Kartik Kirtibhai Parekh Vs State of Gujarat

Criminal Revision Application No. 46 and 47 of 2003

Court: Gujarat High Court

Date of Decision: June 17, 2004

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 258, 397, 401#Drugs and Cosmetics Act, 1940 â€" Section 18#Negotiable Instruments Act, 1881 (NI) â€" Section 138, 139, 141, 141(1), 141(2)#Penal Code, 1860 (IPC) â€" Section 120(B), 420

Citation: (2005) 1 GLR 361

Hon'ble Judges: C.K. Buch, J

Bench: Single Bench

Advocate: A.D. Shah, for the Appellant; Nandini Joshi, Assistant Public Prosecutor for Respondent No. 1, P.M. Vyas, Hiren P. Vyas and Sejal H. Vyas, for the Respondent

Judgement

C.K. Buch

1. The petitioners of both these Revision Applications, preferred u/s 397 r/w. Section 401 of the Criminal Procedure Code, 1973, are the orig.

accused nos. 3 and 4 of Criminal Case Nos. 2987/2001 and 2988/2001, pending in the Court of learned Judicial Magistrate (F.C.), Ahmedabad

Rural, filed by the respondent no. 2-orig. complainant for the offence punishable u/s 138 r/w. Section 142 of the Negotiable Instruments Act, 1881

(hereinafter referred to as the "NI Act").

2. Considering the points involved in both these Revision Applications, on consensus this Revision Applications have been heard together and are

being disposed of by this common judgment.

3. The case of the respondent no. 2-orig.complainant, Pinnacle Finstock Pvt. Ltd., a broker engaged in sale and purchase of shares on the basis of

brokerage, is that their company had transactions of sale and purchase of shares with the orig.accused no. 1-Classic Credit Ltd. and that there was

outstanding amount payable by the orig. accused no. 1 and to honour their liability of payment, the orig.accused no. 1 had issued two cheques i.e.

(i) Cheque No. 944264 dated 5th March, 2001 for an amount of Rs. 1,00,66,035-95 ps. and (ii) Cheque No. 944263 dated 5th March, 2001

for the amount of Rs. 83,92879/-; and both these cheques were drawn on Global Trust Bank Ltd., Fort, Mumbai. These cheques were handed

over to the representative of the respondent no. 2-orig. complainant by the accused and the representative of the orig.complainant -Company was

assured that as and when the said cheques are deposited, they would be honoured and on the basis of that assurance, the said cheques were

accepted. On 14th August, 2001, both these cheques were presented by the respondent no. 2-orig.complainant in their bank account with

H.D.F.C. Bank Ltd., Satellite Road, Vejalpur Naka, Ahmedabad Branch but they were returned on 18th August, 2001 with an endorsement

Refer to Drawer"". The respondent no. 2-orig.complainant was informed by the H.D.F.C. Bank Ltd. about the return of the cheques by a Memo

dated 24th August, 2001. According to the respondent no. 2, thus the accused had committed breach of promise and assurance given at the time

of handing over/presentation of cheques. It is averred in the complaint that when the accused were contacted, they replied that the amount of

cheques will not be paid and thus the respondent no. 2 felt that the accused had cheated him and the accused had committed a breach of trust in

pursuance of their common intention.

4. Ultimately, the respondent no. 2 after issuance of notice by Regd.Post A.D. and U.P.C. to the accused through his lawyer filed two different

criminal complaints on account of return of both the above referred cheques stating that the accused have committed an offence of cheating and

committed breach of trust as well as an offence punishable u/s 138 of the NI Act. On 28th September, 2001, the learned Judicial Magistrate

(F.C.), Ahmedabad Rural, after recording verification issued process against all the accused and registered the complaint as Criminal Case Nos.

2987/01 and 2988/01 respectively.

5. The orig. accused no. 1-Classic Credit Ltd. and the orig. accused no. 2-Kirtibhai Narbheram Parekh, one of the Directors, have not challenged

the order of issuance of process. The petitioners (orig. accused nos. 3 and 4) on service of process filed an application to drop the proceedings

contending that there are no averments as required u/s 141 of the NI Act, implicating both of them either in the complaint or in the verification

recorded by the learned Magistrate. A detail application being application exh.8 pointing out relevant facts and grounds was submitted by the

accused. However, the learned Magistrate vide its order dated 10th October, 2002, rejected the said application. It is contended that the

petitioners (orig. accused nos. 3 and 4) came to know about the said order on 25th October, 2002. The said order was kept reserved by the

learned Magistrate and the same was not pronounced till October, 2002 and in fact, the accused were not given dates after 18th May, 2002. But

for rejecting the application exh.8, the learned Magistrate took a view that the Form No. 29 discloses the names of Directors and as the petitioners

were the Directors at the relevant point of time when the cheques were issued, they are vicariously liable for the act of the company and it can be

inferred that they were also concerned and engaged in day to day affairs and charge of the company. In the very order rejecting the application

exh.8 preferred by the petitioners under challenge before this Court, it is also observed that it is the responsibility of the petitioners to establish that

they were not required to make the payment of outstanding amount of the cheques. The learned Magistrate after considering the scheme of Section

141 of the NI Act has held that as the burden is on the concerned accused-Director to establish that he is not responsible and; unless and until the

said burden is discharged by the petitioners, the petitioners (orig. accused) cannot escape the prosecution. The grievance expressed before the

Court by the petitioners is that a gross error has been committed by the learned Magistrate as it clearly transpires that according to learned

Magistrate there is a presumption that all the accused-Directors were in charge of day to day affairs of the company and they are collectively

responsible for the act of the company. The learned Magistrate has held that the reply given to the notice by the accused is an evasive reply and all

the Directors are collectively responsible and even otherwise in view of the scheme of Section 258 of the Criminal Procedure Code, the Court has

no power to drop the proceedings.

6. The order under challenge is assailed on more than one ground. However, the learned senior counsel Mr. A.D. Shah has concentrated his

argument on the grounds "B", "C", "D" and "E" of the memo and it would be beneficial to reproduce these four grounds which are common in

both the Revision Applications to appreciate the rival contentions raised before this Court, which are as under :-

[B] That the learned Magistrate seriously erred in placing burden on the accused to show that they were not in-charge of affairs of the company as

required u/s 141 of the Negotiable Instruments Act. The learned Magistrate committed serious error on question of law as to the burden to be

discharged by the accused.

[C] That the learned Magistrate seriously erred in interpreting Section 141 of the Negotiable Instruments Act which contemplating the existence of

certain facts for attracting vicarious liability. Section 141 clearly requires that when company has committed the offence, it is not only the company

, but also every person who at the time when the offence was committed, was in-charge of and was responsible to the company for the conduct of

the business of the company. If these two criteria are established, then there is a deeming fiction of guilt of the concerned accused who is in-charge

of and is responsible to the company for the conduct of the business of the company. Thus, this burden is to be discharged by the prosecution.

Unless and until there is averment or material in the complaint to show that accused No. 3 and 4 were in-charge of and were responsible to the

company accused No. 1 for conduct of the business of the company, their liability for the offence u/s 138 of Negotiable Instruments Act cannot

arise. The learned Magistrate clearly overlooked the observations of the Apex Court, where Their Lordships of the Apex Court, in matter of

K.P.G. Nair Vs. M/s. Jindal Menthol India Ltd. (2001 Supreme Court Criminal Ruling Page 27), which clearly require;

It is true, as submitted by Mr. Arora that the words of Section 141(1) need not be incorporated in a complaint as magic words but it cannot also

be disputed that substance of the allegations read as a whole, should answer and fulfill the requirements of the ingredients of the said provision (for

being proceeded against for an offence which he is alleged to have committed). On the above premises, 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.

[D] That the learned Magistrate seriously erred in coming to the conclusion that accused No. 3 and 4, being Directors, they were deemed to be in-

charge of and responsible for the conduct of the business of the company. Such an inference can never be drawn in a criminal trial, and when

provisions of Section 141 require the said facts to be borne out from the complaint, the issuance of process against these accused is absolutely

unwarranted.

[E] That the learned Magistrate ought to have seen, that when the accused is called upon to plead guilty or not guilty to the accusation mentioned in

the complaint, the accused has every right to point out to the concerned Court that taking the facts as it is emerging from the complaint and

verification, there is no offence committed by him and he should not be called upon to plead guilty or not. Mere issuance of process, by itself, will

not compel an accused to undergo the entire process of trial. The accused, when he appears before the Court on issuance of summons, has a right

to point out to the Court, that looking to the facts emerging from the complaint and verification, he is not guilty of the offence, for which the process

has been issued, and the Court should drop the proceedings qua him by considering the aspect of issuance of process. Thus, the learned

Magistrate committed serious error in not entertaining the petition on that ground also.

7. While developing the argument, the learned senior counsel Mr. A.D. Shah for the petitioners has taken me through various decisions including

the decision referred to hereinabove in ground "C". He has placed reliance on the observations made by the Apex Court in the case of State of

Karnataka v/s. Pratap Chand and ors., reported in 1981 SCC 453 . The Apex Court was dealing with the provisions of Sections 18-A and 34 of

the Drugs and Cosmetics Act, 1940. Reading Section 34 of the said Act, it is submitted that the scheme of Section 141 of the NI Act is pari

materia and by referring to Section 34 of the said Act, the Apex Court in para :8 of the decision has held that there is no merit in the appeal filed by

the State of Karnataka quoting the relevant paragraph from the decision reported in Girdhari Lal Gupta Vs. D.H. Mehta and Another, he Apex

Court has held that :

A person ''in charge of'' and ''responsible to the company for the conduct of the business of the company'', contemplated in Section 34(1) must be

a person in overall control of the day to day business of the company or firm. If a partner of the firm is not in such overall control, he cannot be

liable to be convicted merely because he had the right to participate in the business of the firm under the terms of the partnership deed.

8. According to Mr. Shah, there is no averment either in the notice or in the plaint or even in the verification recorded by the learned Magistrate

that any of these two petitioners-accused was actively involved in day to day business of the company or any of them was ''in charge of'' the

business of the company. Directorship by itself would not make them constructively/vicariously liable for any criminal wrong. While issuing process,

the learned Magistrate was supposed to consider the contents of the application and the facts stated on oath by the respondent no. 2-orig.

complainant verifying the contents of the application. The learned Magistrate ought not have issued process to the petitioners in absence of

categorical statement or any other relevant convincing prima facie evidence as to the involvement of the petitioners-orig. accused nos. 3 and 4. Mr.

Shah has also placed reliance on the decision reported in >2001 SCC 27 and India case as under v M s. Jindal Menthol Ltd. cited referred

relevant appellant-K.P.G. :6 11 decision. allegations made appellant Mr. K.P.G. Nair are :

That the accused No. 1 is the Company, the accused No. 2 is the whole-time Chairman, the accused No. 3 is one of the Directors, who signed

the share certificates on the date of issuance of the same and the three cheques which were issued to the complainant for the payment of the value

of the preferential shares on the date of maturity. Accused Nos. 4 and 5 are the signatories of all the three cheques. All the accused persons

hatched a conspiracy with a malafide intention to deceive the complainant to the tune of Rs. 57 lacs, thereby committing an offence of cheating and

are liable to be punished u/s 420/120-B, IPC. All the accused persons are also responsible for the dishonourment of the cheques under the

Negotiable Instruments Act and all are liable to be punished for the offences committed u/s 138, NI Act. All the accused persons have failed to

make the payment of the dishonoured cheques despite the legal notice which was sent by registered post.

9. The Apex Court ultimately observed that it is true that the words of Section 141(1) need not be incorporated in the complaint as magic words

but also it cannot be disputed that the substance of the allegations read as a whole should answer and fulfill the requirement of the ingredients of the

said provision. In paras :7 and 8 of the said decision, the Apex Court has held that :

7. From a perusal of the excerpts of the complaint, it is seen that nowhere it is stated that on the date when the offence is alleged to have been

committed, the appellant was incharge of or was responsible to the accused Company for the conduct of its business. Here it will be appropriate to

note sub-section (1) of Section 141 which is in the following terms :

Section 141(1) : If the person committing an offence u/s 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.

8. From a perusal of Section 141, it is evident that in a case where a Company committed offence u/s 138, then not only the Company but also

every person who at the time when the offence was committed, was incharge of and was responsible to the Company for the conduct of the

business of the Company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a

person other than the Company can be proceeded against under those provisions, only if that person was incharge of and was responsible to the

Company for the conduct of its business.

10. Placing reliance on the judgment reported in the case of K.P.G. Nair (supra), the Apex Court in the case of Katta Sujatha (Smt.) v/s.

Fertilizers and Chemicals Travancore Ltd. and anr., has observed 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 if 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.

11. So according to Mr. Shah, in absence of such a categorical averment, the learned Magistrate ought not have issued process against the

petitioners. Mr. Shah has further placed reliance on the decision of this Court in the case of Mayurbhai N. Vyas v/s. State of Gujarat and anr., this

Court has observed that even as per the complaint, the accused-Mayurbhai was neither concerned with the day to day conduct of the business of

the company nor he was in charge of the business. For short, for want of specific averment and the evidence against the concerned accused-

Mayurbhai, the Court terminated the proceedings as it was not possible for the Court to say that the concerned accused was in charge of the day

to day affairs of the business of the company or he was responsible for the conduct of the business of the company and, therefore, he is not liable

to face the prosecution. According to Mr. Shah, considering the ratio of this decision, the process issued against the petitioner nos. 3 and 4 could

not have been issued and, therefore, this Court should interfere and drop the proceedings against them.

12. The say of the respondent no. 2-orig.complainant is that the claim of Section 141 creates vicarious liability and it would be wrong to infer that

the other Directors or partners were not aware about the actual available fund in a particular Bank Account from which the Company has issued

cheques of the amount of more than Rs. 50 lakhs or one crore. So the learned Magistrate while issuing process cannot be said to have committed

any error either of law or of fact and, therefore, the order of issuance of process should be treated as a simple order of inter locutory in nature.

One of the arguments advanced before this Court is that the order of issuance of process is inter locutory in nature and, therefore, the proceedings

in the nature of Criminal Revision would not lie in view of the statutory bar of sub-section (2) of Section 397 of the Criminal Procedure Code. But

this argument is not found attracted and an accused, if he is able to convince the Revisional Court, the complainant under certain vague allegations

or without making any specific categorical statement in the complaint or even in the verification recorded by the learned Magistrate before issuing

process, should not force the accused to face the criminal proceedings and such an accused can also pray that as and when the Court receives any

evidence involving the accused in the crime or the complainant is able to lead any evidence under which a reasonable inference can be drawn about

either constructive or vicarious liability of a particular accused, at that stage he can be joined as an accused in view of Section 319 of the Criminal

Procedure Code.

13. One question which needs to be answered in light of the statement made before the Court is whether the present accused arranged as an

accused in the orig. complaint initially and the proceedings against one such accused if is quashed, or he is discharged in view of scheme of

Sections 227 and 228 of the Criminal Procedure Code, such an accused person can be joined as an accused in the very criminal case pending

trial. As per the settled legal proposition in a case instituted under Police Report, the answer may be different but in a private complaint when an

accused prays specifically that in absence of any categorical averments in the complaint and in view of the language of a particular statute, the

proceedings initiated against him by issuance of process, such an accused person can be joined as an accused at any stage of the trial, if the Court

is satisfied that now there is adequate legal evidence to arrange the accused person against whom the proceedings were earlier dropped as an

accused. It is rightly argued that no accused can be permitted to escape from criminal liability even when there is adequate legal evidence, such

evidence may be direct or circumstantial.

14. Mr.Hiren Vyas, learned counsel appearing for the orig.complainant has heavily placed reliance on the decision reported in Priti Bhojnagarwala

Vs. State of Gujarat and Another, wherein this Court after referring to as many as 36 different decisions including the decision of this Court; and in

one of the decisions the Apex Court has held that when the ingredients of the complaint prima facie indicating applicability of sub-section (2) of

Section 141 of the NI Act namely the offence being committed in connivance or negligence of the Director or officer of the Company, then in those

cases, it is not necessary to establish that the accused was in charge of or responsible for the affairs of the company. In this decision, the petitioner

had approached the High Court invoking jurisdiction u/s 482 of the Criminal Procedure Code. Before exercising inherent jurisdiction of the High

Court, the Court has considered various aspects including the facts of the cited case. While dealing with the case of Priti Bhojnagarwala (supra),

the Court was asked to consider 30 Criminal Misc. Applications filed u/s 482 of the Criminal Procedure Code and on facts, the Court found that

the number of cheques were issued by orig. accused no. 2, Manoj Bhojnagarwala. The Court also found that there is an element of cheating by the

family of the accused and the accused were required to pay an amount of Rs. 85,74,500/- for the clearance of the debt for which the accused had

issued various cheques of various dates. Because of the representations made by the accused, different cheques of different dates came to be

presented by the complainant on particular dates and they were dishonoured. The complainant had received a vague reply from the accused and

they neither admitted their liabilities nor there was any specific denial of such liabilities. The Court found that it is the defence of the accused that

Nidhi Investment is a proprietary firm and none of the accused named in the cause title of the complaint had any concern with the said Nidhi

Investment firm. The stand of accused no. 2-Manoj Bhojnagarwala was found unreasonable, unacceptable and also contrary to his conduct

because this very accused no. 2-Manoj Bhojnagarwala had issued a cheque as an authorized signatory of the Nidhi Investment. The very cheque

was produced with the complaint. It was found by the Court that this very accused no. 2-Manoj Bhojnagarwala issued cheques in two different

capacities, which were sufficient to establish design of the accused to cheat the family of the complainant and the complainant himself. In this

background, the Court refused to quash the complaint, so this decision would not help the respondent no. 2 much. One more aspect which is

relevant, is that this decision is rendered by this Court on 5th May, 2001. It is true that while dealing with the case of Priti Bhojnagarwala (supra),

this Court has considered the decisions reported in Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others, and AIR 1989

SCC 1982 , in the case of Sham Sunder and ors. v/s. State of Hariyana. But it is rightly submitted by the learned senior counsel Mr. A.D. Shah

that this Court should not place any reliance on the findings recorded by this Court in the case of Priti Bhojnagarwala (supra) in view of the settled

legal proposition that reliance cannot be placed on a decision without discussing as to whether it was rendered in same factual and legal

background. The judgment of the Court cannot be considered as a statute. Judges are supposed to interpret the language or words of the statutes.

The words or language used in a judgment may have an effect of a statute but the same should not be interpreted as a statute. It would be

beneficial to quote paras :12 and 13 of the decision in the case of Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others,

12. In Home Office v. Dorset Yacht Co. [1970 (2) All ER 294] Lord Reid said, ""Lord Atkin"s speech..... is not to be treated as if it was a

statute definition. It will require qualification in new circumstances."" Megarry, J. in Shepherd Homes Lt. v. Sandham (No. 2) [(1971) 1 WLR

1062] observed : ""One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament."" In Herrington v.

British Railways Board [1972 (2) WLR 537] Lord Morris said :

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered

that judicial utterances made in the setting of the facts of a particular case.

13. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases

by blindly placing reliance on a decision is not proper.

15. The observations made by the Apex Court in the case of Divisional Controller, K.S.R.T.C. v/s. Mahadeva Shetty, are also found relevant,

wherein the Apex Court has said that :

The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a

case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try

to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is

rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing

binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not the part of ratio

decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an

investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as measure of social justice. Precedents have

silentio and without argument are of no moment. Mere casual expression carry no weight at all. Nor every passing expression of a judge, however

eminent, can be treated as an ex cathedra statement having the weight of authority.

So the Court is not inclined to accept the submission of Mr. Vyas that accepting the ratio of the decision in the case of Priti Bhojnagarwala (supra),

the present Revision Application should be dismissed and it may be held that no error has been committed by the learned Magistrate in issuing

process against all the accused named in the cause title of the complaint.

16. The case of Priti Bhojnagarwala (supra) has been decided by this Court on 4th May, 2001; but in subsequent decision the Apex Court in the

case of Katta Sujatha (Smt.) (supra), after referring to the decision of K.P.G. Nair (supra) has confirmed the ratio of decision in the case of State

of Karnataka v/s. Pratap Chand (supra), whereby the Apex Court has explained the meaning by observing that the term, ""person in charge"" must

mean that the person should be in overall control of the day to day business of the company or firm. The observations of the Apex Court in the

case of State of Hariyana v/s. Brijlal Mittal and ors., reported in 1988 (5) SCC 343, therefore, would become very relevant so far as present

revision is concerned, wherein the Apex Court has observed that :

Simply because the person is a Director of a company it does not necessarily mean that he fulfils both the above requirements so as to make him

liable. Conversely, without being a director a person can be in charge of and conduct of its business. From the complaint in question we, however,

find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie,

that they were in charge of the company and also responsible to the company for the conduct of its business.

17. In the present case except a bald statement, there is no allegation or averment in the complaint that both the petitioners were concerned with

the day to day business of the company or were aware about the issuance of the cheques in question.

18. During the course of arguments, the learned counsel appearing for the parties were asked to show the xerox copies of the cheques given to the

orig. complainant and on a close look at the documents and especially the status and name of the person who has signed the cheques, a pointed

out query was raised to the learned senior counsel Mr. A.D. Shah and after looking to the signatures on both the cheques as well as Vakalatnama,

Mr. Shah has requested for some time and ultimately, he has fairly accepted that he is not pressing this revision application so far as petitioner no.

1-Kartik Kirtibhai Parekh is concerned. Therefore, the Court is supposed to record the finding only qua the stand taken by petitioner no. 2-Ketan

Vinaychandra Parekh (orig. accused no. 4) and it is not the say of the respondent no. 2-orig. complainant that any of these two cheques has been

signed by the petitioner no.2-Ketan Vinaychandra Parekh (orig. accused no.4).

19. The say of Mr. Hiren Vyas before this Court is that the petitioner no.2-orig. accused no.4 is the main person behind the entire transaction and

he is the person responsible for issuance of cheques by orig. accused no.1 and he is the person who was dealing with the business of sale and

purchase of shares-stock of various companies. But Mr. Vyas was not in a position to point out a single statement either from the complaint or

from the verification recorded by the learned Magistrate. The contents of the Form No.29 maintained under the provisions of the Companies Act,

1956, by themselves would not help the complainant at this stage and it would be wrong to infer that the contents of Form No.29 would shift the

onus on the accused in view of the presumption emerging from the scheme of Sections 138, 139 and 141 of the NI Act.

20. The Court is aware about the ratio of the decision in the case of Raj Lakshmi Mills v. Shakti Bhakoo, (2002) 8 SCC 236 wherein the Apex

Court has held that at the stage of summonsing when the evidence was yet to be led by the parties, the High Court could not on an assumption of

facts come to a finding of fact that the respondent was not responsible for the conduct of business. But in this cited decision by Mr. Vyas, it

appears on reading para :3 of the decision that the High Court had recorded a finding of fact that the respondent-Shakti Bhakoo was not in charge

or responsible for the conduct of business. In the present case on appreciation of the facts, the petitioner no. 2 at least has effectively pointed out

that there is neither a bald statement regarding the involvement and conduction of the business by the petitioner no. 2 nor there is any prima facie

evidence before the Court under which the petitioner no. 2-orig. accused no. 4 can be said to be responsible for issuance of cheques in question.

Therefore, the order of issuance of process against the petitioner no. 2-orig.accused no. 4 can be said to be bad in eye of law. The Apex Court in

the case of Delhi Administration (now NCT of Delhi) v/s. Manoharlal, reported in 2002 SCC 1670, has held that :

The High Court and all other courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not

absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading

of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them.

21. The two accused out of the main four accused have not filed Revision Application and on behalf of petitioner no. 1-orig.accused no. 3,

Revision Application has not been pressed in view of the facts pointed out to the Court by the learned senior counsel Mr. A.D. Shah. The Court at

present is scrutinising the propriety and validity of the order of issuance of process and not the sustainability of the entire complaint and it is

possible for this Court to observe that by holding evidence if the respondent no. 2-orig.complainant is able to establish that the petitioner no. 2-

orig.accused no. 4 was vicariously/constructively liable for the criminal wrong in question and was concerned with the day to day business and was

aware about issuance of cheques and/or was effectively dealing with the concerned Bank Account regularly, then he can be joined as an accused

invoking jurisdiction of the Court u/s 319 of the Criminal Procedure Code. Even the Court suo motu can join the petitioner no. 2-orig.accused no.

4 as an accused at any appropriate stage of the trial. The petitioner no. 2 challenges the legality and validity of the order of issuance of process

technically by pointing out certain missing averments/allegations but it is always open for the complainant to establish a fact that the petitioner no. 2-

orig.accused no. 4 was in charge of or was responsible to the company for the conduct of business of the company and/or for issuance of cheques

in question. But I am afraid at this stage to say that the order of issuance of process against the petitioner no. 2-orig.accused no. 4 is legal. So the

order of issuance of process against petitioner no. 2-orig.accused no. 4 is not found sustainable and, therefore, the proceedings against the

petitioner no. 2-orig. accused no. 4 shall have to be terminated/dropped. The Judicial Magistrate issuing process should act meticulously and

examine the averments made in the complaint and the verification statement in such or similar cases; especially when the prosecution is under

special legislation. It is true that evidence is not required to be pleaded but there must be basic averments-allegations as to how one is involved in

the alleged crime.

22. It is clarified that in view of the above observations, it will be open for the complainant, if he is able to satisfy the Court by leading evidence

about the involvement of the petitioner no. 2-orig.accused no. 4 in the offence referred to in the complaint, by leading reasonable evidence, to join

the petitioner no. 2-orig. accused no. 4 as an accused again in the same proceedings at any subsequent appropriate stage of the trial. Even

otherwise, it will be open for the Court to join the petitioner no. 2-orig. accused no. 4 as an accused, if the Court by itself is satisfied with the

evidence to be led by the complainant during the trial as to the involvement of the petitioner no. 2-orig.accused no. 4 in the offence, that shall not

be viewed as a fresh or second prosecution.

23. With the above observations, both the Revision Applications are partly allowed. So far as the petitioner no. 1-Kartik Kirtibhai Parekh (orig.

accused no. 3) is concerned, they are dismissed as not pressed and the same are allowed with the observations made hereinabove qua the

petitioner no. 2-Ketan Vinaychandra Parekh (orig. accused no. 4). Rule is made absolutely in above terms in both the Revision Applications.