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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: August 16, 2023

Decided on: November 28, 2023

+ **CRL.M.C. 1645/2019 & CRL.M.A. 6584/2019, CRL.M.A. 38631-32/2019**

MR. K.S. MEHTA

..... Petitioner

Through: Mr. Darpan Wadhva, Senior Advocate with Mr. Vikas Kumar, Mr. Ayush Kapur, Ms. Palak Tyagi, Mr. Jalaj Govil, Advocates

V

**M/S MORGAN SECURITIES & CREDITS
PVT. LTD.**

..... Respondents

**Through: Mr. Rohit Priya Ranjan,
Mr. Sanket Mishra,
Ms. Srishti Sonkar,
Advocates**

CORAM

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

1. The present petition is filed under section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”) to set aside the order dated 29.01.2019(hereinafter referred to as the “**impugned order**”) passed by the Court of Sh. N.K Malhotra Additional Sessions Judge / Special Judge,CBI-02, Patiala House



Courts, New Delhi in Criminal Revision bearing no.540/2018 titled as **K. S. Mehta V M/S Morgan Securities& Credits Pvt. Ltd.** and order dated 10.10.2018 passed by the court of sh. Dharmender Singh, Metropolitan Magistrate- 05, Patiala House Courts, New Delhi in Complaint Case bearing no.15857/2017 titled as **M/S Morgan Securities& Credits Pvt. Ltd. V Blue Coast Hotels& Resorts Ltd.& others.**

2. M/S Morgan Securities and Credits Pvt. Ltd. (herein referred to as “the respondent/the complainant”) through its Authorized Representative Mahender Gautam filed a complaint under sections 138/141/142 of Negotiable Instruments Act, 1881 (hereinafter referred as “NI Act”) and 420 IPC titled as **M/S Morgan Securities& Credits Pvt. Ltd. V Blue Coast Hotels& Resorts Ltd.& others** bearing no15857/2017 on allegations that the accused no. 2 namely Arun Suri with the consent of the accused no 3 to 6 namely Mamta Suri, Basant Kumar Goswami, K. S. Mehta (the petitioner) and the Sushil Suri on behalf of the accused no.1 known as Blue Coast Hotels & Resorts Ltd. had approached the respondent/the complainant for the financial assistance for business



purposes by way of Inter Corporate Deposit(ICD) facility with a promise to repay back the amount of the ICD as per the terms mutually agreed and reduced in writing by way of an Inter Corporate Deposit Agreement dated 09.09.2002. The respondent/complainant paid Rs.5,00,00,000/- (Rs. five crores only) under the ICD facility to the accused(s) vide cheque bearing no. 227605 dated 09.09.2002 drawn on HDFC Bank, K.G. Marg, New Delhi and Demand Promissory Note and Inter Corporate Deposit Receipt were also executed in favour of the respondent no 2/the complainant besides other documents. The Accused (s) were required to pay Rs.5,00,00,000/- (Rupees five crores only) after expiry of 180 days from the date of receipt of ICD, i.e. on 08.03.2003 along with interest as agreed.

2.1 The respondent/the complainant has extended the financial assistance to the accused no. 1 to the tune of Rs.5,00,00,000/- (Rupees Five Crores Only) according to the usual prevailing corporate convention and, believing and acting upon promises of the accused(s) persons. The accused no. 2 is the managing Director and Authorized Signatory, the accused no.3 to 5 are the Directors, and the



accused no.6 is the Authorized Signatory of the accused no 1 and are incharge of day to day affairs and are responsible for the conduct of the business of the accused No.1 and for all acts and deeds committed by or on behalf of the accused no. 1.

2.2 The respondent/the complainant also filed / initiated arbitration proceedings against the accused No. 1, 2 and the accused no.6and M/s Morepan Laboratories Ltd. joined as parties during the Arbitration proceedings. During the arbitration proceedings, a compromise took place between the accused no. 1, 2 &6and M/s Morepan Laboratories Ltd. and the respondent/the complainant and a Memorandum of Settlement dated 27.05.2003 was signed and accordingly the Arbitrator passed a Consent Award on 21.07.2003. Thereafter the accused no.2 on behalf of the accused no. 1 with the consent and knowledge of the accused No.3 to 6 have signed and issued several cheques and most of them were got dishonour. The accused no.2 on behalf of the accused no.1 with the consent of the accused no.3 to 6 towards part payment of the outstanding bill had issued the cheque bearing no 842629 dated 30.03.05 amounting to Rs. 50,00,000/- drawn on ICICI Bank Ltd., Connaught Place, New



Delhi (hereinafter referred as “cheque in question”).The respondent/the complainant presented cheque in question to its banker HDFC Bank for encashment but cheque in question got dishonoured due to “ funds insufficient” vide cheque returned memo dated 27.09.2005 and this fact was intimated to the respondent/the complainant by its banker on 30.09.2005. The respondent/the complainant sent legal notice dated 15.10.2005 which was served upon the accused(s). The accused no 2 is the Managing Director and authorized signatory and the accused no 3 to 6 are the directors of the accused no. 1 and are incharge of and responsible for the conduct of business and day to day affairs and management of the accused no 1. The respondent being aggrieved filed the present complaint.

3. The concerned court of Metropolitan Magistrate vide order dated 19.11.2005 opined that there is sufficient grounds to proceed against the accused (s) for offences punishable under section 138 read with section 141 of the NI Act and accordingly summoned the accused(s).The accused Arun Suri stated to have been expired and proceedings qua the accused Arun Suri were ordered to be abated vide order date 10.10.2018. The Court of Sh. Dharmender Singh,



Metropolitan Magistrate-05, Patiala House Courts, New Delhi (hereinafter referred to as “the trial court”) vide order dated 10.10.2018 opined that *prima facie* case under section 138 of NI Act is made out against accused company (the accused no 1) and remaining accused (the accused no 2 to 6 including the petitioner). The relevant part of the order dated 10.10.2018 is reproduced verbatim as under:-

This court is of the considered view that although accused Arun Suri (Expired) is drawer of cheque in question but the liability of remaining accused persons is due to the fact that they allegedly were directors of accused company at the time of issuance of cheque. As per Section 141 of NI Act directors of company who are responsible for its day to day affairs and conduct of its business, are vicariously liable and specific allegations have been levelled against them as it is clearly stated that they were responsible for day to day affairs of accused company and they were directors of the accused company at the time of issuance of cheque in question and in view of this court they can prove that they were not the directors of the company the time of issuance of cheque only in their defence evidence. As per judgment of Hon'ble High Court of Delhi in case titled as *Sudeep Jain Vs. M/s ECE Industries Ltd, CRL M.C 1821/2013 & 1822/2013 dated 6.05.2013*, the guidelines contained in said judgment came into effect from 01.07.2013 and before that said guidelines were not in operation and present complaint has been filed in the year 2005. Accordingly prime facie case u/s 138 NI Act is made out against accused company and remaining accused persons who are presently facing the criminal proceedings.



4. The petitioner being aggrieved by the order dated 10.10.2018 filed Criminal Revision bearing no. 540/2018 titled as **K. S. Mehta VM/s. Morgan Securities & Credit Pvt. Ltd.** which was dismissed vide order dated 29.01.2019 (hereinafter referred to as “**the impugned order**”) passed by the court of Sh. N.K Malhotra Additional Sessions Judge/Special Judge, CBI-02, New Delhi district, Patiala House Courts, New Delhi (hereinafter referred as to “**the revisional court**”). The relevant portion of the impugned order dated 29.01.2019 reads as under:-

As I observed in para no.7 of this judgment that complainant has specifically mentioned that accused no.2 is the Managing Director and Authorized Signatory, Accused No.3 to 5 are the Directors and accused no. 6 is the authorized signatory of the company, who are in charge of day to day affairs and are responsible for the conduct of the business of the accused no. 1 company and for all acts and deeds committed by or on behalf of accused no.1 company. Taking into consideration that complainant has specifically averred in para no.5 of the complaint that accused no.2 on behalf of the accused no.1 with the consent of the accused no.3 to 6 in the part payment of the outstanding bill had issued cheque no.842629 dated 30.03.2005 amounting to Rs.50 lacs. drawn on ICICI Bank Ltd, Connaught Place, New Delhi and taking into consideration that in para no.11 of the complaint, the complainant has clearly mentioned that accused Nos.3to6 are the Directors of accused no. 1 company are in charge of. and are responsible to the company for the conduct of business and day to day affairs and management of the company and all accused persons



have consented, connived and neglected to make repayment and dishonouring of the said cheque and are liable for that offence. I am of the view that complainant has specifically mentioned the roles of the petitioners in the complaint.

In view of the above discussions, I am of the view that there is no illegality or infirmity in the order dated 10.10.2018 passed by Ld. MM in CC No. 15857/17. Ld. Trial Court has passed a reasoned order. The revision petitions filed. by the petitioners are without any merits and same are here by dismissed.

5. The petitioner being aggrieved filed the present petition to challenge the impugned order wherein besides referring factual position pleaded that the petitioner (arrayed as the accused no 5 in the complaint) is an independent practicing Chartered Accountant and was independent Director of the accused No. 1. The petitioner had never received any remuneration from the accused no. 1 Company except normal meeting fee from 2001 to 2012 during the period of his directorship. M/S Morepen Laboratories Ltd. had issued cheques in terms of consent award passed on the basis of Memorandum of Settlement dated 27.5.2003 executed between the respondent/the complainant and M/S Morepen Laboratories Ltd, M/s Blue Coast Hotels & Resorts Ltd., Arun Suri and Sushil Suri in arbitration proceedings initiated by the respondent/ the complainant.



The respondent/the complainant filed an execution petition no. 13/04 before this Court. The accused no. 1 M/S Blue Coast Hotel & Resort through letter dated 05.04.2004 had also issued post-dated cheques to backup the cheque issued by the associate company M/S Morepen Laboratories Ltd. on a specific assurance that these cheques would be presented only if the associate company M/S Morepen Laboratories Ltd did not pay its dues. The respondent/the complainant and its directors assured that they will hold the cheques issued by the accused no.1 and entrusted to the respondent/the complainant and promised not to initiate legal proceedings and withdraw any legal proceedings already initiated and promised to return the cheque upon clearance of the respondent/the complainant dues. M/S Morepen Laboratories Ltd made the payment of Rs 5 Crore alongwith Rs 37,50,000/- towards interest of delayed payment in lieu of the cheque in question which was acknowledged by the respondent/the complainant vide endorsement in letter dated 29.4.2005. The respondent/the complainant misused the cheques and due to this M/S Morepen Laboratories Ltd filed a complaint against the respondent/the complainant and its directors on 01.07.2009 with the SHO, PS



Barakhambha Road.

5.1 The trial court ignored material fact that the petitioner is a Chartered Accountant and was an Independent Non-executive Director in the accused no 1 without any remuneration and never incharge of and responsible for the day to day affairs of the accused no1. The trial court wrongly held that *prima facie* case under section 138 NI Act is made out against the petitioner. The revisional court also dismissed the Criminal Revision bearing no. 540/2018 vide impugned order.

5.2 The petitioner challenged order dated 10.10.2018 passed by the trial court and impugned order on grounds that the courts below did not appreciate that the petitioner was only an independent Non-Executive Director of the accused no. 1 and was not in charge of and responsible for the day to day conduct of the business of the accused no.1. The petitioner was not a party to the ICD agreement, memorandum of settlement and the consent award pursuant to which the cheque in question was issued leading to the present complaint. The petitioner has been falsely implicated as he is independent Non-Executive director of the accused no. 1. The courts below failed to



appreciate that the petitioner is a Chartered Accountant and was an Independent Non-Executive Director during the relevant period. The petitioner neither held any share in the accused no 1 nor was receiving any remuneration. The petitioner could not be held responsible for the conduct of the business of the accused no. 1. The petitioner being an Independent Non-Executive Director and not being involved in the day to day affairs of the accused no 1 is not liable for the offence under section 138 NI Act. The petitioner who was appointed as an independent director without any executive role ceased to continue as a director with effect from 10.11.2012 as reflected in Form No. 32. The courts below failed to appreciate that the cheque in question was not signed by the petitioner and was not part of the transaction resulting in either the cheque in question being issued or leading to its dishonour. The cheque in question was signed by the accused no. 2 in pursuance to a Memorandum of Settlement dated 27.05.2003 and a consent award dated 21.07.2003/28.06.2003.

5.2.1 The revisional court has failed to appreciate that there is no averment in the complaint as to how the petitioner was in any manner involved in the affairs and conduct of business of the accused no. 1



nor there is any specific or material evidence determining the conduct as to the part played by the petitioner as a Director of the accused no 1. The revisional court passed the impugned order merely on the basis of false, baseless, bald and cursory allegations. The revisional court has failed to appreciate that the allegations made in the complaint are vague and bald and does not make any prima facie case against the petitioner. The impugned order is based on conjectures and surmises. It was prayed that impugned order be set aside.

6. The learned senior counsel for the petitioner advanced oral arguments and also submitted written submissions. It was argued that the revisional court without appreciating the facts and by ignoring the settled principles of law has dismissed the revision petition vide impugned order and held that there is no illegality or infirmity in the order dated 10.10.2018 passed by the trial court. The impugned order dated 29.01.2019 suffers from material error of the process of law. It is accepted legal proposition that section 141 of NI Act does not make a Director of a company automatically vicariously liable for commission of an offence on behalf of the company and no specific averments are made against the petitioner in the complaint. It is also



argued that cheque in question was issued by the accused no 1, managing director and authorized Signatory out of arbitration settlement to which the petitioner was not a party. The petitioner is a Chartered Accountant and was an independent Non-Executive Director of the accused no. 1 never involved in the day to day affairs of the accused no. 1. The accused no. 1 issued cheques pursuant to the said consent award and the petitioner had no role in said transaction. The petitioner has never been a shareholder or a Director of the Blue Coast Group of Companies except being an Independent Non-Executive director of the accused no 1 as mentioned in the Corporate Governance Reports. The petitioner has marked himself as a Director and not as a Non-Executive Director in Form 32 due to legal provisions as per Companies Act, 1956.

6.1 The learned Senior Counsel relied on **Pooja Ravinder Devidasini V State of Maharashtra and another**, 2014 (16) SCC 1; **National small Industries Corporation Limited V Harmeet Paintal & another**, (2010) 3 SCC 330; **Ashok Shewakramani & others V State of Andhra Pradesh and others**, MANU/SC/0858/2023; **Sunita Palita and others V Panchami**



Stone Quarry, MANU/SC/0944/2022; Prashant Bharti V State of NCT of Delhi, MANU/SC/0063/2013; S.M.S Pharmaceuticals Ltd. V Neeta Bhalla and another, MANU/SC/0622/2005 etc.

7. The counsel for the respondent stated that the petitioner has challenged order dated 10.10.2018 passed by the trial court and impugned order passed by the revisional court primarily on grounds that the petitioner is an Independent Non-Executive Director, there is no specific averment attributed to the petitioner in the complaint to bring the petitioner within the ambit of Section 141 of the NI Act, the petitioner was not a party to arbitration and as such proceeding qua the petitioner for the offence of section 138 of NI Act is not maintainable. It is argued that the accused no 1 issued cheque in question with the consent and knowledge of the petitioner to discharge its liability towards the respondent/ the complainant. The legal notice was also issued to the petitioner after dishonour of the cheque in question which was not replied by the petitioner. The petitioner has not challenged the summoning order dated 26.10.2005. There is no provision under which the petitioner can be discharged for offence under section 138 of NI Act. The present petition being



second revision in nature is not maintainable. The Corporate governance Report and Form 32 relied upon by the petitioner are not admissible as per section 76 of Indian Evidence Act, 1872. It is further argued that specific allegations qua the petitioner have been made in the complaint meeting basic ingredients of section 141 of the NI Act. The arbitration proceedings and proceedings under section 138 of the NI Act are different and distinct and arbitration proceedings do not have any bearing on trial under section 138 of the NI Act. It was argued that the present petition is liable to be dismissed.

8. Section 138 and section 141 of the NI Act 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 provisions of this Act, be punished with imprisonment for 19 [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, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

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

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

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..

9. Section 138 of NI Act casts criminal liability on a person who issues a cheque towards discharge of a debt or liability as a whole or in part and the cheque is dishonoured by the bank on presentation. Section 138 of NI Act creates criminal liability in case of dishonour of a cheque. The main ingredients of section 138 of NI Act are:

(i) Issuance of a cheque

(ii) Presentation of the cheque

(iii) Dishonour of the cheque

(iv) Service of statutory notice on the person sought to be made liable, and

(v) Non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice.



9.1 Section 141 of NI Act extends criminal liability in case of a company to every person who at the time of the offence, was in charge of and was responsible for the conduct of the business of the company. A company is a juristic person and every person who at the time of commission of offence is in charge and responsible for the conduct of the business of the company is liable for the offence stated to be committed by the company. The criminal liability arises when the offence was committed and not on the basis of merely holding a designation or office in a company. Section 141 of the NI Act mandates that a person is criminally liable when at the time of commission of offence was in charge and responsible for the conduct of the business of the company and person connected with the company may not fall within the ambit of section 141 of the NI Act.

9.2 The Supreme Court in **SMS Pharmaceuticals Ltd. V Neeta Bhalla & another**, 2005 (8) SCC 89 held as under:-

The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for



dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who, at the time the offence was committed, was incharge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is 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." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was



committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"..etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision



has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

9.2.1 The Supreme Court in **Siby Thomas V M/s Somany Ceramics Ltd.**, Criminal Appeal No.... of 2023 (arising out of Special Leave Petition (Crl.) No.12 of 2020) decided on 10th October, 2023 referred decision in **S.P. Mani and Mohan Dairy V Dr. Snehalatha Elangovan**, 2022 SCC OnLine SC 1238 and observed that it is the primary responsibility of the complainant to make specific averments in the complaint, so as to make the accused vicariously liable. The Supreme Court also referred observations made in **S.P. Mani** which are as under:-

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."

9.2.2 It was further observed as under:-

11. In the light of the afore-extracted recitals from the decision in *Gunmala Sales Private Limited v. Anu*, (2015) 1 SCC 103 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.



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.

9.2.3 The Supreme Court in Siby Thomas V M/s Somany Ceramics Ltd. also referred Anita Malhotra V Apparel Export Promotion Council & another,(2012) 1 SCC 520 wherein it was observed as under:-

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.

9.2.3 The Supreme Court in Siby Thomas V M/s Somany Ceramics Ltd. also referred Ashok Shewakramani & others V



State of Andhra Pradesh & another, 2023 INSC 692 wherein it was observed as under:-

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 subsection 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.

9.2.4 The Supreme Court in Siby Thomas V M/s Somany Ceramics Ltd. after referring above mentioned decisions observed as under:-

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 to be read



conjunctively in view of use of the word "and" in between.

10. It is reflecting that the respondent/the complainant vide Inter Corporate Deposit Agreement dated 09.09.2002 has paid Rs.5,00,00,000/- (Rs. five crores only) to the accused no.1 vide cheque bearing no. 227605 dated 09.09.2002 drawn on HDFC Bank, K.G. Marg, New Delhi on execution of Demand Promissory Note and Inter Corporate Deposit Receipt which was required to pay back after expiry of 180 days from the date of receipt of ICD, i.e. on 08.03.2003 along with interest. The accused no. 2 (now deceased) was the managing director and authorized signatory, the accused no.3 to 5 including the petitioner were the directors, and the accused no.6 was the authorized signatory of the accused no. 1 and stated to be in charge of day to day affairs and are responsible for the conduct of the business of the accused No.1 and for all acts and deeds committed by or on behalf of the accused no. 1. The respondent no./the complainant also initiated arbitration proceedings against the accused No. 1, 2 and the accused no.6 wherein M/s Morepan Laboratories Ltd also joined as one of the parties. The accused no. 1, 2 & 6 and M/s Morepan Laboratories Ltd. and the respondent/the complainant entered into



compromise vide Memorandum of Settlement dated 27.05.2003 and thereafter the Arbitrator passed a Consent Award dated 21.07.2003. The accused no.2 on behalf of the accused no.1 with the consent of the accused no.3 to 6 towards part payment of the outstanding amount had issued cheque in question i.e. cheque bearing no 842629 dated 30.03.05 amounting to Rs. 50,00,000/- drawn on ICICI Bank Ltd., Connaught Place, New Delhi which on presentation got dishonoured due to “ funds insufficient” vide cheque returned memo dated 27.09.2005. The cheque amount was not paid despite legal notice dated 15.10.2005. The concerned court of Metropolitan Magistrate vide order dated 19.11.2005 summoned the accused(s) including the petitioner for offences punishable under section 138 read with section 141 of the NI Act. The trial court vide order dated 10.10.2018 opined that *prima facie* case under section 138 of NI Act is made out against accused company (the accused no 1) and remaining accused (the accused no 2 to 6 including the petitioner). The revisional court vide impugned order dismissed revision petition bearing no 540/2018 which was filed to challenge the order dated 10.10.2018.



10.1 The petitioner was arrayed as the accused no 5 in the complaint and has been summoned for offence punishable under section 138 of NI Act. **5.1** The petitioner is a Chartered Accountant. The petitioner was not a party to the Inter Corporate Deposit Agreement dated 09.09.2002, Memorandum of Settlement dated 27.05.2003 and the Consent Award dated 21.07.2003 pursuant to which the cheque in question was issued leading to the present complaint. The cheque in question was not signed by the petitioner which was signed by the accused no. 2. The petitioner as per Farm 32 was appointed as Additional Director with effect from 29.06.2001 and resigned as Director on 10.11.2012. The petitioner is not shown as Non-Executive Director in Farm 32. The petitioner in Governance Reports for Financial Years 2003-2004 and 2005-2006 and in other documents filed by the petitioner was shown as Independent Non-Executive Director.

11. It was argued on behalf of the petitioner that the impugned order and order dated 10.10 2018 passed by the trial court suffer from material error of the process of law as section 141 of NI Act does not make a Director of a company automatically vicariously liable for



commission of an offence on behalf of the company. The complaint is without sufficient averments to make petitioner vicariously liable for acts done on behalf of the accused no 1. The counsel for the respondent/the complainant argued that the respondent has made the specific averments in the complaint regarding issuance of cheque in question with the knowledge and consent of the accused no 3 to 6 who were the persons-in-charge and responsible to the day-to-day affairs of the accused no 1 and referred paras no 2, 4, 6, 8, 9, 11 and 12 of the complaint.

11.1 It is accepted legal proposition in view of law laid down by the Supreme Court in above referred decision that it is the primary responsibility of the complainant to make specific averments in the complaint so as to make the accused vicariously liable. If the basic averment is made in the complaint under section 138 of NI Act 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 then Magistrate can issue process against such 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.

11.2 The petitioner is arrayed as the accused no 5 in the complaint. The perusal of complaint reflects that the respondent/the complainant has made following allegations in the complaint qua the petitioner, some of which are also discussed by the revisional court in impugned judgment:-

2. That Accused No. 2 with the consent of Accused Nos. 3 to 6 on behalf of Accused No.1 had approached complainant company for the financial assistance for business purposes by way of Inter Corporate Deposit (ICD) facility with a promise to repay back the monies/amount of the ICD as per the terms mutually agreed and reduced in writing by way of an Inter Corporate Deposit Agreement dated 09.09.2002.

4. That complainant company has extended the financial assistance to Accused No. 1 company to the tune of Rs.5,00,00,000/- (Rupees Five Crores Only) according to the usual prevailing corporate convention and, believing and acting upon promises of the accused persons. Accused No. 2 is the managing Director and Authorized Signatory, Accused No.3 to 5 are the Directors, and Accused No.6 is the Authorized Signatory of company, who are incharge of day to day affairs and are responsible for the conduct of the business of the Accused No.1 company and for all acts and deeds committed by or on behalf of Accused No. 1 company.

5. That complainant also filed / initiated arbitration proceedings against Accused No. 1, 2 and



accused no.6 and M/s Morepan Laboratories Ltd. jointed as parties during the Arbitration proceedings. The Arbitration proceedings were conducted by Hon'ble Mr. Justice H.L. Aggarwal (Retd.) and during the proceedings, a compromise took place between Accused No. 1, 2 & 6 and M/s Morepan Laboratories Ltd. and the complainant. In pursuance of this compromise, a Memorandum of Settlement dated 27.05.2005 was signed and on the basis of which the Hon'ble Arbitrator passed a Consent Award on 21.07.2003.

6. That in compliance of the above said award and as per terms of the compromise/ Memorandum of Settlement dated 27.05.2003 and accused no.2 on behalf of Accused No. 1 with the consent and knowledge of Accused No.3 to 6, have signed and issued several cheques most of them were got dishonour. Accused No.2 on behalf of the accused No.1 with the consent of the accused no.3 to 6 in the part payment of the outstanding bill had issued the following cheque.....

10. That the complainant company got issued Notice dated 15.10.2005 through their counsel Shri B.S. Arora dispatched under Registered AD covers as well as UPC on 18.10.2005. Notice were duly served upon the accused persons and notice sent by the registered by AD covers are duly served.

11. That the Accused No.2, is the Managing Director and authorized signatory. Accused Nos. 3 to 7 are the Directors of Accused No. 1 company are incharge of and are responsible to the company for the conduct of business and day to day affairs and management of the company and all accused persons have consented, connived and neglected to make repayment, and dishonouring of the said cheque and are liable for that offence.



12. That accused persons have failed to pay legally accrued debts to complainant company in usual course of business as stipulated in the Inter Corporate Deposit Agreement, but accused persons have also made themselves liable to be prosecuted as provided under section 138, 141 and 142 of the Negotiable Instruments Act, 1881 as amended update.

13. That although there were no sufficient amount in the account of the accused person but the accused person had issued the cheque to defraud the complainant and thereby caused wrongfully loss to the complainant and had gain wrongfully.

11.3 The perusal of above paras of the complaint reflects that the respondent/the complainant pleaded that the accused no.1 through the accused no.2 with the consent of the accused no.3 to 6 including the petitioner had approached the respondent/the complainant for the financial assistance for business purposes by way of Inter Corporate Deposit (ICD) facility. The respondent/the complainant also pleaded that the petitioner being one of the directors of the accused no.1 was incharge of day to day affairs and are responsible for the conduct of the business of the accused no.1 company and for all acts and deeds committed by or on behalf of the accused no 1. The respondent/the complainant also pleaded that the accused no.2 on behalf of the accused no 1 with the consent and knowledge of the accused no.3 to



6 including petitioner have signed and issued several cheques and further cheque in question was issued by the accused no.2 on behalf of the accused no 1 with the consent of the accused no.3 to 6 in the part payment of the outstanding amount. The respondent/the complainant also got issued notice dated 15.10.2005 which was also served on the petitioner. The respondent/the complainant as such made sufficient, adequate and ample averments against/qua the petitioner in the complaint necessary to constitute vicarious liability of the petitioner. The argument advanced on behalf of the petitioner that the complaint is without sufficient averments to make petitioner vicariously liable for acts done on behalf of the accused no.1 is without any basis.

12. It is also argued on behalf of the petitioner that the cheque in question was issued by the accused no.1 and its managing director and authorized Signatory out of arbitration settlement to which the petitioner was not a party. The petitioner is a chartered accountant and was an independent Non-Executive Director of the accused no 1. The petitioner never remained involved in the day to day affairs of the accused no.1. The petitioner never received any remuneration



from the accused no.1. It is also argued that the petitioner was neither a party nor a signatory to the Inter Corporate Deposit Agreement, Memorandum of Settlement dated 27.05.2003 and Consent Award dated 21.07.2003. The petitioner did not have any role in issuance of cheque in question. The learned Senior Counsel referred Corporate Governance Report of the accused no 1 Company, Annual Report of the years 2003-2004 and 2005-2006. The counsel for the respondent/the complainant argued to the contrary.

12.1 Section 141 of the NI Act provides for a constructive liability which is created by a legal fiction. The section 141 of the NI Act being a penal should receive strict construction and compliance. If the accused played insignificant role in affairs of the company may not be sufficient to attract the constructive liability under Section 141 of the NI Act. The petitioner as per Form 32 was appointed as Additional Director on 29.06.2001 and resigned as Director with effect from 10.11.2012. Form 32 appears to be a declaration regarding appointment of a director etc. in the company or any change thereto as per section 303(2) of the Companies Act, 2013. It reflects that when the cheque in question was issued, the petitioner



was a director in the accused no 1. The petitioner was not shown as Independent Non-Executive Director of the accused no.1 in Form 32 as pleaded and alleged by the petitioner.

12.2 Section 2(34) of the Companies Act, 2013 defines the Director which means a director appointed to the Board of a company. Section 2(10) of the Companies Act, 2013 defines as Board of Directors in relation to a company means the collective body of the directors of the company. Chapter XI of the Companies Act, 2013 deals with appointment and qualifications of the directors. Section 149 of the Companies Act, 2013 provides that a company is required to have a Board of Directors. Section 149(6) of the Companies Act, 2013 defines as Independent Director. Independent director in relation to a company means a director other than a managing director or a whole-time director or a nominee director. Independent Director may be a person of integrity and may possess relevant expertise and experience. Independent Director is or was not a promoter of the company or its holding, subsidiary or associate company. Independent Director has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their



promoters, or directors during the relevant period. The petitioner does not fall within the definition of independent director or non-executive director being Director of the accused no.1 as reflected from Form 32.

12.3 The petitioner in Governance Report and other documents relied on by the petitioner is shown as Independent Non-Executive Director. However Governance Report also reflects that the petitioner had attended 10 Board meetings and also attended last AGM. Mere fact that the petitioner in few documents which are required to be proved during trial, was mentioned as independent non-executive director does not mean that the petitioner was not directly or indirectly related with the affairs of the accused no.1. The documents including Governance Report, Annual Report etc. referred and relied upon by the parties are not conclusive proof that the petitioner was independent non-executive director of the accused no.1. The documents relied upon by the petitioner are not conclusive proof to establish that the petitioner was not responsible for day to day affairs and conduct of business of the accused no 1. Had the petitioner not responsible for affairs of the accused no 1, it can only be established



and proved in accordance with law during the trial of the complaint under section 138 of NI Act. The petitioner cannot be absolved from his liability qua the cheque in question by pleading that he was independent non-executive director of the accused no 1. The nomenclature of the petitioner in certain documents submitted by the petitioner and required to be proved in accordance with law does not mean that the petitioner was a non-functional director of the accused no1.

12.4 It is reflecting that the petitioner was not a party to the execution of Inter Corporate Deposit Agreement, Memorandum of Settlement dated 27.05.2003 and Consent Award dated 21.07.2003 and the cheque in question was not issued under his signature. However the petitioner was appointed as Additional Director and resigned as Director from the accused no.1 and was one of the Director when the cheque in question was issued, the petitioner cannot absolve from vicarious liability arising out of cheque in question by pleading that he was not a party to the execution of Inter Corporate Deposit Agreement, Memorandum of Settlement dated 27.05.2003 and Consent Award dated 21.07.2003 and the cheque in



question was not issued under his signature. The arguments advanced by learned Senior Counsel on above legal and factual propositions are without any force.

13. It is also relevant to mention that the petitioner never challenged his summoning for offence punishable under section 138 of the NI Act and only challenged impugned order whereby the trial court judicially opined about existence of prima facie case against him.

14. The present petition is accordingly dismissed. There is no legal and factual infirmity in the order dated 10.10.2018 passed by the trial court and impugned order passed by the revisional court. None of the observation on factual position in present judgment shall be taken as opinion on final merits of the case.

15. The pending applications if any also stand disposed of.

**DR. SUDHIR KUMAR JAIN
(JUDGE)**

NOVEMBER 28, 2023

j/sd