

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on: 14.09.2017

Orders pronounced on:11.10.2017

CORAM

THE HON`BLE MR.JUSTICE **A.D.JAGADISH CHANDIRA**

Crl.O.P.No.25668 of 2012

and

M.P.No.1 and 2 of 2012

P.S.Arul Kumar

... Petitioner/2nd Accused

Vs

1.Ajeez Ahamed

...1st Respondent/Complainant

2.M/s. Shaan Granites

...2nd Respondent/1st Accused

No.3/2, Canal Bank Road,
East CIT Nagar, Nandanam,
Chennai-600 035.

represented by its Partners
3 and 4 herein.

3.V.Shanmugasundaram

...3rd Respondent/3rd Accused

4.Konidala Anil Kumar

...4th Respondent/4th Accused

Criminal Original Petition filed under Section 482 Cr.P.C to quash
the complaint in C.C.No.3787 of 2011 on the file of FTC-I, Metropolitan
Magistrate, Egmore, Chennai-8, in so far as the petitioner is concerned.

For Petitioner

: M/s.S.S.Rajesh

For 1st Respondent

: M/s.M.Hussainy Basha

For 2nd to 3rd Respondents

: No appearance

ORDER

The petitioner who is the second accused has filed this Criminal Original Petition to quash the proceedings pending in C.C.No.3787 of 2011 on the file of the learned Metropolitan Magistrate, FTC-I, Egmore, Chennai-8.

2. For better appreciation of the case, relevant paragraphs in the complaint in C.C.No.3787 of 2011 are extracted hereunder in verbatim.

"3. The complainant state that the first accused is a partnership company under the name and style of M/s.SHAAN GRANITES having office at No.3/2 Canal Bank Road, East CIT Nagar, Nandhanam, Chennai-600 035 as per partnership deed dated 25.03.2008 and carrying out the Granites business. The Second to Fourth accused are partners of the first accused company and also representing the first accused company. While so the Complainant had entered into an agreement dated 27th day of March 2008 with the First Accused Company to raise granite blocks thereby the business commenced between the Complainant and the First Accused Company. During the business transactions the Third Accused had issued a cheque on 15.05.2010 bearing No.205200 drawn on ICICI Bank Limited, Santhome Branch, Chennai for a sum of Rs.20,70,000/- (Rupees Twenty lakh and Seventy thousand only) the term of agreements and Memorandum of understanding dated 27.03.2008 and 06.01.2010 respectively but the same was returned with an

endorsement "INSUFFICIENT FUNDS".

4. The Complainant further states that when he informed about the dishonour of the cheque the Accused had requested the Complainant to represent the same once again. As per their advise and keeping good faith upon the accused the complainant had re presented the said cheque for collection through AXIS Bank No.4, Good Shed Street, Madurai but to his shock and surprise the said cheque was once again dishonoured with an endorsement "INSUFFICIENT FUNDS" for which the complainant had caused a legal notice dated 14.07.2010.

5. The Complainant further states that the Accused No.2 to 4 had come to the Complainant's Office and pleaded apologies on 15.06.2011 and have issued a post dated cheque dated 18.06.2011 for Rs.45,00,000/- (Rupees Forty Five Lakh only) bearing No.205198 drawn on ICICI Bank, Santhome Branch, Chennai after calculating the complete due along with the liability amount of Rs.20,70,000/- (Rupees Twenty lakhs and Seventy thousand only).

6. The Complainant further states that keeping good faith upon the Accused for the second time the Complainant had presented the above said cheque bearing No.205198 dated 18.06.2011 for Rs.45,00,000/- drawn on ICICI Bank, Chennai through his banker's Andhra Bank, Triplicane Branch, Chennai-600 005. To his shock and surprise the above said cheque had been returned unpaid by the Banker's of the Accused along with a Memorandum denoting the term "INSUFFICIENT FUNDS" as the reason for

the return of the Cheque unpaid dishonoured as per their Memo dated 20.06.2011.

7.The Complainant states that within the stipulated time granted under the Act the Complainant sent a legal notice by Registered Post with acknowledgment due to the Accused on 04.07.2011 calling upon the accused to settle the account within 15 days from the date of receipt of the notice. The Notice sent to Accused 2 to 4 out of which the Second accused received the said notice and the notices sent to other accused were returned un-served.

8. The Complainant stated that the Accused failed to pay the entire cheque amount within 15 days as stated supra. Hence the Complainant is forced to file this Complaint under Section 138 of the Negotiable Instruments Act.

9. The cause of action for the above complaint arose at Chennai where the Accused and the Accused Bank lies within the jurisdiction of this Honb'le Court; on 18.06.2011 when the Accused had issued the cheque is in question at Chennai; on 18.06.2011 when the above said cheques was presented for collection; when the above said cheques was returned unpaid as "INSUFFICIENT FUNDS"; On 20.06.2011 when the Accused Bank has issued a Memo intimated the above said dishonour; On 04.07.2011 when the Complainant had issued a lawyer's legal notice at Chennai; When the second accused has received the notice; other two accused notices were returned un-served; when the accused had committed an offence punishable under Section 138 of the Negotiable Instruments Act and hence the entire cause of action for the above Complaint arose at Chennai.

10. Further, the above complaint is filed within 30 days

from the date of expiry of 15 days from the date of receipt of legal notice as per provisions of the Negotiable Instruments Act. Hence, the above complaint is within the limitation period.

11. The Complainant, therefore prays that this Hon'ble Court may be pleased to take up the above complaint to file and issue summons to the accused, try and punish the accused as per Sections 138 and 142 of the Negotiable Instruments Act and thus render justice. "

3.The contention raised by the learned counsel for the petitioner is that the 1st accused is an unregistered partnership and that though the petitioner is arrayed as A2 in this case no averment has been made in the complaint that he is in-charge of and responsible to the firm for the conduct of the business of the firm as well as the firm as required u/s 141 of the N.I.Act and that he is neither Managing Partner of the 1st accused firm nor the signatory to the cheque in question, and that excepting a bald averment made against the petitioner in para 3 that the second to fourth accused are partners of the first accused company and also representing the first accused company, no other averment has been made that the petitioner is in charge of and responsible for the conduct of the day-to-day affairs of the business of the firm as well as the firm. The learned counsel for the petitioner submitted that the 1st accused being a partnership firm the substance of the allegations in the complaint when read as a whole should be sufficient to fulfil the

requirements of Section 141 and there should be specific averments as to the person who was in charge of and responsible for the conduct of the business of the company as well as the company and in the absence of such an averment in the complaint against the petitioner/accused, the complaint against him has to be quashed and relied on the judgments reported in (2014) 16 SCC 1 and (2015) 1 SCC 103 and contended that the proceedings under Section 138 being a quasi criminal case, can be launched only against the "drawer" and cannot be used to foist an offence on some other person, who under the statute is not liable for the commission of such offence.

4.Further, it was also contended by the learned counsel for the petitioner that the respondent/complainant had during the pendency of the case had filed a petition under Section 257 of Cr.P.C in CrI.M.P.No.1273 of 2013 before the trial court stating that due to the intervention of common friends a compromise was arrived and on 25.08.2013 a Memorandum of Understanding was entered into between the complainant and V.Shanmugasundaram-Accused No.3, Konidala Anil Kumar, Accused No.4 and the complainant and had prayed for permission to withdraw his complaint and acquit all the accused. Whereas the learned Magistrate by an order dated 19.11.2013 has passed the following order:

"Complainant present. The complainant has filed a

petition U/s.257 Cr.P.C. to withdraw the complaint, stating that A3 and A4 and complainant themselves amicably settled their claim of the subject matter of the case. Hence, the complainant wants to withdraw the above said case against A3 and A4 from the file of this Hon'ble Court. Taking into consideration the facts and circumstances, the complainant is permitted to withdraw the complaint against A3 and A4. Hence, the petition is allowed. The complaint is dismissed as withdrawn and A3 and A4 are acquitted U/s.257 Cr.P.C".

5. It was contended by the learned counsel for the petitioner that though the petition had been filed seeking to withdraw the complaint against all the accused based on a Memorandum of Understanding and without there being any details or particulars with regard to the nature of the memorandum of understanding and with regard to monetary settlement arrived between the parties the learned Magistrate had passed an order dismissing the complaint as withdrawn only against A3 and A4 and acquitting them u/s.257 of Cr.P.C and allowing the complaint to continue against the petitioner alone is illegal. It is also contended by the learned counsel for the petitioner that no reasoning had been given by the Magistrate to continue prosecution against the petitioner when permission had been sought for withdrawal against all the accused. Further it was contended that notice was issued to the firm and only

that the petitioner not being the signatory to the cheque cannot be prosecuted since he is not the person who has drawn the cheque.

6.The learned counsel for the 1st respondent/ complainant contended that it is an admitted fact that the firm is a partnership firm and in the partnership deed, it has been stated that the petitioner is major partner who has paid a capital of Rs.80,000/- into the company, whereas the 3rd and 4th accused have paid only Rs.10,000/- each and as such it should be presumed that the petitioner is the major partner and also submitted that there is averment against the petitioner that the accused 2 to 4 are partners of the first accused company and also representing the first accused company. He also drew the attention of this court to the partnership deed wherein the petitioner was shown to have invested 80% in the partnership. Admittedly, it is an unregistered partnership but no designation had been given to the partners in respect of managing the firm.

7. Though notice has been ordered and served on the other accused they have neither appeared nor engaged counsels to represent them. This court feels that they are not necessary parties for deciding this petition.

having considered the materials, the following issues arises for consideration:

- (i) *Whether the averments in the complaint are sufficient to proceed against the petitioner as required u/s. 138 and 141 of Negotiable Instruments Act?*
- (ii) *Whether the continuation of the proceedings only against the petitioner/A2, who is neither the signatory of the cheque nor the person in charge of the firm particularly in a situation when A3 and A4 who are admittedly the signatories of cheque having been acquitted based on the Memorandum of Understanding with the complainant, is proper?*

9. It is useful to refer Sections 138 and 141 of Negotiable Instruments Act:

"Section 138 :

Dishonour of cheque for insufficiency, etc., of funds in the account - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another persons from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the

amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said account of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. - For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

Section 141 :

Offences by companies [1] *If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment, in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or

the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

Explanation. - For the purposes of this section,-

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "Director" in relation to a firm, means a partner in the firm.

10. In the judgment reported in 2015 I SCC 103 (***Gunmala Sales Private Limited vs. Anu Mehta and others***) it has been held as follows: (para 27 to 30)

27. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in [Sections 138](#) and [141](#) of the NI Act read in the light of the powers of a Magistrate referred to in [Sections 200](#) to [204](#) of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if

this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under [Section 482](#) of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances if any? Inherent power under [Section 482](#) of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court's inherent powers? We do not think so.

28. SMS Pharma-(1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in charge of and responsible for the conduct of the company's business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma-(1), we find that after referring to the various provisions of the [Companies Act](#) it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to Directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a Director in a company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of

the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two Directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule that a Director of a company is in charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma-(1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss 'the doctrine of Indoor Management' on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the [Companies Act](#) that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be

allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma-(1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

29. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.

30. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under [Section 482](#) of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling uncontrovertible

material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director.

11. The Hon'ble Apex Court in **Pooja Ravinder Devidasabu vs. State of Maharashtra reported** in (2014) 16 SCC 1 (decided on 17.12.2014) referring to the judgment reported in (2015) 1 SCC (Cri) 580 = (2015) 1 SCC 103 (decided on 17.10.2014) has held as follows: (para Nos. 14 to 21, 22, 23, 28 and 30)

"14. Learned counsel for the respondents made a reference to the Judgment of this Court in Gunmala Sales Private Ltd. Vs. Anu Mehta & Ors. (2015) 1 SCC (Cri) 580 decided on 17-10-2014 and submitted that once in a complaint filed under [Section 138](#) read with [Section 141](#) of the N.I. Act, the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the Company at the relevant time when the offence was committed, the Magistrate can issue process against such Director and the basic averment is sufficient

to make out a case against the Director. Hence, learned senior counsel concluded that there is no illegality in issuing process against the appellant.

15. We have given our thoughtful consideration to the arguments advanced by the counsel on either side at length. The questions that arise for determination are:

15.1. (i) whether the appellant is liable for prosecution under [Section 138](#) read with [Section 141](#) of the N.I. Act for the alleged offence of dishonour of cheques committed by the default Company?;

15.2. (ii) whether the High Court was right in dismissing the writ petitions filed by the appellant seeking quashing of the criminal proceedings initiated against her by the Respondent 2?

16. Before delving into the merits of the case, it would be apt to take note of relevant portions of the complaints filed by Respondent 2 which read thus:

"I say that the Accused 2 to 5 on behalf of Accused 1 have approached us with request for trade finance facility and accordingly the said facility has been granted by us to the accused as per their request and requirement.

I say that Accused 1 is private limited Company of which Accused 2, 3 & 5 are Directors and accused No. 4 is the Director & authorized signatory of Accused 1 M/S Elite International Pvt. Ltd.-Imprest. At all material time relevant and relating to the complaint, Accused 2 to 5 were and are in charge of and responsible for the conduct of business of Accused 1 and are also looking after day to day affairs of Accused 1. It is further submitted that

Accused 2 to 5 with Accused 1 are liable to be prosecuted and / or connived in the commission of the present offence, in their capacity as a Director/signatory of the said private limited Company.

I say that as narrated in para 4 Accused 2 to 5 responsible for the affairs of Accused 1 i.e. private limited Company are liable to be prosecuted for having committed a criminal offence in the event of failure on their part to comply with the requisitions contained in the statutory notice dated 03-11-08, which was sent to them both under R.P.A.D. & U.P.C. on 06/11/08. I say that notice was received by all the accused on or about 08/11/08 and notice sent through U.P.C. are deemed to have been served. However, accused have failed and neglected to make our payment under the above said dishonoured cheques".

17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company-M/S Elite International Pvt. Ltd. On 1-7-2004 and had also executed a Letter of Guarantee on 19-1-2005. The cheques in question were issued during April, 2008 to September, 2008. So far as the dishonour of Cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the Company but does not involve in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under [Section 141](#) of

*the Act on a person, at the material time that person shall have been at the helm of affairs of the Company, one who actively looks after the day-to-day activities of the Company and particularly responsible for the conduct of its business. Simply because a person is a Director of a Company, does not make him liable under the [N.I. Act](#). Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under [Section 141](#) of the N.I. Act. In *National Small Industries Corporation (supra)* this Court observed: (SCC p.336, paras 13-14)*

"13. [Section 141](#) is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes,

especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfilment of the requirements under [Section 141](#).

18. In Girdhari Lal Gupta Vs. D.H. Mehta & Anr. (1971) 3 SCC 189, this Court observed that a person 'in charge of a business' means that the person should be in overall control of the day to day business of the Company.

19. A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned [See: State of Karnataka Vs. Pratap Chand & Ors. (1981) 2 SCC 335:1981 SCC (Cri) 453].

20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under [Section 141](#) of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

21. In *Sabitha Ramamurthy & Anr. Vs. R.B.S. Channbasavaradhya* (2006) 10 SCC 581: (2007) 1 SCC (Cri) 621), it was held by this Court that: (SCC pp.584-85, para 7)

"7. ... it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. [pic]Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable there for. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company."

By verbatim reproducing the wording of the Section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the N.I. Act.

22. As held by this Court in *Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors.* (1998) 5 SCC 749:1998 SCC (Cri) 1400), summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. 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.

23. In *Gunmala Sales Private Ltd. (supra)* (2015) 1 SCC (Cri) on which learned counsel for the respondents has heavily relied, this Court at Para 34.3 held: (SCC p.127).

"34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the

court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, un-controvertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out".

28. In the entire complaint, neither the role of the appellant in the affairs of the Company was explained nor in what manner the appellant is responsible for the conduct of business of the Company, was explained. From the record it appears that the trade finance facility was extended by the Respondent to the default Company during the period from 13th April, 2008 to 14th October, 2008, against which the Cheques were issued by the Company which stood dishonoured. Much before that on 17th December, 2005 the appellant resigned from the Board of Directors. Hence, we have no hesitation to hold that continuation of the criminal proceedings against the appellant under [Section 138](#) read with [Section 141](#) of the N.I. Act is a pure abuse of process of law and it has to be interdicted at the threshold.

30. Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence under [Section 138/141](#) of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the appellant which is nothing but a pure abuse of process of law."

12. To summarise things, right from the decision pursuant to the reference made to the three judges bench in SMS Pharma(1) reported in [(2005) 8 SCC 89] there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has

to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. " We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial".

Further, as contended by the counsel for the petitioner though the petition under Section 257 of Cr.P.C had been filed to permit the complainant to withdraw the complaint against all the accused no reasoning had been attributed for the dismissal of the complaint only against the accused No.3 and 4 and not against the petitioner herein. From the fact of hand on the reading of the complaint in entirety, there is no averment against the petitioner that he is the person in charge of and responsible for conduct of the business of the company. Merely because a person has invested major amounts will not make a person the Managing Partner or the person in charge of and responsible for the conduct of the business of the firm or the firm unless he is specifically designated to be so. This court has also perused the partnership deed of the firm wherein in clause 12 it has been stated:

<http://www.judis.nic.in> "12. BANK ACCOUNTS: The partners do hereby agree to open any new

account before any bank and operate the same in common benefit of the firm and the banking operations shall be carried on under the signature of all the PARTNERS individually /or authorised partners in common."

In this case it is an admitted fact that the petitioner A2 is not the signatory to the cheque whereas A3 and A4 who have been acquitted pursuant to the memorandum of understanding are the persons who have signed the cheque on behalf of the partnership firm. In the order acquitting A3 and A4 nothing had been stated about what is the Memorandum of Understanding between the Accused No.3 and 4 and the complainant and the reason for withdrawing the complaint against them and continuing the complaint against the petitioner alone and the firm.

13. At this juncture it is necessary to refer to paras 13, 14 and 15 of the judgment referred supra in 2015 I SCC 103 (Gunmala Sales Private Limited vs. Anu Mehta and others)

"13. Several judgments have been cited before us. It is necessary to refer to them in brief to get an idea as to how different Benches of this Court have dealt with this issue. We must begin with SMS Pharma-(1), which is a decision of three-Judge Bench of this Court. All subsequent decisions are of two-Judge Benches. The three-Judge Bench was dealing with the reference made by a two-Judge Bench for determination of the following questions:

"(a) Whether for purposes of [Section 141](#) of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of [pic]the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

14. After considering [Sections 138](#) and [141](#) of the NI Act, [Sections 203](#) & [204](#) of the Code and the relevant provisions of the [Companies Act](#), this Court answered the questions posed in the reference as under:

"(a) It is necessary to specifically aver in a complaint under [Section 141](#) that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of [Section 141](#) and has to be made in a complaint. Without this

averment being made in a complaint, the requirements of [Section 141](#) cannot be said to be satisfied.

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

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under [Section 141](#) of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under [Section 141](#). So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of [Section 141](#)."

15. In Saroj Kumar Poddar v. State (NCT of Delhi) and anr.[15], the appellant therein was the Director of a public limited company which had issued three cheques in favour of respondent 2, who was manufacturer and supplier of chemical compounds. The cheques having been dishonoured, the complaint came to be filed. Application for quashing of the complaint was filed by the appellant in the High Court. The High Court dismissed the said application. While setting aside the High Court's order and after referring to SMS Pharma-(1), a two-Judge Bench of this Court observed as under:

"14. The appellant did not issue any cheque. He, as noticed hereinbefore, had resigned from the directorship of the Company. It may be true that as to exactly on what date the said resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations made in para 3, thus, in our opinion do not satisfy the requirements of Section 141 of the Act." This Court further observed that with a view to making a Director of a company vicariously liable for the acts of the company, it was obligatory on the part of the complainant to make specific allegations as are required in law."

in para 8 above are hereunder:

(i) There is no allegation/averment against the petitioner as required under section 141 of the N.I Act.

(ii) When there is no averment against the petitioner as required under Section 141 N.I Act and when the petitioner being neither the Managing Partner nor the signatory of the cheque and A3 and A4 who being the signatories of the cheque having been acquitted pursuant to the MOU, the continued proceedings against the petitioner without any reasoning is improper.

Though the point regarding the Power of Attorney had not been raised by the counsel for the petitioner, this court had the occasion to go through the Power of Attorney executed by the drawee of the cheque viz; S.M.R.Ramar to his agent Ajeez Ahamed to proceed against the accused which has been marked as Ex-P1 by the complainant. Strangely the power of attorney had been issued to proceed against the accused specifically in respect of cheque dated 15-05-2010 for Rs. 20,70,000/= whereas the complaint has been filed in respect of cheque dated 18.06.2011 for Rs. 45,00,000/= which this court feels is yet another infirmity.

15. In the result, this court finds that the continuation of the

prosecution against the petitioner is an abuse of process of law and

hence the proceedings against the petitioner in C.C.No.3787 of 2011 on the file of FTC-I, Metropolitan Magistrate, Egmore, Chennai-8 is hereby quashed.

16. This Criminal Original Petition is ordered accordingly. Consequently, the connected miscellaneous petitions are closed.

11.10.2017

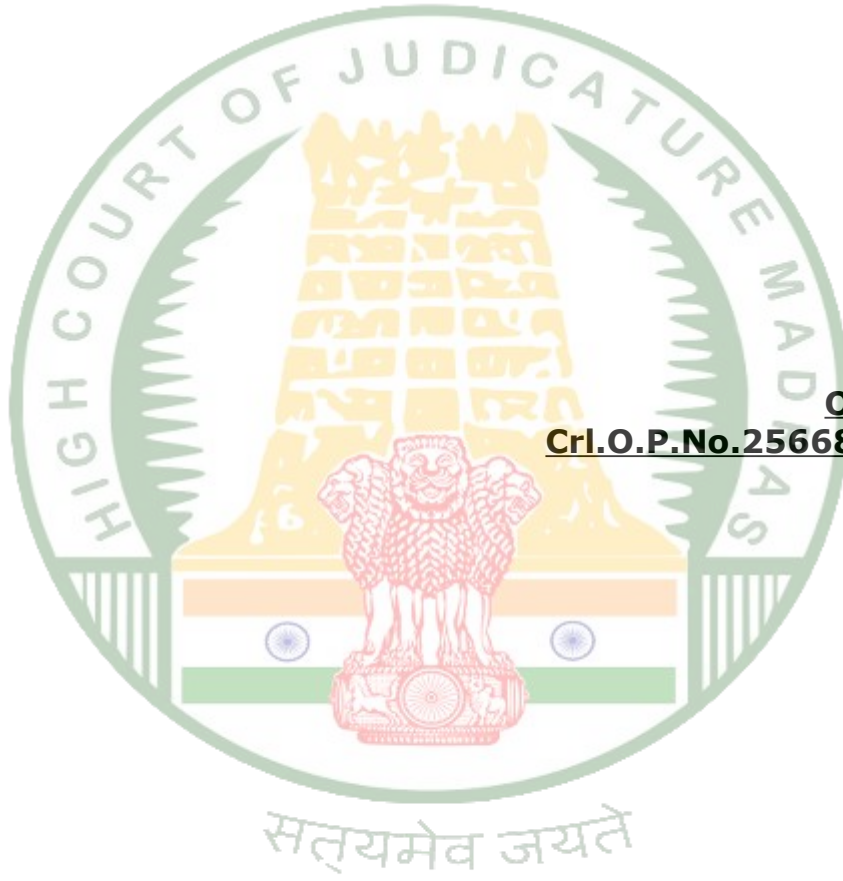
Uma/gr.
Index : Yes
Internet: Yes

To

The Metropolitan Magistrate, FTC No.I, Egmore, Chennai.



WEB COPY



ORDER IN
CrI.O.P.No.25668 of 2012

WEB COPY

11.10.2017