hereinafter referred to as Act for the sake of convenience], in Criminal Complaint Cases No.676/1997, 677/1997, 679/1997 dated 23.8.2005 by which learned Magistrate had rejected the application of the applicant for recalling of the process against him for the offence under section 138 of the Act.

2] Facts which are necessary for the disposal of these applications can be stated thus. The respondent no.1 had filed complaints against the present applicant who is accused no.4 in these complaint cases, for the offence punishable under section 138 of the Act and 420 of the I.P.C. As stated above the complainant had filed these complaints under section 138 of the Act and 420 of I.P.C. alleging that this accused [accused no.4] along with other accused i.e. no. 2, 3 and 5 are the Directors of accused no.1 company - A.U. Roller Flour Mill Private Limited. They had business dealings with the complainant's firm i.e. M/s Mamata Agency. During the business transaction, they had issued cheque. Three cheques were issued on Allahabad Bank, Nagpur on 28.10.1997 and 21.10.1997. They were dishonoured. After due compliance of the necessary provisions of issuing notices etc. as the amount was not paid, the complainant filed relevant complaints for offence under section138 of the Act read with section 420 I.P.C.

3] During the said proceedings, the learned Magistrate passed an order of issue of process against the accused persons after recording verification statement of the complainant, including this accused.

4] Learned trial Judge vide his order dated 23.8.2005 heard the parties and found that the trial court had no powers to recall the process issued against the accused in view of the observations of the Apex court in [Subramanian Sethuraman ..vs.. State of Maharashtra] 2006(1)M.L.J. 626. As such he rejected the application of applicant for recalling of process.

5] This order was challenged by the applicant before this Court under section 482 of Cr.P.C. However, in view of the decision of this Court in [V.K. Jain ..vs.. Pratap C. Padode] reported in 2005(3) Mh.L.J. 778, the liberty was granted to the applicant to move the Sessions Court in its revisional jurisdiction under section 397 of Cr.P.C. to challenge the said order of issue of process. Accordingly, the applicant approached the Sessions Court under section 397 Cr.P.C. bearing Criminal Revision no.408/2006, 409/2006 and 410/2006 to challenge the order of issue of process. After hearing both the sides, the learned Ad-hoc Additional Sessions Judge rejected the revision applications of the applicant i.e. said applications were dismissed vide order dated 10.7.2006. This order is challenged in these applications.

6] It may be stated that the learned Ad-hoc Additional Sessions Judge while rejecting the applications of the applicant has

found that the factum of resignation by the applicant dated 6.10.1997 has to be considered at the time of trial. He has also found that the judgment referred by the applicant to contend that the allegations as made out in the complaint are not sufficient to attract the offence under section 138of the Act as well as section 420 Cr.P.C., does not support him. He also found that this is not a case of complete absence of allegations in the complaint to constitute the offences against the applicant. He has also observed that the form no.32 which is placed on record is a copy and is not sufficient to hold that the applicant seizes to have any responsibility in the business of the accused since 6.10.1997. Apart from this, in the judgment, he has observed that the applicant has not applied for condonation of delay in filing revision application and the same was barred by limitation. However, he has observed that "However these applications are being dismissed on merits and not merely on limitation." This order as stated above is challenged in these applications.

7] Learned counsel for the applicant - Shri Bhatt has submitted that the delay in preferring the revision application before the Sessions Court was not because of the fault of the applicant, but it was because of the change in the principle of law as regards the maintainability of an application under section 482 of Cr.P.C. to challenge the order of issue of process. On rejecting the application for recalling the order of issue of process , according to him, this application under section 482 of Cr.P.C. was maintainable as the applicant would be facing the trial though he is not at all liable for the alleged offences. He has relied on certain authorities to contend that the offence under section 138 of Cr.P.C.

is not at all made out when the Director has tendered the resignation, which he can tender it even unilaterally and it is necessary for the company to accept the same and form No.32 and its acceptance by the Registrar of Companies is mere a formality. Therefore, he has contended that when it is prima facie established that the applicant has resigned from the accused company w.e.f. 6.10.1997, he is not liable for any transaction which the company did thereafter including in the present case the liability of dishonour of the cheques issued by the company under section 138 of the Act as the same were issued after 6.10.1997.

8] According to him, allegations in the instant complaints are not sufficient to attract the action against the applicant under section 138 of the Act and therefore, when there are no sufficient allegations against applicant to show that at the time of issue of relevant cheque he was responsible for the business of the accused - company; he can not be proceeded under section 138 of the Act or under section 420 of I.P.C. and he should not be required to face the trial despite this situation; only on the ground that the said point can be decided at the time of trial, according to him this would sheer abuse of process of law and therefore, interference by this court under section 482 of Cr.P.C. to prevent abuse of process of law and also to secure ends of justice is warranted.

9] As against this, learned counsel for the respondent - Mr. Shelat has submitted that the case for alleged offences is made out against the applicant in the complaints. He was responsible for the business of the accused - company at the relevant time. Even if it

is his case that he has resigned from the Directorship of the said company on 6.10.1997, that fact will have to be established in the trial and at the threshold at the time of consideration of issue of process. The same cannot be considered. Further according to him, this is not a case where this court should interfere under section 482 of Cr.P.C. as the trial has been already delayed. He has also taken me through the reasons recorded by the Sessions Court and also other relevant material to contend that as trial is pending since 1997 and nothing has happened towards the further progress of the trial, the order under section 482 Cr.P.C. is not at all warranted. He has pressed into service observations of this court in 2006 ALL MR (Cri.) 438 S. B.& Internatijonal Limited ..vs.. State of Maharashtra and another] and also observations of the Apex Court in AIR 1992 SC 604 State of Haryana ..vs.. Bhajanlal in his support.

10] In order to consider the rival contentions of the parties, it is necessary to bear in mind as to what material is on record against the applicant (accused no.4) in the complaint. The reading of the relevant complaint would show that the complainant has alleged in paragraph 2 of the complaint thus:

> "2- That, the accused no.1, is a private limited company and accused No.2 to 5 being its Directors are used to purchase goods i.e. wheat on credit from the complainant firm."

In paragraph 3 the complaint it is alleged :

> "3- - - - - -The accused No.5 on behalf of all accused had issued two account payee cheques - - - - - - -"

In paragraph 4 the complainant has stated :

> "4-.....Thus one thing is very clear then crystal that

> the accused no.5, had issued the above cheques deliberately knowingly and with malafide intention to cheat and defraud the complainant.- - - -"

Further in paragraph 5 it is contended:

> "5. .....The accused No.s 1 & 4 have received the said notice on 3.11.1997, but accused nos. 2,3 4 have deliberately avoided to receive the same....."

11] On perusal of these contents of the complaint, it would be seen that the allegations against the present applicant is that he was purchasing goods from the complainant as the director of the said accused company. No where it clearly depicts that the accused no.4 was in active Directorship of the accused - company at the time of issuance of cheque. The complaint only says that the accused no.5 had issued a cheque on behalf of the rest of the accused. Therefore, unless there is specific material on record to show that this applicant was active as Director of the Accused company at the relevant time, he would not be liable for the offence under section 138 of the Act, in view of provisions of section 141 of Negotiable Instruments Act which reads thus:

> Sec. 141 - **Offence by companies**. -- (1) If the person is committing an offece under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence;

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

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

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

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.

12] It is further necessary to bear in mind that rest of the accused have not challenged the order of issue of process and they are facing the trial, which include the accused - company as well as rest of the Directors.

13] At this stage it is necessary to consider the following authorities pressed into service by the learned counsel for the applicant.

In D.P.Jain..vs... 2006 (5) M.L.J. 705, this court has

observed in paragraph 11 thus:

> "11. I have carefully considered the rival submissions. I have also gone through the case law cited at the bar. It may be noted that in order to fasten vicarious liability against the partners of the firm, there must be clear, specific and unambiguous allegations made in the complaint. Every partner of the firm cannot automatically be roped in. The complainant can proceed only against such persons who at the time the offence was committed by the firm, were in-charge and were responsible to the firm for the conduct of its business. Such persons must be in over all control of the day-to-day business of the firm. A complainant based on vague statement that one of the partners signed the cheque on behalf of the partners and the cheque was issued towards the amount due and payable by all the partners is not a complaint in the eye of law. The accusation against each partner must be specific and unambiguous. The role played by each of the accused must be clearly stated in the complaint. No complainant can be permitted to launch prosecution against all the partners of a firm without there being a proper foundation in the complaint itself about the actual role played by them at the material point of time when the office is committed by the firm. No prosecution would lie against a partner on the simple accusation in the complaint that such person was the partner of the firm.

It is pertinent to note that in paragraph 9 and 10 of the said judgment, this court has considered the observations of the Apex Court in 2001 (10) SCC 218..... and 2002 7 SCC 755, 2005 Cr.L.J. 4249.

> 9. The learned counsel for the applicants submitted that under Section 141 of the Negotiable Instruments Act, if the person committing an offence under Section 138 is a company (which includes a firm), every person who, at the time the offence was committed, was in charge of, and was responsible to the company/firm for

the conduct of the business of the company/firm, as well as the company/firm, shall be deemed to be guilty of the offence. The learned counsel for the applicants submitted that in order to attract the provisions of section 138of the Negotiable Instruments Act the complainant must make averment in the complaint itself that every person, who is named as an accused, was responsible to the firm for the conduct of the business of the firm. In the absence of such averment no vicarious liability can be fastened on the partner of the firm. The learned counsel for the applicants pointed out that in para no. 1 of the complaint, it is averred that the "complainant is a company registered under the Indian Companies Act, 1956 and accused no. 1 is a partnership firm of which accused no. 2 to 4 are the partners". In para No. 2 of the complaint it is averred that "accused no. 2 on behalf of all the accused issued a cheque in favour of the complainant and that the said cheque was issued towards the amount due and payable by all the accused to the complainant and in discharge of preexisting debt and liabilities". The learned counsel for the applicants vehemently submitted that it is nowhere averred in the complaint that accused nos. 2, 3 and 4 were incharge of and were responsible to the firm for the conduct of the business of the firm. In the absence of such an averment, it cannot be said that they are guilty of the offence punishable under sectin 138 of the Negotiable Instruments Act. In support of his submissions, the learned counsel for the applicants placed his reliance on the following cases:

(i) In K.,P.G.Nair vs. Jindal Menthol India Ltd., (2001) 10 SCC 218, it is held that :

> "In view of section 141 a person other than the company can be proceeded against under those provisions only if that person was in charge of and was responsible to the company for the conduct of its business. Though words of section 141 (1) need not be incorporated in a complaint as magic words but substance of the allegations read as a whole should answer and fulfil the

> requirements of the ingredients of the said provisions (for being proceeded against for an offence which he alleged to have committed). On the above premise, it is clear that the allegations made in the complaint do not either in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence the appellant was in charge of and was responsible to the Company for the conduct of its business. Therefore, in this case the High Court has misdirected itself and committed an error in coming to the conclusion that the requirements of Section 141 are prima facie satisfied insofar as the appellant is concerned. The proceedings in question for the alleged offence under Section 138 as against the appellant are quashed."

(ii) In Katta Sujatha (Smt.) vs. Fertilizers and Chemicals Travancore Ltd. and another,m (2002) 7 SCC 655, it is held that:

> In short the partner of a firm is liable to be convicted for an offence committed by the firm if he was in charge of and was responsible to the firm for the conduct of the business of the firm or it is proved that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of the partner concerned."

(iii) In Monaben Ketanbhai Shah and another vs. State of Gujarat and others, 2004 Cri. L.J. 4249, it is held that :

> Section 141 does not make all partners liable for the offence. Criminal liability has been fastened on those who, at the time of commission of offence, was in-charge of and was responsible to firm for conduct of business of firm. These may be sleeping partners. Primary responsibility is on complainant to make necessary averments in complaint so as to make accused vicariously

liable. For fastening criminal liability, there is no presumption that every partner knows about the transaction. The obligation of appellants to prove that at the time the offence was committed they were not in-charge of and were not responsible to the firm for conduct of business of firm, would arise only when complainant makes necessary averments in complaint and establishes that fact. The instant case is of total absence of requisite averments in complaint. Therefore, order of Magistrate directing discharge of accused persons, holding that there are no allegations in complaint making out offence against them is proper."

10. The learned counsel for non-applicant no. 1/ complainant, on the other hand, submitted that the pleadings made by the complainant in the complaint are sufficient to attract the provisions of section 138 of the Negotiable Instruments Act. He pointed out that it has been specifically averred that accused no. 2 issued cheque in favour of the complainant on behalf of all the accused and that the same was issued towards the amount due and payable by all the accused to the complainant in discharge of their pre-existing debt or liabilities. He submitted that no more pleading is necessary. It is for the accused persons to show that the offence was committed without his knowledge or that he had exercised all due diligence. The burden in this regard has to be discharged by the accused persons during trial. Thus the complaint is not liable to be quashed as urged on behalf of the applicant. In support of his submissions, the learned counsel for non-applicant no.1/ complainant placed his reliance on the following cases:

(i) Orient Syntex Ltd. and others vs. Besant Capital Tech. Ltd., 1999(3) Mh.L.J. 413 = 2000 Cri. L.J. 210 (Bombay)
(ii)S.V.Muzumdar and others vs. Gujarat State Fertilizer Co. Ltd., and another, 2005(3) Mh.L.J. 754 (SC)."

14] In 2005 Cr.L.J. 4140 S.M.S.Pharmaceuticals Ltd.... vs...

Neeta Bhalla and another, the Apex Court in paragraph 20 has observed thus;

> "20..... (a) 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.
>
> (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases....."

15] Here is case where the applicant says that he has resigned from the applicant - company on 6.10.1997 i.e. admittedly prior to the issuance of the cheques by the accused - company, by the accused no.5.

16] In this behalf, the observations of the Division Bench of this Court in 2002(2) Mh.L.J. 36 - Saumil Dilip Mehta vs. State of Maharashtra and others, in paragraph 6 and 7 needs to be seen:

> "6. The submissions advanced by the litigating parties are touching an important point involved in this matter which make us to express our views on the point

whether a director of a public or private limited company can resign unilaterally and that too by writing a letter to the chairman of the said company or its secretary. Is it necessary for such a director to fill up form NO. 32 and is obliged to give a notice or intimation to that effect to the Registrar of Companies? The question arises for our adjudication is whether that particular director is obliged to give such information to the Registrar of Companies and whether he cannot retire without complying with the said requirement. Keeping in view the provisions of the Companies Act, the relevant articles of the Constitution of India, we come to the conclusion that a director of the public limited company or private limited company can tender his resignation unilaterally and without filling in form 32 and without sending a notice to the Registrar of Companies. It is clear that the filling in the said form and giving due intimation and information to the Registrar of Companies is the duty of the Company Secretary and not of an individual director. Suffice it to say that what he has to do is to send in writing a letter informing either the chairman or the Secretary of the Company, as the case may be, his intention to resign from the post of the Director of the said company. Thereafter the said letter has to be moved in the meeting of the directors of the company, may be ordinary meeting or may be extra-ordinary or special meeting, as the case may be, and the Board of Directors have to take a decision whether the Board is accepting his resignation or not. An intimation should be sent to such director and after such resolution is passed, the Company Secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the Board of Directors. It is for the Company Secretary to fill in the forms as prescribed and to give due information and intimation to the Registrar of Companies, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the Company, accounts and balance sheet of the company and thereafter the said fact is to be brought to the notice of the members of the Company as early as possible and at the latest in annual general

meeting.

> 7. When a director has tendered his resignation and the Board of Directors has accepted it and has acted on it, such director cannot be held liable for the liability incurred by the said company after the date of acceptance of his resignation except the liability which has been incurred by him for purchase of shares of the said company and noting more."

17] It would be clear that if the Director tenders his resignation prior to issuance of the cheque, he would not be liable for the said offence if any committed by the company - accused.

Thus tender of resignation and issuance of Form no.32 needs to be proved prior to the commission of the offence.

18] At this stage it is necessary to consider the observations of this court in 2006 ALL MR (CR) 438 S.B. & T. International Ltd., vs. State of Maharashtra and Anr., wherein in paragraph 3 it is observed thus:

> "3. This petition questions the correctness of the decision of the 1st d hoc Additional Sessions Judge, Palghar dated 1st August, 2005, in Crim. Rev. Application NO. 41 of 2005. By the said order the Sessions Judge has allowed the revision application thereby setting aside the order passed by J.M.F.C. Vasai, dated 7th August, 2002 issuing process under Section 138 of the Negotiable Instruments Act against respondent no. 2 in CC No. 3582 of 2002. The basis on which the Sessions Judge has allowed the revision application in favour of respondent NO. 2 is that respondent NO. 2 had produced form No. 32 to substantiate the plea that at the relevant time respondent no. 2 was not the director of the accused company. No other aspect has been considered in the

> judgment of the Sessions Judge. In my opinion, the petitioner /complainant is justified in contending that the question whether Respondent no. 2 continued to be the director in the accused company at the relevant time is a matter for trial. Indeed form No. 32 is a public document but even then the said document will have to be proved in evidence in defence by the accused. That by itself cannot be the basis to hold that no offence is made out aginst the concerned accused. This aspect has been considered in the decision dated 23rd December, 2004, in the case of (Vijay Mallya vs. State of Maharashtra and other) Crim. Application NO. 4827 of 2004. Applying the principles stated therein this petition ought to succeed. I am conscious of the fact that the Sessions Court adverted to several other decisions in the impugned judgment buy in the abovesaid judgment delivered by me I have considered most of the judgments referred to in the impugned judgment and taken the view that production of Form No. 32 by itself is not sufficient. Accordingly, this petition is allowed. The impugned judgment is set aside with the directions to the trial Court to proceed with the trial in accordance with law uninfluenced by any observations made in the impugned judgment or for that matter in the present order."

19] It clearly seems that in this case the basis on which the Sessions Judge had allowed the revision application of the accused was because of the form no.32 to substantiate his plea that he was not Director of the accused - company at the relevant time and no other aspect was considered in the said judgment by the learned Sessions Judge.

20] Further in 2001 Bombay 655 [Dushyant D. Anjira vs. Wall Street Finance Ltd. and Another, it has been held that, when there was no reason to disbelieve the form no.32, it would liable to be accepted for the purposes of showing that the said director was

not responsible for the business of the company after the resignation.

21] Here is the case where the applicant has produced the document of form no.32 which was accepted by the Registrar of the Companies at later date. The said change appears to have been accepted in December 1997, but it clearly seems to have been accepted, that the date of resignation is 6.10.1997 vide certified copy produced on record.

22] In these circumstances, when there is no sufficient material on record to show that this accused - applicant was working in the accused - company as Director at the time of issuance of cheque i.e. after 6.10.1997, he can not be held liable for the alleged offences as in the complaint there are only general allegations and in specific against accused no.5 to the effect that he had issued cheque on behalf of the company as well as other Directors. There is no contention & ex-facie established fact that this accused has concocted this form no.32 or his resignation, dated 6.10.1997 to avoid the liability of the accused arising out of the complaints filed by the complainant. I have already pointed out above that the applicant -accused no.4 has filed an application for recalling of process or to challenge the issue of process order and therefore, unless there is sufficient material on record to show that this accused was taking active part in the business or was responsible as Director even after 6.10.1997 or at least there is such allegation in the complaint, ex-facie he can not be held liable for the offence under section 138 of the Act and 420 I.P.C. When this is obvious, there can be no substance in the contention that

this matter should be established at the time of trial because when ex-facie there is no material in the complaint or otherwise to show that the accused can be proceeded for the offence under section 138 of Cr.P.C. or 420 of I.P.C., asking him to face the trial would clearly to be an abuse of process of law. In my opinion, even if there is delay in challenging that order, the delay would not be fatal and would not put constraints on this court to exercise the powers under section 482 of Cr.P.C. to quash the order of issuance of process against the accused - applicant.

23] In Bhajanlal's case [AIR 1992] SC 604 the Apex Court observed in paragraph 109 thus:

> "109. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rate cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim and caprice."

24] Here is the case where there is no sufficient material in the complaint or otherwise to show that the accused applicant was acting in the affairs of the company after 6.10.1997. It is also not shown that there is reason to believe that he must have concocted the resignation of 6.10.1997 to avoid liability and responsibility arising out of the transactions referred in the complaint. This is not an inquiry as to whether the factum of resignation of the applicant is established or not. Here is case where applicant says that he has resigned on 6.10.1997 from the affairs of the company as well as

Directorship of the accused - company. The complainant himself says that accused no.5 on behalf of the company issued cheque and only allegation against accused no.4 is that he was purchasing articles from the complainant. When there is certified copy of the form no.32 and its acceptance by Registrar of Companies on record, it has to be held that the accused no.4 - applicant had no responsibility in the affairs of the company or issuance of the relevant cheques at the relevant time so as to attract liability under section 138 of the Act or 420 of I.P.C. Hence exercise of power under section 482 Cr.P.C. by this court would not be an arbitrary exercise of power.

25] Learned counsel for the respondent has contended that the applicant has been moving courts after the courts and he is delaying the trial and he has exhausted the remedy under section 482 Cr.P.C. earlier and therefore, this application would not lie. I am unable to accept this contention for the simple reason that the applicant had sought liberty to file revision application under section 397 of Cr.P.C. because of the judgment of this court in V.K. Jain ..vs.. Pratap 2005(3) Mh.L.J. 778. Therefore, if at the relevant time this court was of the view that the application under section 482 of Cr.P.C. was not maintainable as remedy under section 397 Cr.P.C. is availablebefore Sessions Court and applicant chooses to avail that remedy, that would not dis-entitle him from preferring another application under section 482 of Cr.P.C. particularly in the circumstances of the case. True that the trial of the accused has been already delayed and cheque amount is quite a large amount, but that fact by itself will not be sufficient to reject the application of the applicant as it is otherwise tenable in law. Merely because

the said point can be decided at the time of the trial, that fact by itself will not prevent this court from exercising powers under section 482 of Cr.P.C. to prevent the abuse of process of law. At the cost of repetition, I may again point out that there are no sufficient allegations in the complaint to show that this applicant was dealing with the business of the company at the time when the cheques were issued, he has also produced documentary evidence on record to show that he had resigned from the Directorship of the company on 6.10.1997 i.e. much prior to the issuance of the cheque. Complainant himself says that the accused no.5 had issued cheque on behalf of the company and there is no material on record to show that the accused has either, cheated the complainant or any way was responsible for issuance of the false cheques or was responsible for the affairs of the accused - company. Therefore, accused no.4 i.e. applicant, can not be asked to face the trial, in such circumstances. In my opinion, the exercise of power under section 482 of Cr.P.C. is clearly warranted to quash and set aside the order of issue of process against this accused no. 4 - applicant, in the relevant complaint case.

26] Therefore, the orders of issue of process against this applicant in Criminal Complaint Case No. 676/97, 677/97, 679/97 passed by learned Judicial Magistrate, First Class, Special Court are hereby quashed and set aside, so also the order passed by t he learned Ad-hoc Additional District Judge in Criminal Revision NO. 408/2006, 409/2006 and 410/2006 is hereby quashed and set aside.

27] In the circumstances of the case, learned Magistrate is

directed to expedite the trial of rest of the accused by conducting the same on day to day basis.

28] It is also made clear that this order shall not prevent the tial court from taking cognizance of any offence, noticed to have been committed by this applicant, under section 319 of Cr.P.C. during the course of trial.

Rule is made absolute in the aforesaid terms.

JUDGE

smp.