

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 539 OF 2021

Mahesh Sharma

...Petitioner

Versus

1. State of Maharashtra
2. Anmol Steel Processors Pvt. Ltd.
a Company incorporated under the
provisions of Companies Act, 1956
having its registered office at:
D-15, MIDC, Taloja, Dist. Raigad

...Respondents

Mr. Ramgopal Tripathi, for the Petitioner.

Mr. Kezer Kharawala, i/b Lex Juris, for Respondent no.2.

Mr. S. R. Agarkar, APP for the State/Respondent no.1.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 19th APRIL, 2022

PRONOUNCED ON: 6th JUNE, 2022

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsels for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 ("the Code") assails the legality, propriety and correctness of the judgment and order dated 27th January, 2020 passed by the learned Additional Sessions Judge, Grater Bombay, in Criminal Revision Application No. 876 of 2019, whereby the revision preferred by the petitioner against an order of issuance of

process dated 24th August, 2018 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, in CC No.1145/SS/2018, for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (“the N. I. Act, 1881”) came to be dismissed, affirming the said order of the learned Magistrate.

3. The background facts necessary for determination of this petition can be stated as under:

(a) Siddharth Tubes Limited is a company registered under the Companies Act, 1956. Mr. Nainesh Jayantilal Sanghvi is the Managing Director of Siddharth Tubes Limited. At the instance of Mr. Nainesh Sanghvi, the petitioner became an additional Director of Siddharth Tubes Limited, under independent category, with effect from 9th November, 2017 as Mr. Umesh Dube its former independent director resigned from the said position.

(b) Anmol Steel Processors Pvt. Ltd., respondent no.2, a company registered under the Companies Act, 1956, lodged a complaint being CC No.1145/SS/2018, for the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1881, impleading the petitioner as accused no.4 apart from Siddharth Tubes Limited (A1), Mr. Nainesh Sanghvi (A2), Mr.

Shreyans Gupta, wholetime Director and CFO of Siddharth Tubes Ltd. (A3), with the allegation that the accused had purchased Hot Rolled P & O Coil and other steel material from the complainant. Invoices were allegedly raised during the period 31st August, 2014 to 22nd May, 2015. The accused had made certain payments and they were adjusted against the due amount on first in first out basis. As of 31st December, 2017, the accused owed a sum of Rs.4,05,53,594/- towards the goods sold and delivered by the complainant. In order to discharge the said liability the accused had issued nine cheques dated 30th December, 2017 drawn on Oriental Bank of Commerce, Indore, aggregating to a sum of Rs.1,77,63,642/- payable on 30th December, 2017. Upon presentment, the cheques were returned unencashed with the remarks, "account closed". A statutory demand notice was served on the accused on 16th February, 2018 to which accused gave reply raising false and untenable contentions. As the accused committed default in payment of the amount covered by the dishonored cheques within the stipulated period, the complainant lodged the complaint. Process came to be issued against all the accused for the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1881.

(c) The petitioner, upon being apprised of the facts, assailed the order of issuance of process by preferring revision application before the Court of Session. The main thrust of the challenge was that the petitioner had no concern whatsoever with the transaction between Siddharth (A1) and the complainant, which had allegedly taken place in the year 2014 – 2015. The petitioner was inducted as an independent Director of Siddharth (A1) on 9th November, 2017. The petitioner was neither in-charge of nor responsible for the day to day affairs of Siddharth (A1). The petitioner was even not aware of the issue of the subject cheques by Siddharth (A1). In the circumstances, the impleadment of petitioner as an accused by invoking the provisions under Section 141 of the N. I. Act, 1881 was wholly unwarranted. The learned Magistrate, according to the petitioner, had committed a grave error in roping in the petitioner despite absence of necessary averments in the complaint and material to substantiate the case of the complainant.

(d) The learned Additional Sessions Judge was not persuaded to accede to the submissions on behalf of the petitioner. By the impugned order the revision application came to be dismissed opining *inter alia* that there was material to

indicate that the subject cheques were issued on 30th December, 2017 after the petitioner came to be inducted as an additional Director on 9th November, 2017 and thus, *prima facie*, the petitioner was the Director of Siddharth (A1) when the cheques in question were issued. The learned Additional Sessions Judge was of the view that the question as to whether the petitioner was an independent Director and was not in-charge of and responsible to the day to day affairs of Siddharth (A1) was a matter for trial. Thus, having regard to the limited nature of revisional jurisdiction, the learned Additional Sessions Judge declined to interfere with the order passed by the learned Magistrate. Being further aggrieved the petitioner has invoked the writ jurisdiction of this Court.

4. I have heard Mr. Tripathi, the learned Counsel for the petitioner, Mr. Kharawala, the learned Counsel for respondent no.2 and Mr. Agarkar, the learned APP for the State, at some length. With the assistance of the learned Counsels for the parties, I have perused the material on record.

5. Mr. Tripathi submitted that in the facts of the case the prosecution of the petitioner is nothing but an egregious abuse of the process of the Court. Amplifying the submission, Mr. Tripathi would urge that the fact that the petitioner became an

additional Director of Siddharth (A1) on 9th November, 2017 is incontrovertible. Nor the fact that the petitioner came to be inducted as a non-executive independent Director can be put in contest in the face of Form No.DIR-12 maintained by the Registrar of Companies (“ROC”). In the face of this material, according to Mr. Tripathi, if the averments in the complaint are perused it becomes abundantly clear that by no stretch of imagination the petitioner could have been roped in, in the capacity of a Director who was in-charge of and responsible to the conduct of the business of Siddharth (A1).

6. Taking the Court through the averments in the complaint, especially paragraphs 2 and 3, which bear upon the vicarious liability of the Directors of Siddharth (A1), Mr. Tripathi would urge that the complaint lacks the basic averments and requisite particulars to proceed against the petitioner for the offence punishable under Section 138 read with Section 141 of the N.I. Act, 1881. The learned Magistrate committed a grave error in mechanically issuing process against the petitioner, and the learned Additional Sessions Judge also fell in error in not correcting the mistake the learned Magistrate had fallen into, urged Mr. Tripathi.

7. In contrast to this, Mr. Kharawala, the learned Counsel for respondent no.2 – complainant, supported the impugned judgment and order. Mr. Kharawala mounted a two fold challenge to the petition. One, in the backdrop of the settled legal position that at the stage of issuance of process the inquiry is of extremely limited nature and the revisional jurisdiction is further circumscribed, Mr. Kharawala would urge that the learned Additional Sessions Judge was justified in not interfering with the order passed by the learned Magistrate. Two, the submission on behalf of the petitioner that there are no averments in the complaint so as to bring the act and conduct of the petitioner within the tentacles of Section 141 of the N. I. Act, 1881, is demonstrably incorrect. Inviting the attention of the Court to the averments in the complaint, the reply to the demand notice dated 16th February, 2018 and rejoinder thereto, Mr. Kharawala would urge that there is adequate material to *prima facie* indicate the complicity of the petitioner for the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1881.

8. Mr. Kharawala further submitted that the legal position has crystallized to the effect that even in respect of a Director (not being Managing or Joint Managing Director) it is sufficient

to have averments in the complaint that the said Director was in-charge of and responsible to the conduct of the business of the company, and it is not the requirement of law that further particulars of the role played by such Director be specifically averred in the complaint. In the case at hand, according to Mr Kharawala, there are more than adequate averments in the complaint and supporting material to make out the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1981, against the petitioner.

9. To bolster up the submission on the aspect of the scope of the inquiry, at the stage of issuance of process, Mr. Kharawala banked upon the judgment of the Supreme Court in the case of *Smt. Nagawwa vs. Veeranna Shivlingappa Konjalgi and others*.¹ Reliance was placed on the judgment of the Supreme Court in the case of *Jagannath Choudhary and others vs. Ramayan Singh and another*², wherein the limited nature of the revisional jurisdiction was expounded. Mr. Kharawala placed reliance on the judgments of the Supreme Court in the cases of *Standard Chartered Bank vs. State of Maharashtra and others*,³ *Ashutosh Ashok Parasrampuriya vs. Gharrkul Industries Pvt. Ltd.*⁴ and

1AIR 1978 Supreme Court 1947.

2(2002) 5 Supreme Court Cases 659.

3(2016) 6 Supreme Court Cases 62.

4AIR Online 2021 SC 868.

the judgment of this Court in the case of *Purushothaman Jambukesan vs. Patel Engineering Limited and ors.*,⁵ to lend support to the submissions as regards the ingredients of Section 141 of the N. I. Act, 1881.

10. The legal position on the aspect of invoking the vicarious liability under Section 141 of the N. I. Act, 1881 is fairly crystallized. Indeed, there is catena of decisions of the Supreme Court and this Court which spell out the contours of the vicarious liability under Section 141 of the N. I. Act, 1881 especially on the aspect of the necessity and extent of pleadings in the complaint. As the judgment of the Supreme Court in the case of *S. M. S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*⁶ deals with the question of the liability under Section 141 of the N. I. Act, 1881 elaborately and the propositions were enunciated in the context of the three questions which arose for consideration in the said case, it may be apposite to profitably extract the same. They read as under:

“1.

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

52017 ALL MR (Cri) 76.

6(2005) 8 SCC 89.

(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 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?"

.....

The answers to the questions posed in the reference are as under:

20.

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to 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."

11. The aforesaid pronouncement in the case of **S.M.S.**

Pharmaceuticals (supra), has been followed in a number of

judgments. The propositions were restated in the case of *Gunmala Sales (P) Ltd. vs. Anu Mehta*⁷. The observations in paragraphs 30 to 34 are instructive and hence extracted below:

“30. 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.

31. 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.

32. In this connection, it would be advantageous to refer to [Harshendra Kumar D v. Rebatilata Koley & Ors.](#),[22] where process was issued by the Magistrate on a complaint filed under Section 138 read with Section 141 of the NI Act. The appellant therein challenged the proceeding by filing revision application under Section 397 read with Section 401 of the Code. The case of the appellant-Director was that

⁷(2015) 1 SCC 103.

he had resigned from Directorship. His resignation was accepted and notified to the Registrar of Companies. It was averred in the complaint that the appellant was responsible for the day-to-day affairs of the company and it was on his and other Directors assurance those demand drafts were issued. Despite this averment, this Court quashed the complaint taking into account resolution passed by the company, wherein it was reflected that the appellant had resigned from the post of Director much prior to the issuance of cheque and the fact that the company had submitted Form-32. It was argued before this Court that the documents furnished by the accused could not have been taken into account. Repelling this submission this Court observed as under: (*Hareshendra Kumar D. case (2011) 3 SCC 351*, SCC pp.361-62 paras 24-26).

“24. In *Awadh Kishore Gupta*³ this Court while dealing with the scope of power under Section 482 of the Code observed: (SCC p. 701, para 13)

“13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the court to act as if it was a trial Judge.”

25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which [pic]are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents — which are beyond suspicion or doubt — placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process,

the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company."

33. As already noted in *Anita Malhotra*, relying on *Harshendra Kumar*, this Court quashed the complaint filed under Section 138 read with Section 141 of the NI Act relying on the certified copy of the annual return which was a public document as per the Companies Act read with Section 74(2) of the Evidence Act, which established that the appellant/Director therein had resigned from the Directorship much prior to the issuance of cheques. This was done despite the fact that the complaint contained the necessary averments. In our opinion, therefore, there could be a case where the High Court may feel that filing of the complaint against all Directors is abuse of the process of court. The High Court would be justified in such cases in quashing the complaint after looking into the material furnished by the accused. At that stage there cannot be a mini trial or a roving inquiry. The material on the face of it must be convincing or uncontroverted or there must be some totally acceptable circumstances requiring no trial to establish the innocence of the Directors.

34. We may summarize our conclusions as follows:

34.1 Once in a complaint filed under Section 138 read with Section 141 of the NI 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;

34.2 If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

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, uncontrovertible 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. In the absence of such evidence or circumstances, complaint cannot be quashed;

34.4 No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

12. In the case of *Standard Chartered* (supra), on which a strong reliance was placed by Mr. Kharawala, the Supreme Court extensively referred to the aforesaid propositions in the case of *S.M.S. Pharmaceuticals* (supra) and *Gunmala Sales*

(supra) and after adverting to the facts in the said cases, declined to quash the proceedings as the averments in the complaint in the said case satisfied the test laid down in ***Gunmala Sales*** (supra). In the case of ***Ashutosh Parasrampurila*** (supra) relied upon by the Counsel for respondent no.2, again the Supreme Court adverted to the propositions enunciated in the case of ***S.M.S. Pharmaceuticals*** (supra) and applying those propositions to the facts of the said case found that there were clear allegations in the complaint that at the time the cheques were issued by the company and dishonored by the Bank, the appellants were the Directors of the company and were responsible for its business. It was further observed that it would be open for the appellants – Directors to establish during the course of the trial that the appellants were the non-executive directors and thus not responsible for the conduct of the affairs of the company.

13. A learned Single Judge of this Court in the case of ***Purushothaman Jambukesan*** (supra) after referring to the pronouncements in the case of ***S.M.S. Pharmaceuticals*** (supra) and ***Gunmala Sales*** (supra) repelled the challenge to the continuation of the prosecution for the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1881

based on the contention that the petitioners therein were appointed as independent and non-executive Directors. The learned Single Judge observed that Section 141 of the N. I. Act, 1881 does not make any distinction between the Directors and Executive Directors. It would be an internal affair of the company as to whether the particular Director is an Executive Director or otherwise. In the absence of any indication to the contrary in the record maintained by the ROC, it cannot be said that process issued against the petitioners, who claimed to be non-executive directors, was liable to be quashed.

14. Evidently, the question as to whether in a given case the provisions contained in Section 141 of the N.I. Act, 1881 are legitimately invoked against a particular Director or officer of the company turns upon the facts of the case. The position which the person (challenging the order of issuance of process) holds in the company, which is alleged to have committed the offence punishable under Section 138 of the N. I. Act, 1881 is of decisive significance. If such person happens to be the Managing Director or a joint Managing Director it is not necessary to make an averment in the complaint that he was in-charge of and responsible to the conduct of the business of the company. If such person happens to be the signatory to the cheque, again

there is no need to make a specific averment to that effect as the very fact that the dishonored cheque was signed by him on behalf of the company may sustain the liability under Sub-section (2) of Section 141 of the Act.

15. The controversy, in a majority of cases, arises where the accused is a Director of the company (and not a Managing Director or Joint Managing Director). In such cases, a specific averment in the complaint that person was in-charge of, and responsible to the company for the conduct of the business of, the company is peremptory to bring the case within the tentacles of Section 141(1) of the N. I. Act, 1881. However, there is no further requirement that the particular role played by such person be specifically averred. Conversely, the mere fact that a person is a Director of the company by itself is not sufficient to make such person liable under Section 141 of the Act, 1881. No liability can be fastened by drawing an inference that since a person is Director he is deemed to be in-charge of, and responsible to, the company for the conduct of its business. It has to be averred as a matter of fact that the person sought to be arraigned has been in-charge of and responsible for the conduct of business of the company at the time of the commission of the offence.

16. On the aforesaid touchstone reverting to the facts of the case, it is necessary to note that there is not much controversy over the fact that the petitioner came to be inducted as an additional Director of Siddharth (A1) on 9th November, 2017. This claim of the petitioner finds requisite support in documents of unimpeachable character, namely, Form No.DTR-12, which reveals that the petitioner came to be appointed under independent category, and as a non-executive Director and the copies of the letter of appointment dated 9th November, 2017, consent thereto by the petitioner and the resolutions passed in the meeting of the Board of Directors of the company on 9th November, 2017. The fact that the petitioner came to be appointed as an independent and non-executive director is thus borne out by the entries in Form No.DTR-12.

17. In the aforesaid backdrop, the nature of the role of the petitioner in the management of the affairs of Siddharth (A1) is required to be appreciated. Of necessity, recourse is required to be made to the averments in the complaint as the issue primarily hinges upon construction of averments in the complaint. Only paragraphs 2 and 3 of the complaint contain the averments germane to the aspect of fastening of the liability

with the aid of Section 141 of the N. I. Act, 1881. They read as under:

“2. The Complainant states that Accused No.1 is a Company and Accused no.2 is the Managing Director, Accused no.3 is the wholetime Director and CFO and Accused no.4 is the Additional Director of accused no.1 having respective addresses mentioned in the cause title of the complaint. The Accused Nos.2, 3 and 4 are looking after and responsible for day to day affairs of Accused no.1.

3. The Complainant states that they are the dealer in Iron and Steel materials and the merchant, suppliers & commission agent in Iron and Steel materials. Further during the course of business the Accused no.1 through Accused nos.2, 3 and 4 have approached to the Complainant and placed various orders for the purchase of Hot Rolled P & O Coil and other steel materials for various quality and quantity as per their requirement. The Complainant crave leave of this Hon'ble Court to refer to and rely upon the said e-mails and purchase orders of Accused as and when required”

18. Evidently, there is a solitary assertion in paragraph 2 that accused nos.2, 3 and 4 are looking after and responsible for day to day affairs of accused no.1. Undoubtedly, the articulation may not be of decisive significance. What has to be seen is whether the fact that the petitioner was in-charge of and responsible to the conduct of the business of the company has been averred.

19. To properly appreciate the aforesaid question, it is necessary to retain emphasis on the nature of the transaction between the complainant and Siddharth (A1). Indisputably, the sale and delivery of the goods was during the period 31st August, 2014 to 22nd May, 2015, for which invoices were allegedly raised.

In paragraph 6 of the complaint, the complainant has averred that for the period 31st August, 2014 to 31st December, 2017 the outstanding was of Rs.4,05,53,594/-, inclusive of a sum of Rs.2,27,89,952/-, being the interest component. It is further averred that the last payment of Rs.5,00,000/- was made by the accused on 3rd March, 2016. The subject cheques, according to the complainant, were payable on 30th December, 2017.

20. In the aforesaid context, the averments in paragraph 3 of the complaint extracted above do not advance cause of the complainant. An endeavour was made to demonstrate that accused no.1 company approached the complainant through accused nos.2, 3 and 4 – the petitioner herein and placed orders for purchase of the goods. Indubitably, the petitioner was not in the frame when the orders were placed in the year 2014 – 2015. The petitioner came to be inducted on 9th November, 2017 only. Thus the role of placing orders for the goods sought to be attributed to the petitioner is, *ex facie*, untenable.

21. It was submitted on behalf of respondent no.2 that the fact that orders were placed in the distant past is of no significance since the liability has to be ascertained as of the date of the commission of the offence. The learned Additional Sessions Judge was also of the view that since the subject

cheques were drawn after the petitioner came to be inducted as an additional director, the petitioner cannot wriggle out of the situation.

22. At the first blush, the aforesaid submission appears alluring. However, in the light of the concomitant circumstances borne out by the record, the issue cannot be determined in as simplistic manner as suggested by the complainant.

23. The question of issuance of the cheques on 30th December, 2017 is undoubtedly a matter for trial. However, it is pertinent to note that the accused referred to and relied upon a communication dated 12th December, 2017 to bolster up the defence that the cheques were handed and delivered by way of security and demanded the return of those cheques as there was change in the management and signatories at the Bank. A request was made therein not to fill the date on those cheques and present them for encashment, and also to treat them as cancelled. Interestingly, the complainant relied upon the said communication in the affidavit-in-reply to the instant petition, albeit for the purpose of demonstrating that in the said communication the accused had admitted the outstanding dues

and that when the said letter was issued the petitioner was very much a Director of the Siddharth (A1).

24. The relevant part of paragraph 3(d)(iv) of the affidavit-in-reply reads as under:

“3(d)(iv) Hereto annexed an marked as Exhibit-2 is a copy of the letter dated 12.12.2017. Pertinently, the said letter was issued after the appointment of the Petitioner i.e. on 09.11.2017 and the Petitioner was well aware that Accused No.1 has issued the cheque to Respondent No.2 for securing the payment of the outstanding amount of invoices and that the invoices are outstanding. Respondent no.2 further submits that the Accused Company despite assuring to remit the outstanding dues of the Respondent no.2, failed and/or ignored to remit the outstanding amount of invoices, and hence, Respondent no.2 was left with no other option than to deposit the cheques issued by the Accused Company. It is clear that albeit, the subject cheques may not have been issued to Respondent no.2 when Petitioner was not a Director, certainly, the above letter dated 12.12.2017 was addressed when the Petitioner was the Director and was aware of the issuance of the cheques and the liability of the Respondent no.2 under the invoices.”

(emphasis supplied)

25. The aforesaid stand of the complainant, which was stated to be an undisputed position, indicates that the factum of issuance of the subject cheques before the petitioner came to be inducted as an additional Director of the Siddharth (A1) is not seriously contested, if not clearly admitted. It is true that the liability has to be ascertained as of the date of the commission of the offence punishable under Section 138 of the N. I. Act, 1881. However, the attendant circumstances cannot be lost sight of. First, there is material on record to indicate that the

petitioner was appointed as an independent non-executive director. Secondly, the sale and delivery of the goods had taken place years before the petitioner came to be inducted as an additional Director. Thirdly, the complainant made an endeavour to rope in the petitioner by making an unsustainable allegation that the petitioner had also placed orders with the complainant on behalf of the Siddharth (A1). Fourthly, the fact that the subject cheques were also delivered before the petitioner came to be appointed as a Director of Siddharth (A1) is, by and large, incontestible. Lastly, there is a bald assertion that the petitioner was also looking after and responsible for day to day affairs of Siddharth (A1).

26. In my considered view, the aforesaid factors are required to be appraised cumulatively. The material placed on record by the petitioner, if considered through the cumulative effect of the aforesaid factors, justifies an inference that despite an assertion in the complaint that the petitioner was looking after and responsible for the day to day affairs of the company, this Court would be justified in exercising the extraordinary jurisdiction. The basic averment in the complaint, in the circumstances of the case, appears to be against the weight of the record, which justifies an inference that the petitioner could not have been in-

charge of and responsible for the conduct of the business of the company at the relevant time. In such circumstances, making the petitioner to face the trial would amount to abuse of the process of the Court.

27. For the foregoing reasons, I am impelled to hold that the learned Additional Sessions Judge did not bestow adequate consideration to the aforesaid aspects and proceeded to jettison away the objection of the petitioner in a routine manner on the premise that when the cheque was drawn the petitioner was, in fact, a Director of Siddharth (A1). Thus, the impugned order as well as the order passed by the learned Magistrate issuing process against the petitioner are liable to be quashed and set aside.

28. Hence, the following order:

: O R D E R :

- (i) The petition stands allowed.
- (ii) The impugned judgment and order stands quashed and set aside.
- (iii) The order passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai, dated 24th August, 2018, issuing process against the

petitioner - Mahesh Sharma, for the offence punishable under Section 138 read with Section 141 of the N. I. Act, 1881, also stands quashed and set aside.

- (iv) The complaint stands dismissed qua the petitioner.
- (v) The complaint to proceed against rest of the accused.
- (vi) By way of abundant caution, it is clarified that the observations made hereinabove are confined to the determination of the prayer to quash the proceedings against the petitioner and the learned Magistrate shall not be influenced by any of the observations made hereinabove while deciding the complaint CC No.1145/SS/2018.

Rule made absolute in the aforesaid terms.

[N. J. JAMADAR, J.]