



2024:DHC:6231



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 20th August, 2024

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CRL.M.C. 598/2018 and CRL.M.A. 2180/2018**RAJESH MADAN**

..... Petitioner

Through: Mr. Siddharth Aggarwal, Senior Advocate with Mr. Aditya Wadhwa, Mr. Ayush Srivastava, Mr. Siddharth Sunil, Mr. Ashish Raghuvanshi and Mr. Shivansh Agarwal, Advocates

versus

M/S GOOD MARKETING AND SALES PVT LTD Respondent

Through: Mr. Mudit Jain, Advocate

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CRL.M.C. 599/2018 and CRL.M.A. 2184/2018**HARJEET SINGH KOHLI**

..... Petitioner

Through: Mr. Siddharth Aggarwal, Senior Advocate with Mr. Aditya Wadhwa, Mr. Ayush Srivastava, Mr. Siddharth Sunil, Mr. Ashish Raghuvanshi and Mr. Shivansh Agarwal, Advocates

versus

M/S GOOD MARKETING AND SALES PVT LTD Respondent

Through: Mr. Mudit Jain, Advocate

+

CRL.M.C. 601/2018**GEETA MATHUR**

..... Petitioner

Through: Mr. Siddharth Aggarwal, Senior Advocate with Mr. Aditya Wadhwa, Mr. Ayush Srivastava, Mr. Siddharth Sunil, Mr. Ashish Raghuvanshi and Mr. Shivansh Agarwal, Advocates



versus

M/S GOOD MARKETING AND SALES PVT LTD Respondent
Through: Mr. Mudit Jain, Advocate

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. These three petitions have been preferred on behalf of the Petitioners under Section 482 Cr.P.C. seeking quashing of summoning order dated 14.12.2017 and the complaint in Ct. Case No.16632/2017 titled '*Good Marketing and Sales Pvt. Ltd. v. Brightstar Telecommunications India Ltd. & Ors.*' qua the Petitioners. Since common questions of fact and law arise in the three petitions they were heard together and are being decided by this common judgment.

2. Facts to the extent necessary and emerging from the petitions are:

- (a) M/s Brightstar Telecommunications India Ltd. ('BTIL') is a company incorporated under the Companies Act, 1956 and is structured into multiple business segments encompassing distribution of mobile handsets, accessories, communication devices etc. and is associated with leading telecom operators and biggest brands in the Original Equipment Manufacturer space including Apple products.
- (b) Rajesh Madan, accused No.6 (hereinafter referred to as 'Petitioner No.1') was inducted in BTIL on 31.03.2015 as an Independent Non-Executive Director; Harjeet Singh Kohli, accused No.8 (hereinafter referred to as 'Petitioner No.2') was inducted in BTIL on 01.08.2016



as Non-Executive Director; and Geeta Mathur, accused No.5 (hereinafter referred to as 'Petitioner No.3') was inducted in BTIL on 30.03.2015 as an Independent Non-Executive Director.

- (c) M/s Good Marketing and Sales Pvt. Ltd., complainant company/ Respondent herein is a part of group of companies including iWorld Business Solutions Pvt. Ltd. ('IBS') and iWorld Digital Solutions Pvt. Ltd. ('IDS') and is owned and operated by the same individuals and for the ease of reference is hereinafter referred to as the complainant. BTIL entered into two sets of transactions with the iWorld Group Companies (hereinafter referred to as the 'iWorld') viz: (a) three Distributorship Agreements whereby BTIL agreed to sell certain products; and (b) a "Sales Terms and Conditions" Agreement ('STC') dated 20.04.2015, under which BTIL was to purchase phone accessories from the complainant.
- (d) Petitioners learnt that under the STC Agreement, BTIL had on 18.05.2015 issued to the complainant an undated and blank security cheque bearing No.000437 drawn on M/s Kotak Mahindra Bank, K.G. Marg Branch, allegedly signed by Mr. Puneet Khanna, the then Chief Financial Officer ('CFO') and Mr. Mukesh Kapoor, the then Finance Controller ('FC'). Mukesh Kapoor resigned from BTIL in October, 2015 while Puneet Khanna resigned on 28.02.2017. Fact of resignation of Puneet Khanna is reflected in Form No.DIR-12 while the resignation of Mukesh Kapoor is evident from his e-mails, not disputed.
- (e) Disputes having arisen between BTIL and iWorld on account of non-clearance of dues by iWorld under the Distributorship Agreements,



BTIL filed petitions under Sections 9 and 11 of the Arbitration and Conciliation Act, 1996, which are stated to be pending and BTIL also initiated prosecution under Section 138 of Negotiable Instruments Act, 1881 ('NI Act') against iWorld and its officers.

- (f) BTIL had cleared all its dues under the STC Agreement and despite this, complainant misused and presented the security cheque, which was dishonoured vide return memo dated 24.10.2017 for the reason '*Drawers signature not as per mandate*' and resulted in the instant prosecution. Petitioners No.1 and 3 were Independent Non-Executive Directors while Petitioner No.2 was Non-Executive Director having nothing to do with the day to day working of BTIL and yet legal notices dated 20.11.2017 were sent to them along with notices to BTIL and 6 other individuals under Section 138 read with Section 141 of NI Act, alleging that Petitioners were vicariously liable for the offence under Section 138 of NI Act. Petitioners responded to the legal notices on 08.12.2017 through their counsel denying the allegations and stating that the concerned cheque was a security cheque and all obligations under the STC Agreement had been fulfilled by BTIL. It was also clarified that Petitioners were Independent Non-Executive Directors/Non-Executive Director respectively and had no role to play in the day to day affairs of BTIL.
- (g) Despite receipt of response to the legal notice and being aware of the status of the Petitioners, complainant maliciously filed a complaint under Section 138 read with Sections 141 and 142 of NI Act on 12.12.2017 before learned Metropolitan Magistrate, Patiala House Courts, against BTIL, Petitioners and other individuals. There is no



avermment in the complaint as to how Petitioners were in charge of or responsible for the conduct of the day to day business and affairs of BTIL, so as to make them vicariously liable for the alleged offence. In fact, complaint does not even disclose details under STC or the basis of alleging that there is an enforceable debt/liability of the Petitioners in connection with the concerned cheque.

(h) On 14.12.2017, learned MM proceeded to record pre-summoning evidence of the Authorised Representative of the complainant and passed an order taking cognizance and summoning the Petitioners and others accused of the offence, without application of mind on whether the complaint disclosed commission of the offence alleged and in ignorance of Form No.DIR-12 reflecting the status of the Petitioners in BTIL. Aggrieved by the summoning order, Petitioners approached this Court.

3. Learned Senior Counsel for the Petitioners argues that Petitioners No.1 and 3 were Independent Non-Executive Directors while Petitioner No.2 was Non-Executive Director in BTIL and were neither in-charge nor responsible for the day to day conduct of business of BTIL and thus vicarious liability cannot be fastened upon them to bring them under the rigours of Section 141(1) of NI Act. Status of the Petitioners in BTIL is amply demonstrated and proved from the Resolution passed by the Board of Directors of BTIL appointing them as also from the separate e-mails intimating them of their appointments and setting out the terms and conditions of appointments, apart from Form No.DIR-12, which was placed before the learned MM. The status and role of the Petitioners in BTIL was clearly brought to the notice of the complainant in the reply to the



complainant's statutory legal notice under Section 138 of NI Act. There is no concept of vicarious liability in criminal jurisprudence and what is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company will not fall within the ambit of the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. As held by the Supreme Court, if being a director or manager or secretary was enough to cast criminal liability, the legislature would have used the expression "every director, manager or secretary in a company is liable" instead of "every person". Reliance was placed by learned Senior Counsel on the judgments of the Supreme Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Another*, (2005) 8 SCC 89; *Pooja Ravinder Devidasani v. State of Maharashtra and Another*, (2014) 16 SCC 1; *Sunita Palita and Others v. Panchami Stone Quarry*, (2022) 10 SCC 152; *S.P. Mani & Mohan Dairy v. Dr. Snehalatha Elangovan*, (2023) 10 SCC 685; and of this Court in *Sudeep Jain v. M/s. ECE Industries Ltd.*, 2013 SCC OnLine Del 1804 and *Lalit Bhasin v. Pawan Trade Connect Pvt. Ltd.*, 2024 SCC OnLine Del 559.

4. It was contended that the complainant has made only bald averments in the complaint in respect of the Petitioners that they were in charge of and responsible for the conduct of the business of BTIL and has not spelt out how and in what manner Petitioners were in charge and responsible and therefore, the contents of the complaint are not sufficient to attract the



offence under Section 138 of NI Act. There are catena of judgments wherein it is held that the complaint must necessarily contain averments as to how and in what manner the accused were in charge of and responsible for the conduct of business of the company, failing which at the threshold the complaint case and the summons ought to be quashed. In order to bring the offence under Section 141(2), where the offence is alleged to be committed by a company, a Director, Manager, Secretary or other officer of a company, it is to be proved that the offence was committed with the consent or connivance of, or is attributable to, any neglect on the part of such individual. No material was placed before the learned MM at the pre-summoning stage which would even *prima facie* suggest that there was any consent, connivance or neglect on the part of the Petitioners, who were Non-Executive Directors. In this context, reliance was placed on the judgment of the Supreme Court in *S.P. Mani (supra); Anita Malhotra v. Apparel Export Promotion Council and Another, (2012) 1 SCC 520* and of this Court in *J.N. Bhatia & Ors. v. State & Anr., 2006 SCC OnLine Del 1598*.

5. Section 149(12) of the Companies Act, 2013 lays down the eventualities in which Independent and Non-Executive Directors may be held liable for any omission or commission by the company and provides that such Directors can be held liable only in respect of such acts of omission or commission by the company which had occurred with their knowledge, attributable through Board processes and with their consent or connivance or where they had not acted diligently. Specific averments to the effect that offence was committed with knowledge/consent/connivance of the Petitioners, were required to be made in the complaint by the complainant in terms of Section 149(12) to hold the Petitioners liable, as



held by this Court in ***Kanarath Payattiyath Balrajh v. Raja Arora, 2017 SCC OnLine Del 7418*** but a bare perusal of the complaint would show that only bald and vague allegation has been made in one line that the cheque in question was signed by accused Nos.2 and 3 with the knowledge and consent of accused Nos.4 to 10. There is neither any averment nor evidence on record to suggest even *prima facie* that Petitioners had knowledge regarding the concerned transactions or that there was any consent or connivance on their part. The impugned order shows that the learned MM has not applied its mind to the complaint and the averments therein and is in teeth of the judgment of this Court in ***Sudeep Jain (supra)***, wherein the Court observed that the prime objective of the High Court is to remind all the Metropolitan Magistrates in Delhi to carefully scrutinize all complaint cases being filed under Section 138 read with Section 141 of NI Act against the accused companies at the pre-summoning stage and make sure that notice is directed only to those Directors or employees of the company who satisfy the principles laid down in various judgments by the Supreme Court viz. ***S.M.S. Pharmaceuticals Ltd. (supra)***; ***National Small Industries Corporation Limited v. Harmeet Singh Paintal and Another, (2010) 3 SCC 330***, etc.

6. It was argued that reliance of the complainant on Form No.MGT-7 to contend that Petitioners being Executive Directors were regularly attending Board meetings/Audit Committee's meetings etc. and this was sufficient to hold them vicariously liable and fasten liability under Section 141(2), is wholly misplaced for more than one reason. Firstly, no such averment was made in the complaint and it is for the first time during the course of oral hearing that this argument was made. Secondly, even as per the laid down



procedure, once the complainant has already tendered pre-summoning evidence, there is no occasion to bring on record any additional document either before this Court or even before the learned MM. In the present petition, Court is testing the validity of the impugned summoning order, which cannot be done on the anvil of fresh documents or factual averments, brought before this Court. Without prejudice, even if Form No.MGT-7 is considered, it shows that Petitioners are Non-Executive Directors, who merely attended Board/Audit meetings but this fact alone does not and cannot lead to a conclusion that Petitioners played any role in the day to day affairs of BTIL and/or were responsible for the conduct of its business. Even otherwise, Independent and/or Non-Executive Directors are ordinarily expected to participate in Board meetings and this is evident from a plain reading of Schedule 4 of the Companies Act, 2013.

7. Last but not the least, it was argued by Mr. Aggarwal that the cheque in question was an undated blank cheque given as security, which could not have been encashed. It was executed pursuant to a completely different agreement i.e. STC dated 20.04.2015, under which all debts stood paid by BTIL. The cheque in question was misused by the complainant and its issuance or presentation has no basis in any existing and enforceable debt against the Petitioners. That the cheque was misused is apparent when one closely looks at the cheque which bears the previous name of BTIL i.e. Beitel Teletech Limited. Going by the stand of the complainant, if the cheque is correctly dated 31.08.2017, the same could not have been issued in the name of Beitel Teletech Limited in light of the change of the name of the company to M/s Brightstar Telecommunications India Ltd. in February, 2017. The mischief of the complainant in lodging a false and



malicious prosecution is thus apparent. Admittedly. Petitioners are not the signatories to the cheque and both the signatories i.e. Mukesh Kapoor and Puneet Khanna had resigned from BTIL much prior to the alleged date of commission of the offence on 24.10.2017 in as much as Mukesh Kapoor resigned in October, 2015 while Puneet Khanna resigned on 28.02.2017.

8. Learned counsel for the Respondent, *per contra*, argued that Petitioners are vicariously liable for the offence under Section 138 read with Section 141 of NI Act since they were Directors of BTIL when the offence was committed. To absolve themselves from the liability, Petitioners shall have to prove that they were not involved in the day to day affairs of BTIL and that there was no connivance on their part in committing the offence and this onus cannot be shifted on the complainant. Petitioners were Directors of BTIL at the time of commission of the offence and it makes no difference that they were allegedly Independent Non-Executive Directors or Non-Executive Directors. It is trite that once in a complaint filed under Section 138 read with 141 of NI Act, basic averment is made that a Director is in-charge of and responsible for the conduct of the business of the company at the time when the offence was committed, process can be issued by the learned Magistrate and rest would be a matter of trial, as held by the Supreme Court in ***K.K. Ahuja v. V.K. Vora and Another*, (2009) 10 SCC 48** and ***Gunmala Sales Private Limited v. Anu Mehta and Others*, (2015) 1 SCC 103**.

9. It was argued that in ***Gunmala Sales (supra)*; *Sunil Todi and Others v. State of Gujarat and Another*, 2021 SCC OnLine SC 1174**; and ***S.P. Mani (supra)***, the Supreme Court held that at the stage of considering a



petition under Section 482 Cr.P.C. Court is required to look into only the averments made in the complaint by the complainant and no more. Complainant has, in the present case, clearly adverted to the acts committed by the Petitioners and the averments made disclose the commission of the offence under Section 138 of NI Act. Complainant has averred that accused Nos.2 to 10 which includes the Petitioners, who are accused Nos.6, 8 and 5 respectively, have personally interacted with various officers of the complainant and represented to the officials of the complainant that they were Directors and/or responsible officers of BTIL (accused No.1) and are the persons-in-charge of BTIL and responsible for the conduct of the day to day business of the company. They further represented that all acts and deeds done by them were binding on BTIL. BTIL issued the cheque from the account with the knowledge of accused Nos. 4 to 10 including the Petitioners and accused Nos. 2 to 10 gave an assurance to the officers of the complainant that the cheque will be honoured on presentation for recovery of the debt/liability. There are categorical averments in the complaint that Petitioners gave their consent and connived in the commission of the offence and thus all essential ingredients of Section 149(12) of the Companies Act are made out. These averments were sufficient for the learned MM to issue summons to the accused persons including the Petitioners.

10. Petitioners have argued that the complaint does not disclose any legally enforceable debt against BTIL or the Petitioners. This argument cannot be accepted in light of the provisions of Section 139 of NI Act, which create a legal presumption in favour of the complainant that as a holder of the cheque, complainant has received the cheque in discharge of a liability and as held in **Rangappa v. Sri Mohan, (2010) 11 SCC 441** by the Supreme



Court, the presumption includes the existence of a legally enforceable debt or liability.

11. Petitioners have primarily predicated their case on their alleged status as Non-Executive Directors and are using this as a shield against their existing liability and criminal culpability. Heavy reliance is placed on Form No.DIR-12 claiming the document to be an unimpeachable evidence in their defence. There are, however, several documents on record of the Registrar of Companies ('RoC') which reflect that Petitioners played an active role in executing day to day business of the company by being part of the Board meetings as well as meetings of the Audit Committees, Corporate Social Committees and Nomination Committees of BTIL. Form No.MGT-7 filed by BTIL in compliance of the mandate issued by Ministry of Corporate Affairs is an equally unimpeachable document as Form No.DIR-12 and reflects their role and participation in the day to day affairs of BTIL. All these aspects require evidence and thus the case must proceed to trial. Reliance in this context is placed on the judgment of this Court in ***Basant Kumar Goswami v. State NCT of Delhi and Another, 2023 SCC OnLine Del 7635***, wherein the Court held that having attended Board meetings and being a member of an Audit Committees, Petitioner would not fall within the definition of Independent Director or Non-Executive Director and cannot escape the liability of commission of an offence under Section 138 of NI Act.

12. It was urged that BTIL and complainant were having three different kinds of transactions but the same were not interlinked. In these transactions, several documents were executed, such as STC Agreement dated 20.04.2015; Credit Notes/Purchase Orders/Invoices; and Distributorship



Agreement dated 27.05.2015 and admittedly a running account was maintained between the parties. The ledger account maintained by the complainant and the corresponding credit notes would bely the stand of the Petitioners that there existed no legally enforceable debt against BTIL. In the Arbitration Petition bearing No.664/2017 filed by BTIL against the complainant, BTIL has filed a copy of its ledger account where there is a reference to the credit note of Rs.1.34 crores given by BTIL to the complainant. Between 2016 to 2017, complainant made several requests to BTIL to issue credit notes including but not limited to processing the earlier ones, but to no avail. The cheque was issued to clear the outstanding liability and with the knowledge of the Petitioners.

13. The stand of the Petitioners that the cheque in question was an undated and blank cheque given as security allegedly misused by the complainant, is incorrect. Petitioners do not deny the issuance of the cheque and whether or not there was an outstanding liability or the cheque was misused will be proved only during the trial. As a matter of fact, copy of the purported and imaginary blank cheque is not available in the records of the complainant and no proof has been filed by BTIL to show that it was ever sent as an attachment to email or otherwise to the complainant. The truth and correctness of this *alibi* is itself questionable.

14. It was contended that it is wrong for the Petitioners to argue that the learned MM has not applied his mind before issuing the summons. The impugned order on a plain reading would indicate that the learned MM has duly adverted to all aspects averred in the complaint as also to the evidence by way of affidavit, bank memo, cheque in question, demand notice and a host of other documents including the arguments of the parties. In **Sunil**



Todi (supra), the Supreme Court observed that once the Magistrate adverts to all the aforesaid documents, his order cannot be invalid as betraying non-application of mind. The judgment in **Sudeep Jain (supra)** relied upon by the Petitioners was in the context of a Director and is distinguishable.

15. Heard learned Senior counsel for the Petitioners and learned counsel for the complainant.

16. Sections 138 and 141 of NI Act have been analysed and examined in several judgments from time to time and to avoid prolixity, I may only refer to a few. In **S.P. Mani (supra)**, the Supreme Court observed as follows:-

“25. Evidently, the gist of Section 138 is that the drawer of the cheque shall be deemed to have committed an offence when the cheque drawn by him is returned unpaid on the prescribed grounds. The conditions precedent and the conditions subsequent to constitute the offence are drawing of a cheque on the account maintained by the drawer with a banker, presentation of the cheque within the prescribed period, making of a demand by the payee by giving a notice in writing within the prescribed period and failure of the drawer to pay within the prescribed period. Upon fulfilment of these requirements, the commission of the offence which may be called the offence of “dishonour of cheque” is complete. If the drawer is a company, the offence is primarily committed by the company.

26. By virtue of the provisions of sub-section (1) of Section 141, the guilt for the offence and the liability to be prosecuted and punished shall be extended to every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of its business; irrespective of whether such person is a Director, manager, secretary or other officer of the company. It would be for such responsible person, in order to be exonerated in terms of the first proviso, to prove that the offence was committed without his knowledge or despite his due diligence.

27. Under the separate provision of sub-section (2), if it is proved that the offence was committed with the consent or connivance of or was attributable to the neglect on the part of any Director, manager, secretary or other officer of the company, such person would also be deemed to be guilty for that offence. Obviously, the burden of alleging and proving consent, connivance or neglect on the part of any Director, etc. would rest upon the complainant. The non obstante clause with which sub-section (2) opens indicates that the deeming provision is distinct and different from



the deeming provision in sub-section (1) in which the office or designation of the person in charge of and responsible to the company for the conduct of its business is immaterial.

28. *While the essential element for implicating a person under sub-section (1) is his or her being in charge of and responsible to the company in the conduct of its business at the time of commission of the offence, the emphasis in sub-section (2) is upon the holding of an office and consent, connivance or negligence of such officer irrespective of his or her being or not being actually in charge of and responsible to the company in the conduct of its business. Thus, the important and distinguishing feature in sub-section (1) is the control of a responsible person over the affairs of the company rather than his holding of an office or his designation, while the liability under sub-section (2) arises out of holding an office and consent, connivance or neglect.*

29. *While all the persons covered by sub-section (1) and sub-section (2) are liable to be proceeded against and also punished upon the proof of their being either in charge of and responsible to the company in the conduct of its business or of their holding of the office and having been guilty of consent, connivance or neglect in the matter of commission of the offence by the company, the person covered by sub-section (1) may, by virtue of the first proviso, escape only punishment if he proves that the offence was committed without his knowledge or despite his due diligence.*

30. *As for the requisite evidence, the burden upon the prosecution would be discharged under sub-section (1) when a person is proved to be in charge of and responsible to the company in the conduct of its business and would shift upon the accused to prove that he was ignorant or diligent, if that be his defence; whereas under sub-section (2) the prosecution would be required to allege and prove the consent, connivance or neglect and holding of the office by the accused. There is nothing to suggest that the same person cannot be made to face the prosecution either under sub-section (1) or sub-section (2) or both."*

17. The Supreme Court further analysed the expression occurring in Section 141(1), i.e. '*at the time the offence was committed*' and observed as under:-

"34. The seminal issue raised and required to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in-charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time" when the offence under Section 138 can be said to have been committed by the company. It



is commonplace that an offence means an aggregate of facts or omissions which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called “dishonour of cheque” can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in K. Bhaskaran v. Sankaran Vaidhyan Balan [K. Bhaskaran v. Sankaran Vaidhyan Balan, (1999) 7 SCC 510 : 1999 SCC (Cri) 1284] , that : (SCC p. 518, para 14)

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

35. Different persons can be in-charge of the company when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. To take an example, in the case of a company, “A” might be in charge of the company at the time of drawing the cheque, “B” might be in charge of the company at the time of dishonour of cheque and “C” might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of A, B and C, respectively, or any of them would advance the purpose of the provision and, if none can be prosecuted or punished, it would frustrate the purpose of the provisions of Section 138 as well as Section 141.

36. The key to this interpretation lies in the use of the phrase: “every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly” as it occurs in sub-section (1) of Section 141 and the use of the phrase “provided that nothing contained in this sub-section shall render any person liable to punishment if he proves...” that occurs in the first proviso. Every person who was in charge of and was responsible to the company for the conduct of its business at the time any of the components necessary for the commission of the offence occurred may be “proceeded against”, but may not be “punished” if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remaining on him.

37. Therefore, it also has to be held that the time of commission of the offence of dishonour of cheque cannot be on the stroke of a clock or during



15 days after the demand notice has to be construed as the time when each of the acts of commission and omission essential to constitute the offence was committed. The word “every” points to the possibility of plurality of responsible persons at the same point of time as also to the possibility of a series of persons being in charge when the sequence of events culminating into the commission of offence by the company were taking place.

38. As to what this “relevant time” is, was a question that this Court was called to answer, inter alia, in N. Rangachari v. BSNL [N. Rangachari v. BSNL, (2007) 5 SCC 108 : (2007) 2 SCC (Cri) 460] . In this case, Data Access, a company had issued two cheques to BSNL, which were duly presented, but were dishonoured for insufficiency of funds. A complaint under Section 138 of the NI Act was filed. While BSNL held the Directors liable, the appellant, a Chairman in the company contended that he being a nominated Chairman and holding an honorary post in the Company, was never assigned with any of the company's financial or other business activities. He was the Chairman for name's sake and was never entrusted with any job or business or constituted a signing authority.”

18. In the context of the issue as to when a Director can be arraigned and proved to be guilty as a person ‘in charge of and responsible to the company’, the Supreme Court observed as under:-

“31. A Director or manager can be arraigned and proved to be guilty as the person in charge of and responsible to the company as well as the Director of the company who, as such, might have consented to, connived at or been negligent in respect of the offence of dishonour of cheque, be logically deduced that a person can be arraigned in a complaint as the accused along with the company if it prima facie appears that he was in charge of and responsible to the company for the conduct of its business, although he may or may not be or may not have continued to be a Director or other officer of the company, as mentioned in sub-section (2). It would be sufficient if the complaint indicates that such person has been arraigned on the basis of averments which disclose him or her to be the person in charge of and responsible to the company in the conduct of its business at the time the offence was committed.

32. Evidently, a person who signs the cheque or who has the authority to sign the cheque for and on behalf of the company, regardless of his office or capacity, can, prima facie, be assumed to be in charge of and responsible to the company in the conduct of its business. And, where such person is prosecuted, then, if it be his defence that the offence was committed without his or her knowledge or that he or she has exercised all due diligence to prevent the commission of such offence, the burden to



prove that would be on him or her and can only be discharged at the stage of evidence.”

19. The issue of vicarious liability under Section 141 of NI Act was discussed in paragraphs 44 to 49 as follows:-

“44. This Court in Commr. v. Velliappa Textiles Ltd., introduced the concept of ego and alter ego in relation to the employee and the employer corporation. The Court elucidated this principle in the following words:

“56. In order to trigger corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the ego, the centre of the corporate personality, the vital organ of the body corporate, the alter ego of the employer corporation or its directing mind. Since the company/corporation has no mind of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. To this extent there are no difficulties in our law to fix criminal liability on a company. The common law tradition of alter ego or identification approach is applicable under our existing laws.”

(emphasis in original)

45. Now, the logical question that would follow is who would be liable through the company for this offence? Can the company itself be prosecuted for this offence? Answering this question, Section 141 says, “every person who was in charge of” and “was responsible to the company for the conduct of the business” shall be deemed to be guilty of the offence.

46. This concept of vicarious liability has been explained by this Court in *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya*:

“7. ... 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 therefor. 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 petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted.”

(emphasis supplied)



47. At this stage, we should look into the decision of this Court in *K.K. Ahuja v. V.K. Vora*, wherein this Court discussed the principles of vicarious liability of the officers of a company in respect of dishonour of a cheque and held :

“27. The position under Section 141 of the Act can be summarised thus:

(i) If the accused is the Managing Director or a Joint Managing Director, 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. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix “Managing” to the word “Director” makes it clear that they were in-charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a Director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager [as defined in Section 2(24) of the Companies Act] or a person referred to in clauses (e) and (f) of Section 5 of the Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under Section 141(1) of the Act. No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under Section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company cannot be made liable under sub-section (1) of Section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, 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.”

(emphasis supplied)

48. In a very recent pronouncement in *Sunita Palita v. Panchami Stone*



Quarry, this Court, after referring to K.K. Ahuja referred to above, observed as under:

“29. ... when the accused is the Managing Director or a 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 the 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 officers of a company can be made liable only under sub-section (2) of Section 141 of the NI 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.”

49. In yet one another recent pronouncement in *Ashutosh Ashok Parasrampuriya v. Gharrkul Industries (P) Ltd.*, this Court after due consideration of the decisions in *S.M.S. Pharmaceuticals; S.K. Alagh v. State of U.P.; Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. and GHCL Employees Stock Option Trust v. India Infoline*, observed as under:

“24. In the light of the ratio in S.M.S. Pharmaceuticals [S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89 : 2005 SCC (Cri) 1975] and later judgments of which a reference has been made what is to be looked into is whether in the complaint, in addition to asserting that the appellants are the Directors of the Company and they are in-charge of and responsible to the Company for the conduct of the business of the Company and if statutory compliance of Section 141 of the NI Act has been made, it may not be open for the High Court to interfere under Section 482CrPC unless it comes across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abused of process of court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the particular Director for which there could be various reasons.”

(emphasis supplied)”

20. It would be useful and relevant at this stage to allude to some of the earlier judgments on the issue. In *S.M.S. Pharmaceuticals Ltd. (supra)*



while dealing with the manner in which the averments must be specifically made against the Accused in a complaint under Section 138 read with Section 141 NI Act, the Supreme Court observed as under:-

“8. The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word “director” is defined in Section 2(13) of the Companies Act, 1956 as under:

“2. (13) ‘director’ includes any person occupying the position of director, by whatever name called;”

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a secretary of Department B regarding a cheque issued by the



secretary of Department A which is dishonoured? The secretary of Department B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements. Not every person connected with a company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a company would naturally know why the cheque in question was issued and why it got dishonoured.

9. *The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.*

10. *While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:*

“Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of



business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of “every person” the section would have said “every director, manager or secretary in a company is liable”..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. *A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.*

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

13. *The question of what should be the averments in a criminal complaint has come up for consideration before various High Courts in the country as also before this Court. Secunderabad Health Care Ltd. v. Secunderabad Hospitals (P) Ltd. [(1999) 96 Comp Cas 106 (AP)] was a case under the Negotiable Instruments Act specifically dealing with Sections 138 and 141 thereof. The Andhra Pradesh High Court held that every director of a company is not automatically vicariously liable for the offence committed by the company. Only such director or directors who were in charge of or responsible to the company for the conduct of business of the company at the material time when the offence was committed alone shall be deemed to be guilty of the offence. Further it was observed that the requirement of law is that: (Comp Cas p. 112)*

“There must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of



and responsible to the company in the conduct of its business at the material time when the offence was committed.”

14. *The same High Court in V. Sudheer Reddy v. State of A.P. [(2000) 107 Comp Cas 107 (AP)] held that: (Comp Cas p. 110)*

“The purpose of Section 141 of the Negotiable Instruments Act would appear to be that a person [who appears to be] merely a director of the company cannot be fastened with criminal liability for an offence under Section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-to-day affairs of the company and was responsible to the company.”

Further, it was held that allegations in this behalf have to be made in a complaint before process can be issued against a person in a complaint. To the same effect is the judgment of the Madras High Court in R. Kannan v. Kotak Mahindra Finance Ltd. [(2003) 115 Comp Cas 321 (Mad)] In Lok Housing and Constructions Ltd. v. Raghupati Leasing and Finance Ltd. [(2003) 115 Comp Cas 957 (Del)] the Delhi High Court noticed that there were clear averments about the fact that Accused 2 to 12 were officers in charge of and responsible to the company in the conduct of the day-to-day business at the time of commission of the offence. Therefore, the Court refused to quash the complaint. In Sunil Kumar Chhaparia v. Dakka Eshwaraiah [(2002) 108 Comp Cas 687 (AP)] the Andhra Pradesh High Court noted that there was a consensus of judicial opinion that: (Comp Cas p. 691)

“[A] director of a company cannot be prosecuted for an offence under Section 138 of the Act in the absence of a specific allegation in the complaint that he was in charge of and responsible to the company in the conduct of its business at the relevant time or that the offence was committed with his consent or connivance.”

The Court has quoted several judgments of various High Courts in support of this proposition. We do not feel it necessary to recount them all.

15. *Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where primary liability is that of a company. State of Karnataka v. Pratap Chand [(1981) 2 SCC 335 : 1981 SCC (Cri) 453] was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for the conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of the day-to-day affairs of the company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In Municipal Corpn. of Delhi v. Ram Kishan Rohtagi [(1983) 1*



SCC 1 : 1983 SCC (Cri) 115] the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which are arrived at against the accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.

16. *In State of Haryana v. Brij Lal Mittal [(1998) 5 SCC 343 : 1998 SCC (Cri) 1315] it was held that 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 a 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.*

17. *K.P.G. Nair v. Jindal Menthol India Ltd. [(2001) 10 SCC 218 : 2002 SCC (Cri) 1038] was a case under the Negotiable Instruments Act. It was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that the requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. [(2002) 7 SCC 655 : 2003 SCC (Cri) 151] This was a case of a partnership. It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in Monaben Ketanbhai Shah v. State of Gujarat [(2004) 7 SCC 15 : 2004 SCC (Cri) 1857] . It was observed as under: (SCC p. 17, para 4)*

“4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed



and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter.”

It was further observed: (SCC pp. 18-19, para 6)

“6. ... The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint.”

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the



parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19. *In view of the above discussion, our answers to the questions posed in the reference are as under:*

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

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

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



21. The same view was reiterated by the Supreme Court in ***National Small Industries Corporation Limited (supra)***, wherein it was observed that:

“38. But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.”

22. The Supreme Court summarised and culled out the following principles :-

“(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position, they are liable to be proceeded with.



(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in-charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.”

23. In **Anita Malhotra (supra)**, the Supreme Court restated the proposition that the complaint should specifically spell out how and in what manner the Director was in charge of or 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. Relevant paragraph is as follows:-

“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 [(2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] .) 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.”

24. In a recent judgment in **Siby Thomas v. Somany Ceramics Limited, (2024) 1 SCC 348**, the Supreme Court reiterated and reaffirmed that bald averments in the complaint will not be sufficient to satisfy the mandatory requirements under Section 141(1), referring to the judgment in **Ashok Shewakramani and Others v. State of Andhra Pradesh and Another, (2023) 8 SCC 473** and I quote:-



“18. Thus, in the light of the dictum laid down in *Ashok Shewakramani case* [*Ashok Shewakramani v. State of A.P.*, (2023) 8 SCC 473 : (2023) 4 SCC (Civ) 116 : (2023) 3 SCC (Cri) 568 : 2023 INSC 692], it is evident that a vicarious liability would be attracted only when the ingredients of Section 141(1) of the NI Act, are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of Section 141(1) of the NI Act, would reveal that only that person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

19. In such circumstances, para 24 in *Ashok Shewakramani case* [*Ashok Shewakramani v. State of A.P.*, (2023) 8 SCC 473 : (2023) 4 SCC (Civ) 116 : (2023) 3 SCC (Cri) 568 : 2023 INSC 692] is also relevant. After referring to Section 141(1) of the NI Act, in para 24 it was further held thus : (SCC p. 480)

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

20. 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 482CrPC. In the result the impugned order [*Siby Thomas v. Somany Constructions Ltd.*, 2019 SCC OnLine P&H 7919] is set aside and the subject criminal complaint filed by the respondent and pending before the learned CJ (JD) JMIC, Bahadurgarh, in the matter titled as *Somany Ceramics v. Tile Store* vide COMA-321-2015 (CNRNO : HRJRA1004637-2015), stand quashed only insofar as the appellant, who is Accused 4, is concerned. The appeal stands allowed as above. There will be no order as to costs.”

25. Co-ordinate Bench of this Court in ***Alibaba Nabibasha v. Small Farmers Agri-Busines Consortium and Others***, 2020 SCC OnLine Del



1250, following the judgments referred to above, quashed the complaint pending before the Trial Court under Section 138 of the NI Act including the summons observing as follows:-

“20. It is also settled law that mere repetition of the phraseology of Section 141 of NI Act that the accused is In-charge and responsible for the conduct of the day-to-day affairs of the Company may not be sufficient and facts stating as to how the accused was so responsible must be averred. It is the case of the respondent No. 1 that the petitioner was involved in the discussion and represented the respondent No. 2 before the agreement was executed on March 03, 2011 but that does not mean even after his resignation he continues to be responsible for the actions of the Company including the issuance of cheques and dishonour of the same which then attracts proceedings under Section 138 of the NI Act against him.

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22. This Court is conscious of the settled position of law that the High Court while entertaining a petition of this nature shall not consider the defence of the accused or conduct a roving inquiry in respect to the merits of the accusation/s but if the documents filed by the accused/petitioner are beyond suspicion or doubt and upon consideration, demolish the very foundation of the the accusation/s levelled against the accused then in such a matter it is incumbent for the Court to look into the said document/s which are germane even at the initial stage and grant relief to the person concerned under Section 482 CrPC in order to prevent injustice or abuse of process of law. In my opinion the present petition would fall within the aforesaid parameters.

23. I must state that the learned counsel for the petitioner is justified in relying upon the judgment of a Coordinate bench of this Court in the case of J.N. Bhatia (supra), wherein it was held as under:

“16. However, difficulty arises when the complainant states that the concerned accused was Director and also makes averment that he was in charge of and responsible for the conduct of its day-to-day business, but does not make any further elaboration as to how he was in charge of and responsible for the day-to-day conduct of the business. The question would be as to whether making this averment, namely, reproducing the language of Sub-section (1) of Section 141 would be sufficient or something more is required to be done, i.e. is it necessary to make averment in the complaint elaborating the role of such a Director in respect of his working in the company from which one could come to a prima facie conclusion that he was responsible for the conduct of the business of the company.



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24. Thus, what follows is that mere bald allegation that a particular person (or a Director) was responsible for the conduct of the business of the company would not be sufficient. That would be reproduction of the language of Sub-section (1) of Section 141 and would be without any consequence and it is also necessary for the complainant to satisfy how the petitioner was so responsible and on what basis such an allegation is made in the complaint.

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32. It can, therefore, be safely concluded that the view, which is now accepted by the Supreme Court, is that mere repetition of the phraseology contained in Section 141 of the NI Act, i.e. "the accused is in charge of and responsible for the conduct of the day-to-day affairs of the company", may not be sufficient and something more is to be alleged to show as to how he was so responsible.

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48. In this petition specific averment is made by the petitioner that he was neither a Director of the company nor at all incharge of the company nor involved in day-to-day running of the company at the time of commission of the alleged offence in February and March, 1999 when the cheques were dishonoured. What is stated is that the petitioner had resigned from the company on 4.2.1998 and copy of Form 32 was also submitted with the Registrar of Companies. Certified copy of Form 32 issued by the office of the Registrar of Companies is enclosed as per which, the petitioner resigned with effect from 4.2.1998. Cheques in question are dated 31.12.1998, which were issued much after the resignation of the petitioner as the Director and were dishonoured subsequently and notice of demand is also dated 8.2.1999 on which date the petitioner was not the Director, as certified copy of Form 32 obtained from the Registrar of Companies is filed indicating that the resignation was also intimated on 26.2.1998, which can be acted upon in view of judgment of this Court in *Sarla Kumar Dr. (Mrs.) v. Srei International Finance Ltd. (supra)*. The summoning order qua the petitioner is liable to be quashed. It is accordingly quashed and the complaint qua him is dismissed.

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76. Summoning orders are issued in all these cases. Sh. Mukhesh Punjwani, who is accused No. 4, has filed these petitions raising similar plea that he had tendered his resignation on 1.3.2002, which was accepted on 10.3.2002 and thereafter, Form 32 was filed with the Registrar of Companies. Cheques were allegedly issued on 20.3.2002,



namely, after his resignation and were dishonoured much thereafter when he was not the director. It is further contended that apart from bald allegation that he was in charge of the affairs of the company, nothing is stated as to how he was in charge of and/or responsible for the conduct of the day-to-day business of the accused No. 1 company. The averments qua the petitioner herein contained in all these complaints are as under:

“The accused Nos. 2 to 4 are the Directors and accused No. 5 is the General Manager Finance, who are responsible for the day-to-day affairs of accused No. 1 company and are jointly and severally liable for the acts and liabilities of the accused No. 1 company.”

77. On the basis of these bald averments, I am afraid, proceedings could not have been maintained against the petitioner herein, as it is not specifically stated as to how the petitioner was in charge of and responsible for the affairs of the company. The summoning orders qua the petitioner are hereby quashed and the complaints qua him are dismissed.

24. Additionally, in the judgment of Kamal Goyal (supra) on which reliance has been placed, this Court has held as under:

“12. In the case before the Hon'ble Supreme Court, the respondent No. 1 had resigned from the Directorship of the Company under intimation to the complainant and in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company in the year 1999 when the cheque was dishonoured as he had no say in the matter that the cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioner under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy of Form 32 accepts his plea that he was not a director of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. He having resigned from the directorship much prior to even presentation of the cheque for encashment, he cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, he continued to control the affairs of the company and therefore continued to be person in charge of and responsible to the company for the conduct of its business.”

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27. Even in the recent judgment in the case of *Ashoke Mal Bafna (supra)*, the Hon'ble Supreme Court has held as under:

*“9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See *Pooja Ravinder Devidasani v. State of Maharashtra*).*

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.

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12. Before summoning an accused under Section 138 of the Act, the Magistrate is expected to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and then to proceed further with proper application of mind to the legal principles on the issue. Impliedly, it is necessary for the courts to ensure strict compliance with the statutory requirements as well as settled principles of law before making a person vicariously liable.

13. The superior courts should maintain purity in the administration of justice and should not allow abuse of the process of court. Looking at the facts of the present case in the light of settled principles of law, we are of the view that this is a fit case for quashing the complaint. The High Court ought to have allowed the criminal miscellaneous application of the appellant because of the absence of clear particulars about the role of the appellant at the relevant time in the day-to-day affairs of the Company.”

26. It would be useful to refer to the observations of the Andhra Pradesh High Court in this context in the case of *Secunderabad Health Care v. Secunderabad Hospitals, 1998 SCC OnLine AP 338*, which are as follows:-



“14.there must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were incharge of and responsible to the company in the conduct of its business at the material time when the offence was committed”

27. To the same effect are the observations of the Andhra Pradesh High Court in ***V. Sudheer Reddy v. State of Andhra Pradesh and Others, 1999 SCC OnLine AP 863*** and are extracted hereunder for ready reference:-

“7. The purpose of section 141 of the Negotiable Instruments Act would appear to be that a person on the basis of merely being a director of the company cannot be fastened with criminal liability for an offence under section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-to-day affairs of the company and was responsible to the company.....”

28. There is thus unanimity in judicial opinion that necessary, specific and unambiguous averments ought to be made in a complaint under Section 138 of the NI Act, before the person accused of the offence is subjected to criminal prosecution and it is not enough to make a general and bald allegation that the person was in charge of the day to day affairs of the company. The least that is required is to ascribe a specific role to a person before any criminal liability can be fastened on him/her and from the complaint itself, a reasonable and plausible inference must be discernible that the person accused was in charge of and responsible to the firm for the conduct of its business, with a caveat that a hyper-technical approach should not be adopted in quashing the complaints since the laudable object is to prevent dishonour of cheques and sustain the credibility of commercial transactions, for which avowed purpose Legislature has enacted Sections 138 and 141 of the NI Act.

29. In ***Sabitha Ramamurthy and Another v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581***, the Supreme Court restated the



requirements of Section 141 of the NI Act and held that the complainant must make a clear statement of fact to enable the Court to arrive at a *prima facie* opinion, even if the allegations are that the accused is vicariously liable. Section 141 of the NI Act raises a legal fiction where a person although not personally liable for commission of an offence, would be vicariously liable but before a person can be made vicariously liable, strict compliance with statutory requirements is to be insisted. In ***Krishna Lal Chawla and Others v. State of Uttar Pradesh and Another*, (2021) 5 SCC 435**, the Supreme Court held that the power conferred on the Magistrate under Section 202 Cr.P.C. to postpone the issue of process pursuant to a private complaint also provides an important avenue for filtering out frivolous complaints and this power must be fully exercised. On receipt of a private complaint, the Magistrate must first scrutinize it to examine if the allegations made in the private complaint, *inter alia*, smack of an instance of frivolous litigation and then examine and elicit the material that supports the case of the complainant.

30. Coming to the facts of the present case, perusal of Form No. DIR-12 of the accused company BTIL reflects that Petitioners No.1 and 3 were Independent Non-Executive Directors while Petitioner No.2 was Non-Executive Director at the time of commission of the alleged offence. In view of Section 141 of NI Act and Section 149 of Companies Act, 2013, Petitioners could be held vicariously liable only if it was shown that they were in charge of and responsible for the conduct of the business of the company at the time of commission of offence and not otherwise and complainant was required to specifically aver in the complaint as to how the Petitioners were in charge of day to day affairs of the company BTIL as well



as conduct of its business, as per settled law. Relevant paragraphs from the complaint extracted hereunder would show that only bald and general allegations have been made against the Petitioners, which are not sufficient to satisfy the mandatory requirements of Section 141(1) of NI Act. Save and except, a general statement that Petitioners were in charge of the day to day business of the company, there are no averments ascribing any role to the Petitioners leading to an inference that they were involved in the day to day functioning of the company or in-charge of its business and there is no denial to the fact that Petitioners were independent Non-Executive Directors/Non-Executive Director respectively. There are no allegations that Petitioners had any role in the dishonour of the cheque on presentation and admittedly, Petitioners were not the signatories. Relevant paragraphs from the complaint are as follows:-

“4. That the Accused No. 2 to 10 approached the Complainant for and on behalf of Accused No. 1 and interacted personally with various officers of the Complainant company from time-to-time and represented to the Complainant's officials that the Accused No. 2 to 10 are Directors and/or responsible Officers of Accused No. 1 and are the persons-in-charge of Accused No. 1 and are responsible for the conduct of the day-to-day business of Accused No. 1. Further Accused No. 2 to 10 also represented that all acts and deeds done by them are binding on Accused No. 1.

5. That towards the discharge of part of the legal debts/liability, the Accused No. 1 issued a cheque, duly signed by the Accused No. 2 & 3 as Authorised Signatory of Accused No. 1 from the account maintained by the Accused No.1 with its banker and with the knowledge and consent of Accused No 4 to 10. The Accused No. 2 to 10 made an assurance to the Complainant's official that the cheque shall be honoured on the presentation for the recovery of the debts/liability.”

31. It is settled that Section 141 is a penal provision creating vicarious liability and must be strictly construed and therefore, bald cursory statements in the complaint in the absence of a specific role being ascribed



to a Director and without spelling out how and in what manner the accused were in charge of or responsible to the accused company for the conduct of its business, vicarious liability cannot be fastened. It is also settled that it is not enough to state in the complaint that a particular person was a Director, Managing Director, CEO, etc. As held by the Supreme Court in ***S.M.S. Pharmaceuticals (supra)***, it may be that in a given case, a person may be a Director but may know nothing about the day to day functioning of the company and there is no universal rule that a Director is in charge of its everyday affairs. In this context, I may also allude to the judgment in ***Pooja Ravinder Devidasani (supra)***, as follows:-

“17. There is no dispute that the appellant, who was wife of the Managing Director, was appointed as a Director of the Company—M/s Elite International (P) Ltd. on 1-7-2004 and had also executed a letter of guarantee on 19-1-2005. The cheques in question were issued during April 2008 to September 2008. So far as the dishonour of cheques is concerned, admittedly the cheques were not signed by the appellant. There is also no dispute that the appellant was not the Managing Director but only a non-executive Director of the Company. Non-executive Director is no doubt a custodian of the governance of the company but is not involved in the day-to-day affairs of the running of its business and only monitors the executive activity. To fasten vicarious liability under Section 141 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and is particularly responsible for the conduct of its business. Simply because a person is a Director of a company, does not make him liable under the NI Act. Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an 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 an offence under Section 141 of the NI Act. In National Small Industries Corpn. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed : (SCC p. 336, paras 13-14)



“13. 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. But the complaint should spell out as to how and in what manner Respondent 1 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.

14. 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.”

(emphasis in original)”

32. Reliance by the complainant on the judgment in **Basant Kumar Goswami (supra)** is misplaced. In a catena of judgments, Supreme Court has laid down that it is on the complainant to aver specifically how a Director was involved in the day to day affairs of a company at the time of commission of the alleged offence under Section 138 of NI Act. In the complaint, as noted above, complainant has only made a bald averment that Petitioners were Directors and were involved in the day to day affairs of the company, without anything more. The case of the complainant hinges on the averment that Petitioners were regularly attending Board meetings and taking active part in the meetings of Audit Committees, Corporate Social Committees and Nomination Committees and are thus vicariously liable. Form No.MGT-7 is relied on in this context. Be it noted that this plea was not taken in the complaint and for the first time argument was raised before this Court. Secondly, merely attending Board/Audit meetings cannot singularly lead to a conclusion that Petitioners played any role in the day to day affairs of BTIL or were responsible to the company. Even otherwise,



Independent and/or Non-Executive Directors are ordinarily expected to participate in Board meetings and this is evident from a plain reading of Schedule 4 of the Companies Act, 2013. Even on a factual note, this plea is incorrect going by the written submissions filed by the Complainant wherein it is stated that Petitioners allegedly attended four meetings. Clearly, two of the four meetings were post the date of commission of the alleged offence. In this context, I may allude to the following observations of the Supreme Court in ***S.M.S. Pharmaceuticals Ltd. (supra)***:-

“8.There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a secretary of Department B regarding a cheque issued by the secretary of Department A which is dishonoured? The secretary of Department B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he



satisfies those requirements. Not every person connected with a company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a company would naturally know why the cheque in question was issued and why it got dishonoured.”

33. Sections 138 and 141 of the NI Act were introduced in the Act to encourage the wider use of a cheque and to enhance the credibility of the instrument. The intent of the Legislature in carrying out the amendment was to encourage people to have faith in the efficacy of banking transactions and use of cheques as negotiable instruments. To balance, a penal provision was enacted to ensure that the drawer of a cheque does not misuse the provisions and honours his commitment. The issue herein concerns the criminal liability arising out of dishonour of a cheque. Normally, the criminal liability is not vicarious i.e. one cannot be held criminally liable for the act of another. Section 141 of NI Act is, however, an exception where the offence under Section 138 is committed by a Company but the liability extends to the officers of the Company, subject to fulfilment of the conditions under Section 141, as a caveat. Since it is a criminal liability, the conditions have been enacted to ensure that the person who is sought to be made vicariously liable for the alleged offence of the Company has a definite role to play in the incriminating act and as a corollary, a person who has no role to play cannot be proceeded against, only on account of his being an officer of the Company. Through several judicial pronouncements as noted above, it has been enunciated that it must be clearly averred in the complaint made against any person that he/she, at the time the offence was committed, was in charge of and responsible for the conduct of the business of the Company



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and thus liable. The present complaint, in my view, fails to pass muster and basis the same, no criminal liability can be fastened on the Petitioners.

34. In view of the aforesaid settled law, since the contents and averments in the complaint are insufficient to attract the provisions under Section 141(1) of NI Act, the impugned order dated 14.12.2017 passed by learned MM (NI Act), Patiala House Courts, New Delhi, in CC No.16632/2017 is set-aside to the extent of issuing summons to the present Petitioners for alleged commission of the offence punishable under Section 138 of Negotiable Instruments Act, 1881.

35. Petitions stand allowed in the aforesaid terms. Pending applications also stand disposed of.

JYOTI SINGH, J

AUGUST 20, 2024/BSR/KA