IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3528 OF 2022

1. Gagan Makar Singh
Age 58 years, residing at 422,
The Magnolias, DLF Golf Links,
Golf Course Road, DLF Phase 5,
Galleria DLF IV, Gurgaon
122 009- Haryana.

2. Ravindra Dhariwal
Age-57 years, Behind Radha
Swami Satsang, Asola Village,
Aashray Farm, Sub-Post Office
SP School, Bhatti Mines, Asola-VI,
New Delhi 113 030. **...Petitioners**

Versus

1. The State Of Maharashtra
Through the Office of
Public Prosecutor, Bombay High Court,
Mumbai 400 001.

2. Shinhan Bank
Unit No. 001, Ground Floor,
Peninsula Tower 1, Peninsula Corporate Park,
Ganpatro Kadam Marg, Lower Parel,
Mumbai 400 013. **...Respondents**

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Mr. S Anchan Advocate for Petitioner.
Mr. Omprakash Jha i/by The Law Point Advocate for Respondent No.2.
Mr. Y. Y. Dabake, APP for Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 16th JANUARY, 2024

<u>P.C.</u>:-

1. The petitioners are aggrieved by order issuing process dated 4th July 2022 passed by learned Metropolitan Magistrate, 7th Court, Dadar, Mumbai for offence under Section 138 of Negotiable Instruments Act on the complaint filed by Respondent No.2.

2. The brief facts emanating from the complaint are as follows:-

(i) The complainant Bank is carrying on banking business in accordance with licenses under the Banking Regulation Act.

(ii) The accused No.1 is the Company registered under the Companies Act. The accused No.1 approached the complainant to procure Digital Factoring Loan (for short "DFL") facility under Trade Receivables Discounting System. At the request of accused No.1 the said facility was sanctioned by the complainant for Rs. 20 crores on 31st January 2019 for one year to provide working capital loans to MSMEs through corporate purchaser i.e. accused No.1.

(iii) The DFL was extended twice at the behest of accused No.1 ultimately up to 31st July 2021 with the condition that the bills will be extended for a period for which upfront interest is received maximum upto the credit line maturity date and that there would any fresh discounting during the extended credit line period.

(iv) The accused No.1 reported COVID induced financial stress and was therefore unable to service its debt obligations. In view of the same, the accused No.1 requested all its lenders for a one time restructuring (OTR) under the RBI Resolution Framework for COVID-19 related stress dated 6th August 2020.

(v) In order to implement a resolution plan under the OTR, support of 75% of lenders by value and 60% lenders by number was required. The accused No.1 through its authorized signatory, accused No.10, the then chief financial officer of accused No.1 made application to the complainant seeking to enter into an OTR. After numerous discussions with the accused No.1, the complainant issued letter dated 16th April 2021 sanctioning the OTR in line with the RBI circular dated 6th August 2021 on the terms and conditions as set out in the said letter.

(vi) On the date of issuance of the sanction letter, the outstanding dues of the accused No.1 against the DFL was Rs. 19.18 crores. As per the terms of the sanction letter, the repayment schedule of the DFL was extended to 31st December 2021. It was also stated for payment on the agreed date, the accused No.1 was required to issue post dated cheques dated 31st December 2021 towards the outstanding principal of Rs. 19.18 crores and another towards the interest component for the period from 1st October 2021 to 30th December 2021.

(vii) The sanction letter contained other provisions pertaining to the conversion of the accrued interest till 30th September 2021 into funded interest term loans and other conditions.

(viii) All lenders of the accused No.1 also entered into a common inter-creditor agreement dated 26th April 2021 and framework agreement dated 26th April 2021 . The accused No.1, 2 and 10 were given authority by the accused No.1 to take steps to execute the ICA and the framework agreement and further to negotiate the financing documents. As per the documents, the lenders agreed to abide by the respective sanction letters of each of the lenders, in line with the resolution plan submitted by the accused No.1, 2 and 3. The debt due by accused No.1 to its lenders including the complainant was to be serviced by 30th December 2021 with the grace period of one month.

(ix) As mentioned in the sanction letter, the accused No.1 issued cheque No.081651 dated 31st December 2021 for Rs.19,18,00,000/- towards repayment of principal outstanding due to the complainant. Cheque was signed by accused No.10.

(x) As per the terms of the framework agreement, the complainant awaited repayment of the loan amount on 31st December 2021 and further waited for a period of one month grace period. After grace period expired on 31st January 2022, the complainant presented the cheque on 29th March 2022. Cheque was returned dishonoured with the endorsement “Exceeds Arrangement” stated in the return memo.

(xi) During this period, the accused No.2 to 8 were in the active directorship of accused No.1 and were involved and aware of the measures being undertaken for executing the framework agreement and the terms and conditions of OTR. The accused No.2 to 8 were appraised in the board meeting dated 17th April 2021 of the steps undertaken for loan restructuring and the board of directors authorised the officers/directors of the accused No.1 company to do such activities that may be necessary for the loan restructuring. The accused No.2 to 8 authorised the accused No.10 to issue the cheque to complainant towards repayment of the loan.

(xii) The accused No.2 is the Managing Director of the accused No.1 company. Accused No.3 is the chairman and accused Nos.3 to 9 are the current directors of accused No.1 company and accused No.10 is Chief Financial Officer of the company. Accused Nos. 2 to 8 were the directors of accused No.1 at the relevant point of time when loan was disbursed to accused No.1. The accused Nos. 2 to 8 have taken active part in the loan disbursal. The accused Nos. 2 to 9 have overall control over the day to day business activities of accused No.1, specifically when the loans were disbursed by complainant to accused No.1 and also at the relevant time when the cheque under reference in the instant notice was issued by accused No.1 to the complainant towards payment of principal loan amount. The accused were collectively in charge of and responsible for the conduct of the accused No.1. The accused No.2 to 10 are liable for all the acts of omission and commission on behalf of accused No.1 company for the offence mentioned in the complaint.

(xiii) The complainant issued statutory notice dated 13th April 2022 under Section 138 of the Negotiable Instruments Act to accused Nos. 1 to 10. The Statutory Notice was delivered to the accused. The payment was not made and the complaint was filed against accused for offence under Section 138 read with 141 of the Negotiable Instruments Act.

3. Learned Advocate for the petitioners submitted that the petitioners were non-executive directors of accused No.1 company. There are no sufficient averments in the complaint to prosecute petitioners for offence under Section 138 by invoking section 141 of the Negotiable Instruments Act. The petitioners are relying upon DIR Form 12 which indicate that the petitioners were non-executive independent Additional Directors. The petitioners have filed affidavit by placing on record the relevant extract of the annual report of 2020– 2021 of future retail limited setting out the extension of term of the petitioners as independent directors. The petitioners have also placed on record copy of declaration issued by FRL

with respect to its name change. The petitioners are not signatory to the cheque. The petitioners were not associated with accused company in the capacity of chief Managing Director or any other key managerial position. The cheque was signed by Chief Financial Officer. The petitioners being independent non-executive Directors are not responsible for the day to day affairs of company. The petitioners were inducted as independent non-executive Directors under Section 149(4) of Companies Act.

4. Learned Advocate for the Petitioners has relied upon the following decisions:-

(i) Sunita Palta and Others Vs. Kit Marketing Pvt. Ltd.[1]

(ii) Yashovardhan Birla Vs. CECIL Webber Engineering Ltd and Ors.[2]

(iii) Prakash Chand Vs. State and Another[3]

(iv) Mr. Satvinder Jeet Singh Sodhi and Anr. Vs. State of Maharashtra and Anr. delivered by this Court in Criminal Application No. 74 of 2021 dated 1st July 2022.

(v) Sunita Palita and Others Vs. Panchami Stone Quarry[4];

(vi) Gunmala Sales Private Limited Vs. Anu Mehta and Others.[5]

5. Learned Advocate for respondent submitted that the petitioners had actively participated in the day to day affairs of accused No.1 company. The

1 2020 SCC OnLine Del 2592
2 2023 SCC OnLine Del 2127
3 2022 SCC OnLine Del 4497
4 2022 SCC OnLine SC 945
5 (2015) 1 SCC 103

complaint stipulates the role of the petitioners. Petitioners had admittedly attended board meetings which clearly indicate that they were part of day to day affairs of future retail limited. They were appraised about steps undertaken for loan restructuring. The Board of Directors Authorised Officers of Accused No.1 to do such activities that may be necessary for loan restructuring. The Respondent No.2 rely upon the minutes of Board of Directors of Future Retail Limited dated 17th April 2021. The minutes indicate that the petitioners were aware and involved in the discussion and approval of one time resolution plan in respect of digital Factoring Loan Transaction. The accused No.2 to 8 authorised accused No.10 to issue cheque towards repayment of loan. The petitioners were director of accused No.1 at the relevant point of time when the complainant disbursed the loan to accused No.1. Petitioners have taken active part in DIL disbursal. They have overall control over day to day business activities of accused No.1. The petitioners along with other accused are collectively in charge and responsible for the conduct of accused No.1. Hence, they are liable for the liability of accused No.1. Grounds urged by petitioner cannot be considered at this stage. The complainant must be given an opportunity to prove its case by adducing evidence during the trial. There is sufficient material to indicate that the petitioners were responsible for the liability of accused No.1. They had actively participated in the day to day affairs of accused No.1. The company issued cheque which was dishonoured with remarks “Exceeds Arrangement”. The petitioners have not replied to the demand notice. The petitioners have participated in Board meetings in respect of DIL, OTR, ICA and factoring agreement. The respondent No.2 filed reply and additional reply and relied upon minutes of meeting dated 17th April 2021. It is submitted that the petitioners had participated in approving resolutions.

6. Learned Advocate for Respondent has relied upon the following decisions:-

(i) S. P. Mani and Mohan Dairy Vs. Dr. Snehalatha Elangovan[6]

(ii) Siby Thomas Vs. Somany Ceramics Ltd.[7]

7. Undisputedly the petitioners are being prosecuted as Directors of accused No.1 company. The accused No. 10 is Chief Financial Officer. He is the signatory to the cheque. The accused No.3 is the Managing Director of accused No.1 company. The contention of the petitioners is that they are independent non-executive directors and therefore, they cannot be prosecuted for offence under Section 138 of the Negotiable Instruments Act by invoking section 141 of Negotiable Instrument Act.

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

6 2022 SCC OnLine SC 1238

7 2023 SCC OnLine SC 1299

"149(6) An Independent director in relation to a company, means a director other than a managing director or a whole time director or a nominee director

-(a) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

(b) (i) who is or was not a promoter of the company or its holding, subsidiary or associate company;

(ii) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

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

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

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

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

(ii) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

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

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

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

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

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

(7) .....

(8) .....

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

(10) .....

(11) .....

(12) Notwithstanding anything contained in this Act—

(i) an independent director;

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

9. Section 150 of the Companies Act is as follows:

"150. Manner of selection of independent directors and maintenance of databank of independent directors*.-(1) Subject to the provisions contained in sub-section (5) of Section 149, an independent director may be selected from a data bank containing names, addresses and* *qualifications of persons who are eligible and willing to act as independent directors, maintained by any body, institute or association, as may by notified by the Central Government, having expertise in creation and maintenance of such data bank and put on their website for the use by the company making the appointment of such directors:*

Provided that responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment.

(2) The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of Section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director.

(3) The data bank referred to in sub-section (1), shall create and maintain data of persons wiling to act as independent director in accordance with such rules as may be prescribed.

(4) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfil the qualifications and requirements specified under Section 149."

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

11. In the case of **Pooja Ravinder Devidasani Vs. State of Maharashtra**[8], the Supreme Court has observed that non–executive director is no doubt a custodian of the governance of the company but does not involve in the day

8 AIR 2015 SC 675

to day affairs of the company for running of its business and observing/monitoring the activities. To fasten vicarious liability under Section 141 of the Act on a person, at the material time, that person shall have been at the helm of affairs of the company, one who actively looks after the day to day activities of the company and particularly responsible for the conduct of its business. Every person connected with the company will not fall within ambit of the provision. Simply because a person is director of company does not make him liable under the NI Act. Only those persons who are incharge and responsible for the conduct of business of the company at the time of commission of the offence will be liable for criminal action. A director, 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 for offence by invoking Section 141 of NI Act.

12. In the case of **Sunita Palta & Ors. Vs. M/s. Kit Marketing Pvt. Ltd**., before the Delhi High Court, the submission of the petitioners was that they are independent non executive Additional Directors and were not involved in the day to day affairs of the company at any point of time. They were not Managing Directors nor signatories to the cheque. Form No.32 showed that they were independent non executive additional directors. The objection of the complainant was that the said issue can be decided during the trial. The Delhi High Court relied upon the decision of Supreme Court in the case of

S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla[9] and **Pooja Ravinder Devidasani Vs. State of Maharashtra** (Supra), and **K.K. Ahuja Vs. V.K. Vora**[10] and **Chintalapati Srinivasa Raju Vs. Securities and Exchange Board of India**[11] and it was observed that admittedly, the petitioners therein were neither the Managing Directors nor the authorised signatories of the accused company. Except the general allegations, no specific role was attributed to them.

13. In the case of **Yashowardhan Birla Vs. Cecil Webber Engineering Ltd. and Others** (supra), decided by Delhi High Court, the petitioner had contended that the petitioner was an independent non-executive Director who was not managing the day to day affairs of the accused company and was not a signatory to the cheque. On behalf of complainant, it was contended that the petitioner was a director at the time of issuance of the cheque and that the letterhead on which the promissory note and the receipt was given by accused No.1 reflected that it was 'Yash Birla Group' and therefore being part of the conglomerate of which the petitioner was a chairperson, it would be assumed that the petitioner was incharge of and responsible for the affairs of the accused company. The Court observed that the petitioner was not a signatory to the cheque; the Managing Director for the company is already arrayed as accused No.2 and petitioner

9 (2005) 8 SCC 89
10 (2009) 10 SCC 48
11 (2018) 7 SCC 443

was a non-executive co-chairman of the accused company. The dictum of Hon'ble Supreme Court in **Sunita Palita and Others Vs. Panchami Stone Quarry**[12] is applicable. Mere designation as a Director cannot import vicarious liability for a dishonoured cheque. It was this very mischief that was sought to be circumscribed, curtailed and avoided by the decision in **S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla**[13], the spirit of these decisions by Hon'ble Supreme Court is that there has to be something more substantial shown by the complainant rather than bald averment that a particular accused was in-charge of day to day affairs of the company. Vicarious liability is a specific species and assumes critical importance, particularly when there is criminal liability involved and therefore, cannot be taken lightly. If such an extention of principle of vicarious liability were to remain, it would go against the very grain and texture of what the Hon'ble Supreme Court has held in catena of decisions. Courts have consistently reiterated that a non-executive Director may be the custodian of Governance of the Company but are not involved in the day to day affairs of running its business and only monitor executive activities of the company.

14. In **Sunita Palita and Others Vs. Panchami Stone Quarry** (supra), the Appellants had argued that they are independent, non-executive

12 (2022) 10 SCC 152
13 (2005) 8 SCC 89

Directors of accused company and in no way responsible for the day to day affairs of the accused company. Such Directors are inducted in the company for their expertise or special knowledge in any particular discipline. They are not in-charge of the management of the company. It was held that every person connected with the company does not fall within the ambit of section 141 of the N. I. Act. It would be travesty of Justice to drag directors, who may not even be connected with the issuance of a cheque or dishonour thereof such as Director (personnel), director (Human Resources Development) etc. into Criminal Proceedings because of their designation. The appellants were independent, non executive Directors of a company. The observations in paragraph 43 of the decision reads as follows:-

> *"43. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v. State of Maharashtra and Anr. (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs."*

15. In the case of **Prakash Chand Vs. State and Another** (supra), decided by High Court of Delhi, the petitioner stated that, he was an Independent/Non-Executive Director in the accused company at the time of commission of offence. It was held that, as per settled legal propositions, it was to be specifically averred in the complaint as to how the petitioner, being an independent director, was in-charge of day to day affairs of the company as well as the conduct of business. Complaint contains general allegations against all directors without any specific role. There was material to show that petitioner is independent director in the company.

16. In **Chintalapati Srinivasa Raju Vs. Securities and Exchange Board of India** (supra) it is observed as follows:-

> *"23. Non-executive directors are, therefore, persons who are not involved in the day to day affairs of the running of the company and are not in charge of and not responsible for the conduct of the business of the company."*

17. In the case of **S.P. Mani and Mohan Dairy** (supra) the Apex Court in the said decision has considered the scope of section 141 of the Negotiable Instruments Act. Paragraph No.44 to 47 of this Judgment reads as under:-

> *"44. We may also examine this appeal from a different angle. It is not in dispute, as noted above, that no reply was given by the respondent to the statutory notice served upon her by the appellant. In the proceedings of the present type, it is essential for the person to whom statutory notice is issued under Section 138 of the NI Act to give an appropriate reply. The person concerned is expected to clarify his or her stance. If the person concerned has some unimpeachable and incontrovertible 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. If any such foundation is laid, the picture would be more clear before the eyes of the complainant. 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. Had the respondent herein given appropriate reply highlighting whatever she has sought to highlight before us then probably 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.

45. 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, if the partner keeps quiet and does not say anything in reply to the same, then the complainant has all the reasons to believe that what he has stated in the notice has been accepted by the noticee. In such circumstances what more is expected of the complainant to say in the complaint.

46. When in view of the basic averment process is issued the complaint must proceed against the Directors or partners as the case may be. But, if any Director or Partner wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling incontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be an abuse of process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint, it must be shown that no offence is made out at all against the Director or Partner.

47. Our final conclusions may be summarised as under:-

a.) The primary responsibility of the complainant is to make specific averments in the complaint 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. On the other hand, the first proviso to sub-section (1) of Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the Court that the offence was committed without his/her knowledge or he/she had exercised due diligence to prevent the commission of such offence, he/she will not be liable of punishment.*

b.) The complainant is supposed to know only generally as to who were in charge of the affairs of the company or firm, as the case may be. The other administrative matters would be within the special knowledge of the company or the firm and those who are in charge of it. In such circumstances, the complainant is expected to allege that the persons named in the complaint are in charge of the affairs of the company/firm. It is only the Directors of the company or the partners of the firm, as the case may be, who have the special knowledge about the role they had played in the company or the partners in a firm to show before the court that at the relevant point of time they were not in charge of the affairs of the company. Advertence to Sections 138 and Section 141 respectively of the NI Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the officers in charge of the affairs of the company/partners of a firm 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.

c.) Needless to say, the 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. But vicarious criminal 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. Hence, they are not adversely prejudiced if they are eventually found to be not guilty, as a necessary consequence thereof would be acquittal.

d.) If any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he/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."

18. The Apex Court in the aforesaid decision elaborately discussed the observations in the case of **Gunmala Sales Pvt. Ltd. Vs. Anu Mehta and Others** and held that, the principles of law and the dictum in Gunmala Sales Pvt. Ltd. (supra), still holds the field and reflects the correct position of law.

19. In **Gunmala Sales Private Limited Vs. Anu Mehta and Others** (supra) 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.

20. In the case of **Siby Thomas Vs. Somany Ceramics Ltd.** (supra), the Apex Court referred to decision in S. P. Mani (supra) and it was observed that vicarious liability would be attracted when the ingredients of Section 141(1) of the N.I. Act are satisfied. Merely because somebody is managing

the affairs of the company, perse, 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 business of the company.

21. In the present case the petitioners were non-executive independent directors. There is no doubt about the genuineness of the documents relied upon by the petitioners indicating that they were independent, non-executive Additional Directors.

22. In the complaint it is alleged that, accused No.1 had approached the complainant to procure Digital Factoring Loan. At the request of accused No.1 said facility was sanctioned by complaint for one year. The DFL was extended twice at behest of accused No.1. Accused No.1 requested all its lenders for one time restructuring under RBI resolution framework for covid related stress dated 6th August 2020. The accused No.1, through, accused No.10, the then Chief Financial Officer of the accused No.1, made an application to the complainant seeking to enter into OTR. After discussions with accused No.1 and its representatives, the complainant issued letter dated 16th April 2021 sanctioning the OTR in line with RBI circular dated 6th August 2021. To further the OTR, all lenders of the accused No.1 also entered into common inter-creditor agreement dated 26th April 2021. Accused No.1, 2 and 10 were given authority by accused No.1 to take steps

to execute the ICA and the framework agreement and to negotiate the financing documents under the terms of above documents, the lenders agreed to abide by respective sanction letters of each lenders in line with resolution plan submitted by accused Nos. 1, 2 and 3. Accused No.1 issued cheque towards repayment of outstanding. It was signed by accused No.10. While making the aforesaid averments, no role is prescribed to petitioners. In the subsequent paragraphs of complaint, general allegations are made against all the accused. It is pertinent to note that accused No.2 is managing Director. Accused No.3 is Chairman. Cheque is signed by accused No.10. The petitioners has stated that they attended the meetings and dutifully acted in good faith. The petitioner No.1 has filed additional Affidavit and submitted documents viz. relevant extract of Annual Report 2020-21 of accused No.1 setting out the extention of term of petitioners as independent Directors and Declaration issued by accused No.1 with respect to its name change. The minutes of the meeting dated 29th April 2021 held by accused No.1 mentions that petitioners were re-appointed during the meeting as independent Directors. The certificate issued by Dy. Company Secretary mentions that the company was originally incorporated as Bharti Retail Pvt. Ltd. The name was than changed to Bharti Retail Limited vide resolution dated 24th April 2009 and fresh certificate of incorporation upon change of name on conversion to public limited company which was obtained on 21st May 2009. The name was further changed to Future Retail

Limited vide Resolution dated 18th November 2015 and fresh certificate of incorporation was issued. Attending meetings would not change status of petitioners. Considering the claim of petitioners, documents in record, averments in complaint, the petitioners cannot be prosecuted for the offence by invoking section 141 of N. I. Act. The proceedings are requirred to be quashed against petitioners.

ORDER

(i) Criminal Writ Petition No.3528 of 2022 is allowed.

(ii) Order issuing process dated 4th July 2022 issued against petitioners in C.C. No.371/SC/2022 and the proceedings in the said complaint is quashed and set aside.

(iii) Writ Petition is disposed off.

(PRAKASH D. NAIK, J.)