ABC 2016 (II) 551 GUJ
ACQUITTAL & BAIL CASES

a

HIGH COURT OF GUJARAT

(A.J. Shastri, J.)

Special Criminal Application (Quashing) No. 1660 of 2009

Decided on 11 November, 2016

b

D C MEHTA & ANR. ***- Applicant(s).***

Versus

STATE OF GUJARAT & ANR. ***- Respondent(s).***

c

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 482 — Quashing of FIR — Indian Penal Code, 1860 — Sections 120(b) & 420 — Prevention of Corruption Act, 1988 — Section 13(2) r/w 13(1)(d)— No material against petitioners' role — Petitioners are neither specifically named in the FIR nor even are specifically attributed in the charge-sheet — No specific role — Held, Managing Director & the Directors of the Company should not have been summoned only because some allegations were made against the Company —FIR & consequential proceedings quashed. (Para 15 & 17)***

d

(B) Criminal Jurisprudence — Vicarious liability — Principle of — Held, except in some matters IPC does not contemplate any vicarious liability on the part of a person. (Para 17)

(C) Interpretation of Statute — Indian Penal Code, 1860 — Vicarious liability — legal fiction — Held, commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. (Para 17)

e

(D) Indian Penal Code, 1860 — Offence by a company — Managing Director or the Directors — liability of — Held, cannot be said to have committed an offence only because they are holders of offices. (Para 17)

f

(E) Code of Criminal Procedure, 1973 — Section 156(3)— Power of Magistrate for order of investigation — Proceedings under — Requirement of — the complaint must disclose the relevant material ingredients of alleged offence.(Para 19)

g

(F) Code of Criminal Procedure, 1973 — Section 156(3)— Power of Magistrate for order of investigation — Complaint of civil nature — impact of — Held, if there appears to be flavour of civil nature the same cannot be allowed to be agitated in the form of criminal proceedings.(Para 19)

h

Facts:- *It was alleged in the FIR the officials of KRIBHCO have given a pecuniary advantage to a firm and thereby cheated KRIBHCO by abusing their position as public servants being in conspiracy with the*

officials of the said firm. The offence came to be registered u/ss 120(b) and 420, IPC as well as u/s 13(2) r/w 13(1)(d) of PC Act.

It was observed by the hon'ble Gujarat High Court that the present petitioners are not sufficiently attributed either in the FIR or in the charge-sheet, which would connect them in the proceeding and therefore the compliant and all subsequent proceedings qua present petitioners were quashed and set aside.

Law of relief:- If the criminal complaint is of the flavour of civil nature, same cannot b sent for investigation to police.

Held:- In the light of aforesaid background of facts, if now to be looked into the context of the allegations made by the respective parties, it appears prima facie that there is no material available in so far as the petitioners' role is concerned which is alleged. Petitioners are neither specifically named in the FIR nor even are specifically attributed in the charge-sheet as well. Thorough investigation has taken place which has indicated no material concrete enough to continue the prosecution against the petitioners and therefore, in the absence of any specific role to be played and in the absence of specific material being available, it appears to this Court that the present two petitioners, who are original accused nos. 6 and 7, are wrongly dragged into prosecution. In case of offences which are alleged, the concept of vicarious liability cannot be stretched to that level by which petitioners can be allowed to languish in prosecution. The series of decisions by now have well defined the proposition on the exercise of inherent jurisdiction and this case appears to be coming within the purview of said proposition, whereby Court deems it proper to exercise inherent jurisdiction. (Para 15)

17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company. (Para 17)

Yet in another decision reported in 2011 (13) SCC 412 again the said principle is reiterated by the Hon'ble Apex Court and has held that

in the absence of any ingredient of alleged offence being seen no accused can be dragged into prosecution. The Court has held that for proceedings underSection 156(3) of Cr.P.C., the complaint must disclose the relevant material ingredients of alleged offence and if there appears to be flavour of civil nature the same cannot be allowed to be agitated in the form of criminal proceedings, and while dealing with the said aspect, the Apex Court has quashed the complaint. The Apex Court while dealing with the said case has relied upon series of decisions and has ultimately held that ingredients of Section 405, 406 420 read with Section 34of the IPC are not attracted and since the complaint is based on inherent and improbable and contains the flavour of civil nature, the order of 156(3) came to be quashed. In so far as the said relevant accused is concerned, the Court while dealing with the said case has also considered the extraordinary delay and latches in respect of filing of complaint, and here also if we peruse the record, the complaint came to be filed in the year 1999 with respect to alleged transaction, which took place in the year 1994-95, and therefore, the decision cited by the learned counsel referred to above is attracting the background of present case on hand also. (Para 19)

Counsel:- ***For Applicant(s):*** *Mr P.M. Thakkar, Ld Senior Advocate For Thakkar & Pahwa Advocates.*
For Respondent(s): *Mr R.C. Kodekar, Advocate.*

Cases Referred:-

1. 2015 (4) SCC 609. *(Para 4)*
2. 2013 (4) SCC 505. *(Para 4)*
3. 2011 (13) SCC 412. *(Para 4)*
4. 2008 (5) SCC 668. *(Para 4)*
5. 2010 (8) SCC 233. *(Para 11)*
6. 2015 (4) SCC 609. *(Para* 17*)*
7. 2013 (4) SCC 505. *(Para 18)*
8. ***2011 (13) SCC 412.*** *(Para 19)*
9. ***2008 (5) SCC 668.*** *(Para* 20*)*
10. 2015 (11) SCC 730. *(Para 21)*

JUDGMENT

A.J. SHASTRI, J.: - 1. The petitioners by way of present petition are seeking a relief of quashing and setting aside the FIR being RC 9 (A)/1997 ABD dated 22.01.1997 registered with CBI Gandhinagar Police Station, as also the order passed by the learned Special Judge C.B.I. Court No. 5, Mirzapur, Ahmedabad, dated 30.07.2009 below Exh.77 and all consequential further proceedings qua petitioners.

2. The brief facts are as under:

The petitioners have filed the aforesaid petition initially against an order dated 30.07.2009 passed below Exh.77, whereby a request of the petitioners to discharge from the prosecution was not accepted and therefore, on the premise which has been stated in the petition the petitioners have sought relief. Initially the petitioners have filed the petition along with other accused persons related to very same offence and all the three matters were adjourned as no hearing has taken place on account of paucity of time and therefore, the Court in the said order has directed that proceedings which are pending in the form of Special Case No. of 1999 pending before the learned Special Judge, C.B.I. Court No.5, Mirzapur, Ahmedabad, was ordered to be adjourned. Later on, it appears from the record that this present petition being Special Criminal Application No.16 of 2009 came up for consideration before this Court on 20.08.2009, in which, after hearing the parties to the proceedings and after recording the brief reasons, in so far as the petitioners are concerned, the proceedings of Special Case No. of 1999 were ordered to be stayed and subsequently the other cognate petitions namely, Special Criminal Application No.1659/2009 to Special Criminal Application No.1661/2009 came to be admitted and interim relief granted earlier was ordered to be continued till further orders. Here the fact is to be noticed that interim relief staying the proceedings of Special Case No. of 1999 came to be stayed in so far as only Special Criminal Application No.16 of 2009 is concerned, whereas such order is not reflecting in respect of other petitions. However, be that as may, the proceedings in respect of this very offence are pending in the form of aforesaid three Special Criminal Applications. The matters appeared before the Court, wherein initially Special Criminal Application No.16 of 2009 was pressed for hearing at the request of the learned advocates appearing for the respective parties and the hearing with respect of Special Criminal Application No.16 of 2009 came to be concluded and hence, the same is being dealt with vide present judgment and order.

3. The brief facts of the prosecution is that on the basis of information received from C.B.I., Ahmedabad Office, the F.I.R. Came to be lodged in which in substance the case is that one Mr. H.C. Malhotra while working as Director (Marketing) KRIBHCO and other officials of KRIBHCO entered into a criminal conspiracy with one Mr. M.R. Harshe, General Manager (Materials) and others of M/s. Deepak

Nitrite Ltd., Baroda (M/s. DNL) during the year 1994-95 in respect of supply of ammonia quantity at the discounted price and thereby has caused a wrongful pecuniary loss to the extent of Rs.33.47 lakhs to KRIBHCO. The allegation which is reflected in the FIR that the above named officers, though being public servants, allowed the discount of Rs.1,000/- per metric tone instead of only Rs.150/- per metric tone, when the rate of ammonia was Rs.6,400/- per metric tone around the month of July, 1994. It is the case of prosecution that on 13.02.1995, the rate of ammonia was raised from Rs.6,400/- to Rs.7,000/- per metric tone in the year 1995-96, even then the firm was allowed to lift ammonia by giving discount of Rs.1,000/- per metric tone on the old rate i.e. Rs.6,400/- and in this way from 13.02.1995 onwards a pecuniary advantage of Rs.1,600/- per metric tone was allowed to the said firm by abusing the position of being a public servant without intimating the enhanced rate of ammonia to the plant at Surat. It was alleged in the FIR that the KRIBHCO plant at Surat can maintain a maximum stock of 4,000 metric tone at a plant and though on 31.03.1995 the stock of ammonia had come down within the permissible limit, even though the special discount as referred to above was given to the firm M/s. Deepak Nitrite Ltd., Baroda to lift ammonia up to the end of May, 1995 and therefore, it is alleged in the FIR that during the passage of time from June, 1994 to May, 1995 the officials of KRIBHCO have given a pecuniary advantage to the extent of Rs.33.47 lakhs approximately to the firm and thereby cheated KRIBHCO by abusing their position as public servants being in conspiracy with the officials of M/s. Deepak Nitrite Ltd., Baroda and by asserting this the offence came to be registered under Section 120 (b) and 420 of the Indian Penal Code as well as under Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988, and after investigation the charge-sheet also came to be filed with respect to this very complaint, and it is in this regard the petitioners have approached the Court concerned initially by way of an application for seeking discharge from the prosecution, which was registered as application below Exh.77. The said application came up for consideration before the Special Judge, CBI Court No.5 at Mirzapur, Ahmedabad, who by a judgment and order dated 30.07.2009 was pleased to reject the application. A fact may be taken note of that the said application was filed by original accused nos. 3, 4, 6, 7 and 8. However, the present petition is related to original accused nos.6 and 7. These accused persons have preferred a Special Criminal

Application against the said order, which is registered as Special Criminal Application No.16 of 2009 and so far as other accused are concerned, they appeared to have filed cognate petitions referred to above. This petition was originally directed against an order of rejection on discharge application below Exh.77, but then during the course of time on 16.06.2011 the amendment was carried out, whereby the petition was amended and the relevant clause also came to be inserted for seeking quashment of the FIR dated 22.01.1997 and subsequent proceedings thereunder, and it is this amendment, which has extended the scope of petition. As said earlier, this petition was entertained by the Court and in the aforesaid background, the petition has come up for final disposal.

4. The learned senior counsel Shri P.M. Thakkar, appearing on behalf of the petitioners, has contended that so far as the present petitioners are concerned, they are original accused nos. 6 and 7 and are not responsible in connection with the alleged conspiracy. It was pointed out by the learned counsel for the petitioners that no case is made out from the bare reading of the FIR and even during the course of investigation when the charge-sheet came to be filed the counsel contended that there is no material worth the name which would permit the prosecution to arraign the petitioners as accused persons. It was pointed out by the counsel that neither any allegation is made against the petitioners nor even named in the charge- sheet and there is no whisper about any role being played by the petitioners in connection with the offence alleged. The learned counsel further submitted that ex-facie from the bare reading of the averments contained in the complaint as well as from the material available on record of the charge-sheet no case is even prima facie made out of offence alleged in the original complaint. The learned counsel has submitted that simply because the petitioners are the office bearers of M/s. Deepak Nitrite Ltd. cannot be vicariously held liable for alleged conspiracy. The counsel for the petitioners has submitted from the overall material on record and the allegations contained in the FIR, it seems that some commercial decision in the compressed situation appears to have been taken by KRIBHCO to supply the quantity of ammonia to the firm named as Deepak Nitrite Ltd and therefore, such commercial decision can never be inferred to be criminal conduct in any manner. It was contended that at the best, it might be a breach of contract which would not entail any criminal proceedings, however, be that as may, the counsel submitted that so far as the present

petitioners are concerned, no case worth the name is made out either in the FIR or from the papers contained in the charge-sheet. The learned counsel has further drawn the attention to various clauses contained in the contract and has also taken the Court to other relevant papers attached to the petition compilation and then contended that so far as provisions contained under the Prevention of Corruption Act are not at all attracted in any manner. Even earlier allegation is also not being substantiated qua these offence against the petitioners and so far as other offences alleged in the complaint related to Indian Penal Code, no case worth the name is reflected being substantiate and therefore, in so far as the petitioners are concerned, the complaint tantamount to be an abuse of the process of law. The learned counsel has contended further that petitioners have not done any thing in their personal capacity nor have played any role in the entire transaction and therefore, to fix the petitioners under vicarious liability is impermissible. The learned counsel has submitted, on the contrary, the Deepak Nitrite has made an upward revision of basic price of supply of ammonia, which fact is entirely spelt out from a communication in the form of letter dated 02.03.1995 written by M/s. Deepak Nitrite to KRIBHCO, which is part of charge-sheet papers. It was also contended that there is no allegation in the FIR that petitioners have ever made any representation to the complainant neither any property is delivered on account of any representation of the petitioners nor the petitioners have induced in any manner to get the undue advantage to M/s. Deepak Nitrite. The learned counsel by referring to the ingredients of Section 420 of the Indian Penal Code has submitted that none of the ingredients are established even prima facie either from the bare reading of the FIR or from the charge-sheet papers to connect the petitioners in any manner. The learned counsel has further drawn the attention that even Section 13, which has been pressed into service to arraign the petitioners, is also not substantiating the test of its ingredients from the material on record and therefore, since no case is made out of any nature, the counsel submitted that to continue the prosecution against the petitioners is nothing but an example of abuse of the process of court. The learned counsel has drawn the attention to series of decisions to contend that petitioners cannot be arraigned in prosecution in any manner looking to the material even gathered during the course of investigation. The learned counsel has submitted following decisions in this regard, which in this judgment at a later

point of time, will be discussed and dealt with, but to summarize the following decisions are pressed into service by the counsel for the petitioners. ***(i) 2015 (4) SCC 609 (para. 42, 43, 44, 45 and 46), (ii) 2013 (4) SCC 505 (para. 12, 13, 17 to 21), (iii) 2011 (13) SCC 412 (para. 31, 40, 42), (iv) 2008 (5) SCC 668 (para. 13).*** By referring to these decisions and the ratio laid down contained thereunder the learned counsel for the petitioners contended that prosecution against the petitioners is nothing but clear example of abuse of the process of law. The learned counsel has then submitted various paragraphs of the charge-sheet filed in this very case and from the relevant extract of the said paragraphs also the counsel submitted that no case is made out against the petitioners and therefore, the complaint in question and the subsequent proceedings may be quashed. So far as the conspiracy is concerned, the said allegations is also not reflected in any manner and therefore, since the petitioners are not public servants at all even the charge leveled in the complaint has not taken place.

5. The learned counsel for the petitioners has further contended that with respect to another co-accused this Hon'ble Court has quashed the proceedings under an order dated 22.02.2001 in Criminal Misc. Application No.2 of 2000 and thereby contended that almost in similar set of circumstance, the petitioners are also arraigned and therefore, the case qua them also be quashed in the interest of justice. The learned counsel has submitted ex-facie since the petitioners are not public servants, there is no question of offence being committed under Section 13 of the Act and at the best qua petitioners charge of Section 120(b) might be left out from being considered, but looking to the papers contained in the charge-sheet and the material prevailing on record, it is even that charge is also not substantiating remotely and therefore, in the absence of any material under the guise of abatement the petitioners may not be allowed to languish in litigation for all time to come. And therefore, under this set of circumstance, the learned counsel by referring to all these relevant materials has requested the Court not to continue the prosecution against the petitioners and consequentially requested the Court to allow the petition in the interest of justice.

6. To oppose the petition, Mr. R.C. Kodekar, learned Additional Public Prosecutor appearing on behalf of respondent no.2 has contended that various disputed questions of fact are reflecting from record and therefore, on this count no inherent jurisdiction be exercised. The counsel submitted that even looking to the allegation

contained in the FIR coupled with the investigation papers atleast conspiracy is reflected from the record and therefore, the learned counsel submitted to allow the prosecution to prove the case against the petitioners as well. It was contended by the counsel Mr. Kodekar that petitioners are in collision with the officials of KRIBHCO and in that connection have generated undue advantage in favour of M/s. Deepak Nitrite and caused loss to KRIBHCO. It was also contended by the counsel that almost more than 10 to 11 retailers were available for purchase of the ammonia quantity and further at the relevant point of time the capacity at Surat plant was also within the permissible limit to be stocked and therefore, there was no circumstance to even grant a special discount to the extent of Rs.1,000/- per metric tone instead of merely Rs.150/- per metric tone and therefore, there is a clear collusion between the officials of KRIBHCO with M/s. Deepak Nitrite and therefore, the offence is made out as contended by the counsel and submitted that petitioners being part of said conspiracy cannot be allowed to throttle the case at his stage. The learned counsel has further submitted that there is a huge pecuniary loss to KRIBHCO caused on account of said alleged conspiracy, which is yet to be proved and therefore, this is not the case in which the Court should intervene and throttle the prosecution case. It was also contended by the counsel that though the Managing Director objected still however, the stock was permitted to Deepak Nitrite at a concessional rate and therefore, this had happen on account of collusion between the parties to the transaction and therefore, no quashing be permitted at this stage of the proceedings. The learned counsel has further submitted that there is a serious financial loss caused to KRIBHCO and therefore, to find out the truth proper adjudication be made and therefore, petition may not be entertained. The learned counsel submitted that the Apex court has categorically stated that whether the evidence is sufficient or not is not to be found out at the quashing stage while exercising inherent jurisdiction and therefore, by referring to a decision reported in ***AIR 2005 SC 359(1)*** the counsel submitted not to entertain the petition. The learned counsel for the respondent has further submitted that the discharge application was considered at length by the Court below and a well reasoned judgment on the said application for discharge is sufficient enough to indicate that this is not the case where extraordinary jurisdiction is to be exercised. It was contended by the counsel that in case which has been taken in aid of another co-accused

has got the different set of circumstance from that of petitioners and therefore, simply because in the said case the complaint came to be quashed by this Court in the absence of any similarity, no order of that nature be passed especially when the allegations are leveled against the petitioners.

7. As against this, the learned counsel for respondent no.2, Mr. R.C. Kodekar, has cited a decision reported in AIR 2005 SC (Supra) and has suggested that no roving or fishing inquiry or mini trial at this stage as it is impermissible as held by the Apex Court and therefore, by referring to paragraphs 8 and of the said decision has contended that no exercise of extraordinary jurisdiction be undertaken in favour of the petitioners. While going through the said decision it is found by the Court that, in that case the Apex Court was essentially concerned with Section 227 of the Code of Criminal Procedure which deals with an issue of discharge of an accused person and in that context the observations have been made by the Hon'ble Apex Court. While here in the case on hand, of course, initially the challenge was made to an order passed under Section 227 of the Code of Criminal Procedure, however, at a later point of time, petition was got amended without any opposition by respondent no.2 and scope was enlarged by incorporating the relief of quashing the complaint as also all consequential proceedings and therefore, in this context, it appears that the judgment cited by the learned counsel for respondent no.2 is not squarely applicable. Of course, the principle underlying by the Apex Court is undisputed. However, the background of facts is not permitting the Court to apply in its full effect in view of above said peculiar set of circumstance, and therefore, the said decision cited by the counsel is of no avail to respondent no.2. It is quite clear by now that the slight change in the fact would make a world of difference in applying principle of precedent and therefore, here the background of facts is altogether different from that which was available in 2005 cited by the counsel for respondent no.2. The Court deems it proper not to apply the principle on the case on hand. Hence, the same is not squarely applicable.

8. The learned advocate has drawn the attention that the charge-sheet has clearly indicated that in connivance to the other officials, Deepak Nitrite has taken undue advantage and caused serious loss and the material which has been gathered from the investigation is sufficient enough to attract the role of the petitioners.

When asked in detail the counsel has drawn the attention to paragraphs 33, 34 and of the petition compilation which is a part of the charge-sheet attached to the petition. But then, ultimately, the counsel submitted that the trial court be allowed to find out the true fact is to under which circumstance the transaction has taken place at a discounted price and thereby requested the Court not to entertain the petition.

9. In response to the said stand of the leaned counsel for respondent no.2 in rejoinder to it, the counsel for the petitioners has contended that when the capacity was reduced the bulk buyers were already very much available and therefore, a commercial decision was taken by KRIBHCO officials over which there was no control of the petitioners and therefore, when the decision was taken at a level of KRIBHCO no fault can be found of the present petition in any manner. It was contended by the counsel in rejoinder that no decision is taken by these two petitioners of present petition nor any statement of any of the witnesses would indicate any role of petitioners in any manner about the transaction in question. These two petitioners are neither signatory to the contract nor are signatory to any communication which took place between KRIBHCO and Deepak Nitrite nor are participants of any meeting with any of the officials of KRIBHCO nor it is reflected remotely even from the charge-sheet that any active role is played by the petitioners and therefore, in the absence of any material whatsoever nature in a generalized manner the petitioners cannot be allowed to be plugged in conspiracy or abatement. None of the statements in the charge-sheet are triggering anything against the petitioners and therefore, the learned counsel has relied upon a further decision reported in ***2015 (4) SCC 668*** as well as reiterated the decisions referred to above and thereby has ultimately contended that the prosecution has not made out any case in so far as the petitioners are concerned and therefore, in the background of this a request is made by the petitioners to quash the complaint. The learned counsel has lastly and substantially contended further that there is a gross delay in even lodging the complaint. The alleged transaction is that of 1994-95 whereas the FIR came to be registered in the year 1999 and this unexplained delay of four years is also vital which goes to the root of the matter against the prosecution and therefore, the background of facts are such that so far as the petitioners are concerned prima facie even remotely no case is made out. Hence, petition be allowed by granting relief as prayed for in the petition.

10. Having heard the learned counsels appearing for the respective parties and having perused the material on record following facts are emerging which are worth to be taken note of before dealing with the contentions raised by the respective parties:

(i) The gist of the allegation in brief in this complaint is that though there is a price rise known of the officials a special discount was given, though there is a capacity to stock at Surat plant available the transaction took place of supply of ammonia at a much discounted price and this decision is taken by not informing the price rise at the Surat plant office and in conspiracy it is alleged that loss is caused to KRIBHCO to the extent of Rs.33.47 lakhs and this is how the case is tried to be made out of Section 120(b) and 420 of the Indian Penal Code and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act.

(ii) From the charge-sheet it appears that substantially the role played in the transaction is by one Mr. H.C. Malhotra as also by Mr. U.M. Mehta. It is also emerging from the charge- sheet that substantially case is thrust upon Mr. H.C. Malhotra and U.M. Mehta as they are the real persons in charge of the affairs of transaction at the relevant point of time. No reference is made of present petitioners in the FIR nor in charge-sheet neither any special attribution appears to have been made. The said extract of the charge-sheet is attached to the petition compilation from page no.32 to 38 and from that material the petitioners appear to have not been figured prominently.

(iii) So far as the present petitioners are concerned, it appears that there is no cogent material which would connect the petitioners with the alleged crime nor any material appears to be on record to fix even a constructive liability of the petitioners.

(iv) It is also appearing from the record that petitioners are not figured in the charge-sheet as active participants nor are coming within the purview of even public servants and therefore, there appears to be a bleak chance of the petitioners being held responsible in any manner.

(v) In the context of aforesaid facts, which are emerging from the record, the petitioners not being public servants, prima facie, no provisions of sections alleged are attracted. There is no cogent material enough to attract any of the ingredients of sections alleged in the complaint and while coming to this conclusion, the Court has gone through every detail material gathered during the course of investigation as contained in the charge-sheet, as also the

role examined whether played or not by the petitioners and therefore, coming to this conclusion there appears to be no conspiracy hatched by the petitioners neither petitioners appear to have abated nor have actively participated in alleged commission of crime and therefore, material is not sufficient enough to proceed against the petitioners.

11. While coming to this conclusion qua petitioners, the offence of criminal conspiracy is established or not, Court has an advantage to go through the recent pronouncement of decision of Apex Court reported in ***2010 (8) SCC 233.*** The relevant observations are worth to be considered, hence reproduced hereunder:

> 27. In State v. Nalini it was held that : (SCC p.516, para 583) "583. (1) .... Offence of criminal conspiracy is an example to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused haqve the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed."

Of course, the case before the Hon'ble Apex Court was after trial, but principle is not getting changed, therefore, when in case on hand, there is no remote circumstance connecting petitioners, Court has to take view in the interest of justice.

12. A substantive offence being alleged to have committed is by one Mr. H.C. Malhotra and Mr. U.M. Mehta for which even sanction is obtained and therefore, prima facie the counsel for the petitioners has rightly submitted that there is no role played by the petitioners.

13. It is also emerging from the record that the decision to supply to Deepak Nitrite Ltd. is taken at a level of KRIBHCO over which there was no control of the present petitioners. It is emerging from the record that there is no material worth the name to indicate that any bribe is given to the officials of KRIBHCO by the petitioners and it appears that a conscious decision is taken by KRIBHCO by resorting to conditions stipulated in the contract which took place on 21.07.1994.

14. It is also emerging from the record that KRIBHCO administration has taken the decision to supply the ammonia to M/s. Deepak Nitrite Ltd. and over such decision there was no control of the petitioners in any manner nor even alleged. It is also emerging from the record that proposal was to be flavoured by the Chief Manager (Finance & Accounts) which came to be approved in a committee meeting and with other higher officials of KRIBHCO. In this entire episode there is no role alleged against the petitioners which ultimately has caused the alleged commission of crime. It is also emerging from the record that in a cognate petition of another co-accused in which also general allegations were made. This Court has quashed the complaint in case of original accused no.5 which order is attached to the petition compilation at page 89 and therefore, from above situation there appears to be a transaction of supply of ammonia at a much discounted price though several retailers were available for seeking such supply. Still heavy discount Appears to have been given de- horse the terms of the contract.

15. In the light of aforesaid background of facts, if now to be looked into the context of the allegations made by the respective parties, it appears prima facie that there is no material available in so far as the petitioners' role is concerned which is alleged. Petitioners are neither specifically named in the FIR nor even are specifically attributed in the charge-sheet as well. Thorough investigation has taken place which has indicated no material concrete enough to continue the prosecution against the petitioners and therefore, in the absence of any specific role to be played and in the absence of specific material being available, it appears to this Court that the present two petitioners, who are original accused nos. 6 and 7, are wrongly dragged into prosecution. In case of offences which are alleged, the concept of vicarious liability cannot be stretched to that level by which petitioners can be allowed to languish in prosecution. The series of decisions by now have well defined the proposition on the exercise of inherent jurisdiction and this case appears to be coming within the purview of said proposition, whereby Court deems it proper to exercise inherent jurisdiction.

16. Now in the context of aforesaid situation, if the contents of the charge-sheet ultimately are to be looked into, there is no reference to present petitioners being active participants in any manner and therefore, the Court deems it proper to reproduce the relevant extract of the said charge-sheet to substantiate the same. Hence, reproduced hereinafter:

"This case was registered on the basis of an information received in CBI Ahmedabad office. It was alleged that Shri H.C. Malhotra while working as Director (Marketing), KRIBHCO and other KRIBHCO officials entered into criminal conspiracy with Shri M.R. Harshe, G.M. (Materials) and others of M/s. Deepak Nitrite Ltd., Baroda (M/s. DNL) and the said firm during the year 1994-95 caused wrongful loss to the tune of Rs.33.47 lacs to KRIBHCO by giving discount of Rs.1,000/- per MT for Ammonia supplied during April, 1995 and May, 1995 when the stock of Ammonia was within manageable limit.

During 1995 Shri H.C. Malhotra was posted & functioning as Director (Marketing) who was responsible for the functioning of entire Marketing Operations of KRIBHCO. His duties included sale and distribution of Urea and Ammonia. Also during the aforesaid period Shri U.M. Mehta was posted & functioning as Joint Director Manager (Marketing). Shri Mehta apart form his other duties, was also responsible for the work relating to the sale of surplus Ammonia.

During 1995 sale of surplus Ammonia was regulated ans monitored by Ammonia Cell in Central Marketing Office at NOIDA (UP) and Shri U.M. Mehta was In-charge of the Ammonia Cell whereas Shri H.C. Malhotra was the Head of entire Marketing Division. Proposals regarding fixation of rates of sale of surplus Ammonia were used to be initiated by the Officer In-charge of Ammonia Cell in consultation with the plant and the same were approved by the Managing Director on the recommendations of the Director (Marketing) and Director (Finance).

On 21.02.1995, a proposal was moved by Shri U.M. Mehta for annual sale of Ammonia during financial year 195-96 to M/s. EID Parry (India) Ltd., Chennai; M/s. Deepak Nitrite Ltd. (DNL), Baroda ans M/s. Nav Gases & Chemicals, Pune respectively at a basic price of Rs.7,000/- per MT and filling charges @ Rs.25/- per MT. The annual quantity indicated for sale were 10,000 MTs, 15,000 MTs and 12,000 Mts, respectively fro the parties. A provision fro quantity discount dispatched was more than 1,000 Mts during any calender month was also proposed. In terms of payment, M/s.

EID Parry was required to make full payment against Invoice ans other documents by cheque at KRIBHCO'S Madras Office, while in case of M/s. DNL & M/s. Nav Gases & Chemicals credit of 45 days was proposed. A penalty clause of Rs.100/- per MT per month for not lifting the committed quantity was also proposed. The said proposal was reviewed by G.M. (Finance & Accounts), Shri S.D. Banerjee. Shri Banerjee did not agree with credit facility of 45 days proposed to M/s. DNL and M/s. Nav Gases & Chemicals Ltd. and instead recommended sale on cash and carry basis as in the case of M/s. EID Parry. This was endorsed by Managing Director with the modification proposed by Finance & Accounts Dept. on 02.03.1995.

Based on approval of Managing Director, KRIBHCO issued sale order to M/s. DNL on 10.03.1995. However, DGM (Materials) of M/s. DNL represented on 30.03.1995 to KRIBHCO for amending the condition with regard to credit facility and requested either for remove the condition or continue supplies at the old terms vide Sale Order dated 21.07.1994. But, no approval of Managing Director was taken on the representation and that Shrti U.M. Mehta in discussion with Shri H.C. Malhotra, Director (Marketing) decided to continue supply as per the earlier Sale Order of 21.07.194 in violation of the approval Managing Director.

The Daily Reports containing details of dispatch and production of Ammonia were made available by the Plant officials to Director (Marketing) and other Functional Directors in the Organization, based on this MIS/Daily Performance Reports were prepared and circulated to all concerned officials including Shri H.C. Malhotra ans U.M. Mehta, who were thus fully aware of the Daily Stock Position of Ammonia during the said period. The minimum stock of Ammonia for running the plant efficiently was estimated to be 4,000 MTs; this was considered to be the manageable level and the sale of ammonia was not required to made when the stocks fell below the manageable level in April-May, 1995. Yet this was not done by Shri H.C. Malhotra and Shri U.M. Mehta.

The bulk sale orders were issued by Marketing Division on approval of the Managing Director while Sale Orders to retailers were issued by Director (Marketing).

Despite the fact that there was no delegation of powers made to Shri U.M. Mehta by Shri H.C. Malhotra, proposals for sale of Ammonia were not put-up formally for orders by Shri U.M. Mehta. Instead Shri Mehta accepted oral instructions of Shri Malhotra and based on them signed and issued Sale Orders of Ammonia.

KRIBHCO had bulk sale on discount in the past to clear high level accumulated stocks. However, the stocks had come down within the manageable limit from March, 1995 onwards as would be seen from the table below:-

01.02.1995 11,471 MTs
01.03.1995 10,053 MTs
01.04.1995 03,653 MTs
01.05.1995 03,422 MTs
01.06.1995 02,533 MTs

Yet the condition in the Sale Order that supply would be subject to availability was not implemented. Between March to May, 1995 Shri Mehta had replied to various parties that there was shortage of Ammonia stocks due to shut-down of one of the production units. Like-wise Shri Mehta has refused supplies to large number of retailers, namely, M/s. ASCO Chemicals Co., M/s. Atul Products Ltd., M/s. Mona Rasayan md., M/s. Tata Chemicals Ltd., M/s. Atic Ind. Ltd., M/s. Birla VXL Ltd., M/s. Cibatul Ltd., M/s. Mysore Ammonia Pvt. Ltd., Mumbai and M/s. Gujarat Heavy Chemicals besides M/s. IPCL and M/s. Cynide Chemicals were amongst the major buyers and their total lifting in 1993-94 and 1994-95 was higher than M/s. DNL and M/s. Nav Gases & Chemicals. On one hand Shri H.C. Malhotra and U.M. Mehta refused to supply or reduced quota of Ammonia to retailers (which was at higher price of Rs.7,000/- per MT) and on the other hand, they continued supply to M/s. DNL and M/s. Nav Gases at discounted price of Rs.6,000/- per MT.

The discounted sales of Ammonia were required more for liquidation of high stocks and that this not being the case, the sales of retailers should have received priority for optimization of revenues. Yet Shri H.C. Malhotra and U.M. Mehta not only continued supplies of bulk buyers on discount from April to May, 1995, but allotted quantities over and above the pro-rata share based on contractual commitment for the year.

The preferential allotment of Ammonia to M/s. DNL and M/s. Nav Gases & Chemicals was made with discount intention on their part.

A total quantity of 5410.48 MTs (3347.56 MTs to M/s. DNL and 2062.92 MTs to M/s. Nav Gases) of Ammonia was sold at a discounted price against the cash & carry price of Rs.7,000/- per MT. Out of this, 3347.56 MTs was sold to M/s. DNL, which resulted in a loss of Rs.33.47 lacs to KRIBHCO.

The facts, circumstances and evidence available on record established that Shri H.C. Malhotra, Director (Marketing) and U.M. Mehta, the then Joint General Manager (Marketing), both of KRIBHCO while discharging their duties as public servants entered into criminal conspiracy / were a party to the said conspiracy with M/s. Nav Gases & chemicals and hence committed offence of criminal mis-conduct. Thus, there exists sufficient oral as well as documentary evidence which established that there was a huge demand of Ammonia during the months of April and May, 1995 from a large number of other retail buyers/parties. But, the aforesaid Shri H.C. Malhotra and Shri U.M. Mehta by abusing their official position as public servants did not supply the quantity to other parties ans instead showed undue favours to M/s. Deepak Nitrite Ltd. against the interest of KRIBHCO.

M/s. Deepak Nitrite Ltd. lifted only 93 MTs Ammonia against offered Ammonia of 1200 MTs in 1993-94 and 7342 MTs against offered Ammonia of 14.600 MTs in 1994-95. Whereas the firm lifted 1665.4 MTs & 1682.16 MTs of Ammonia in April & May, 1995 respectively. M/s. DNL lifted Ammonia by showing its storage license to KRIBHCO, but diverted/sold Ammonia to various other parties which were refused by KRIBHCO including M/s. IPCL (a Govt. Undertaking). M/s. DNL sold Ammonia to other parties directly as well as through a mediator M/s. Ujjwal Rasayan which was not an authorized firm for sale of ammonia, as it did not have Storage License in its own name. M/s. DNL after taking the Ammonia in its books and storing the same in its Storage facility, was not authorized to sale ammonia as it was not having re-filling facility as its Plant as per requirement of Explosives Act. Thus, M/s. DNL as a result of conspiracy with Shri H.C. Malhotra and Shri U.M. Mehta of KRIBHCO got

allotted a large quantity of Ammonia for itself at discounted rates and deprived other buyers, who were requesting KRIBHCO for Ammonia at a higher rates (i.e. without discount) and forced the other buyers to purchase Ammonia from itself or through its mediator and caused huge revenue loss to M/s. KRIBHCO.

Hence, in pursuance of the said criminal conspiracy hatched between Shri H.C. Malhotra and Shri U.M. Mehta of KRIBHCO and Shri M.R. Harshe (A-3), R.V. Iyer (A-4), Shrenik Kasturbhai Lalbhai (A-5), Deepak C. Mehta (A-6), Ajay C. Mehta (A-7) and M/s. Deepak Nitrite Ltd., Baroda, caused pecuniary loss to the tune of Rs.33.47 lacs to KRIBHCO ans corresponding gain to themselves. And thereby committed offences u/ss. 120-B IPC r/w 13(1)(d) of PC Act, 1988.

The aforesaid commission & omission constitute offences and criminal conspiracy and criminal mis-conduct punishable u/ss. 120-B, IPC ans Section 13(2) r/w 13(1)(d) of PC act, 1988 and substantiative offences against Public servants Shri H.C. Malhotra and Shri u.M. Mehta u/s 13(2) r/w 13(1)(d)of PC Act, 1988."

17. In the background of aforesaid set of circumstance, if the decisions which are cited by the counsel for the petitioners are to be looked into, prima facie which suggests that prosecution against the present petitioners is ill-founded to be continued. First judgment which has been cited which is reported in ***2015 (4) SCC 609*** in which the concept of corporate criminal liability is dealt with by the Apex Court and while dealing with the said concept in what manner the vicarious liability doctrine can be pressed into service. The Supreme Court while analyzing the said doctrine has propounded that only if there is sufficient incriminating material then only the same can be pressed into service and the relevant discussion which contains the proposition is reflecting in paragraphs 42, 43, 44, 45 and 46 which are reproduced hereinafter:

"42. No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy.

However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offendor, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada (supra), the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

45. This very principle is elaborated in various other judgments. We have already taken note of Maharashtra State Electricity Distribution Co. Ltd. (supra) and S.K. Alagh (supra). Few other judgments reiterating this principle are the following:

45.1 Jethsur Surangbhai v. State of Gujarat :

(SCC pp. 210-11, para-9) "9. With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh, unless the prosecution proved that there was a close

cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1). The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the Chairman of the Managing Committee, he must be held to be vicariously liable for any order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature mens rea cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to Items 2, 3 and 4. It is conceded by Mr Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was Chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that [pic] the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for items 2 to 4. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the Chairman was to be made liable then all members of the Committee viz. Tehsildar and other nominated members, would be equally liable because all of them participated in the deliberations of the meetings of the Committee, a conclusion which has not even been suggested by the prosecution. As Chairman of the Sangh the appellant had to deal with a large variety of matters and it would not be humanly possible for him to analyse and go into the details of every small matter in

order to find out whether there has been any criminal breach of trust. In fact, the hero of the entire show seems to be A-3 who had so stage-managed the drama as to shield his guilt and bring the appellant in the forefront. But that by itself would not be conclusive evidence against the appellant. There is nothing to show that A-3 had either directly or indirectly informed the appellant regarding the illegal purchase of fertilisers or the missing of the five oil engines which came to light much later during the course of the audit. Far from proving the intention the prosecution has failed to prove that the appellant had any knowledge of defalcation of Items 2 to 4. In fact, so far as item 3 is concerned, even Mr Phadke conceded that there is no direct evidence to connect the appellant."

45.2 Sham Sunder v. State of Haryana: (SCC p.632, para9) "9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

45.3 Hira Lal Hari Lal Bhagwati v. CBI: (SCC p.277, para 30) "30. In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit.

In the instant case, the said law which prevails in the field i.e. the Customs Act, 1962 the appellants have been thereinunder wholly discharged and the GCS granted immunity from prosecution."

45.4 Maksud Saiyed v. State of Gujarat: (SCC p. 674, para 13) "13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be

correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

45.5 R. Kalyani v. Janak C. Mehta: (SCC p. 527, para 32) "32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

45.6 Sharon Michael v. State of T.N.: (SCC p. 383, para 16) "16. The first information report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant Company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the Company."

45.7 Keki Hormusji Gharda v. Mehervan Rustom Irani: (SCC pp. 480-81, paras 16-19) "16. We have noticed hereinbefore that despite of the said road being under construction, the first respondent went to the police station thrice. He, therefore, was not obstructed from going to the police station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a

situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 IPC.

17. The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

18. In Pepsi Foods Ltd. v. Special Judicial Magistrate (1998) 5 SCC 749 this Court held as under: (SCC p. 760, para 28) "28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean

that although the allegations made in [pic]the complaint petition even if given face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure."

46. It is stated at the cost of repetition that in the present case, while issuing summons against the appellants, the Special Magistrate has taken shelter under a so-called legal principle, which has turned out to be incorrect in law. He has not recorded his satisfaction by mentioning the role played by the appellants which would bring them within criminal net. In this behalf, it would be apt to note that the following observations of this Court in the case of GHCL Employees Stock Option Trust v. India Infoline Ltd.: (SCC p. 516, paras 19 & 21) "19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. (Thermax Ltd. v. K.M. Johny followed) xx xx xx

21. In the instant case the High Court has correctly noted that issuance of summons against Respondents 2 to 7 is illegal and amounts to abuse of process of law. The order of the High Court, therefore, needs no interference by this Court."

18. Similar is the case with respect to a decision reported in ***2013 (4) SCC 505*** in which also it has been held by the Apex Court that if no specific role assigned to the accused in commission of crime and if the complaint is based upon bald and vague allegations, the issuance of summons against this accused is held to be illegal amounting to abuse of the process of law and thereby the Apex Court has deprecated the said issuance and roping the accused in general. The relevant extract of the said decision is contained in paragraphs 13, 14, 15 to 19. Hence, reproduced hereinafter:

"13. There is no dispute with regard to the legal proposition that the case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.

14. Be that as it may, as held by this Court, summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

15. In the case of Madhavrao Jiwaji Rao Scindia and Another Etc. vs. Sambhajirao Chandrojirao Angre and Others Etc. AIR 1988 SC 709, this Court held as under:

"7. 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 any 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 is 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."

16. In the case of Punjab National Bank and Others vs. Surendra Prasad Sinha, AIR 1992 SC 1815, a complaint was lodged by the complainant for prosecution under Sections 409, 109 and 114, IPC against the Chairman, the Managing Director of the Bank and a host of officers alleging, inter alia, that as against the loan granted to one Sriman Narain Dubey the complainant and his wife stood as guarantors and executed Security Bond and handed over Fixed Deposit Receipt. Since the principal debtor defaulted in payment of debt, the Branch Manager of the Bank on maturity of the said fixed deposit adjusted a part of the amount against the said loan. The complainant alleged that the debt became barred by limitation

and, therefore, the liability of the guarantors also stood extinguished. It was, therefore, alleged that the officers of the Bank criminally embezzled the said amount with dishonest intention to save themselves from financial obligation. The Magistrate without adverting whether the allegations in the complaint prime facie make out an offence charged for, in a mechanical manner, issued the process against all the accused persons. The High Court refused to quash the complaint and the matter finally came to this Court. Allowing the appeal and quashing the complaint, this Court held as under: (Surendra Prasad Sinha case, SCC pp. 504-05, para 6) "6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta."

17. In the case of Maksud Saiyed vs. State of Gujarat and Others (2008) 5 SCC 668, this Court while discussing vicarious liability observed as under :- (SCC p, 674, para 13) "13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Codedoes not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is

the Company. The learned Magistrate failed to pose unto himself the correct question viz., as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

18. From bare perusal of the order passed by the Magistrate, it reveals that two witnesses including one of the trustees were examined by the complainant but none of them specifically stated as to which of the accused committed breach of trust or cheated the complainant except general and bald allegations made therein. While ordering issuance of summons, the learned Magistrate concluded as under :-

"The complainant has submitted that the accused Nos.2 to 6 are the directors of the company and accused No.7 is the secretary of the company and were looking after the day to day affairs of the company and were also responsible for conduct and business of the accused No.1 and some time or the other have interacted with the complainant.

I have heard arguments on behalf of the complainant and perused the record. From the allegations raised, documents placed on record and the evidence led by the witnesses, prima facie an offence u/s 415, 409/34/120B is made out. Let all the accused hence be summoned to face trial under the aforesaid sections on PF/RC/Speed Post/courier for 2.12.2008."

19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against respondent Nos.2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. Recently, in the case of M/ s.Thermax Ltd. & Ors. vs. K.M. Johny & Ors. 2011 (11) SCALE 128, & ors. while dealing with a similar case, this Court held as

under :-(SCC p. 429, paras 38 & 39) "38. Though Respondent No.1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it is pointed out that appellant Nos. 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1 - Company, who do not have any personal role in the allegations and claims of Respondent No.1. There is also no specific allegation with regard to their role.

39. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company."

19. Yet in another decision reported in ***2011 (13) SCC 412*** again the said principle is reiterated by the Hon'ble Apex Court and has held that in the absence of any ingredient of alleged offence being seen no accused can be dragged into prosecution. The Court has held that for proceedings underSection 156(3) of Cr.P.C., the complaint must disclose the relevant material ingredients of alleged offence and if there appears to be flavour of civil nature the same cannot be allowed to be agitated in the form of criminal proceedings, and while dealing with the said aspect, the Apex Court has quashed the complaint. The Apex Court while dealing with the said case has relied upon series of decisions and has ultimately held that ingredients of Section 405, 406 420 read with Section 34of the IPC are not attracted and since the complaint is based on inherent and improbable and contains the flavour of civil nature, the order of 156(3) came to be quashed. In so far as the said relevant accused is concerned, the Court while dealing with the said case has also considered the extraordinary delay and latches in respect of filing of complaint, and here also if we peruse the record, the complaint came to be filed in the year 1999 with respect to alleged transaction, which took place in the year 1994-95, and therefore, the decision cited by the learned counsel referred to above is attracting the background of present case on hand also.

20. In yet another decision in the context of vicarious liability of the directors for the charges leveled against the company, the Apex Court while dealing with the case in case of Maksud Saiyed reported in ***2008 (5) SCC 668*** has held that absence of any requisite allegation, the vicarious liability cannot be allowed to be attracted and while dealing with the case the Apex Court has held that summoning the accused person in criminal case is a serious matter and the duty of Magistrate was prescribed. The relevant paragraphs of the said decision is reproduced hereinafter:

> "13.Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

21. And therefore, from the said proposition and the submission of law propounded by the Apex Court, the Court is of the opinion that there is no sufficient material at this stage available to allow the prosecution to continue to drag the petitioners in prosecution. The law on the issue of exercise of extraordinary jurisdiction is sufficiently explained over the period of time and in series of cases it has been held that of course, there is no straight jacket formula to exercise, but there is no embargo upon exercise of such jurisdiction if facts are warranting and therefore, simply because the criminal case is lodged and the petitioners are joined, it cannot be said that such person in absence of any cogent material can be allowed to languish in litigation till the trial is over. The law on the aspect is sufficient enough to indicate right from 1963 onwards that

even after filing of the charge-sheet the power to quashing can be exercised. The Apex court has consistently held that if facts are so warranting, the power to quash the complaint can be exercised and such proposition of law laid down by the Hon'ble Apex Court in some decisions which are also relevant hence, reproduced hereinafter: ***2015 (11) SCC 730:***

> "7. We have carefully considered the rival submissions made before us. From a bare perusal of Section 482 of the Code, it is clear that the object of exercise of power under the Section is to prevent abuse of process of law, and to secure ends of justice. In Rajiv Thapar v. Madan Lal Kapoor, this Court has enumerated the steps required to be followed before invoking inherent jurisdiction by the High Court under Section 482 of the Code as under: (SCC pp. 348-49, para 30) "30. Based on the factors canvassed in the foregoing paragraphs,. We would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 of Cr. P.C.:
>
> 30.1. Step one: Whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling ans impeccable quality?
>
> 30.2. Step two: Whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?
>
> 30.3. Step three: Whether the material relied upon by the accused has not been refuted by the prosecution / complainant; and / or the material is such that it cannot be justifiably refuted by the prosecution / complainant?
>
> 30.4. Step four: Whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?
>
> 30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 of Cr.P.C. such exercise of power,

besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused.

8. In Rishipal Singh v. State of U.P., explaining the law in the similar circumstances, as in the present case, this Court observed, in para 17 as under:

"17. It is no doubt true that the courts have to be cery careful while exercising the power under Section 482 Cr.P.C. At the same time we should not allow a litigant to file vexatious complaints to otherwise settle their scores by setting the criminal law into motion, which is a pure abuse of process of law and it has to be interdicted at the threshold."

In Rishipal Singh, the complainant, who was an accused in connection with an offence punishable under Section 138 of the Act, had filed a criminal complaint relating to offences punishable under Sections 34, 379, 411, 417, 418, 467, 468, 471 and 477 IPC."

22. From the aforesaid discussion of material and case laws cited, it appears to this Court that the present petitioners are not sufficiently attributed either in the FIR or in the charge- sheet, which would connect them in the proceeding and therefore, to continue them as accused persons in the trial of the case, the same amounts to an abuse of the process of law qua them. This observation made by the Court is at this stage of the proceedings, however, if ultimately, during the course of trial from the evidence as well, if it emerges a specific material or evidence then always power under Section 319 of Cr. P.C. is available which the counsel has also candidly accepted and therefore, considering this overall set of circumstance and the material on record and keeping in mind that liberty which is already available after the evidence being recorded at this stage, the Court is of the opinion that there is no enough material to arraign the petitioners in commission of crime as none of the ingredients of the alleged offence are ex-facie available. Hence, the compliant qua present petitioners is quashed and set aside consequently all subsequent proceedings are also held and liable to be quashed. The aforesaid observations are made by the Court in the context of material available on record in so far as only petitioners are concerned and at this stage therefore, these observations are restricted to present petition only.

23. In view of above, the petition is allowed and the complaint being FIR RC No.9(A)/97 ABD dated 22.01.1997 registered with C.B.I. Gandhinagar Police Station and subsequent proceedings related to it are hereby quashed and set aside in so far as it relates to present petitioners only and consequently order dated 30.07.2009 passed by the learned Special Judge, C.B.I. Court No.5, Mirzapur, Ahmedabad below Exh.77 is also hereby quashed and set aside in case of present petitioners. Petition is allowed. Rule is made absolute.

Result:- Petition allowed.

ABC 2016 (II) 583 GUJ
ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(Z.K. Saiyed, J.)
Criminal Appeal No. 547 of 2000
Decided on 29 November, 2016

JITENDRA NATWARLAL BHAVSAR & ORS. ***- Appellant(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered:- ***(A) Indian Evidence Act, 1872 — Section 32 — Dying declaration — Accused persons & the deceased were staying in different cities — Presence of relatives of the deceased — At the time of recording of dying declaration the parents of the deceased were very well present — Held, it can be presumed that the names of the accused were implicated at the instance of her parents. (Para 14)***

(B) Indian Penal Code, 1860 — Section 498-A — Conviction under — Implication of relatives — Residing separately in different city — dying declaration recorded in the presence of the parents of the deceased — False implication not ruled out — their role not proved — Acquittal — Admitted fact — husband of the deceased beaten her & threatened her to give divorce — & go to her parental home — was present at the time of her committing suicide — Conviction of husband upheld. (Para 14)

Facts:- *As per the case of the prosecution the deceased was married with accused No.1 before three years from the incident. The accused Nos.2 and 3 are the father and mother and the accused No.4 is sister of the accused No.1. it was alleged that she was harassed by the accused, even she was scolded for having brought less dowry and she was ill-treated and therefore, she committed suicide. It was also the case of the prosecution that after the marriage, the deceased resided with her husband i.e. accused No.1 and her in-*