IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4113 OF 2022

Mr. Venkatachalam Thirupathi .. **Petitioner**

v/s.

1. ED & F Man Commodities (I) Pvt. Ltd.
2. State of Maharashtra .. **Respondents**

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Mr. Aabad Ponda, Senior Advocate a/w Mr. Vinit Jain a/w Mr. M. Sharanya a/w Mr. Ashok Verma i/b Mr. Vinit Jain, for the Petitioner.
Mr. Prasanna Bhangale a/w Amisha Nair i/b VIS Legis Law Practice for respondent No.1
Mr. A.R. Patil, APP for the respondent No.2 – State

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CORAM: R.G. AVACHAT, J.

Date of reserving judgment : 1st March, 2023

Date of pronouncing judgment : 31st March, 2023

J U D G M E N T :-

Rule. Rule made returnable forthwith and taken up for final hearing with the consent of learned counsel for the parties.

2. The challenge in this writ petition under Article 227 of the Constitution of India, is to the order of issuance of process, dated 14/12/2020, passed by the Court of Additional Chief Metropolitan

Magistrate, 23rd Court, Mumbai, in complaint, bearing C.C.No.1565/ SS/2019.

3. Facts giving rise to the present petition are as follows :-

The petitioner is accused No.3 in C.C.No.1565/SS/2019. It is a case instituted for offence punishable under Section 138 read with 141 of the Negotiable Instruments Act (for short N.I. Act). The respondent No.1 herein is the original complainant in the said case (complainant). The complainant is a Private Limited Company. The accused No.1 in the case, C.C.No.1565/SS/2019 is a Public Limited Company, in the business of manufacturing of sugar and related products. The accused Nos.2 to 5 in the complaint are the Directors of the Accused No.1.

4. It is the case of the complainant that, two agreements were entered into between the complainant and the accused No.1 Company. First agreement is dated 18/8/2017. It was for purchase of 2500 M.T. sugar by the complainant from the accused Company. The complainant paid a sum of Rs.9 Crores towards purchase price of entire sugar agreed to be bought. The accused Company supplied

the complainant 1847.30 M.T. sugar. It did not return the amount due towards unsupplied sugar.

5. Another agreement dated 30/9/2017 was executed between the two Companies, whereunder the complainant agreed to supply the accused Company molasses for manufacturing of alcohol. It was further agreed that, on sale of alcohol, profit arising therefrom was to be shared by both the Companies. The complainant also infused some amount for manufacturing of alcohol.

6. It is the case of the complainant that the accused Company committed breach of both the agreements. Ultimately, a settlement agreement was executed between the two Companies. The accused Company agreed to pay the complainant a sum of Rs.5 Crores towards principal amount due, plus Rs.78,21,670/- towards interest @ 18% p.a. thereon on or before 30/9/2018. It also agreed to pay interest @ 18% p.a. on the principal sum of Rs.5 Crores until the principal amount is paid back. Since the accused Company failed to comply with the settlement agreement, the complainant filed a Company Petition, No.1422/2018, under Section 7 of the Insolvency of Bankruptcy Code, 2016 (I.B.C.) before the National Company Law

Appellate Tribunal, Chennai Bench. Again a settlement was arrived at before the National Company Law Appellate Tribunal, Chennai Bench. The accused Company undertook to pay a consolidated sum of Rs.8,39,60,031/- (Rupees Eight Crores Thirty Nine Lakhs Sixty Thousand and Thirty One with interest @ 14% p.a. thereon after deducting tax (T.D.S.) @ 10% from the interest component). Towards repayment of the said amount, three cheques, the details whereof are given below, were issued by the accused Company.

Sr. No.	Date	Drawer's Bank Name	Cheque No.	Amount (Rs.)
1.	30/4/2019	State Bank of India	520706	2,79,86,677
2.	31/5/2019	State Bank of India	520707	2,79,86,677
3.	30/6/12019	State Bank of India	520708	2,79,86,677
			Total :-	8,39,60,031

7. The complainant presented the cheque dated 30/4/2019 for encashment. The cheque returned unpaid for the reason "Refer to drawer" on 1/5/2019. The complainant, therefore, issued a statutory notice dated 22/5/2019, calling upon the accused Company to pay the amount covered by the cheque. Since the demand notice was not complied with, the complainant instituted

the complaint.

The learned Additional Chief Metropolitan Magistrate issued the process against the accused No.1 Company and its Directors, including the petitioner herein. The petitioner (original accused No.3) is, therefore, before this Court in the present petition.

8. Mr. Aabad Ponda, learned Senior Counsel for the petitioner would submit that, the complainant has not filed any reply to the Writ Petition nor has it disputed the annexures/ documents filed along with the petition. The petitioner was appointed as an independent Director on 23/5/2005. He resigned on 9/5/2019 i.e. before the date of issuance of statutory notice dated 28/6/2019. The petitioner was not a member of key managerial personnel and was in fact an independent, non-executive Director, as per the audit report of 2015. The petitioner is not a signatory to any of the documents/ agreements executed between the complainant and the accused Company. He is not a drawer of the cheque. The complaint lacks necessary averments to make out a case for issuance of process against the petitioner. The learned Additional Chief Metropolitan Magistrate did not take into consideration all these facts before

issuance of the process qua the petitioner herein.

9. Relying on the judgment of the Apex Court in case of **S.M.S. Pharmaceuticals Vs. Neeta Bhalla [2005(8) SCC 89]**, learned Senior Counsel would submit that, the necessary averments ought to be contained in the complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. A complaint has to be examined by the Magistrate in the first instance on the basis of the averments contained therein. Merely being described as a Director in the Company is not sufficient to satisfy the requirements of Section 141. Even a non-Director can be liable under Section 141 of the N.I. Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

10. The learned Senior Counsel, relying on the judgment in case of **S.P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan [2022 SCC OnLine SC 1238]**, would submit that, merely stating

that a person is involved into the day-to-day affairs and management of the Company is not enough. The person must be shown to be both incharge of and responsible for the conduct of the business and its affairs. The twin-clauses are both necessary.

Then, relying on the judgment of the Apex Court in case of **K.K. Ahuja Vs. V.K. Vora & anr. [(2009) 10 SCC 48)**, learned Senior Counsel would submit that, the petitioner was neither a Managing Director nor signatory of the cheque. Prefix 'Managing' to the word 'Director' makes it clear that the Director was incharge of and responsible to the Company for the conduct of the business of the Company. According to him, the combined reading of Sections 5 and 291 of the Companies Act, 1956 with definitions in clauses (24), (26), (30), (31), (41) and (45) of Section 2 thereof would show that the persons namely Managing Directors, whole-time Directors, Manager, Secretaries are considered to be the persons responsible for the Company for the conduct of its business. In the absence of the officers named immediately hereinabove, any Director or Directors who may be specified by the Board in this behalf, and where the Director is so specified, all the Directors are supposed to be responsible to the Company for the conduct of its business. According to him, if mere reproduction of the wording of Section 141(1) in the complaint is not sufficient to make a person liable to face the prosecution, virtually every officer/ employee of the Company without exception could be impleaded as accused by merely making an averment in terms of Section 141(1) of the N.I. Act. Trauma, facing a hardship of criminal proceedings in such cases, may be more serious than the ultimate punishment. It is not proper to subject all and sundry to be impleaded as accused in the complaint against a Company.

11. The learned Senior Counsel, relying on the judgment of **Girdhari Lal Gupta Vs. D.N. Mehta & anr. [AIR 1971 SC 2162]**, would submit that, "What then does the expression a person in-charge and responsible for the conduct of the affairs of a company mean" ? It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in over all control of the day to day business of the

company or firm. This inference follows from the wording of section 23C(2)."

12. Relying on the judgment of the Apex Court in case of R.K. Khandelwal Vs. State [1964] 62 A.L.J. 625, learned Senior Counsel would submit that, there can be directors who merely lay down the policy and are not concerned with the day to day working of the Company. Consequently, the mere fact that the accused person is a partner or director of the Company, shall not make him criminally liable for the offences committed by the Company unless the other ingredients are established which make him criminally liable. Thus it is observed that a person "in charge of a business" means that the person should be in overall control of the day-to-day business of the Company.

13. The learned Senior Counsel adverted this Court's attention to Section 2(47) read with Section 149(5) of the Companies Act, which describe who could be termed to be independent Director and his liability in such capacity.

14. Relying on the judgment in case of **Pooja Ravinder**

Devidasani Vs. State of Maharashtra & anr. [(2014) 16 SCC 1], he would submit that, the non executive Director of the Company is not involved in the day-to-day affairs of 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.

15. Learned Senior Counsel also relied on the judgment in case of National Small Industries Corpn. Vs. Harmeet Singh Paintal [(2010) 3 SCC 330, State of Karnataka Vs. Pratap Chand [(1981) 2 SCC 335] and Lalankumar Singh & ors. Vs. State of Maharashtra [2022 SCC OnLine SC 1383]. Learned Senior Counsel also relied on some other authorities namely :-

(1) Saroj Kumar Poddar Vs. State (NCT of Delhi) & anr.
2007(3) SCC 693

(2) Anita malhotra Vs. Apparel Exports Promotion Council
(2012) 1 SCC 520

(3) Chintalapati Srinivasa Raju Vs. SEBI [2018 (7) SCC 443]

(4) Ashok Bafna Vs. Upper Iondia Steel [2018(4) SCC 2023-03-23]

(5) Shailendra Swarup Vs. Deputy Director-cum-Member
2020(16)SCC 561

(6) Dayle D'Souza Vs. Govt. of India
2021 SCC OnLine SC 1012

16. The sum and substance of the submissions of the learned Senior Counsel is that, to make a person liable vicariously in view of Section 141 of the N.I. Act, the complaint must contain all the necessary averments to suggest that the person concerned was incharge of and responsible to the day-to-day affairs of the Company while the offence took place. According to learned Senior Counsel, the person concerned should have been at the helm of the affairs of the Company from the date of issuance of cheque to the date of failure of making payment of the dishonour of the cheque within a statutory period after receipt of a statutory demand notice. He would reiterate that the petitioner was an independent non-executive Director. He resigned from the post a few days after the cheque was issued. The petitioner thus does not get covered by/ with the ingredients of the offence punishable under Section 138 read with 141 of the N.I. Act. He would further submit that, the Apex Court judgment in S.P. Mani's case (supra) on one hand and judgment of the Apex Court in case of Girdhari Lal (supra) and Sarojkumar (supra) on the other, are inconsistent with each other.

17. The accused in S.P. Mani's case (supra) were partnership

firm and its partners. According to learned Senior Counsel, whether the judgment of the Apex Court in Lalankumar Singh (supra) or in case of S.P. Mani (supra) will apply is a question involved herein since both contradict each other on the point of averments. According to learned Senior Counsel, there is thus a need to have a detailed discussion or the reference to larger Bench. The learned Senior Counsel ultimately urged for allowing the writ petition.

18. Learned counsel for the complainant would, on the other hand, submit that, the complaint contained necessary averments in terms of Section 138 read with 141 of the N.I. Act. The learned Additional Metropolitan Magistrate rightly issued the process. The learned counsel relied on the Apex court judgment in case of S.P. Mani (supra). He would further submit that, the documents placed on record by the petitioner himself indicate the petitioner was incharge of day-to-day affairs of the Company. The petitioner herein was a Chairman of the audit committee, played a vital role in the functioning of the accused Company. He resigned post issuance of the cheques. According to learned counsel, the judgment in Lalan Kumar's case (supra) has been passed after the judgment in S.P.

Mani's case (supra) was delivered. In Lalan Kumar's case (supra), the question as to interpretation of certain provisions of Drugs Act was involved. During all the business transactions of the complainant and the accused Company, the petitioner was one of the Directors of the accused Company. According to learned counsel, whatever contentions the petitioner has raised, are in the nature of his defence and those could only be gone into during trial of the case, more so when the complaint contained the necessary averments for issuance of process against the petitioner. He, therefore, urged for dismissal of the writ petition.

19. Considered the submissions advanced. Perused all the authorities relied on. Also perused the complaint and the documents relied on. Before adverting to the factual matrix of the case, it is necessary to refer to relevant provisions of Section 138, 141, and 142(a), (b) of the Negotiable Instruments Act. The Sections read as under :

> **138. Dishonour of cheque for insufficiency, etc., of funds in the account.**— Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank

unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years', or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

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

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

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

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

141. Offences by companies.— (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the

company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

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

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

Explanation.— For the purposes of this section, —

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

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

142. Cognizance of offences.— (1) Notwithstanding anything contained in the Code of Criminal

Procedure, 1973 (2 of 1974),—

(a) no court shall take cognizance of any offence punishable under section 138 except upon a

complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

20. In case of S.P. Mani (supra), it is observed as under :

29. The seminal issue raised and requires to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of subsection (1) of Section 141 for being in-charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time" when the offence under Section 138 can be said to have been committed by the company. It is common place that an offence means an aggregate of facts or omissions which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called "dishonour of cheque" can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510, that:

> "14. The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence: (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice."

30. Different persons can be incharge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, "A" might be in charge of the company at the time of drawing the cheque, "B" might be in charge of the company at the time of dishonour of cheque and "C" might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C resply or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141. The key to this interpretation lies in the use of the phrase: "every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly" as it occurs in subsection (1) of Section 141 and the use of the phrase "provided that nothing contained in this sub section shall render any person liable to punishment if he proves…" that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be "proceeded against", but may not be "punished" if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or

during 15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The word "every" points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place. As to what this 'relevant time' is, was a question that this Court was called to answer, inter alia, in N Rangachari v. Bharati Sanchar Nigam Limited, (2007) 5 SCC 108 : AIR (2007) SC 1682. In this case, Data Access, a company had issued two cheques to the BSNL, which were duly presented, but were dishonoured for insufficiency of funds. A complaint under Section 138 of the NI Act was filed. While the BSNL held the directors liable, the appellant, a chairman in the company contended that he being a nominated chairman and holding an Honorary post in the Company, was never assigned with any of the company's financial or other business activities. He was the Chairman for name sake and was never entrusted with any job or business or constituted a signing authority. Resolving the issue of when the liability could be fastened, this Court said:

> "In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were in charge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour."
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> [Emphasis supplied]

32. In the aforesaid context, we may straight away proceed to look into the following observations made by this Court in the case of Monaben Ketanbhai Shah v. State of Gujarat in Criminal Appeal No. 850 of 2004 decided on 10.08.2004 reported in (2004) 7 SCC 15: "Section 138 of the Act makes dishonour of the cheque an offence punishable with imprisonment or fine or both. Section 141 relates to offences by the company. It provides that 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. Thus, vicarious liability has been fastened on those who are in charge of and responsible to the company for the conduct of its business. For the purpose of Section 141, a firm comes within the ambit of a company. 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. If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the Court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking."

[Emphasis supplied]

39. In yet one another recent pronouncement in the case of Ashutosh Ashok Parasrampuria v. Gharrkul Industries Pvt. Ltd. reported in (2021) SCC Online SC 915, this Court after due consideration of the decisions in the case of SMS Pharmaceuticals (supra); S.K. Alagh v. State of Uttar Pradesh (2008) 5 SCC 662; Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd., (2010) 10 SCC 479, and GHCL Employees Stock Option Trust v. India Infoline Limited, (2013) 4 SCC 505, observed as under: “In the light of the ratio in SMS Pharmaceuticals Ltd. (supra) and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are incharge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not open for the High Court to interfere under Section 482 CrPC unless it comes across some unimpeachable, incontrovertible 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 abuse4` of process of Court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the particular Director for which there could be various reasons.” [Emphasis supplied]

40. The principles discernible from the aforesaid decision of this Court in the case of Ashutosh Ashok Parasrampuriya (supra) is that the High Court should not interfere under Section 482 of the Code at the instance of an accused unless it comes across some unimpeachable and incontrovertible evidence to indicate that the Director/partner of a firm could not have been concerned with the issuance of cheques. This Court clarified that in a given case despite the presence of basic averments, the High Court may conclude that no case is made out against the particular Director/ partner provided the Director/partner is able to adduce some unimpeachable and incontrovertible evidence beyond suspicion and doubt.

> 46. When 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 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 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."

21. Relying on the three Judge Bench judgment of the Apex Court in **S.M.S. Pharmaceuticals Vs. Neeta Bhalla [2005(8) SCC 89],** in paragraph No.19 of the judgment in case of Harmeet Singh (supra), relied upon by learned Senior Counsel for the petitioner, it has been observed :

> 19. In view of the above discussion, our answers to the questions posed in the reference are as under:
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the

company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

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

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

22. All the judgments relied on by the learned Senior Counsel for the petitioner are two Judge Bench judgments of the Apex court. The observations and findings made therein were based

on factual matrix therein. Say for example, in case of Pooja Ravinder (supra), the appellant therein ceased to be the Director w.e.f. 7/12/2005. The cheques in question were issued during April 2008 to September 2008 i.e. long after the appellant therein had ceased to be the Director of the Company.

23. Girdhari Lal's case (supra) was post conviction of the appellant therein. In paragraph No.6, it has been observed :

> 6. What then does the expression "a person in-charge and responsible for the conduct of the affairs of a company mean" ? It will be noticed that the word 'company' includes a firm or other association and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person 'in-charge' must mean that the person should be in overall control of the day to day business of the company or firm. This inference follows from the wording of Section 23C(2).

24. K.K. Ahuja's case has been considered in S.P. Mani's case. The facts in case of Anita Malhotra suggest that the appellant therein had resigned from the post of the Director long before the cheques questioned therein were issued. The facts in case of Harmeet Singh's case (supra) would indicate that, Harmeet Singh was no more Director of the Company when the cheques alleged in the complaint

were signed and issued. The facts in Ashokkumar Bafna's case (supra) indicate that the appellant therein had resigned as a Director w.e.f. 2/1/2006. Whereas the cheques were bounced about 7 months post his resignation.

25. Now let's turn to the averments in the complaint./ Paragraphs No.4, 5, 6 and 8 of the complaint need to be reproduced below :

> "4. The accused No.1 is a public limited company having its place of business as stated in the cause title above and involved inter alia in the business of manufacturing of sugar and related products. Accused No.2 is the Chairman and Managing Director and the authorised signatory of the Accused No.1 company. The Accused Nos.3, 5 and 6 are directors of the Accused No.1 company and are in charge of the Accused No.1 Company and are involved in the day-to-day affairs and management of the Accused No.1 company.
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> 5. The Complainant submits that, the Accused No.2 to 6 were responsible for the day-to-day business activities of the Accused No.1 on the date when the cheque in the matter in hand was dishonoured.
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> 6. It is submitted that the present complaint is filed due to the offences committed by all the Accused by consent and connivance with each other and the same shall also be attributable to wilful neglect on the part of all the Accused to not arrange for the honouring of the cheques. Accordingly, the accused Nos.2 to 6 are liable to be prosecuted for having failed to honour the cheques issued by them on behalf of the Accused No.1 company and further having failed to comply within the stipulated time of fifteen (15) days with the requirements of the

statutory legal notice dated 22nd May 2019 issued under the provisions of Section 138 r/w. Section 141 of the Negotiable Instruments Act, 1881.

7. . . . .
. . . .

8. That dishonour of a cheque is a criminal offence punishable under the Negotiable Instruments Act, 1881 and that this offence has been committed by the above named Accused No.1 to 6 with an intention to cheat and defraud the Complainant by not making necessary re-payments as required, assured and guaranteed to the Complainant. The Accused No.2 is the Chairman and Managing Director and Signatory of the dishonoured cheque bearing No.520706. The Accused No.3 to 6 are involved in the day-to-day affairs and management of Accused No.1 company and therefore are completely aware about the settlement arrived at with the Complainant and their obligation to make re-payment thereunder. In fact, it appears that since the very inception of the transaction the Accused No.2 to 6 had the intention of cheating the Complainant for the purpose of dishonestly and fraudulently making wrongful gains at the cost of the Complainant's victimization."

26. Reading of the aforesaid averments in the complaint suggests, there are pleadings in terms of Section 141 of the N.I. Act as has been expected in view of three Judge Bench judgment of the Apex Court in S.M.S. Pharmaceuticals' case (supra).

27. True, the petitioner herein was an independent non-executive Director. He has, therefore, reason to contend that he was no way concerned with the day-to-day affairs and management of

the accused Company. There is also record to indicate the petitioner to have resigned from the post of Director w.e.f. 9/5/2019.

28. The documents placed on record by the petitioner himself indicate that the petitioner was the Chairman of the Audit Committee. The same suggests, the petitioner, in spite of being an independent non-executive Director, was incharge of and looking after financial affairs of the accused Company. Admittedly, the business transactions between the complainant and the accused Company took place before the petitioner resigned. The cheque was also returned unpaid before the petitioner put in his papers. Relying on the judgment paragraph No.30 of the Apex Court in S.P. Mani's case (supra), this Court finds it to be not a case to grant the petitioner relief for the reasons that the petitioner was Chairman of the Audit Committee, all the business transactions have taken place before his resignation, the cheque was also issued before the petitioner resigned. This Court, therefore, finds no merit in this Writ Petition. The Writ Petition is, therefore, dismissed.

(R.G. AVACHAT, J.)