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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 10 OF 2023, 12 OF 2023 AND 14 OF 2023-F

CRIMINAL REVISION APPLICATION NO. 10 OF 2023

ARVIND KUMAR .... Applicant.
VS
STATE OF GOA, THROUGH ITS PUBLIC PROSECUTOR AND ANR. .... Respondents.

WITH

CRIMINAL REVISION APPLICATION NO. 12 OF 2023

MANMOHAN SINGH .... Applicant.
VS
STATE OF GOA, THROUGH ITS PUBLIC PROSECUTOR AND ANR. .... Respondents.

WITH

CRIMINAL REVISION APPLICATION NO. 14 OF 2023

RENU SHARMA .... Applicant.
VS
STATE OF GOA, THROUGH ITS PUBLIC PROSECUTOR AND ANR. .... Respondents.

Mr. Gauravvardhan Sinai Nadkarni, Advocate for the applicant.

Mr. S. G. Bhobe, Public Prosecutor for respondents.

CORAM: PRAKASH D. NAIK, J

DATED: 19th OCTOBER 2023

ORAL ORDER.:

1. The applicants are seeking quashing of order issuing process dated 24.5.2023 passed by learned Additional Sessions Judge, Panaji Goa in Special Criminal Case NDPS No. 34 of 2021 for offence under Section 27(b)(ii), 27(c) and 27(d) of the Drugs and Cosmetics Act.

2. Complainant was filed by respondent no.2 before the Court of District Judge. Complainant had alleged that on 13.12.2017 complainant visited premises of accused no.1 M/s Salcete Pharmaceuticals (now know as Drograia Salcete) for routine inspection. Several drugs were found stocked for sale and distribution. Amongst other drugs one drug Rabeprazole Sodium EC Capsules purported to be manufactured by M/s Lukshmi Maa Pharma, were found stocked for sale. Sample was drawn for the purpose of analysis. Sample was declared as not of standard quality by Government Analyst vide order dated 13.2.2018. For the reason that this samples does not conform to the required standards. Show cause notice was issued to accused no.10. Reply dated 4.4.2018 was submitted by accused no.10 M/S. Salcete Pharma and it was contended that purchase invoices of the product were transported from main branch M/s Drogaria Salcete. Show cause notice was sent to accused no.11 M/s Drogaria Salcete. Accused no. 11 has been granted wholesale drug licence. Accused nos. 10 and 11 are partnership firm with three partners. Reply was submitted by accused no. 11 on 7.5.2018 and it was noted that drug was purchased from M/s Akumentis Healthcare Ltd (accused no. 4) vide invoice dated 31.10.2017. Vide various invoices name of the manufactures was printed as M/s. V-2 Pharmaceuticals(accused no.1). Accused nos. 10 and 11 was called for personal hearing on 16.4.2021. Accused no. 12 stated that stockist agreement form and drug licences copy of M/s Akumentis Healthcare Ltd Pune. Matter was reported to State Drugs Controller, Panchkula, Haryana since the manufacturer was located within its jurisdiction. Further inquiries were conducted by respective authorities. On scrutiny of the documents it was noted that M/s Akumentis Healthcare Ltd (accused no. 4) is a company having cooperate office at Ghodbunder Road Thane (West) and registered office at New Delhi. As per the list of directors submitted by accused no. 5, firm is having six directors as on 7.2.2020 out of which four directors namely Manmohan Singh, Allean Das, Mr. Arvind Kumar and Ms. Renu Sharma were in charge and responsible for the conduct of the business of the company when the offence was committed. Accused no.1 represented by accused nos. 2 and 3 were responsible for manufacturing and selling the drugs without obtaining drug licence. Accused no.4 through it authorised signatory, accused no.5 transferred this subject drug to M/s Akumentis Healthcare Ltd Pune who further sold the drug to accused no.11 vide invoice dated 31.10.2017. Accused no.11 transferred drug to their branch M/s Drogaria Salcete Mapusa vide invoice dated 14.12.2017, 15.12.2017 and 20.10.2017. Under Section 34 of the Drugs and Cosmetics Act 1940 when an offence under this Act has been committed by 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. Accused no. 5 is authorised signatory of wholesale premise of accused no. 4. Accused nos.6, 7, 8 and 9 who are directors of accused no. 4 were responsible for the conduct and affairs of accused no. 4 and hence accused no. 4 along with accused no. 5, 6, 7 8, and 9 are responsible for purchasing this spurious drug. Complaint was filed on 31.8.2021.

3. Learned Sessions Judge issued process vide order dated 20.9.2021. Order issuing process was challenged by the applicants before this Court by preferring Criminal Writ Petition No.8/2022. Vide order dated 7.3.2022 passed by this Court the order issuing process was set aside and matter was remanded to the trial Court for taking appropriate steps in accordance with law. This Court had observed that impugned order issuing process clearly shows that concerned Court had issued summons without recording any reason even briefly to indicate application of mind for issuance of process.

4. Learned Sessions Judge thereafter passed order dated

24.5.2023 and again issued process for the offence under the Drugs and Cosmetics Act. While passing the said order it was observed that material on record prima facie makes out an offence punishable under Section 27(b)(ii), 27(c) and 27(d). It was also observed that material on record does not make out any offence punishable under Section 28 of the Drugs and Cosmetics Act against accused nos. 1 to 3.

5. Process was issued against accused nos.1, 2 and 3 under Section 27(b)(ii), 27(c) and 27(d) and under Sections 27(c) and 27(d) against accused nos. 4 to 14.

6. These revision applications are preferred by accused no.8, accused no. 6 and accused no. 9.

7. Learned Advocate for the applicants Mr. G. Nadkarni, submitted as under:-

(i) The applicants were independent non-executive directors appointed in compliance and under Section 149 of the Company Act 2013.

(ii) The applicant in Criminal Revision Application No. 10 of 2023 is a practising advocate in New Delhi. Applicants were never in charge, related or responsible to the day to day affairs and conduct of the business of accused no.4 company, in terms of Section 149(12) of the Companies Act 2013. An independent director under the law can be held liable under those act or omission or commission that occurred with their knowledge, attributable through Board processes and with their consent or connivance or where directors do not act diligently.

(iii) Order issuing process was passed mechanically without application of mind. Except stating that applicants are directors, there is no application of mind or any consideration as regards applicants. There is no specific role or specific allegations against the applicants in the complaint.

(iv) Order issuing process dated 28.9.2021 was set aside by this Court vide order dated 7.3.2022 on the ground that there was non-application of mind. The matter was remanded back to the trial Court for taking steps in accordance with law. However, from the impugned order, it is evident that there is again non application of mind while issuing process against the applicant.

(v) There is no specific, pleadings, allegations, or averments in the complaint making out the particulars, nature or detail or the role attributable as to suggest that the applicants were responsible for the day to day affairs in commission of alleged offence. In the absence of any such averment and allegation, the prosecution of the applicant is impermissible in law. As per section 34 of the Drugs and Cosmetics Act, 1940 there has to be specific allegations and averments regarding the role attributable under vicarious liability of a person being sought to be prosecuted for the offence committed by company and more particularly the conduct of the business pertaining to commission of the alleged offence.

vi. Complainant does not plead or aver the particulars of the role and the involvement of the applicants in the commission of the alleged offence merely proceeds on the presumption that the applicants being directors of the company were responsible for the conduct of the said company.

vii. Learned Judge has passed impugned order without application of mind and despite direction by this Court, the impugned order was passed without application of mind.

viii. Applicants are relying on Form DIR-12 which clearly mentions that the applicants are independent non executive directors. These documents are authentic and cannot be disputed.

8. Mr. Nadkarni, has relied upon following decisions:-

1. Sunita Palita V/s Panchami Stone Quarry, (2022) 10 SCC 152

2. Lalankumar Singh V/s State of Maharashtra, 2022 SCC OnLine SC 1383.

3. Ravindranatha Bajpe V/s Mangalore Special Economic Zone Ltd., 2021 SCC OnLine SC 806.

4. Pooja Ravindra Devidasani V/s State of Maharashtra, (2014) 16 SCC 1

5. State of Haryana V/s Brij Lal Mittal, AIR 1998

SC 2327

6. Satvinder Jeet Singh Sodhi V/s State of Maharashtra, 2022 SCC OnLine Bom 2298

7. Municipal Corporation of Delhi V/s Ram Kishan Rohtagi and others AIR 1983 SC 67

8. Umesh Sharma V/s S. G. Bhakta, 2002 SCC OnLine Bom 991

9. S.P. Mani and Mohan Dairy V/s Dr. Snehalatha Elangovan 2022 SCC OnLine SC 1238.

10. Harshendra Kumar D. V/s Rebatilata Koley and Others (2011) 3 SCC 351.

11. Ashok Shewakramani and others V/s State of Andhra Pradesh and Another (2023) 8 SCC 473.

12. Siby Thomas V/s Somany Ceramics Ltd. Criminal Appeal No. 3139 of 2023 (Arising out of Special Leave Petition (Cri.) No. 12 of 2020 decided on 10.10.2023.

9. Learned Public Prosecutor Mr. Bhobe appearing for the respondents submitted that there are sufficient averments in the complaint to indicate that the applicants were in charge of work responsible for the day to day affairs of the accused no. 4 company. Learned Sessions Judge has perused the complaint and on the basis of averments issued the process against the accused. At this stage it is not expected that the complainant would know about the role played by accused as a director of the company. Contentions of the applicants that they are independent directors by relying upon the documents cannot be considered at this stage. In the event applicants are relying upon certain documents they are required to be proved at the time of trial. Prima facie case has been made against the accused. There is no infirmity in the order issuing process. Information was submitted during the inquiry by the person connected with accused no.4 which indicates that the applicants are directors of accused no. 4. Information and documents supplied on behalf of the accused no. 4 indicates that applicants were responsible for the day to day affairs of accused no.4. In the complaint it has been specifically stated that accused nos.6, 7, 8, 9 who are directors of accused no.4 were responsible for the conduct and affairs of accused no. 4 and along with accused no.4 even accused nos.5, 6, 7, 8 and 9 are responsible for purchasing the not of standard quality and spurious drug from M/s Lukshmi Maa Pharma (accused no.1) It is further submitted that documents submitted on behalf of the accused no.4 contains minutes of the meeting of board of directors of M/s Akumentis Healthcare Ltd held on 24.8.2014. Said minutes indicates that it resolved that Manmohan Singh(accused no.6) and others are authorised to appoint stockist, distributors or consignee sale agent for stocking and distribution of products and to execute and sign agreement, affidavit and declaration and other deeds and to do all acts, deeds and things as may be necessary in connection therewith. Thus accused no. 6 was actively involved in the business of no.4 company. Revisional Court cannot look into the documents relied upon by the applicants in the nature of their defence for considering the ground for quashing the proceedings. No case is made out for quashing the order issuing process against the applicant. Hence, applications preferred by applicants may be rejected.

10. Applicants are impleaded as accused being directors of accused no.4 company M/s Akumentis Healthcare Ltd in the complaint. It is alleged that the accused no.5 is the authorised signatory of the wholesale premise of the accused no. 4. Accused nos. 6, 7, 8 and 9 who are directors of accused no.4 were responsible for the conduct and affairs of accused no.4 and he along with accused no.4 even accused nos. 5, 6, 7, 8, and 9 are responsible for purchasing lot of non standard quality and spurious drug from accused no.1 which is in violation for licence and responsible for stocking for sale and selling the drug which are not of standard quality.

11. From the averments reflected in the complaint it is apparent that complainant had proceeded with the fact that the applicants are directors of accused no. 4 and responsible to conduct the business of accused no. 4 and hence, are responsible in the acts mentioned therein. Complainant had drawn the presumption for attributing the alleged act considering the fact that the applicants are directors of accused no.4.

12. Section 34 of the Drugs and Cosmetics Act reads as follows:-

> *"Where an offence under this Act has been committed by 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 such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."*

13. The aforesaid provisions relates to vicarious liability of the director of the company. Section 34 provides that where an offence under this Act has been committed by 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.

14. Order issuing process passed by the Court does not reflect application of mind in the light of Section 34 of the Drugs and Cosmetics Act.

15. In the case of *Pepsi food Ltd Vs. Special Judicial Magistrate*[1], it is held that 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.

16. The applicants have relied upon documents in support of their contention that the applicants are independent non executive directors. The applicant in Criminal Revision Application

1 (1998) 5 SCC 749

No.10/2023 (accused no. 8) has placed on record Form DIR 12 which indicates that he was appointed on 1.6.2015 as independent non executive director. The applicant in Criminal Revision Application No.12/2023 (accused no. 6) has also relied upon form DIR 12 which shows that he was appointed on 11.10.2010 as independent non executive director of accused no.4. Similarly applicant in Criminal Revision Application No.14/2023 was appointed on 11.9.2016 as independent non executive director of accused no. 4. There is nothing on record to doubt the genuineness of the aforesaid documents.

17. Section 149(6) (9) and (12) of the Companies Act read as follows:-

> *" 149(6) An Independent director in relation to a company, means a director other than a managing director or a whole time director or a nominee director -(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;*
>
> *(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company'*
>
> *(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;*

(c) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

(d) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or other promoters, or directors, amounting to two percent or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(e) who, neither himself nor any of his relatives--

(i) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years

immediately preceding the financial year in which he is proposed to be appointed, of--

(A) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company; or

(B) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(iii) holds together with his relatives two per cent. or more of the total voting power of the company;

(iv) is a Chief Executive or director, by whatever name called, of any nonproft organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds two per cent. or more of the total voting power of the company; or

(f) who possesses such other qualifications as may be prescribed.

(7) .....

(8) .....

(9) Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.

(10) .....

(11) .....

(12) Notwithstanding anything contained in this Act--

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently."

18. Aforesaid provision indicates that independent director or non-executive director not being a promoter of or key managerial persons, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

19. Documents on records show that the applicant are independent non executive directors. In the light of the averments made in the complainant, role of independent directors, documents on record, applicants cannot be prosecuted for the offence under the Drugs and Cosmetics Act for which process has been issued against them.

20. In the case of *Municipal Corporation of Delhi Vs Ram Kishan Rohtagi and others* (supra), it was observed that in the case there was not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable.

21. In the case of *Pooja Ravinder Devidasani Vs State of Maharashtra*(supra), the appellant was non executive director of the company. It was observed that non-executive Director is no doubt a custodian of the governance of the Company, but is not involved 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 who were responsible for the conduct of the business of the company at the time of commission of the offence will be responsible for criminal action as director, who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time would not be liable for any offence under Section 141 of the Negotiable Instruments Act.

22. In the case of *National Small Industries Corpn. Ltd Vs Harmeet Singh Paintal, (2010) 3 SC 330,* it was observed that 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. Complaint should spell out as to how and in what manner director 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. 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.

23. In the case of *Girdhari Lal Gupta vs D.H. Mehta (19712) SCC (Cri) 279,* the Supreme Court observed that a person 'in-charge' must mean that the person should be in over all control of the day to day business of the company.

24. In the case of *State of Karnataka Vs Pratap Chand 1981 SCC (Cri) 453,* it was observed that 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.

25. In *Sabitha Ramamurthy & Anr vs R.B.S. Channabasavaradhya (2006) 10 SCC 581,* Supreme Court held that 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 are vicariously liable. 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 therefore. 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 are made so as to make the accused therein vicariously liable for the offence committed by the company. By verbatim reproducing the words of section without a clear statement of fact supported by proper evidence so as to make the accused vicariously liable is a ground for quashing the proceedings initiated under Section 141 of N.I.Act.

26. In the case of *S.M.S. Pharmaceuticals Ltd vs Neeta Bhalla & Anr , (2005) 8 SCC 89* it was observed that while analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 has committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "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 etc."

27. In *K. K. Ahuja Vs V. K. Vora(2009) 10 SCC 48*, it was held that when the accused is the Managing Director or Joint Managing Director of a company, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. This is because the prefix `Managing' to the word `Director' makes it clear that Director was in charge of and responsible to the company, for the conduct of the business of the company. A director or an officer of the company who signed the cheque renders himself liable in case of dishonour other officer of a company can be made liable only under sub section 2 of section 141 of the N.I. Act by averring in the complaint their position and duties in the company and their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

28. In *Gunmala Sales Pvt. Ltd vs Anu Mehta & Ors , (2015) 1 SCC 103,* it was observed that, 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 would 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.

29. In the case of *State Of Haryana vs Brij Lal Mittal & Ors* (supra). Accused were prosecuted as directors of the manufacturers with aid of Section 34 of Drugs and Cosmetics Act 1940. The Apex Court referred to Section 34 of the said Act and it is held that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question however, it is found that bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business.

30. In the case of *Sunita Palita Vs Panchami Stone Quarry*(supra) complainant had alleged that accused are directors of accused no.1 and are responsible for conduct of day to day affairs of business of accused no.1. Prosecution was initiated under Section 138 read with Section 141 of the N.I. Act. Decision was delivered on 1.8.2023. The Apex Court referred to the decision of the Supreme Court in *S. M. S. Pharmaceuticals Ltd Vs Neeta Bhalla* and various other decisions. Appellants therein had contended that the they were non executive independent director. The Apex Court observed that a director of a company who was in charge or responsible for the conduct of the business of the company at the relevant time will not be liable under the provisions of section 138 and 141. Liability depends upon the role one plays in the company and not on designation or status alone. Reference was made to the decision in the case of *National Small Industries Corporation Ltd Vs Harmeet Singh Paintal*(supra) and *Pooja Ravinder Devidasani Vs. State of Maharashtra* (supra). It was observed that High Court had over looked that non executive independent director of the accused company based on unimpeachable materials on record. High Court observed that in the complaint it is specifically avered that all the accused persons were responsible and liable for whole business management of the accused company and took the view that the averments in the complaint were sufficient to meet the requirements of Section 141 of the NI Act. Appeals were allowed and the proceedings were acquitted.

31. In the case of *S. P. Mani and Mohan Diary Vs Dr. Snehalatha Elangovan in Criminal Appeal No. 1586 of 2022 (arising out of Special leave appeal(Criminal) No.9811 of 2021.* The Supreme Court has dealt with the issue relating to the vicarious liability under Section 141 of the NI Act. Respondent accused had preferred an application under Section 482 of Cr.P.C. in the High Court and prayed that criminal proceedings instituted against her may be quashed. High Court quashed the proceeding merely on the ground that there was nothing to indicate as to how and what manner the respondent at the relevant point of time was in charge and was responsible for the conduct of the business of the firm. Respondent accused had relied upon decisions in *Gunmala Sales Private Limited Vs Anu Mehata and ors* (supra), *National Small Industries Corporation Vs. Harmeet Singh Paintal and anr*., (supra) and *Sunita Palita and others Vs. Panchami Stone Quarry,* (supra). Observation of the Apex Court in paragraph 33 in the said decision are reproduced herein below:-

> *“Thus, the legal principles discernible from the aforesaid decision of this Court may be summarised as under:*
>
> *(a) Vicarious liability can be fastened on those who are in charge of and responsible to the company or firm for the conduct of its business. For the purpose of Section 141, the firm comes within the ambit of a company;*
>
> *(b) It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole;*
>
> *(c) If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed in regards the law.*
>
> *(d) In construing a complaint a hypertechnical approach should not be adopted so as to quash the same.*
>
> *(e) The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in the enactment of Sections 138 and 141 respectively should be kept in mind by the Court concerned.*

> *(f) These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within the statutory period even after the issue of notice.*
>
> *(g) The power of quashing should be exercised very sparingly and where, read as a whole, the factual foundation for the offence has been laid in the complaint, it should not be quashed.*
>
> *(h) The Court concerned would owe a duty to discharge the accused if taking everything stated in the complaint is correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking.*"

32. The Apex Court thereafter considered the question as to who is liable and what is vicarious liability. In paragraph 42 of the said decision it was observed that principles of law and dictum as laid down in *Gunmala Sale Private Limited* still holds the field and reflects the correct position of law. In paragraph 43 it was observed that there were averments in the complaint and the statutory notice to the accused. There are specific averments that the cheque was issued with the consent of the accused and without her knowledge. This was sufficient to pay the respondent to trial in the alleged offence. The case of the respondent that at the time of issuance of cheque or at the time of commission of the offence she was in no manner concerned with the firm or she not in charge responsible for the day to day affairs of the firm cannot be on the basis of mere bald assertion in this regard. The same is not sufficient to make good her case, the respondent is expected to lead unimpeachable and incontrovertible evidence. Nothing was adduced by the respondent before the High Court to get the proceedings quashed. High Court had practically no legal bass to say that averments are not sufficient to fasten the vicarious liability upon the respondent by virtue of Section 141 of the NI Act. No reply was given by respondent to the statutory notice. In the proceedings of the said type it is essential for the person to whom the statutory notice is issued to give an appropriate reply. Person concerned is expected to clarify his or her stance. If the person have some unimpeachable and in controvertible material to establish that he or she has no role to play in the affairs of the company/firm, then such material should be highlighted in the reply to the notice as a foundation. The complainant would come to know as to why the person to whom he has issued notice says that he is not responsible for the dishonour of the cheque. If reply was given the complainant would have undertaken further enquiry and would have tried to find out what was the legal status of the firm on the date of the commission of the offence and what was the status of the respondent in the firm. The object of notice before the filing of the complaint is not just to give a chance to the drawer of the cheque to rectify his omission to make his stance clear so far as his liability under Section 138 of the NI Act is concerned. Once the necessary averments are made in the statutory notice issued by the complainant in regard to the vicarious liability of the partners and upon receipt of such notice and if the partner keeps quiet, then the complainant has reasons to believe that what he has stated in the notice has been accepted by the noticee. When he in view of the basic averment process is issued the complaint must proceed against the Directors or partners as the case may be. But, if any Director or Partner wants to quash the process on the ground that only a bald averment is made in the complaint and that he is 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 incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of 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 or Partner. The primary responsibility of the complainant is to make specific averments so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company to show that they were not liable to be convicted. The existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial to show that at the relevant time they were not in charge of the affairs of the company or the firm. Final judgement and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. Vicarious liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners qua the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction and they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquitted. Director who wants the process to be quashed on the ground that only a bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make out a case that making him/her stand the trial would be an abuse of process of Court.

33. In the above decision, there is reference to the earlier decision of Apex Court in *National Small Industries Corp. Ltd Vs Harmeet Singh Paintal and another* (supra) being relied upon by the respondent therein. Apparently there is no discussion about the observation made by the Apex Court in the said decision. It also appears that decision in the case of Pooja *Ravinder Devidasani Vs State of Maharashtra* was not placed before the Apex Court for consideration. The decision was delivered on 16.9.2022.

34. In the case of *Ashok Shewakram Mani and others Vs State of Andhra Pradesh and another, decided on 3.8.2023 (2023) 8 SCC 473*. The Apex Court had considered the challenge to the order passed by the High court dismissing the petition under section 482 of Cr.P.C. preferred by the director of the company for quashing criminal proceedings under Section 138 of the Negotiable Instruments Act. Several other petitions were heard by the Apex court. Main issue canvassed by the appellants was that they were directors of the accused company. The mandatory averments in terms of sub-section (1) of Section 141 of the NI Act was not made. The respondents contended that there are sufficient averments against the accused and that they have not replied to the statutory notice issued under Section 138 of the Negotiable instruments Act in support of the contention regarding failure of the appellant to give reply to the statutory notice. Reliance was placed on the decision of the Apex court in the case of "*S.P. Mani and Mohan Diary Versus Dr Snehalatha Elangovan* " In the complaint in question which is subject matter of Criminal Appeal No. 879 of 2023, it is s stated that the accused No.1 is the Company on whose account the cheques were issued and accused No.2 is the Managing Director of the accused No.1. The appellants were Directors of the accused No.1/Company. The accused 2 to 7 are fully aware of the business transactions of the accused No.1 company. They are all jointly and severally liable for the transactions of the accused No. 1 company. All the accused are fully aware of the issuance of the cheques without balance in the account. They are fully aware that the cheques will be dishonoured. It clearly establishes that all the accused with an intention to deceive and defraud the complainant have issued the cheques and directed the complainant to present the cheques. Accused have issued the cheques knowing fully well,that there are no funds in their account. The accused have not paid the cheque amount within 15 days after receipt of the notice. The cheques were issued towards legally enforceable debt and liability of the complainant. So, they have committed an offence, punishable under section 138 of N.I. Act. In the complaint it was also stated that notice was not served on the accused. The Apex Court observed that service of notice is condition precedent for initiating proceeding under the said Act. Averments made in the complaint does not fulfil the requirement of section 141(1) of the NIA. It was not stated that at the time of commission of the offence accused were in charge of and were responsible to the company for the conduct of the business of the company. Most important averment was missing in the complaint. Decision in *S. P. Mani and*

Mohan Diary Vs Dr. Snehalatha Elangovan(supra) has no application. While dealing with other appeal it was observed that complaint mentions that accused were directors of the company and managing the company and busy with the day to day affairs of the company and all are managing the company and also in charge of the company jointly and severally labile for the act of accused no.1 company. Complainant relied upon the decision of *S. P. Mani and Mohan Diary Vs Dr. Snehalatha Elangovan*(supra), The Apex Court held that there is non compliance on the part of the complaint that the requirement of sub-section 1 of section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to penal provision. Vicarious liability is attracted when the ingredients of sub section 1 of section 141 are satisfied. Section provides that every person who at the time of offence committed was in charge of and was responsible to the company for the conduct of business of the company as well as the company shall be deemed to be guilty of the offence under Section 138 of the NI Act. Requirement of section 141 of the NI Act is different and higher. Every person who is sought to be roped by virtue of sub section 1 of section 141 of the NI Act must be a person who at the time of offence committed was in charge of and was responsible to the company or conduct of the business of the company. Merely because somebody is managing the affairs of the company, *per se*, he does not become in charge of the conduct of the business of the company or the person responsible for the company for the conduct of the business of the company. For example, a manager of a company may be managing the business of the company. Only on the ground that he is managing the business of the company, he cannot be roped in based on sub-section 1 of Section 141 of the NI Act. Allegation that accused were busy with the day-to-day affairs of the company is hardly relevant in the context of sub section 1 of Section 141 of the NI Act. The allegation that they are in charge of the company is neither here nor there and by no stretch of imagination one cannot conclude that the allegation of the complainant is that accused was also responsible to the company for the conduct of the business. Only by saying that person was in charge of the company at the time when the offence was committed is not sufficient to attract sub-section 1 of Section 141 of the NI Act. The words "was in charge of" and "was responsible to the company for the conduct of the business of the company" ought be read conjunctively and not dis-conjunctively in view of the use of word "and" in between.

35. In a subsequent decision delivered on 11.10.2022 by the Apex Court in the case of *Lalankumar Singh and others Vs State of Maharashtra*(supra), the Court considered vicarious liability embarked under section 34 of the Drugs and Cosmetics Act. Appellants were directors of manufacturing company. Complaint was filed before the Chief Judicial Magistrate, Beed under Section 18(a)(i) read with Sections 16 and 34 of the Drugs and Cosmetics Act. Process was issued against the accused. It was contended on behalf of the appellants that Section 34 of the said Act specifically provides that only such person who, at the time of the commission of the offence, 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. Merely mentioning that the appellants, being the Directors of the accused company, were responsible to the company for the conduct of the business of the company would not be sufficient to initiate proceedings against them. Unless and until there is a specific averment as to what was the role in the conduct of the business of the company, a person cannot be proceeded against solely on the ground that he was a director of the company. It was contended on behalf of the complainant that there is sufficient compliance of requirement of Section 34 of the said Act. Complaint has to be read as a whole and cannot be read in a piecemeal manner. The Apex Court considered Section 34 of the said Act and observed that vicarious liability of a person for being prosecuted have an offence committed under the Act by a under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. In the complaint there was no allegations to indicate that they were in charge of the company and also responsible to the company for the conduct of its business. Simply because the person is a director of the company, it does not necessarily mean that he fulfils the twin requirements of Section 34(1) of the said Act. A person cannot be made liable unless, at the material time, he was in charge of and was also responsible to the company for the conduct of its business. Apex Court referred to the decision in *S.M.S. Pharmceuticals Ltd. Vs. Neeta Bhalla*(supra) and observed that it was held that merely because a person is a director of a company, it is not necessary that he is aware about the day to day functioning of the company. The Apex Court has held that there is no universal rule that director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day to day affairs of the company or responsible to the affairs of the company. Reference was also made to the decision in *Pooja Ravinder Devidasani Vs State of Maharashtra and Sabitha Ramamurthy Vs R. B. S. Channabasavaradhya* (supra) and various other decisions. Reference was also made to the decision in *Ashok Mal Bafna Vs Upper India Steel Manufacturing and Engineering Company Limited*. It was held that there was no specific averments against the appellants and the proceedings were quashed. The Court also observed that order of issuance of process is not an empty formality. The Magistrate is required to apply its mind whether sufficient ground for proceeding exists in the case or not.

36. In the subsequent decision of the Apex Court delivered on 10.10.2023 in the case of *Siby Thomas v. Somany Ceramics Ltd* (supra) order passed by High Court of Punjab and Haryana at Chandigarh rejecting the application preferred by the accused under Section 482 of the Cr.P.C. was under challenge. Accused/Appellant had set up twin grounds for quashing the complaint against hi, firstly that he had resigned from the partnership firm before issuance of the cheque and the complaint is devoid of mandatory averments required to be made in term of sub section 1 of section 141 of NI Act. It was contended before the Apex Court by the appellant that averments elaborating/specifying his role in the day-to-day affairs of the partnership firm much-less mandatorily required averments for his prosecution are conspicuously absent in the complaint. Appellants relied upon decision of the Supreme Court in *Anita Malhotra v. Apparel Export Promotion Council & Anr.(2012) 12 SCC 520* and another decision of the Supreme Court in the case of *Ashok Shewakramani & Ors. v. State of Andhra Pradesh & Anr.*

Respondent/Complainant however submitted that averment in the complaint are sufficient to satisfy the mandatory requirement in terms of section 141 of the N.I. Act. Reliance was placed on the decision of the Supreme Court in the case of *S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan*(supra). The Supreme Court reproduced averments in the complaint wherein it was stated that accused no.1 is partnership firm and accused nos. 2 to 6 are partners of accused no.1. The accused No.2 to 6 being the partners are responsible for the day to day conduct and business of the accused No. 1. The accused No.1 through its partners i.e. accused No.2 to 6, on the basis of the authority vested in them approached to the complainant for purchasing the ceramic tiles, sanitary wares and bath fitting from the complainant on credit basis. The request of the accused No.1 was accepted by the complainant and the accused agreed to pay the amount of the goods purchased by them to the complainant within one month and it was also agreed that if the accused failed to make the payment within one month in that case they shall also be liable to pay interest @ 24% per annum on the balance sale consideration till its full realization. The Apex Court observed that besides the aforesaid averments no other avements are made in the complaint in regard to appellant's role. Therefore, the question is whether the averments referred to hereinbefore are sufficient to prosecute the appellant under Section 138 of the NI Act, on the afore-extracted averments barring in mind the averments made in the complaint in relation to the role of the appellant and sub-section (1) of Section 141 of the N.I. Act rival contentions are to be appreciated. Going by the decision relied on by the respondent in *S.P. Mani and Mohan Dairy v. Dr. Snehalatha Elangovan*(supra), it is primary responsibility of the complainant to make specific averments in the complaint so as to make the accused vicariously liable. Respondent however had relied upon the observation of the Apex Court in the case of *S. P. Mani's* case (supra), in paragraph 47(b) the complainant is supposed to know generally as to who were in charge of the affairs of the company or firm, as the case may be and that the other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it and in such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. Paragraph 10 to 17 of the decision are reproduced herein below:-

> *10. We are of the considered view that the respondent has misread the said decision. Under the sub-caption 'Specific Averments in the complaint', in paragraph 41 and sub-paragraphs (a) and (d) as also in paragraph 42 thereof, it was held in the decision in S.P. Mani's case (supra) thus:-*
>
> *"41. In Gunmala Sales Private Limited (supra), this*

Court after an exhaustive review of its earlier decisions on Section 141 of the NI Act, summarized its conclusion as under:-

"(a) 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;

(b) ......

(c) ......

(d) 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."

42. The principles of law and the dictum as laid in Gunmala Sales Private Limited (supra), in our opinion, still holds the field and reflects the correct position of law."

11. In the light of the afore-extracted recitals from the decision in Gunmala Sales Private Limited v. Anu Mehta4, quoted with agreement in S.P. Mani's case (supra) and in view of sub-section (1) of Section 141 of the N.I. Act it cannot be said that in a complaint filed under Section 138 read with Section 141 of the N.I. Act to constitute basic averment it is not required to aver that the accused concerned is a person who was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed. In paragraph 43 of S.P. Mani's case (supra) it was held thus:

"43. In the case on hand, we find clear and specific averments not in the complaint but also in the statutory notice issued to the respondent."

It is thereafter that in the decision in S.P. Mani's case (supra) in paragraph 47 (a) it was held that the primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable.

12. Bearing in mind the afore-extracted recitals from the decisions in Gunmala Sales Private Limited's case (supra) and S.P. Mani's case (supra), we have carefully gone through the complaint filed by the respondent. It is not averred anywhere in the complaint that the appellant was in charge of the conduct of the business of the company at the relevant time when the offence was committed. What is stated in the complaint is only that the accused Nos. 2 to 6 being the partners are responsible for the day-to-day conduct and business of *the company. It is also relevant to note that an overall reading of the complaint would not disclose any clear and specific role of the appellant. In the statutory notice dated 10.09.2015 (Annexure-P6) at paragraph 3 it was averred thus:-*

"3. That for liquidation of the aforesaid legal liability/outstanding, you noticee No. 2 to 6 issued cheque number 005074 dated 21.08.2015, amounting to Rs. 27,46,737/- drawn on Punjab National Bank, Ernhipalam (Kozhikode) branch in favour of my client from the account of noticee No. 1."

In response to that in Annexure- P7 reply the appellant herein stated thus:-

"In this regard, I would like to convey you that, I have retired from M/s Tile store as partner way back on 28-5-2013 and I am not a partner of M/s. Tile Store any more. (Copy of Retirement deed enclosed).

During the time of my retirement, there were no dues to M/s. Somany Ceramics Ltd. from M/s. Tile Store as full payments were made for the consignments taken from them. (Copy of accounts statements up to 31-05-2013 enclosed)"

13. In the light of the aforesaid circumstances the averments of the respondent in paragraphs 5 and 6 of the complaint are also to be seen. In paragraph 5 of the complaint, it was alleged that accused No.1 through accused No.2 had purchased the goods from the complainant on credit basis through proper sales invoices and, in paragraph 6 it was alleged that for liquidation of legal liability outstanding accused Nos. 2 and 3 issued cheque Nos. 005074 dated 21.8.2015 *amounting to Rs.27,46,737/- drawn upon Punjab National Bank, Ernhipalam (Kozhikode), in favour of the complainant from the account of accused No.1. The appellant is the accused No. 4 in the complaint.*

14. In view of the factual position relating the averments revealed from the complaint as aforesaid it is relevant to refer to the decisions relied on by the learned counsel appearing for the appellant. In the decision in Anita Malhotra's case (supra) in paragraph 22 it was held thus:-

"22. This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal). In the case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr. Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed."

15. Paragraph 19 of the Ashok Shewakramani's case (supra) is also relevant for the purpose of the case and *it, in so far as relevant, reads thus:*

"19. Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section 1 of Section 141 are satisfied. The Section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence under Section 138 of the NI Act. In the light of sub-section 1 of Section 141, we have perused the averments made in the complaints subject matter of these three appeals. The allegation in paragraph 1 of the complaints is that the appellants are managing the company and are busy with day to day affairs of the company. It is further averred that they are also in charge of the company and are jointly and severally liable for the acts of the accused No.1 company. The requirement of sub-section 1 of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section 1 of Section 141 NI Act must be a 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. Merely because somebody is managing the affairs of the company, per se, he does not become in charge of the conduct of the business of the company or the person responsible for the company for the conduct of the business of the company. For example, in a given case, a manager of a company may

be managing the business of the company. Only on the ground that he is managing the business of the company, he cannot be roped in based on sub-section 1 of Section 141 of the NI Act. The second allegation in the complaint is that the appellants are busy with the day-to-day affairs of the company. This is hardly relevant in the context of subsection 1

of Section 141 of the NI Act. The allegation that they are in charge of the company is neither here nor there and by no stretch of the imagination, on the basis of such averment, one cannot conclude that the allegation of the second respondent is that the appellants were also responsible to the company for the conduct of the business. Only by saying that a person was in charge of the company at the time when the offence was committed is not sufficient to attract sub-section 1 of Section 141 of the NI Act."

16. Thus, in the light of the dictum laid down in Ashok Shewakramani's case (supra), it is evident that a vicarious liability would be attracted only when the ingredients of Section 141(1) of the NI Act, are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of Section 141(1) of the NI Act, would reveal that only that 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 alone shall be deemed *to be guilty of the offence and shall be liable to be proceeded against and punished. In such circumstances, paragraph 20 in Ashok Shewakramani's case (supra) is also relevant. After referring to the Section 141(1) of NI Act, in paragraph 20 it was further held thus:*

"20 On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" cannot be read disjunctively and the same ought be read conjunctively in view of use of the word "and" in between."

17. The upshot of the aforesaid discussion is that the averments in the complaint filed by the respondent are not sufficient to satisfy the mandatory requirements under Section 141(1) of the NI Act. Since the averments in the complaint are insufficient to attract the provisions under Section 141(1) of the NI Act, to create vicarious liability upon the appellant, he is entitled to succeed in this appeal. We are satisfied that the appellant has made out a case for quashing the criminal complaint in relation to him, in exercise of the jurisdiction under Section 482 of Cr.P.C. In the result the impugned order is set aside and the subject Criminal Complaint filed by the respondent and pending before Ld. CJ (JD) JMIC, Bahadurgarh, in the matter titled as M/s. Somany Ceramics v. M/s. Tile Store etc. vide COMA- 321-2015 (CNRNO: HRJRA1004637-2015), stand quashed only in so far as the appellant, who is accused No. 4, is concerned. Appeal stands allowed as above. There will be no order *as to costs.”*

37. In the case of *Harshendra Kumar D vs Rebatilata Koley and others (2011) 3 SCC 351*, it was observed that 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 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 accused, the accusations against him cannot stand, it would be travesty of justice if 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. 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. High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. If the criminal complaint is allowed to proceed against the appellant, it would result in gross injustice to the appellant and tantamount to an abuse of process of the Court.

38. In the case of *Satvinder Jeet Singh Sodhi And Anr vs The State of Maharashtra*. Complaint was filed alleging offence under Section 138 of the N.I. Act. Appellants had contended that they are not responsible for the day to day affairs of the accused no.1 company since they are none executive independent director of the company. Reference to section 149(6), (9) and (12) of the company Act. It was observed that independent director or non executive director not being a promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently. Referring to the various decisions of the Supreme Court and relying upon the documents on record indicating that accused were independent non executive director and in the light of averment made in the complaint, role of independent director, proceedings were quashed.

39. It is pertinent to note that Section 34 of the Drugs and Cosmetics Act and Section 141 of the NI Act are *pari materia*. Section 141 is reproduced herein below:-

> *"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 any body corporate and includes a firm or other association of individuals; and

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

40. It is not in dispute that the applicants are non executive independent directors. There is no reason to doubt the veracity of the documents relied upon by the applicants indicating that they were appointed as non executive independent director.

41. In the light of the provisions of the company Act which are referred to herein above and the documents relied upon by the applicants they cannot be prosecuted by invoking vicarious liability under section 34 of the Drugs and Cosmetics Act.

42. Complaint relates to violation of provision under Section 18(a) (i) section 16(1)(a) read with rule 124-B, section 17 B(e) section 18(c), 18-A punishable under Section Section 27(b) (ii), Section 279c), Section 27(d) Section 28 of the Drugs and Cosmetics Act, 1940. Section 34 of the said Act relates to where an offence under this Act has been committed by 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. The documents on record and the averments in the complaint does not satisfy the requirement of section 34 to prosecute the applicants for the said offences.

43. Complaint avers that applicants joined accused no.4 company on 1.6.2015, 11.10.2010 and 9.9.2016 respectively and were in charge and responsible for the conduct of the business of the company when the offence was committed. It is further alleged that accused no. 4 through its authorised signatory accused no. 5 transferred the subject drug to M/s Akumentis Healthcare Limited, Pune. Accused no. 5 is authorised signatory of wholesale premise of accused no. 4 and accused no. 6, 7, 8 and 9 are directors of accused no.4 were responsible for the affairs and conduct of the business of the accused no. 4 and he along with accused no. 4, even accused nos. 5, 6, 7, 8 and

9 are responsible for purchasing spurious drugs.

44. Averments reflect that the conclusion is based on inferences. Applicants being directors are inferred to be respondent for the conduct of the business of the company when the offence was committed, complainant does not specify any role played by the applicants. Although the respondents had contended that resolution dated 24.8.2014 attributes certain activities to the applicants in revision application no. 12/2023, there is no material on record to s how that at the time when offence was committed, the applicants were responsible for day to day affairs of the business for the company.

45. Considering the aforesaid, it would be an abuse of process of law to continue the prosecution against the applicants which is required to be quashed and set aside.

ORDER

(i) Criminal Revision Application Nos. 10/2023, 12/2023 and 14/2023 are allowed.

(ii) Impugned order dated 24.5.2023 passed by the learned Additional Sessions Judge-1 North Goa Panaji in the Special Criminal Case(NDPS) No. 34 of 2021 and proceedings in Special Criminal Case No. 34/2021 are quashed and set aside as against applicants.

(iii) Criminal Revision Applications stand disposed of.

PRAKASH D NAIK, J.

VINITA VIKAS NAIK Digitally signed by VINITA VIKAS NAIK
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