IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.275 OF 2022

Mrs.Ranjana Sharma, Age 69 years,
R/o.32, Royal Bugalows, Nipania,
Indore-452 010 (M.P.) Petitioner
versus
1. HDFC Bank Limited,
HDFC Bank House, Senapati Bapat Marg,
Lower Parel (W), Mumbai-400 013.

2. The State of Maharashtra. Respondents

Mr.Karansingh Rajput i/by Mr.Fauzan Shaikh, Advocate for Petitioner.
Mr.Sujit Shelar and Mr.Suraj Singh i/by Mr.Meghnath Navlani, Advocate for Respondent no.1.
Mr.Y.Y.Dabake, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 10th January 2024

PC :

1. Petitioner has invoked Article 227 of Constitution of India and Section 482 of Code of Criminal Procedure challenging order dated 16th December 2019 issuing process and proceedings in Criminal Case No.2486/SS/2019 pending before the the Court of learned Metropolitan Magistrate, 7th Court, Bhoiwada, Dadar, Mumbai.

2. The complaint was filed by Respondent no.1 u/s.138 of Negotiable Instruments Act (N.I.Act).

3. The allegations in the complaint can be summarized as under :-

(i) The complainant is a company registered under the provisions of Companies Act. Accused no.1 is the company registered under the Companies Act and engaged in the business of sale of cars and spare parts manufactured by Hyundai Motors (I) Limited;

(ii) Accused nos.2 to 4 are the Directors of accused no.1 company and responsible for day to day affairs, management and working of accused no.1 company. Accused no.3 is the signatory of dishonoured cheque;

(iii) Accused no.1 through accused nos.2 to 4 had approached the complainant for grant of credit facility in the form of revolving loan facility as inventory funding for the working capital facility. After due deliberation and negotiations with accused nos.2 to 4, the complainant granted revolving loan facility initially to the extent of Rs.5,00,00,000/- vide sanction letter dated 9th August 2014;

(iv) Complainant advanced the facility to Rs.6,00,00,000/- vide sanction letter dated 27th October 2015. The facility was further enhanced to Rs.6,50,00,000/- vide sanction letter dated 22nd February 2016 and lastly to Rs.8,00,00,000/- vide sanction letter dated 12th September 2016;

(v) Accused executed loan and security documents in favour of complainant accepting the terms and conditions of respective documents. Accused no.1 entered into loan agreement with complainant on 17th September 2016 and executed Demand Promissory Note for Rs.8,00,00,000/- on 20th September 2016;

(vi) The credit facilities were availed and utilized by accused. Accused no.1 failed to maintain bank account with complainant bank in the manner agreed to and defaulted into timely repayments. The complainant was constrained to classify the account of accused as Non Performing Asset on 27th March 2018;

(vii) Accused no.1 failed to maintain and regularize the account. Accused instructed the complainant bank to deposit the cheque bearing No.002759 dated 11th April 2019 for a sum of Rs.6,02,04,217/-. The cheque was issued by accused no.1 with an assurance that sufficient balance would be maintained in the bank account;

(viii) The complainant deposited the cheque for encashment in HDFC Bank Limited, Ballard Estate Branch, Mumbai on 16th April 2019. The cheque was dishonoured for the reason "Account Blocked" as mentioned in the written memo dated 16th April 2019. The complainant realized that account of accused no.1 did not have sufficient balance for honouring the cheque;

(ix) The complainant issued legal notice dated 6th May 2019 through its advocate calling upon the accused to make payment of the said dishonoured cheque. The notice was sent on 6th May 2019 by speed post. The notice was returned to the advocate for complainant since accused did not claim the service of notice. The postal receipt returned back with remark "unclaimed";

(x) Accused did not make any payment. The cheque was issued towards legally outstanding debts and the said cheque has been dishonoured and thereupon accused have committed the offences u/s.138 r/w 141 of N.I.Act.

4. Vide order dated 16th December 2019 learned Metropolitan Magistrate issued process against accused u/s.138 of N.I.Act.

5. Learned advocate for Petitioner submitted that proceedings u/s.138 of N.I.Act are not maintainable as the cheque was dishonoured on the ground that account was blocked. The account was blocked by Sales Tax Authorities. The account being frozen pursuant to the order passed by Sales Tax Authorities on 16th July 2018, no steps could be taken by the complainant for releasing the amount and therefore initiation of proceedings against the company and its Directors for dishonour of cheque is misconceived. Petitioner had written letters to Sales Tax Authorities seeking permission to operate the bank account so as to enable them to make payment. The drawer company had filed company petition before National Company Law Tribunal at Indore Bench at Ahmedabad and vide order dated 18th January 2021 moratorium was imposed by Tribunal and interim resolution professional was appointed. The cheque was deposited for encashment in HDFC Bank Limited, Ballard Estate Branch, Mumbai. However, instead of filing the complaint in the Court having jurisdiction at Ballard Estate, Mumbai, the complaint was filed in the Court of Metropolitan Magistrate at Bhoiwada, Dadar, Mumbai. The Court which took cognizance of the complaint had no jurisdiction to entertain the complaint. The demand notice was not delivered to the accused. The Petitioner ought not to have been prosecuted by invoking Section 141 of N.I.Act for want of sufficient averments to hold vicariously liable for the offence committed by accused no.1 company. The word `In charge of' is missing from the averment regarding liability of Directors.

6. Learned advocate for Respondent no.1 submitted that cheque was issued in discharge of liability. It has been dishonoured. The accused cannot claim that cheque could not be honoured since account was blocked and hence the proceedings u/s.138 of N.I.Act

are not maintainable. There was no sufficient balance in the bank account of accused. Assuming that accused no.1 company is declared insolvent, the Directors are not absolved from their liability. The process was issued against accused by order dated 16th December 2019. The order was passed by NCLT appointing Resolution Professional on 18th January 2021. The Court had jurisdiction to entertain the complaint. There are sufficient averments against accused to invoke Section 141 of N.I.Act. The Petitioner was Director of company. The Directors were responsible for its day to day affairs, management and working of accused no.1 company. There are sufficient averments in the complaint to invoke Section 141 of N.I.Act. The accused did not reply to the demand notice. The grounds urged by Petitioner involves triable issues and proceedings cannot be terminated at this stage.

7. Although Petitioner has urged several issues, it would not be necessary to adjudicate all the issues as the proceedings are required to be quashed against Petitioner on the ground that there are no sufficient averments to invoke vicarious liability against Petitioner in consonance with Section 141 of N.I.Act.

8. Complaint stipulated that accused nos.2 to 4 are the Directors of accused no.1 company and responsible for day to day affairs, management and working of accused no.1 company. Accused no.1 through accused nos.2 to 4 had approached the complainant for grant of credit facility.

9. Section 141 of Negotiable Instruments act is reproduced hereinbelow :

"**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 incharge 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 as 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."

10. 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.

11. In the case of <u>Girdhari Lal Gupta vs D.H. Mehta (19712)-SCC-(Cri)-279</u>, 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.

12. In the case of State of <u>Karnataka Vs Pratap Chand 1981-SCC-(Cri)-453</u>, 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.

13. In <u>Sabitha Ramamurthy & Anr vs R.B.S. Channabasavaradhya (2006)-10-SCC-581</u>, 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.

14. 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 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."

15. 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.

16. 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.

17. In the case of State Of Haryana vs Brij Lal Mittal & Ors (AIR-1998-SC-2327). 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.

18. In the case of Sunita Palita Vs Panchami Stone Quarry (2022)10-SCC-152, the 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. This 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 they were non executive independent directors. The Apex Court observed that a director of a company who was not 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 (2014)16-SCC-1. 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 averred 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.

19. In the case of S. P. Mani and Mohan Dairy Vs Dr. Snehalatha Elangovan in Criminal Appeal No. 1586 of 2022 (arising out of Special leave appeal (Criminal) No.9811 of 2021 delivered on 16th September 2022, 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 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).

20. In the aforesaid decision the Court looked into the observations made in the case of Monaben Ketanbhai Shah Vs. State of Gujarat (2004)7-SCC-15 and in paragraph 33 summarized that legal principles discernible from the said discussion which is 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."

21. The Hon'ble Supreme Court thereafter considered the question as to who is liable and what is vicarious liability. 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. Referring to the facts of the case before the Court 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 put the respondent therein to trial in the alleged offence. Nothing was adduced by the respondent before the High Court to get the proceedings quashed. High Court had practically no legal basis 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 process is issued with basic averments 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. 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 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 judgment 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.

22. In the subsequent decision in the case of Ashok Shewakramani and others Vs State of Andhra Pradesh and another, (2023) 8 SCC 473, decided on 3.8.2023, 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. 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 were 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 Dairy Versus Dr Snehalatha Elangovan ” In the complaint in question which was subject matter of Criminal Appeal No. 879 of 2023, it was 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 Dairy 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 Dairy 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.

23. In a decision delivered on 11.10.2022 by the Apex Court in the case of Lalankumar Singh and others Vs State of Maharashtra 2022-SCC OnLine (SC)-1383, the Court considered vicarious liability 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 for an offence committed under the Act being Director of 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.

24. In the subsequent decision of the Apex Court delivered on 10.10.2023 in the case of Siby Thomas v. Somany Ceramics Ltd (2023)-SCC OnLine-1299 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 him. 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 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 averments 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 bearing 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.

25. Paragraph 10 to 17 of the aforesaid 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 unimpeachable nothing prevents evidence or it from

totally taking 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 Mehta, 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 circumstances, and punished. Paragraph 20 In in such 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.”

26. Mr.Shelar has relied upon two decisions of this Court viz. Indermal Pannalal Jain and others Vs. State of Maharashtra (Writ Petition No.2018 of 2017) dated 22nd November 2022 and Samrat Ashokkumar Oswal Vs. Mahalaxmi TMT Pvt.Ltd. (Criminal Application No.1557 of 2022/Criminal Application No.1558/2022) dated 20th December 2023.

27. In the case of Indermal Pannalal Jain and others (supra), this Court relied upon decision in the case of S.P.Mani (supra) and held that the averments in the said complaint is sufficient compliance as mandated u/s.141 of the N.I.Act.

28. In the case of Samrat Ashokkumar Oswal (supra), this Court referred to decision of the Hon'ble Supreme Court in the case of Siby Thomas (supra) and relied upon decision in the case of S.P.Mani (supra) and held that the averments so made in the peculiar facts and circumstances, can be said to be in conformity with the provisions of the Act. It was further observed that the complainant ha issued statutory notice to the accused stating that they are/were Directors of accused no.1 and were in-charge of and responsible for the day to day activities of business of the company at the material time and looking after day to day business of accused no.1. The allegation was not denied by accused by submitting reply to notice. When the Applicant has not responded and thus admitted the averments made in the statutory notice that at the relevant time he as Director of the company and was in-charge of and responsible for the day to day affairs of the company, the complainant cannot be expected to plead a detailed role played by the Applicant. Having realized the hurdle, the Applicant has replied the notice but only after filing complaint, making it in consequential.

29. The Hon'ble Supreme Court has consistently held in various decisions that Section 141 of N.I.Act is a penal provision creating vicarious liability, which must be strictly construed. The law laid down in decisions quoted hereinabove can be summarized that averments in complaint must be in consonance with strict interpretation of penal statutes, where it creates vicarious liability. In National Small Industries Corpn. Ltd. Vs. Harmeet Singh Paintal (supra), it is held that, it is not sufficient to make bald cursory statement that Director 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. The complaint should

spell out as to how and in what manner the Director was in-charge of or was responsible to the accused company for the conduct of its business. In Sobita Ramamurthy (supra), it is held that by virbatim reproducing the words of section without clear statement of fact supported by proper evidence so as to make accused vicariously liable is a ground for quashing proceedings u/s.138 of N.I.Act. In K.K.Ahuja Vs. K.K.Vora (supra), it is observed that the Director can be held liable by averring that the complaint their position and duties in the company and role regarding issue and dishonour of cheque, disclosing consent, connivance or negligence. In case of Gunmala Sales Pvt.Ltd (supra), it was held that in the facts of the case on an over all reading of complaint, the High Court may despite presence of basic averments quash complaint due to absence of more particulars about role of Directors in complaint if unimpeachable evidence is brought before the Court. In Ashok Shewakramani and others Vs. State of A.P and another (supra), it is held that requirement of Section 141 of N.I.Act is different and higher. The words `was in-charge of' and `was responsible to the company for the conduct of the business of the company' ought to be read conjunctively and not dis-junctively in view of word `and' in between. In the case of Lala Kumar Singh and others Vs. State of Maharashtra, it was observed that there is no universal rule that Director of a company is in-charge of its everyday affairs. It was 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. In Siby Thomas Vs. Somany Ceramics Ltd. (supra), it is held that vicarious liability would be attracted when the ingredients u/s.141(1) of N.I.Act are satisfied.

30. The averments in impugned complaint are lacking to invoke Section 138 r/w Section 141 of N.I.Act. The Petitioner is not the signatory to the cheque.

31. Section 138 of N.I.Act contemplates punishment for Dishonour of cheque for insufficiency etc. of the funds in the account. If any cheque drawn by a person on an account maintained by drawer is returned by bank unpaid on the ground that amount of 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; commits offence. Proviso to the above section indicate that the cheque has to be presented within stipulated time and demand for the payment of amount has to be made by giving notice within stipulated time and the drawer of cheque fails to make payment of the amount to the payee within stipulated period. Section 142 of N.I.act relates to provision of cognizance of offence wherein complaint is to be made within one month of date of cause of action under clause (c) of proviso to Section 138. Thus, issuance of notice of demand of payment of amount reflected in Section 138 of the Act is prerequisite to initiate proceedings under the said provision. The provision does not infer liability of drawer of cheque for not replying the notice of demand. The requirement of Section 141 of the N.I.Act is different and higher. In the event there are no averments at all in the complaint for invoking vicarious liability, it cannot be held vicariously liable on the ground that reply to notice is not given by Director. For taking cognizance of complaint against the Director, the learned Magistrate has to apply mind whether there are requisite averments in complaint. In a given case, in the complaint except stating that accused is Director, the complaint is completely silent even about the statutory averments and if the Director did not reply

to notice, it cannot be assumed that he/she is vicariously liable in the absence of any material.

32. It is pertinent to note that in the decision of S.P.Mani and Mohan Dairy Vs. Snehlatha Elangovan (supra), the Supreme Court had categorically observed that the law laid down in the earlier decision by the Supreme Court in the case of Gunmala Sales Pvt.Ltd Vs. Anu Mehta and others (supra) still holds the field.

33. Considering the consistent view taken by Supreme Court in several decisions that there has to be sufficient averments to prosecute the Directors of a company by invoking Section 141 of N.I.Act, the proceedings against Petitioner herein are required to be quashed and set aside.

ORDER

(i) Criminal Writ Petition No.275 of 2022 is allowed and disposed off;

(ii) The order issuing process dated 16th December 2019 passed below Exhibit-1 and the proceedings in C.C No.2486/SS/2019 pending on the file of learned Metropolitan Magistrate, 7th Court, Bhoiwada, Dadar, Mumbai are quashed and set aside as against the Petitioner.

(PRAKASH D. NAIK, J.)

MST